4A_392/2008[1]

Judgement of December 22, 2008

First Civil Law Court

Federal Judge CORBOZ, Presiding,
Federal Judge KLETT (Mrs),
Federal Judge ROTTENBERG LIATOWITSCH (Mrs),
Federal Judge KOLLY,
Federal Judge KISS (Mrs),
Clerk of the Court: CARRUZZO.

Union des Associations Européennes de Football (UEFA),
Appellant,
Represented by Mr Ivan CHERPILLOD

v.

Z._____ Association,
Respondent,
Represented by Mr Afshin SALAMIAN and Mr Antonio RIGOZZI

Facts:

A.

A.a

Created in 1895, Z._____ Association (hereafter Z._____) is the entity responsible for organising football on the territory of…

[1] Translator's note: Quote as Union des Associations Européennes de Football (UEFA) *v.* Z._____, 4A_392/2008. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch.

The Union des Associations Européennes de Football (hereafter UEFA), which has its seat in Nyon, is an Association under Swiss law, the purpose of which consists in particular in dealing with all issues concerning European football. It is one of the continental confederations of football. Any European association wishing to become a member of the Federation Internationale de Football Association (hereafter FIFA) must first become a member of UEFA. Congress, the UEFA's highest body, is competent to admit an association. The Executive Committee may admit an association into membership on a provisional basis with the same rights and obligations as a member, except for voting rights. The next UEFA Congress decides on the final admission of an association admitted on a provisional basis.

The UEFA's Organs for the Administration of Justice are the Control and Disciplinary Body, the Appeals Body and the Disciplinary Inspector.

To solve the disputes at the European level UEFA instituted a system resulting from the three following provisions contained in its Statutes (June 2007 version):

"**CAS as Ordinary Court of Arbitration**

Article 61

Jurisdiction [1] The CAS shall have exclusive jurisdiction, to the exclusion of any ordinary court or any other court of arbitration to deal with the following disputes in its capacity as an ordinary court of arbitration:

a) disputes between UEFA and associations, leagues, clubs, players or officials;
b) disputes of European dimension between associations, leagues, clubs, players or officials.

Conditions of intervention [2] The CAS shall only intervene in its capacity as an ordinary court of arbitration if the dispute does not fall within the competence of a UEFA organ.

CAS as Appeals Arbitration Body

Article 62

Jurisdiction [1] Any decision taken by a UEFA organ may be disputed exclusively before the CAS in its capacity as an appeals arbitration body, to the exclusion of any ordinary court or any other court of arbitration.

Right to appeal

[2] Only parties directly affected by a decision may appeal to the CAS. However, where doping-related decisions are concerned, the World Anti-Doping Agency (WADA) may appeal to the CAS.

Time Limit for Appeal

[3] The time limit for appeal to the CAS shall be ten days from the receipt of the decision in question.

Internal procedures

[4] An appeal before the CAS may only be brought after UEFA's internal procedures and remedies have been exhausted.

Suspensory effect

[5] An appeal shall not have any suspensory effect as a stay of execution of a disciplinary sanction, subject to the power of the CAS to order that any disciplinary sanction be stayed pending the arbitration.

Scope of review

[6] The CAS shall not take into account facts or evidence which the appellant could have submitted to an internal UEFA body by acting with the diligence required under the circumstances, but failed or chose not to do so.

Common Provisions

Article 63

Excluded jurisdiction

[1] The CAS is not competent to deal with:

a) matters related to the application of a purely sporting rule, such as the Laws of the Game or the technical modalities of a competition;
b) decisions through which a natural person is suspended for a period of up to two matches or up to one month;
c) awards issued by an independent and impartial court of arbitration in a dispute of national dimension arising from the application of the statutes or regulations of an association.

European members

[2] Only arbitrators who have their domicile in Europe shall be competent to deal with disputes submitted to the CAS according to the present Statutes.

Procedure

[3] Moreover, proceedings before the CAS shall take place in accordance with the Code of Sports-related Arbitration of the CAS."

A.b. In 1997, Z._____ submitted a request for membership to FIFA. After a preliminary review of the request, FIFA passed it on to UEFA in 1999 for the latter to decide as to Z._____ being provisionally admitted. In a report dated August 27, 2001, the Committee of Legal Experts appointed for that purpose reached the conclusion that nothing would prevent such provisional admission on the basis of the statutory provision then in force. However, on October 11, 2001 the UEFA Congress amended the provision and decided that

henceforth only the European associations having their seat in an independent state recognised by the United Nations and responsible for organising football on the territory of their country would be eligible as members of UEFA and the petitioning association does not fulfil that requirement.

A.c In a letter of June 6, 2002 Z._____ asked UEFA whether it accepted CAS arbitration or not. In a letter of July 12, 2002, UEFA answered in the affirmative as follows:

"After discussing this item with the members of the UEFA Executive Committee we would like to confirm to you that UEFA accepts the CAS arbitration in Lausanne regarding the affiliation request of the Football Association of Z._____."[2]
On August 16, 2002 Z._____ sent a request for arbitration to the Court of Arbitration for Sport (CAS). It submitted that the Executive Committee of UEFA should be ordered to examine its candidacy under the rules applicable at the time when it had applied and that on the basis of such rules it should be found that it was eligible to be provisionally admitted into UEFA immediately. The CAS issued its award on October 22, 2003. Essentially upholding the point of view of Z._____, it ordered UEFA to decide on the application for membership of that Association before March 31, 2004 in accordance with the rules in force at the time when the application for membership was made. In its meeting of March 22, 2004 the UEFA Executive Committee, referring to a FIFA opinion according to which Z._____ did not fulfil the criteria for being admitted there, decided that the same applied with regard to UEFA membership.

Z._____ attempted without success to enforce the arbitral award in the state courts.

A.d On May 12, 2005 Z._____ filed a new request for arbitration. It submitted that the CAS should find that it was entitled to being provisionally admitted to UEFA and/or that the Executive Committee should be ordered to admit it as such at its next meeting. Z._____ also asked the CAS to oblige the UEFA Executive Committee to put its application for final admission on the agenda of the next Congress and to order the latter to make a decision on the final admission of Z._____ on the basis of the rules applicable when the application

[2] Translator's note: In English in the original text.

for membership had been filed in 1999. Finally it sought damages because UEFA had not admitted it provisionally on March 22, 2004.

The parties raised no objection as to the dispute being submitted to an ordinary CAS arbitration.

In its award of July 6, 2006, the CAS ordered the UEFA Executive Committee to admit Z._____ provisionally at its next meeting, to put the application for full UEFA membership by Z._____ on the agenda of the following Congress and to invite the latter to decide on the application for full membership by Z._____ in conformity with the letter and the spirit of the award, particularly according to its paragraphs 82, 83 and 84, namely according to the rules in force at the time Z._____ filed its initial application in 1999, to the exclusion of the rules introduced subsequently. The question of damages was deferred to a separate award.

A.e On December 8, 2006, the UEFA Executive Committee admitted Z._____ as a member provisionally and decided to put the application by Z._____ for full membership on the agenda of the next Congress. At the Congress held on January 25 and 26, 2007 in A._____, with 45 against, 3 in favour and 4 abstentions, the delegates decided not to admit Z._____ as a full member of UEFA.

In its brief of February 5, 2007 relating to damages, Z._____ attempted to challenge that decision, which it considered contrary to the spirit of the second award. To that effect, it made some additional submissions seeking a finding that the decision made on January 26, 2007 by Congress was void and to obtain a declaration according to which it should be immediately admitted as a full member of UEFA. However, in a decision taken on August 29, 2007 by the majority of its members, the CAS, following UEFA's opinion, rejected that submission because it was outside the scope of its mission.

B.

On March 6, 2007, Z._____ introduced a third request for arbitration, whilst claiming that the CAS had wrongly refused to entertain that request within the framework of the still pending second arbitration. Its submissions sought again a finding that it was entitled to be

admitted as a full UEFA member and to order the latter to admit it as such immediately. Preliminary submissions were attached, seeking the production of documents by UEFA as well as submissions with a view to provisional and conservatory measures being granted.

In its first answer to the third request for arbitration, UEFA argued that it should be treated as an appeal, which should have been filed within 10 days from the decision taken by the Congress on January 26, 2007. In its opinion, the request was thus late and the CAS should decline jurisdiction.

After giving the parties an opportunity to argue the issue, the CAS, composed of three new members, decided to issue a separate decision on its jurisdiction among other preliminary issues. On July 3, 2008 it issued an award in this respect and admitted its jurisdiction. According to the majority opinion which prevailed within the arbitral panel, the CAS had jurisdiction as an ordinary court of arbitration within the meaning of Art. 61 of the UEFA Statutes. One of the three arbitrators, whilst also reaching the conclusion that the CAS had jurisdiction, considered that it should decide the matter as an Appeals Arbitration Body pursuant to Art. 62 of the Statutes. Contrary to the opinion of UEFA, he held that Z._____ had not seized the CAS after the time limit to appeal had expired.

C.
On August 27, 2008, UEFA filed a Civil Law appeal with the Federal Tribunal. It submits that the award under appeal should be annulled and the CAS held to have no jurisdiction in the dispute between the parties. Subsidiarily, the Appellant submits that the matter should be returned to the CAS for a new decision within the meaning of the federal judgement.

In its answer, the Respondent principally submits that the matter is not capable of appeal and subsidiarily that the appeal should be rejected.

The CAS submitted its file and did not file an answer.

Reasons:

1.

According to Art. 54 (1) LTF[3] the Federal Tribunal issues its decision in an official language, as a rule that of the decision under appeal. When the decision was written in another language (here English), the Federal Tribunal uses the official language chosen by the parties. In front of the CAS they opted for English whilst in the briefs they submitted to the Federal Tribunal they used French. According to its practice the Federal Tribunal will accordingly issue its decision in that language.

2.

2.1 In the field of international arbitration, a Civil law appeal is possible against the decisions of arbitral tribunals under the conditions set forth at Art. 190 to 192 PILA[4] (Art. 77 (1) LTF).

2.2 The seat of the CAS is in Lausanne. At least one of the parties (in this case the Respondent) did not have its domicile in Switzerland at the decisive time. The provisions of chapter 12 PILA are accordingly applicable (Art. 176 (1) PILA).

2.3 The Appellant is directly concerned by the award under appeal, which compels it to continue to proceed in front of an arbitral tribunal the jurisdiction of which it challenges. It thus has a personal, present and legally protected interest to ensure that the award was not issued in violation of Art. 190 (2) (b) PILA, which gives it standing to appeal (Art. 76 (1) LTF).

Filed within 30 days after the notification of the award under appeal (Art. 100 (1) LTF in connection with Art. 46 (1) (b) LTF) the appeal satisfies the formal requirements of Art. 42 (2) LTF and is accordingly admissible.

There is no need to review the controversial issue as to whether a Civil law appeal is subject to a minimal amount in dispute or not when its object is an international arbitral award. Assuming this to be the case, such a requirement could not go beyond that which is

---

[3] Translator's note: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organising the Federal Tribunal, RS 173.110.

[4] Translator's note: PILA is the most frequently used English abbreviation for the Federal Statute of December 18, 1987, on Private International Law, RS 291.

applicable to a Civil law appeal against a decision taken by a cantonal authority of last instance. Yet, according to case law, a dispute relating to membership of an association, such as the one at hand is a financial matter within the meaning of Art. 74 LTF and it is accordingly not subject to the requirement of a minimal amount in dispute (decision 4A_258/2008 of October 7, 2008 at 3.3; decision 5A_260/2007 of August 7, 2007 at 1 and cases quoted, particularly ATF 108 II 15 at 1a).

2.4 According to Art. 190 (3) PILA, an interlocutory decision may only be appealed on the grounds set forth at Art. 190 (2) (a) and (b) PILA (ATF 130 II 76 at 4). This appeal does not overlook that restriction since it relates only to a violation of Art. 190 (2) (b) PILA.

2.5

2.5.1 Pursuant to Art. 77 (3) LTF, the Federal Tribunal reviews only the grievances which were raised and reasoned by the appellant. That provision corresponds to Art. 106 (2) LTF setting the same requirements with regard to a violation of fundamental rights as well as cantonal and inter-cantonal law. The appellant must accordingly formulate his grievances in accordance with the strict requirements in this respect resulting from case law as to Art. 90 (1) (b) OJ[5] (see ATF 128 III 50 at 1c), which remains valid under the aegis of the new Federal procedural law (ATF 134 III 186 at 5).

2.5.2 The Respondent argues that the appeal does not meet those requirements. According to the Respondent, the Appellant would not have explained how the alleged neglect of the time limit to appeal would necessarily result in a lack of jurisdiction of the CAS. Indeed, the legal writers quoted in the appeal would not have discussed the very specific case of the time limit to appeal in a sport matter. As to the three awards of the CAS quoted by the Appellant, they would not at all substantiate the argument submitted by the Appellant. The Respondent's objection is groundless. Simply reading pages 16 to 18, par. 4, of the appeal is enough to be convinced. The Appellant explains clearly, with reference to legal writing and case law, in what way, according to the Appellant, the late filing of the appeal must be sanctioned by a finding that the CAS has no jurisdiction pursuant to the principles governing the applicability

[5] Translator's note: OJ is the French abbreviation for the previous Statute organising the Federal Tribunal, before the new law came into force.

of an arbitration clause in time. Whether that demonstration is convincing or not is not decisive to determine if the matter is capable of appeal.

When the decision under appeal is based on several independent reasons, alternative or subsidiary, all sufficient, each must be challenged appropriately under penalty of the matter no longer being capable of appeal (ATF 115 II 300 at 2a; 111 II 398 at 2b). That principle also applies to the appeals against international arbitral awards (decision 4P.278/2005 of March 8, 2006 at 1.2.2, not published in ATF 132 III 389). From that the Respondent would deduct that all appellants should be obliged to rebut all the arguments the opponent developed alternatively or subsidiarily in front of the arbitrators with a view to substantiating the solution that the arbitrators ultimately adopted on the basis of one of the various arguments. The Respondent cannot be followed on that path. Indeed, Art. 77 (3) LTF, which mentions grievances, only refers to the grievances aimed at the decision under appeal, namely the arbitral award, to the exclusion of any other writing. Accordingly, nothing justifies extending the scope of the obligation to reason (the appeal) as suggested by the Respondent. Yet nothing prevents the Appellant from seeking to rebut all the different elements of the multiple reasonings contained in the briefs of the other party in case the appeal body, assuming it has the right to do so, would consider the possibility to uphold the solution contained in the award under appeal by substituting new reasons. Under letter D of the answer (p. 15 ff) the Respondent alleges "the impossibility for the Federal Tribunal to review the interpretation of the arbitral clause made by the CAS". According to the Respondent, such impossibility would result from the fact that the Appellant did not even allege that the interpretation made by the arbitral tribunal was based on the hypothetical intent of the parties – which would still have to be demonstrated according to the Respondent – rather than on their real intent, in which case this could not be reviewed by the Federal Tribunal. It is actually difficult to understand where the Respondent is trying to go. The CAS interpreted the provisions on jurisdiction in the UEFA Statutes, which both parties relied on. The Appellant explains in detail why the result of that interpretation is wrong in its view. Hence, the matter is capable of appeal in this respect, with no need to examine the rather artificial construction concocted by the Respondent on the basis of the distinction between objective and subjective interpretation of manifestations of intent.

3.

3.1 According to the Appellant, the CAS was wrong to hold that it had jurisdiction pursuant to Art. 61 of the UEFA Statutes when the matter fell within Art. 62 of the Statutes, which provides for an appeal procedures in front of the CAS based on the filing of an *ad hoc* statement within ten days from the decision challenged. The Respondent having failed to meet that deadline, the CAS should accordingly have denied jurisdiction for lack of one of the necessary conditions and there was no or no longer any agreement between the parties on which its jurisdiction could be based.

The Respondent disputes this fourfold argument entirely. In its opinion, the arbitrators in the majority rightly derived the jurisdiction of the CAS from Art. 61 of the UEFA Statutes. Moreover, one must agree with the arbitrator in the minority that the appeal was not filed too late. Would it have been, that would have no impact on the CAS jurisdiction. Also, the jurisdiction would in any event result from the arbitration clause binding the parties.

3.2 In jurisdictional matters, the Federal Tribunal freely reviews the legal issues, including preliminary issues determining jurisdiction or lack of jurisdiction of the arbitral tribunal. However, it reviews the facts on which the award under appeal was based – even when the issue is jurisdiction – only if one of the grievances mentioned at Art. 190 (2) PILA is raised against the factual findings or when some new facts or evidence (see Art. 99 (1) LTF) are exceptionally taken into account in the framework of the Civil law appeal (ATF 129 III 727 at 5.2.2; 128 III 50 at 2a and the cases quoted).

According to the Respondent, the Federal Tribunal could review only the argument upheld by the arbitral tribunal to find that it had jurisdiction, to the exclusion of the subsidiary arguments put forward by the Respondent but not dealt with in the award under review, as this would violate the principle of competence-competence in Art. 186 (1) PILA. This is not the case. When seized of a duly reasoned grievance for lack of jurisdiction, the Federal Tribunal freely reviews all legal aspects (*jura novit curia*), which may occasionally lead the Federal Tribunal to reject the grievance on an other ground than that which is mentioned in the award under review, as long as the facts found by the arbitral tribunal are sufficient to justify the substitution of new reasons. By doing so, the appeal body does not question the

power given to the arbitral tribunal by law to decide on its own jurisdiction. The hypothesis, not realised in this case, must be reserved should the facts found in the award under appeal not allow the Federal Tribunal to decide in full awareness on the alternate ground supposed to justify the solution reached by the arbitral tribunal.

The power of review of the Federal Tribunal having been clarified, it is appropriate at this point to examine, within the limits thus explained and on the basis of the grievances advanced by the Appellant, whether the CAS was wrong to assume jurisdiction or not. The analysis will firstly bear on the solution admitted by the arbitrators in the majority. It is only if that solution should be disapproved that it would be necessary to review the series of arguments that the Appellant puts forward to demonstrate that, contrary to the opinion of the minority arbitrator, the CAS did not have jurisdiction as an Appeals Arbitration Body in this case either.

4.

4.1

4.1.1 To admit the CAS jurisdiction, the arbitrators in the majority adopted thereasoning summarized hereunder. Admittedly, the Respondent is an association within the meaning of Art. 61 (1) of the UEFA Statutes and it was admitted on a provisional basis of January 26, 2007, when the Congress voted against its admission as a full member of UEFA.

The dispute between the parties is not one of those outside the jurisdiction of the CAS pursuant to Art. 63 of the UEFA Statutes.

To solve the issue in dispute, the relationship between Art. 61 (2) and 62 of the UEFA Statutes must be analysed. The former provision subjects the intervention of the CAS as an ordinary court to the condition that "the dispute does not fall within the competence of a UEFA organ". If that condition is not met the CAS may only be seized as an Appeals Arbitration Body pursuant to the latter provision. Art. 61 (2) of the UEFA Statutes concerns only the UEFA's organs for the administration of justice. Hence the Congress, which is a decision making body of the aforesaid Association, more precisely its supreme organ, does not fall within that exclusion clause. The dispute as to the Respondent's admission is a dispute between UEFA and an association. As such, it falls within the jurisdiction of the CAS

as an ordinary court of arbitration pursuant to Art. 61 (1) of the UEFA Statutes. Also, the Statutes do not rule out arbitration to challenge a decision by the supreme decision making body of UEFA. The CAS therefore has jurisdiction in the matter at hand as an ordinary court of arbitration. Art. 62 of the UEFA Statutes confirms that conclusion. Indeed from its paragraph 4 (according to which internal procedures and remedies must have been exhausted) and from its paragraph 6 (dealing with facts of evidence which the appellant failed to submit or chose not submit to an internal UEFA body) it follows that the intervention of the CAS as an appeal jurisdiction requires a pre-existing dispute and its resolution within the hierarchical framework of the UEFA jurisdictional bodies. A dispute arising from a decision taken by the supreme organ of that Association is manifestly not such of nature.
4.1.2 According to the Appellant, Art. 62 of the UEFA Statutes is a *lex specialis* with regard to Art. 61 of the same Statutes as is shown by the historical interpretation of these provisions. This means that the appeal necessarily rules out an ordinary arbitration. Yet there is no doubt that the Congress is a UEFA organ. Consequently, its decision not to admit the Respondent as a full member of UEFA could only be the object of an appeal to the CAS on the basis of Art. 62 (1) of the UEFA Statutes. It is surprising that the arbitrators in the majority did not mention the clear text of that provision in their reasoning at all.

According to the Appellant the CAS did not understand the scope of Art. 61 of the UEFA Statutes. That provision refers in particular to the disputes which may arise between UEFA and an association. These are the proprietary disputes in particular, such as those involving the contractual liability of one of the parties. Such disputes cannot be the object of a decision by a UEFA organ. This is why the aforesaid provision submits them to the arbitration of the CAS as an ordinary court of arbitration instead of the civil court normally having jurisdiction. However, when a dispute arises from a decision taken by a UEFA organ, it may only be submitted to the CAS as an Appeals Arbitration Body according to Art. 62 (1) of the UEFA Statutes once the internal remedies have been exhausted or directly when there are none, as is the case when the decision originates from Congress. Paragraphs 4 and 6 of that provision do not change the situation and they could not be interpreted, as the CAS did, to mean that there would be no appeal to the CAS when the decision cannot be appealed internally.

Finally, the mere fact that the secretariat of the CAS gave the matter to the Ordinary Arbitration Division and not to the Appeals Arbitration Division is not dispositive of the

issue as to in what capacity – as an ordinary court of arbitration or as an Appeals Body – the aforesaid arbitral tribunal should have been seized by the Respondent.

4.1.3 For its part the Respondent shares the view of the arbitrators in the majority. According to the Respondent the Appellant contradicts its previous allegation that Art. 61 (2) of the UEFA Statutes traces the respective scopes of Art. 61 and 62 when it claims that Art. 62 of the UEFA Statutes is a special provision with regard to Art. 61 of the same Statutes.

According to the Respondent, the Arbitral tribunal was right to concentrate on Art. 61 (2) of the UEFA Statutes. The words "dispute" and "organ" there are of fundamental importance to its interpretation. The organ in question may only be of a jurisdictional nature since it is entrusted with deciding a dispute. Hence, the provision must be read as meaning that the CAS intervenes as an ordinary court of arbitration only if the dispute is not within the competence of a jurisdictional organ of UEFA. However, the decision taken by the Congress on January 26, 2007 was not jurisdictional in nature but rather resembled a manifestation of will as a consequence of the Respondent's offer to become a member. Hence the dispute arising there from between UEFA and an association provisionally admitted had to be submitted to the ordinary arbitration of the CAS pursuant to Art. 61 (2) of the UEFA Statutes.

The Respondent also sees a confirmation that the opinion of the majority arbitrators was well founded at Art. 62 (2) of the UEFA Statutes. In its view, the concept of standing to appeal, and not that of standing to act, which the provision resorts to, requires that adversary proceedings between the parties led to the decision under appeal. However it is obvious that there are no parties in front of the Congress when it decides to admit a new member.

Finally, the Respondent relies on the principle *in dubio contra stipulatorem* should the precise relationship between Art. 61 and 62 of the UEFA Statutes remain obscure.

4.2

4.2.1 The statutes of a legal entity in private law are normally interpreted according to the principle of trust, similarly to statements of contractual intent (ATF 87 II 89 at 3 p. 95; PERRIN/CHAPPUIS, Droit de l'association, 3rd ed. 2008, p. 38 ff.). As is the case for the

text of a law, an interpretation according to the objective meaning is also conceivable (decision 7B.9/2005 of May 3, 2005 at 2.3 and references), or even better according to some legal writers (see among others: HEINI/SCHERRER, in Commentaire bâlois, Zivilgesetzbuch I, 3rd ed. 2006, n° 22 of preliminary remarks to Art. 60-79 CC). This is the case in particular when interpretation of the statutory provisions relating to issues of jurisdiction is involved, as here (see ATF 114 II 193 at 5a p. 197).

4.2.2 The statutory provisions in dispute were adopted by UEFA after the revision of the Code of arbitration for sport (hereafter the Code) which the International Counsel of Arbitration for Sport (ICAS) carried out in 2004. In order to appreciate its scope it is accordingly not without interest to recall briefly what the jurisdiction of the CAS consists of. It is indeed hardly possible to disregard the pertinent rules of the Code when an interpretation of the UEFA Statutes is required and one may even wonder if and to what extent the latter could derogate to the former, for instance by stating in what capacity the CAS could be seized of a dispute of a certain nature without paying attention to the former.

The CAS panels are entrusted in particular with deciding the disputes submitted to them by way of ordinary arbitration and to handle disputes concerning the decisions of federations, associations or other organisations, which are submitted to the CAS in its capacity as arbitration body to the extent that the statutes or regulations of such sport organisations or a specific agreement provide for (Art. S12 and R27 of the Code). In the former case, they are set in motion by the Ordinary Arbitration Division and in the latter by the Appeal Arbitration Division (Art. S20 of the Code). The ordinary arbitration procedure is the object of Art. R38 ff. of the Code and the appeal arbitration procedure of Art. R47 ff. In order to seize the CAS as an appeal jurisdiction, the appellant must have exhausted the remedies available pursuant to the statutes or the regulations of the sport organisation from which the decision under appeal originates (Art. R47 (1) of the Code).

As a matter of principle, two types of disputes may be submitted to the CAS: commercial disputes and disputes of disciplinary nature. Within the scope of commercial disputes are essentially those relating to the performance of contracts, for instance in the field of sponsoring, of the sales of television rights, of organising sports events, of employment relationships, etc. The disputes relating to civil liability also fall within that category. These

cases are dealt with by the CAS as a court of exclusive jurisdiction. Disciplinary matters are the main component of the second type of disputes submitted to the CAS. Disputes relating to doping are the principal ones. Such disciplinary matters, which are generally handled by the competent sport authorities as a first instance, may then be the object of an appeal to the CAS, which is then acting as an Appeals Body (Matthieu REEB, Le rôle du Tribunal Arbitral du Sport (TAS), in Sport und Recht: Vertragsgestaltung im Sport, Zurich 2004, p. 125 ff., in particular p. 134 ff.; also see the CAS website "http://www.tas-cas.org", under General Information/History of the CAS/Types of disputes submitted to the CAS). One of the modifications adopted when the revision of the Code entered into force in 2004 put an end to the CAS practice consisting in limiting the scope of the appeal proceedings only to the disputes of disciplinary nature. Since then, as soon as the arbitration relates to the challenge of a decision by an organ of a sport federation having accepted the CAS jurisdiction, the case must be attributed to the Appeals Arbitration Division and decided according to the rules of the appeal procedure. The criteria for delimitation are accordingly purely formal and no longer depend on the object of the decision under appeal.

Applying such delimitation criteria in a situation comparable *mutatis mutandis* to the one at hand, the CAS, as an appeal body, issued an award on April 23, 2008 within the framework of a challenge made by a national sport federation disputing the decision taken by the general assembly of the international federation of the sport involved admitting as a member a regional federation having its seat in the country of that national federation (CAS case 2007/A/1424, which gave rise to the decision of the Federal Tribunal of October 7, 2008 in case 4A_258/2008).

4.2.3

4.2.3.1 It is not disputed and neither could it be that the dispute submitted to the CAS was outside the clause excluding jurisdiction at Art. 63 (1) of the UEFA Statutes. As such, the jurisdiction of the CAS to entertain it is beyond discussion. The same does not apply to the issue as to in what capacity that arbitral body should have intervened in this case, namely as an ordinary court of arbitration or as an Appeals Arbitration Body.

Pursuant to Art. 61 (2) of the UEFA Statutes, the CAS intervenes as an ordinary court of arbitration only to the extent that the dispute does not fall within the jurisdiction of another

organ. As to Art. 62 of the same Statutes, it provides for the exclusive jurisdiction of the CAS as an Appeals Arbitration Body with regard to any decision taken by a UEFA organ. The Appellant takes the view that the former provision determines the respective scope of Art. 61 and 62 of the aforesaid Statutes. According to the Claimant, the latter provision would be a *lex specialis* with regard to the former. Admittedly, as Respondent rightly points out, it appears quite difficult from a purely logical point of view to consider that a rule may be a special provision with regard to another rule which is supposed to define the scope of both rules, considering that a special rule necessarily applies in function of the general rule (*lex specialis derogate generali*). Besides that issue of logic, the Respondent's opinion as to the scope of Art. 61 (2) of the UEFA Statutes may be approved, whatever may be the relationship between the two rules of law quoted, as it is confirmed by the historical interpretation of the provision. From the commentary of the proposed modifications to the UEFA Statutes adopted by the Congress in Budapest on March 23, 2006, it appears that the new paragraph two of Art. 61 of the Statutes should connect with the new Art. 62 (1) "by establishing that the decisions taken by a UEFA organ, because they may be submitted already to the CAS as an Appeals Body, could not be brought in front of the CAS as an ordinary court of arbitration" (quoted document, § 4 ad Art. 61). On the basis of that remark, it appears reasonable to interpret Art. 61 (2) of the UEFA Statutes as meaning that the jurisdiction *ratione materiae* of the CAS as an ordinary court of arbitration is not given whenever it may be seized as an arbitral Appeals Body pursuant to Art. 62 (1) of the UEFA Statutes. Yet this does not solve the issue in dispute. The conditions under which the latter provision may be applied must still be determined.

4.2.3.2 Its literal interpretation undeniably goes in the direction suggested by the Appellant. The Congress is a UEFA organ and, in that capacity, it takes decisions (Art. 12 of the UEFA Statutes). According to that interpretation, any decision taken by Congress could therefore be challenged only in front of the CAS as an Appeals Arbitration Body. Art. 61 of the UEFA Statutes would refer for its part to the disputes which could not be the object of a decision by a UEFA organ, such as disputes relating to the civil or contractual liability of one of the parties. It would be for the CAS as an ordinary court of arbitration to decide that kind of disputes. This proposal corresponds more or less to the interpretation given by the CAS itself as to the pertinent provisions of the Code (see 4.2.2 above). However, all the Respondent's objections may not be dismissed out of hand.

4.2.3.3 The Respondent claims in particular that if one were to follow the Appellant's reasoning, there would never be an ordinary arbitration but only appeals arbitrations since even in the areas quoted as examples by the Appellant (civil or contractual liability) the UEFA is called upon to make a decision at one time or another, which may give rise to a dispute. Such a thesis appears groundless. It is indeed artificial to construct as a decision within the meaning of Art. 62 of the UEFA Statutes the internal decision taken by that association to put an end to a contractual relationship with a third party or to choose the organisation to which it intends to sell its television rights or even its refusal to recognise its civil liability when it is questioned by the victim of some harm, to quote only a few examples.

However, the argument derived from the text of Art. 61 (2) of the UEFA Statutes in connection with the contents of Art. 62 appears far more convincing than the previous one. The Respondent emphasises the use of the words "dispute" and "organ" used in that text. It argues that the organ involved can only be a jurisdictional organ since its function is to decide a dispute. Hence, according to the Respondent, a dispute between UEFA and a member falls within the jurisdiction of the CAS as an ordinary court of arbitration if it did not cause a decision to be issued by a jurisdictional organ of that association. According to the Respondent, Art. 62 (1) of the UEFA Statutes must consequently be interpreted as meaning that only the decisions made by a jurisdictional organ of UEFA fall within its scope. In its opinion, this interpretation would be confirmed by paragraph 3, 4 and 6 of the provision quoted, which respectively relate to standing to appeal (and not to standing to act), the exhaustion of internal procedures and remedies of UEFA and the scope of the judicial review of the CAS in connection with evidentiary proceedings in front of a UEFA internal body. Applying that reasoning to the case at hand, the Respondent emphasises that the decision issued by the Congress on January 26, 2007 not to admit it as a full member of UEFA does not relate to the administration of justice but constitutes the manifestation of the intent of that organ not to accept (the Respondent's) offer to become a member. Still according to the Respondent, at the time the Congress voted there was no dispute since it had already been admitted to the UEFA provisionally and the issue as to its final membership was on the agenda of that Congress meeting. It is the latter's refusal to abide by the second arbitral award which gave rise to the dispute. Consequently, the dispute does not fall within the competence of a UEFA organ and should be submitted to the ordinary arbitration of the CAS pursuant to

Art. 61 (1) (a) of the UEFA Statutes. The argument developed in that way by the Respondent is difficult to refute. Admittedly, it would require an extensive interpretation of the concept of organ at Art. 61 (2) and 62 (1) of the UEFA Statutes. However, the reasons which the Respondent draws from a logical and systematic analysis of the provisions justify going beyond a purely literal interpretation. They are corroborated by another reason, based on the very document the Appellant relied on to support its "historical" interpretation, which appears to have escaped both the parties and the CAS. It is the text of the version of Art. 62 (1) of the UEFA Statutes prior to the one adopted at the Budapest Congress in March 23, 2006. That text specified *expressis verbis* that the decisions which could be challenged in front of the CAS within 10 days after their notification were the "decisions of the jurisdictional organs of UEFA" (emphasis supplied by this court). However, by reading the commentary relating to the proposed modification of that provision, one cannot find an intent of the authors of that proposal to voluntarily suppress the word "jurisdiction" in the new wording of Art. 62 (1) of the UEFA Statutes, particularly since their first concern was to abandon the distinction between sport disputes and proprietary disputes which characterised the regulations then in force. It appears accordingly that notwithstanding the suppression of that wording, doubtlessly involuntary, it is indeed to the jurisdictional organs of the UEFA that Art. 61 (2) and 62 (1) of the latest version of the UEFA Statutes make reference.

Accordingly, by admitting its jurisdiction as ordinary court of arbitration, the CAS did not give an incorrect interpretation of such statutory provisions. Therefore, the Appellant's grievance that Art. 190 (2) (b) PILA would have been violated is groundless. The appeal must thus be rejected without reviewing the grievances by the Appellant as to the opinion of the arbitrator in the minority seeking to justify in another way the solution adopted by the majority of the CAS or the Respondent's arguments in support of that opinion.

5.

The Appellant shall pay the judicial costs relating to the federal proceedings (Art. 66 (1) LTF) and pay compensation to the Respondent (Art. 68 (1) and (2) LTF). The latter claims costs in the amount of CHF 50'000.-. Yet, such an amount appears grossly exaggerated in a case where the financial interests involved are admittedly important, yet which relates only to the jurisdiction of the CAS at this stage in the proceedings. It must therefore be substantially reduced.

Therefore, the Federal Tribunal pronounces:

1. The appeal is rejected.

2. The judicial costs, set at CHF 20'000.-, shall be borne by the Appellant.

3. The Appellant shall pay to the Respondent an amount of CHF 22'000.- for the federal judicial proceedings.

4. This judgement shall be notified to the representatives of the parties and to the Court of Arbitration for Sport (CAS).

Lausanne, December 22, 2008

In the name of the First Civil Law Court of the Swiss Federal Tribunal

The presiding Judge: The Clerk:

CORBOZ CARRUZZO