

ON THE JURISDICTION AND ITS JURISPRUDENCE OF COURT OF ARBITRATION FOR SPORT - BASED ON FOOTBALL CASES

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Abstract: *Jurisdiction refers to the basis on which an arbitral tribunal or arbitrator has the power to review specific disputes and make binding rulings. It is not only a prerequisite for the smooth progress of Court of Arbitration for Sport (CAS), but also the basis for the validity, recognition, and enforcement of CAS awards. The issue of jurisdiction runs through the entire arbitration process from the time the parties to the dispute reach an arbitration agreement, to the challenge of jurisdiction in the arbitration proceedings, and then to the challenge of the party who refuses to perform the award on the grounds of jurisdiction. Based on the CAS procedural rules and football regulations, the CAS jurisdiction on football cases has the special characteristics of the football industry. This article takes football cases as an example and combines theoretical analysis with case analysis to explore the sources, jurisdictional powers, jurisdictional challenges, and development trends of CAS jurisdiction.*

Key Words: *Jurisdiction; Jurisprudence; Court of Arbitration for Sport; Football Cases*

1 Overview of the evolution of CAS Jurisdiction

1.1 The establishment of CAS

In the early 1980s, with the development of professional sports, international sports disputes continued to increase, the lack of independent sports dispute resolution tribunals, which was a problem faced by international sports organizations at that time. At the International Olympic Committee (IOC) conference held in Rome in 1982, led by Mr. **Juan Antonio** Samaranch, the IOC authorized Judge and member of the IOC, Mr. Koba Mbaye, the Hague International Court of Justice in the Netherlands, to draft the Constitution of the Court of Arbitration for Sport, and to establish a specialized arbitration jurisdiction for direct or indirect sports disputes. In 1983, IOC officially approved the Constitution of the Court of Arbitration for Sport, which came into effect on June 30, 1984, marking the official establishment of CAS. In the 1991 CAS Arbitration Guidelines, a model arbitration clause was included, which inserted the following clause into the articles of association or

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club rules: *“Any dispute arising from the present Statutes and Regulations of the... Federation which cannot be settled amicably shall be settled finally by a tribunal composed in accordance with the Statute and Regulations of the Court of Arbitration for Sport to the exclusion of any recourse to the ordinary courts. The parties undertake to comply with the said Statute and Regulations, and to accept in good faith the award rendered and in no way hinder its execution.”*¹

This clause prefigured the subsequent creation of special rules to settle disputes related to decisions taken by sports federations or associations. The International Equestrian Federation (IEF) was the first sports organization to adopt this provision. Afterwards, many international sports federations, domestic sports federations, and associations adopted this arbitration clause, greatly expanding the jurisdiction of CAS.

In the 1992 Gander case, the Swiss Federal High Court explicitly stated that CAS must be more independent in organization and finance from the International Olympic Committee, which led to significant reforms of CAS.

1.2 The development of CAS jurisdiction

At the Paris Conference on June 22, 1994, the IOC, the International Olympic Federations (ASOIF) for the Summer Olympics, the International Olympic Federations (AIWF) for the Winter Olympics, the International Olympic Committee Federation (ANOC), and 31 international sports federations signed an agreement to establish the International Council of Arbitration for Sport (ICAS) to replace the support of the IOC for its operations and administration, and established two divisions, the Ordinary Arbitration Division the Appeal Arbitration Division. On the other hand, CAS established the “Code of Sports-related Arbitration” (Code), which came into force on 22 November 1994. Since then, in nearly 30 years of continuous development and evolution, the CAS Code have undergone multiple revisions and continuously strengthened its jurisdiction.

In addition to the sports organizations under the jurisdiction of CAS signed in the 1994 Paris Agreement, the International Association of Athletics Federations (IAAF) and FIFA respectively accepted CAS jurisdiction in 2001 and 2002. Since the end of 2002, all Olympic International Federations and some non-Olympic International Federations have accepted CAS jurisdiction, and the authority of CAS has been widely recognized.

2 Basis of CAS jurisdiction for football disputes

Since FIFA accepts jurisdiction, CAS jurisdiction on football disputes also requires the existence of arbitration agreements or arbitration clauses, as well as the arbitrability of football disputes.

1. Despina Mavromati, Matthieu Reeb. The Code of the Arbitration for Sport Commentary, Cases and Materials [M] Wolters Kluwer Law & Business, 2015.1-2.

2.1 Arbitration agreement

Generally speaking, the core effectiveness of an arbitration agreement for the parties and the arbitral tribunal is to establish and safeguard arbitration jurisdiction, which is an important prerequisite for arbitration.² An arbitration agreement is an agreement between the parties to the arbitral tribunal to resolve existing and/or future disputes in accordance with relevant procedural provisions, thereby excluding the jurisdiction of national courts.³ In terms of legal attributes, an arbitration agreement is considered a procedural contract (*Prozess Vertrag*) that sets out potential disputes and procedural rules, and is the core of the arbitration procedure.

The arbitration agreement has two binding effects: on the one hand, either party submits the arbitration basis to the arbitration agreement; On the other hand, arbitral tribunals also accept disputes based on arbitration agreements. For the parties, an arbitration agreement is the decisive will of the parties to grant jurisdiction to the arbitral tribunal rather than the national court. For an arbitral tribunal, an arbitration agreement is one of the necessary conditions for obtaining jurisdiction and the most important preliminary evidence for its acceptance of the case. Article R27 of the CAS Code clearly stipulates that if the parties agree to submit the dispute to CAS, these procedural rules shall apply.

The arbitration agreement is also an important basis for conducting arbitration proceedings. Subject to the provisions of the law and prohibitions of arbitration, the arbitral tribunal or arbitrator shall respect the procedural rules or agreements chosen by the parties through the arbitration agreement, such as the appointment of arbitrators and the method of forming the arbitral tribunal. Article R39 of the CAS Code: "*Unless it is clear from the outset that there is no arbitration agreement referring to CAS, the CAS Court Office shall take all appropriate actions to set the arbitration in motion.*" Both Article R47 and Article R55 require the existence of an arbitration clause or arbitration agreement. Therefore, the arbitration agreement is a common will of the parties' agreement to resolve their disputes through CAS arbitration, and it is also an important basis for CAS jurisdiction.

2.2 Arbitration Clause

An arbitration clause is a special type of arbitration agreement inserted into a contract or a special agreement between the parties, or in the statutes or regulations of a sports organization. For football disputes, arbitration clauses, like arbitration agreements, are a prerequisite for CAS arbitration jurisdiction, especially

2. Liu Xiao Hong. The Legal Theory and Empirical Study of International Commercial Arbitration Agreements [M]. The Commercial Press, 2005, P4.

3. FIFA Regulations on the Status and Transfer of Players, 2021 Edition.

in appeal proceedings where arbitration clauses play a crucial role. Formally, the arbitration clause for football disputes mainly includes the statutes and regulations of the football organization and the athlete's participation form.

2.2.1 The Statutes and Regulations of FIFA, Intercontinental and Regional Football Federations

The FIFA, football Association or League has explicitly stipulated that they accept the jurisdiction of CAS, giving CAS jurisdiction on disputes arising from these football organizations. Based on the "pyramid style" administration structure of international football, FIFA and its six affiliated intercontinental federations all contain provisions on the jurisdiction of CAS, which lays the foundation for CAS to handle disputes related to these football federations. Such as FIFA Statutes and Regulations, as mentioned earlier, FIFA is the highest governing body of international football and have been under the jurisdiction of the CAS since November 11, 2002. The 2004 edition of the FIFA Statues officially includes provisions on the jurisdiction of the CAS. Article 57(1) of the 2021 FIFA Statute stipulates that "*Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question.*"⁴, and determines that CAS has jurisdiction on FIFA related disputes., as well as the Article 24 of FIFA Regulations on the Status and Transfer of Players (RSTP) stipulates: "*Decisions reached by the DRC or the DRC judge may be appealed before the Court of Arbitration for Sport (CAS)*". The situation is similar for football federations such as UEFA, AFC, and others.

2.2.2 Entry Form

In the football system, athletes and football organizations essentially belong to a subordinate legal relationship, and athletes must abide by the statutes and regulations of the football organization. In order to participate in competitions, athletes are often required to fill out competition forms, which contain arbitration clauses for disputes to be appealed to CAS. These license contracts containing arbitration clauses are binding on each athlete who signs the competition form. For CAS, it has obtained mandatory dispute jurisdiction. In CAS 2011/O/2574, the UEFA 2011/2012 registration form signed by the parties stipulates: (a) commitment to comply with the directives and decisions made by the UEFA Statues and Regulations regarding the competition; (b) Promise to recognize the jurisdiction of CAS; (c) Agree to apply the CAS Code and acknowledge the instructions issued by CAS, and agree to resolve any disputes related to competition eligibility, participation or exclusion through CAS; (d) Confirm that the player

4. FIFA Statutes, 2021 edition.

or official complies with the obligations listed in items (a) to (c)⁵. These clauses, along with UEL Regulations 2.07 and 32.01, as well as UEFA Articles of Association 59, constitute the arbitration clause of CAS jurisdiction, therefore CAS has jurisdiction. In addition, confirming jurisdiction based on arbitration clauses requires some prerequisites. In CAS 2018/A/5782, the panel pointed out: "*If the parties have not concluded a specific arbitration agreement, CAS can only exercise jurisdiction if the statutes or regulations applicable to the case establish a right of appeal to CAS and the appellant has properly exhausted all legal remedies available to it before pursuing an appeal to CAS.*"⁶ In other words, in the appeal process, the arbitration clause, as a basis for CAS jurisdiction, must first exhaust internal remedies.

2.3 Arbitrability of International Football Disputes

Arbitrability is essentially a limitation imposed by the state on the scope of arbitration. Generally speaking, determining the arbitrability of a dispute may involve or comply with the applicable law of the arbitration agreement, the law of the place of arbitration, and the law of the place of enforcement of the award.⁷

2.3.1 Legal basis for arbitrability

According to the principle of the law of the place of arbitration, the arbitrability of disputes in Switzerland should be determined in accordance with Article 177 (1) of the Swiss PILA, and there is no room for the application of the laws of other countries. Article 177 (1) of PILA stipulates that "all appeals related to money may be submitted to arbitration"⁸, and the term "money related" here can be interpreted as any dispute involving economic interests or property. In other words, if the dispute involves any economic interest claim, it can be arbitrated, that is, if at least one party has a certain economic interest relationship in the dispute, it constitutes arbitrability. The only limitation on this is public policy. Swiss law is widely open to international arbitration, which has a profound impact on the definition of arbitrability. Article R27 of the CAS Regulations further defines the object of sports arbitration by citing principles related to sports or "economic matters", requiring that at least one party to an economic dispute must meet the requirements of interest or economic nature.

5. CAS 2011/O/2574 UEFA v. FC Sion/Olympique des Alpes SA.

6. CAS 2018/A/5782 DNN Sports Management LDA v. Baniyas Football Sports Club Company.

7. Song Lianbin. Study on Jurisdiction of International Commercial Arbitration. [M]. Law Press, 2000, 132-133.

8. Swiss Federal Act on Private International Law (PILA).

2.3.2 The "Economics" of International Football Disputes

Generally speaking, the economic viability of disputes related to contracts, infringement, company law, or intellectual property in international football is beyond doubt. However, international football disputes also involve matters related to the preparation, organization, and operation of matches, tournaments, competitions, and other sports related matters. Can these disputes with "disciplinary" and "sports" characteristics be arbitrated? SFT explicitly states that according to Article 177 (1) of the PILA, if the dispute does not involve strict meaning of "rules of game", but rather involves association activities or participation in competitions, and the sanction has personal and financial consequences for individuals or entities, then the disciplinary sanction imposed by sports organizations can be arbitrated. In other words, Article 177 of PILA considers the economic consequences of disputes rather than the economic characteristics of disputes.

In the CAS 2004/A/593, regarding the dispute on Welsh Football Association against the decision of UEFA, the Panel held that if the consequence of a decision was to allow a national football team to participate in the final stage of the 2004 European Championship, Welsh Football Association would lose the prize money paid by UEFA to 16 finalists, each of whom was 7.5 million Swiss francs, as well as other benefits such as the team's reputation, credibility, and market value of its players. Therefore, based on the circumstances of the case and considering its impact, the disputed decision has economic implications for both parties, and it clearly has serious economic implications. According to Article 62 of the UEFA Statute, CAS has the right to hear appeals against decisions of a monetary nature.⁹ In addition, the broad understanding of "economy" in Swiss law has been repeatedly confirmed in SFT's judgments.¹⁰ As far as the arbitrability of disciplinary decision appeals is concerned, it is only required that the challenged decision satisfies the requirement of violating the law or regulations.

2.3.3 International football disputes and public policies

Another factor that affects the arbitrability of international football disputes is public policy. In CAS arbitration practice, it mainly involves Swiss public policy and whether it violates the European Convention on Human Rights, as well as the application of mandatory laws in other countries. In terms of public policy, Article 19 (2) of PILA stipulates that the arbitral tribunal must consider public policy issues when making appropriate decisions under Swiss legal concepts. According to Swiss law, the right to personality is a fundamental right that is explicitly protected under Article 28 of the Swiss Civil Code (SCC). Swiss

9. CAS 2004/A/593 Football Association of Wales (FAW) v. Union des Associations Européennes de Football (UEFA).

10. CAS 2007/A/1392 Federación Panameña de Judo (FPJ) & Federación Venezolana de Judo (FVJ) v. International Judo Federation(IJF).

law holds that a person can only relinquish a portion of their freedom through a contract, but cannot destroy their freedom or reduce it to the point of endangering the foundation of their freedom. The sanction of the association is limited to the scope of not infringing on the personality rights of members. Only when the interests of the association far outweigh its infringement on the personality rights of members, can the sports association be allowed to take measures that seriously harm personal economic development.¹¹ Otherwise, SFT will not only examine the effectiveness of association sanctions from the perspective of abuse of power, but also examine whether the sanctions are legitimate. SFT further points out that the sanction for engaging in a profession cannot be severe enough to establish a criminal sanction, even if the punishment in some cases is similar to that between sports sanction and criminal sanctions such as doping disputes, it can still be arbitrable under the procedural provisions of Article 6 of the European Convention on Human Rights (ECHR). According to Swiss law and CAS precedents, a party to any arbitration clause is eligible to appeal as long as it is affected by the award and has a legitimate or sufficient interest in the case.¹²

3 The content and scope of CAS Jurisdiction in International Football Disputes

The jurisdiction of arbitration refers to the scope of the functions of the arbitral tribunal or arbitrator in exercising arbitration power. The jurisdiction of international football CAS arbitration is not only based on the provisions of the arbitration rules, but also takes into account the relevant provisions of the constitution or rules of the international football organization and the general principles in precedents.

3.1 The de novo power of review of CAS

The scope of review by general administrative courts is usually characterized by minimum review standards, mainly procedural review. They cannot replace the judgment of administrative organs with their own judgments, and can only control the fairness and correctness of the previous procedure, the way decisions are made, the reasons for making decisions, and the authority of the decision-making institution. The review power of the CAS Sports Arbitral tribunal is different from the former. According to Article R57 of the Sports Arbitration Regulations, the CAS Arbitral tribunal has the power to fully review facts and laws. This provision means that appeals against decisions made by sports organi-

11. Laurence Burger. For the first time, the Supreme Court sets aside an arbitral award on grounds of substantive public policy[J]. *ASA Bulletin*, 2012, 30(3): 603-610.

12. Swiss International Arbitration Decisions. 4A_558/2011.

zations to CAS are not limited to whether the decision-making body's decision is correct or whether an independent ruling is made on the claims of the parties, but also require a re-examination of the merits of the case. In contrast, the CAS arbitral tribunal is not limited to evaluating the correctness of previous procedures and decisions in the appellate arbitration proceedings, but independently and responsibly determines whether the arguments of the appellant and the respondent are correct in the circumstances of the case.¹³ The de novo mechanism of CAS can enable deficiencies in the internal procedures of the association to be corrected by appealing to CAS. In fact, CAS cases indicate that CAS appeal arbitration allows for a comprehensive retrial of the case under the protection of due process, which not only provides the parties with the opportunity to submit written applications and various types of evidence, but also facilitates the extensive hearing and questioning of witnesses or experts during the hearing. Therefore, the CAS panel does not need to analyze the possible infringement of due process rights by the sports organization that issued the appeal decision. It can proceed to comprehensively review the facts and legal arguments submitted by the parties, and make a clear ruling on the merits of the case based on this.¹⁴

3.2 Competence-Competence

3.2.1 *The Theory of Competence-Competence and Its Basis*

Competence-Competence refers to the power of an arbitral tribunal to determine its own jurisdiction, including the power to make rulings on issues such as the existence or effectiveness of an arbitration agreement, without the need for prior judicial decisions.¹⁵ At present, “*Competence-Competence*” has become a widely recognized principle in international arbitration and is considered an inevitable result of the principle of arbitration agreement autonomy. Generally speaking, *Competence-Competence* includes two aspects: The first, the arbitral tribunal or arbitrator has the power to decide whether they have jurisdiction on a case. The second, the power to determine whether arbitration jurisdiction is established lies with the arbitral tribunal or arbitrator, and as long as there is an arbitration agreement between the parties, the court must submit the dispute to arbitration. Therefore, as long as there is prima facie evidence to prove the existence of an arbitration agreement, the court should grant priority jurisdiction to the arbitral tribunal. This means giving priority to the arbitral tribunal in

13. CAS 2015/A/3959CD Universidad Católica & Cruzados SADP v. Genoa Cricket and Football Club.

14. CAS 2018/A/5800 Samir Arab v. Union Européenne de Football Association (UEFA).

15. Liu Xiao Hong, *The Legal Theory and Empirical Study of International Commercial Arbitration Agreements* [M]. The Commercial Press, 2005: 98-99.

terms of time, making it the first arbiter of jurisdictional objections. The Swiss academic community also believes that if there is a dispute before the arbitral tribunal exercises jurisdiction, Swiss law takes priority for the arbitral tribunal to determine its own jurisdiction and whether it is bound by the arbitration agreement.¹⁶MÜLLER pointed out that Swiss law gives the arbitral tribunal priority in determining its jurisdiction when it is challenged. The arbitral tribunal reviews whether the submitted dispute belongs to its own jurisdiction or the jurisdiction of ordinary courts, and decides whether the summoned person is bound by the arbitration agreement.¹⁷It is the arbitral tribunal itself, not the national court, that first determines its jurisdiction. Therefore, the arbitral tribunal enjoys priority, also known as " *Competence-Competence* ".¹⁸

3.2.2 Articles on CAS Competence-Competence

Since 2012, CAS has clearly defined competence-competence in its procedural rules. Article R39 of the 2012 version CAS Code stipulates that "... *In general, the arbitral tribunal may rule on its jurisdiction either in a preliminary decision or in an award on the merits.*" Article R55 also contains the aforementioned provisions on CAS's discretionary jurisdiction regarding the appeal procedure. These regulations provide a direct basis for CAS's discretionary jurisdiction.

It is generally believed that complete Competence-Competence includes two aspects: first, the arbitral tribunal itself has the inherent power to confirm the validity of the arbitration agreement and jurisdiction, which is commonly referred to as the "positive effect" of Competence-Competence. The provisions of Article R39 and Article R55 of the CAS Sports Arbitration Regulations on discretionary jurisdiction reflect the "positive effect" of Competence-Competence. This discretionary jurisdiction to some extent frees the arbitral tribunal from reliance on judicial authorities and ensures the finality of CAS arbitration awards.¹⁹Secondly, before the arbitral tribunal makes an award on its jurisdiction, the court's review of the arbitral tribunal's jurisdiction should be limited, that is, the negative effect of discretionary jurisdiction. Article 7 of the Swiss PILA stipulates that the court has no jurisdiction on disputes on which the parties have signed an arbitration agreement, except in the following cases: (1) if the respondent has not raised a

16. CAS 2009/A/1910, Telecom Egypt Club v. Egyptian Football Association (EFA).

17. MÜLLER Ch., International Arbitration – A Guide to the Complete Swiss Case Law[M] Zurich et al. 2004, pp. 115-116.

18. Berti S , Honsell H , Vogt N P , et al. International arbitration in Switzerland: an introduction to and a commentary on Articles 176-194 of the Swiss Private International Law Statute[M]. Kluwer Law International, Helbing & Lichtenhahn, 2001.

19. Zhang Chunliang. On the Autonomy of International Sports Arbitration Agreements - Special Discussion on the Rules and Practice of the Court of Arbitration for Sport, [J]. Journal of Tianjin University of Sport , 2011, 26 (6) : 510-515.

challenge to jurisdiction; (2) If the court finds the arbitration agreement invalid, or unenforceable; (3) Clearly unable to form a court due to the respondent's reasons. According to the above conditions for reviewing arbitration jurisdiction and the interpretation of Article 186 of the FILA, the SFT restricts judicial intervention in arbitration and confirms that before the arbitral tribunal makes an award, the court only conducts a superficial examination of the validity of the agreement regarding challenge to arbitration jurisdiction in Switzerland.

3.3 Limitations on CAS Review

3.3.1 *Respect the rules of the game*

The limitation of disputes on sports organizations such as leagues and associations lie in the fact that CAS has jurisdiction over "legal disputes", rather than disputes of all nature, and rules of game disputes are not within its jurisdiction. The issue with the rules of the game is based on the national court's belief that such disputes cannot be resolved. In theory, the arbitrability of rules of the game under the conditions set forth in Article 177 (1) of PILA and Article R27 of the CAS Code. However, based on the national court's belief that arbitral tribunals cannot handle such disputes, both national courts and arbitral tribunals are unable to review them. SFT believes that disputes related to rules of the game are not legal rules and cannot be reviewed by national courts and arbitral tribunal, because the competition cannot be frequently interrupted due to appeals to judges. Therefore, rules of the game are not under the control of judges.

Due to the different objectives of sports organization rules and regulations, the distinction between competition rules and legal regulations is not clear. Some competition rules are strictly limited to technical rules, while others are disciplinary decisions for violations of rules, and there are also third category rules related to internal reporting, competition organization, and result evaluation of sports organizations. So, how to judge which are legal regulations and which are rules of the game? The distinction between competition rules and legal regulations can be based on objective standards and the nature of the problem. CAS panel indicate that the rules of the game determine how the game must be played and who will judge the outcome of the game. For example, the weight of the ball used in the game cannot establish arbitrability disputes, regardless of whether the weight of the ball used in the game complies with the rules or whether the athlete has taken illegal measures. The arbitral tribunal considers that the application of purely technical rules is non-reviewable. In the CAS 2015/A/3880, the Panel held that sanction a player with a yellow card for misconduct during the game was a "rule of the game". In principle, the disciplinary decision made by the referee on the field is final and irrevocable, unless there is a video recording and the referee does not see the player's serious misconduct and the player is sent off.²⁰

20. CAS 2015/A/3880 FC Steaua Bucuresti v. Gabriel Muresan.

The principle of respecting rules of the game is an important feature of the sports law "*lex sportiva*", which is a rule specifically designed for sports that guides many sports competitions at a fundamental level. If a more comprehensive review of referee matters that have long been considered relevant to the venue is conducted, it may undermine the basic structure of sports law. Therefore, decisions made by competition officials enjoy "immunity from qualification", and CAS must review a decision made at competition only if the decision is incorrect or a decision that an irrational person could make. In other words, it is not allowed to conduct an examination of the right and wrong of the field decision. CAS can only intervene when the person requesting review determines that a decision in a particular field of movement has been tainted by fraud, dishonesty, prejudice, arbitrariness, or corruption.²¹

3.3.2 *Respect for Football Association Autonomy*

Swiss law grants associations broad discretion, including determining the obligations of their members and other persons bound by rules and imposing necessary sanctions to enforce these obligations. According to Swiss law, associations have the power of sanction and only need to meet the following conditions: first, violate the statute and regulations that the association must comply with; Secondly, the association's articles of statute or regulations have sufficiently clear provisions on the basis of sanction; Thirdly, the sanction procedure must safeguard the right to be heard, so that the association can implement the sanction.²² FIFA, as an association under Swiss law, has the authority to decide its sanctions within a certain scope and also to decide whether to take jurisdiction on related disputes. According to Article 67 (3) (b) of the FIFA Statute, CAS cannot handle appeals arising from a maximum of 4 competitions ineligible. In other words, the sanctions of 4 or fewer competition bans should not be appealed to CAS, which has no jurisdiction on it. In the CAS 2012/A/2948, the president of the appeal arbitration division pointed out that according to FIFA rules, CAS clearly has no jurisdiction on the dispute arising from the FIFA disciplinary committee's sanction of a coach's 4 game ban. Therefore, the president of the appeal arbitration division issued an order to dismiss the appellant's application for interim measures and terminate the proceedings.²³

21. CAS 2010/A/2170 Iraklis Thessaloniki FC v. Hellenic Football Federation (HFF) and CAS 2010/A/2171 OFI FC v. Hellenic Football Federation (HFF).

22. CAS 2005/A/1001 Fulham FC (1987) Ltd v. Fédération Internationale de Football Association (FIFA).

23. CAS 2012/A/2948 Claudio Daniel Borghi Bidos v. Fédération Internationale de Football Association (FIFA).

3.3.3 Respect the award of formal independent arbitral tribunals

The exception provided for in Article 67 (3) (c) of the FIFA Statutes includes the possibility for associations and federations to appoint another independent and formally composed arbitral tribunal, with the aim of ensuring in principle that all decisions related to football can be appealed in a formally independent arbitral tribunal. This also provides a certain degree of freedom for football associations in various countries to establish a "judicial system" in domestic affairs, allowing them to decide whether to recognize another arbitral tribunal in addition to CAS to handle domestic disputes.²⁴ According to FIFA Circular 1010, the composition of "independent" and "formal" requires the arbitral tribunal to meet the minimum procedural standards, including the principle of equality of the arbitral tribunal, the right to independent and fair proceedings, the principle of fair hearing, and the principle of equal treatment. The FIFA National Dispute Resolution Chamber Standard Rules, which came into effect on January 1, 2008, provide detailed provisions on these basic procedural rights, including the requirements for the composition of the national arbitral tribunal, the form and conduct of the arbitration proceedings, the generation and examination of evidence, the deliberation of committee members, and the form and content of the arbitral tribunal and its decisions. CAS also emphasizes this situation in its case awards. In the CAS 2014/A/3613, Article 2 (3) (A) (I) of the Statute of the Greek Football Association did not provide for an appeal to CAS, but instead provided for "another independent and impartial arbitral tribunal". Accordingly, disputes covered by Article 2 (3) (A) (I) of the Greek Football Association Statute can only be submitted to an independent and impartial arbitral tribunal other than CAS. The CAS believes that if the regulations of a national association do not specify CAS or provide for the jurisdiction of an independent and impartial arbitral tribunal, CAS jurisdiction cannot be assumed.²⁵

In the CAS 2012/A/2983, the Greek club ARIS and the Brazilian player agreed in their contract that in the event of a dispute, the dispute would be resolved in the first instance by the Financial Dispute Resolution Committee (PEEOD) of the Greek Football Association, and in the second instance by the Arbitral tribunal of the Greek Football Association (HFFAC). After the dispute arose due to the breach of contract between the two parties, ARIS filed an appeal to PEEOD, who made a decision. However, the player ignored the decision and continued to appeal to HFFAC. Eventually, the appeal was dismissed because the defendant did not attend. After retiring, the player appealed to

24. CAS 2010/A/2170 Iraklis Thessaloniki FC v. Hellenic Football Federation (HFF) and CAS 2010/A/2171 OFI FC v. Hellenic Football Federation (HFF).

25. CAS 2014/A/3613 PAOK FC v. Hellenic Football Federation (HFF) & Panathinaikos FC.

FIFA DRC, which made a decision partially supporting the player's appeal.²⁶In the CAS appeal process, the panel pointed out that due to FIFA's lack of valid subpoena and failure to provide an opportunity to be heard during the proceedings, it was not possible to conclude that "PEEOD and HFFAC do not constitute an independent arbitral tribunal that guarantees fair proceedings and fair rulings, and respect the principle of equal representation of players and clubs". Therefore, FIFA DRC has no authority to hear and decide on appeals filed by players against clubs, and PEEOD serves as the initial hearing. The CAS further points out that international employment disputes can be heard by tribunal other than FIFA DRC and must meet the following requirements: firstly, the state has established an independent arbitral tribunal; Secondly, the jurisdiction of the independent arbitral tribunal derives from the explicit reference of the employment contract; Thirdly, the independent arbitral tribunal should ensure fair procedures and respect the principle of equal representation of players and clubs, which meets the requirements of FIFA Circular 1010 and FIFA Standard Regulations for National Dispute Resolution Chambers, where internationality is based on the national identity of the parties, rather than the national identity of the dispute.²⁷

4 Challenges and Confirmation of CAS Jurisdiction on International Football Disputes

According to the CAS Code, after the start of CAS arbitration proceedings, if the applicant or respondent has any challenge to the jurisdiction of CAS, the panel, or the arbitrator in whole or in part, they should raise it in a timely manner. Otherwise, it will constitute implied consent or waiver. According to CAS cases, the challenge and confirmation of jurisdiction in international football arbitration mainly involve three aspects: arbitration agreement, arbitration by reference, and appeal decision.

4.1 Challenges and Confirmation of the Validity of Arbitration Agreement

4.1.1 Lack of arbitration agreement or arbitration clause

The arbitration agreement or arbitration clause is the cornerstone of CAS jurisdiction, and its core role is to establish and safeguard CAS arbitration jurisdiction. The lack of effective arbitration agreements or clauses will directly result in

26. CAS 2012/A/2983 ARIS Football Club v. Márcio Amoroso dos Santos & Fédération Internationale de Football Association.

27. CAS 2018/A/5659 Al Sharjah Football Club v. Leonardo Lima da Silva & Fédération Internationale de Football Association (FIFA).

CAS having no jurisdiction on disputes. In the TAS 2002/O/422, at that time, the FIFA rules had not yet stipulated arbitration clauses subject to CAS jurisdiction. When Besiktas submitted an appeal, there was no provision in the FIFA Statute or RSTP granting CAS jurisdiction to handle disputes between FIFA and any of its members or any other third party. Both in accordance with FIFA's regulations and based on FIFA's recognition of CAS jurisdiction, decisions made by FIFA before November 11, 2002 cannot constitute arbitration clauses refer to CAS jurisdiction, therefore CAS does not have jurisdiction on these disputes.²⁸

An arbitration agreement is an agreement between the parties to resolve existing or future disputes by an arbitral tribunal in accordance with relevant procedural rules, thus excluding the jurisdiction of national courts. If the arbitration agreement cannot determine the exclusion of the jurisdiction of the national court, CAS cannot obtain jurisdiction based on this agreement. In the CAS 2012/A/3007, in the materials submitted by the appellant, in addition to the "choice of law clause" stipulated in Article 9, paragraph 3 and Article 12, paragraph 2 of the contract, Article 9, paragraph 2 stipulates: "The parties agree that any dispute arising from this employment contract shall be resolved through mediation in the legal tribunals of the Russian Football Federation (RFU) and the Five Person Super League (MFAR). If the parties fail to resolve the dispute through negotiation or in the RFU or MFAR legal tribunals, the law of the Russian Federation shall apply." The CAS panel analyzed the content of the clause and stated that the relevant provisions under the employment contract did not provide sufficient clarity of intent and did not apply utility or benevolence. "The space of the benevolence principle can be considered that both parties do not want to exclude the jurisdiction of national courts, therefore CAS does not have jurisdiction on this dispute."²⁹SFT points out in its cases that when evaluating whether a valid arbitration agreement has been reached, the first step is to analyze whether the contracting parties have reached a consensus to have their disputes resolved by the arbitral tribunal and exclude the court. If such a consensus cannot be reached, the contract must be interpreted in accordance with the principle of good faith.³⁰If it has been determined that both parties agree to exclude the dispute from the national court and there is only a disagreement between the parties regarding the arbitration procedure, then the arbitration agreement should be respected and maintained in accordance with the principles of utility or benevolence.³¹

28. TAS 2002/O/422 Besiktas / Fédération Internationale de Football Association (FIFA) & SC Freiburg.

29. CAS 2012/A/3007 Mini FC Sinara v. Sergey Leonidovich Skorovich.

30. Swiss International Arbitration Decisions.4A_627/2011.

31. Swiss International Arbitration Decisions.4A_244/2012.

4.1.2 pathological clauses

It is generally believed that an arbitration agreement that constitutes substantive validity should include compulsory effects on the parties, the exclusion of intervention by national courts in disputes, the authorization of the arbitral tribunal to resolve disputes that may arise between the parties, and the provision of arbitration procedures that can make and enforce arbitration awards under fast and effective conditions.³² The imperfect arbitration agreement reached by the parties that cannot fully satisfy their valid establishment is called a "pathological clause". It is generally believed that a pathological clause has one of the following characteristics: firstly, the clause is ambiguous or ambiguous in terms of jurisdiction, or contains contradictory clauses; Secondly, it did not accurately mention the arbitral tribunal selected by the parties to be appointed; Thirdly, it does not impose any procedural mandatory consequences on the parties involved in disputes; Fourthly, it does not exclude the intervention of national courts in resolving disputes, or at least award before issuing an arbitration order; Fifthly, no arbitrator has been granted to resolve any disputes that may arise between the parties involved; Sixth, it is not allowed to establish a procedure that is easy to make and execute decisions under optimal efficiency and speed conditions.³³

How to determine jurisdiction based on pathological clauses in CAS proceedings? In the CAS case, a club and a football agency reached an agreement in 2003 regarding the transfer of players, which included a clause stating that "the dispute governing body of this agreement is the FIFA Commission or UEFA Commission". Obviously, this clause does not meet the criteria for a valid arbitration clause and is a pathological arbitration clause. The two sides had a disagreement in 2008 on the financial consequences of player transfers and filed a dispute with the FIFA Player Identity Committee for resolution. The FIFA Player Identity Committee (PSC) rejected the jurisdiction of the case on the grounds that the parties involved were agencies rather than individuals. In May 2010, the case was appealed to CAS. The CAS panel held that the parties had a common intention to submit their dispute to CAS, and there was no indication that due to FIFA's refusal to hear the dispute, the parties would not choose CAS arbitration, but rather intended to submit it to CAS located in Switzerland. Therefore, it confirmed that CAS has jurisdiction on the case. Afterwards, the parties appealed the ruling of the case to the (SFT) on the grounds of CAS's erroneous acceptance of jurisdiction. SFT believes that the designation of FIFA and UEFA in the parties' agreement indicates that both parties wish for an organization fa-

32. CAS 2017/A/5065 Jacksen Ferreira Tiago v. Football Association of Penang & Football Association of Malaysia (FAM).

33. Benjamin G. Davis. Pathological Clause: Federic Eisemann's Still Vital Criteria.[J]. Arbitration International, 1991, 65.

miliar with football transfer to determine any disputes that may arise under their transfer contract. The appellant also acknowledges that if FIFA PSC accepts jurisdiction on this case, it may appeal its decision to CAS. Based on this, SFT conclude that it must be assumed that both parties have submitted any disputes that may arise from the transfer agreement of February 19, 2003 to CAS.³⁴ In fact, in order to facilitate the effective resolution of disputes through specialized arbitral tribunals such as CAS, the condition for SFT to review the validity of arbitration agreements is "benevolence", and a valid arbitration agreement can be reached through submission alone. Overall, when dealing with jurisdictional issues arising from pathologic clauses, the arbitral tribunal needs to confirm two aspects of CAS jurisdiction based on pathologic clauses: first, whether the parties have reached mutual agreement on the objective key points of reaching an arbitration agreement, including the intention of both parties to submit their disputes to the arbitral tribunal for a binding decision and the specificity of the disputed object submitted to the arbitrator, as well as any other issues deemed crucial to the conclusion of the arbitration agreement based on mutual agreement; Secondly, if a valid agreement is concluded, can it be interpreted as granting CAS jurisdiction.

4.2 Challenges to the validity of reference clauses and their confirmation

A reference clause is also known as an incorporation clause.³⁵ It is generally believed that since the relevant documents mentioned or referred to in the contract are an integral part of the contract, the content of the contract agreed upon by both parties is also the arbitration clause contained in the document. Therefore, the parties have an arbitration agreement, and such reference or reference is a reference clause. In practice, whether this reference clause meets the standards of a valid arbitration agreement or arbitration clause is one of the important reasons for defending the jurisdiction of CAS.

4.2.1 Global reference

Global reference refers to the situation where the parties to a contract do not explicitly include an arbitration clause, and are bound by other documents that contain arbitration clauses, including arbitration clauses. Given the pyramid administration structure of international football, the football association or league to which the parties belong usually refer the statutes or rules of higher-level football federations in their statutes or regulations, and arbitration clauses may exist through this way of reference. As mentioned above, SFT is benevolent of the effectiveness of sports arbitration agreements. Therefore, what specific conditions

34. Swiss International Arbitration Decisions.4A_246/2011.

35. Liu XiaoHong. Study on Legal Theory and Empirical Research of International Commercial Arbitration Agreement[D]. East China University of Political Science and Law, 2004, p35.

are needed to determine the effectiveness of the global reference? Can refer the FIFA Statute or other Intercontinental Federation Statute constitute a valid global reference? In the CAS 2011/A/2430, the parties argued that the service contract referred to the FIFA Statute, which should constitute the jurisdiction of CAS. However, the panel pointed out that according to CAS jurisprudence, the FIFA Statute itself does not constitute CAS jurisdiction, so there is no reason to consider mentioning the FIFA Statute as a specific arbitration agreement. Therefore, simply refer the FIFA Statute throughout the entire contract is not sufficient to constitute CAS's jurisdiction on disputes.³⁶

At the national level, if the National Football Association has not issued a challenge decision, is not a party to the procedure that led to the challenge decision, and the applicable rules do not stipulate that the National Football Association accepts CAS as having jurisdiction to challenge to its relevant decisions, then there is no arbitration clause binding the National Football Association.³⁷ Even if it involves doping disputes, the general reference to anti-doping rules in the National Football Association's articles of association is not sufficient to constitute a reason for the National Football Association to accept CAS jurisdiction. The purpose of this reference is to bind players to comply with the provisions of the Anti-Doping Regulations, but it cannot become an obligation of the National Football Association to submit disputes to arbitration that are not parties to it.

In summary, in order for CAS to have jurisdiction to hear appeal decisions, the statutes or rules of football related institutions that make appeal decisions must clearly recognize CAS as the appeal tribunal. The Sports Arbitration Regulations require sports organizations that directly appeal to CAS to include provisions for appealing to CAS in their statutes of association or regulations. The CAS panel emphasized that CAS does not have omnibus jurisdiction, and only when it is explicitly stipulated in the statutes of association or regulations that CAS has jurisdiction, CAS has the right to hear disputes. Ambiguity is not enough.³⁸ SFT proposed in the judgment that the principle of good faith should be applied to the analysis of "global reference". If the parties have signed the relevant documents and have not raised any challenges to this clause, it can be deemed that the written form requirements of the arbitration clause have been met.

4.2.2 Jurisdiction on domestic football disputes

CAS is the authoritative tribunal for resolving sports disputes, mainly dealing

36. CAS 2011/A/2430 Football Club Apollonia v. Albanian Football Federation (AFF) & Sulejman Hoxha.

37. CAS 2013/A/3147 Khaled Mohammad Sharahili v. Saudi Arabian Football Federation (SAFF).

38. CAS 2008/A/1571 Nusaybindemir SC v. Turkish Football Federation (TFF) & Sirnak SC.

with international disputes, but there is no clear provision to exclude domestic disputes. According to the principle of arbitration, can domestic football disputes obtain the jurisdiction of CAS? In the current football case rulings released by CAS, there are some precedents regarding the reference clause involving domestic football dispute jurisdiction. The CAS 2011/A/2472 is considered a landmark case by CAS on this issue. The panel in this case found that there is no mandatory provision in the FIFA Statute that requires national federations or associations to appeal their decisions to the CAS. Articles 59 to 61 of the FIFA Statute, FIFA Circular 827, and the FIFA press releases of December 12, 2002 and October 19, 2003 cannot be interpreted as providing for this mandatory right of appeal.³⁹ The panel further pointed out that if the mandatory requirement of the FIFA Statute is for the National Federation or Association to provide for the right to appeal its decisions, then the National Federation or Association must provide for this right in its Statutes or Regulations, otherwise there is no right to appeal to the CAS. In addition, in any case, whether the National Football Association can grant CAS jurisdiction through arbitration clauses does not entirely depend on the will of the national federation or association, but is also subject to the legal jurisdiction of the country where these tribunals are located. This principle has been repeatedly confirmed in subsequent football precedents. In the CAS 2013/A/3199, the panel pointed out that the statutes and regulations of FIFA or UEFA only provide for the reference of CAS arbitration and do not authorize CAS to have jurisdiction to appeal decisions passed by national federations or associations. Therefore, without submitting a specific arbitration agreement to CAS, CAS does not have jurisdiction to hear disputes between Spanish clubs and the Spanish Football Association.⁴⁰

Under certain conditions, CAS can accept domestic football disputes. In the CAS 2011/A/2604, professional athletes agreed to comply with Brazilian Football Federation (CBF) rules in their contracts through the registration of the CBF. According to Article 1 (2) of the CBF Statute, all athletes must comply with FIFA regulations, among other things. In addition, Brazilian law strengthens the status of international sports regulations in the Brazilian sports system. Article 1, paragraph 1 of the Pele Law clearly stipulates that Brazil's official sports practices are bound by national and international regulations, and the various International Sports Organization regulations accepted by the national federations are bound. Article 3 (III) of the Pele Law stipulates: "Athletes engaged in professional sports shall comply with international sports organization regulations in addition to complying with the Pele Law and national sports rules." Therefore,

39. CAS 2011/A/2472 Al-Wehda Club v. Saudi Arabian Football Federation (SAFF).

40. CAS 2013/A/3199 Rayo Vallecano de Madrid SAD v. Real Federación Española de Fútbol (RFEF).

international sports regulations directly apply to Brazilian sports, and any athlete registered with a Brazilian federation is directly bound by the international regulations accepted by that federation, including the provisions granting jurisdiction to CAS, just as Article 61 of the FIFA Statute grants FIFA the right to appeal to CAS, domestic federations may appeal to CAS.⁴¹ Therefore, for domestic football disputes, in addition to requiring clear rules from national federations to recognize CAS jurisdiction, there must also be support from national laws.

In summary, Article 63 of FIFA's Statute does not grant CAS jurisdiction on domestic dispute, nor does it require the rules of the Federation of Nations to grant CAS the right to appeal domestic disputes.⁴² The main purpose of Article 63 of the FIFA Statute and Article 59 of the UEFA Statute, as well as the statutes of each intercontinental federation, is to ensure that their football related decisions can be appealed to CAS. However, the regulations of federations such as FIFA and UEFA are merely a directive aimed at introducing a provision for CAS arbitration, rather than granting CAS jurisdiction to appeal decisions passed by national federations or associations. If it is applicable to domestic disputes, it is necessary to connect each specific and clear reference in the national football association regulations word for word.⁴³ Furthermore, whether an arbitration clause granting jurisdiction to CAS can be passed does not entirely depend on the will of the national federation or alliance, as it is also subject to the laws of the country where the relevant institution is located. If the national federation or league constitution or rules clearly stipulate the jurisdiction of CAS and are supported by its national laws, CAS can also deal with domestic football disputes.

4.3 Challenge and Confirmation of International Football Appeal Decision

According to Article S20 of the Sports Arbitration Regulations, cases submitted to the CAS arbitration procedure shall be distributed by the CAS office to appropriate division, and the parties shall not object to such distribution or raise it as a claim. Only when there is a change in the situation during the arbitration proceedings, the CAS office may delegate the proceedings to other division after consultation with the arbitral tribunal.⁴⁴ Therefore, the appeal process

41. CAS 2011/A/2604 Fédération Internationale de Football Association (FIFA) v. Confederação Brasileira de Futebol (CBF), Superior Tribunal de Justiça Desportiva do Futebol (STJD) & Tarcisio France da Silva.

42. CAS 2013/A/3058 FC Rad v. Nebojša Vignjević.

43. CAS 2010/A/2170 Iraklis Thessaloniki FC v. Hellenic Football Federation (HFF) and CAS 2010/A/2171 OFI FC v. Hellenic Football Federation (HFF).

44. CAS 2013/A/3254 PT Liga Prima Indonesia Sportindo (LPIS), PT Persibo Football Club, Persebaya Football Club, Persema Football Club, PSM Makassar Football Club, Arema Football Club, Persipasi Football Club, Farid Rahman, Tuty Dau, Widodo Santoso, Sihar Sitorus, Bob

for registering CAS cannot be converted to the ordinary CAS process and is assigned by the CAS office. In fact, regarding international football disputes, FIFA rules clearly stipulate the jurisdiction of the appeal process. The statutes of UEFA, AFC, CONFEDERATION AFRICAINE DE FOOTBALL (CAF), CONFEDERATION OF NORTH, CENTRAL AMERICA AND CARIBBEAN ASSOCIATION FOOTBALL (CONCACAF) etc. clearly distinguish the ordinary jurisdiction and appeal jurisdiction of CAS. Therefore, CAS's appeal jurisdiction and ordinary jurisdiction on football disputes are clearly. According to Article R47 of the CAS Code, three conditions must be met to constitute the jurisdiction of CAS appeal decisions: first, both parties must agree to CAS arbitration, that is, consent to arbitration; Secondly, there must be a decision from a federation, association, or other relevant sports organization to make a decision; Thirdly, before appealing to CAS, internal remedies must be exhausted.

4.3.1 Consent Arbitration

According to Article R47 of the CAS Code, arbitration shall not be conducted without consent, and an arbitration agreement may be expressed in writing; Disputes regarding decisions made by sports related statutes or regulations, if the statute's articles of association or rules provide for the right to appeal to CAS, are refer to arbitration. In other words, the arbitration requirements arising from appealing the decision of the federation are in line with the agreement of all parties to arbitration. Generally speaking, in the field of international football, the Football federation stipulates in its statutes or rules that any dispute should be resolved through arbitration, and players accept an offer by signing their respective declarations or only by participating in matches organized by the federation. Agreeing to arbitration refers to the process in which lower ranked organizations join higher-level organizations as members in the relationship between clubs, national federations, and international federations, in order to accept the latter's "proposal" for arbitration. Determining whether the parties truly agree to arbitration is an important step in confirming jurisdiction. In the CAS 2009/A/1947, the parties did not enter into a specific arbitration agreement. Article 2.6 of the Statue of the Ghanaian Football Association (GFA) states: "GFA is a member of FIFA... therefore, it has an obligation to comply with FIFA regulations." The panel held that Article 63 of the 2009 FIFA Statute itself cannot constitute a binding arbitration clause by reference. Only when the federations of various countries incorporate the FIFA Statute into their respective statutes can CAS be recognized as having jurisdiction. In addition, the panel pointed out that the parties can also express their views on submitting the arbitration in the appeal

Hippy, Mawardy Nurdin and Halim Mahfudz v. Fédération Internationale de Football Association (FIFA), Asian Football Confederation (AFC), Football Association of Indonesia (PSSI) and Johar Arfin Husin.

materials, and through the deliberation of the arbitral tribunal on jurisdictional matters, confirm the parties' agreement to arbitration, thereby determining jurisdiction. In this case, the parties did not raise any arguments or requests regarding jurisdictional matters and failed to reach their agreement to arbitration. Therefore, CAS has no jurisdiction.⁴⁵

4.3.2 Existence of a decision

According to Article R47 of the CAS Code, another condition that constitutes the jurisdiction of CAS arbitration in international football disputes is the existence of a "decision". The FIFA Statute and Rules do not define the term "decision". According to the definition of the Swiss Federal Court, a decision is a sovereign act of an individual that constitutes or explains the legal situation in a mandatory and binding manner through specific administrative legal relationships, and has direct binding force on the authorities and the party accepting the decision.⁴⁶ The CAS panel pointed out that "decision" is substantive rather than formal, and is a declaration of intention that can affect the legal status, that is, it must include an award aimed at influencing the legal status of the recipient or other parties.⁴⁷ According to Swiss legal principles and CAS case law, a "decision" has the following characteristics: firstly, the form of the letter is not related to determining the existence of a "decision", and making it in the form of a letter cannot exclude the possibility of constituting an appealable "decision". Secondly, in principle, to make a letter a "decision", the letter must contain a ruling. Based on this, the tribunal making the decision intends to influence the legal status of the recipient or other parties to the decision.⁴⁸ Thirdly, a decision is a unilateral act sent to one or more designated recipients with the intention of producing legal effect. Fourthly, decisions that can be appealed by sports associations or federations are usually notices issued by the association to one party, based on "*animus decisendi*", which is the intention of an organization of the association to make a decision on a certain matter. General communications that do not meet these conditions cannot serve as a "decision" to constitute CAS jurisdiction. In the CAS 2005/A/899, the panel held that this letter did not affect the determination of the appellant's legal status, only included information on which association or institution was qualified to handle the appellant's request, and did not affect the choice to seek relief from the competent authority, therefore it did not constitute a "decision" that could be appealed to CAS. Not containing any ruling informa-

45. CAS 2009/A/1947 Tema Youth FC v. Ghana Football Association (GFA).

46. CAS 2004/A/659 Galatasaray SK v. Fédération Internationale de Football Association (FIFA) & Club Regatas Vasco da Gama & F. J.

47. CAS 2005/A/899 FC Aris Thessaloniki v. FIFA & New Panionios N.F.C.

48. CAS 2009/A/1781 FK Siad Most v. Clube Esportivo Bento Gonçalves.

tion cannot be considered a decision. CAS can make a ruling on the acceptability of a request, but it does not involve the merits of the request.⁴⁹

4.3.3 *Denial of justice*

Article R47 of the CAS Code requires the existence of decisions made by sports federations, associations, or organizations. This concept includes not only the existence of decisions, but also the refusal of formal justice to allow appeals in the absence of a decision. If the football organization unreasonably refuses to make a decision or delays the decision beyond a reasonable period, an appeal can be filed against the denial of justice.⁵⁰ The principle of "denial of justice" aims to protect the parties involved and prevent the International Federations from abusing the de novo system of CAS and intentionally violating procedures, deliberately delaying the time for making decisions, while also preventing parties from appealing to CAS by exhausting internal remedies. However, not all communications that do not constitute a "decision" constitute a "denial of justice".

In the CAS 2008/A/1633, the panel pointed out that if a letter does not contain any formal decision from FIFA, but only a purely informational opinion from the administrative department, and does not affect any decision that any FIFA decision-making body may make in the future regarding relevant or similar matters, this itself does not constitute a decision that can be appealed to CAS.⁵¹ FIFA stated in the letter that it cannot intervene in matters submitted by the club in the same way as the club, but if an appropriate application is made to its institution, it opens the door to handling the case. In this regard, the panel believes that this is different from the strict "denial of justice" that ultimately appealed to CAS. These letters are neither "decisions" that have a significant impact on the legal status of both parties, nor constitute "denial of justice". CAS further points out in its precedents that constituting a "denial of justice" that can be appealed to CAS requires the existence of "a lack of decision-making that has a serious or fatal impact on the interests of the club or receiver", as well as the need to balance the power of the adjudicating body to investigate appeals and issue rulings.⁵² Therefore, it believes that the principle of "denial of justice" aims to prevent federations and associations from abusing the de novo system and intentionally violating procedures of CAS. However, it can also easily lead to clubs, players, and other relevant parties abusing the principle of "denial of justice", frequently

49. CAS 2005/A/899 FC Aris Thessaloniki v. FIFA & New Panionios N.F.C.

50. CAS 2015/A/4213 Khazar Lankaran Football Club v. Fédération Internationale de Football Association.

51. CAS 2008/A/1633 FC Schalke 04 v. Confederação Brasileira de Futebol.

52. CAS 2017/A/5460 Iván Bolado Palacios v. Fédération Internationale de Football Association (FIFA), Bulgarian Football Union (BFU) & PFC CSKA Sofia.

appealing to CAS under the pretext of "denial of justice" by federations and associations. Therefore, CAS has added conditions that gradually constitute "denial of justice" in its developed case law.

4.3.4 Exhaust internal remedies mechanism

The exhaustion of internal remedies mechanism is a general judicial principle. Article 75 of the Swiss Federal Civil Code stipulates that members of an association must exhaust all internal remedies before raising challenges to the association in an external court. According to Article R47 of the CAS Code, in the absence of a specific arbitration agreement between the parties, CAS can only have the right to appeal to CAS in accordance with the applicable articles and rules of the case, and the appellant must exhaust internal remedies before CAS can have jurisdiction. Article 58 (2) of the FIFA Statute stipulates that only after exhausting internal remedies can be sued to CAS. This provision aims to provide opportunities for FIFA's internal remedy agencies to ensure full compliance with all relevant rules applicable to the case, remedy alleged violations of this regulation, and prevent appeals to CAS. In other words, in order to obtain CAS jurisdiction, not only does a "decision" need to be made, but such a decision is "final". Therefore, whether the dispute submitted to CAS exhausts the internal remedies mechanism is an important aspect of determining its jurisdiction. In the CAS 2018/A/5782, the statute and regulations of the UAE FA did not provide for the right to appeal to CAS against the decisions of its Player Status Committee (PSC), and the UAE FA's decision was final and could not be appealed. Therefore, the panel considered that the appellant did not appeal the decision of the PSC before the UAE FA Arbitral tribunal but rather lodged an appeal before CAS directly, it cannot be considered as having exhausted the legal remedies available to it prior to its appeal to CAS, and therefore has not satisfied the second condition of Article R47 of the CAS Code.⁵³

Exhausting internal remedies is not only formal, but also should have substantive significance. In the CAS 2014/A/3703, the club claim compensation for damages caused by UEFA's decision. UEFA argues that the claim is not part of the dispute submitted to a lower-level agency, and therefore internal remedies have not been exhausted and cannot be submitted to CAS. The panel dismissed UEFA's application and found that the damages compensation was a civil dispute and not a disciplinary issue in itself. Therefore, the club cannot be required to first file such a claim with the federation just to exhaust internal remedies. However, if the club claim compensation from the federation and is inevitably rejected by the federation, it will be further determined that the obligation to

53. CAS 2018/A/5782 DNN Sports Management LDA v. Baniyas Football Sports Club Company.

exhaust internal remedies only involves effective and not illusory remedies, nor formal measures.⁵⁴

Conclusion

After years of development, the jurisdiction of CAS has been continuously strengthened, not only due to its widespread recognition by the IOC and various federations, but also supported by courts such as the Swiss Federal Court, the European Court of Human Rights and other national court. At the same time, the jurisdiction of CAS is limited by the conditions for its appeal to CAS from the statutes and regulations of international federations such as FIFA, and by mandatory national laws such as Swiss law on arbitrability, public interest, and other issues. It always maintains a balance between internal supervision of sports organizations and external supervision under national law. The football case fully reflects this point. After years of arbitration practice, the CAS panel has developed unique review and judgment standards for challenge and confirmation of its jurisdiction, and continuously improved the validity of arbitration agreements, the validity of reference clauses, and the existence of appealable decisions in review and judgment. It is undeniable that Swiss law has played an important role in it. In the new era of change, international sports organizations such as the IOC and FIFA are undergoing new internal governance reforms, including the establishment of new department, new rules, and the transformation of new work models. For example, the IOC has released strategic trilogy such as the 2020 Agenda, the 2020+5 Agenda, and the latest IOC AI Agenda. Relevant national laws also have new legislation or revision, which will inevitably have a new impact on the jurisdiction of CAS. Anyway, it believes that CAS will continue to be a powerful tool for promoting internal standardization and rule of law within sports organizations, and a shield for strengthening the legitimacy of sports community autonomy externally.

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