

# Chapter 2

## Procedural Aspects

**Abstract** This chapter looks at the procedural rules that are outlined in the Rules Governing the Procedures of the Players’ Status Committee and the Dispute Resolution Chamber (“Procedural Rules”). In this chapter all relevant procedural aspects, such as the jurisdiction of the DRC, its composition, applicable law, procedural aspects, such as withdrawal and challenges, the entities which are entitled to lodge a claim before the DRC, the procedural costs and the manner of enforcement of the decisions, will be discussed extensively. Finally, in this chapter the appeal procedure before the CAS will also be brought to the readers’ attention.

**Keywords** Procedural rules • Composition • Jurisdiction • Applicable law • Litispendency • Res iudicata • Forum shopping • Culpa in contrahendo • Admissibility • Withdrawal • Challenges • Burden of proof • Renouncement of right • Non ultra petitem • Counterclaim • Intervening party • Prescription • Provisional measure • CAS

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## 2.1 Introduction

After having discussed the judicial field of the RSTP, it is also important to acquire broader knowledge of the relevant procedural aspects relating to this Chamber, the judicial sphere within which the Chamber has to operate, such as the course of the proceedings. These procedural rules are outlined in more detail in the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber ("Procedural Rules"), on the understanding that FIFA has also placed so-called "*Frequently Asked Questions*" documents on its website [www.fifa.com](http://www.fifa.com) in order to gain more information.<sup>1</sup> In this chapter all relevant procedural aspects, such as the jurisdiction of the DRC, its composition, applicable law, procedural aspects such as withdrawal and challenges, the entities which are entitled to

<sup>1</sup>Dispute Resolution Chamber. <http://www.fifa.com/governance/disciplinary/dispute-resolution-system.html>. Accessed 26 July 2016.

lodge a claim before the DRC, the procedural costs and the manner of enforcement of the DRC decisions will be discussed. Finally, the procedure before the CAS will be brought to the readers' attention, which cannot be left unmentioned as the decisions reached and issued by the DRC may be appealed before the CAS.

To begin with, the proceedings and deliberations of the DRC, including those of the DRC Judge, which will be discussed later, generally take place at FIFA headquarters in Zurich, Switzerland, subject to exceptions.<sup>2</sup> As stated earlier, the DRC was only created by FIFA in 2001 and its first decision was dated 22 November 2002.<sup>3</sup> The DRC has issued many decisions since then. However, the problem we (still) face is that FIFA does not publish all the DRC decisions on its website. Following the Procedural Rules, should decisions be of general interest, they *may* be published.<sup>4</sup> Consequently, it is difficult to estimate how many decisions have been taken by the DRC. Since the first decision in 2002 until the end of 2015, more than 2000 decisions were published on the FIFA website (for unclear reasons, however, FIFA recently decided to remove certain decisions previously published on its website from the list).<sup>5</sup>

Following the Procedural Rules, as a general rule the proceedings before the DRC are conducted in writing.<sup>6</sup> However, if the circumstances appear to warrant it, the parties may be summoned to attend an oral hearing.<sup>7</sup> For example, in a DRC decision of 28 September 2007, the DRC emphasized that as a general rule, proceedings before the DRC shall be conducted in writing. The Chamber deemed that the case did not contain any particular factual difficulty which might justify the necessity that the parties attend an oral hearing in order to present their case directly before the Chamber. Therefore, the DRC was unanimously of the opinion that the presence of the parties before the Chamber would not provide it with any new relevant factual information.<sup>8</sup> In an earlier case of 17 August 2006 before the DRC, the Chamber decided that oral hearings will only be held in the event of the DRC requiring oral arguments or testimonies of any witnesses or experts.<sup>9</sup> In other words, it can be concluded that in case a dispute contains any particular factual difficulty which might justify the necessity that the parties attend an oral hearing in order to present their case directly before the Chamber, or in case the DRC requires oral arguments or testimonies of any witnesses or experts, an oral hearing can be held and the DRC might deviate from its general line to conduct the procedure in writing.

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<sup>2</sup>Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber, 2015 edition, Article 10.

<sup>3</sup>DRC 22 November 2002, no. 300702.

<sup>4</sup>Procedural Rules, 2015 edition, Article 20.

<sup>5</sup>Dispute Resolution Chamber. <http://www.fifa.com/about-fifa/official-documents/governance/dispute-resolution-chamber.html>. Accessed 26 July 2016. For the sake of completeness, it is worth mentioning that the decisions of the PSC are also published. <http://www.fifa.com/about-fifa/official-documents/governance/player-status-committee.html>. Accessed 26 July 2016. The first decision of the PSC as published on the FIFA website is dated 21 November 2011.

<sup>6</sup>Procedural Rules, 2015 edition, Article 8.

<sup>7</sup>Procedural Rules, 2015 edition, Article 11 para 1.

<sup>8</sup>DRC 28 September 2007, no. 9719.

<sup>9</sup>DRC 17 August 2006, no. 86137.

As we will see in Chap. 3 of part II, all relevant DRC decisions are classified according to various subjects. However, before analysing the most relevant decisions, which is the essence of this book, it is useful to have broader knowledge of the most relevant procedural aspects in relation to the DRC. Once we understand the judicial framework and the limited field and scope within which the DRC has to operate, we have a solid foundation and will have a better understanding of the DRC decisions. All the relevant procedural aspects will now be discussed. Aside from this, it must be mentioned that in this chapter, only the DRC decisions pertaining to *procedural issues* will be discussed on the understanding that the relevant DRC decisions with regard to its material content will be analysed per relevant subject in Chap. 3 of part II. Furthermore, it is important to know for the time being, that DRC decisions can only be enforced through its own FIFA channels. Finally, another important aspect is that decisions reached by the DRC or the DRC Judge may be appealed before the CAS. All these principles are laid down in the “*Rules Governing the Procedures of the PSC and the Dispute Resolution Chamber*”, also called the Procedural Rules, which will be addressed first.

## 2.2 Procedural Rules

According to Article 25 para 7 of the RSTP, the detailed procedure for the resolution of disputes arising from the application of the RSTP is further explicitly outlined in the Procedural Rules.<sup>10</sup> Initially, there were the Procedural Rules of the FIFA PSC dated 21 February 2003 and the Rules Governing the Practice and Procedures of the DRC dated 28 February 2002. These rules were replaced by the new Rules Governing the Procedures of the PSC and the DRC which were approved by the FIFA Executive Committee on 29 June 2005 and which came into force on 1 July 2005.<sup>11</sup> The 2005 edition of the Procedural Rules finally constituted a new set of procedural rules that were applicable to both the PSC as well as to the DRC.<sup>12</sup>

Since 2008 the Procedural Rules have been amended and the 2005 edition of the Procedural Rules has been replaced. The new rules, the 2008 edition, were approved by the FIFA Executive Committee on 27 May 2008 and came into force on 1 July 2008. A very important amendment in the 2008 edition in comparison to the 2005 edition, is the fact that in the 2008 edition it states that there are now costs related to procedures before the DRC. Until 1 July 2008 no costs were related to these procedures. For example, according to para 1 of Article 17 of the Procedural Rules, 2008 edition, an advance of costs was not only payable for proceedings before the PSC and the Single Judge (with the exception of proceedings relating to the provisional registration of players), but also for proceedings before the DRC in relation to disputes regarding training compensation and the solidarity

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<sup>10</sup>RSTP, 2016 edition, Article 25 para 7.

<sup>11</sup>Procedural Rules, 2005 edition, Article 18 para 3.

<sup>12</sup>As was pronounced in FIFA Circular no. 959 dated 16 March 2005.

mechanism. According to the second paragraph of said provision, no advance of costs shall be paid for proceedings before the DRC in relation to disputes regarding training compensation and the solidarity mechanism if the value of the dispute does not exceed CHF 50,000.<sup>13</sup> With regard to the actual costs, a maximum amount of CHF 25,000 was levied in connection with proceedings not only of the PSC and the Single Judge (with the exception of proceedings relating to the provisional registration of players), but also as from 2008 for proceedings before the DRC relating to disputes regarding training compensation and the solidarity mechanism. However, as mentioned in Article 18 para 2 of the 2008 edition, DRC proceedings relating to disputes between clubs and players in relation to the maintenance of contractual stability as well as international employment-related disputes before the DRC between a club and a player, were still free of charge.

As from 2012, the 2008 edition of the Procedural Rules has also been amended and replaced by the 2012 edition. The “2012 rules” were approved by the FIFA Executive Committee on 27 September 2012 and came into force on 1 December 2012. The 2012 edition of the Procedural Rules is applicable to proceedings submitted to FIFA on or after the date on which these rules came into force.<sup>14</sup> Finally, as from 1 April 2015 a new version of the Procedural Rules has been issued by FIFA, the 2015 edition.

It can be inferred from the 2015 edition of the Procedural Rules that FIFA is actually trying to make the existing dispute resolution system faster and more efficient, which is one of the weaker points of the FIFA procedures. For example, in this new edition, a new para 4 to Article 9 has been added, which will limit the parties’ possibilities to change their requests and arguments after the closure of an investigation, also in order to contribute to faster procedures. Aside from this, a new para 5 to Article 9 and a new para 3 to Article 19 were added in order to have a more concrete and explicit legal basis which allows the FIFA administration, according to FIFA Circular 1468, in the absence of direct contact details, to continue the practice as it is today, to notify the parties about documents and decisions via the member associations involved.<sup>15</sup> With the aforementioned intention of making the existing dispute resolution system faster and more efficient, as well as attempting to further harmonize the application of deadlines, according to the literal text of FIFA Circular no. 1468, amendments were made to Article 16 paras 10–12 of the Procedural Rules, which concern time limits and the possible extension of deadlines. Obviously, Article 6 para 1 of the Procedural Rules had to be amended due to the new Regulations on Working with Intermediaries, which came

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<sup>13</sup>As stipulated in Article 17 para 4 of the Procedural Rules, 2015 edition, an advance of costs is calculated according to the value of the dispute. If the amount in dispute is up to CHF 50,000, the advance of costs is CHF 1000, if the amount in dispute is up to CHF 100,000, the advance of costs is CHF 2000, if the amount in dispute is up to CHF 150,000, the advance of costs is CHF 3000 and if the amount in dispute is up to CHF 200,000, the advance of costs is CHF 4000. From CHF 200,001, the advance costs is CHF 5000.

<sup>14</sup>Procedural Rules, 2012 edition, Article 21.

<sup>15</sup>According to FIFA Circular 1468, the new provisions correspond to the existing regulatory framework within the FIFA Disciplinary Code.

into force as of 1 April 2015, as a result of which the “licensed players’ agents” were definitely deleted from (and not replaced yet by the “intermediaries” on) the list of parties that are entitled to lodge a formal claim before the PSC or the DRC.

Finally, it is important to establish which edition is applicable to the case at hand. So, in each decision under “*considerations*”, before entering the context of the specific matter at hand, the DRC first assesses and decides whether it is competent to deal with the matter at stake and in this regard refers to the Procedural Rules in order to decide which version of the Procedural Rules is applicable.<sup>16</sup> Article 21 para 1 of the Procedural Rules states that the Procedural Rules of 2015 are applicable to proceedings submitted to FIFA on or after the date on which these Procedural Rules came into force. In other words, in the event that the case was submitted to FIFA before 1 April 2015, then the former Procedural Rules, 2012 edition, are applicable and shall be applied to the case.<sup>17</sup>

## 2.3 Composition

The DRC meets in the form of a panel and adjudicates, in principle, in the presence of at least 3 members, including the chairman or the deputy chairman. In practice we note that the DRC regularly passes decisions in a composition of 5 (or more) members.<sup>18</sup> According to the FIFA Commentary, the composition must be based on the fundamental principle of equal representation of players and clubs. In total, the DRC has 24 members, in which 12 members represent the players and are proposed by the players’ associations and 12 members are proposed by the clubs or leagues. The FIFA Executive Committee will formally appoint the proposed members of the DRC committee, together with the chairman as well as the deputy chairman.<sup>19</sup>

The DRC members may not and are not allowed to perform different functions in the same matter. They must refrain from attempting to influence other bodies and committees and they must maintain strict confidentiality concerning all information that comes to their attention while exercising their office and is not mentioned in the decision. In particular, they are obliged to respect the secrecy of deliberations.<sup>20</sup>

It is furthermore important to mention that if the case is of a simple nature, then it may be handled and decided on by a single judge, the so-called DRC Judge. In such event, the DRC members will designate a DRC Judge from among its members.<sup>21</sup> The aspect of the DRC Judge will be reviewed more extensively later in this book.

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<sup>16</sup>See for example, DRC 17 August 2006, no. 862.

<sup>17</sup>Procedural Rules, 2015 edition, Article 21 para 2.

<sup>18</sup>The list of DRC members is placed on the website of FIFA. <http://www.fifa.com/about-fifa/committees/committee=1889876/index.html>. Accessed 26 July 2016.

<sup>19</sup>FIFA Commentary, explanation Article 24, p. 72. Procedural Rules, Article 4.

<sup>20</sup>Procedural Rules, 2015 edition, Article 5 para 7.

<sup>21</sup>RSTP, 2016 edition, Article 24 para 2.

## 2.4 Jurisdiction

### 2.4.1 Civil Court

Article 68 para 2 of the FIFA Statutes stipulates that recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations.<sup>22</sup> To ensure that the associations do not address the civil courts, they are obliged to insert a clause in their statutes stipulating that their clubs and members are in turn prohibited from taking a dispute to ordinary courts.<sup>23</sup> However, in general, the national law of many countries provides for the compulsory jurisdiction of ordinary courts in the case of employment-related disputes. Hence, parties can decide to submit a labour dispute to a competent ordinary court, because the choice of judge is a fundamental right that cannot be denied. Players and clubs are therefore entitled to seek redress before a civil court as an exception to the statutory principles of the FIFA Statutes.<sup>24</sup> In this regard, we take note that the DRC will declare parties inadmissible in case the parties contractually decided to submit a labour dispute to a competent ordinary court. For example, in its case of 16 October 2014, the DRC stressed that the RSTP do not prohibit players and clubs from referring employment-related disputes that have possibly arisen to the local, national courts.<sup>25</sup> The DRC concluded that the claimant's claim was inadmissible. Following the FIFA Commentary, some national legislation does not even allow labour disputes to be referred to a deciding body other than civil courts before the dispute has arisen.<sup>26</sup>

Parties may decide to divert from the choice of judge if there is no compulsory jurisdiction of ordinary courts and refer the matter to (national or international) sports arbitration. However, according to the principle of “*litispendency*”, a case pending before civil courts cannot be dealt with by sports arbitration.<sup>27</sup> The DRC explicitly forbids a party to address several civil courts and then address FIFA if the decision of the civil court does not satisfy the party concerned, known as “*forum shopping*”. The DRC deems it of utmost importance that the practice of parties to have their legal cases heard by several decision-making bodies aimed at

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<sup>22</sup>FIFA Statutes, 2016 edition, Article 59 para 2.

<sup>23</sup>In a decision of the DRC of 4 February 2005, a player went straight to the Labour Tribunal Court of the country concerned without having ever lodged a formal financial complaint with FIFA against the claimant and moreover never asked for assistance in relation with his ITC. The DRC was of the opinion that “*this behaviour contradicts the basic football rules and must be strongly reprimanded*”. DRC 4 February 2005, no. 25820.

<sup>24</sup>FIFA Commentary, explanation Article 22, p. 64.

<sup>25</sup>DRC 16 October 2014, no. 10143276.

<sup>26</sup>FIFA Commentary, explanation Article 22, p. 64.

<sup>27</sup>FIFA Commentary, explanation Article 22, p. 64. See also CAS 2012/A/2983 *Aris Football Club v. Marcio Amoroso dos Santos & FIFA*, award of 22 July 2013.

obtaining the most favourable judgment, must be strictly forbidden.<sup>28</sup> The DRC is of the opinion that players and clubs are entitled to seek redress before a civil court for employment-related disputes, since for such issues, the choice of judge is a fundamental right that cannot be denied. However, as already mentioned, parties may decide and are free to divert from the choice of judge and instead refer the matter to sports arbitration.<sup>29</sup>

In a decision by the DRC of 15 February 2008, the claim of a player was inadmissible due to the fact that the DRC was not competent.<sup>30</sup> In this case the Chamber indicated that the competence of the DRC, without prejudice to the right of any player or club, is to seek redress before a civil court in disputes between clubs and players. In other words, also from this decision of the DRC it follows, that a dispute between a club and a player can be referred to ordinary courts. The DRC established that clause 13 of the relevant employment contract was to be considered a choice of forum that attributed exclusive jurisdiction to the regional Labour Court in order to deal with any possible dispute between the contractual parties. The DRC decided that it was not competent to decide on the present dispute between the player and the club, and that the player's claim against the club was not admissible.

In a decision by the DRC of 3 July 2008, the parties concerned brought their cases before several courts, more specifically before the national civil court, thenational dispute resolution chamber, the DRC and also the CAS.<sup>31</sup> The facts in this case were as follows. On 19 June 2002 a Slovenian player and the club O signed an employment contract valid from 19 June 2002 until 30 May 2004. On 8 March 2005, the player turned to FIFA due to the non-payment of his salary. The player

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<sup>28</sup>DRC 21 November 2006, no. 1161241. In a decision by the DRC of 21 February 2006 with regard to a dispute between a player and a club, the Chamber concluded that it could not protect the player's stance. By referring the question with regard to his registration to a civil court the player had infringed Article 61 para 2 of the FIFA Statutes. With regard to the contractual dispute, the player preferred to revert to the decision-making bodies of the football instances. The DRC however decided that such forum shopping cannot be accepted, in particular in view of the disrespect of the FIFA Statutes. As a consequence, the DRC decided as a result thereof not to enter into the consideration of the player's claim. One can see that the DRC is very rigorous regarding the way to civil courts. See also DRC 21 February 2006, no. 26267, and DRC 2 November 2007, no. 117309.

<sup>29</sup>Following the DRC jurisprudence it is not relevant whether the case is initiated based on sub a or sub b of Article 22 RSTP, the so-called "*sub a or b-procedure*", as will be introduced in this chapter later on. See DRC 2 November 2007, no. 1171310.

<sup>30</sup>DRC 15 February 2008, no. 28747. During the year 2012, 1787 claims were lodged before the various decision-making bodies, i.e. DRC, DRC Judge, PSC and its Single Judge.

<sup>31</sup>DRC 3 July 2008, no. 78662. See also DRC 16 April 2009, no. 49024, in which case the DRC decided that it is not possible to lodge a claim before the DRC as well as a national committee. In this case, the Chamber considered that the player, by lodging a second claim before the national deciding body, recognized, by action implying his intention, the competence of the national committee.

pointed out that a decision was already passed in his favour by the national disciplinary committee on 13 October 2003. The player asserted that he had been unable to find a new club due to the unlawful behaviour of the club. Therefore he suffered a loss and claimed compensation. According to the club the player was not able to lodge a new claim against the club because the matter had already been decided by a national dispute resolution chamber. The player disagreed with the club's position asserting that the matter that was lodged before the national dispute resolution chamber was another case relating to his earned salary for the previous football season. The player also started a procedure before the national civil court. On 21 February 2006 the DRC decided it was not competent to deal with this matter. On appeal the CAS decided to set aside the decision by the DRC and referred the case back. The club and the player reiterated their position before the DRC. With regard to the club's argument disputing the competence of the DRC, the Chamber noted that the claim before the national dispute resolution chamber did not appear to include any claim for breach of contract or compensation for breach of contract. The DRC also deemed that the case before the civil court was also not related to nor constituted a claim for breach of contract. In this case the club failed to prove that an independent arbitration tribunal had been established on a national level. With regard to the contents of this case the DRC came to the conclusion that the club had in fact acted in breach of the employment contract by undisputedly having failed to remit the player's remuneration during a considerable period of time. The DRC decided that the club was liable to pay to the player EUR 20,000 as compensation for breach.

In a decision by the DRC of 1 March 2012, club A, the respondent in this procedure, allegedly lodged a claim against player G, the claimant, on 23 June 2011 at the country C District Court regarding termination of the employment contract and compensation. However, on 21 July 2011, the player lodged a claim at FIFA against the club maintaining that the club terminated the employment contract without *just cause*. The club contested FIFA's competence. The DRC acknowledged that the club contested the competence of FIFA invoking "*lis pendens*" on the basis that the club had lodged a claim against the player at the country C District Court. According to the DRC, recourse to arbitration is considered a basic principle despite the exception contained in Article 22 of the RSTP, which allows players and clubs to seek redress before a civil court. The DRC decided in the matter at hand that it was competent to deal with this case.<sup>32</sup> In the matter at hand, the club had lodged a claim against the player at the country C District Court prior to the claim of the player at the DRC. Although the DRC found itself competent to decide upon the matter at hand, it is crucial to take note of the fact that in this case (a) the club had failed to provide substantial evidence demonstrating that it actually had lodged a genuine claim at the country C court, (b) the club did not refute the player's representation as regards the country C procedure and did not follow formalities with regard to the notifications of summons, (c) the club had not provided

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<sup>32</sup>DRC 1 March 2012, no. 3122113. See also DRC 31 July 2013, no. 07131395.

the DRC with evidence that the player was properly informed of the pending proceeding before the district court and (d) the parties did not include a well-drafted jurisdiction clause. In other words, if (a) the club had not failed to provide substantial evidence demonstrating that it actually had lodged a genuine claim at the country C court, (b) the club did refute the player's representation as regards the country C procedure and did follow the formalities with regard to the notifications of summons, (c) the club had provided the DRC with evidence that the player was properly informed of the pending proceeding before the district court and (d) the parties did include a well-drafted jurisdiction clause, the DRC would most likely not be competent to deal with the case. It is at least interesting to take note of these aspects for future cases regarding the competency of the DRC.

The FIFA Commentary furthermore refers to the fact that despite being entitled to lodge a claim in relation to an employment dispute at an ordinary court of law, parties prefer to refer their litigations to sports-deciding bodies for a variety of reasons.<sup>33</sup> In general, sports arbitration is a fast-decision-making system. As we will see later on, the DRC will have to adjudicate within 60 days of receipt of the request.<sup>34</sup> Also the sport specialist's knowledge is a decisive factor in avoiding the civil court and opting for sports-deciding bodies, such as the DRC. A final important aspect, in my opinion the most relevant one, is the possibility for FIFA to enforce the decisions throughout its own FIFA channels.<sup>35</sup> It must be noted that it is generally difficult to enforce a decision of an ordinary court or an arbitration court in a foreign country. According to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards held in New York on 10 June 1958, only 156 countries declared that they apply the Convention for the recognition and enforcement of awards.<sup>36</sup> This means that in certain countries there is no legal way to enforce an arbitral decision.<sup>37</sup> FIFA is competent to respond directly to a member that infringes the rules. It is for that reason that parties prefer the DRC as a sports-deciding body.

Finally, the principle of "*res iudicata*" is relevant to keep in mind. According to this principle, the judicial decisions have become definite and can no longer be called into question, which is underlined by the DRC in a decision of 16 August 2006.<sup>38</sup> In another case before the DRC of 16 November 2012, the DRC discusses the conditions with regard to the principle of *res iudicata*. The DRC noted in this respect that the claimant party had already lodged a claim in the present matter on 13 September 2009 involving the same parties, which was decided by the DRC on

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<sup>33</sup>FIFA Commentary, explanation Article 22, p. 65.

<sup>34</sup>RSTP, 2016 edition, Article 25 para 1.

<sup>35</sup>FIFA Commentary, explanation Article 22, p. 65.

<sup>36</sup>This Convention will apply to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought. As of June 2015, 156 countries can be entitled as state party. See also The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. <http://www.newyorkconvention.org/>. Accessed 26 July 2016.

<sup>37</sup>FIFA Commentary, explanation Article 22, remark 99, p. 65.

<sup>38</sup>DRC 17 August 2006, no. 861307.

6 May 2010. Therefore, the DRC first had to establish if they had competence to deal with the claim at stake by virtue of the legal principle of *res iudicata*. The Chamber wished to emphasize that the application of such legal principle must be analysed *ex officio* by the deciding body and deemed it appropriate to recall that on the basis of the principle of *res iudicata*, a decision-making body is not in a position to deal with a claim in the event that a deciding body has already dealt with the exact same matter and already passed a final and binding decision relating to such matter. Indeed, the parties to the dispute as well as the deciding authority were bound by the final and binding decision previously passed. In continuation, the Chamber stated that the decision by the DRC of 6 May 2010 was final and binding, which is one of the criteria to establish as to whether the principle of *res iudicata* is applicable. Further to this, the DRC underlined that the principle of *res iudicata* is applicable if cumulatively and necessarily the parties to the disputes and the object of the matter in dispute are identical. The DRC determined that the object of the matter in both disputes was not identical and that, therefore, the claim was not affected by the principle of *res iudicata*.<sup>39</sup>

### 2.4.2 The PSC

Without prejudice to the right of any player or club to seek redress before a civil court for employment-related disputes, which was one of the requirements of the European Commission, as explained before, FIFA is competent regarding cases such as those mentioned in Article 22 of the RSTP, 2016 edition. In this light and according to this Article, FIFA makes a distinction between the competence of the PSC as defined in Article 23 of the RSTP and the DRC as mentioned in Article 24 of the RSTP.

As mentioned in the introduction, (at least from a theoretical point of view) the PSC plays an important role in relation to the DRC, which can be derived from several provisions in the regulations. For example, Article 54 para 2 of the FIFA Statutes, which explicitly states that the PSC shall be responsible for the work of the DRC.<sup>40</sup> As mentioned previously, but worth mentioning again in this part of

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<sup>39</sup>DRC 16 November 2012, no. 11121309. See also CAS 2006/A/1029 *Maccabi Haifa FC v. Real Racing Club Santander*, award on 2 October 2006, in which case the issue of “*res iudicata*” was also discussed. In this case it was decided that 3 elements of *res iudicata* exist, namely (a) the same persons (*eadem personae*), (b) the same object (*eadem res*) and (c) the same cause (*eadam causa petendi*). For the exception of “*res iudicata*” to be successfully admissible, it is necessary that all three elements be concurrently present. See also DRC 23 July 2015 no. 07151614 and DRC 27 November 2014, no. 11142430.

<sup>40</sup>FIFA Statutes, 2016 edition, Article 46 para 2. Further to this, another indication that the PSC can be seen as the “umbrella organisation” of the DRC is Article 23 para 3 RSTP, 2016 edition, in which it is stated that in case of uncertainty as to the jurisdiction of the PSC or the DRC, the chairman of the PSC shall decide which body has jurisdiction. Furthermore, in the first published DRC decisions, for example the DRC decision of 21 November 2003, no. 113291, the Chamber was described as ‘*The Dispute Resolution Chamber of the Players’ Status Committee*’, as the Chamber was also mentioned in the Regulations for the Status and Transfer of Players, 2001 edition.

the book, another signal for the influence of the PSC on the DRC can be underlined by making reference to Article 23 para 2 of the RSTP as well as Article 3 of the Procedural Rules, 2015 edition, in which provisions are laid down that in case of uncertainty regarding the jurisdiction of the PSC or the DRC, the chairman of the PSC shall decide which body (the DRC or the PSC) has jurisdiction. Nowadays, the PSC also still has general competence on matters relating to the players' status that do not concern disputes related to the competence of the DRC.<sup>41</sup>

Just like the DRC, pursuant to Article 23 para 4 of the RSTP, the PSC will generally adjudicate in the presence of at least 3 members, including the chairman or the deputy chairman.<sup>42</sup> The said provision further describes that the case may be settled by a Single Judge if it is of "*such a nature*". According to Article 23 para 3, "*such a nature*" can be described as a case that is considered to be urgent or raises no difficult factual or legal issues or in case it concerns a decision on the issuance of international clearance in accordance with Annex 3, Article 8, and Annex 3a of the RSTP. In that event that the chairman or a person appointed by him, who must be a member of the committee, may adjudicate as a Single Judge. In this regard it must be noted that decisions of both the PSC and the Single Judge may be appealed before the CAS, which procedure will be discussed later in this book.

Pursuant to Articles 22 and 23 of the RSTP, the PSC committee has general competence with regard to employment-related disputes between a club or an association and a coach of international dimension. However, if there is an independent arbitration tribunal guaranteeing fair proceedings on a national level, not the PSC, but this national committee will be competent to handle the matter.<sup>43</sup>

The PSC is furthermore competent with regard to all other disputes between clubs belonging to different associations that do not fall within the explicit remit of the DRC.<sup>44</sup> Aside from this, the PSC has competency regarding:

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<sup>41</sup>RSTP, 2016 edition, Article 22 under f.

<sup>42</sup>The list of members of the PSC is placed on the FIFA website. <http://www.fifa.com/about-fifa/committees/committee=1882032/index.html>. Accessed 26 July 2016.

<sup>43</sup>This follows from the RSTP, 2016 edition, Article 22 under c.

<sup>44</sup>RSTP, 2016 edition, Article 23 para 1 in conjunction with Article 22 under c and f. In DRC decision a decision by the DRC of 11 March 2005 regarding an international transfer, the DRC decided that it was not competent to handle this matter. In this case there was a financial dispute between the parties resulting from the transfer of a Brazilian player. The DRC had decided earlier that the case at hand should be considered as a dispute over the interpretation and execution of a transfer contract that had been signed between the buying and selling clubs. Therefore, the DRC was of the opinion that these disputes did not fall within their remit and that the PSC was the competent body. DRC 11 March 2005, no. 35671. The PSC is not competent with regard to disputes related to the solidarity mechanism either, which also follows from DRC 28 August 2013, no. 08131586.

- the written, substantiated request of a player who wishes to exercise his right to change associations;<sup>45</sup>
- any disputes concerning matters related to the protection of minors;<sup>46</sup>

<sup>45</sup>Regulations governing the Application of the Statutes, 2016 edition, Article 8 para 3.

<sup>46</sup>RSTP, 2016 edition, Article 19 paras 4–5 and Annex 2 and 3. Pursuant to Article 19 para 1 RSTP, international transfers of players are only permitted if the player is over the age of 18. However, according to para 2, 3 exceptions to this rule apply: (a) The player's parents move to the country in which the new club is located for reasons not linked to football. (b) The transfer takes place within the territory of the European Union (EU) or European Economic Area (EEA) and the player is aged between 16 and 18. In this case, the new club must fulfil minimum obligations. (c) The player lives no further than 50 km from a national border and the club with which the player wishes to be registered in the neighbouring association is also within 50 km of that border. The maximum distance between the player's domicile and the club's headquarters shall be 100 km. In such cases, the player must continue to live at home and the two associations concerned must give their explicit consent. The conditions of this provision shall also apply to any player who has never previously been registered with a club and is not a national of the country in which he wishes to be registered for the first time. According to para 4, every international transfer according to para 2 and every first registration according to para 3 is subject to the approval of the subcommittee appointed by the PSC for that purpose. The application for approval shall be submitted by the association that wishes to register the player. The former association shall be given the opportunity to submit its position and the sub-committee's approval shall be obtained prior to any request from an association for an ITC and/or a first registration. Any violations of this provision will be sanctioned by the FIFA Disciplinary Committee in accordance with the FIFA Disciplinary Code. In addition to the association that failed to apply to the sub-committee, sanctions may also be imposed on the former association for issuing an ITC without the approval of the sub-committee, as well as on the clubs that reached an agreement for the transfer of a minor. Pursuant to para 5, the procedures for applying to the sub-committee for a first registration and an international transfer of a minor are contained in Annex 2 of the RSTP. Aside from the aforementioned three conditions, there are two other conditions. In the first place, the sub-committee appointed by the PSC has confirmed that a foreign minor who has been living for at least five years in the country where he wishes to be registered at a club for the first time should be considered a national of that country from a sporting point of view. In other words, an application for the registration of a foreign minor under these circumstances is regularly being granted. Via FIFA Circular no. 1542, FIFA informed its members regarding changes in the RSTP concerning the provisions on the protection of minors. From the Circular it follows that the wording of Article 19 paras 3 and 4 of the RSTP has been amended in order for it to adequately reflect the well-established jurisprudence of the Sub-Committee of the PSC in relation to the so-called "five-year rule". According to FIFA and following that which is set out in this Circular, the aforementioned rule created by jurisprudence allows for the first registration of a minor player for a club in a territory of a country of which he is not a national, provided that he has lived continuously for at least five years in that territory immediately prior to the intended first registration. Said rule is already included as a separate application in TMS. As such, the current amendment of the provision does not constitute any change to the existing practice and constant jurisprudence. The current Article 19 para 3 of edition 2016 now reads as follows: "The conditions of this article shall also apply to any player who has never previously been registered with a club, is not a national of the country in which he wishes to be registered for the first time and has not lived continuously for at least the last five years in said country." In the current Article 19 para 4 of edition 2016 it is added: "... as well as every first registration of a foreign minor player who has lived continuously for at least the last five years in the country in which he wishes to be registered ....". Further to this, 2 other conditions can be derived from case CAS 2008/A/1485 *FC Midtjylland A/S v. FIFA*, award of 6 March 2009. The international transfer of minors is allowed in cases where the players concerned could establish without doubt that the reason for relocation to another country was related to their studies, and not to their activity as football players. Further to this, the international transfer is also allowed in cases in which the association of origin and the new club of the players concerned have signed an agreement with the scope of a development programme for young

- the (withdrawal of a) provisional registration of a player;<sup>47</sup>
- issues in relation to the release of players;<sup>48</sup>
- any claims for recovering solidarity contribution in case of unjustified payment<sup>49</sup>; and
- disputes whereby a match agent is involved.<sup>50</sup>

Footnote 46 (continued)

players under certain strict conditions (agreement on the academic and/or school education, authorisation granted for a limited period of time). In this *Midtjylland* case it was also decided that Article 19 RSTP applies equally to amateur and professional minor players. Article 19 is there to protect minor player without any specification as to the status of these players. For further relevant jurisprudence of the CAS in this regard, see also CAS 2012/A/2862 *FC Girondins de Bordeaux v. FIFA* (Vada II), award of 11 January 2013, from which award it follows that in case a player aged 16 (or 17) years is transferred from outside the EU to a country inside the EU and the player has a European passport, the player is entitled to claim a transfer on the basis of Article 19 para 2 RSTP despite the fact it contains no transfer within the EU. See also CAS 2005/A/955 *Cádiz C.F., SAD v. FIFA and Asociación Paraguaya de Fútbol*, award of 30 December 2005, CAS 2007/A/1403 *Real Racing Club de Santander SAD v. Club Estudiantes de la Plata*, order of 12 December 2007, CAS 2005/A/956 *Carlos Javier Acuña Caballero v. FIFA and Asociación Paraguaya de Fútbol*, award of 30 December 2005 and CAS 2013/A/3140 *A. v. Club Atlético de Madrid SAD & Real Federación Española de Fútbol (RFEF) & FIFA*, award of 10 October 2013. In the latter case it was decided that Article 19 RSTP sets key principles designed to protect the interests of minor players. Therefore, it must be applied in a strict, rigorous and consistent manner, which means that there can be no other exceptions to the principle of Article 19 RSTP than those carefully drafted in para 2 of said provision. According to the CAS, Article 19 para 2 lit. a RSTP aims to protect the young player who follows his family moving abroad for personal reasons, and not the parents who follow their child in view to integrate at a club situated abroad. The test is thus, according to the CAS, to assess the true intention and motivation of the player's parents. The CAS decided that the player's parents did not move to Spain for reasons linked to football. See also TAS 2011/A/2494 *FC Girondins de Bordeaux c. FIFA* (Vada I), award of 22 December 2011. In the latter award the CAS stressed that the rationale of Article 19 para 2 lit. a RSTP is to allow a minor player to follow his or her family and not to allow a family to follow its child. In CAS 2014/A/3793 *FC Barcelona v. FIFA*, award of 24 April 2015 (operative part of 30 December 2014). In the latter case, it was established by the CAS that FC Barcelona had breached the rules regarding the protection of minors and the registration of minors attending football academies, Article 19 and Article 19bis of the RSTP. See also CAS 2014/A/3611 *Real Madrid FC v. FIFA*, award of 27 February 2015.

<sup>47</sup>RSTP, 2016 edition, Annex 3, Article 8.2 paras 6–7. See also CAS 2011/A/2354 *Elmir Muhic v. FIFA*, award of 24 August 2011. See also Wild 2011, p. 263, in which book reference is made to the cases CAS 2003/O/530 *AJ Auxerre v. Valencia and M. Sissoko*, award of 27 August 2004, and CAS 2004/A/791 *La SASP Le Havre Athletic Club and l'Association Le Havre Athletic Club v. FIFA and Newcastle United and M. Charles N'Zogbia*, award of 27 October 2005 (reference to this award was made in DRC 28 September 2007, no. 97938; see also DRC 9 November 2004, no. 114667–09, and DRC 26 November 2004, no. 114667–26).

<sup>48</sup>RSTP, 2016 edition, Annex 1, Article 6 para 2 in conjunction with 3.

<sup>49</sup>If the new club paid the entire amount of compensation to the former club without having deducted the 5 % solidarity contribution, the claim for recovering the amount paid in excess would have to be filed with the PSC, which can be based on Article 22 under f of RSTP, 2016 edition. See also FIFA Commentary, explanation Article 24, p. 73, footnote 108.

<sup>50</sup>Procedural Rules, 2015 edition, Article 6 para 1. See also the FIFA website. [http://resources.fifa.com/mm/document/affederation/administration/02/55/56/57/rulesgoverningtheproceduresofhepscandthedrc\(april2015\)\\_neutral.pdf](http://resources.fifa.com/mm/document/affederation/administration/02/55/56/57/rulesgoverningtheproceduresofhepscandthedrc(april2015)_neutral.pdf). Accessed 26 July 2016. A distinction is made between “club-club-disputes”, “coach-disputes” and “players’ and match agent disputes”.

In addition to the above, it must be mentioned that the PSC also had competence before 1 April 2015 in the event that a national association had rejected an applicant for a players' agent's licence fairly, and it was competent in case it concerned a dispute in which a players' agent had provided services to a player.<sup>51</sup>

### 2.4.3 *The DRC*

#### 2.4.3.1 General

As stated above, the jurisdiction of the DRC is defined in Article 22 and Article 24 of the RSTP. With regard to its jurisdiction and with reference to Article 3 para 1 of the Procedural Rules, also under the part "*considerations*" of the decision, and after the Chamber has determined exactly which edition of the Procedural Rules is applicable to the matter at hand, subsequently (mostly in the second paragraph of the "*considerations*"), and before entering into the substance of the matter, the DRC examines its jurisdiction in light of Articles 22 to 24 of the RSTP, 2016 edition.<sup>52</sup>

According to the above and the current version of the RSTP, 2016 edition, the DRC will therefore adjudicate on the disputes in accordance with these Articles 22 to 24, however, with the exception of the issuance of an ITC. Although it is not explicitly mentioned in the RSTP, and as already mentioned in the above, contractual disputes related to the *issuance* of an ITC will be settled by the PSC.<sup>53</sup>

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<sup>51</sup>In the decisions regarding players' agents (currently named "intermediaries"), reference was made to Article 30 para 2 of the former Players' Agents Regulations ("PAR"), 2008 edition, from which it followed that FIFA was competent to deal with international disputes in connection with the activities of licensed players' agents, i.e. individuals who hold a valid players' agent license issued by the relevant member association. Pursuant to the aforementioned provision, in the case of international disputes in connection with the activity of players' agents, a request for arbitration proceedings could be lodged with the PSC. See also PAR, 2008 edition, Article 4 para 3. Aside from this, the PSC approved the players' agents regulations of the national associations, according to the preamble of the PAR. Following Article 1 para 3 of the former PAR, 2008 edition, it did not cover any services which may be provided by players' agents to other parties such as managers or coaches. Furthermore, the PSC did not have jurisdiction in a dispute between an agent and his client, if the representation contract(s) was (were) not concluded between the player/club and the agent personally (which principle applies even in cases where the agent is the sole proprietor of the company). In other words, it was an ongoing practice of the PSC that they will not appear to be in a position to hear claims of players' agents against clubs when the contract at the base of the relevant dispute was concluded with a company. Lastly, it is interesting to note that the PSC or the Single Judge (as the case may be) did not hear any case subject to these regulations if more than 2 years had lapsed after the event giving rise to the dispute, or more than six months had lapsed since the players' agent concerned had terminated his activity. The application of this time limit was examined *ex officio* in each individual case by the PSC.

<sup>52</sup>See for example DRC 22 July 2004, no. 74557.

<sup>53</sup>This can be derived from the RSTP, 2016 edition, Article 24 para 1, and Annex 3, Article 8.2 paras 6–7, which stated, among other things, that the professional player, the former club and/or the new club are entitled and have been given the facility to file a claim with FIFA in accordance with Article 22 of the RSTP.

According to Article 22 in conjunction with 24 of the RSTP, the DRC has jurisdiction with regard to:

1. disputes between clubs and players in relation to the maintenance of contractual stability where there has been an ITC request and a claim from an interested party in relation to said ITC request, in particular regarding the issue of the ITC, sporting sanctions or compensation for breach of contract (the so-called “*sub a procedure*”);<sup>54</sup>
2. employment-related disputes between a player and a club of an international dimension (the so-called “*sub b procedure*”); the aforementioned parties may, however, explicitly opt in writing for such disputes to be decided by an independent arbitration tribunal that has been established at national level within the framework of the association and/or a collective bargaining agreement. Any such arbitration clause must be included either directly in the contract or in a collective bargaining agreement applicable to the parties. The independent national arbitration tribunal must guarantee fair proceedings and respect the principle of equal representation of players and clubs;<sup>55</sup>
3. disputes relating to training compensation and the solidarity mechanism between clubs belonging to different associations;<sup>56</sup> and
4. disputes relating to the solidarity mechanism between clubs belonging to the same association provided that the transfer of a player at the basis of the dispute occurs between clubs belonging to different associations.<sup>57</sup>

In view of the above and as referred to in Chap. 1 of this book, it must be mentioned that in the 2015 edition an amendment with regard to Article 22 under b was added, which concerned the division of jurisdiction between the DRC and NDRC’s, in order to better clarify the pertinent aspects. In the 2014 edition and former editions of the RSTP, Article 22 under b was described less extensively as it was mentioned in the former Article 22 under b that the DRC was competent in case of employment-related disputes between a player and a club of an international dimension, unless an independent arbitration tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs has been established at national level within the framework of the association and/or a collective bargaining agreement.<sup>58</sup>

As regards point 4 above, and as mentioned previously in Chap. 1, via FIFA Circular no. 1500, as from 1 October 2015, a new system has been created to properly manage claims through the TMS regarding training compensation and the solidarity mechanism. As a consequence to all of this, a sub-committee has been appointed by the DRC, which comprises only DRC members, each of whom is

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<sup>54</sup>RSTP, 2016 edition, Article 22 under a.

<sup>55</sup>RSTP, 2016 edition, Article 22 under b.

<sup>56</sup>RSTP, 2016 edition, Article 22 under d.

<sup>57</sup>RSTP, 2016 edition, Article 22 under e.

<sup>58</sup>RSTP, 2016 edition, Article 22 under b.

able to pass a decision as a Single Judge. Therefore, Article 24 of the RSTP has been amended in such a way that a new para 3 has been included in this provision, from which it follows that training compensation and the solidarity mechanism claims handled through TMS will be decided on by the sub-committee of the DRC. As mentioned, the exact procedure is described in Annex 6 of the RSP, 2016 edition.

In the following paragraphs, the above 4 special cases that fall within the remit of the DRC will be discussed and reviewed in more detail on the understanding that the DRC jurisprudence related to Article 22 under b is related to former editions as from the 2014 edition. However, only with regard to the abovementioned matters will the DRC be competent to decide upon the case. For example, in a decision by the DRC of 11 March 2005 regarding an international transfer, the DRC decided that it was not competent to handle this matter. In this case there was a financial dispute between the parties resulting from the transfer of a Brazilian player. The DRC decided earlier that the case at hand should be considered as a dispute about the interpretation and execution of a transfer contract that had been signed between the buying and selling clubs. Therefore, the DRC was of the opinion that these disputes did not fall within their remit and that the PSC was the competent body. The Chamber finally concluded that it was not competent to deal with this claim, which should be forwarded to the next available meeting of the PSC, or, alternatively, the Single Judge of the PSC.<sup>59</sup>

#### 2.4.3.2 “*Sub a Procedure*”: ITC Request

In the first place, the DRC is competent in case it concerns a so-called “*sub a procedure*”. Pursuant to Article 22 sub a of the RSTP, the DRC is competent in case of disputes between players and clubs in relation to the maintenance of contractual stability where there has been an ITC request and a claim from an interested party in relation to said ITC request, in particular regarding the issue of the ITC, sporting sanctions or compensation for breach of contract. In other words, if there is an ITC request from a national association, the DRC will automatically have jurisdiction.

For the sake of completeness, a player who is registered with a club that is affiliated to an association will not be eligible to play for a club affiliated to a different association, unless an ITC has been issued by the former association and received by the new association. Until the ITC has been received by the new association, the professional is not eligible to play in official matches for his new club. As an example, if a player is transferred from the German professional football club Bayern München to the Italian professional football club AC Milan, the Italian football association will ask for an ITC from the German football association.

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<sup>59</sup>DRC 11 March 2005, no. 35671. As said previously, if there is doubt with regard to the jurisdiction of the PSC or the DRC, the chairman of the PSC decides which body (the DRC or the PSC) will eventually have jurisdiction. See FIFA Commentary, explanation Article 23, p. 66.

Within the following seven days after the date of the ITC request, the German football association will issue the ITC to the Italian football association or inform the Italian association that the ITC cannot be issued because the contract between Bayern München and the player concerned has not expired or that there has been no mutual agreement regarding its termination.<sup>60</sup>

In my opinion, the fact that the DRC automatically has jurisdiction in the case of an ITC request and in the event of a claim from an interested party in relation to such ITC request, could promote (the risk of) “*forum shopping*”. The “only” action one party has to take to establish jurisdiction of the DRC is to request an ITC. The possible negative effect is explained in the following situation. Because decisions by certain national arbitral tribunals sometimes differ from decisions by the DRC with regard to the same subject, obviously parties would prefer to bring their claim to the instance where they expect to be most successful. An example is the unilateral extension option. The Dutch KNVB Arbitration Tribunal decided twice that the unilateral extension in the contract of the player is valid. For example, in the case between Trabelsi and Ajax, the extension option was valid. However, if Arsenal, who had shown interest in this player at that time, had informed Ajax that it was interested in the player, then the English Football Association could have requested an ITC from the Dutch Football Association. The DRC would then automatically be competent to decide on the same clause, the same unilateral extension option in the same contract. In line with its ongoing jurisprudence with regard to the validity of the unilateral extension option, it was not unlikely that the DRC would have decided that the same unilateral extension option might be invalid. In other words, if the player and the potential new club Arsenal created a “*FIFA forum*”, the outcome of the same case might have been different and might have been in favour of the player.<sup>61</sup>

### 2.4.3.3 “*Sub b Procedure*”: Employment-Related Disputes

#### 2.4.3.3.1 General

In the second place, aside from the *sub a procedure*, according to Article 24 para 1 and Article 22 under b of the RSTP, 2016 edition, the Chamber is also competent if it concerns an employment-related dispute between a player and a club of international dimension, the so-called “*sub b procedure*”. In this regard, in Article 22 under b, FIFA added that the aforementioned parties may, however, explicitly opt in writing for such disputes to be decided on by an independent arbitration tribunal

<sup>60</sup>RSTP, 2016 edition, Annex 3, Administrative Procedure Governing the Transfer of Players between Associations, Article 8.1 para 1, and Article 8.2 para 4 under a and b.

<sup>61</sup>Aside from the aspect and potential risk of “*forum shopping*”, if FIFA would have decided differently as compared to the outcome of a national arbitral court, this would also lead to an undesirable situation which is not in line with the main purpose of FIFA, namely to create uniformity, equality and certainty for the international football world.

that has been established on a national level within the framework of the association and/or a collective bargaining agreement. Any such arbitration clause must be included either directly in the contract or in a collective bargaining agreement applicable to the parties. The independent national arbitration tribunal must guarantee fair proceedings and furthermore respect the principle of equal representation of players and clubs.<sup>62</sup> In this regard, it must be noted that any defence or lack of jurisdiction must be raised prior to a defence on the merits, as follows from the jurisprudence of the DRC.

Several elements mentioned in Article 22 under b of the RSTP, 2016 edition, are interesting to take note of, on the understanding that this Article has been amended (extended) in the 2015 edition. As we will see, the ongoing jurisprudence of the DRC with regard to Article 22 under b of the RSTP would more than likely have led to this amendment in 2015. The new amendments are a kind of codification of the jurisprudence. In this respect, it must be mentioned that the jurisprudence of the DRC relating to Article 22 under b is only related to former editions of the RSTP. However, several aspects in connection with Article 22 under b of the RSTP, are interesting and will be brought to the readers' attention.

Firstly, the DRC is competent in the event of an “*employment-related dispute*”.

In a decision by the DRC of 25 August 2006, the DRC emphasized that it has no competence to deal with disputes related to image rights and therefore the player had to be referred to the competent national tribunals.<sup>63</sup> However, with regard to image rights (related) disputes, the DRC Judge also decided (in another case) that such conclusion might be different if specific elements of the separate agreement suggest that it was in fact meant to be part of the actual employment relationship.<sup>64</sup>

So too in a case of 13 December 2013, the DRC Judge referred to the jurisprudence of the Chamber in this regard, which has established that if there are separate agreements, as a general rule, the Chamber tends to consider the agreement on image rights as such and does not have the competence to deal with it.<sup>65</sup> However, such conclusion might be different if specific elements of the separate agreement suggest that it was in fact meant to be part of the actual employment relationship. In the case at hand, the DRC Judge concluded that such elements appear to exist. In particular, the agreement contains *inter alia* provisions regarding bonuses directly related to the achievement of sporting objectives, which are typical for employment contracts and not for image rights agreements. Also, the image rights agreement contains provisions regarding accommodation, flight tickets and the use of a car, which again, are typical for employment contracts. The DRC Judge decided not to consider the image rights agreement as such, but determined that

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<sup>62</sup>RSTP, 2016 edition, Article 22 under b. See also CAS 2008/A/1517 *Ionikos FC v. C.*, award of 23 February 2009.

<sup>63</sup>DRC 25 August 2006, no. 86613. See also 12 March 2009, no. 39274.

<sup>64</sup>DRC 13 December 2013, no. 12131045. See also Blackshaw et al. 2005.

<sup>65</sup>DRC 13 December 2013, no. 12132433.

said agreement was in fact an additional agreement to the employment contract instead. In a DRC case of 17 January 2014, the DRC decided accordingly, and established that the image rights agreement was in fact an additional agreement to the employment contract instead.<sup>66</sup> With regard to the reimbursement of stolen goods, the DRC Judge referred to Article 22 of the RSTP and consequently emphasized that, as a general rule, it is not competent to decide upon matters of insurance, but that such affairs fall under the jurisdiction of the competent national authorities. Also with regard to insurance matters, the DRC is not competent, as decided in its case of 11 March 2011.<sup>67</sup>

In a case relating to a “training agreement”, the DRC concluded that the training agreement did not constitute an employment contract but rather an instrument intended to safeguard and protect the rights of a player in formation.<sup>68</sup> The DRC underlined in this regard that its jurisdiction was limited to considering disputes arising from an “employment contract”. As a result, the Chamber adjudicated that it was not competent to decide on the consequences of a possible breach of the training agreement or of the non-respect of the formal prerequisites for an early termination of the relevant agreement concluded between the player and the club. Yet, it is important to determine that the dispute is actually “employment-related”, otherwise the DRC will decide that it is not competent to deal with the case. The DRC also lacks competence to deal with disputes arising out of rent-contracts.<sup>69</sup>

In its decision of 7 June 2013, the Chamber acknowledged that the respondent contested the competence of FIFA’s deciding bodies to adjudicate on the present matter, asserting that the dispute was not an “*employment-related dispute*”.<sup>70</sup> However, the Chamber considered that the 2 agreements signed in August 2009 had not put an end to the contractual relationship between the parties, since the claimant remained bound to the respondent, with the latter trying to loan the claimant to another club. Since no loan was eventually agreed upon, the claimant continued to be contractually bound to the respondent. In this respect, the Chamber deemed that the conclusion of the agreement in August 2009 should be considered in light of the employment contract signed in July 2008, the former being a direct consequence and closely related to the signing of the latter. The Chamber was of the opinion that the present dispute was an employment-related dispute that fell under its jurisdiction.

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<sup>66</sup>DRC 17 January 2014, no. 114396. See also DRC 30 August 2013, no. 08133402. See also DRC 10 February 2015, no. 02151030 and DRC 28 March 2014, no. 03141211. In the latter case, the DRC referred to its jurisprudence according to which, when an agreement bearing the title “image rights agreement” also includes typical elements of an employment contract, this agreement is considered as part of the employment contract. The Chamber considered the player’s claim to be admissible. See also CAS 2014/A/3579 *Anorthosis Famagusta FC v. Emanuel Perrone*, award of 11 May 2015 and CAS 2015/A/3923 *Fábio Rochemback v. Dalian Aerbin FC*, award of 30 October 2015.

<sup>67</sup>DRC 11 March 2011, no. 311896.

<sup>68</sup>DRC 26 November 2004, no. 114667–26, and DRC 9 November 2004, no. 114667–09.

<sup>69</sup>DRC 3 September 2015, no. 091511705.

<sup>70</sup>DRC 7 June 2013, no. 06132378.

In the past, the DRC jurisprudence showed that parties were able to claim financial damages based on the principle of *culpa in contrahendo* according to which it follows that parties who enter into negotiations may end up paying damages as a result of terminating negotiations without *just cause*. For example, in a decision of 12 January 2006, the DRC decided that, the fact that parties enter into negotiations, could result in the obligation to pay damages as a result of terminating negotiations without *just cause*.<sup>71</sup> Also, in its decision of 26 October 2006, the Chamber concluded that no valid employment contract was concluded between the parties, but the factual relationship had to be taken into consideration.<sup>72</sup> The player concerned brought his claim before the DRC, requesting that it be declared that a valid employment contract had been concluded between him and the club concerned. The Chamber went on to state that the aforementioned actual circumstances of the present matter, particularly the participation of the player in three preparatory matches with the club, led to the conclusion that a factual employment relationship should be taken into consideration. Given that a factual employment relationship had been established between the player and the club in which the player had rendered services to the club, and given the fact that the player did not bear any responsibility for the actual termination of the aforementioned factual employment relationship or the non-finalisation of a formal employment contract, the Chamber deemed that the player was entitled to receive compensation from the club, despite the fact that no formal and valid written employment contract had been concluded between the parties. The Chamber deemed that on account of its stance, the club concerned had to be called to account for its responsibilities pertaining to failure of the envisaged transaction.<sup>73</sup> Also, in its decision of 15 February 2008, the DRC referred to the principle of *culpa in contrahendo*.<sup>74</sup> In this case it was decided by the Chamber that the concept of *culpa in contrahendo* imposes a mutual duty of care on parties negotiating a contract and can, under certain circumstances, result in the liability of a party preventing a contract from being concluded for financial damages suffered by the other party whilst relying on the validity of the forthcoming contract.

As from 2008 no decisions of the DRC are published from which it follows that compensation can be awarded on the so-called principle of *culpa in contrahendo*. For example, in the DRC decision of 21 September 2012, the Chamber had to decide to whether or not an employment contract between the parties had been concluded.<sup>75</sup> The application of the “*burden of proof*” principle in the present matter, led the members of the DRC to conclude that it was up to the player to prove that the employment contract, on the basis of which he claims compensation for breach of contract from the respondent, indeed existed. Generally, the DRC held

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<sup>71</sup>DRC 12 January 2006, no. 16830.

<sup>72</sup>DRC 26 October 2006, no. 1061318. See also DRC 12 October 2006, no. 1061118.

<sup>73</sup>DRC 23 February 2007, no. 27409.

<sup>74</sup>DRC 15 February 2008, no. 28079.

<sup>75</sup>DRC 21 September 2012, no. 912213.

that it could not assume that an employment contract had been concluded by and between the parties simply based on circumstances, which may be likely, but does not provide certainty of the signing of a contract. In addition, the Chamber agreed that it must be very careful in the acceptance of documents, other than the employment contract, as evidence for the conclusion of a contract. In respect of the foregoing, the Chamber had to conclude that the documents presented by the claimant did not prove beyond doubt that the respondent and the claimant had validly entered into an employment contract. Furthermore, even if it would have been possible to establish, on the basis of the documents on file other than an employment contract, that the parties had entered into a labour agreement, the Chamber wished to highlight that it would need to be in possession of such labour agreement in order to be able to properly assess the claim of the claimant.<sup>76</sup>

Also, in a decision by the DRC of 28 June 2013, the DRC concluded that the parties had not signed a valid and binding employment contract, since the document named “*Variazione di Tesseramento*” lacks all the “*essentialia negotii*” to be considered a valid employment contract.<sup>77</sup> The DRC decided that, since no employment contract was concluded between the claimant and the player, there was no possibility for the Chamber to assess whether or not such alleged employment contract had been terminated by the player. Therefore, the complaint had to be rejected.

As can be derived from Article 22 sub b of the RSTP, 2016 edition, two further aspects relating to the employment-related disputes should be considered and must be taken into consideration with regard to the jurisdiction of the DRC, namely (a) whether there is international dimension, and also (b) whether the national association concerned has an independent arbitral tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs within the framework of the association and/or a collective bargaining agreement.

#### 2.4.3.3.2 International Dimension

With regard to the jurisdiction of the DRC in relation to employment-related disputes, another requirement according to Article 22 under b of the RSTP, 2016 edition, is the presence of the “*international dimension*”. The DRC has handed down numerous decisions in which the term “*international dimension*” came up for consideration.<sup>78</sup> From the consistent jurisprudence of the DRC it can be derived that the dispute has an international dimension (and the DRC is thus competent in the

<sup>76</sup>See also PSC 23 September 2014, no. 09141041.

<sup>77</sup>DRC 28 June 2013, no. 06132647.

<sup>78</sup>DRC 1 June 2005, no. 65349, DRC 23 March 2006, no. 631290, DRC 27 April 2006, no. 46610, DRC 17 August 2006, no. 86174, and DRC 26 October 2006, no. 1061318.

concept of the *sub b procedure* to adjudicate and to handle a case) when 2 parties have different nationalities and then claim against each other.<sup>79</sup>

In a decision of 2 November 2005, the DRC also emphasized that a dispute has an international dimension when 2 parties of clearly different nationalities claim against each other. However, when both parties have the same nationality, the dispute will be considered to be national or internal, which mean that the rules and regulations of the member association will be applied to the matter, and the deciding bodies, in accordance with the relevant provisions, are obliged to decide on the issue.

In a decision of 3 October 2008, the DRC also referred to the international dimension.<sup>80</sup> The DRC underlined that, as a general rule, the international dimension is represented by the fact that the player of the relevant club affiliated to the association, is not a national of that country. The DRC was of the opinion that the dispute was between a club and a player from the same country. Furthermore, the DRC emphasized that the dispute did not arise from the rights and obligations agreed upon in an employment contract. As a result, and due to the lack of an international dimension, the DRC decided that the present claim was inadmissible.

With regard to this “*international dimension*”, in the case of 7 February 2014, the DRC decided that when both parties have the same nationality, the dispute shall be considered as national or internal, with the consequence that the rules and

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<sup>79</sup>In the concept of Article 22 under a of the RSTP, 2016 edition, the so-called “*sub a procedure*”, FIFA Commentary states that when a player signs for a club affiliated to *another* association as a result of an employment-related dispute, it is irrelevant whether the player has the nationality of the country where the former club was domiciled. The registration of the player following the termination of the contract determines whether the dispute is national or international. For example, if the player registers at a new club in the same association where his former club is domiciled, the dispute is national. If the player registers at a club in another association and there is an ITC request, the dispute is international. According to FIFA Commentary, such international disputes are referred to the DRC with regard to the substance of the matter. See FIFA Commentary, explanation Article 22, p. 66. For example, in a DRC decision of 9 November 2004, the player had concluded “*a contrat stagiaire*” with a French club, valid from 1 July 2003 until 30 June 2004. After the contract expired, the player signed an employment contract with an English club. On 13 August 2004, the English Football Association asked the French Football Federation to issue the ITC for the player. The French Football Federation refused to issue the ITC. On 19 August 2004, the English Football Association asked FIFA to order the French Football Federation to issue the ITC. On 2 September 2004, FIFA ordered the French Football Federation to issue the ITC. In the same letter, FIFA authorised the English Football Association to provisionally register the player. On 14 September 2004, the French club appealed to the CAS and asked for a suspension of the registration and on 6 October 2004 the CAS suspended the registration of the English Football Association until the final DRC decision. The DRC considered that it was competent to judge in this case, because of the international dimension. In line with the above, it is clear and it explicitly follows that the DRC may adjudicate on all cases and disputes where an ITC is involved. See also DRC 9 November 2004, no. 114667–09, and DRC 26 November 2004, no. 114667–26. The DRC further decided that, before it takes a final decision, it will give the parties the option to resolve their problems amicably. If the parties cannot reach an amicable settlement, then the Chamber will reconsider the case at a future meeting.

<sup>80</sup>DRC 3 October 2008, no. 1081355.

regulations of the association concerned shall be applied to the matter, and the deciding bodies are to decide on the issue in accordance with the relevant provisions.<sup>81</sup> If FIFA's deciding body would deal with such internal matters, the internal competence of FIFA members would be violated. These principles of delimitation between the competence of FIFA and the competence of the associations, are primordial for the reciprocal recognition of the organizations and autonomy of FIFA and the member associations. The Chamber turned its attention to circumstances surrounding the double citizenship of a player. The Chamber has observed that more and more players with two or more nationalities have appeared in the world of football, and that FIFA and its deciding bodies are confronted with an augmented number of cases, which concern double citizenship. In this respect, the DRC emphasized that a player's nationality is expressed by his passport(s) or identification documents, but that in the framework of plural citizenship a player could, under certain circumstances, possibly invoke a "*sportive nationality*". The "*sportive nationality*", generally, is linked to the concrete situation of the registration of a player at a club affiliated to the specific association domiciled in a country of which the player also is a national, in compliance with the rules of registration and eligibility for a club of the association concerned. In such situations, both the club and the player may reap benefits from the "*sportive nationality*". For example, the player being registered as a "*local player*" does not charge any quota of foreign players and would have no difficulty in obtaining a visa or work permit, if at all required. Furthermore, any possible restriction on the number of foreign players in the country would not be applicable in such situation. Obviously, such circumstances are to the benefit of both the club and the player. The Chamber recalled the crucial fact that the claimant, who holds the nationality of both country P and country J, was registered with the respondent as a country P player and not as a country J player. The Chamber then turned to the claimant's argument in accordance with which, on the basis of his country J nationality, the matter at stake should be dealt with by FIFA and not by the national deciding bodies of country P. In this respect, the DRC analysed the employment contract and established that such contract was concluded by the parties making reference to the country P nationality of the claimant. Moreover, the DRC noted that the Football Association of country P confirmed that the claimant was registered, during the term of the contract, as a country P national and that he even played for the national team of country P. Especially due to the fact that the country P/country J claimant was registered as a country P player with the respondent, the case of the

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<sup>81</sup>DRC 7 February 2014, no. 02143217. See also DRC 25 April 2014, no. 04143063. In the latter case, the DRC also pointed out that when both parties have the same nationality, the dispute shall be considered as national or internal, with the consequence that the rules and regulations of the association concerned shall be applied to the matter, and the deciding bodies are to decide on the issue in accordance with the relevant provisions. If FIFA's deciding body would deal with such an internal matter, the internal competence of FIFA members would be violated. These principles of delimitation between the competence of FIFA and the competence of the associations are primordial for the reciprocal recognition of the organizations and autonomy of FIFA and its member associations.

claimant in question comes under the jurisdiction of the football association in the country concerned (i.e. country P), as a result of which FIFA cannot intervene due to a lack of jurisdiction over the matter. Consequently, the DRC finally decided in the matter at hand, that the present claim was inadmissible.

In another more recent unpublished case of the DRC of 25 April 2014, the DRC also turned its attention to circumstances surrounding the double citizenship of a player. The DRC has observed that more and more players with two or more nationalities have appeared in the world of football, and that FIFA and its deciding bodies are confronted with an augmented number of cases, which concern double citizenship. In this case, the DRC emphasized that a player's nationality is expressed by his passport(s) or identification documents, but that in the framework of plural citizenship a player could, under certain circumstances, possibly invoke a "*sportive nationality*". The "*sportive nationality*", generally, is linked to the concrete situation of the registration of a player at a club affiliated to the specific association domiciled in a country of which the player is also a national, in compliance with the rules of registration and eligibility for a club of the association concerned. In such situations, both the club and the player may reap benefits from the "*sportive nationality*". For example, the player being registered as a "*local player*" does not charge any quota of foreign players and would have no difficulty in obtaining a visa or a work permit, if at all required. Furthermore, any possible restriction on the number of foreign players in the country would not be applicable in such situation. Obviously, such circumstances are to the benefit of both the club and the player. In this case, it was decisive under which citizenship the player actually signed the contract and under which citizenship he was registered with the club concerned. In this case, the club was affiliated to an association of a country, for which the player had the citizenship of that same country. There was no international dimension as the player was formally not a foreigner in the country concerned. As a result thereof, the DRC had no jurisdiction in this matter.

In line with the above and according to several other DRC decisions, FIFA bodies such as the DRC are competent to deal with disputes related to the transfer of a player exclusively where there is a so-called *international impact*.<sup>82</sup> In several cases, the DRC refers to its own well-established jurisprudence according to which, in employment-related disputes between a club and a player that has international dimension, the main criterion is that the parties do not belong to the same country. In line with the above, the international dimension is simply represented by the fact that the player concerned is a foreigner in the country concerned. The jurisdiction of FIFA will then be established and the dispute will then fall within the remit of the DRC.<sup>83</sup>

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<sup>82</sup>DRC 26 November 2004, no. 114667–26, and DRC 1 June 2005, no. 65349.

<sup>83</sup>FIFA Commentary, explanation Article 22, p. 66.

### 2.4.3.3.3 Independent Arbitration Tribunal

Aside from the “*international dimension*” discussed above, another important requirement in relation to employment-related disputes, according to Article 22 under b of the RSTP, is that the Chamber only has jurisdiction when no independent arbitration tribunal within the framework of the association and/or a collective bargaining agreement exists on a national level, and that fair proceedings and respecting the principle of equal representation of players and clubs is guaranteed.<sup>84</sup> In other words, the DRC has no jurisdiction and a *sub b procedure* cannot be initiated, if an independent arbitration tribunal is established on a national level and respects the principles of equal representation of players and clubs with an independent chairman within the framework of the association and/or a collective bargaining agreement.<sup>85</sup>

Following consistent jurisprudence of the DRC, a valid arbitration clause referring to an arbitration court on a national level, must explicitly be included in the employment contract. This can also be derived from Article 22 under b of the RSTP, 2016 edition since it was added as from the 2015 edition that the parties may, however, (and if they want the DRC to be competent, must) explicitly opt in writing for such disputes to be decided by an independent arbitration tribunal that has been established on a national level within the framework of the association and/or a collective bargaining agreement. In other words, a clear reference to the competence of the national arbitration tribunal must be included in the employment contract. This can be inferred and follows from the well-established jurisprudence of the DRC.

For example, in its decision of 2 November 2007 the Chamber decided, that following a general principle of arbitration procedures without a valid arbitration agreement, the competence of a specific arbitration body per se cannot be established.<sup>86</sup>

A clear and explicit reference to the specific arbitration body that will be the competent body to adjudicate on the pertinent matter must be included in the employment contract. The player must be aware at the time of signing the contract that the parties will be submitting potential disputes related to their employment relationships to this body.<sup>87</sup> If the contract is not provided with such a clause, it is not the national arbitration court, but the DRC who will be competent to handle the case. For example, in a decision of 17 August 2006, the DRC decided that the competence of a national body must be explicitly stipulated by the parties in the relevant contract, at least with a clear reference to the national regulations providing for such competence.<sup>88</sup> It is therefore strongly recommended not only to

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<sup>84</sup>RSTP, 2016 edition, Article 22 under b in conjunction with Article 24.

<sup>85</sup>DRC 17 August 2006, no. 861174.

<sup>86</sup>DRC 2 November 2007, no. 2117.

<sup>87</sup>FIFA Commentary, explanation Article 22, remark 101, p. 66.

<sup>88</sup>DRC 17 August 2006, no. 86999.

explicitly provide an arbitration clause in the contract, but also to make a clear reference to the national regulations providing for such competence if the parties prefer to refer their dispute to the DRC. For example, in a case before the Chamber of 17 August 2012, the contract concerned clearly did not refer to a national dispute resolution chamber or any similar arbitration body as meant in Article 22 of the RSTP. Therefore, the Chamber finally deemed that said clause did not constitute an arbitration clause, but rather a clause concerning a choice of law.<sup>89</sup>

In its case of 6 March 2013, the DRC Judge was of the opinion that it was competent to handle the case between the parties and referred to the contents of a relevant contract and agreement and underlined that it did not contain any jurisdiction clause, i.e. both the contract and the agreement did not contain a provision referring to the competence of any national dispute resolution chamber or any similar arbitration body of the country C Football Association for disputes arising from the execution of the contract or agreement. Therefore, the DRC Judge deemed it obvious that the parties in the present dispute had never agreed to submit any possible dispute to the relevant arbitration bodies of the country C Football Association.<sup>90</sup>

From the DRC case of 17 January 2014 it appeared, that a reference was made by the parties to a collective bargaining agreement, in which provisions for the dispute resolution body were contained, was not valid according to the DRC.<sup>91</sup>

Multiple decisions come to the fore where the parties did not provide the contract with a clear arbitration clause. In these decisions the DRC decided that the arbitration clauses were rather vague. For example, in a DRC decision of 6 March 2013, the DRC Judge acknowledged that the respondent contested the competence of FIFA's deciding bodies on the basis of Article 3 a) of the contract, highlighting that the contract parties had agreed to submit any dispute to the "*relevant committee*" of the country C Football Association.<sup>92</sup> However, the DRC Judge outlined in the matter at hand that the contents of the relevant provision regarding the arbitration was rather vague and that said clause did not explicitly refer to a national dispute resolution chamber or any similar arbitration body in the sense of Article 22 under b of the RSTP. As a result thereof, the Chamber decided it was competent.<sup>93</sup>

In the decision of the Chamber of 27 February 2014, the DRC found that the arbitration clause was clear.<sup>94</sup> With regard to the contract, the DRC analysed whether it was competent to deal with disputes arising from this contract and referred to Article 22 under b. The DRC established that it was not competent to

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<sup>89</sup>DRC 17 August 2012, no. 8122302.

<sup>90</sup>DRC 6 March 2013, no. 031322423. See also DRC 27 February 2014, no. 02143259.

<sup>91</sup>DRC 17 January 2014, no. 01143276.

<sup>92</sup>See also DRC 28 March 2014, no. 03142693, and DRC 28 March 2014, no. 03141211.

<sup>93</sup>DRC 6 March 2013, no. 03132697. See also DRC 26 October 2012, no. 10121653, DRC 25 October 2012, no. 10121186, DRC 7 June 2013, no. 06131674, and DRC 15 March 2013, no. 03132656.

<sup>94</sup>DRC 27 February 2014, no. 02142682.

adjudicate on this specific case since (a) the jurisdiction clause in the contract was clear and exclusive in favour of the PEEOD and the Court of Arbitration of the country G Football Federation; and (b) the CAS confirmed that the relevant country G deciding bodies fulfilled the requirements of equal representation and having an independent chairman and guaranteeing fair proceedings, i.e. the relevant country G deciding bodies were therefore competent to adjudicate on disputes between players and clubs.<sup>95</sup>

Secondly, it is important to be aware that parties must actually invoke the arbitration clause. For example, in a decision of 10 June 2004, the DRC decided that it was also competent to deal with a dispute, *“even if written agreements signed between the parties involved in the dispute contain a clause by means of which the jurisdiction of another body is referred to”*. In this case, neither the player nor the club had invoked the relevant clause in their claim or response to the claim.<sup>96</sup> In a decision of 26 November 2004 with regard to the same issue, the Chamber decided accordingly.<sup>97</sup> In a more recent case of 31 October 2013, the DRC decided it was competent to decide upon the case since the claimant did not contest the competency.<sup>98</sup>

In the third place, we note the fact that it is of the utmost importance that the independent arbitration tribunal, established on a national level, respects the principles of equal representation of players and clubs with an independent chairman within the framework of the association and/or a collective bargaining agreement. In this regard, it is well-established jurisprudence of the DRC that even if the contract at the basis of the present dispute would have included a valid and clear arbitration clause in favour of a national dispute resolution, the respondent referring to this clause must be able to prove that, in fact, the national dispute resolution chamber meets the minimum procedural standards for independent arbitration tribunals as laid down in Article 22 under b of the RSTP, in FIFA Circular no. 1010 as well as in the FIFA National Dispute Resolution Chamber Standard Regulations (NDRC Regulations). In FIFA Circular no. 1010, dated 20 December 2005, it explicitly states that *“the parties must have equal influence over the appointment of arbitrators. This means, for example, that every party shall have the right to appoint an arbitrator and the two appointed arbitrators appoint the chairman of the arbitration tribunal”*. Furthermore, in said FIFA Circular 1010 it also states that *“where arbitrators are to be selected from a predetermined list, every interest group that is represented must be able to exercise equal influence over the compilation of the arbitrator list”*.

The DRC committees refer in their decisions to the general principle of equal representation of players as well as of clubs, and in this regard, emphasizes that

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<sup>95</sup>See DRC 17 January 2014, no. 0114044.

<sup>96</sup>DRC 10 June 2004, no. 64357.

<sup>97</sup>DRC 26 November 2004, no. 114628, DRC 11 March 2005, no. 35284, DRC 1 June 2005, no. 65412, DRC 1 June 2005, no. 65414, and DRC 17 August 2006, no. 86833.

<sup>98</sup>DRC 31 October 2013, no. 10131629.

this principle is one of the most fundamental elements to be fulfilled for a national dispute resolution chamber to be recognized. For example, in the case before the DRC of 17 August 2012, the Chamber stressed that even if the contract would have included a valid arbitration clause, the respondent was unable to prove that the said national DRC met the minimum procedural standards for independent arbitration tribunals as laid down in the RSTP. The national regulations did not meet the principle of equal representation as established by FIFA. In conclusion, the DRC finally assumed that the claim concerned was admissible.<sup>99</sup>

It is the party that refers to the arbitration clause and objects to FIFA's competence (and thus not the party that contests the national body's competence) that must prove that the national dispute resolution chamber meets the minimum procedural standards for independent arbitration tribunals as laid down in Article 22 sub b of the RSTP, in FIFA Circular no. 1010, as well as in the FIFA National Dispute Resolution Chamber Standard Regulations (NDRC Regulations). In that respect, the party must provide FIFA with the relevant documents to prove that a national body is competent to deal with the case in an official FIFA language.

In the DRC case of 6 March 2013, the DRC Judge deemed that it was obvious that the parties to the dispute had never agreed to submit any possible dispute to the relevant arbitration bodies of the country C Football Association. The DRC Judge noted that, although having been asked to do so, the respondent did not provide a translated version of the documents, in its submission it only enclosed the documents in the country C language. In view of the foregoing and taking into consideration Article 9 of the Procedural Rules, the DRC Judge decided that it could not take the relevant documents which were not translated into one of the four FIFA languages into consideration.<sup>100</sup>

In its case of 13 October 2010, the DRC noted that the player concerned contested the competence of the deciding bodies of the Football Federations of R and F and, consequently, refused to participate in the procedure pending in country R. The player pointed out, in any case, that the matter at hand had been pending before the deciding bodies of FIFA since 3 February 2010, i.e. before a claim had been lodged by the club before the Football Federation of F. The DRC turned its attention to the principle of equal representation of players and clubs and underlined that this principle was one of the most fundamental elements to be fulfilled, in order for a national dispute resolution chamber to be recognized as such. The DRC was eager to point out, that in view of the Regulations of the Football Federation of R, the respective jurisdiction of these two deciding bodies did not appear to depend on the nature of the dispute, but rather on the participation of the club involved in a possible dispute in the "*First League National Championship*" or not. As a side-note, the DRC was eager to point out that the framework of jurisdiction of the DRC of F—contrary to the framework of jurisdiction of the NDRC of the Football Federation of R—was not clearly defined by the Football

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<sup>99</sup>DRC 17 August 2012, no. 8122302. See also DRC 4 July 2003, no. 730291, DRC 10 June 2004, no. 6400276, DRC 1 June 2005, no. 65349, and DRC 28 March 2008, no. 381130.

<sup>100</sup>DRC 6 March, no. 03132423.

Federation of R Regulations, Article 26.8. In light of the documentation provided by the Football Federation of R, the DRC was of the unanimous opinion that the DRC of F did not fulfil one of the *conditionae sine qua non* stipulated in Article 22 under b of the RSTP—and illustrated in Article 3 para 1 of the FIFA NDRC Regulations—being, that the national independent arbitration tribunal needs to respect the principle of equal representation between players and clubs. Indeed, the DRC highlighted that, since the DRC of F was composed of five members: one chairman, one deputy chairman and three members, whose nominations shall exclusively be approved by the Executive Committee of F, the said arbitration tribunal did not appear to comprise an equal number of players' and clubs' representatives, in light of the documentation provided. The DRC summarized that the DRC of F, which passed the decision at hand, was not constituted in accordance with the fundamental and explicit principle of equal representation of players and clubs, and therefore did not fulfil the minimum procedural standards laid down in Article 22 under b of the RSTP, FIFA Circular no. 1010 and the NDRC Regulations.<sup>101</sup>

In its case of 25 April 2013, the Chamber acknowledged that the respondent contested the competence of FIFA's deciding bodies on the basis of clause 6 of the employment contract. The DRC noted that clause 6 of the employment contract did not refer to a specific national dispute resolution chamber or any similar arbitration body in the sense of Article 22 under b of the RSTP. Therefore, the members of the Chamber deemed that said clause could not serve as a basis for the jurisdiction of the Sporting Dispute Resolution Chamber of the country P Football Association. Subsequently, the Chamber referred to Article 9 para 1 under e of the Procedural Rules which stipulates that all documents of relevance to the dispute, shall be submitted in the original version as well as translated into one of the official FIFA languages. However, the Chamber acknowledged that the documents provided by the respondent were only provided in its translated version. This means that the Chamber did not have at its disposal the original version of the relevant documentation and, therefore, the Chamber could not establish with certainty whether the Sporting Dispute Resolution Chamber of the country P Football Association complied with the standards of an independent arbitration tribunal guaranteeing equal representation and fair proceedings. Finally, the DRC emphasized that it cannot ground its decision on the basis of documentation that is incomplete. So the Chamber finally concluded that the respondent's objection to the competence of FIFA to adjudicate the dispute thus had to be rejected.<sup>102</sup>

In the DRC decision of 17 May 2013, the prerequisite of equal representation is not only mentioned in the RSTP, but also in FIFA Circular no. 1010 as well as in Article 3 para 1 of the NDRC Regulations, which illustrates the aforementioned principle as follows: "*The NDRC shall be composed of the following members,*

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<sup>101</sup>DRC 13 October 2010, no. 10102536. See also DRC 6 March 2013, no. 03132697, DRC 26 October 2012, no. 10121653, and DRC 7 June 2013, no. 06131674.

<sup>102</sup>DRC 25 April 2013, no. 04131433.

*who shall serve a four-year renewable mandate: (a) a chairman and a deputy chairman, chosen by consensus, by the players' and club representatives [...]; (b) between three and ten players' representatives who are elected or appointed, either on proposal of the players' associations affiliated to FIFPro, or, where no such associations exist, on the basis of a selection process agreed to by FIFA and FIFPro; (c) between three and ten club representatives [...].*" In this respect, FIFA Circular no. 1010 states the following: "*The parties must have equal influence over the appointment of arbitrators. This means, for example, that every party shall have the right to appoint an arbitrator and the two appointed arbitrators appoint the chairman of the arbitration tribunal [...]. Where arbitrators are to be selected from a predetermined list, every interest group that is represented must be able to exercise equal influence over the compilation of the arbitrator list.*" In continuation, the DRC Judge noted that, according to the translated version of para 16 of the country S Football Association Rules, the decisions of the country S Football Association Arbitration Court have the same legal effect as a final judgment of an ordinary court. In this regard, the DRC Judge held and decided that it does not see that the relevant provisions allow for a possible appeal of the decisions of the country S Football Association Arbitration Court and that it is therefore doubtful whether the principle of fair proceedings is guaranteed.<sup>103</sup>

We also took note of DRC decisions in which reference was made to the CAS decisions regarding whether or not the national arbitration committee fulfilled the requirements of equal representation, and of an independent chairman, and guaranteed fair proceedings. For the DRC the conclusion of the CAS Panel is important in this context. For example, in a case of 24 May 2014, the DRC took into account that the CAS had previously issued an award, whereby it decided that the national arbitration bodies of the country G Football Federation fulfilled the requirements of equal representation, and of an independent chairman, and guaranteed fair proceedings, in compliance with the applicable standards.<sup>104</sup> As a result thereof, FIFA was not competent.

#### **2.4.3.4 Training Compensation and Solidarity Mechanism**

Further to the above, the DRC is competent with regard to disputes relating to training compensation and the solidarity mechanism between clubs belonging to different associations.<sup>105</sup> As mentioned previously via FIFA Circular no. 1500, with effect from 1 October 2015 a newly created sub-committee only comprising DRC members, each of whom is able to pass a decision as a Single Judge, was appointed by the DRC. Obviously, where it concerns a dispute between clubs belonging to the same association, the competency of the court will be appointed

<sup>103</sup>DRC 17 May 2013, no. 05131423. See also DRC 13 December 2013, no. 12131045.

<sup>104</sup>DRC 27 May 2014, no. 05142694.

<sup>105</sup>RSTP, 2016 edition, Article 22 under d in conjunction with Article 24.

in the relevant national regulations.<sup>106</sup> The DRC may review disputes concerning the amount of training compensation payable and will use its discretion to adjust this amount if it is clearly disproportionate in the case under review.<sup>107</sup> Hereafter, we will see that with regard to disputes relating to the *calculation* of training compensation and solidarity contribution, the Single Judge of the DRC, the so-called DRC Judge, is competent to deal with this matter.<sup>108</sup> In Chaps. 11 and 12 of Part II, the DRC decisions in relation to the concept of training compensation and the solidarity mechanism will be discussed, and the relevant rules and jurisprudence in this regard will be handled.

#### **2.4.3.5 Solidarity Mechanism Between Clubs Belonging to the Same Association**

According to Article 22 under e and Article 24 para 1 of the RSTP, the DRC is also competent to assess disputes relating to the solidarity mechanism between clubs belonging to the same association, on the proviso that the transfer of a player which forms the basis of the dispute, occurs between clubs belonging to different associations on the understanding that the sub-committee appointed by the DRC was created, via FIFA Circular no. 1500, with effect from 1 October 2015. The DRC decisions in relation to the training compensation and the solidarity mechanism will be discussed in the second part of this book.

### **2.4.4 The DRC Judge and the Single Judge of the PSC**

As a result of the positive experience with the Single Judge of the PSC, a similar figure has been introduced by FIFA with the DRC as from the RSTP 2005 edition.<sup>109</sup> The Single Judge of the DRC is officially called the “*DRC Judge*”. The identity and jurisdiction of the Single Judge of the PSC and the DRC Judge is detailed in Article 23 para 4 and Article 24 para 2 of the RSTP, 2016 edition.<sup>110</sup> If

<sup>106</sup>There is an exception, as will be discussed in Chap. 12 of Part II, to the rule that FIFA’s solidarity mechanism does not apply to national transfers: if the association concerned has included a clear clause in its own regulations, thereby acknowledging the obligation to pay an amount of solidarity contribution as a consequence of domestic transfers. See FIFA Commentary, explanation Article 1, p. 128.

<sup>107</sup>RSTP, 2016 edition, Annex 4, Article 5 para 4. Circular 959 dated 16 March 2005.

<sup>108</sup>It is important to emphasize that the Single Judge of the PSC is competent to decide on the calculation of the amount of solidarity contribution. If the new club paid the entire amount of compensation to the former club without having deducted the 5 % solidarity contribution, the claim for recovering the amount paid in excess has to be lodged with the PSC (RSTP, Article 22 under e). FIFA Commentary, explanation Article 24, p. 73, footnote 108.

<sup>109</sup>FIFA Commentary, explanation Article 24, p. 72.

<sup>110</sup>Procedural Rules, 2015 edition, Article 3 para 2.

the DRC Judge is to be installed, the members of the DRC will designate a DRC Judge for the clubs as well as a DRC Judge for the players from among its members.

One of the amendments in the 2015 edition of the RSTP concerned Article 24 para 2 of the RSTP to further strengthen the efforts made for a faster and more efficient dispute resolution. In this respect, the competence of the chairman and deputy chairman of the DRC was expanded so as to grant them Single Judge competences relating to training compensation and the solidarity mechanism disputes.

The DRC generally adjudicates in the presence of at least three members, including the chairman or the deputy chairman, pursuant to Article 24 para 2 unless the case is of such a nature that it may be settled by a DRC Judge. If the matter will be settled by a DRC Judge, the members of the DRC shall then designate a DRC Judge for the clubs and one for the players from among its members. In this regard, the DRC Judge may adjudicate in the following cases:

- a. all disputes up to a litigious value of CHF 100,000;
- b. disputes relating to training compensation without complicated factual or legal issues, or in which the DRC already has a clear, established jurisprudence; and
- c. disputes relating to solidarity contributions without complicated factual or legal issues, or in which the DRC already has a clear, established jurisprudence.

The disputes in points b. and c. above may also be adjudicated by the chairman or the deputy chairman as Single Judges. From Article 24 para 2 of the RSTP, 2016 edition, it follows that the DRC Judge, as well as the chairman or deputy chairman of the DRC (as the case may be), is obliged to refer cases concerning fundamental issues to the DRC. The DRC shall consist of equal numbers of club and players' representatives, except in those cases that may be settled by a DRC Judge, whereby each party shall be heard once during the proceedings.<sup>111</sup> It must further be emphasized that following the FIFA Commentary, the DRC Judge is also competent with regard to the *calculation* of training compensation and solidarity contribution.<sup>112</sup>

The question is what can be seen as cases without complicated factual or legal issues or cases in which the DRC already has a clear, established jurisprudence? We may assume that all the jurisprudence in which the DRC refers to the "well-established jurisprudence" in its decisions, could at least be considered as "DRC Judge proof". According to the FIFA Commentary, the disputes to be decided by the DRC Judge must be so-called "*clear-cut cases*" in which the facts and figures are clear and unquestionable, but where the player's new club is refusing to make the payment without a valid reason. If it cannot be viewed as a "*clear cut case*" and the case is more complicated according to Article 24 para 2 of the RSTP, the DRC Judge is then obliged to submit these fundamental issues to the Chamber.<sup>113</sup>

<sup>111</sup>On the understanding that decisions reached by (the DRC or) the DRC Judge may be appealed before the CAS.

<sup>112</sup>FIFA Commentary, explanation Article 24 para 2, p. 73.

<sup>113</sup>RSTP, 2016 edition, Article 24 para 2.

Following the FIFA Commentary, a fundamental issue is the situation that is not covered by the existing jurisprudence for which decisions within the Chamber are essential. Furthermore, according to the FIFA Commentary, a fundamental issue can be assumed in a case where the existing jurisprudence of the DRC needs to be expanded or amended. In the last place, a fundamental case can be defined as a situation that has a major impact on the daily application and interpretation of the RSTP.<sup>114</sup> In all these cases, the DRC Judge will refer the case to the Chamber.

Aside from the DRC Judge, we also have the Single Judge of the PSC. Following Article 23 para 4 of the RSTP, the Single Judge of the PSC is competent in cases that are urgent or raise no difficult factual or legal issues, and for decisions on the provisional registration of a player in relation to international clearance in accordance with Annex 3, Article 8, and Annex 3a. In that case, the chairman or a person appointed by him, who must be a member of the committee, may adjudicate as a Single Judge. Following the FIFA Commentary, the Single Judge provides major flexibility by arranging meetings at short notice to deal with cases. Given the increasing number of cases, the Single Judge has become increasingly important, if not indispensable.<sup>115</sup> In recent years, we have noted that the Single Judge of the PSC and the DRC Judge too, have issued more and more decisions, because the DRC and the PSC have created a well-established jurisprudence.

In view of the above it must be noted that, as also mentioned previously, via FIFA Circular no. 1500 with effect from 1 October 2015, a sub-committee appointed by the DRC was created with regard to claims relating to training compensation and the solidarity mechanism that are now dealt with via TMS. This sub-committee only comprises DRC members, each of whom is able to pass a decision as a Single Judge. As also follows from Article 3 of Annex 6 of the RSTP, each member of the sub-committee is able to pass decisions as a Single Judge.

### 2.4.5 Conclusion

Following Articles 22 and 24 of the RSPT, it can be concluded that the DRC is competent with regard to disputes between players and clubs in respect of the maintenance of contractual stability where there has been an ITC request and a claim from an interested party in relation to said ITC request, particularly regarding the issue of the ITC, sporting sanctions or compensation for breach of contract (the so-called “*sub a procedure*”). Aside from this, the DRC is competent if it concerns employment-related disputes between a player and a club of international dimension, unless an independent arbitration tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs has

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<sup>114</sup>FIFA Commentary, explanation Article 24, p. 73.

<sup>115</sup>FIFA Commentary, explanation Article 23 para 3, p. 70.

been established on a national level within the framework of the association and/or a collective bargaining agreement, on the understanding that the aforementioned parties may, however, explicitly opt in writing for such disputes to be decided by an independent arbitration tribunal that has been established on a national level within the framework of the association and/or a collective bargaining agreement. In this context, any such arbitration clause must be included either directly in the contract or in a collective bargaining agreement applicable to the parties, and the independent national arbitration tribunal must also guarantee fair proceedings, and respect the principle of equal representation of players and clubs (the so-called “*sub b procedure*”). Further, the DRC is competent in cases of disputes relating to training compensation and the solidarity mechanism between clubs belonging to different associations, and disputes relating to the solidarity mechanism between clubs belonging to the same association, provided that the transfer of a player at the basis of the dispute occurs between clubs belonging to different associations.

In relation to employment-related disputes, the *sub b procedure*, we face some further restrictions. The first requirement according to Article 24 under b of the RSTP, 2016 edition, is the presence of the *international dimension*. From the jurisprudence of the DRC it can be inferred that the DRC is competent when a player signs with a club affiliated to *another* association as a result of an employment-related dispute.

Furthermore, and also in relation to the *sub b procedure*, it is important to note that the jurisdiction of the DRC is excluded if an independent arbitration tribunal exists on a national level and guarantees fair proceedings and respects the principle of equal representation of players and clubs. In that respect, it is decisive that the arbitral court on a national level respects the principle of equal representation of players and clubs and has been established within the framework of the association and/or a collective bargaining agreement. In this regard, firstly it is of crucial importance that a valid arbitration clause referring to an arbitration court on a national level, is explicitly included in the employment contract. Based on the DRC jurisprudence, the contract should not only be provided with an arbitration clause, but parties should also make a clear reference to the national regulations providing for such competence. The jurisprudence of the DRC further shows that there are a lot of cases in which the DRC decides that the arbitration clause is rather vague and is thus not valid. Again, a clear and explicit reference to the competence of the national arbitration tribunal must be included by the parties in the employment contract. Furthermore, in order to make the national arbitration court competent, it is important that one of the parties actually invokes the arbitration clause. If neither the player nor the club invokes the arbitration clause in their claim or response to the claim, it is not the national arbitration court, but the DRC who is the competent body to decide.

Finally, and also in relation to the *sub b procedure*, the jurisprudence of the DRC also points out that it is of utmost importance that the independent arbitration tribunal that is established on a national level respects the principles of equal representation of players and clubs, with an independent chairman within the framework of the association and/or a collective bargaining agreement. In this

regard, it is well-established DRC jurisprudence that even if the contract at the basis of the dispute would have included a valid and clear arbitration clause in favour of a national dispute resolution, if a party disputes the competency of the national arbitration court, the other party in the dispute referring to the arbitration clause must prove that, in fact, the national dispute resolution chamber does meet the minimum procedural standards for independent arbitration tribunals as laid down in Article 22 under b of the RSTP, in FIFA Circular no. 1010 and the FIFA National Regulations. If this party is unable to prove that the national regulations meet the principle of equal representation as established by FIFA, the national arbitration court is not admissible.

Notwithstanding the above, the PSC still holds general competence on players' status matters that concern all other disputes. More specifically, the PSC committee has general competence with regard to employment-related disputes between a club or association and a coach of international dimension, unless an independent arbitration tribunal guaranteeing fair proceedings on a national level exists (as a result of which this national committee will be competent to handle the matter), all disputes between clubs belonging to different associations and regarding the request of a football player who wishes to exercise his right to change associations, any disputes concerning matters related to the protection of minors, the (withdrawal of a) provisional registration of a player, issues in relation to the release of players, and with regard to claims for recovering solidarity contribution in case of unjustified payment, and disputes that involve a match agent.

If the case is of a less complicated nature, it can be dealt with by a Single Judge, on the understanding that we have the Single Judge of the PSC and the Single Judge of the DRC, the so-called DRC Judge. As mentioned earlier, the Single Judge of the PSC and the DRC Judge have limited competences. The FIFA Commentary shows that the DRC is also competent regarding the *calculation* of training compensation and solidarity contribution. The Single Judge of the PSC can also be competent in cases that are urgent or raise no difficult factual or legal issues, and for decisions on the provisional registration of a player in relation to international clearance in accordance with Annex 3, Article 8, and Annex 3a of the RSTP.

## 2.5 Applicable Law

### 2.5.1 *National Law*

In their application and adjudication of law, the DRC will apply the FIFA statutes and regulations such as the RSTP, whilst taking into account all relevant arrangements, laws and/or collective bargaining agreements that exist on a national level, as well as the specificity of sport.<sup>116</sup> The DRC will therefore not only decide on

<sup>116</sup>Procedural Rules, 2015 edition, Article 2. See also RSTP, 2016 edition, Article 25 para 6.

the grounds of the applicable RSTP, but, according to the RSTP also the Procedural Rules. The Chamber must also take into account elements such as the national law of the country concerned as well as collective bargaining agreements that exist on a national level. In view thereof, one is immediately aware of an area of tension between the RSTP and the national laws of the countries concerned. An important question is, which rules prevail? What happens if the DRC is of the opinion that a clause is invalid, while according to national law, this same clause should be considered as valid? What if the parties have chosen a certain national law to be applicable for their case? Is the DRC obliged to follow this national law and to what extent must it be taken into account? There are many examples in which this tension between the RSTP and national law comes to the fore.

It can be assumed that the RSTP is the main ground for the judgement of the DRC. However, within this operational field, according to the RSTP and Procedural Rules, the DRC has been limited by the national laws of the countries concerned and the collective bargaining agreements that exist on a national level. So the deciding bodies such as the DRC have been given guidelines by FIFA. These guidelines reflect national particularities such as national law, as well as the specific role played by sport, also known as “the specificity of sport”. However, it must also be noted that the FIFA Commentary explicitly states that the Chamber has a certain amount of discretion as to how the guidelines may be applied to the particular case at hand.<sup>117</sup>

In their adjudication of law, the jurisprudence of the DRC teaches that the RSTP is the main source of law and most important ground. In my point of view this is quite understandable (although not always to the satisfaction of the parties concerned), since the DRC created its own well-established jurisprudence during the (last few) years. It would be quite impractical and will also be to the detriment of uniformity, equality and certainty on a worldwide scale, if certain fundamental principles and basic rules do not apply to all participants in professional football, if, due to the influence of national laws, the DRC decisions vary substantially in their outcome with regard to the same legal subjects. It can be inferred from DRC jurisprudence that the RSTP is leading and that national laws are quite (and have increasingly become) inferior. From a formal point of view, the DRC takes into account the national law, which is laid down in and can be inferred from the applicable Procedural Rules and the RSTP, but in reality we face and experience that national laws are not decisive for the DRC. As an example, in a decision of 6 August 2009, with regard to the question on which rules prevail, the DRC considered the jurisprudence of the CAS, in particular CAS 2005/A/983, which states that the RSTP has supremacy over national laws in cases regarding transfers of players between football clubs from different associations.<sup>118</sup> Also, as regards collective bargaining agreements that exist on a national level and to which reference is made by one of the parties, in the DRC decision of 28 September 2007, the Chamber explicitly referred to a decision of the Single Judge in which the latter

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<sup>117</sup>FIFA Commentary, explanation Article 25, p. 77.

<sup>118</sup>DRC 6 August 2009, no. 89145. See also DRC 6 August 2009, no. 89391.

emphasized that provisions of a collective agreement for professional football have a national impact and thus cannot have any effect in another country.<sup>119</sup>

Analysing the DRC decisions leads to the conclusion that national laws will not be taken into account, especially when it conflicts with the well-established jurisprudence. In the DRC decision of 26 October 2012, the club referred to Article 2 of the employment contract which states that “[...] *the first 12 months of the player’s contract is considered as probation according to the Termination Law of 1967*”. In other words, the club referred to national law, i.e. the Termination Law of 1967, in order to be entitled to terminate the employment contract. However, the DRC deemed it appropriate to analyse the question whether such clause inserted in an employment contract could be considered valid. In that regard, the Chamber deemed that the application of the abovementioned rule was arbitrary, since it leads to an unacceptable result based on non-objective criteria, which entitled the respondent to unilaterally terminate the contract during the first 12 months of the contract. The DRC Judge emphasized that the lack of objective criteria due to the application of the relevant rule, led to an unjustified disadvantage of the claimant’s financial rights. In this regard, the DRC considered that the possibility granted to the respondent to prematurely terminate the contract within its first year, without the need to indicate any reasons for it and only based on the fact that such period is to be considered as a probation period, appeared to be of a highly subjective nature, which means that, de facto, it was left to the complete and utter discretion of the respondent whether or not it was willing to continue the contractual relationship. In view of the foregoing, the Chamber decided that Article 2 of the contract invoked by the respondent to terminate the contract was clearly potestative and that, consequently, the respective argument by the respondent could not be upheld by the DRC. The DRC concluded that, in accordance with the general legal principle of *pacta sunt servanda*, the respondent had to fulfil its obligations as per the employment contract.<sup>120</sup> This case shows that the Chamber did not follow the national law to which the club referred.

In a more recent (unfortunately) unpublished DRC decision of 27 February 2014, the DRC also wished to point out that when deciding a dispute before the DRC, FIFA’s regulations prevail over any national law chosen by the parties. In this regard, the Chamber emphasized that the main objective of the FIFA regulations is to create a standard set of rules to which all the actors within the football community are subject to and can rely on. This objective would not be achievable, according to the DRC, if the DRC would have to apply the national law of a specific country on every dispute brought before it. Therefore, the Chamber deems that it is not appropriate to apply the principles of a particular national law to the present affair, which concerns alleged outstanding remuneration only, but rather the RSTP, general principles of law and, where possible, the DRC’s

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<sup>119</sup>DRC 28 September 2007, no. 97938.

<sup>120</sup>DRC 26 October 2012, no. 10121653.

well-established jurisprudence.<sup>121</sup> In line with the unpublished case of 27 February 2014, also in a DRC case of 15 October 2015, the Chamber wished to point out that when deciding a dispute before the DRC, FIFA's regulations prevail over any national law chosen by the parties.<sup>122</sup>

Also, in the DRC decision of 27 February 2014, the DRC was quite clear. In this case the employment contract contained a jurisdiction clause and a clause which stipulated that country P's civil law was applicable to the employment contract.<sup>123</sup> The club was of the opinion that civil law had to be applied to the employment contract. Where the club claimed that civil law had to be applied in this case, the DRC, however, stressed that FIFA's regulations prevail over any national law chosen by the parties. The DRC was of the opinion that it is in the interest of football that the termination of a contract is based on uniform criteria rather than on provisions of national law chosen by the parties. The Chamber deemed that it is not appropriate to apply the principles of a particular national law to the termination of the contract but rather the RSTP's general principles of law, and, where possible, the Chamber's well-established jurisprudence. It is therefore vital to mention that FIFA's regulations prevail over any national law chosen by the parties, as was also literally decided in the unpublished case of 16 October 2014. The main objective of the FIFA regulations is to create a standard set of rules, according to the DRC, which all the actors within the football community are subject to and can rely on. This would not be achievable if the DRC would have to apply the national law of a specific country on every dispute brought before it.

As regards the above, and following the given examples, the RSTP often prevails above national law. In fact, jurisprudence shows that FIFA's regulations prevail over any national law chosen by the parties even if a party claims national law is applicable to the case. In my point of view, it is justified that the RSTP can overrule national law, but this should not be justified under all circumstances. The DRC can take into account several elements, for example whether (a) the parties have explicitly laid down in the employment contract that a certain national law must be applicable for their case, (b) whether, the national law concerned is

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<sup>121</sup>In another unpublished DRC decision of 10 April 2015, the respondent stated that Uzbekistan law had to be applicable to the case and referred to this national law. However, the Chamber highlighted that the main objective of FIFA regulations is to create a standard set of rules to which all the actors within the football community are subject to and can rely on. This objective would not be achievable if the DRC would have to apply national law of a specific country on every dispute brought before it. This should apply, in particular, to the termination of a contract. In this respect, the DRC wished to point out that it is in the interest of football that the termination of a contract is based on uniform criteria rather than on provisions of national law that may vary considerably from country to country. Therefore, in this case the DRC finally deemed that it was not appropriate to apply the principles of a particular national law to the termination of the contract but rather the RSTP's general principles of law and, where possible, the Chamber's well-established jurisprudence.

<sup>122</sup>DRC 15 October 2015, no. 1015863.

<sup>123</sup>DRC 27 February 2014, no. 02142147.

mandatory which must be demonstrated and invoked by the party claiming that national law is applicable; (c) the deviation from national law should, in principle, pursue a legitimate objective and should be considered as a vital issue, such as the protection of minors; and (d) the deviation should not be in conflict with the well-established jurisprudence of the DRC.

It is not only Article 17 that refers to the fact that compensation for breach shall be calculated with due consideration of “the law of country concerned”, but also Article 2 of the Procedural Rules that states that in their application and adjudication of law, the PSC and the DRC shall also apply the laws that exist on a national level. If FIFA’s regulations prevail under all circumstances, this would make the contents of the aforementioned provisions completely superfluous. In Chap. 3, we will also see that certain DRC decisions are not in line with certain national laws.<sup>124</sup> It can therefore be concluded that certain DRC decisions can be characterised as *Lex Sportiva*. In other words, the Chamber often takes into account the specificity of the football sport, at some points to the detriment of the relevant national laws.

### 2.5.2 *Applicable Edition RSTP*

It is because of the different editions of the RSTP, that the DRC first establishes which version of the RSTP applies to the case that is submitted to FIFA. In each DRC decision under “*consideration*”, after the DRC has established which Procedural Rules are applicable to the matter in conformity with Article 21 paras 1 and 2, and after having established its competence in accordance with Article 24 paras 1 and 2 in relation to Article 22 under b of the RSTP, the Chamber analyses which version of the RSTP applies.

In order to define which version of the regulations applies to the claim in question, *the date of the submission of the claim* is the most relevant criterion. Therefore, the general rule is that any case that has been brought to the DRC before the most recent version of the RSTP rules came into force, the 2016

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<sup>124</sup>For example, on the one hand, in the Netherlands our Dutch KNVB Arbitration Tribunal had to adjudicate in a case between AFC Ajax N.V. against Hatem Belgacem Trabelsi. In this case the Dutch Arbitration Tribunal decided that a unilateral extension option in favour of Ajax according to the Dutch national law was valid. See Dutch KNVB Arbitration Tribunal, 4 June 2004, no. 1022. Also in a more recent case between player Timo Letschert and Roda JC of 29 August 2014, no. 1408, our Dutch KNVB Arbitration Tribunal decided that the unilateral extension option concerned was valid. On the other hand, with regard to this specific subject, the DRC is of the opinion that if the extension option is unilateral in favour of the employer and the player has no say whatsoever in the right of the club to extend the contract or not, such a unilateral extension option is not valid and cannot be binding. This leads to the conclusion that if the unilateral extension option is permitted according to national law, it still risks being deleted and overruled by the opinion of the DRC if this same case is brought before the DRC. In my view, this also creates a lack of certainty and uniformity. Obviously, FIFA can only create the abovementioned equality, uniformity and certainty if the same rules apply to all participants on an international level.

edition, will be assessed according to the previous regulations.<sup>125</sup> In other words, to establish which edition of the RSTP applies to a case, the date on which the case is brought to FIFA must be determined first and is generally the decisive factor regarding the edition.<sup>126</sup>

Notwithstanding the above, in 2005 FIFA concluded that, according to the above general rule, the date of submission of the claim was the only relevant criterion by which to define which version of the RSTP should apply to the case. FIFA realised that a decision on certain claims thus only depended on their date of submission. This led to the negative result that certain claims should be accepted if they were submitted after the date that the RSTP came into force, but the same claims would have had to be rejected if they were submitted before this date. FIFA concluded that the date on which the facts that led to the claim had occurred was not taken into consideration. So in 2005 FIFA decided that this situation was clearly in violation of the procedural principles of equality, uniformity and legal certainty, one of the main purposes of FIFA. This resulted in the modification of Article 26 of the RSTP, 2005 edition.<sup>127</sup> In FIFA Circular no. 995, FIFA gave a more detailed explanation regarding the applicable regulations. The submission of the claim is (still) the most decisive criterion, but in said Circular FIFA provided 3 exceptions to this general rule, on the understanding that “*any cases not subject to this general rule shall be assessed according to the regulations that were in force when the contract at the centre of the dispute was signed, or when the disputed facts arose*”.

The above 3 exceptions are now also laid down in Article 26 of the current 2016 edition. Firstly, we still face the exception of disputes regarding training compensation. In fact, on the one hand the 2001 edition of the RSTP establishes that training compensation is calculated by multiplying the training costs of the new club corresponding to the category of the training club by the years of training with the former club.<sup>128</sup> On the other hand, the 2005 and later editions of the RSTP state in Annex 4 Article 5 para 2 that training compensation is calculated by taking the training costs, and thus only the category of the new club, multiplied by the number of years of training with the former clubs. Secondly, there is the exception of disputes regarding the system of the solidarity mechanism. Since the 2005 edition of the RSTP came into force, loans were also subject to the same rules that applied to player transfers, including the provisions on training compensation and the system of the solidarity mechanism.<sup>129</sup> In the third place, there is still the exception of labour disputes related to contracts signed before 1 September 2001.<sup>130</sup> These

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<sup>125</sup>RSTP, 2016 edition, Article 26 para 1.

<sup>126</sup>FIFA Commentary, explanation Article 26, p. 79.

<sup>127</sup>FIFA Circular no. 995 dated 23 September 2005.

<sup>128</sup>FIFA Commentary, explanation Article 25, p. 79.

<sup>129</sup>FIFA Commentary, explanation Article 25, p. 80.

<sup>130</sup>FIFA Commentary, explanation Article 25, p. 79.

contracts, in application of former Article 46 para 3 of the 2001 edition of the RSTP, will have to be governed by the 1997 edition of the RSTP.<sup>131</sup>

## 2.6 Admissibility

In accordance with Article 6 para 1 of the Procedural Rules, 2015 edition, and Article 22 under a until f, of the RSTP, 2016 edition, parties of FIFA are:

- member associations;
- clubs;
- players;
- coaches; or
- licensed match agents.<sup>132</sup>

The above mentioned parties are entitled to lodge a claim and thus have standing to sue before FIFA. Via its Circular no. 1468, in the 2015 edition and as a result of the new regulations regarding intermediaries, i.e. Regulations on Working with Intermediaries, which came into force on 1 April 2015, FIFA informed its members on the amendment of Article 6. The amendment concerned the deletion of the licensed players' agents from the list of parties that are entitled to lodge a claim and thus have standing to sue before the PSC and DRC. In order to avoid any doubt and misunderstanding, in a new para 2 of Article 23 of the RSTP, 2015 edition, it was in the 2015 edition and is in the current 2016 edition explicitly laid down by FIFA that the PSC will not have jurisdiction to hear any contractual disputes involving intermediaries.

In several cases before the DRC, the Chamber was of the opinion that it was not in a position to intervene if an unlicensed players' agent was involved. Due the fact that the unlicensed players' agent was not entitled to lodge a claim with the DRC and a party was not entitled to lodge a claim against an unlicensed agent, in such cases the DRC was not competent to decide on the matter at hand. Also in a case dated 11 March 2005, the DRC decided that it could not intervene in the refund of an amount by a non-licensed players' agent, because the person representing the player at the signature of the contract was not a licensed players' agent (on the understanding that this case was not dealt with under the former editions as from edition 2015 edition of the RSTP).<sup>133</sup>

In a decision of 4 April 2007, the DRC referred to Article 6 para 1 of the Procedural Rules which clearly establishes that only "members of FIFA, clubs, players, coaches or licensed match and players' agents" can be parties in proceedings pending before the decision-making bodies of FIFA. In this case there was a

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<sup>131</sup>FIFA Commentary, explanation Article 25, p. 80.

<sup>132</sup>Procedural Rules, 2015 edition, Article 6 para 1.

<sup>133</sup>DRC 11 March 2005, no. 35174. See also DRC 2 November 2005, no. 115780.

dispute involving the X Sports Association and another club. The Chamber held that, whereas the one club was duly affiliated to its national football federation, it had to be established whether the entity X Sports Association was a club that was affiliated to the football federation and thus a holder of the active legitimation under the terms of Article 6 para 1 of the Procedural Rules, to file a claim before the competent bodies of FIFA. The DRC first of all drew attention to the considerations of the CAS in an (unfortunately unmentioned) earlier case, in which it was expressed that X Sports Association is not a club but rather an association aggregating youth football clubs and organizing competitions and activities for them. With due regard for the relevant findings of the CAS according to which the X Sports Association was rather an association than a club, the DRC deemed that it had no alternative but to conclude that the X Sports Association had failed to provide the DRC with sufficient evidence proving that, on the date of its petition, the X Sports Association was a club duly affiliated to the football federation and entitled to constitute a party to procedures before FIFA following Article 6 para 1 of the Procedural Rules.<sup>134</sup>

Also, in the case of 25 April 2013, the DRC referred to Article 6 para 1 of the Procedural Rules. On 12 June 2007, a player and a company “*Company M.*” signed an agreement entitled “*contract of services*”, valid from 1 July 2007 until 30 June 2010, which stated that “*the [company], according to its agreement with [the club], is in possession of the utilisation rights of the football teams of [the club], as an advertisement carrier*”. Consequently, the parties agreed that “*the [player] transfers the exclusive rights of the marketing and PR—connected to his person and activities as a footballer—to the [company], and gives advertisement facilities during the duration of the present contract*”. By means of a letter dated 14 May 2008 sent to the player, the club terminated the contract on the basis of its clause 2 as of 30 June 2008. On 22 March 2010, completed on 3 June 2010, the player lodged a claim before FIFA against the club requesting the payment of EUR 14,550 on the basis of the “*contract of services*”. The DRC referred to Article 6 para 1 of the Procedural Rules, according to which only members of FIFA, clubs, players, coaches or licensed match and players’ agents are admitted as parties before FIFA’s relevant decision-making bodies. The Chamber agreed that the company cannot be considered to be a party in the sense of Article 6 para 1 of the Procedural Rules. The DRC concluded that FIFA is not competent to deal with any claim based on the “*contract of services*” concluded between the claimant and the company, since said contract is not signed with a party as established in Article 6 para 1 of the Procedural Rules and, moreover, since said contract does not include any employment-related clauses. The Chamber highlighted that such conclusion is in line with well-established jurisprudence of the DRC. Consequently, the Chamber decided that the claimant’s claim based on the “*contract of services*” is not admissible.<sup>135</sup>

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<sup>134</sup>DRC 4 April 2007, no. 47510b. See also DRC 10 August 2007, no. 87505, and DRC 8 June 2007, no. 671337.

<sup>135</sup>DRC 25 April 2013, no. 04133208.

One must draw a distinction between the admissibility of a party before the DRC and before the PSC. The aforementioned association, the coach and the licensed match agent are not entitled to lodge a claim before the DRC. These parties are exclusively entitled to bring their claim before the PSC.<sup>136</sup> In other words, for these 2 parties, as well as for clubs dealing with counterparties other than players, the DRC will not be the competent body to deal with the matter concerned. Therefore, with regard to the admissibility of entities before the DRC, one can say that only clubs (on the understanding that the claim is lodged against a player), players and national football associations (in relation to training compensation and the solidarity mechanism) are admissible and entitled to lodge a claim before the DRC.<sup>137</sup>

It must further be noted that professional as well as amateur players are entitled to lodge a claim before the DRC.<sup>138</sup> The same principle applies to the clubs. Professional and amateur clubs are entitled to lodge a claim before the DRC. Pursuant to the list of definitions of the RSTP, 2016 edition, the former club and the new club are respectively called “*the club that the player is leaving*” and “*the club that the player is joining*”. Obviously both clubs, the former and the new club, may have the status of amateur club. Consequently, both clubs are entitled to lodge a claim before the DRC, since the RSTP, 2016 edition, apply to them both. The fact that amateur clubs can bring their claim to the DRC can also be derived from numerous DRC decisions in which amateur clubs act in the procedure as claimant.<sup>139</sup>

In respect of the above, it can be derived that FIFA only intervenes in conflicts involving and between member associations, clubs, players, coaches and match agents. As a consequence of this, applications from or against other entities or subjects are not admissible in light of the aforementioned regulations. This also means

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<sup>136</sup>In a decision of the PSC of 23 September 2014, no. 09141090, the PSC decided that the legal heir of a coach (in this procedure the coach passed away during the investigation phase) is not a party indicated in Article 6 para 1 of the Procedural Rules as a result of which the Single Judge was not in a position to deal with the dispute. With reference to this case it is to be expected that the DRC will follow the same line since the Single Judge emphasized that the decision-making bodies of FIFA have a very strict framework limited by its own regulations, and that it may not act outside the limitations established by said regulations. See also Vandellos.

<sup>137</sup>Furthermore, it is important to know that a claim will only be dealt with by the DRC if there is a legitimate reason for dealing with this claim. Procedural Rules, 2015 edition, Article 5 para 4. See also DRC 10 August 2011, no. 811829.

<sup>138</sup>DRC 22 July 2004, no. 7481. At the time that the player lodged his claim, he was registered as an amateur. However, the actual dispute was related to his previous employment contract concluded with a former club.

<sup>139</sup>See for example DRC 28 September 2006, no. 96338. In this case the club transformed from a professional club to an amateur club (at the end of the 2002/03 season). See also DRC decision of 23 February 2007, no. 271322, with regard to the successor of a former club. In this case the DRC unanimously decided that the successor must be considered as the club that entered into the contractual relationship with the player via the employment contract concluded with the former club. Therefore the successor was liable for any commitment entered into by the respondent towards the player.

that in case a party, in the sense of Article 6 para 1 of the Procedural Rules, starts a procedure before the DRC of the PSC against a party who is not a party in the sense of Article 6 para 1 of the Procedural Rules, the DRC or the PSC will not handle the case. There is no standing to be sued.

Finally, with regard to the admissibility, it is worth mentioning that FIFA used to be of the opinion that, as a general rule, their services and decision-making bodies, such as the DRC, PSC and the Disciplinary Committee, were not in a position to deal with cases of clubs which were in a bankruptcy proceeding, i.e. *inter alia* under administration. Due to the CAS jurisprudence, this is no longer common practice and has been corrected in the meantime.<sup>140</sup> For example, in CAS 2012/A/2754 it states: “FIFA’s deciding bodies are competent as long as they are asked to address the issue of the recognition of the claim. It is only when they are seized with a request for the enforcement of the claim, that FIFA’s Disciplinary Code comes into play and that “disciplinary proceedings, may be closed if (...) a party declares bankruptcy”.<sup>141</sup> In other words, currently FIFA’s services and decision-making bodies, such as the DRC and the PSC, will deal with cases of clubs which are in a bankruptcy proceeding, i.e. *inter alia* under administration. However, according to Article 107 sub b of the FIFA Disciplinary Code, the proceedings before *FIFA’s Disciplinary Committee* may be closed if a party declares bankruptcy. In other words, the FIFA Disciplinary Committee is only engaged when a decision of the FIFA DRC is not complied with.<sup>142</sup> As a side-note, and as we will see further in this chapter, if one of the parties will not abide by the decision of the DRC, the matter can be passed on to the FIFA Disciplinary Committee.<sup>143</sup> For example, in the event that, based on a DRC decision, any amounts due are not paid within the stated time limit, the matter will be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision to be made.

In a DRC decision of 31 October 2013, the DRC decided that it had no competence due to the fact the club was not affiliated anymore to the national association. The DRC acknowledged that, according to the information received from the country G Football Federation on 28 December 2012, the professional club M was no longer affiliated to the country G Football Federation due to its relegation to the amateur division. In addition, the country G Football Federation clarified that, as a result of its relegation, the professional club ceased its operations and its founding

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<sup>140</sup>CAS 2011/A/2343 *CD Universidad Católica v. FIFA*, award of 1 March 2012. See also CAS 2012/A/2750 *Shakhtar Donetsk v. FIFA & Real Zaragoza*, award of 15 October 2012.

<sup>141</sup>CAS 2012/A/2754 *UC Sampdoria v. Club San Lorenzo de Almagro & FIFA*, award of 8 February 2013.

<sup>142</sup>See also CAS 2011/A/2586 *William Lanes de Lima v. FIFA & Real Bétis Balompié*, award of 3 October 2012.

<sup>143</sup>In a case before the PSC of 30 January 2012, the Single Judge of the PSC pointed out that, in principle, FIFA’s Disciplinary Committee may only execute decisions taken by the competent FIFA deciding bodies and therefore concluded that the present matter should be heard and decided by the PSC; See PSC 30 January 2012, no. 1121193.

sports association entered the amateur competition. The Chamber took into account that from the information contained in the TMS, which only includes professional clubs, it can be noted that club M, had been inactive and not been participating since 2011. The Chamber concluded that the data contained in the TMS confirmed the information provided by the country G Football Federation in connection with the status of the respondent, club M, and therefore they had no reason to doubt the accuracy of the respective statements made by country G. The Chamber recognized that the respondent, i.e. the club with which the claimant had signed the contract at the basis of the present dispute, was no longer affiliated to the country G Football Federation. Consequently, bearing in mind Article 6 para 1 of the Procedural Rules, in accordance with which parties are members of FIFA, clubs, players, coaches or licensed match agents and players' agents, the DRC decided that it had no competence to enter into the substance of the present matter due to the fact that the respondent was not affiliated to its relevant member association.<sup>144</sup>

Also in a recent DRC decision of 12 December 2013, the respondent party claimed that the claimant appeared to be in bankruptcy proceedings and therefore deemed that FIFA was no longer competent to deal with the present claim.<sup>145</sup> In this regard, the Chamber pointed out that according to the official statement of 1 July 2013 issued by the Football Association of country A, the claimant, however, was still affiliated and actively participating in its competitions. Therefore, the Chamber recalled the contents of Article 6 para 1 of the Procedural Rules which establishes that clubs which are under the auspices of one of FIFA's member associations, are legitimate parties before FIFA's deciding bodies. Consequently, and since the matter concerned a dispute between parties belonging to two different associations, the DRC confirmed that it was competent to deal with this matter.

## 2.7 Representation

A party wanting to submit a claim before the DRC may use the services of a representative. According to Article 6 para 2 of the Procedural Rules, parties may appoint a representative.<sup>146</sup> However, a written power of attorney is compulsory and will be requested by the DRC from such representatives. Following the "*Frequently Asked Questions documents*" as placed on the website of FIFA, the power of attorney, inter alia, must authorise the representative to act on behalf of the party in the relevant matter before the competent decision-making bodies of FIFA.<sup>147</sup>

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<sup>144</sup>DRC 31 October 2013, no. 10132786.

<sup>145</sup>DRC 12 December 2013, no. 12132748.

<sup>146</sup>Procedural Rules, 2015 edition, Article 6 para 2.

<sup>147</sup>Dispute Resolution Chamber. <http://www.fifa.com/governance/disciplinary/dispute-resolution-system.html>. Accessed 26 July 2016.

A written power of attorney must be correctly drafted. As also mentioned in the “*Frequently Asked Questions documents*” the power of attorney should make a clear reference to the parties involved in the dispute, it has to be dated and signed by the relevant party, and should have been issued recently.<sup>148</sup> Furthermore, the petitions submitted to the DRC must also contain the name and address of the legal representative, if applicable, as well as the power of attorney.<sup>149</sup> Following numerous DRC decisions, most parties actually use the services of a representative.<sup>150</sup>

## 2.8 Withdrawal and Challenges

Pursuant to Article 7 para 1 of the Procedural Rules, regarding the concept of withdrawal, the members of the PSC and the DRC may not exercise their office in any cases in which they have a personal and/or direct interest. In such cases, the member in question shall disclose the reasons for withdrawing in sufficient time.<sup>151</sup>

It would be quite logical that the members of the DRC are of a different nationality than the parties involved in the dispute. In other words, the member in question should not exercise his office in case it has the nationality of one of the parties. Particularly if the chairman has the same nationality as one of the parties. Irrespective of the fact of any impartiality, it should in any case remove any possible appearance of partiality, especially when you consider that DRC members generally adjudicate in the presence of at least three members, including the chairman or the deputy chairman, whereby the chairman has the casting vote in case of a tie between the other two members.<sup>152</sup> If the chairman has the same nationality as one of the parties, in case of a tie between the two other members, the chairman then has the final vote.

Another example regarding the concept of withdrawal, in line with the above, was given in a DRC decision of 4 February 2005 where the DRC took note of the issue raised by a Spanish club with regard to the composition of the DRC Chamber, especially regarding the nationality of two of its members, namely Mario Gallavotti and Michele Colucci, both Italians.<sup>153</sup> In view of such a request, both Mario Gallavotti and Michele Colucci decided of their own volition, to leave the chamber during the course of the debate on the subject of this dispute and

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<sup>148</sup>It must explicitly follow from the power of attorney that the representative is appointed in the proceedings in front of FIFA.

<sup>149</sup>Procedural Rules, 2015 edition, Article 9 under b.

<sup>150</sup>See for example DRC 12 January 2006, no. 16453. In this case player X was represented by Mr Y. See also DRC 10 August 2008, no. 871322.

<sup>151</sup>Procedural Rules, 2015 edition, Article 7.

<sup>152</sup>Procedural Rules, 2015 edition, Article 14 para 1.

<sup>153</sup>DRC 4 February 2005, no. 25960a.

consequently did not take part in this judgement. The chairman and the two members of the DRC were then left to pass a decision on the matter at hand in accordance with the Procedural Rules.

In line with the abovementioned point of view regarding the different nationalities of parties and DRC members, more specifically with regard to the position of the chairman, in the case before the DRC of 17 August 2012, we finally do take note of the fact that this is an important element. In the said case, the Chamber pointed out that contrary to the information contained in FIFA's letter dated 10 August 2012, by means of which the parties were informed of the composition of the DRC, the chairman in question refrained from participating in the deliberations due to the fact that he had the same nationality as one of the parties involved in the matter, i.e. club A. Therefore, the Chamber finally adjudicated in the presence of four DRC members, two club representatives and 2 player representatives.<sup>154</sup> In a similar DRC decision of 26 April 2012, the Chamber was also eager to emphasize that contrary to the information contained in FIFA's letter dated 20 April 2012, by means of which the parties were informed of the composition of the Chamber, the Chairman, Mr. Geoff Thompson (England), refrained from participating in the deliberations in the case at hand, due to the fact that he had the same nationality as the respondent party in the procedure. Finally, the DRC adjudicated the case in the presence of four members.<sup>155</sup>

In the DRC case of 26 October 2012, the DRC was also eager to emphasize that, contrary to the information contained in FIFA's letter dated 19 October 2012, by means of which the parties were informed of the composition of the Chamber, member Q and member R refrained from participating in the deliberations in the case at hand, due to the fact that member Q had the same nationality as the claimant party and that, in order to comply with the prerequisite of equal representation of club and player representatives, member R also refrained from participating. Finally, the DRC adjudicated in the presence of three members.<sup>156</sup> A similar case in this regard is the DRC case of 28 June 2013, whereby the DRC was eager to emphasize that contrary to the information contained in FIFA's letter dated 24 June 2013, by means of which the parties were informed of the composition of the DRC, member Mr. M and member Mr. G refrained from participating in the deliberations in the case at hand, due to the fact that member Mr. M had the same nationality as the claimant and that, in order to comply with the prerequisite of equal representation of club and player representatives, member Mr. G also refrained from participating and the DRC finally adjudicated in the presence of three members.<sup>157</sup>

Also in the case before the DRC of 27 May 2014, two members of the DRC, members Mr. E and Mr. M, refrained from participating in the deliberations, due

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<sup>154</sup>DRC 17 August 2012, no. 812019.

<sup>155</sup>DRC 26 April 2012, no. 412107.

<sup>156</sup>DRC 26 October 2012, no. 10121653.

<sup>157</sup>DRC 28 June 2013, no. 06132458. See also DRC 29 November 2013, no. 1113766.

to the fact that Mr. E had the same nationality as a party involved in the present proceedings.<sup>158</sup> In order to comply with the prerequisite of equal representation of club and player representatives, member Mr. M also refrained from participating and thus the DRC finally adjudicated the case in the presence of 3 members.<sup>159</sup>

Finally, aside from the concept of withdrawal, members of the DRC may also be *challenged* by the parties if there is legitimate doubt about their independence and impartiality. A challenge must be made under consequence of a forfeit within five days of the grounds for the challenge coming to light, otherwise the parties shall forfeit the right to make a challenge. These motions must be substantiated and, if possible, supported by evidence. If the member concerned disputes the allegations raised, the DRC will reach a decision on the challenge in the absence of the said member.<sup>160</sup> In the event that the Chamber is no longer able to function as a consequence of challenges, the Executive Committee will make a final decision on the challenges and, if necessary, appoint an ad hoc committee to deal with the material facts of the case.<sup>161</sup>

## 2.9 Petitions

Pursuant to Article 9 of the Procedural Rules, petitions must be submitted in one of the four languages (English, French, German, Spanish) via the FIFA general secretariat.<sup>162</sup> First of all, it is interesting to note that submissions will not be considered by the DRC if it is *not* submitted in one of the four FIFA languages.

For example, in a DRC decision of 27 April 2007, the Chamber noted that one of the parties took position in the dispute, however, without providing a translation of its submission into one of the official FIFA languages despite having been asked to do so by FIFA on several occasions. Therefore, the Chamber deemed that this party's submission could not be considered and in this way this party renounced its right to defence and accepted the allegations of the claimant.<sup>163</sup> In a similar case before the DRC of 28 March 2012, the Chamber also underlined that the respondent party sent a letter to FIFA allegedly providing its position in its native language, but without providing FIFA with the relevant translation into one of the four official languages, despite several requests. In addition, the Chamber remarked that the country C Football Federation sent the cited respondent's correspondence to FIFA and provided a short explanation of its contents. However, the

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<sup>158</sup>DRC 27 May 2014, no. 05142461.

<sup>159</sup>See also DRC 28 August 2014, no. 0814312.

<sup>160</sup>Procedural Rules, 2015 edition, Article 7 para 2.

<sup>161</sup>Procedural Rules, 2015 edition, Article 7 para 3.

<sup>162</sup>FIFA Statutes, 2016 edition, Article 9 para 1. See also the "*Frequently Asked Questions documents*" as placed on the website of FIFA.

<sup>163</sup>DRC 27 April 2007, nos. 471066a, 471066b, 471066c and 471066d.

country C Football Federation did not submit to FIFA any power of attorney despite being requested to do so by the FIFA administration.<sup>164</sup> Also, in its decision of 6 March 2013, the DRC Judge noted that, although having been asked to do so, the respondent did not provide a translated version of the documents it enclosed in its submission in the country C language only. Taking Article 9 of the Procedural Rules into consideration, the DRC Judge decided that it could not take into account the relevant documents which were not translated into an official FIFA language.<sup>165</sup>

As soon as the submitted petition is submitted to the FIFA General Secretary, the latter will forward the submitted petition to the PSC or the DRC (depending on the case). In the event that the petition is submitted to the wrong FIFA office (for example the PSC instead of the DRC), then onward transmission of the petition to the correct office (the DRC) will be effected *ex officio* by the wrong FIFA office (the PSC).<sup>166</sup> This also follows from the well-established jurisprudence of the DRC in cases whereby a petition is submitted by a party to the wrong FIFA office.<sup>167</sup>

According to the aforementioned Article 9 para 1 of the Procedural Rules, 2015 edition, petitions before DRC (and PSC) must contain the following particulars:

- the names and addresses of the parties;<sup>168</sup>
- the name and address of the legal representative, if applicable, and the power of attorney;
- the motion or the claim;
- a representation of the case, the grounds for the motion or claim and details of the evidence;
- documents of relevance to the dispute, such as contracts and previous correspondence with regard to the case in the original version and, if applicable, translated into one of the four official languages (evidence);
- the names and addresses of other natural and legal persons involved in the case concerned (evidence);
- the amount in dispute, insofar as it is a financial dispute;
- proof of payment of the relevant advance of costs for any proceedings before the PSC or the Single Judge, or for any proceedings related to disputes concerning training compensation or the solidarity mechanism; and
- the date and a valid signature.

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<sup>164</sup>DRC 28 March 2012, no. 03122286.

<sup>165</sup>DRC 6 March 2013, no. 03132423. See also DRC 27 February 2013, no. 02131190, and DRC 25 April 2013, no. 02131190.

<sup>166</sup>Procedural Rules, 2015 edition, Article 16 para 4.

<sup>167</sup>See for example, DRC 12 December 2013, no. 12132748.

<sup>168</sup>In addition to the requirements as laid down in Article 9 para 1 of the Procedural Rules, 2015 edition, the “*Frequently Asked Questions documents*” as placed on the website of FIFA, further mentions that a fax number of the parties is also needed.

In the event that the petition does not satisfy one of the abovementioned requirements, the petition will be returned for redress along with a warning that the petition will not be dealt with in the event of non-compliance.<sup>169</sup> However, it must be stressed that any petitions with improper or inadmissible contents will be rejected immediately.<sup>170</sup>

In case the petition has been submitted to the FIFA General Secretary, a written confirmation will then be sent to the claimant.<sup>171</sup> In general, if there is no reason not to deal with a petition, the petition will be sent to the opposing party of the person affected by the petition, setting a time limit for a statement or reply. According to Article 16 para 11 of the Procedural Rules and amended in its 2015 edition, time limit for the answer and for possible second submissions, if applicable, shall be 20 days (on the understanding that in any urgent cases, the time limit may be reduced).<sup>172</sup> In this regard, regulatory time limits may generally not be extended.<sup>173</sup>

If no statement or reply is received before the time limit expires, a decision will be taken on the basis of the documents on file.<sup>174</sup> As mentioned before, it is possible to ask for an extension, pursuant to Article 16 para 12 of the Procedural Rules. However, the DRC (as well as the PSC) must take into consideration the principle of expeditious execution of the proceedings. With regard to the time limits, Article 16 of the Procedural Rules further specifies the rules in detail.

In case of late submissions it is at the discretion of the judicial body to determine whether the party's position should be taken into account, despite the fact that a decision will be taken on the basis of the documents on file if no statement or reply is received before the time limit expires. In this regard, a new para 4 to Article 9 of the Procedural Rules of the 2015 edition has been added, as introduced in FIFA Circular 1468. According to this new paragraph, the parties shall not be authorized to supplement or amend their requests or their arguments, to produce new exhibits or to specify further evidence on which they intend to rely, after notification of the closure of the investigation.<sup>175</sup> We have to await further jurisprudence by the DRC, knowing that the DRC jurisprudence, thus far, shows that the DRC was not stringent on time limits (compared to the CAS, for example).

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<sup>169</sup>Procedural Rules, 2015 edition, Article 9 para 2.

<sup>170</sup>Procedural Rules, 2015 edition, Article 9 para 2.

<sup>171</sup>Procedural Rules, 2015 edition, Article 6 para 3.

<sup>172</sup>Procedural Rules, 2015 edition, Article 16 para 11.

<sup>173</sup>Procedural Rules, 2015 edition, Article 16 para 10.

<sup>174</sup>Procedural Rules, 2015 edition, Article 9 para 3. A second exchange of correspondence will only be instituted in special cases.

<sup>175</sup>The FIFA administration may, however, request additional statements and/or documents at any time.

In its case of 28 October 2011, the DRC Judge decided that it would be unreasonable not to consider the respondent's statements, which were submitted only a few weeks after the given time limit.<sup>176</sup> Also the PSC case of 16 February 2012, the PSC decided that it was at its discretion to determine whether the party's position should be taken into account. Since the respondent's statement was not submitted to FIFA unreasonably late and in view of its contents, the PSC decided to accept the statement of the respondent.<sup>177</sup> Also, in the DRC decision of 17 May 2013, the DRC Judge clarified that it is at his discretion to determine whether a party's position, in this matter the respondent, should be taken into account and decided that it would be unreasonable not to consider the respondent's statements, which were remitted only a few weeks after the given time limit.<sup>178</sup> The jurisprudence so far, has shown that if it is unreasonable not to consider a party's late statements, late submissions will then be admitted.

In its case of the DRC of 4 October 2013, the Chamber explicitly noted that the respondent, for its part, failed to present its response to the claim of the player in a timely manner, despite having been duly invited to do so. The Chamber, in particular, noted that the respondent submitted its position on the claim to FIFA after the investigation phase in the present matter had been concluded and even after the parties had been informed of the date of the present meeting as well as of the composition of the Chamber. Therefore, the Chamber decided that the respondent's submission in that case could not be taken into account. The DRC finally concurred that it had to take a decision upon the basis of the documents already on file, in other words, upon the statements and documents presented by the claimant.<sup>179</sup> This also follows from the DRC decision of 27 November 2014.<sup>180</sup>

In principle, an exchange of correspondence will take place, which can also be derived from Article 9 para 3 of the Procedural Rules, 2015 edition, which provision states that there will only be a second exchange of correspondence in special cases. For example, in the case of the PSC decision of 21 November 2011, the Single Judge decided that the claimant had submitted additional statements in relation to the other club's reply, although the claimant club was specifically requested by FIFA to provide its position with regard to the other club's counterclaim only.<sup>181</sup> Therefore, the Single Judge decided that there was no need for a second exchange of correspondence and, consequently, decided not to take into account the unsolicited additional statements. However, there are still legal disputes

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<sup>176</sup>DRC 28 October 2011, no. 1011192.

<sup>177</sup>PSC 12 February 2012, no. 212411.

<sup>178</sup>DRC 17 May 2013, no. 05131423. See also DRC 9 March 2011, no. 5112307, from which case it can be derived that the DRC will consider one party's comments admissible even if they are submitted a few weeks after the time limit set by the FIFA administration.

<sup>179</sup>DRC 4 October 2013, no. 1013439.

<sup>180</sup>DRC 27 November 2014, no. 1114239.

<sup>181</sup>PSC 21 November 2011, no. 11111511.

between parties before the DRC in which a second exchange of correspondence between the parties does take place.<sup>182</sup>

## 2.10 Evidence

According to Article 12 of the Procedural Rules, evidence consists of party testimony, witness testimony, documents, expert reports, real evidence and all other pertinent evidence, on the understanding that evidence will further be heard only in respect of facts relevant to the case.<sup>183</sup> In this regard, and pursuant to Article 12 para 4 of the Procedural Rules, the PSC and the DRC may also consider evidence not presented by the parties, which was also contained in a DRC decision of 28 September 2006.<sup>184</sup> Finally, attention must also be paid to the fact that the DRC is free to evaluate the evidence.<sup>185</sup> In other words, and pursuant to Article 12 para 6 of the Procedural Rules, evidence will be considered subject to discretion by the DRC, in which the Chamber will take into account the conduct of the parties during the proceedings, especially any failure to comply with a personal summons, a refusal to answer questions, or the withholding of requested evidence.<sup>186</sup>

The DRC had to deal with several cases where questions were raised with regard to issues relating to evidence. For example, in the case of 28 September 2006, the DRC noted that as regards the player's registration period with the club, there was a discrepancy between the statement of the club and the Player Passport presented by the Football Federation. The club failed to present documentary evidence in support of its allegation that the player had remained registered with the club until 31 December 1996. The DRC concurred that the relevant registration period must be established on the basis of the documentary evidence presented by the Football Federation, i.e. the Player Passport. Bearing in mind Article 7 of the RSTP, 2016 edition, the DRC emphasized that a Player Passport commonly constitutes the main documentary evidence pertaining to the period of registration of a football player with a club.<sup>187</sup>

In a decision of 21 November 2006, a player requested FIFA's assistance claiming 3 month's salary owed by the club. The Chamber pointed out that a document signed by the relevant parties, in principle, is written proof of a valid contract and

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<sup>182</sup>See for example DRC 31 October 2013, no. 10131039.

<sup>183</sup>Procedural Rules, 2015 edition, Article 12 paras 1–2.

<sup>184</sup>DRC 28 September 2006, no. 96338. Procedural Rules, 2015 edition, Article 12 para 4.

<sup>185</sup>For example, a copy of a cheque does not prove beyond doubt that the amount referred to on such cheque has indeed been received by the claimant, according to the DRC. See DRC 23 January 2013, no. 0113531.

<sup>186</sup>Procedural Rules, 2015 edition, Article 12 para 6.

<sup>187</sup>DRC 28 September 2006, no. 96338.

cannot be declared invalid for a simple allegation.<sup>188</sup> Moreover, the DRC remarked that the party making an allegation has to reasonably sustain the burden of proof in order to preserve the legal principle of legal security. The DRC concluded that the player's allegation regarding the invalidity of the termination of the agreement was not sufficiently proven. The DRC finally decided that the player concerned had not presented any written document substantiating the costs in relation to his medical treatment.<sup>189</sup>

Furthermore, any documents closely linked to a party may not fulfil the requirements of objectivity and impartiality and may thus not be admitted as valid evidence in the sense of Article 12 of the Procedural Rules. From a DRC decision of 21 November 2006, it can be derived that a witness testimony of a player of the club cannot be considered as an impartial witness, especially since the player is employed by the club. In the case at hand, the Chamber stated that the player could not be considered as an impartial witness and that the respondent club could not provide any documentary evidence to substantiate its allegations apart from the player's statement. Therefore, the Chamber finally considered in the matter at hand, that the allegation of the respondent club was ungrounded and therefore had to be rejected due to lack of probative force of the statement submitted by the club.<sup>190</sup>

In line with the above, in the case of 28 March 2012, the DRC asserted that the burden of proof in this case lay with the club. The Chamber noticed that the only documentation provided by the respondent club were personal statements from the club's employees or persons otherwise appointed by the club. The DRC emphasized that the information contained in a statement made by a person closely linked to the club, which moreover, is not supported by any additional documentation whatsoever, is mainly of a subjective perception and might be affected by various contextual factors; so the credibility of such type of documentation is quite limited.<sup>191</sup>

Also, a written statement from a club's coach and a medical report issued by the club's doctor can generally not be relied upon, according to the DRC. For example, in the decision of 6 March 2013, the DRC Judge concluded that the

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<sup>188</sup>In this respect, it is important to know that the agreement between the professional and the club must be in writing pursuant to Article 2 para 2 of the RSTP, 2016 edition. According to Article 8 of the RSTP, 2016 edition, a copy of the player's contract with the national association concerned must then be submitted. The DRC further refutes that a document signed by the relevant parties, in principle, is written proof of a valid contract and cannot be declared invalid for a simple allegation. See also the DRC decision of 21 November 2006, no. 116339. In its decision of 24 March 2004 the DRC decided that the party who claimed that only the contract deposited with the association was applicable, contravened the basic principle of *venire contra factum propria*. See DRC 24 March 2004, no. 34325.

<sup>189</sup>DRC 21 November 2006, no. 116339.

<sup>190</sup>DRC 21 November 2006, no. 611147a. See also an unpublished decision of 6 November 2014, in which case the DRC considered that the documentation could not be considered impartial and, as a result, decided not to give any weight to the relevant statements.

<sup>191</sup>DRC 28 March 2012, no. 3121241.

written statement from the club's coach and a medical report issued by the club's doctor cannot be relied upon, since these documents were issued by persons closely linked to the respondent and, as such, do not fulfil the requirement of objectivity and impartiality.<sup>192</sup>

In the DRC decision of 15 March 2013, the DRC also decided that submitted documents could not be taken into consideration. In this case, the Chamber concluded that the documents submitted by the respondent in its defence, consisting of internal accounting extracts, could not be relied upon, since these documents were issued by the respondent and, as such, according to the DRC, do not fulfil the requirement of objectivity and impartiality. Consequently, the Chamber concurred that these documents shall not be taken into consideration and that the parties' arguments based on these documents shall not be analysed further.<sup>193</sup>

Furthermore, the DRC also often deals with cases in which parties refer to and substantiate their claim with internet extracts or internet communications. The DRC is quite reluctant to accept evidence such as internet extracts or internet communications. However, relevant in this regard is whether or not the statements regarding the evidence are contested by the other party. For example, in its decision of 1 March 2012, the DRC decided that the documentation presented by the claimant in support of its petition, i.e. a website printout, could not be accepted. The DRC duly noted that the respondent had, in fact, not contested that the claimant actually participated in those matches nor that he was entitled to such bonuses. Instead, the respondent merely relied on its statement that the document presented by the claimant was not acceptable as evidence. In light of these circumstances, the Chamber could not agree with the respondent's point of view that the claimant's claim pertaining to EUR 8500 as bonus for matches should be rejected.<sup>194</sup>

In a case before the DRC of 7 April 2011, the DRC had to decide whether or not an employment contract had been concluded between a player and a club. The DRC firstly referred to Article 12 para 3 of the Procedural Rules (burden of proof), according to which, any party claiming a right on the basis of an alleged fact, shall carry the respective burden of proof. The application of this principle in the present matter led the DRC to conclude that it was up to the player to prove that the employment contract, on the basis of which he claims compensation for breach of contract from the club, indeed existed. Due to the fact that the claimant failed to present any other document proving beyond doubt that in fact an employment contract had duly been signed by and between the claimant and the respondent, the DRC agreed that an internet communication, i.e. the print-out of the respondent's internet homepage, could not be considered sufficient evidence demonstrating a

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<sup>192</sup>DRC 6 March 2013, no. 03131723. See also DRC 6 March 2013, no. 0313379.

<sup>193</sup>DRC 15 March 2013, no. 03132824.

<sup>194</sup>DRC 1 March 2012, no. 3122113. See also CAS 2008/A/1705 *Grasshopper and Alianza*, award of 18 June 2009, in which case the CAS Panel admitted the printouts presented by Grasshopper were obtained from the internet, given that Alianza did not invalidate these pieces of evidence with its own records.

contractual link between the parties. Therefore, the DRC decided that, since the claimant had not been able to prove beyond doubt that an employment contract had validly been concluded between himself and the club, there was no possibility for the DRC to examine whether such alleged contract had been breached.<sup>195</sup>

Also in the DRC case of 28 March 2012, we face the issue in which evidence is not contested as result of which the submitted documents can be admitted as evidence in the sense of Article 12 of the Procedural Rules. In this case, the Chamber took note that at the beginning of this procedure, the claimant had merely stated an alleged transfer amount and later provided evidence, i.e. a media report, which stated that the player was transferred in August 2008 from the club involved to the respondent for an amount of EUR 1,000,000. In this context, the Chamber deemed appropriate to point out that, as a general rule, media evidences are not sufficient to prove alleged facts pursuant to Article 12 of the Procedural Rules. However, the Chamber added that for the sake of good order, it is always necessary to take into consideration the particulars of the case. In continuation, the Chamber focused its attention on the matter at stake and took note that after the claimant had submitted the media evidence supporting its allegations to FIFA, i.e. that the player was transferred in August 2008 from the club involved to the respondent for an amount of EUR 1,000,000, the respondent did not contest the cited allegation and did not submit any further comment. In particular, the Chamber reproached the behaviour of the respondent who firstly submitted its alleged position to FIFA written in an unofficial language, and secondly, after having the opportunity to provide FIFA with its comments in connection to the media evidence submitted by the claimant, it did not react at all. In this way, the Chamber finally unanimously agreed that the respondent party therefore tacitly accepted the claimant's allegations.<sup>196</sup>

In the case before the DRC of 27 February 2013, the claimant enclosed and referred to several internet extracts of January 2012, which indicated that the player had signed with the respondent club. In this case, the Chamber noted the documents enclosed with the claimant's claim, respectively dated 9 and 14 January 2012, were prior to the registration of the player with the respondent. The DRC noted in this regard that these documents were extracts from the

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<sup>195</sup>DRC 7 April 2011, no. 411330.

<sup>196</sup>DRC 28 March 2012, no. 03122286. Further to this, in the decision of the PSC of 15 August 2012, the Single Judge of the PSC noted that the claimant had provided several press articles and printouts from the internet as well as the statements of certain former employees of the respondent attesting that he had already been dismissed by the respondent at the beginning of February 2010, while the respondent had based its assertion on the termination letter. The Single Judge, referring to the principle of burden of proof recalled that while the termination letter had undisputedly been issued by respondent and received by the claimant towards the end of February 2010, the documentary evidence provided by the claimant in support of the allegations that his dismissal had taken place beforehand, mainly consisted of third party evidence, the authenticity of which could not be verified with certitude and which, consequently, could not amount to a comparable proof of an alleged fact as the termination letter itself. See PSC 15 August 2012, no. 08122106.

respondent's website and equally considered that the respondent, in its reply, had not provided any clarifications in relation to the contents of such documentation. Hence, considering that the contents of the relevant documentation remained uncontested by the respondent, the Chamber deemed that it was clear that in fact the player had already joined the respondent in January 2012, i.e. prior to the player's registration with club F in February 2012.<sup>197</sup>

As a side-note, in some *PSC* cases, the PSC also had to decide on the validity of the evidence and in which cases press articles and printouts were submitted to the PSC by one of the parties. From these cases we note that if a party provides the PSC with evidence in support of its allegations that mainly consists of '*third party evidence*', the authenticity of which could not be verified with certitude, the said evidence will consequently not be comparable proof of an alleged fact by the PSC.<sup>198</sup> However, if it concerns a press release which is published by the club on its own website and not been questioned by the parties, the PSC can take the said evidence into account.<sup>199</sup>

The DRC can take into consideration internet extracts as exclusive evidence in case it concerns an announcement by a club on its own website, for example that a player signed a contract with a club. In the case before the DRC of 31 October 2013, it concluded that there were numerous elements speaking in favour of a situation of circumvention of the RSTP, as result of which the DRC held that the respondent should be considered as the player's new club.<sup>200</sup> In this case, the DRC referred to the fact that the respondent club, according to its own website, had already signed a contract with the player in August 2011. This also follows from a decision of the PSC of 28 August 2013, in which case the PSC stated that the information published on the website of a board member of the club could also be taken into account.<sup>201</sup>

It is also noteworthy to refer to the case of the DRC of 27 February 2014. In this case, the Chamber highlighted that a certain course of events to which the respondent referred, was never contested by the claimant and thus remained uncontested.<sup>202</sup>

Finally, for the sake of completeness, it is not unlikely that the DRC will decide that information contained in emails is not valid evidence (under all circumstances). In an unpublished case by the PSC of 8 August 2011, the PSC was eager

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<sup>197</sup>DRC 27 February 2013, no. 0213936. See also 18 June 2009, no. 69816. In the latter case the DRC decided that, as a general rule, press releases do not constitute appropriate documentary evidence.

<sup>198</sup>PSC 15 August 2012, no. 08122106.

<sup>199</sup>PSC 19 March 2014, no. 0314713. See also DRC 18 June 2009, no. 69816. See also CAS 2010/A/2145/2146/2147 *Morgan de Sanctis & Sevilla FC SAD v. Udinese Calcio S.p.A.*, award of 28 February 2011.

<sup>200</sup>DRC 31 October 2013, no. 10131359.

<sup>201</sup>PSC 28 August 2013, no. 0813715.

<sup>202</sup>DRC 27 February 2014, no. 0214390.

to point out that, in principle and based on the PSC's approach when dealing with evidence submitted in the form of e-mails, information contained in those e-mails is generally not considered as legally binding. Therefore, the PSC did not take into account the contents of the relevant mail. Although this is a decision issued by the PSC and the decision was not published, it is vital to take note of this and to take this into account for future DRC cases. In this context, in a DRC decision of 31 July 2013, it did not take into account an e-mail of a Financial Director of the club. In this case, the DRC pointed out that an e-mail of the respondent's Financial Director was of a non-official nature, did not contain any expression of the parties' mutual agreement and, therefore, could not be considered as a legally binding document upon which a party could claim the execution of any legal obligations whatsoever.<sup>203</sup> In other words, the DRC may be reluctant in future to establish e-mails as valid evidence.

## 2.11 Burden of Proof

Following Article 12 of the Procedural Rules, the general rule is that any party deriving a right from an alleged fact carries the burden of proof.<sup>204</sup> As mentioned in the "*Frequently Asked Questions documents*" as placed on FIFA's website, any party claiming a right on the basis of an alleged fact shall carry the burden of proof with any written evidence it deems useful in its support, translated, if necessary, into one of the four official FIFA languages. In accordance with the legal principle of the burden of proof, which is a fundamental part of every legal system, a party is obliged to prove allegations presented in a legal action if it wishes to use them as the basis for a claim.

In the past, if the name of a player's agent did not appear in the contract, despite that a licensed players' agent was involved and therefore the name of the agent had to be mentioned in the player's contract, the burden of proof in the event of a dispute rested with the party claiming that the agent participated in the negotiations.<sup>205</sup>

In several decisions the DRC makes reference to the burden of proof. For example, in a decision of 13 May 2005, the DRC also stated that in accordance with the legal principle of the burden of proof, a party must demonstrate allegations presented in a legal action if it wishes to use them as the basis for a claim. In this respect, the Chamber stated that the player's allegation of the rescission of the employment contract by the club at the beginning of July 2003 was not based on any evidence.<sup>206</sup>

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<sup>203</sup>DRC 31 July 2013, no. 07133206.

<sup>204</sup>Procedural Rules, 2015 edition, Article 12 para 3.

<sup>205</sup>FIFA Commentary, explanation Article 18, p. 52, footnote 88.

<sup>206</sup>DRC 13 May 2005, no. 55359.

In another DRC decision dated 21 November 2006, the Chamber concluded that no compensation for breach of contract without *just cause* (in conformity with Article 17 of the RSTP) was due in the matter at hand. In this respect, the DRC referred to the leading Article 12 para 3 of the Procedural Rules, in accordance with which a party deriving a right from an alleged fact carries the burden of proof.<sup>207</sup>

In the decision of 28 September 2006, the DRC decided that pursuant to the legal principle of the burden of proof which is the basis of every legal system, a party deriving a right from an asserted fact must prove the relevant fact. Due to the lack of proof with regard to the club's allegations related to the fulfilment of its financial obligations towards the player for the 2004 season, and bearing in mind its considerations in connection with the flight ticket, the DRC decided that the club had to pay the player with regard to the employment contract for the 2004 season.<sup>208</sup>

In several cases before the DRC, the Chamber had to deal with contradictory statements by (one of) the parties. For example, in its case of 6 March 2013, the DRC Judge had to deal with contradictory statements by a player. In this case, the DRC Judge finally decided that, in view of the contradictory statements by the player as well as taking into account the lack of documentary evidence, the claimant player had not sufficiently substantiated his claim, as the player did not present any conclusive documentary evidence which adduced that the amount of EUR 9610 was indeed still owed to him by the club.<sup>209</sup>

It is of paramount importance to substantiate all claims. In the DRC decision of 14 August 2013, the DRC Judge concluded that the claimant had substantiated his claim pertaining to outstanding monthly salary with sufficient documentary evidence. However, as to the match bonuses requested by the claimant, the DRC Judge established that the claimant did not provide documentary evidence regarding his entitlement to the aforementioned bonuses for match appearances, i.e. the claimant had not provided any documentation that he had indeed participated in any matches. The DRC Judge decided that the claimant's request in relation to the bonuses for match appearances should be rejected.<sup>210</sup> In the decision of 1 October 2015, the DRC Judge took into account that the respondent, for its part, failed to present its response to the claim of the claimant, despite having been invited to do so. In this way, the DRC Judge considered that the respondent renounced its right to defence and thus accepted the allegations of the claimant. Taking into account the documentation presented by the claimant in support of his petition, the DRC Judge concluded that the claimant had not fully substantiated his claim pertaining to overdue payables with pertinent documentary evidence in accordance with Article 12 para 3 of the Procedural Rules. That is, there is no contractual basis

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<sup>207</sup>DRC 21 November 2006, no. 116218.

<sup>208</sup>DRC 28 September 2006, no. 961007.

<sup>209</sup>DRC 6 March 2013, no. 03132373.

<sup>210</sup>DRC 14 August 2013, no. 0813427.

relating to the claimant's claim pertaining to the bonus of USD 750 relating to "*the qualification of the respondent in the semi-finals of the national cup*". The DRC Judge finally decided to reject this part of the claimant's claim.<sup>211</sup>

## 2.12 Renouncement of Rights

It is essential to realise that a party can bear the risk of renouncing its rights.<sup>212</sup> In this context, one can refer to Article 9 para 3 of the Procedural Rules, 2016 edition, which states that if there is no reason to deal with a petition, it will be sent to the opposing party or the person affected by the petition, setting a time limit for a statement or reply. If no statement or reply is received before the time limit expires, a decision will be taken on the basis of the documents on file and as result thereof the party that did not react before the time limit, bears the risk of renouncing its rights.

For example, in a case of 2 November 2005, the DRC decided on a contractual dispute that had arisen between an Armenian player and a Lebanese club. In this case the club never took a position in the dispute, despite having been asked to do so by the FIFA administration on several occasions. The DRC pointed out that if no reply to the claim is received from the club, the case will be decided only on the basis of the facts and evidence from the player. The DRC reproached the behaviour of the club and underlined that the club concerned had renounced its right to defence and thus accepted the allegations of the player. In this case, the DRC finally decided in favour of the player due to the club's lack of action.<sup>213</sup>

We noted a substantial number of DRC decisions in which a party does not respond before the time limit expires, or does not respond at all.

In a DRC case of 2 November 2007, with regard to the allegations of a club, according to which it did not receive the payment of a 5 % portion of the compensation paid to the player's previous club, the DRC stated that the other party had failed to provide FIFA with any statements regarding the complaint and had thus renounced its rights to defence. In other words, the members of the DRC concluded in this case, that the allegation had been accepted by that club, that he had not received the payment of the solidarity contribution.<sup>214</sup>

With regard to the above, the DRC requests a party (on several occasions) to take a position in the dispute and thus to respond in good time. In a case before the DRC of 19 February 2009, the Chamber also referred to the principle of

<sup>211</sup>DRC 1 October 2015, no. 10151062.

<sup>212</sup>See for example DRC 28 July 2005, no. 75377, DRC 12 January 2006, no. 16716, DRC 27 April 2006, no. 461150, DRC 28 September 2006, no. 96392, and DRC 21 November 2006, no. 611814.

<sup>213</sup>DRC 2 November 2005, no. 115334.

<sup>214</sup>DRC 2 November 2007, no. 117420. See also DRC 14 September 2007, nos. 971056a, 971056b and 971056c, and DRC 27 April 2007, no. 47849.

renunciation of rights.<sup>215</sup> In this case of 19 February 2008, club A contacted FIFA to demand the payment of the relevant portion of solidarity contribution for the transfer of the player from club R to club O. However, the latter did not respond to several communications from FIFA. The Chamber focused on the behaviour of club O during the procedure of the present matter and remarked that it never took position despite being requested to do so. The DRC therefore emphasized that club O renounced its rights of defence. The DRC therefore finally concluded that club A was entitled to receive solidarity contribution paid by club O to R for the transfer of the player in accordance with Annex 5 Article 1 of the RSTP.<sup>216</sup>

Also, in the DRC decision of 31 July 2013, the DRC decided that the respondent, for its part, failed to present its response to the claim of the player, despite having been invited to do so. In this way the respondent renounced its right to defence, so the DRC accepted the allegations of the claimant.<sup>217</sup>

If a party fails to present its response to the claim of the other party, despite having been invited to do so, it generally renounces its right. However, it is of the utmost importance that the claim is substantiated with sufficient documentary evidence. This is also confirmed in a more recent DRC decision of 18 March 2014, in which case the DRC Judge noted that the respondent had also failed to present its response to the claim of the claimant, despite having been invited to do so.<sup>218</sup> By not presenting its position to the claim, the DRC Judge was of the opinion that the respondent party renounced its right of defence and, thus, accepted the allegations of the claimant party, on the understanding that the DRC Judge concluded that the claimant had substantiated his claim pertaining to outstanding remuneration with sufficient documentary evidence. This can also be derived from the case of 27 May 2014, in which the claimant claimed bonuses whilst the respondent did not respond to the claim.<sup>219</sup> The DRC recalled the general legal principle of the burden of proof and observed that the claimant had not presented any documentary evidence regarding his entitlement to the bonus in question, i.e. the claimant had not provided any documentation that the club had indeed remained in the country I Super League. The DRC decided that the claim had to be rejected. Also in the decision of the DRC of 6 November 2014, the claim was not sufficiently substantiated.<sup>220</sup>

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<sup>215</sup>DRC 19 February 2009, no. 29953b, and DRC 7 May 2008, no. 581140b. See also DRC 12 March 2009, no. 39778.

<sup>216</sup>See also for example DRC 28 May 2010, no. 510583, and DRC 13 December 2010, no. 1210534.

<sup>217</sup>DRC 31 July 2013, no. 07131192. See also DRC 31 July 2013, no. 07131192, DRC 10 July 2013, no. 07132410, DRC 25 April 2013, no. 04131433, DRC 17 January 2014, no. 001143001, and DRC 7 February 2014, no. 02143251.

<sup>218</sup>DRC 18 March 2014, no. 0314130. See also DRC 18 March 2014, no. 0314195.

<sup>219</sup>DRC 27 May 2014, no. 05142679.

<sup>220</sup>DRC 6 November 2014, no. 1114424.

In a more recent DRC decision the claimant's claim was also rejected despite the fact that the counterparty renounced its right. In the decision of 27 August 2014, the DRC Judge observed that the respondent failed to present its response to the claim of the claimant, despite having been invited to do so.<sup>221</sup> In this way, the DRC Judge deemed that the respondent renounced its right of defence. The DRC Judge turned his attention to the claim of the claimant and noted that he was requesting alleged outstanding remuneration for the 2011/2012 season, particularly for the months of March, April and May 2012. In this context, and making reference to Article 12 para 3 of the Procedural Rules—which stipulates that any party claiming a right on the basis of an alleged fact shall carry the burden of proof—the DRC Judge concluded that the claimant had not provided any evidence of a contractual relationship with the respondent for the 2011/2012 season, for which he claimed outstanding remuneration. As a consequence, since the claimant had failed to prove having concluded an employment contract valid for the period for which he claims outstanding remuneration, the DRC Judge decided that the claim had to be rejected. In other words, despite the fact that the respondent renounced its right, the claimant's claim was still rejected by the DRC Judge due to the lack of evidence.

In line with the above, it is also important to remember that if accusations are not contested, a party bears the risk that the DRC will accept the accusations. For example, in a case before the DRC of 27 February 2014, the Chamber noted from the documentation submitted by the respondent, that the player apparently took part in the UEFA Under-17 European Championship tournament in country J. In particular, the Chamber noted that the player apparently left the claimant's training facilities in order to join country I's U-17 national team on 25 September 2007, that the tournament ended on 3 October 2007 and that the player never returned to the claimant before being transferred to club R. The DRC highlighted that such course of events was never contested by the claimant and thus remained uncontested.<sup>222</sup>

## 2.13 Non Ultra Petitem

When a party claims a certain amount before the DRC, the DRC will not adjudicate more than the amount of the claim of the party, also known as the principle of *non ultra petitem*. In such cases, the DRC refers to the *non ultra petitem rule*, as a result of which the Chamber cannot adjudicate more than is claimed by a party.<sup>223</sup>

In a case of 28 July 2005 before the DRC relating to training compensation, the Chamber stated that for the year in which it trained the player, the club would be

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<sup>221</sup>DRC 27 August 2014, no. 08141425.

<sup>222</sup>DRC 27 February 2014, no. 0214390.

<sup>223</sup>DRC 9 November 2004, nos. 114707 and 114708, DRC 2 November 2005, no. 115236, and DRC 12 January 2006, no. 16309.

entitled to training compensation in the amount of EUR 60,000. However, the DRC noted that in its claim submitted to the DRC, the club only requested EUR 50,000. Consequently, and in conformity with the principle of *non ultra petitem*, the DRC finally decided that it was not in a position to grant the club the amount of EUR 60,000, but only the amount of EUR 50,000 as was claimed by the claimant.<sup>224</sup>

In another case before the DRC of 2 November 2005, a player only claimed the amount of USD 300,000. According to the principle of *non ultra petitem*, also in this case the Chamber finally decided that the club concerned was only required to pay the player the amount of USD 300,000 for salary, sign-on fees and bonuses.<sup>225</sup>

## 2.14 Amendment of Claim

Although this is not laid down in the RSTP or the Procedural Rules, from the jurisprudence of the DRC it follows that a party is entitled to amend its claim during the procedure before the DRC. This can be derived from several cases before the DRC, such as the DRC case of 25 April 2013, in which case the claimant lodged a claim against the respondent before FIFA on 25 January 2010, requesting to be awarded an amount of EUR 93,600. Subsequently, on 28 September 2011, FIFA received an unsolicited additional position from the claimant, amending his initial claim only in the total amount that he requested. The new amount requested by the claimant before the DRC was EUR 81,406.16.<sup>226</sup>

Via its Circular no. 1468, FIFA introduced a new para 4 to Article 9 of the Procedural Rules in its 2015 edition. As mentioned previously, the parties shall not be authorized to supplement or amend their requests or their arguments, to produce new exhibits or to specify further evidence on which they intend to rely, after notification of the closure of the investigation, on the understanding that the FIFA administration may, however, at any time request additional statements and/

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<sup>224</sup>DRC 28 July 2005, no. 75231. As a side-note, a party can be given the option to pay in instalments. In its case of 9 May 2011, the DRC took note of the fact that the respondent acknowledged its debt in the amount of EUR 20,000 and proposed to settle the matter by paying said amount to the claimant. The DRC observed that the claimant requested the payment of the mentioned amount in one single instalment and that the respondent proposed to pay the amount in dispute in several instalments. In view of all the above, the DRC Judge concluded that the due amount of should be paid in two instalments in order to ensure a proper solution to the present dispute in the interests of both parties. DRC 9 May 2011, no. 5113444.

<sup>225</sup>DRC 2 November 2005, no. 115236. Also the CAS decided in CAS 2008/A/1644 *Adrian Mutu v. Chelsea Football Club*, award of 31 July 2009, that even though it had full power to review the facts and the law of the case, the arbitral nature of the CAS proceedings obliges the Panel to decide on all claims submitted, but at the same time prevents the Panel from granting more than what the parties are actually asking for.

<sup>226</sup>DRC 25 April 2013, no. 04131433.

or documents. In other words, this means that an amendment of claim will not be admitted (any longer) after notification of the closure of the investigation by FIFA.

In principle, the counterparty has the right to respond to the amended claim in absence of which the counterparty renounces its right. In a case the DRC Judge noted that the respondent had been given the opportunity to reply to the amended claim submitted by the claimant, but that the respondent had failed to present its response in this respect. In this way, so the DRC Judge deemed, the respondent renounced its right of defence and thus accepted the allegations of the claimant.<sup>227</sup> This can also be derived from the DRC case of 10 July 2013. In this case the claimant lodged a complaint before FIFA on 27 April 2012, claiming the amount of USD 188,500 plus interest, made up of USD 100,000 as an outstanding amount for the season 2009–2010 as well as USD 88,500 as compensation. On 11 June 2012, the parties reached an agreement to resolve the matter amicably. According to the “*protocol*” which was signed by both parties, the respondent accepted still owing USD 75,000 to the claimant regarding the contract, thus, in order to settle its debts, would pay to the claimant the amount of USD 57,500 in instalments. On 30 July 2012, the claimant stated that the respondent had not yet fulfilled its obligations in connection with the protocol and, after amending his claim, requested the payment of the amount of USD 75,000 plus interest at the rate of 5 % p.a. as from 10 July 2012. However, despite having been invited by FIFA to provide its position in respect of the amended claim of the claimant, the respondent did not respond to the amended claim.<sup>228</sup>

In the case of 6 March 2013, the DRC Judge took due note that the claimant originally requested the amount of USD 1,358,938 regarding outstanding remuneration, in consideration of the contract. The DRC Judge further noted that the respondent partially accepted the claimant’s claim, by paying the claimant the total remuneration in the currency of country U 4,854,948 as established in the agreement. The DRC Judge finally acknowledged that the claimant amended his initial claim, by accepting that the aforementioned payment had been made.<sup>229</sup>

It is of vital importance that the amended claim does not lack any clarity. For example, in the DRC case of 7 February 2014, the claimant also amended its claim. However, the DRC was eager to emphasize in this case that the breakdown of the amounts claimed by the claimant in his modified claim lacked certain clarity.<sup>230</sup>

## 2.15 Counterclaim

As with the entitlement of a party to amend its claim, the possibility of the submission of a counterclaim is not laid down in the RSTP or the Procedural Rules (although it can indirectly be derived from Article 17 paras 3 and 5 of the

<sup>227</sup>DRC 10 July 2013, no. 07132410.

<sup>228</sup>DRC 10 July 2013, no. 07132410.

<sup>229</sup>DRC 6 March 2013, no. 0313789.

<sup>230</sup>DRC 7 February 2014, no. 02143251.

Procedural Rules, 2015 edition where reference is made to a counterclaim). However, in this regard, from the DRC jurisprudence it explicitly follows that a party can submit a counterclaim during a DRC procedure.<sup>231</sup> Following several DRC decisions, one can see that this is possible.<sup>232</sup> The party may then generally give its reaction and respond to the counterclaim. Finally, the DRC will give its final decision on both the submitted claim and the counterclaim in one decision.

In a DRC decision of 31 October 2013, the player lodged a claim before FIFA on 27 August 2012 for breach of contract and compensation for breach of contract against the club, requesting that the club be ordered to pay the total amount of EUR 14,000. In its response, the club claimed that, in keeping with the club's common practice, the player was requested, on numerous occasions, to visit the club's offices in order to receive his monthly salary, which had always been paid to the player in the same manner; however, he failed to do so. The club rejected the player's arguments and lodged a counterclaim against him for the payment of compensation for breach of contract without *just cause*. In this case, the DRC finally decided that the claim of the claimant, player L, was partially accepted. The counterclaim of the respondent, club D, was rejected and the respondent had to pay to the claimant the amount of EUR 4000.<sup>233</sup> From this case, it follows that a party may insert a counterclaim and that a final decision will be given on both the claim as well as the counterclaim.<sup>234</sup>

## 2.16 Intervening Party

The Procedural Rules and the RSTP neither provide for rules for a party who wishes to intervene in the DRC proceedings. However, according to various DRC decisions, an *intervening* party is entitled to be and can get involved in the procedure.<sup>235</sup>

For example, in a DRC decision of 27 April 2006, a player acting in this procedure as claimant was transferred in 1996 from a national club to club B in another country. In 1999 the player transferred to club C, who acted as the intervening party. On 25 August 2003, a transfer contract for the player was concluded between the latter club and new club D, acting in this procedure as the respondent. The respondent appeared to be prepared to pay the solidarity contribution to the clubs which were entitled to receive it and which were involved in the player's

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<sup>231</sup>Filing a counterclaim in an appeal procedure before the CAS after 1 January 2010 is no longer possible.

<sup>232</sup>DRC 26 November 2004, 114628, DRC 28 July 2005, no. 75923, DRC 23 September 2005, no. 95855, DRC 17 August, nos. 861174 and 861307.

<sup>233</sup>DRC 31 October 2013, no. 10132457.

<sup>234</sup>DRC 18 December 2012, no. 12121204.

<sup>235</sup>DRC 23 September 2005, no. 95168, DRC 27 April 2006, no. 46400, DRC 28 September 2006, no. 96633, DRC 23 March 2006, no. 36446, and DRC 21 November 2006, no. 611183a.

training and education in accordance with the applicable FIFA regulations. On 5 December 2003 and 15 January 2004, the intervening party submitted statements to FIFA regarding the distribution of the solidarity contribution for the player. The intervening party objected to the respondent withholding the solidarity contribution for several reasons. The DRC finally decided that the respondent should pay the claimant a certain amount as solidarity contribution in relation to the transfer of the player from the intervening party to the respondent. Finally, the members of the chamber furthermore stated that the intervening party's position should be rejected, since solidarity contribution is an independently existing claim besides training compensation.<sup>236</sup> Furthermore, in a DRC decision of 25 April 2013, an intervening party was also involved in the procedure. However, despite having been invited by FIFA to do so in the matter at hand, the intervening party concerned did not submit any comments to the DRC.<sup>237</sup>

In conclusion, a party can intervene in a procedure before the Chamber. Especially, in decisions with regard to training compensation and the solidarity mechanism, an intervening party becomes involved in the DRC procedure. This is quite logical due to the fact that the new club is often obliged to pay a solidarity contribution or an amount of training compensation to several former clubs involved which take the position that they are entitled to receive a certain amount.<sup>238</sup>

## 2.17 Costs

### 2.17.1 Costs of FIFA Proceedings

Following the "2005 edition", the edition that came into force on 1 July 2005, and former editions of the Procedural Rules, the general rule was that the costs of proceedings before the DRC and the DRC Judge were free of charge.<sup>239</sup> In other words, there were no costs related to these procedures. However, as from the "2008 edition" of the Procedural Rules, the edition that came into force on 1 July 2008, and as also laid down in the current Procedural Rules, edition 2015, we note nowadays, that only the aforementioned "*sub a and b procedures*" are free of charge. No costs will thus be charged if it concerns DRC proceedings relating to disputes between clubs and players in relation to the maintenance of contractual stability and ITC requests ("*sub a procedure*") and the employment-related disputes with international dimension ("*sub b procedure*").<sup>240</sup>

<sup>236</sup>DRC 27 April 2006, no. 46400.

<sup>237</sup>DRC 25 April 2013, no. 04132000. See also DRC 31 October 2013, no. 10132457.

<sup>238</sup>See also DRC 12 December 2013, no. 12131160.

<sup>239</sup>Procedural Rules, 2005 edition, Article 15 para 2. See also RSTP, 2005 edition, Article 25 para 2.

<sup>240</sup>Procedural Rules, 2015 edition, Article 18 para 2. See also RSTP, 2016 edition, Article 25 para 2.

In respect of the above, we can conclude that all (other than *sub a* and *sub b*) proceedings before FIFA are *not* free of charge on the understanding that neither will costs be levied for proceedings relating to the provisional registration of players.<sup>241</sup> In accordance with Article 25 para 2 of the RSTP and Article 18 of the Procedural Rules, 2015 edition, the maximum costs of proceedings before the PSC including the Single Judge (with the exception of proceedings relating to the provisional registration of players), as well as proceedings before the DRC including the DRC Judge, in relation to disputes regarding training compensation and the solidarity contribution, shall be set at a maximum amount of CHF 25,000—and shall normally be paid by the unsuccessful party and thus in consideration of the parties' degree of success in the proceedings (where, in special circumstances, the costs may be assumed by FIFA), taking into account that the allocation of the said costs will be explained in the decision itself.<sup>242</sup> As also follows from the FIFA Commentary, taking into account (a) the outcome of the proceedings, (b) the conduct and (c) financial resources of the parties, as a general rule the costs related to the DRC procedure will generally be borne by the unsuccessful party.<sup>243</sup> Further, we note the fact that, in the event that a party generates unnecessary costs on account of its conduct, costs may be imposed upon it, irrespective of the outcome of the DRC proceedings.

With regard to the exact amount of the procedural costs, Annex A of the Procedural Rules points out that the procedural costs will be levied in accordance with a fixed table, whereby the extent of the costs is subject to the amount in dispute. For example, if the amount in dispute is up to CHF 50,000 the procedural costs are up to CHF 5000. In the event the amount in dispute is up to CHF 100,000 the costs are up to CHF 10,000. In the event the amount in dispute is up to CHF 150,000 the procedural costs are up to CHF 15,000. In case the amount in dispute is up to CHF 200,000, the procedural costs are up to CHF 20,000. With regard to any disputes higher than CHF 200,000 the procedural costs are up to CHF 25,000.<sup>244</sup>

In accordance with Article 15 of the Procedural Rules, the PSC, the DRC, the Single Judge and the DRC Judge may decide not to communicate the grounds, which will be discussed more extensively in the following paragraphs, in which the parties then have 10 days from receipt of the findings of the decision to request the grounds of the decision, in writing. With regard to the procedural costs, Article 18 para 3 of the Procedural Rules, states that no fees shall be charged if a party decides not to request the grounds of a decision once the findings have been communicated.<sup>245</sup>

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<sup>241</sup>Procedural Rules, 2015 edition, Article 18 para 1.

<sup>242</sup>RSTP, 2016 edition, Article 25 para 2.

<sup>243</sup>FIFA Commentary, explanation Article 25, p. 75.

<sup>244</sup>Procedural Rules, 2015 edition, Annex 1.

<sup>245</sup>Procedural Rules, 2015 edition, Article 15 para 1 and Article 18 para 3. With regard to Article 15 of the Procedural Rules, see CAS 2011/A/2563 *CD Nacional v. FK Sutjeska*, award of 30 March 2012. See also CAS 2011/A/2436 *Associação Académica de Coimbra-OAF v. Suwon Samsung Bluewings FC*, award of 25 May 2012.

Finally, parties must be aware that an *advance of costs* is payable for proceedings before the PSC and the Single Judge (with the exception of proceedings relating to the provisional registration of players), as well as for proceedings before the DRC in relation to disputes regarding training compensation and the solidarity mechanism. However, aside from the “*sub a and sub b procedures*”, no advance of costs needs to be paid for proceedings before the DRC in relation to disputes regarding training compensation and the solidarity mechanism if the value of the dispute does not exceed CHF 50,000.<sup>246</sup> In this regard, the advance of costs shall be duly considered in the decision regarding costs in accordance with Article 18 of the Procedural Rules, 2015 edition.<sup>247</sup> Furthermore, the advance of costs for disputes relating to training compensation or the solidarity mechanism shall be reimbursed to the party concerned if all parties to the dispute accept the FIFA administration’s proposal regarding the amounts owed and the calculation of such amounts (see also Article 13 of the Procedural Rules).<sup>248</sup>

In addition to the above, the advance of costs is also subject to the amount in dispute. In the event that the amount in dispute is up to an amount of CHF 50,000, the amount related to the advance of costs is CHF 1000. If the amount in dispute is up to CHF 100,000, the advance of costs are CHF 2000. If the amount in dispute is up to CHF 150,000, the amount related to the advance of costs is CHF 3000. If the amount in dispute is up to CHF 200,000, the amount related to the advance of costs is CHF 4000 and with regard to amounts in dispute higher than CHF 200,001, the advance of costs is CHF 5000.

By absence of which the claim is not immediately inadmissible (since petitions that do not comply with one of the requirements in relation to Article 9 para 1 of the Procedural Rules, will only be returned for redress with a warning that the petition will not be dealt with in the event of non-compliance), one should be aware that pursuant to Article 17 para 3 of the Procedural Rules, the advance of costs must be paid by the claimant or counterclaimant at the time that the claim or counterclaim is lodged, as stated in Article 9 para 1 of the Procedural Rules.<sup>249</sup> This can also be derived from Article 17 para 5 of the Procedural Rules, in which Article it stipulates that if a party fails to pay the advance of costs accordingly when submitting a claim or counterclaim, the FIFA administration shall allow the party concerned ten days to pay the relevant advance. However, failure to do so will (again) result in the claim or counterclaim of the party not being heard.<sup>250</sup>

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<sup>246</sup>Procedural Rules, 2015 edition, Article 17 para 2.

<sup>247</sup>Procedural Rules, 2015 edition, Article 17 para 6.

<sup>248</sup>Procedural Rules, 2015 edition, Article 17 para 7.

<sup>249</sup>Procedural Rules, 2015 edition, Article 17 para 3 and Article 9 para 1.

<sup>250</sup>Procedural Rules, 2015 edition, Article 17 para 5.

### **2.17.2 Procedural Compensation**

As laid down in Article 18 para 4 of the Procedural Rules and as follows from the decisions of the DRC and PSC, FIFA is quite clear in that no procedural compensation shall be awarded in proceedings before the PSC and the DRC.<sup>251</sup> In other words, if a player or a club claims legal fees for the declarations of its legal adviser or lawyer, in all cases the DRC will decide not to grant any legal fees whatsoever. This is the well-established and consistent jurisprudence of the DRC.

The DRC does not make any exceptions in this respect. For example, in a decision of 11 March 2005, the DRC considered that with regard to the demand submitted by the party, according to which any amount awarded to the other party in the present matter should be deducted from a debt the relevant club has towards it, the DRC considered that both matters were completely independent and separate from each other and therefore decided to reject any possible compensation of credits.<sup>252</sup> In a decision of 2 November 2005 regarding legal fees and other expenses, the DRC stated that the player did not quantify or specify these compensations at all, nor did he provide the FIFA administration with any evidence. Consequently, the DRC decided not to award these claimed remunerations. Nevertheless, the DRC also considered rejecting the claim with regard to covering any legal or other fees, because, in accordance with the well-established jurisprudence of the DRC, no procedural compensation are awarded in proceedings before the DRC.<sup>253</sup> Finally, in a DRC decision of 26 October 2006, the Chamber also decided that no procedural compensation would be awarded in proceedings of the DRC and reference was also made to Article 15 paras 2 and 3 of the Procedural Rules.<sup>254</sup> Also, in more recent decisions by the Chamber, such as the decision of 31 July 2013, the DRC decided as such, in accordance with its well-established jurisprudence.<sup>255</sup>

### **2.18 Provisional Measure**

The question is whether the DRC is competent to give a provisional decision. This specific competence is not explicitly regulated in the applicable rules. No DRC decisions are published on the website of FIFA from which it follows that the

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<sup>251</sup>Procedural Rules, 2015 edition, Article 15 para 3. In a CAS procedure the CAS Panel can decide that a party is obliged to pay the procedural costs of the counterparty. In this context, see for example R64.4 of the Procedural Rules of CAS. As a general rule, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, particularly the costs of witnesses and interpreters.

<sup>252</sup>DRC 11 March 2005, no. 35185.

<sup>253</sup>DRC 2 November 2005, nos. 6585 and 115999.

<sup>254</sup>DRC 26 October 2006, no. 1061318. See also DRC 3 July 2008, no. 78662.

<sup>255</sup>DRC 31 July 2013, no. 071311395.

DRC or the DRC Judge declares itself competent in order to decide on the basis of a provisional measure.<sup>256</sup> However, unpublished case law of the DRC shows that, in order not to hinder the player's career and in light of the request for provisional measures, the DRC can be competent to pass a *prima facie* decision with regard to the elements that are of relevance for the possible granting of provisional measures in the sense of Article 6 para 1 of the RSTP.<sup>257</sup> In this unpublished case law the DRC decided it was competent to pass a *prima facie* decision on said elements for the sole purpose of the possible registration of the player with his new club outside the registration period. From this jurisprudence the conclusion must be drawn, that the DRC is thus competent to pass a *prima facie* decision with regard to this particular element in light of Article 6 para 1 of the RSTP, which directly affects the player's possibility to pursue his career. It must be taken into account that the pertinent appreciation of the DRC of that specific aspect is a very limited one, exclusively within the scope of possibly granting of provisional measures, which also follows from this case law. Moreover, that particularly its appreciation is without any kind of prejudice to any future decisions that the Chamber will have to pass with regard to its competence to deal with the substance of the dispute arisen between the player and the club, and if applicable, also with regard to the substance of the matter.

It must further be noted that the Single Judge of the PSC, in any event, is competent to decide on the provisional registration of a player for a club in exceptional circumstances.<sup>258</sup> For example, an immediate provisional registration can be issued by the *new national association* if the new association does not receive a response to an ITC request from the former association within 15 days after submitting the ITC request.<sup>259</sup> The provisional registration will then become permanent 1 year after the ITC request. If, during this 1-year period, the former association presents valid reasons by submitting a claim before the PSC explaining

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<sup>256</sup>Under the CAS Code, parties may apply for provisional or conservatory measures before the CAS, however, only after all internal legal remedies provided for in the rules of the federation or sports-body concerned have been exhausted. See the CAS Code, edition 1 January 2016, Article R37. Following the CAS jurisprudence there are 3 requirements for the granting of provisional measures (i.e. irreparable harm, likelihood of success on the merits of the appeal, and balance of interest). See for example, CAS 2007/A/1403 *Real Racing Club de Santander SAD v. Club Estudiantes de la Plata*, order of 12 December 2007.

<sup>257</sup>See DRC 21 November 2011 and DRC 30 November 2015. From this jurisprudence of the DRC it follows that according to Article 6 para 1 of the RSTP, FIFA may take provisional measures in order to avoid abuse where a contract between a player and his previous club has been terminated by the player with or without *just cause*.

<sup>258</sup>FIFA Commentary, explanation Article 22, p. 66.

<sup>259</sup>RSTP, 2016 edition, Annex 3, Article 8.2 para 6. See also RSTP, 2016 edition, Annex 3a, Article 3 para 5. For the avoidance of misunderstanding, in the latter provision reference is made to 30 days.

why it did not respond to the ITC request, the Single Judge of the PSC will then be entitled to and may withdraw the provisional registration as issued previously.<sup>260</sup>

If the former association *does* reply to the new association, for example by informing the latter that the player is still contracted to its club or that a contractual dispute exists, from the FIFA Commentary it follows that the *new association* is then *not* entitled to issue an immediate provisional registration.<sup>261</sup> In that case, the former association replies to the new association that the ITC cannot be issued because the contract between the former club and the professional has not expired or that there has been no mutual agreement regarding its early termination, the Single Judge of the PSC is then legally entitled to issue a provisional registration.

In this context, the player as well as the former club and the new club are entitled to lodge a claim with FIFA. As follows from the FIFA Commentary, at this stage the procedures within FIFA will provisionally be split. In this context, the DRC will decide in the procedure whether or not the employment contract has been breached or whether the presence of a *just cause* exists. Aside from the DRC procedure, the procedure relating to provisional measures, particularly relating to the provisional registration of the player for the new club, is exclusively within the remit of the PSC who, in turn, has entrusted the Single Judge to deal with these matters. The Single Judge of the PSC will then be asked to pronounce on the provisional registration for the new club after considering whether the interests of the player from irreparable harm, the likelihood of success of the player on the merits of the claim, and whether the interests of the player outweigh those of the opposing party (the so-called balance of convenience of interests), according to the FIFA Commentary. If these conditions are met, the Single Judge will then authorise the new association to provisionally register the player for the new club.<sup>262</sup> If, as is also stated in the FIFA Commentary, the conditions are not met or if the evaluation of the Single Judge does not yet enable the responsibilities to be ascertained in a provisional manner, the Single Judge will not give provisional authorisation and the DRC will have to pronounce first on the substance of the matter. Once the DRC has decided on the breach of the contract and consequently on the financial and sporting consequences, the ITC can be issued in favour of the new association.<sup>263</sup>

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<sup>260</sup>RSTP, 2016 edition, Annex 3, Article 8.2 para 6. See also RSTP, 2016 edition, Annex 3a, Article 3 para 5 and RSTP, 2016 edition, Article 23 para 4, in which it is laid down in the latter Article that, in cases that are urgent or raise no difficult factual or legal issues, and for decisions on the provisional registration of a player in relation to international clearance in accordance with Annex 3, Article 8, and Annex 3a, the chairman or a person appointed by him, who must be a member of this committee, may then adjudicate as a Single Judge.

<sup>261</sup>FIFA Commentary, explanation Annex 3, p. 104, footnote 139. A decision regarding the provisional registration would not affect the sporting results of the new club for the games in which the player participated, but the player only loses eligibility to play for the new club once the provisional registration has been withdrawn. See in this regard FIFA Commentary, explanation Annex 3, p. 104, footnote 140.

<sup>262</sup>Practice has shown that the Single Judge of the PSC can adjudicate within 7 days.

<sup>263</sup>FIFA Commentary, explanation Annex 3, p. 106.

## 2.19 Prescription

Pursuant to Article 25 para 5 of the RSTP, 2016 edition, the DRC will not hear any case subject to the RSTP if more than 2 years have lapsed since the event giving rise to the dispute. In other words, a party waives its right to lodge a claim before the Chamber if more than 2 years have lapsed. The period of limitation in which a claim may be lodged is examined *ex officio* by the DRC while considering the formal aspects.<sup>264</sup> The FIFA Commentary for example, provides for transfer compensation which is paid in 5 equal instalments. Here FIFA indicates that the event giving rise to the dispute is the date on which the last instalment matured.<sup>265</sup>

The jurisprudence of the DRC is quite clear in this respect. It is well-established jurisprudence of the DRC, that the Chamber will not hear any case subject to the RSTP if more than 2 years have lapsed since the event giving rise to the dispute.

In a case before the DRC of 28 July 2005, the club stated that the claim was prescript. The DRC turned to the club's argument that the player's claim was already prescript and in this regard, referred to Article 44 of the RSTP, 2001 edition, in connection with Article 4 of the Procedural Rules, according to which the DRC will not address any dispute if more than 2 years have lapsed since the facts leading to the dispute arose. Therefore, on account of the aforementioned provision, the DRC decided that the right to claim for the salary instalments from December 2001 to April 2002 should be considered as prescript and that the DRC therefore was not in a position to handle this part of the claim. As far as the second part of the player's request was concerned, i.e. the payment of salary of May 2002, the DRC stated that between the origin of this part of the claim on 5 May 2002 and its submission to FIFA on 30 April 2004, 2 years had not yet lapsed. The DRC stated that, taking into consideration the aforementioned provision, the right to claim for the salary instalment of May 2002 was not prescript. Therefore, the Chamber decided that the club should pay the player a certain amount as salary for the month of May 2002.<sup>266</sup>

In a case before the DRC of 12 January 2006, the DRC concluded that between the date when the facts leading to the dispute arose, i.e. 30 June 2002 (the date of signing the employment contract between the player and the club) and the submission of the claim to FIFA on 15 March 2005 by the claimant, another club, more than 2 years had lapsed. The DRC finally concluded that the club's claim for training compensation of the player concerned should be considered as prescript.<sup>267</sup>

In line with the FIFA Commentary that provides for the example relating to transfer compensation which is paid in equal instalments, the DRC decided

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<sup>264</sup>FIFA Commentary, explanation Article 25, para 5, p. 76.

<sup>265</sup>FIFA Commentary, explanation Article 25, para 5, p. 76.

<sup>266</sup>DRC 28 July 2005, no. 75559.

<sup>267</sup>DRC 12 January 2006, no. 16432. See also DRC 27 April 2006, no. 46610.

accordingly in its cases of 27 April 2006. In this case, the DRC took into account that the relevant instalments should have been paid on 4 September 2003 and the claim was received on 7 March 2005. The Chamber concurred that the claim with regard to the first instalment in the amount of EUR 28,548 due on 4 September 2002 could not be considered, since over 2 years and 6 months had lapsed. Therefore, the DRC finally concluded that it could only consider the claim with regard to the second instalment due as at 4 September 2003.<sup>268</sup>

In the case of 3 October 2008, the DRC stated that the player had signed a professional contract on 21 December 2002 and was registered as a professional on 10 August 2002. In the matter at hand, club K lodged a claim for training compensation before FIFA against club C on 22 January 2007, and therefore the DRC decided that more than 2 years had lapsed since the event giving rise to the dispute. The DRC stressed that its jurisprudence confirmed the obligation of the club training and educating players, to follow the career of the player when they intend to claim training compensation before FIFA's decision-making bodies.<sup>269</sup>

Also, in the case of 31 July 2013, the Chamber took note of the formal objection of the respondent, according to which the claimant's amendment of 8 November 2012 should be considered as time-barred, since it was submitted more than 2 years after the event giving rise to the dispute, i.e. the player's termination letter of 3 August 2010. The Chamber referred to Article 25 para 5 of the RSTP in connection with the Procedural Rules, which stipulates that the decision-making bodies of FIFA shall not hear any dispute if more than 2 years have lapsed since the facts leading to the dispute arose, and that the application of this time limit shall be examined *ex officio* in each individual case. The DRC finally deemed that the objection of the respondent was rejected and that the amendment of 8 November 2012 was not affected by prescript and, therefore, was admissible.<sup>270</sup>

In its case of 27 August 2014, the DRC Judge duly noted that due to the fact that the employment contract at the basis of the dispute was concluded on 14 August 2010, and that the claimant had lodged his claim on 26 June 2013, he should examine if the present claim should be considered as time-barred.<sup>271</sup> The DRC Judge referred to Article 25 para 5 of the RSTP, which, in completion to the general procedural terms outlined in the Procedural Rules, clearly establishes that the decision-making bodies of FIFA shall not hear any dispute if more than 2 years have lapsed since the event giving rise to the dispute arose and that the application of this time limit shall be examined *ex officio* in each individual case. The DRC Judge deemed it fundamental to underline that in order to determine whether he could hear the present matter, he should, first and foremost, establish what is "*the event giving rise to the dispute*", i.e. what is the starting point of the time period of

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<sup>268</sup>DRC 27 April 2006, no. 46610. See also DRC 17 August 2006, no. 86119, and DRC 4 April 2007, no. 47932a.

<sup>269</sup>DRC 3 October 2008, no. 108488.

<sup>270</sup>DRC 31 July 2013, no. 07132435. See also DRC 23 January 2013, nos. 01132519 and 01131531.

<sup>271</sup>DRC 27 August 2014, no. 08142998.

2 years as set out under Article 25 para 5 of the RSTP. The DRC Judge referred to the claim of the claimant, according to which the latter requested outstanding salary amounting to USD 10,000. The DRC Judge emphasized that the claimant would be time-barred to claim any amount that would have fallen due prior to 27 June 2011. The DRC Judge underlined that the claimant did not provide any information, let alone documentation relating to the due dates of the amounts claimed, although the claimant was requested on several occasions to provide the FIFA administration with further information with regard to his claim. On account of the foregoing, and considering the complete lack of indication by the claimant as to the due date(s) of the claimed amounts, the DRC Judge deemed, on the basis of the entire documentation, that he was not in a position to conclude that the amounts claimed by the claimant party were not time-barred, as per Article 25 para 5 of the RSTP.

Take into account that also part of a claim of a claimant party can be prescript, as follows from the DRC decision of 27 February 2014, the Chamber focused its attention (only) on part of the claimant's claim. In this case, the respondent stated that the claim of the claimant must be considered time-barred by the statute of limitations in accordance with Article 25 para 5 of the RSTP.<sup>272</sup>

It can be concluded that the jurisprudence of the DRC is quite clear with regard to the "*prescription term*". The DRC jurisprudence leaves no room for any exceptions. The DRC will not hear any case subject to the RSTP, if more than 2 years have lapsed since the event giving rise to the dispute. However, from a CAS case of 24 September 2013, it can be inferred that the limitation period of Article 25 para 5 of the RSTP can be interrupted under circumstances.<sup>273</sup> With regard to the limitation period of 2 years set out in Article 25 para 5 of the RSTP, the CAS stressed in this case that there is no provision providing for the consequences of a possible amicable agreement between parties to postpone the due date for payment of certain amounts. According to the CAS, there is also no provision providing for the possible interruption of the prescription period or a provision specifically determining that the limitation period of 2 years can be interrupted under any circumstances. The CAS held that, where the RSTP contains a *lacuna*, or at least an ambiguity, that should be encouraged in the spirit of good relations in the world of sport. According to the CAS, in this specific case it must be possible for a limitation period to be interrupted if the parties have mutually agreed on a new payment schedule, especially if the debtor asked for it and the *bona fide* creditor relies on such new payment schedule. Therefore, it must be taken into consideration that in future cases, the DRC committees may decide that the prescription term can be interrupted in the event that the parties have mutually agreed on a new payment schedule, especially if the debtor asks for it and the *bona fide* creditor relies on such new payment schedule.

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<sup>272</sup>DRC 27 February 2014, no. 02143259.

<sup>273</sup>CAS 2012/A/2919 *FC Seoul v. Newcastle Jets FC*, award of 24 September 2013.

## 2.20 Decision

### 2.20.1 General

As a general rule, the DRC will adjudicate within 60 days and the DRC Judge will adjudicate within 30 days of receiving a valid request, as laid down in Article 25 para 1 of the Procedural Rules.<sup>274</sup> The limit of 60 and 30 days respectively, can obviously only be complied with if the parties cooperate in the procedure and are willing to provide comprehensive positions within the granted deadlines.<sup>275</sup>

The decisions taken by the DRC are effected by a simple majority vote after secret deliberations. All members in attendance and the chairman have one vote each. Abstentions are not permitted. In case of a tie, the chairman will cast the final vote.<sup>276</sup>

Furthermore, it is important to realise that decisions may also be taken by way of circulars.<sup>277</sup> The decisions will be communicated to the parties in writing. In urgent cases, with the exception of Article 15 of the Procedural Rules (decisions without grounds), the grounds of the decision may be communicated within 20 days of notification of the findings of the decision.<sup>278</sup> The FIFA General Secretariat is finally entitled to announce the decision in the name of and on behalf of the DRC.<sup>279</sup>

Albeit in theory and in accordance with the Procedural Rules, the DRC must adjudicate within 60 days and the DRC Judge must adjudicate within 30 days of receiving a valid request. In practice we note that the DRC and the DRC Judge (as well as the PSC and the Single Judge of the PSC) will not adjudicate within the aforementioned deadline. In practice, we experience that there is a delay in procedures before the DRC and the DRC Judge (as well as the PSC and the Single Judge of the PSC) on the understanding that FIFA is trying to resolve this problem, as also appears from the recent procedural amendments as passed in the editions 2015 of the Procedural Rules and the RSTP, this can be inferred from the amendment with regard to Article 24 para 2 of the RSTP to further strengthen the efforts made for a faster and more efficient dispute resolution, in which the competence of the chairman and deputy chairman of the DRC was extended to grant them Single Judge competences relating to training compensation and the solidarity mechanism disputes. However, here too from a formal point of view, the DRC does not comply with the deadline as laid down in Article 25 para 1 of the RSTP in conjunction with Article 5 para 6 (*“The Players’ Status Committee and the DRC shall perform the duties entrusted to them with due expedition”*) of its

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<sup>274</sup>RSTP, 2016 edition, Article 25 para 1.

<sup>275</sup>FIFA Commentary, explanation Article 25, p. 75.

<sup>276</sup>Procedural Rules, 2015 edition, Article 14 para 1.

<sup>277</sup>Procedural Rules, 2015 edition, Article 14 para 1.

<sup>278</sup>Procedural Rules, 2015 edition, Article 14 para 2.

<sup>279</sup>Procedural Rules, 2015 edition, Article 14 para 3.

own Procedural Rules. There can be no misunderstanding that said Articles clearly obligate FIFA to conduct the proceedings before the DRC (at least) in an expeditious manner.

In the past, the CAS Panels have dealt with several decisions with regard to the principle of “*Denial of Justice*”.<sup>280</sup> In these decisions, the CAS clearly stated that if a body refuses without reasons to issue a decision or delays the issuance of a decision beyond a reasonable period of time, there can be a Denial of Justice, opening the way for an appeal against the absence of a decision. CAS Panels emphasized that the absence of a reaction can be considered as a decision, which is then final.<sup>281</sup>

### 2.20.2 Form and Contents

The written DRC decisions will at least contain the date of the decision (on the understanding that decisions taken by way of a circular, will contain the date of completion of the circular process), the names of the parties and any representatives. Further, the decision is provided with the names of the members participating in the decision taken by the decision-making body, the claims and/or the motions submitted by the parties, and a brief description of the case. The DRC decision or the DRC Judge must also mention the reasons for the findings, the outcome of the evaluation of evidence, and the findings of the decision.<sup>282</sup> Regarding the form and contents, any obvious mistakes in decisions may be corrected by the DRC or the DRC Judge, *ex officio* or on application.<sup>283</sup> In any event, no disadvantage may accrue to any party from an erroneous announcement in a DRC decision.<sup>284</sup>

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<sup>280</sup>See for example CAS 97/169 M, CAS 2004/A/659 *Galatasaray SK v. FIFA and Club Regatas Vasco da Gama & F.J.*, award of 17 March 2005, CAS 2005/A/994, CAS 2005/A/899 *FC Aris Thessaloiniki v. FIFA & New Panionios N.F.C.*, award of 15 July 2005 and CAS 2007/A/1251 *Aris FC v. FIFA*, award of 27 July 2007. See also CAS 2011/A/2436 *AC Coimbra v. Bluewings FC*, award of 25 May 2012, and CAS 2011/A/2563 *CD Nacional v. FK Sutjeska*, award of 30 March 2012. See also CAS 2008/A/1705 *Grasshopper v. Alianza Lima*, award of 18 June 2009.

<sup>281</sup>Until so far, no FIFA decisions are challenged based on “*Denial of Justice*”. However, in the event that serious delays in the procedures before the DRC or the DRC Judge (as well as the PSC and the Single Judge of the PSC) continue, FIFA must take into account that the delays in the DRC procedures can trigger parties to bring their case to the CAS as a result of which the delay in the procedure can be established as a delay beyond a reasonable period of time. In other words, then there might be a “*Denial of Justice*”. In CAS 2014/A/3620 *Us Città di Palermo v. Club Atlético Talleres de Córdoba*, award of 19 January 2015, the Panel also made reference to the duration of the FIFA proceedings and, due to the length of it, the Panel decided to reduce the costs for the FIFA proceedings.

<sup>282</sup>Procedural Rules, 2015 edition, Article 14 para 4.

<sup>283</sup>Procedural Rules, 2015 edition, Article 14 para 5.

<sup>284</sup>Procedural Rules, 2015 edition, Article 14 para 6.

Irrespective of the above, the DRC can also decide not to communicate the grounds of the decision and instead to communicate only the findings of the decision. At the same time, the parties shall be informed that they have ten days from receipt of the findings of the decision, to request the grounds of the decision in writing, and that failure to do so will result in the decision becoming final and binding and the parties then being deemed to have waived their right to file an appeal.<sup>285</sup> The time limit to file an appeal begins upon receipt of the motivated decision.<sup>286</sup>

### 2.20.3 Service and Publication

Decisions will be sent to the parties directly, with a copy sent to the respective associations.<sup>287</sup> Notification is deemed to be complete at the time that the decision is received by the party, at least by fax, on the understanding that notification of a representative shall be regarded as notification of the party.<sup>288</sup> Decisions which are communicated by fax will be legally binding. Alternatively, in the absence of direct contact details, decisions intended for the parties in a dispute, particularly clubs, are addressed to the association concerned with the instruction to forward the decisions immediately to the relevant party. These decisions are considered to have been communicated properly to the ultimate addressee four days after communication of the decisions to the association. Failure by the association to comply with the aforementioned instruction may result in disciplinary proceedings in accordance with the FIFA Disciplinary Code, as follows from Article 19 para 3 of the Procedural Rules. It must be noted that not all DRC decisions are published on the official FIFA website. Decisions, if they are of general interest, may be published by the General Secretariat in a form determined by the DRC, e.g. condensed in the form of a media release. Due restraint will be exercised when publishing. Following a substantiated request by a party, certain elements of the decision may be excluded from publication.<sup>289</sup> In order to create more uniformity, certainty,

<sup>285</sup>Procedural Rules, 2015 edition, Article 15 para 1. See also CAS 2011/A/2563 *CD Nacional v. FK Sutjeska*, award of 30 March 2012. According to this case, it was possible to appeal before the CAS after the 10 day period as stated in Article 15 of the Procedural Rules until 21 days after receipt of the unmotivated FIFA verdict. However, this is “repaired” as from 2012 edition of the Procedural Rules.

<sup>286</sup>Procedural Rules, 2015 edition, Article 15 para 2. See also Procedural Rules, 2015 edition, Article 16 para 13, in which it states that the time limit for filing an appeal shall always begin on receipt of the full version of the decision. Furthermore, all decisions that lead to sporting sanctions may only be communicated with grounds. See Procedural Rules, 2015 edition, Article 15 para 4. The DRC may decide that the amount due must be paid in instalments. See DRC 12 December 2013, no. 12133757.

<sup>287</sup>Procedural Rules, 2015 edition, Article 19 para 1.

<sup>288</sup>Procedural Rules, 2015 edition, Article 19 para 2.

<sup>289</sup>Procedural Rules, 2015 edition, Article 20.

equality and transparency for all participants in the international football world, obviously all DRC decisions should be published by FIFA on its own website and not just a selection from it.

## 2.20.4 Enforcement

### 2.20.4.1 General

DRC decisions are solely decisions regarding *dispute resolution*. As mentioned before, the DRC decisions are in no way arbitral awards, such as the decisions of the CAS, nor can the DRC decisions be described as binding advisories. As was stated by the CAS in its award of 1 June 2010 between FC Sion and Al Ahly, FIFA proceedings are not court proceedings, and neither arbitral proceedings. Rather, they are “*intra-association proceedings*”, based on the private autonomy of the association, which, by definition lack the procedural rigour that one can find in true court proceedings.<sup>290</sup> Consequently, the DRC decisions cannot be enforced by the parties through the bailiffs or national civil courts. The DRC decisions can only be enforced via FIFA channels, i.e. through disciplinary power.

Nevertheless, enforcement through FIFA’s own association law is a very efficient method of enforcement.<sup>291</sup> This method of enforcement can be presumed to be a satisfactorily working system. Aside from there being some exceptions, parties are willing to cooperate in case of a reprimand. As mentioned, it is generally difficult to enforce a decision of a civil court or an arbitration court in a foreign country. According to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards held in New York on 10 June 1958, as of 1 January 2015, 156 countries declared that it applies the Convention to the recognition and enforcement of awards.<sup>292</sup> This means that in certain countries, there is no legal way to enforce an arbitral award.<sup>293</sup> FIFA is competent to respond directly to a country that infringes the rules. Moreover, parties prefer the DRC as a sports-deciding body (apart from the fact that the DRC procedures still have delay), because the members of the Chamber are specialists in the football world and, FIFA can enforce the decisions through its own disciplinary power. This all makes the above method of enforcement through its own organisation powerful and very effective.

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<sup>290</sup>CAS 2009/A/1880 *FC Sion v. Fédération Internationale de Football Association (FIFA) & Al-Ahly Sporting Club* and CAS 2009/A/1881 *E. v. Fédération Internationale de Football Association (FIFA) & Al-Ahly Sporting Club*, award of 1 June 2010.

<sup>291</sup>In my view this should be another reason why more publicity should be given to the DRC decisions.

<sup>292</sup>This Convention will apply to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought.

<sup>293</sup>FIFA Commentary, explanation Article 22, remark 99, p. 65.

### 2.20.4.2 Disciplinary Committee

If one of the parties will not abide by the decision of the DRC, the matter can be passed on to the FIFA Disciplinary Committee.<sup>294</sup> In each DRC decision, under the part “*Decisions of the Dispute Resolution Chamber*”, we note that the DRC emphasizes that, in the event that any amounts due, based on the verdict, are not paid within the stated time limit, the matter will be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision. The FIFA Disciplinary Committee will then decide which matters will be appropriate to force the parties to abide by the decision. If the matter is forwarded to the FIFA Disciplinary Committee, disciplinary sanctions may be imposed upon the debtor. According to Article 62 para 2 of the FIFA Statutes, the Disciplinary Committee may pronounce the sanctions described in the Statutes and the FIFA Disciplinary Code on members, officials, players and match agents. Anyone who fails to pay another person (such as a player, a coach or a club) or FIFA a sum of money in full or in part, even though instructed to do so by a body or an instance of FIFA or the CAS, following Article 64 para 1 of the FIFA Disciplinary Code, will be fined for failing to comply with a decision, will be given a final deadline by the judicial bodies of FIFA in which to pay the amount due or, if it is a club, will be warned and notified that, in case of default or failure to comply with a decision within the period stipulated, points will be deducted or demotion to a lower division ordered.<sup>295</sup> A transfer ban may also be pronounced. A ban on any football-related activity may also be imposed against natural persons, according to Article 64 para 4 of the FIFA Disciplinary Code.<sup>296</sup>

The FIFA Disciplinary Committee, which is equal to the competence of any enforcement authority, cannot review or modify the substance of a previous decision which is final and binding and has thus become enforceable. In other words, it is not allowed to analyse the case decided by the FIFA judicial body, i.e. to check the correctness of the amount ordered to be paid, but it has a sole task to analyse if the debtor complied with the final and binding decision rendered by the FIFA judicial body.

In its Circular no. 1270 of 21 July 2011, FIFA also referred to the range of application of Article 64 of the FIFA Disciplinary Code, which concerns the enforcement of decisions rendered by the CAS as result of which it is now

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<sup>294</sup>In a case before the PSC of 30 January 2012, the Single Judge pointed out that, in principle, FIFA’s Disciplinary Committee may only execute decisions taken by the competent FIFA deciding bodies and therefore concluded that the present matter should be heard and decided by the Players’ Status Committee. See PSC 30 January 2012, no. 1121193.

<sup>295</sup>FIFA Disciplinary Code, 2011 edition (adopted by the FIFA Executive Committee on 30 May 2011), Article 64 para 1.

<sup>296</sup>FIFA Disciplinary Code, 2011 edition, Article 64 para 4.

exclusively limited to those cases that had previously been dealt with by a FIFA body or committee.<sup>297</sup>

The FIFA Executive Committee appoints the members of the FIFA Disciplinary Committee and the Appeal Committee for at least 8 years. Furthermore, the committee meetings are deemed to be valid if at least three members are present.<sup>298</sup> In general, there are no oral statements and the FIFA Disciplinary Committee decides on the basis of the file.<sup>299</sup> As mentioned earlier and as opposed to DRC proceedings pursuant to Article 107 of the FIFA Disciplinary Code, proceedings before the FIFA Disciplinary Committee may be closed if a party declares bankruptcy.

In general, a decision of the FIFA Disciplinary Committee can be challenged before the Appeal Committee of FIFA if the decision is not declared final by the relevant FIFA regulations, in which the decision of the Appeal Committee will be irrevocable and binding on all the parties, on the understanding that the decision of the Appeal Committee in appeal can finally be challenged before the CAS.<sup>300</sup> However, as laid down in Article 64 para 5 in connection with Article 74 of the FIFA Disciplinary Code, any appeal against a decision passed in accordance with the above Article 64 of the FIFA Disciplinary Code (which is applicable in case of non-compliance of FIFA DRC decisions), must be lodged with the CAS directly.<sup>301</sup>

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<sup>297</sup>Furthermore, in view of the fact that not only natural persons and clubs but also member associations may be considered as offenders, the FIFA Disciplinary Code has an explicit provision applicable to associations. Aside from this, according to FIFA Circular 1270, in order to extend the responsibility for enforcing decisions onto the associations, a provision has been added to the FIFA Disciplinary Code, according to which the association of the deciding body shall bear the responsibility for enforcing any financial or non-financial decision that has been pronounced against a club by a court of arbitration within the relevant association or by a national dispute resolution chamber, both of which must be duly recognized by FIFA. Following said Circular, the same principle applies to a financial or non-financial decision pronounced against a natural person, with the slight but crucial difference that should the natural person be registered (or otherwise have signed a contract in the case of a coach) with a club affiliated to another association in the meantime, the new association shall bear the responsibility for enforcing the relevant decision. Reference must also be made to Article 14 para 1 lit a of the FIFA Statutes, 2016 edition, according to which members have to comply fully with the Statutes, regulations, directives and decisions of FIFA bodies at any time, as well as the decisions of the CAS passed on appeal on the basis of Article 57 para 1 of the FIFA Statutes (from which it follows that FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, member associations, confederations, leagues, clubs, players, officials, intermediaries and licensed match agents).

<sup>298</sup>FIFA Disciplinary Code, 2011 edition, Article 81 para 1 and Article 82 para 1.

<sup>299</sup>FIFA Disciplinary Code, 2011 edition, Article 11 para 1.

<sup>300</sup>FIFA Statutes, 2016 edition, Article 55 para 3. See also FIFA Disciplinary Code, 2011 edition, Article 126 paras 1–2 and Article 128.

<sup>301</sup>FIFA Disciplinary Code, 2011 edition, Article 64 para 5 and Article 74.

## 2.21 Court of Arbitration for Sport

### 2.21.1 General

As follows from Article 24 of the RSTP, decisions reached by the DRC or the DRC Judge may be appealed before the CAS. Each DRC decision or the DRC Judge is provided with a document called “*Directions with regard to the appeals before CAS*”, in which document it is laid down that any party intending to challenge a final decision issued by the DRC, must file a statement of appeal with the CAS within a 21-day time limit from receipt of the grounded decision challenged. This also follows from Articles 57 and 58 of the FIFA Statutes and R47 of the CAS Code of Sports-related Arbitration (“the CAS Code”).<sup>302</sup> The provisions of the CAS Code are applicable to the CAS proceedings, in which it is important to note that the CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law.<sup>303</sup>

After analysing the material part of DRC decisions, which will be discussed in more detail in Part II of this book, we can conclude that in the last few years the DRC has created well-established jurisprudence with regard to its international football-related disputes. However, a problem we experience, is the fact that not all decisions are published on the website. As said previously, only in cases of general interest may the DRC decision be published.<sup>304</sup> In other words, it is possible that the DRC deviates from the general line in *unpublished* decisions. We cannot exclude this with full certainty. In this context, we also face this same problem with the CAS awards since not all decisions are published either, whereby there is an extra complication with regard to the jurisprudence of the CAS. From a formal and legal point of view, the CAS is not bound and not obliged to follow earlier jurisprudence due to an absence of the so-called “*Stare Decisis-principle*”. However, in my point of view, this will and should not mean that the CAS Panels do not have to take into account the outcome of previous decisions. In other words, and also in order to attain more uniformity, equality and legal certainty on a worldwide scale, they cannot deviate under all circumstances, also according to the CAS jurisprudence.<sup>305</sup> As mentioned by Blackshaw, in the interests of comity and legal certainty, the CAS Panels usually follow earlier jurisprudence in order

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<sup>302</sup>FIFA Statutes, 2016 edition, Article 58 para 1. See also the CAS Code, edition 1 January 2016, Article R47.

<sup>303</sup>CAS Code, edition 1 January 2016, Article R49. For more information, see [www.tas-cas.org](http://www.tas-cas.org) Accessed 26 July 2016. The precise address of the CAS is Avenue de Beaumont 2, CH-1012 Lausanne (Switzerland). See also FIFA Statutes, 2016 edition, Article 57 para 2.

<sup>304</sup>Procedural Rules, 2015 edition, Article 20.

<sup>305</sup>CAS 2004/A/628 *IAAF v. USATF & Y*, award of 28 June 2004, and CAS 2008/A/1545 *Andrea Anderson et al. v. IOC*, award of 16 July 2010.

(also for the CAS) to build up a so-called *Lex Sportiva*.<sup>306</sup> In this context, the CAS Panels have declared that they are disposed to follow the earlier CAS decisions for reasons of comity and legal predictability in international sports law.<sup>307</sup> In other words, in line with the DRC jurisprudence, the CAS Panels also create a *Lex Sportiva*, but it is important to take into consideration and be aware of the absence of the “*Stare Decisis-principle*”.<sup>308</sup>

### 2.21.2 Background

The CAS, with its headquarters in Lausanne, Switzerland, was established in 1984 to settle sports-related disputes via arbitration following the Statutes of the Bodies Working for the settlement of sports-related Disputes.<sup>309</sup> In this regard, from the website of the CAS it follows that the CAS was placed under the administrative and financial authority of the International Council of Arbitration for Sport (“the ICAS”).<sup>310</sup>

Under an agreement between FIFA and the International Council of Arbitration for Sport, the jurisdiction of the Arbitration Tribunal for Football (TAF) is exercised by the CAS. FIFA has recognized CAS since December 2002 to resolve disputes between FIFA members, confederations, leagues, clubs, players, officials and licensed match agents.<sup>311</sup> In its Circular no. 827, FIFA outlined that after “*intense and very constructive discussions with the International Council of Arbitration for Sport*”, FIFA finally agreed to recognize the jurisdiction of the CAS. Since then CAS has been ready to act as an appeal committee for decisions taken by the DRC after 11 November 2001.<sup>312</sup> One can say that as from 2002, the

<sup>306</sup>Wild 2011, p. 6. Blackshaw also refers to CAS 97/176 *UCI v. J. 7NCK*, award of 28 August 1998. See also Kaufmann-Kohler G and Rigozzi A 2015, *International Arbitration: Law and Practice in Switzerland*, Oxford University Press, Corby Northans.

<sup>307</sup>Blackshaw et al. 2006, pp. 249–250; Mr Frank Oschütz also refers in this regard to CAS 96/149 *A.C. v. FINA*, award of 13 March 1997 (CAS Digest I, pp. 251, 258; p. 250, footnote 21).

<sup>308</sup>See for example, two awards of the CAS regarding the issue of loan: CAS 2012/A/2908 *Panionios GSS FC v. Parná Clube*, award of 9 April 2013, and CAS 2013/A/3119 *Dundee United FC v. Club Atlético Velez Sarsfield*, award of 20 November 2013, whereby both panels surprisingly came to a different conclusion. See also Monbaliu 2014. In my opinion the ‘stare decisis-principle’ cannot be a license to deviate from such important legal basic principles such as loan and the applicability of training compensation. See also the following two CAS awards: CAS 2014/A/3652 *KRC Genk c. LOSC Lille Métropole*, award of 5 June 2015 and CAS 2014/A/3500 *FC Hradec Kralove v. Genoa Cricket and Football Club*, award of 23 September 2014. In both CAS cases the CAS Panels also came to a different and opposing conclusion with regard to the questions whether or not a provision had to be interpreted with retroactive effect.

<sup>309</sup>CAS Code, edition 1 January 2016, Article S20.

<sup>310</sup>See the website of the CAS. <http://www.tas-cas.org/en/index.html>. Accessed 26 July 2016.

<sup>311</sup>FIFA Statutes, 2016 edition, Article 57 para 1.

<sup>312</sup>FIFA Circular no. 827 dated 10 December 2002.

CAS fills the need for a specialised body to resolve sporting disputes with the exclusion of the civil court system. As also mentioned by Blackshaw, since FIFA agreed to use the CAS as a final court for the football-related appeal disputes in 2002, the workload of the CAS has increased substantially (for example, in 2014 the CAS had to deal with exactly 432 cases).<sup>313</sup>

In order to resolve sports-related disputes through arbitration and mediation, 2 bodies were created, namely the ICAS and the CAS.<sup>314</sup> The CAS is composed of 2 divisions: (a) the Ordinary Arbitration Division; and (b) the Appeals Arbitration Division. The Ordinary Arbitration Division consists of panels whose task it is to resolve disputes submitted to the ordinary procedure. The Appeals Arbitration Division consists of panels whose task is to resolve disputes relating to the decisions of sports-related bodies such as the DRC, amongst others. According to the CAS Code, the CAS was set up by the International Olympic Committee, which rules on the basis of FIFA rules, the Code of Sports-related Arbitration and, additionally, Swiss law.<sup>315</sup>

Legal disputes before the CAS may arise out of an arbitration clause inserted in a contract or regulations, or a later arbitration agreement (the so-called “*O procedures*”), or it could involve an appeal against a decision rendered in a sports-related dispute (the so-called “*A procedures*”), such as the DRC or the DRC Judge (or the PSC or the Single Judge of the PSC). In this regard and in accordance with the CAS Code, the CAS resolves disputes through the appeals arbitration procedure relating to decisions of sports-related bodies such as the DRC, insofar as the statutes or regulations of the said sports-related bodies or a specific agreement so provide.<sup>316</sup>

### 2.21.3 Relevant Procedural Aspects

According to the CAS Code, the working languages in principle are French and English (and not also Spanish and German as for the DRC).<sup>317</sup> However, parties may request that a language other than French or English be selected, provided that the Panel and the CAS Court Office agree.<sup>318</sup> Furthermore, as with the DRC procedures, parties may be represented or assisted by persons of their choice.<sup>319</sup>

Furthermore, parties may apply for provisional or conservatory measures under the CAS Code before the CAS, however, only after all internal legal remedies

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<sup>313</sup>Wild 2011, p. 9.

<sup>314</sup>Statutes of the Bodies Working for the Settlement of Sports-related Disputes, Article S.1.

<sup>315</sup>For an extended view, see Reeb 2006.

<sup>316</sup>CAS Code, edition 1 January 2016, Article R27.

<sup>317</sup>See Rigozzi and Hasler 2013. See also Mavromati and Reeb 2015.

<sup>318</sup>CAS Code, edition 1 January 2016, Article R29. CAS includes a Court Office composed of the Secretary General and one or more Counsel, who may represent the Secretary General when required. See CAS Code, edition 1 January 2016, Article S.22.

<sup>319</sup>CAS Code, edition 1 January 2016, Article R30.

provided for in the rules of the federation or sports-body concerned have been exhausted.<sup>320</sup> As we have seen before, neither the RSTP nor the Procedural Rules (formally) leave room for the DRC to take provisional measures in a procedure, as opposed to the Single Judge of the PSC (who is competent to decide on the provisional registration of a player for a club in exceptional circumstances).

In order to be admissible before the CAS, the appellant must submit a statement of appeal that contains, among other things, relevant elements such as the name and address of the respondent, a copy of the decision appealed against, and the appellant's request for relief. If applicable, an application to stay the execution of the decision appealed against, together with reasons (in other words: the statement of appeal filed with the CAS does not automatically stay the execution of the decision challenged, save for the decisions of a financial nature).<sup>321</sup> Furthermore, a copy of the provisions of the statutes or regulations, or the specific agreement providing for appeal for the CAS and evidence of the payment of the Court Office fee of CHF 1000—, must be provided to the CAS.<sup>322</sup> The statement of appeal must be submitted to CAS within a 21-day time limit from receipt of the grounded decision challenged, following Article 24 of the RSTP, Article R49 of the CAS Code and Article 67 of the FIFA Statutes.<sup>323</sup>

With regard to the costs and aside from the Court Office fee of CHF 1000—, it is further worth mentioning that the CAS also determines the possible advance of costs that the parties must pay to the CAS within a certain time limit.<sup>324</sup> In the absence of payment of such advance of costs, the appeal shall be deemed withdrawn and the CAS shall terminate the arbitration. In this context, it is of interest that, in principle, both the appellant and the respondent need to pay an equal share of the advance of costs. However, for example if the appellant paid its share, but the respondent has not, from CAS Code it follows, more specifically Article R64.2, if a party fails to pay its share, the other may substitute for it. In other words, if the respondent does not pay its share of the advance of costs and (also) the appellant does not pay the respondent's part within the time limit fixed by the CAS, the appeal shall be deemed withdrawn and the CAS shall terminate the arbitration.<sup>325</sup>

The statement must further contain the appointment of the arbitrator chosen by the appellant from the CAS list, unless the parties have agreed to a Panel

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<sup>320</sup>CAS Code, edition 1 January 2016, Article R37.

<sup>321</sup>Under well-established CAS jurisprudence, a decision of a financial nature issued by a private Swiss association is not enforceable whenever it is appealed and that, consequently, it may not be stayed. See for example, CAS 2004/A/780 *Christian Maicon Henning v. Prudentópolis SC & Prudentópolis SC v. Christian Maicon Henning & Eintracht Frankfurt Fußball AG*, award of 18 July 2005. See also CAS 2004/A/780 *Christiaan Maicon Henning v/Prudentopolis Esporte Clube & FIFA*, award of 6 January 2005.

<sup>322</sup>CAS Code, edition 1 January 2016, Article R64.1.

<sup>323</sup>The time limits before the CAS are much stricter than time limits in FIFA procedures.

<sup>324</sup>CAS Code, edition 1 January 2016, Article R64 and R65.

<sup>325</sup>In practice we take note of the fact that respondents do not pay their part. In other words, the other party will often (have to) pay.

composed of a sole arbitrator. In this regard, it is important to know that the appellant as well as the respondent in the procedure before the CAS is entitled to appoint an arbitrator, contrary to the DRC procedures. The President of the Appeals Arbitration Division shall then appoint the President of the CAS Panel. In principle, we note the fact that the arbitration procedure is allocated to a Panel composed of 3 arbitrators and constituted following the rules provided by Articles R50 and R54 of the CAS Code.

The statement of appeal must finally be sent to the CAS Court Office in as many copies as there are parties and arbitrators, together with one additional copy for the CAS and one additional copy for FIFA (in principle, a minimum of 6 copies in all).<sup>326</sup>

Within 10 days following the expiry of the time limit for the filing of the statement of appeal, the appellant shall file with the CAS an appeal brief stating the facts and legal arguments giving rise to the appeal, together with all exhibits and specifications of other evidence upon which it intends to rely, failing which the appeal shall be deemed withdrawn.<sup>327</sup> In its written submissions, the appellant shall verify any witnesses, including a brief summary of their expected testimony, and experts, stating their area of expertise, whom it intends to call at the hearing and state any other evidentiary measure which it requests. Within 20 days from the receipt of the appeal brief, the respondent shall submit an answer to the CAS which includes a statement of defence, any lack of jurisdiction, and any exhibits, on the understanding that, in contrast to the FIFA DRC procedures, as from 1 January 2010, the CAS appeals procedure no longer provides for the possibility of filing *counterclaims*.<sup>328</sup>

After the written proceedings, in contrast to the DRC procedures that are conducted in writing (unless the circumstances appear to warrant it to attend an oral hearing), following Article R57 para 2 of the CAS Code, an oral hearing will generally be held, unless, but always after consulting with the parties, the Panel may deem itself to be sufficiently well informed about the matter at hand.

It must further be stressed that the CAS has full power to hear the case *de novo*. It may thus issue a new decision which replaces the decision challenged, or annul the decision and refer the case back to the competent authority for a new decision.<sup>329</sup>

In contrast to the procedural compensation in DRC procedures, in which it is laid down in Article 18 para 4 of the Procedural Rules, and as also follows from the DRC decisions (and those of the PSC), that no procedural compensation shall be awarded in proceedings before the PSC and the DRC, the CAS, however, is free to determine the final amount of the costs of the arbitration and to determine which party shall bear the arbitration costs or in which proportion the parties shall

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<sup>326</sup>CAS Code, edition 1 January 2016, Article R31.

<sup>327</sup>CAS Code, edition 1 January 2016, Article R51. See Article R56 and R57.

<sup>328</sup>As follows from CAS 2010/A/2108. See also CAS Code, edition 1 January 2016, Article R55.

<sup>329</sup>CAS Code, edition 1 January 2016, Article R57.

share them, as follows from Articles R64.4 and R64.5 of the CAS Code. Pursuant to Article R64.5 of the CAS Code, as a general rule, the CAS Panel has discretion to grant the prevailing party a contribution towards its legal fees and other costs.

In view of the above, a summary and/or a press release setting out the results of the proceedings shall finally be made public by the CAS, unless both parties agree that it should remain confidential. A copy of the award is notified to FIFA.

As from 2015, an e-filing service of procedural documents is created by the CAS. This e-filing service can be activated after the opening of arbitration proceedings by the CAS Court Office. This implies, as also explicitly follows from the CAS website, the prior filing of a request for arbitration by a party in accordance with Article R38 of the CAS Code or a Statement of Appeal in accordance with Article R48 by facsimile or courier, within the deadline set out in Article R49 of the CAS Code, as well as the allocation of a specific case number for the arbitration proceedings in question.<sup>330</sup>

Finally, although this lies beyond the scope of this book, it is worth mentioning that the awards of the CAS may be appealed before the Swiss Federal Tribunal (“SFT”). However, the grounds to annul a CAS award, are very limited and mainly procedural ones (i.e. violation of the right to be heard, problems of jurisdiction etc.). In this respect, the SFT is only entitled to review the merits of the case if it violates fundamental principles of law, the so-called public order (Article 190 para 2 under e of the Private International Law Act), i.e. the principles of equity and good faith, protection of personality rights, the principle of *pacta sunt servanda*.

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<sup>330</sup>See also <http://www.tas-cas.org/en/e-filing/e-filing.html>. Accessed 26 July 2016. From the CAS website it follows, each case is identified by the number allocated to it in the CAS Roll. In order to benefit from the e-filing service for the case in question, the user(s) must send a written request to the CAS Court Office by way of the “Case Registration Form”.



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