



Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2019/A/6677 Markus Kattner v. FIFA

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Luigi **Fumagalli**, Professor and Attorney-at-Law, Milan, Italy

Arbitrators: Dr Georg **von Segesser**, Attorney-at-Law, Zurich, Switzerland
Mr Patrick **Lafranchi**, Attorney-at-Law, Bern, Switzerland

Ad hoc Clerk: Mr Dennis **Koolgaard**, Attorney-at-Law, Arnhem, the Netherlands

in the arbitration between

Dr Markus Kattner, Switzerland

Represented by Mr Michael Kramer and Mr Dario Marzorati, Attorneys-at-Law, Pestalozzi
Attorneys at Law Ltd, Zurich, Switzerland

as Appellant

and

Fédération Internationale de Football Association (FIFA), Zurich, Switzerland

Represented by Mr Miguel Liétard Fernández-Palacios, Director of Litigation, and Mr Jaime
Cambreleng Contreras, Head of Litigation, FIFA, Zurich, Switzerland

as Respondent

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I. PARTIES

1. Dr Markus Kattner (the “Appellant”) is a former employee of FIFA.
2. The *Fédération Internationale de Football Association* (the “Respondent” or “FIFA”) is an association under Swiss law and has its registered office in Zurich, Switzerland. FIFA is the world governing body of international football. It exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials and football players worldwide.
3. The Appellant and FIFA are hereinafter jointly referred to as the “Parties”.

II. FACTUAL BACKGROUND

4. Below is a summary of the main relevant facts, as established on the basis of the written submissions of the Parties and the evidence examined in the course of the proceedings. This background information is given for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion.

A. Proceedings before the Investigatory Chamber of the Ethics Committee

5. On 28 July 2016, the Investigatory Chamber of the Ethics Committee (the “Investigatory Chamber”) informed the Appellant that it had opened proceedings against him for alleged violations of the FIFA Code of Ethics (the “FCE”), referring to possible violations of Articles 13, 15, 16, 19, 20 and 21 of the FCE. In this letter, the then Chairman of the Investigatory Chamber (Mr Cornel Borbély) recused himself.
6. On 23 September 2016, the Investigatory Chamber acknowledged receipt of the Appellant’s letters dated 2 and 10 August and 14 September 2016 by which the Appellant had apparently requested the recusal of all members of the Ethics Committee. The Appellant was, *inter alia*, informed that i) the Deputy Chairman of the Investigatory Chamber (Mr Djimrabaye Bourngar) recused himself; ii) his request for withdrawal against Mr Robert Torres was dismissed; iii) the Ethics Committee had authority to investigate his conduct; iv) his objection against the entire Ethics Committee was declared inadmissible; v) he should raise his objections against members of the Adjudicatory Chamber of the Ethics Committee (the “Adjudicatory Chamber”) in due time in front of the Adjudicatory Chamber; and vi) his objection related to the alleged “*lack of both independence and impartiality against (i) the entire Ethics Committee [...], and (ii) the individual members of the investigatory chamber [...] who were either involved in the preliminary investigation or the formal investigation against Gianni Infantino [...]*” were rejected.

B. Proceedings before the Appeal Committee

7. On 3 October 2016, the Appellant filed an appeal with the Appeal Committee against the decisions of the Investigatory Chamber communicated with its letter dated 23 September 2016.

8. On 12 October 2016, the secretariat to the Appeal Committee informed the Appellant, *inter alia*, as follows (in a translation from the original German text provided by the Appellant):

“If the chairman of the Adjudicatory Chamber then [after the Investigatory Chamber has referred the Final Report to the Adjudicatory Chamber] orders the opening of judicial proceedings, you will receive the final report at that time, together with a deadline for submitting your comments. In accordance with Art. 70 para. 2 FCE, this includes, for example, the statement of defense, plea of lack of jurisdiction, evidence, substantiated requests for evidence and witness applications. You are therefore invited to present your arguments against the “Decision of 23 September 2016” in the course of the judicial procedure. Subsequently, you will have the opportunity to appeal the decision in accordance with Art. 80 et seq. FCE; an appeal to the FIFA Appeal Committee appears to be too early at this stage for the reasons mentioned above.”

C. Proceedings before the Adjudicatory Chamber of the Ethics Committee

9. On 6 November 2019, Mr Vassilios Skouris, Chairman of the Adjudicatory Chamber, informed the Appellant that he had initiated adjudicatory proceedings and provided the Appellant with the final report (the “Final Report”) of the Investigatory Chamber, drafted by Mr Bruno De Vita.
10. On 11 November 2019, the Appellant reiterated his challenge request against all members of the Ethics Committee, *i.e.* all members of the Investigatory Chamber and the Adjudicatory Chamber, as well as the Ethics Committee as a whole. The Appellant also objected against the jurisdiction of the Ethics Committee over him. The Appellant’s submission was submitted to both the Investigatory Chamber as well as the Adjudicatory Chamber.
11. On 15 November 2019, the Appellant supplemented his challenge with an addendum (the “Addendum”), filing a complaint for violations of the FCE against Mr Torres, Mr De Vita and Mr Skouris, arguing that this would be another reason for them being biased against him. The Addendum was filed with the Investigatory Chamber, the Adjudicatory Chamber and the Appeal Committee.

D. Proceedings before the Chairman of the Appeal Committee

12. On 27 November 2019, the Chairman of the Appeal Committee invited Mr Skouris and Mr De Vita to provide their position with respect to the Appellant’s challenge.
13. Between 27 November and 1 December 2019, Mr Skouris, Mr De Vita and Ms Maria Claudia Rojas, new Chairwoman of the Investigatory Chamber, submitted their comments on the Appellant’s challenge, requesting it to be dismissed.
14. On 6 December 2019, the Appeal Committee forwarded the three above-mentioned statements to the Appellant.

15. On the same date, 6 December 2019, the Chairman of the Appeal Committee issued his decision (the “Appealed Decision”), with the following operative part:

“The objection submitted by Mr Kattner against the members of the Investigatory Chamber as well as of the Adjudicatory Chamber (Ethics Committee as a whole) is rejected.”

16. On 9 December 2019, the grounds of the Appealed Decision were communicated to the Appellant, providing as follows:

- *“First and foremost, the Chairman pointed out that, in accordance with art. 35 par. 5 of the FCE, he is competent to decide on the objection against a member of the Ethics Committee.*
- *This having been established and as a preliminary remark, the Chairman wanted to recall that, in line with art. 34 par. 4 of the FCE, such objection can only be addressed at individuals and not at the Committee as a whole.*
- *In continuation, the Chairman found it worthwhile to emphasise that, contrary to art. 34 par. 4 of the FCE, the Appellant failed to substantiate his allegations by any documentary evidence demonstrating the lack of independence of the objected members.*
- *Having said that, after a careful analysis of the motion on the hand [sic], and of the relevant positions, the Chairman considered that there are no grounds for questioning the impartiality and/or the independence of the members of both the Investigatory Chamber and the Adjudicatory Chamber.*
- *In particular, the Appellant failed to demonstrate that the conditions for a recusal as set for [sic] under art. 35 par. 2 of the FDC are met. More fundamentally, the Chairman held that, on the basis of the documents at his disposal, there is no basis for concluding that any of the individuals cited has:*
 - i. *either “a direct interest in the outcome of the case”;*
 - ii. *“a personal bias or prejudice concerning [the Appellant]; or personal, first-hand knowledge of disputed evidentiary facts material to the proceedings; or has expressed an opinion, other than as part of the proceedings in question, concerning the outcome of the proceedings; or when the immediate family of the member is a party to the subject matter in controversy, is a party to the proceedings or has any other interest that could be substantially affected by the outcome of the proceedings and his impartiality”;*
 - iii. *“the same nationality” as the Appellant;*
 - iv. *or “already dealt with the case in a different function other than his function as a member of the Ethics Committee”.*
- *As a result of the above considerations, the Chairman concluded that the request for recusal of the members of the Investigatory Chamber as well*

as of the Adjudicatory Chamber (Ethics Committee as a whole) had to be dismissed.”

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

17. On 27 December 2019, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (“CAS”) against the Appealed Decision, in accordance with Articles R47 and R48 of the 2019 edition of the CAS Code of Sports-related Arbitration (the “CAS Code”). The Appellant nominated Dr Georg von Segesser, Attorney-at-Law in Zurich, Switzerland, as arbitrator. The Appellant submitted the following requests for relief:

- “1. Ordering that the Decision no. 26/2019 APC of the Chairman of the FIFA Appeal Committee dated 6 December 2019 in the case of Mr Markus Kattner is null and void and shall be annulled.*
- 2. Declaring that the FIFA Code of Ethics does not apply to the Appellant.*
- 3. Declaring that the FIFA Ethics Committee (consisting of the Investigatory Chamber and the Adjudicatory Chamber) and the FIFA Appeal Committee have no jurisdiction over Appellant.*
- 4. Subsidiarily to 2 and 3, declaring that the FIFA Ethics Committee (consisting of the Investigatory Chamber and the Adjudicatory Chamber) lacks the required independence and impartiality.*
- 5. Subsidiarily to 2, 3 and 4, ordering that all members of the FIFA Ethics Committee, i.e. all members of the Investigatory Chamber and of the Adjudicatory Chamber, as well as the Ethics Committee as a whole/as an institution (including all members and employees of the Secretariat), in particular Bruno De Vita and Vassilos Skouris, recuse themselves of any FIFA internal proceedings conducted by FIFA against Appellant (in particular proceedings no. 26/2019 / E16-00015) and that all actions in which the individuals to be recused were involved shall be declared null and void.*
- 6. Ordering FIFA to bear the costs of the present appeal arbitration procedure and to pay to Appellant Appellant’s legal fees and costs incurred in connection with the present appeal arbitration procedure.”*

18. The Appellant also filed an application for provisional measures together with his Statement of Appeal. More specifically, the Appellant requested that *“FIFA and the Adjudicatory Chamber of the Ethics Committee shall be ordered to stay any internal proceedings conducted by FIFA/Ethics Committee against Appellant [...] until a final award has been rendered in this appeal arbitration procedure and the deadline expiring on 15 January 2020 for [the Appellant] to file his defences shall be cancelled pending the outcome of the present appeal arbitration procedure”*.

19. On 31 December 2019, the CAS Court Office noted, *inter alia*, that the Appellant had applied for provisional measures. In accordance with Article R37 CAS Code, FIFA was

invited to submit its position on this matter.

20. On 13 January 2020, within the extended time limit, the Appellant filed his Appeal Brief, in accordance with Article R51 CAS Code, reiterating and maintaining in full his requests for relief as set out in the Statement of Appeal.
21. On 15 January 2020, within the extended time limit, FIFA filed a reasoned objection against the Appellant's application for provisional measures and nominated Mr Patrick Lafranchi, Attorney-at-Law in Bern, Switzerland, as arbitrator.
22. On 16 January 2020, the Appellant indicated that he no longer requested that the deadline expiring on 15 January 2020 be cancelled and that, in light of the fact that there would be more time to render a decision on the Appellant's application for provisional measures, the Appellant's arguments submitted in the Appeal Brief could also be considered.
23. On 5 February 2020, in accordance with Article R54 CAS Code, and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to decide the present matter was constituted as follows:

President: Mr Luigi Fumagalli, Professor and Attorney-at-Law in Milan, Italy
Arbitrators: Dr Georg von Segesser, Attorney-at-Law in Zurich, Switzerland
Mr Patrick Lafranchi, Attorney-at-Law in Bern, Switzerland
Ad hoc Clerk: Mr Dennis Koolaard, Attorney-at-Law in Arnhem, the Netherlands.
24. On 5 February 2020, following FIFA's indication that it would not pay its share of the advance of costs, the Appellant indicated that the imposition of any additional deadline for FIFA to fulfil its contractual obligations would serve no purpose and that therefore no additional time limit should be set. The Appellant informed the CAS Court Office that he had sent a letter to FIFA on 3 February 2020, indicating that he withdrew from (and/or terminated with immediate effect) any such (contested) contractual agreement on which the applicability of the FCE and the jurisdiction of the FCE is based. FIFA also indicated that such additional withdrawal did not affect its previous withdrawal/termination dated 15 May 2017 and the Appellant's other considerations according to which the FCE is not applicable to him and the Ethics Committee lacks jurisdiction over him, as further explained in the Appeal Brief.
25. On 14 February 2020, FIFA filed a reasoned objection against the jurisdiction of CAS to handle the appeal lodged by the Appellant and the admissibility of the Appellant's appeal. FIFA also requested the Panel to bifurcate the proceedings.
26. On the same date, 14 February 2020, the CAS Court Office invited the Appellant to inform whether he agreed to such request. The time limit for FIFA to submit its Answer was suspended until further notice.
27. On 24 February 2020, the Appellant filed a reasoned objection against FIFA's request to bifurcate the proceedings, arguing that CAS has competence to handle the

Appellant's appeal. The Appellant also requested that, if the Panel would decide to bifurcate the proceedings, such preliminary award would also decide on whether the FCE applied to the Appellant and whether the Ethics Committee has jurisdiction over the Appellant.

28. On 9 March 2020, the CAS Court Office informed the Parties that the Panel had decided to bifurcate the proceedings, in order to decide the issues of jurisdiction and admissibility raised by FIFA in its letter dated 14 February 2020 in a preliminary award.
29. On 18 March 2020, FIFA reiterated its objection against the Appellant's application for provisional measures.
30. On 2 April 2020, the Parties filed submissions on the jurisdiction of CAS and the admissibility of the Appellant's appeal.
31. On 15 and 16 April 2020 respectively, the Appellant and FIFA indicated that they did not consider it necessary to hold a hearing exclusively limited to the issues of jurisdiction and admissibility, following which the CAS Court Office informed the Parties that the Panel had decided to decide on the issues of jurisdiction and admissibility without a hearing.
32. The Panel confirms that it carefully took into account in its decision all of the submissions, evidence, and arguments presented by the Parties, even if they have not been specifically summarised or referred to in the present arbitral award.

IV. SUBMISSIONS OF THE PARTIES

A. Submissions on jurisdiction and admissibility

33. FIFA's initial submission on the bifurcated issues, dated 14 February 2020, in essence, may be summarised as follows:
 - While Article 58 FIFA Statutes provides that only "[a]ppeals against final decisions passed by FIFA's legal bodies" shall be lodged with CAS, the present appeal is filed against an interlocutory ruling of the Chairman of the Appeal Committee, who, as established under Article 35(5) FCE, had to analyse the objection raised by the Appellant against all members of the Ethics Committee.
 - Said ruling is not appealable, as indicated by the absence of a "*notice of the channels for appeal*" in the decision itself, as well as by the fact that Article 35 FCE does not foresee any autonomous appeal in relation to objections raised against members of the Ethics Committee believed to be biased.
 - This is in line with the practice/jurisprudence of CAS; a decision on the challenge of an arbitrator rendered by the ICAS is not considered as an (autonomous) arbitral award subject to an appeal. This practice was confirmed by the Swiss Federal Tribunal (the "SFT"), which ruled that an appeal is open only against the final award on the merits and not the decision of a private institution, and legal scholars.

- The same approach must be analogously applied *a fortiori* in respect of the proceedings before the Ethics Committee. Should the Appellant insist on the alleged partiality of the members of the Ethics Committee, he is only entitled to do so in an appeal against a hypothetical decision on the merits that he may not agree with and against which a *de novo* appeal may be lodged before CAS.

34. The Appellant's submission on the bifurcated issues, dated 24 February 2020, in essence, may be summarised as follows:

- Since FIFA acknowledges that an appeal to CAS may be filed against "*final decisions*" of FIFA's "*legal bodies*" and that the Appeal Committee and/or its Chairman are "*legal bodies*" whose decisions are "*final*", it is undisputed that as a general rule, decisions rendered by the Chairman of the Appeal Committee are subject to an appeal lodged with CAS. Decisions rendered by the Chairman of the Appeal Committee have already been subject to appeal proceedings before CAS.
- FIFA's internal rules, in particular Article 35 FCE, do not provide for an exception to the general rule. There is no provision that would indicate that decisions of the Chairman of the Appeal Committee on challenges against members of the Ethics Committee must be treated differently compared to other decisions rendered by the Chairman of the Appeal Committee.
- FIFA is not able to present any jurisprudence according to which no appeal may be filed against decision rendered by the Chairman on challenges related to objections against members of the Ethics Committee and/or against the entire Ethics Committee as an institution.
- The jurisprudence of the SFT cited by FIFA is irrelevant as it relates to challenges of CAS arbitrators, not to the challenge of members of the Ethics Committee or the Ethics Committee as an institution.
- FIFA's internal rules do not provide that no appeal to CAS can be lodged against interlocutory rulings. The Appealed Decision was labelled as "*Decision*" and lacks any indication that it was interlocutory. The Appealed Decision is not interlocutory because it has a permanent effect, i.e. that the members of the Ethics Committee do not have to recuse themselves from the case but are allowed to conduct and complete the proceedings against the Appellant.
- The lack of an explicit "*notice of the channels*" within the meaning of Article 79 FCE does not change the permanent character of the Appealed Decision. Article 79 FCE is not applicable because it only applies to decisions rendered by the Adjudicatory Chamber, whereas the proceedings before the Appeal Committee leading to the Appealed Decision were governed by the FIFA Disciplinary Code. The FIFA Disciplinary Code does not foresee that a decision rendered by the Appeal Committee or its Chairman contains a "*notice of the channels*".

35. FIFA's submission dated 2 April 2020, in essence, may be summarised as follows:

- The consequences of the Appellant's appeal are twofold:
 - The appeal is inadmissible due to the fact that this type of decisions are not subject to an autonomous and individualized appeal;
 - CAS lacks jurisdiction given that an appeal has been lodged against a decision that is not final, thereby lacking a valid arbitration agreement between the Parties.
- The two CAS awards referred to by the Appellant are irrelevant, because they relate to proceedings where the Chairman of the Appeal Committee upheld decisions of the Chairman of the Disciplinary Committee extending the effects of domestic sanctions to have worldwide effect. In such cases, the Chairman of the Appeal Committee acted as an appeal body, whereas, in the case at hand, he acted as a first instance body ruling on a request for recusal of the members of the Ethics Committee during internal FIFA ethics proceedings, instead of entering into the substance of the case. More fundamentally, the two cases referred to by the Appellant put an end to the FIFA proceedings, whereas the Appealed Decision does not, i.e. the FIFA ethics proceedings against the Appellant are still pending before the Ethics Committee. The Chairman of the Appeal Committee did not act in an adjudicative function here, but merely took a procedural measure that the body in charge of the adjudication could simply not take.
- The Appellant's position is misconceived to the extent that it attempts to rely on the fact that "*as a general rule, decisions by the Chairman of the Appeal Committee are subject to appeal lodged with CAS*", without acknowledging the substantial difference between the Appealed Decision and the two CAS decisions. For these reasons, the Appealed Decision did not contain a "*notice of the channels for appeal*", while the two decisions appealed against in the aforementioned CAS proceedings did.
- While it is true that Article 49 FDC refers to "*decisions*" without any limitation, Article 58(1) FIFA Statutes provides that only "*final decisions passed by FIFA's legal bodies [...] shall be lodged with CAS*".
- Under Swiss law, a final decision is a decision that puts an end to the proceedings, either on the merits or for procedural grounds. A decision rejecting a request for recusal of members of the Ethics Committee only resolves a specific procedural issue and does not put an end to the proceedings. The topic of the alleged partiality and lack of independence of the Ethics Committee can still be raised before CAS once the Adjudicatory Chamber renders a decision on the merits.
- According to the SFT's long standing jurisprudence, decisions on a request for recusal of arbitrators, issued by a private body, such as the ICC or CAS, may not be subject to a direct and immediate appeal to the SFT. This is an issue that can only be challenged with the award. This case law is codified by the Swiss legislator also for domestic arbitration as confirmed by legal doctrine.
- The rationale behind this jurisprudence is that the possibility of an immediate

appeal would allow an uncooperative party to disrupt and/or delay the arbitration proceedings; the same rationale also applies in the context of proceedings within sports associations.

- A direct and individualized appeal is thus inadmissible as it is directed against a procedural decision and not a final one. CAS has no jurisdiction. However, it will have jurisdiction once a final decision on the merits is notified by the Adjudicatory Chamber, which can be cured by the *de novo* nature of CAS' appeals arbitration proceedings. The Appellant will thus not suffer any irreversible procedural prejudice.

36. The Appellant's submission dated 2 April 2020, in essence, may be summarised as follows:

- Besides referring to the submissions set out in his letter dated 24 February 2020 and the Appeal Brief, the Appellant indicates that FIFA's defense of inadmissibility lacks any basis in FIFA's own statutes, rules and regulations.
- In case the Panel finds that the rules are unclear and/or ambiguous with regard to the issue of inadmissibility, the principle "*in dubio contra proferentem/stipulatorem*" must be applied.
- The Appellant reiterates and understands the CAS Court Office letter dated 9 March 2020 in the sense that in the preliminary award the Panel must also decide on whether the FCE applies to the Appellant and whether the Ethics Committee has jurisdiction over the Appellant.

B. Submissions on Request for Provisional Measures

37. In his Statement of Appeal, the Appellant substantiated his application for provisional measures as follows:

- *"The Appellant is of the firm opinion that the Ethics Committee lacks jurisdiction over him. If the Ethics Committee has no jurisdiction over the Appellant, all future efforts and costs incurred by [the Appellant] will prove to be unnecessary. But even if the Ethics Committee had jurisdiction, the members of the Ethics Committee have to withdraw from the case due to their lack of impartiality. It is not acceptable that Appellant has to submit to proceedings conducted by individuals that should recuse themselves.*
- *On the other hand, a stay of the proceedings does not harm FIFA and/or the pending Ethics' proceedings before the Ethics Committee. There is no time pressure in the pending Ethics Proceedings. FIFA has initiated Ethics Proceedings already more than three years ago and decided not to further pursue them until August 2019. The Appellant has no activity in the football business since his unjustified and abusive dismissal by FIFA.*
- *For this reason, before the issues of jurisdiction, applicability of the Ethics Codes and the requests for recusals have been decided in these appeal procedures, the pending Ethics Proceedings against Appellant shall be stayed [...]."*

38. FIFA's reased objection against the Appellant's application for provisional measures dated 15 January 2020, in essence, may be summarised as follows:

- The three cumulative requirements to grant an application for provisional measures as set out in Article R37(5) CAS Code are not fulfilled and such application must therefore be dismissed.
- As to the requirement of *irreparable harm*, insofar the Appellant maintains that he would face unnecessary costs should the proceedings before the Ethics Committee move on, this argument cannot be taken into account as damages of a purely economic nature do not represent irreparable harm as they can be awarded in any final decision on the merits. Insofar the Appellant maintains that the member of the Ethics Committee are biased, this can be raised in a hypothetical appeal against the decision of the Adjudicatory Chamber.
- As to the requirement of *likelihood of success on the merits*, the Appellant failed to make a plausible case for himself in relation to the present appeal. The Appellant failed to demonstrate that a decision refusing the challenge of members of the Ethics Committee constitutes an autonomous decision subject to appeal to CAS. This is supported by jurisprudence of the SFT. The Appellant also did not even explain how a holistic challenge against all members of the Ethics Committee might be upheld even *prima facie*.
- As to the requirement of *balance of interests*, the Appellant failed to demonstrate why his (unknown) interests would prevail over FIFA's goal to ensure the smooth running of the proceedings of its independent committees, to find the truth and to safeguard football's image and credibility.

39. The Appellant's letter dated 16 January 2020, in essence, may be summarised as follows:

- Being subject to scrutiny and potentially sanctions of a so-called judicial body that is obviously biased and dependent from the Appellant's counterparty in Civil law and Criminal law proceedings may cause *irreparable harm* for the Appellant. This biased body regularly publishes its decisions and it is likely to do so in the present case, which will cause reputational damage that cannot be fully undone.
- The Appeal Brief demonstrates that the Appellant's *likelihood of success on the merits* in the "Challenge Matter" are more than just intact.
- FIFA's argument that "a decision refusing the challenge of the members of the FIFA Ethics Committee" does not constitute an autonomous decision subject to appeal to CAS is incorrect and the jurisprudence referred to does not apply because it refers to the challenge of a CAS arbitrator, not to the challenge of members of the Ethics Committee.

40. FIFA's letter dated 18 March 2020, in essence, may be summarised as follows:

- The Appellant failed to prove any sort of – let alone a sufficiently high – reputational damage, as required in the jurisprudence of the SFT. Any media

coverage concerning such decision (which is likely to be quite seldom, if it occurs at all) is inevitable and the Appellant will not be protected against this until a final decision is rendered by CAS.

- The Appellant's implicit intention to incorporate his entire Appeal Brief to the section on the *likelihood of success* in order to substantiate his position must be rejected as it would undermine the purpose of exchanging submissions on provisional measures, which is further supported by the fact that the Panel decided to bifurcate the proceedings to the issue of admissibility and jurisdiction.
- The Appellant's exclusive intention behind the present proceedings is to prevent that another tribunal refuses a future appeal on the basis of having failed to exhaust all possible remedies. Precautionary and unnecessary appeals as this one must be quashed from the outset as they contravene the principle of procedural economy.

V. DOMESTIC ARBITRATION

41. Before commencing with the analysis of the bifurcated issues, and although no specific submissions were made by the Parties in this respect, the Panel notes that it appears that the Appellant was domiciled and/or had its habitual residence in Switzerland at all material times, *i.e.* at least all consecutive employment contracts concluded between the Appellant and FIFA between 16 January 2003 and 10 June 2014 indicate that the Appellant resided at an address in Switzerland.

42. Article 176(1) of Switzerland's Private International Law Act (the "PILA"), provides as follows:

"The provisions of this chapter apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and if, at the time when the arbitration agreement was entered into, at least one of the parties had neither its domicile nor its habitual residence in Switzerland."

43. Given that FIFA had its registered seat in Switzerland at all material times, pursuant to Article 176(1) PILA, Chapter 12 of the PILA is not applicable to the present arbitration. Rather, it concerns a domestic arbitration governed by the Swiss Code of Civil Procedure (the "CPC").

VI. JURISDICTION / ADMISSIBILITY

A. Does FIFA's Objection concern Jurisdiction or Admissibility?

44. Article R47 CAS Code provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and

if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body. [...]

45. Article 58(1) FIFA Statutes (2018 Edition) provides the following:

“Appeals against final decisions passed by FIFA’s legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question.”

46. FIFA’s main argument is that the Appealed Decision is not a “*final decision*” in the context of Article 58(1) FIFA Statutes, but that it is merely a procedural decision that did not bring an end to the proceedings and which is therefore not appealable to CAS individually.

47. The first question to be addressed by the Panel is whether this objection relates to the jurisdiction of CAS or to the admissibility of the appeal.

48. The Panel finds that both positions are arguable and that the discussion is mostly of academic nature, because regardless of the categorisation applied, the material outcome of the present proceedings would be the same, *i.e.* the substance of the appeal would be entertained or not. The difference appears relevant only for the extent to which the SFT may review the issue. In fact, in case the matter concerns jurisdiction the SFT has full power to review it in accordance with Article 190(2)(b) of Switzerland’s Private International Law Act (the “PILS”), whereas its scope of review is more restricted when it concerns an issue of admissibility.

49. The Panel notes that also the SFT held that both concepts are not mutually exclusive and absolutely distinct and finds that such suggestion “*is very formalistic and does not appear convincing*”, since “*it is based on a disputable dichotomous analysis of the concept of inadmissibility of the request and lack of jurisdiction. Indeed the Respondent believes that these two concepts would categorically rule each other out. Yet that remains to be proved. To quote only Swiss procedural law, it generally holds jurisdiction as a requirement of admissibility of the claim and its lack as ground for rejection [citations omitted] and this, would indeed suggest that the two concepts are closely related*” (SFT, 4A_46/2011, consid. 3.3.2, as translated in English by www.swissarbitrationdecisions.com)

50. Legal doctrine provides the following in this respect:

“The distinction between jurisdiction and admissibility is made upon observation of the reason for challenge of the award. If the reason is that the appeal could not be submitted to CAS, the issue is jurisdictional and can be brought before the SFT based on Article 190 paragraph 2 (b) PILA. If the reason is that the appeal could be submitted at the CAS but was incomplete (because a proper decision was missing), the issue is normally one of admissibility and the decision cannot be reviewed by the SFT.” (REEB/MAVROMATI, R47: Appeal, The Code of the Court of Arbitration for Sport, 2015, p. 383)

51. Regardless of the nomenclature applied by the Panel, it is ultimately for the SFT to decide which categorisation is correct, *i.e.* in case the Panel would determine that it concerns an issue of admissibility, the SFT is not barred from determining that it is in fact an issue of jurisdiction and review the analysis in full.
52. The Panel also notes that the SFT recently pronounced itself on the specific question whether the timely filing of an appeal is an issue of admissibility or jurisdiction. The reasoning of this decision, however, appears to apply more broadly to the conditions under which an appeal may be filed with CAS in appeals arbitration proceedings:

“Whether a party is entitled to challenge the decision taken by the body of a sports federation on the basis of the statutory rules and the applicable legal provisions does not concern the jurisdiction of the arbitral tribunal seized of the case, but is a question of standing, that is to say a procedural issue to be resolved according to the relevant rules which the Federal Tribunal does not review when seized of an appeal against an international arbitral award (judgments 4A_428/2011 of February 13, 2012 at 4.1.1 and 4A_424/2008 of January 22, 2009 at 3.3)” (SFT 4A_413/2019, consid. 3.3.2, as translated into English by www.swissarbitrationdecisions.com)

53. Importantly, the Panel notes that while FIFA does not appear to consider the differentiation material, because it maintains that the absence of a “final decision” should lead both to the lack of jurisdiction of CAS, as well as to the inadmissibility of the appeal, the Appellant apparently does not consider it to be an issue of jurisdiction, as he solely refers to the concept of admissibility in his written submissions on the bifurcated issues dated 24 February and 2 April 2020.
54. In the context of a dispute where an appellant had allegedly failed to exhaust the internal legal remedies available to it in the relevant federation, *i.e.* in a situation where it depends on the specific circumstances of the case whether an appeal can be filed to CAS directly, a CAS Panel reasoned, *inter alia*, as follows:

“[T]he requirement [of exhausting legal remedies, red.] does not serve to distinguish the Panel’s mandate from the Parties’ access to justice before state courts. By submitting to CAS jurisdiction, the Parties wanted to exclude any kind of recourse to state courts. In particular, they did not want to enable a party to file an appeal before state courts in all matters, in which a CAS panel finds that the requirements for a “decision” within the meaning of Article R47 CAS Code are not fulfilled. Consequently, the issue whether or not a decision is appealable (within the meaning of Article R47 of the CAS Code) is not aimed at limiting the CAS jurisdiction vis-à-vis state courts. Instead, it is an admissibility issue, since – at the end of the day – the response to the question at stake is dictated by procedural principles such as procedural efficiency.” (CAS 2019/A/6298, para. 78)

55. Also in the present matter it is not in dispute that state courts are not competent to adjudicate and decide on the Appellant’s appeal. If there is a competent body to adjudicate and decide on the Appealed Decision in appeal it is CAS. The Panel, in fact,

notes that the disciplinary proceedings started against the Appellant before the FIFA bodies would lead to decisions falling within the jurisdiction of FIFA in accordance with 58(1) of the FIFA Statutes. It then depends on the specific nature of the Appealed Decision, according to the regulatory framework implemented by FIFA, whether the conditions are satisfied to “activate” the CAS jurisdiction and to verify whether an appeal to CAS is admitted.

56. In light of the above, the Panel considers that FIFA’s arguments, as presented, regard mainly the admissibility of the appeal brought by the Appellant.

B. The Applicable Regulatory Framework

57. In assessing the substance of FIFA’s objection to the admissibility of the appeal, the Panel first sets out the relevant regulatory framework relied upon by the Parties in their submissions.

58. Article 35 FCE (2019 Edition) provides as follows:

“Withdrawal

- 1. A member of the Ethics Committee shall decline to participate in any investigation or adjudicatory proceedings concerning a matter where there are serious grounds for questioning his impartiality.*
- 2. The foregoing shall apply, in particular, in the following cases:*
 - a) if the member in question has a direct interest in the outcome of the matter;*
 - b) if the member has a personal bias or prejudice concerning a party; or personal, first-hand knowledge of disputed evidentiary facts material to the proceedings; or has expressed an opinion, other than as part of the proceedings in question, concerning the outcome of the proceedings; or when the immediate family of the member is a party to the subject matter in controversy, is a party to the proceedings or has any other interest that could be substantially affected by the outcome of the proceedings and his impartiality;*
 - c) if the member has the same nationality as the party implicated;*
 - d) if the member has already dealt with the case in a different function other than his function as a member of the Ethics Committee.*
- 3. Members who decline to participate shall notify the chairperson immediately.*
- 4. An objection against a member of the Ethics Committee believed to be biased must be submitted within five days following the identification of the grounds for non-participation, failing which, such objection shall be deemed waived. The claim must cite the grounds and, if possible, be substantiated.*

5. *The chairperson of the relevant chamber shall decide whether any such claim is valid if the member in question has not declined to participate of his own accord. If the objection is against the chairperson, the chairperson or the deputy chairperson of the FIFA Appeal Committee shall decide.*”

59. Article 49 FDC (2019 Edition) provides as follows:

“Decisions passed by the Disciplinary and Appeal Committees may be appealed against before CAS, subject to the provisions of this Code and articles 57 and 58 of the FIFA Statutes.”

60. Article 58(1) FIFA Statutes (2018 Edition) provides the following:

“Appeals against final decisions passed by FIFA’s legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question.”

C. The Panel’s Analysis of the Admissibility of the Appeal

61. The Panel notes that pursuant to Article 49 FDC in conjunction with Article 58(1) FIFA Statutes, only “final decisions” may be appealed before CAS. The Panel is therefore put to the task of assessing whether or not the Appealed Decision qualifies as a “final decision”.

62. The Panel finds that, first of all, a distinction is to be made between interlocutory decisions and decisions putting an end to the proceedings. Indeed, there can be little doubt that many interlocutory decisions are final in the sense that they cannot be undone, regardless of how insignificant they may be, such as for example granting a party an extension of its deadline to file a written submission. This however does not mean that all interlocutory decisions are “final decisions” in the sense of Article 58(1) FIFA Statutes.

63. The SFT distinguishes between both types of decisions, holding that only decisions terminating the proceedings can be appealed directly to the SFT:

“Il ne s’agit pas d’une décision incidente, qui ne serait séparément susceptible de recours que si elle pouvait causer un préjudice irréparable (art. 5 al. 2 PA et art. 45 al. 1 PA, en liaison avec les art. 97 al. 1 OJ et 128 OJ), mais d’une décision finale. Est une décision finale, en effet, celle qui met un terme à la procédure, qu’il s’agisse d’une décision de fond ou d’une décision qui clôt l’action judiciaire en raison d’un motif tiré des règles de la procédure (ATF 115 II 104 consid. 2a, ATF 110 Ia 134, ATF 107 Ib 343 consid. 1, 221 consid. 1).” (ATF 117 V 237, consid. 1)

Free translation:

“It is not an incidental decision, which would be separately subject to appeal only if it could cause irreparable harm [...], but a final decision. It is, in fact, a final decision which terminates the procedure, be it a substantive decision

*or a decision which closes the legal proceedings for procedural reasons.
[...]*"

64. The Panel finds that this approach should also be applied in the present proceedings.
65. It would indeed be very inefficient if each and every final interlocutory decision would be subject to an independent appeal. It could not have been the intention of the draftsman to open the possibility of an appeal to CAS for every interlocutory decision taken during the proceedings before FIFA, as this would open the door to an uncooperative party to paralyse the proceedings by potentially appealing every single interlocutory decision to CAS.
66. This understanding has recently been confirmed in CAS jurisprudence:
- "[T]he implicit decision of the Investigatory Chamber not to stay the proceedings is not a final decision that can be appealed to CAS directly. It is merely a procedural decision comparable to decisions on whether or not to hold a hearing, to hear witnesses, to admit documents on file after a given deadline, etc. Such types of decisions cannot all be considered final decisions that can be appealed separately, for otherwise an appeal could be brought against almost any procedural decision, which would not be desirable from an efficiency point-of-view and is not how the Panel interprets the applicable rules."* (CAS 2019/A/6298, para. 126)
67. The Panel notes that the FIFA Statutes and/or the FDC do not provide for a specific regime applicable to interlocutory decisions that would allow to deviate from the jurisprudence of the SFT and CAS cited above.
68. Turning now to the specific case at hand, the Panel observes that the Appealed Decision terminates the proceedings before the Chairman of the Appeal Committee, however, it does not terminate or impact on the ethics proceedings against the Appellant, which are still pending before the Adjudicatory Chamber. The Panel therefore finds that the Appealed Decision does not terminate the proceedings as a whole and is therefore not a final decision that can be appealed directly to CAS as such. Moreover, the issues of alleged impartiality or independence can be examined in subsequent proceedings before CAS.
69. Although the present proceedings are governed by the CPC, the Panel notes that Article 393(a) CPC and Article 190(2)(a) PILA are identical, i.e. an arbitral award may be challenged "*where the sole arbitrator has been improperly appointed or where the arbitral tribunal has been improperly constituted*".
70. The SFT acknowledged that the provision in the PILA set the example for the provision in the CPC:
- "Pursuant to Art. 190(2)(a) PILA, an award issued in an international arbitration may be appealed when the sole arbitrator was irregularly appointed or the arbitral tribunal irregularly composed. Art. 393(a) CPC took over the text of this provision verbatim in the list of grounds which can*

be invoked in a civil law appeal against a domestic arbitral award.” (SFT 4A_282/2013, consid. 4)

71. Furthermore, Article 392(b) CPC specifically determines that interim awards may be challenged on the grounds listed in Article 393(a) and (b) CPC, justifying the conclusion that interlocutory or procedural decisions may not, equal to Article 190(3) PILA.
72. The Panel therefore does not deem it inappropriate to refer to jurisprudence and legal doctrine concerning Article 190(2)(a) PILA in these proceedings.
73. The Panel is cognisant of Article 190 PILA, the jurisprudence of the SFT and legal doctrine, supporting the notion that procedural efficiency sometimes requires a quick remedy for important issues related to the proper constitution and jurisdiction of an arbitral tribunal, i.e. that a party does not always have to wait until a final arbitral award is issued, but that it may sometimes file an appeal against an interim or partial award already. This is however subject to certain conditions:

“[O]nly the improper constitution of the arbitral tribunal or the incorrect finding of jurisdiction may be invoked against an interim award, while partial or final awards may be challenged on any of the grounds provided for in Art. 190(2) PILS, i.e., paras. (2)(a)-(e).

The reason why interim awards are (only) open to challenge based on the grounds of Art. 190(2)(a)-(b) is that procedural efficiency demands that the important issues of proper constitution (including independence and impartiality) and jurisdiction of the arbitral tribunal be subject to judicial review at the earliest possible stage of the arbitration. As a result, the aim is to avoid the continuation of proceedings that are flawed from the outset. For this reason, interim awards on jurisdiction or the tribunal’s constitution must be challenged immediately, failing which this right will be forfeited.” (ARROYO, Article 190 PILS, in: ARROYO (Ed.), Arbitration in Switzerland, The Practitioner’s Guide, Ed. 2, 2018, p. 268 following)

“Given that only awards are open to challenge under Art. 190(2) PILS, decisions of a private arbitral institution (such as the ICC Court of Arbitration or the SCAI Arbitration Court)) concerning the tribunal’s constitution cannot be directly challenged under Art. 190(2)(a) PILS. Such (institutional) decisions, which are not “awards”, may only be challenged indirectly before the Supreme Court, i.e., together with the challenge against the (first) subsequent awards of the arbitral tribunal – be that an interim, partial or final award.” (ARROYO, Article 190 PILS, in: ARROYO (Ed.), Arbitration in Switzerland, The Practitioner’s Guide, Ed. 2, 2018, p. 273)

74. The *caveat* that decisions on challenges of arbitrators by private bodies cannot be challenged individually was recently confirmed by the SFT:

“De jurisprudence constante, la décision prise par un organisme privé, comme la Cour d’arbitrage de la Chambre de Commerce Internationale

(CCI) ou le CIAS, au sujet d'une demande de récusation d'un arbitre, ne peut pas faire l'objet d'un recours direct au Tribunal fédéral (ATF 138 III 270 consid. 2.2.1; 118 II 359 consid. 3b; arrêt 4A_546/2016 du 27 janvier 2017 consid. 1.2.3). Elle pourra néanmoins être revue dans le cadre d'un recours dirigé contre la première sentence attaquant, motif pris de la composition irrégulière du tribunal arbitral (ATF 138 III 270, précité, consid. 2.2.1; arrêts 4A_546/2016, précité, consid. 1.2.3; 4A_644/2009 du 13 avril 2010 consid. 1)." (SFT 4A_146/2019, consid. 2.2)

Free translation:

"According to settled case law, the decision rendered by a private body, such as the Court of Arbitration of the International Chamber of Commerce (ICC) or the ICAS, concerning a request for the recusal of an arbitrator, cannot be made subject to a direct action before the Federal Tribunal [...]. It may nevertheless be reviewed in the context of an appeal against the first challengeable award, based on the irregular composition of the arbitral tribunal [...]."

75. The Panel recognises that the legal relationship between the Chairman of the Appeal Committee *vis-à-vis* the Adjudicatory Chamber is not identical to the relationship between ICAS *vis-à-vis* a CAS panel, but the Panel finds that the Appellant did not submit any compelling arguments justifying a distinction.
76. Furthermore, proceedings before the Ethics Committee cannot be equated to civil court or arbitration proceedings. Indeed, CAS made this clear when it stated the following in an often quoted arbitral award:

"FIFA proceedings are not court proceedings, and not even 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. In the Panel's view, general procedural principles that may apply to court proceedings or arbitral proceedings do not automatically apply to intra-association proceedings. Their possible application to intra-association proceedings must be demonstrated in each specific case by the party invoking them." (CAS 2009/A/1880 & 1881, para. 50 of the abstract published on the CAS website)

77. FIFA being a private body, the Panel finds that it is not inappropriate to draw a parallel between the present situation with the situation where a party challenges an arbitrator in arbitration proceedings before CAS and where such challenge is subsequently denied by a private body such as ICAS. Neither decision should be subject to appeal individually. Rather, the party interested in overturning such decision should wait until a final decision is issued terminating the procedure.
78. Insofar the Appellant premises his appeal on the grounds that the Ethics Committee lacks jurisdiction over him or that the FCE is not applicable to him, the Panel finds that such appeal is inadmissible, because – based on the evidence made available to it – no such pronouncements have been made by the Adjudicatory Chamber to date. In any

event, the Appealed Decision cannot be considered as such pronouncement, as it was issued by the Chairman of the Appeal Committee on the limited issue of a challenge. The proceedings before the Adjudicatory Chamber are pending and part of the issues to be addressed are the issues of jurisdiction over the Appellant and/or whether the FCE is applicable to him. Accordingly, in this respect, the Appellant failed to exhaust the legal remedies available to him prior to filing an appeal with CAS, which is in violation of Articles R37 and R47 CAS Code.

79. Consequently, the Panel finds that the Appellant should wait until the Adjudicatory Chamber has issued a final decision terminating the proceedings against him before being able to challenge the jurisdiction and/or the composition of the Ethics Committee. The Appellant does not suffer any prejudice from this, because it may raise its objections in full force before CAS in hypothetical appeal arbitration proceedings against a final decision of the Adjudicatory Chamber. The present Panel has not assessed the substance of the Appellant's arguments as to jurisdiction and/or the independence and impartiality of the Ethics Committee as a whole or individual members thereof, but declares the Appellant's appeal inadmissible exclusively on procedural grounds.

D. The Appellant's application for provisional measures

80. The Appellant's request for provisions measures is dismissed, as he failed to exhaust the legal remedies available to him (cf. para. 78 *supra*) prior to filing an appeal with CAS in accordance with Article R37 CAS Code and because he did not satisfy the criterion of *likelihood of success on the merits*, due to the inadmissibility of the appeal.

VII. COSTS

81. Article R64.4 CAS Code provides the following:

"At the end of the proceedings, the CAS Court Office shall determine the final amount of the cost of arbitration, which shall include:

- the CAS Court Office fee,*
- the administrative costs of the CAS calculated in accordance with the CAS scale,*
- the costs and fees of the arbitrators,*
- the fees of the ad hoc clerk, if any, calculated in accordance with the CAS fee scale,*
- a contribution towards the expenses of the CAS, and*
- the costs of witnesses, experts and interpreters.*

The final account of the arbitration costs may either be included in the award or communicated separately to the parties. The advance of costs already paid by the parties are not reimbursed by the CAS with the exception of the portion which exceeds the total amount of the arbitration costs."

82. Article R64.5 CAS Code provides as follows:

“In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule and without any specific request from the parties, 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, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties.”

83. Having taken into account the outcome of the arbitration, in particular that the Appellant’s appeal is inadmissible, the Panel finds it reasonable and fair that the costs of the arbitration, in an amount that will be determined and notified to the Parties by the CAS Court Office, shall be borne in full by the Appellant.
84. Furthermore, pursuant to Article R64.5 CAS Code and in consideration of the complexity and outcome of the proceedings as well as the conduct and the financial resources of the Parties, in particular that FIFA was not represented by external counsel, the Panel rules that both Parties shall bear their own legal fees and other expenses incurred in connection with the present arbitration proceedings.

* * * * *

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 27 December 2019 by Dr Markus Kattner against the decision issued by the Chairman of the Appeals Committee of the Fédération Internationale de Football Association is inadmissible.
2. The application for provisional measures filed on 27 December 2019 by Dr Markus Kattner is dismissed.
3. The costs of the arbitration, to be determined and served to the Parties by the CAS Court Office, shall be borne in full by Dr Markus Kattner.
4. Both Parties shall bear their own legal fees and other expenses incurred in connection with these arbitration proceedings.
5. All other and further motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland

Date: 13 July 2020

THE COURT OF ARBITRATION FOR SPORT

Lulgi Fumagalli
President of the Panel

Georg von Stegasser
Arbitrator

Patrick Lafranchi
Arbitrator

Dennis Koolaard
Ad hoc Clerk