UNIVERSIDADE CATÓLICA PORTUGUESA – UCP

FACULDADE DE DIREITO – ESCOLA DE LISBOA

CATÓLICA GLOBAL SCHOOL OF LAW

MASTER DISSERTATION

The Arbitral Nature of the Dispute Resolution Chamber

‘Discussion on the necessary requirements for the decisions of the FIFA Dispute Resolution Chamber to be recognized as arbitration awards’

Pedro Henrique Bandeira Sousa

148311019

Master of Transnational Law

Supervisor Prof. José Manuel Meirim

Class of 2012

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ABSTRACT

This dissertation aims to initiate a discussion on the nature of the decisions issued by the FIFA Dispute Resolution Chamber so that they can be enforced, or not, by the New York Convention of 1958. The subject is practically pacified by both jurisprudence and doctrine. However, in order to carry out the analysis and discussion of the theme, the reasons that led to the current understanding, developed since the mid-1990s, should be reviewed and analyzed again, under the current perspective. The purpose of this paper is to show that the scenario that existed when the concept was created, and that has consolidated over the years is different from the current scenario of the DRC. In order to achieve this objective, I will analyze and debate the cases related to this matter, as well as cases of the Swiss Supreme Court, of countries important to the debate and of the Court of Arbitration for Sport - CAS, as well as the doctrinal understanding on the subject and the sports and arbitration legislations. The idea for the discussion started with the analysis of a real case, in Ukraine. After the dispute resolution proceedings in the FIFA Dispute Resolution Chamber, which rendered a favorable award, it did not have a satisfactory outcome due to the lack of enforceability in this particular case. The first part will show the structure of FIFA and the Dispute Resolution System. The second part will analyze the matter of arbitration and the current relationship between arbitration and FIFA. The third part will analyze what is necessary for the formation of an arbitral tribunal and the relationship of the DRC with those requirements. Finally, it will be concluded whether or not it is possible to consider the decisions of the DRC as being arbitral.

Keywords: Arbitration. Dispute Resolution Chamber. FIFA. Enforcement. New York Convention.

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1. INTRODUCTION

The *Fédération Internationale de Football Association* ("FIFA") dispute resolution system is designed to resolve disputes relating to the world of football within the specificity and expertise of the sport. Initially, it was through the Players' Status Committee ("PSC"), which is the committee responsible for disputes related to player status. FIFA then created the Dispute Resolution Chamber ("DRC") to take part of the PSC's obligations and resolve disputes related to players' international status and transfers. The competence of the DRC extends to disputes related to labor issues of players in international dimensions and issues related to training compensation and solidarity mechanism. It is also responsible for contractual issues, such as termination with or without cause, whether it is sporting or not.

The importance of the DRC to the world of football is due to the fact that this body is responsible, through its decisions, to give uniformity and specificity to issues related to soccer disputes. However, part of the scholarly writing understands that these decisions, while responsible for this quality and uniformity, are not arbitral in nature and jurisprudence accompanies this thinking[1].

Accordingly, the DRC is solely responsible for resolving disputes and these can only be performed intra-association. In other words, they are not binding on other disputes and cannot be enforced outside the universe of FIFA statutes and regulations.

However, what will be discussed is precisely the opposite, that these decisions are arbitral in nature and could be enforced by the NY Convention. Therefore, it is necessary to look at the cases that started this definition against the arbitration nature of the decisions of the DRC.

The specificity of the sport and the protection of the rights of the parties, made by those who have more expertise in the subject, which is the DRC, are essential motivators for the discussion that begins.

[1] Some of the authors who share this thought are part of the bibliography used for this work, such as Frans de Weger.

From the point of view of arbitration, considering that the subject is extensive and that there are countless publications on the subject, the work will stick to the essential points for the decisions of the DRC to be considered arbitral.

In order to do so, it will analyze and answer three essential questions, namely whether there is a valid arbitration clause, whether the arbitral tribunal was established according to the minimum requirements to be valid and, consequently, what is the nature of the decision issued by the DRC.

The most sensitive points, on this writer's view, are the questions about the arbitration clause and the arbitrators' choice. Such points will be further explored.

The comparison between the DRC and the National Dispute Resolution Chamber ("NDRC") will also be discussed, since the latter have already been recognized as arbitral by the Swiss Federal Tribunal ("SFT"), the Court of Arbitration for Sport ("CAS") and the DRC itself, while the former have not.

Equally important will be the demonstration of how the FIFA's Legislation applicable to the DRC has evolved, including the changes that were made this year, to demonstrate the effort to give arbitration to the DRC's decisions.

After further elaboration of the above questions, an attempt will be made to draw conclusions on the possible enforceability of the DRC's decisions under the NY Convention and in what scenarios such enforcement would be possible.

As this is a matter of international law, it is not possible to analyze all the legal systems of the countries affiliated to FIFA, where decisions of the DRC can be implemented. Therefore, the discussion will be held around the FIFA legislation, the Swiss law (which is important because it is where FIFA is located), the Brazilian law (for being the country of this writer) and some affiliated countries (for presenting relevant case law for the theme).

This study had its central idea motivated in a real case, started in Ukraine. The Football Federation of Ukraine ("FFU") disciplinary committee sanctioned the club FC Metalist Kharkiv ("Metalist"), for its involvement in a match-fixing situation. After appealing to

CAS[2], the court issued a decision on August 2, 2013, holding the club liable for match-fixing.

This award was rendered soon after the club applied its entry form to the 2013/14 UEFA Champions League and for that reason, the club was disqualified from UEFA competitions, season 2013/14[3].

After the 2014 season, Metalist sank into debt and lost the license to play the Ukrainian Premier League, season 2016/17, which made it automatically lose its membership to the FFU. In 2016, the club ceased activities due to its insolvency.

In March 2015, the Brazilian football club Clube Atlético Paranaense ("Atlético Paranaense"), filed a dispute resolution in the DRC[4] against Metalist, pursuing the amount related to the solidarity contribution arising out of the transfer of athlete Marcio Gonzaga de Azevedo to FC Shakhtar Donetsk. On April 28, 2016, the DRC ruled for the Brazilian club, ordering Metalist to pay the amount of EUR 25,740 plus 5% interest per year, starting from April 13, 2013.

There was no appeal to the CAS by Metalist or Atlético Paranaense, for it was an explicit lack of interest from the latter, who won the procedure.

As Metalist have not paid the amount due, Atlético Paranaense resorted to the FIFA Disciplinary Committee. However, the Disciplinary Committee received correspondence from the FFU stating that Metalist had automatically lost membership because it had lost membership in the Ukrainian Premier League. Because of that, the Disciplinary Committee took position that their services and competent decision-making bodies cannot deal with cases involving clubs that are not affiliated to their Association any longer.

The result of this situation is as follows: Atlético Paranaense won the procedure in vain. Moreover, the club spent money on lawyers, lost almost 2 years only in this procedure which was no good for receiving the amounts owed and would probably spend more than

[2] CAS 2010/A/2267, 2278, 2279, 2280, 2281
[3] CAS 2013/A/3297
[4] DRC Ref. Nr. 14-00770/pam. Solidarity Contribution in connection with the player Marcio Gonzaga Azevedo (Clube Atlético Paranaense, Brazil / FC Metalist Kharkiv, Ukraine).

EUR 25,000 to start court procedure from scratch in Ukraine, which could take several years.

According to what is understood today regarding this situation, if Metalist had appealed to the CAS, this decision would be arbitral. However, Metalist did not appeal. In addition, Atlético Paranaense would not even have to appeal, since it was victorious in the dispute resolution. Therefore, it seems unreasonable that the winners should have to appeal to CAS so that their already favorable decisions have arbitral enforceability, which is in conflict with the lack of interest: an appeal where there is nothing to ask for, only that the award be given arbitral enforceability to be enforced through the New York Convention.

Because of situations such as the one described above, recognition of the decisions of the DRC as arbitrators is of great importance in today's sports world. After this introduction to the subject, the analysis and debates begin.

2. THE *FÉDÉRATION INTERNATIONALE DE FOOTBALL ASSOCIATION*

FIFA is the supreme body of world football and consists of 6 continental confederations and 211 national associations[5]. Each national association is responsible for coordinating the structure of football from amateur to professional level. The purpose of the entity, in accordance with its Statutes[6] (August 2018 Edition, "FIFA Statutes") and Regulations, is to promote the constant improvement of football. FIFA exists to improve the game of football among other things, whereby improvement can be interpreted in the broadest sense of the word[7].

As defined on the Statutes and under the scope of the Swiss Law[8], FIFA is a non-profit association, registered in the Commercial Register of the Canton of Zurich[9], and it only invests its surplus into the statutory objectives of the association[10].

The Statutes and Regulations form the Constitution of football's international governing body and, they are not a *state* constitution, but they bring together the rules and working methods of FIFA, the organization that stands at the apex of the global governance pyramid of the sport of football. The rules constitute the entity — which is FIFA[11].

Regarding the structure itself, as stated on the FIFA Statutes, the Congress is FIFA's supreme and legislative body, the Council is the strategic and oversight body, and the General Secretariat is the executive, operational and administrative body of FIFA[12].

The FIFA Congress is the Supreme Body of the Organization[13], also called "football's parliament", or "legislative body of the world of football". It is formed by a member of each national association and responsible, inter alia, for the development of the game,

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[5] FIFA Organization. http://www.fifa.com/about-fifa/index.html. Last visited 17/04/2018.

[6] FIFA Statutes 2018. http://www.fifa.com/about-fifa/who-we-are/the-statutes.html. Last visited 14/08/2018.

[7] DE WEGER, Frans. *The Jurisprudence of the FIFA Dispute Resolution Chamber – Second Edition*. ASSER International Sports Law Series. Asser Press. The Hague, 2016, p. 4.

[8] Swiss Law Code, Part One, Title Two, Chapter Two.

[9] FIFA Statutes, art. 1.

[10] FIFA FAQ: Setting the record straight. https://www.fifa.com/about-fifa/news/y=2014/m=6/news=faq-setting-the-record-straight-2363145.html. Last visited 16/06/2018.

[11] WEATHERILL, Stephen. *Principles and Practice in EU Sports Law*. Oxford: Oxford EU Law Library, 2017, p. 10.

[12] FIFA Committees. http://www.fifa.com/about-fifa/committees/index.html. Last visited17/04/2018.

[13] FIFA Congress. http://www.fifa.com/about-fifa/fifa-congress/index.html. Last visited17/04/2018.

election of the President, amendment of the Statutes, approval of the finances of the organization and removal of the members of the Executive Committee, if necessary.

In 2016, the FIFA's governance reform approved by the Congress created the FIFA Council[14], formerly known as the Executive Committee. It is a strategic body of the organization, made up of 28 members appointed by national associations through regional confederations, 8 Vice Presidents and the President[15], totaling 37 members. The Council is responsible for the decision-making in the periods between the FIFA Congress.

FIFA also has nine Standing Committees[16], one being important for the development of this study – the Players' Status Committee[17] ("PSC") – that have an advisory and assistance function to the Council and the General Secretariat. Moreover, four independent Committees: the Audit and Compliance Committee, the Appeal Committee, the Ethics Committee and the Disciplinary Committee[18]. These last three are FIFA's judicial bodies and are composed in such a way that the members have the knowledge, abilities and specialist experience that is necessary for the due completion of their tasks.

The Players' Status Committee is responsible for setting up and monitoring compliance with the Regulations on the Status and Transfer of Players[19][20][21] ("RSTP") and determining the status of Players for various FIFA competitions[22].

[14] FIFA Council. http://www.fifa.com/about-fifa/fifa-council/index.html. Last visited 17/04/2018.

[15] FIFA Statutes, art. 33(4): Each confederation has a different number of members elected and vice presidents: CONMEBOL has 4 members and 1 Vice President, AFC has 6 members and 1 Vice President, UEFA has 6 members and 3 Vice President, CAF has 6 members and 1 Vice President, CONCACAF has 4 members and 1 Vice President, OFC has 2 members and 1 Vice President.

[16] FIFA Statutes art. 39-48: Development Committee, Finance Committee, Football Stakeholders Committee, Governance Committee and Review Committee, Medical Committee, Member Associations Committee, Organising Committee for FIFA Competitions, Players' Status Committee and Referees Committee. http://www.fifa.com/about-fifa/who-we-are/the-statutes.html. Last visited 17/04/2018.

[17] FIFA Dispute Resolution System. http://www.fifa.com/governance/dispute-resolution-system/index.html. Last visited 01/06/2018.

[18] *Ibidem*, art. 52 and FIFA Governance Regulations art. 36-38.

[19] FIFA Laws and Regulations. http://www.fifa.com/about-fifa/official-documents/law-regulations/index.html. Last visited 01/06/2018.

[20] The first version of the RSTP was adopted back in 1991 and afterwards amended by the Executive Committee in 1993, 1996, twice in 1997, 2001, 2005, 2008, 2009, 2010, 2012, 2014, twice in 2015, 2016 and the current version, 2018.

[21] De Weger remembers that since the 2008 edition, the regulations are called "FIFA Regulations on the Status and Transfer of Players". The editions before 2008 were called: "FIFA Regulations of the Status and Transfer of Players". In this context, it is therefore called "the FIFA Commentary on the Regulations of the Status and Transfer of Players". DE WEGER. *Op. cit.,* p. 6.

[22] FIFA Dispute Resolution Chamber, http://www.fifa.com/governance/dispute-resolution-system/index.html. Last visited 19/04/2018.

The RSTP lay down global and binding rules concerning the status of players, their eligibility to participate in organized football, and their transfer between clubs belonging to different associations[23].

They are the rules concerning the status of the players and their eligibility to participate in the world of football through registration with clubs, whether they are amateurs or professionals, and their transfer between clubs of different national associations. With this registration, the player agrees to comply with the statutes and regulations of FIFA, the confederations and associations[24]. On the same section concerning the registration of players, are the rules on the enforcement of disciplinary sanctions and overdue payables.

In June 2018, FIFA released the new version of the RSTP[25], which brought essential changes to the DRC's decisions, particularly when it comes to the enforcement of monetary decisions, which will be discussed on the DRC chapter of this essay.

The importance of the PSC to this work is because it is also responsible for the work of the Dispute Resolution Chamber[26] (“DRC”), in accordance to the RSTP and the Rules Governing the Procedures of the Players’ Status Committee and the Dispute Resolution Chamber (“Rules Governing the Procedures of the PSC and the DRC”). Moreover, as stated by FIFA itself, the DRC is FIFA's deciding body that provides arbitration and dispute resolution based on equal representation of players and clubs and an independent chairman[27].

The DRC creation purpose was to resolve disputes in the matter of international players’ status and transfer, as set on the RSTP. Both bodies are the basis of FIFA’s Dispute Resolution System.

For purposes of the scope of this paper, considering the dispute resolution procedures at FIFA, through its internal bodies, the focus will remain solely on the Dispute Resolution System, specially the DRC, and the analysis on the nature of their decisions in the light of international arbitration. In addition, because it scope of the work is to determine

[23] BLACKSHAW, Ian S. *International Sports Law: An Introductory Guide*. ASSER Short Studies in International Law. Asser Press. The Hague, 2017, p. 78.
[24] FIFA RSTP, art. 5(1).
[25] The FIFA RSTP 2018 were approved by the FIFA Council at its meeting in Bogotá, Colombia, on 16 March 2018.
[26] See note 17.
[27] *Ibidem*.

whether the decisions rendered by the DRC have arbitral nature or not, the analysis of the whole procedure to achieve this goal will show that the decisions rendered by the PSC cannot have the same nature.

2.1 The Dispute Resolution System

2.1.1 The Players' Status Committee

The improvement of football pursued by FIFA and mentioned by De Weger exists not only within the rules of the field, but outside the field as well[28]. In this line of thought, FIFA created the Players' Status Committee to provide the football community legal certainty in the matters of players' status.

As before mentioned, pursuant the FIFA Statutes, the PSC is the responsible for the work of the Dispute Resolution Chamber[29], in accordance to the Rules Governing the Procedures of the PSC and the DRC. Another influence of the PSC on the DRC is the fact that, upon uncertainty regarding the jurisdiction of the PSC or the DRC to resolve a case, the chairman of the PSC shall decide which body has jurisdiction.

Since the creation of the Dispute Resolution Chamber, the competence of the Players' Status Committee lies on article 22(c) and (f), and 23, of the RSTP. That includes any case regarding (i) employment-related disputes between a club or an association and a coach of an international dimension, unless an independent arbitration tribunal guaranteeing fair proceedings exists at national level and (ii) disputes between clubs belonging to different associations that do not fall within the cases that are competence of the DRC.

Important to mention that the PSC has no jurisdiction whatsoever to hear any contractual dispute between intermediaries.

The cases on the Player' Status Committee will be adjudicated by at least three members[30], unless the nature of the case allows it to be decided by a single judge. With regard to the latter, these are the urgent cases or that do not present a greater complexity

[28] DE WEGER, Frans. *Op. cit.,* p. 4.
[29] FIFA Statutes, art. 46 (2).
[30] FIFA RSTP, article 23(4): Including the chairman and the deputy chairman.

of facts or legal issues, or cases regarding international clearance pursuant Annex 3, Article 8 and Annex 3a of the RSTP. The single judge will be the chairman, or a person appointed by him, who must be a member of the committee.

Consistent with Article 23 paragraph 4, it is possible to perceive that the decisions rendered by a single judge or the Committee may be appealed before CAS.

A few other situations fall within the competence of the PSC: (i) the written, substantiated request of a player who wishes to exercise his right to change associations[31] and (ii) disputes concerning matters related to the protection of minors[32], (iii) provision registration of players[33], (iv) release of players[34], (v) claims for recovering solidarity contributions in case of unjustified payment[35] and (vi) disputes involving a match agent[36].

2.1.2 The Dispute Resolution Chamber

The creation of the Dispute Resolution Chamber was in 2001, to take over some of the Players' Status Committee disputes and specially to resolve legal issues regarding international status and transfers of players. According to FIFA's own definition, the Dispute Resolution Chamber is a deciding body that provides arbitration and dispute resolution based on equal representation of players and clubs and an independent chairman[37]. The DRC is involved with all matters regarding the international status and transfers of the players, as set forth on the FIFA legislations.

The competence of the DRC is set on article 22(a), (b), (d) and (e) of the RSTP, with the exception of disputes concerning the issue of an International Transfer Certificate[38]. It has jurisdiction over:

- 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,

[31] FIFA Statutes, Regulations Governing the Application of the Statutes, article 8(3).
[32] FIFA RSTP, article 19(4) and (5) and Annex 2 and 3.
[33] *Ibidem,* Annex 3, article 8.2(6) and (7).
[34] *Ibidem,* Annex 1, article 6(2) and (3).
[35] *Ibidem,* article 22 under f.
[36] Rules Governing the Procedures of the PSC and the DRC, article 6(1).
[37] FIFA Dispute Resolution Chamber.
[38] FIFA Regulations on the Status and Transfer of Players, art. 24(1).

sporting sanctions or compensation for breach of contract[39] (the ITC request procedure);

- employment-related disputes between a club and a player of an international dimension. 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 on the parties. The independent national arbitration tribunal must guarantee fair proceedings and respect the principle of equal representation of players and clubs[40];
- disputes relating to training compensation and the solidarity between clubs belonging to different associations[41];
- 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[42].

Article 22 under b presents a division on the jurisdiction of the DRC, pursuant the possibility to resolve the dispute on the NDRC's once the requirements are met. FIFA recognizes that few members have a NDRC that meets the requirements of Article 22 under b and therefore many of the cases end up falling under the jurisdiction of the DRC.

In order to increase awareness of the correct functioning of the NDRC, FIFA drafted the NDRC Standard Regulations so that members could create chambers in the same way as the DRC, with the same principles and, above all, the principle of equal representation between players and clubs. This will be very important once the discussion on the issue of arbitration takes place.

Following the form of the PSC, the DRC shall adjudicate in the presence of at least three members[43], unless the nature of the case allows it to be decided by a single DRC judge, on (i) disputes up to a litigious value of CHF 100,000, (ii) disputes related to training

[39] FIFA RSTP, article 22 under a.
[40] *Ibidem*, article 22 under b.
[41] *Ibidem*, article 22 under d.
[42] *Ibidem*, article 22 under e.
[43] FIFA RSTP, article 24(2): Including the chairman and the deputy chairman.

compensation without complex factual or legal issues, or in which the DRC already has a clear, established jurisprudence and (iii) disputes related to solidarity contributions without complex factual or legal issues, or in which the DRC already has a clear, established jurisprudence. On situations (ii) and (iii) the single judge may be the chairman or the deputy chairman. Decisions rendered by the DRC judge or the DRC may be appealed before the Court of Arbitration for Sport ("CAS").

Here it is possible to identify three crucial differences between the PSC and the DRC, which shows firsthand why the arguments for reaching the objective of this work, which is the arbitration nature of the DRC's decisions, cannot be applied to the PSC.

The first is that, pursuant article 24(2), and unlike the PSC, the panel that will adjudicate will consist of at least one DRC judge for the players and one DRC judge for the clubs, appointed by the DRC members. Second, the chamber must have representatives of the players and clubs in equal numbers. Third, the competence of the DRC Single Judge can be decided by the existence of consolidated jurisprudence in the subject, which shows the importance of the jurisprudence of the DRC.

Jurisprudence is relevant both to the PSC and to the DRC, either by the single judge or by the chamber, but it is in Article 24(2) under ii and iii that it clearly appears as a determining factor, in written form.

That is because one of the objectives on this dissertation is to assess how close a DRC decision is to an arbitral award, provided that the requirements of arbitration law are fulfilled. Thus, regardless of the case that will be discussed in the DRC, what should be discussed is the entire procedure, from the start of the dispute to the decision issued, whether in dispute between a club and a player or training compensation, for example. Whatever the case, the procedure will be the same, under the light of the current regulations. Moreover, having representatives from clubs and players is a major sign of impartiality and independence.

As previously mentioned, the new RSTP 2018[44] brought changes in the enforcement of some types of DRC decision, specially when it comes to monetary decisions.

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[44] Three circulars were issued by FIFA to its members in order to elucidate the changes in the RSTP, namely, Circulars # 1625, # 1627 and # 1628:

The new article 24bis was included to grant powers to the decision-making bodies to impose sanctions on players and clubs should a monetary decision not be complied with. One can say that this is a recognition of the arbitral jurisdiction of the FIFA judicial bodies. With this change, when the judicial body issues a decision, it will also be responsible for enforcing the decision in case of non-payment by the party. Important to mention that the enforcement will take place if the debtor does not pay what is due when the decision is final, whether they have been appealed to CAS, or the parties have not appealed to CAS, and are already enforceable because their deadline has expired.

This new procedure reduces the time it takes to resolve the nonpayment issue. Before, the party had to await the decision of the PSC or DRC, try to get the money to, if it could not, request that the Disciplinary Committee take the appropriate disciplinary measures.

After a brief explanation of FIFA and the dispute resolution system, with the introduction of some important points for the discussion, I will move to the debate on the central point, involving the FIFA DRC and the analysis of international arbitration, limited by the scope this dissertation.

#1625 – amendments to article 14 to include a new paragraph concerning abusive situations where the stance of a party (either a player or a club) is intended to force the counterparty to terminate or change the terms of the contract. Creation of article 14bis to address the specific circumstance of terminating a contract due to overdue salaries. Amendment article 17 with regard to the calculation of compensation for breach of contract without just cause. Article 17 par. 1 of the Regulations now further specifies the method of calculation of the compensation due to a player, with a distinction being made between players having remained unemployed following the breach of the contract without just cause and those having found new employment. Amendment of article 18 to include a provision prohibiting so-called contractual "grace periods" for the payment of due payables towards players, unless explicitly allowed under a collective bargaining agreement, with the said prohibition not affecting those contracts which were concluded prior to the entry into force of the provision in question. Finally, inclusion of article 24bis, which grants FIFA's decision-making bodies, i.e. the Players' Status Committee, the Dispute Resolution Chamber, the single judge or the DRC judge, as the case may be, powers to impose sanctions on players and clubs should a monetary decision not be complied with. Such possible sanctions will be part of the decision as to the substance of the dispute and consist of, for clubs, a ban from registering any new players, either nationally or internationally, and for players, a restriction on playing in official matches.

3. ARBITRATION

There is no objective definition of what an arbitration award is and is up to national and international legal systems to present the parameters to achieve this definition.

At the international scene, the role of the United Nations is decisive for the widespread use of arbitration. That can be seen from the adoption of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("NY Convention")[45], on 1958, and the creation of the United Nations Commission on International Trade Law's Model Law on International Commercial Arbitration ("UNCITRAL Model Law"), on 1985. The former serves as the basis for the recognition and enforcement of arbitral awards while the latter served as a model for several countries' law on commercial arbitration. For the purpose of this work, the focus will remain solely on the NY Convention, broadly used to enforce awards in the world of football.

As mentioned, Swiss law has unique importance for the present discussion. Therefore, it is important to point out that for the Swiss Courts[46], the arbitration award, within the meaning of the Federal Act on Private International Law ("PILS"), is a judgment rendered on the basis of an arbitration agreement by a non-state court to which the parties have entrusted the determination of a case of an economic nature[47] of an international law[48]. According to the Swiss Federal Court's case law, to benefit from the same status of a court decision, an arbitral award must have been issued in an impartial and independent manner.

Before discussing the definition of an arbitral award itself, it is necessary to debate whether there is an arbitration agreement – or clause – between parties that are members of FIFA. In addition, it is necessary to discuss if the procedure to reach the award has the characteristics and scrutiny of an arbitral tribunal. Thus, since the agreement is valid, with the basic rules of arbitration being respected and if the outcome is an award considered as arbitral, it seems that enforcement under the NY Convention is possible.

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[45] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958. http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html. Accessed in 17/04/2018.

[46] ATF 119 II 271 at 3b, p. 275 f.

[47] PILS, art. 177(1).

[48] PILS, art. 176(1).

3.1 Arbitration and FIFA – The "Private Association" Issue

This is the central scope of this paper, which is to debate and reach conclusions if the DRC has competence to issue decisions recognized as arbitration decisions, in order to be enforced through the NY Convention.

The theme is divergent, having valid arguments on both sides that will be presented and debated. It is important to mention that there is no way to dissociate the nature of the DRC itself with the nature of its decisions, so two questions that will be asked and debated are whether the DRC is considered - or can be considered - an arbitral chamber, given its constitution and nature, and if the established tribunal can be defined as arbitral, capable of rendering an arbitral award.

FIFA already presented the definition of the DRC as a deciding body that provides arbitration and dispute resolution[49], involved with all matters regarding the international status and transfers of the players, as set forth on the FIFA legislations, such as the RSTP and Rules Governing the Procedures of the PSC and the DRC.

According to the argument that arbitration clauses contained in the statutes of an association are binding on its members for litigation[50], cases against FIFA will have to follow the procedures set up by FIFA for arbitration and litigation. Moreover, cases within FIFA's judicial bodies will follow these rules as well. This would be the *choice of law* applicable to the dispute resolution.

The fact that parties can appeal to CAS in certain matters does not exclude the eventual arbitration nature of the DRC decision. The decision *is* final and binding[51]. There is a *possibility* to appeal to CAS, but it is neither mandatory nor *ex officio*[52].

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[49] See note 17.

[50] LUCK, Corina. *Arbitration in football: issues and problems highlighted by FIFA's experiences with the court of arbitration for sports, in* YOUD, Kate. *The Winter's Tale of Corruption: The 2022 FIFA World Cup in Qatar, the Impending Shift to Winter, and Potential Legal Actions against FIFA*. Northwestern Journal of International Law & Business, Volume 35, Issue 1 Fall, 2014.

[51] Art. 15(1) of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber.

[52] Many of the country's laws, including the UNCITRAL Model Law, are silent on the possibility of an appeal of the arbitration decision to another arbitral tribunal, mentioning only the possibility of appealing to the state court to set aside the award for the reasons laid down on article 34 of the Model Law. They are also omitted as regards the possibility for the parties to freely agree to this possibility in the arbitration agreement. In this sense is the decision of the American case law *Chicago Typographical Union v. Chicago*

Despite the recurring arbitral characteristics, part of the doctrine and courts considers that the DRC is not an arbitral court itself like CAS and the decisions rendered by the DRC are not international arbitration awards and cannot be enforced through the NY Convention, only through the statutes and regulations of FIFA[53]. Furthermore, that the DRC only resolves and settles disputes, not having binding opinion enforcement[54] and that decisions rendered by a sport federation does not compare to an arbitral award and constitutes merely an expression of will of the judging federation[55].

CAS set this argument on the case Fc. Sion vs FIFA & Al-Ahly[56], when the court decided that FIFA proceedings are not arbitral proceedings, but "intra-association proceedings", based on the private autonomy of the association, which by definition lack the procedural rigor that one can find in true court proceedings. The same argument is present on other cases[57], adding that the decisions issued by FIFA's PSC and DRC are not arbitral awards, but decisions of a Swiss private association. The case law of the Swiss Federal Tribunal often refers to any PSC decision as a decision from a Swiss association[58].

Respecting what this line of doctrinal and jurisprudential thought explains, although the decision is "purely administrative", it shows some of the characteristics of an arbitral decision, such as consent of the parties and complete contradictory procedures, *inter alia*, even if under the guise of a supposed institutional position.

Sun-Times, Inc., 935 F 2d 1501, 1505 (7th Cir 1991); "If the parties want, they can contract for an appellate arbitration panel to review the arbitrator's award. But they cannot contract for *judicial* review of that award; federal jurisdiction cannot be created by contract.".

[53] BLACHSHAW, Ian S. *Op. Cit.,* p. 129.

[54] DE WEGER, Frans. *Op. cit.,* p. 5.

[55] MAVROMATI, Despina. Res Judicata in Sports Disputes and Decisions Rendered by Sports Federations in Switzerland. TAS/CAS Bulletin, 2015/1, p. 47 with reference to Case ATF 119 II 271.

[56] CAS 2009/A/1880 and CAS 2009/A/1881. The part of the judgment that matters for the present essay continues with the following arguments: "*[g]eneral procedural principles that may apply to court proceedings or arbitral proceedings do not automatically apply to intra-association proceedings, but must be demonstrated in each specific case by the party invoking them. Lacking this demonstration, it would be an excessive formalism to deem that a party to an intra-association dispute settlement procedure might not be allowed to specify the exact name and identity of the defendant as soon as an objection is raised in this respect*". In the opinion of this writer, CAS took as a general principle the fact that FIFA proceedings are not arbitral considering only an isolated fact that happened in this arbitration, ignoring all other similarities - fulfilling the requirements - with the arbitration procedure, such as the manifestation of will, existence of the arbitration clause, *inter alia*. By examining only one occurrence in this case - which dealt with the imprecise designation of the defendant - CAS ruled entirely the nature of the DRC's procedure as non-arbitral.

[57] CAS 2003/O/460, para. 5.3.

[58] SFT 4A_490/2009 with mention to BGE 127 III 279 *in* CAS 2010/A/2091, para. 26.

Starting from the first case law above mentioned, there is a crucial point to be discussed, specially cases CAS 2003/O/453, 2003/O/460 and 2003/O/486, which set the tone[59] to define that FIFA's PSC and DRC decisions are not arbitral, as above mentioned. CAS jurisprudence on this matter strongly rely on those cases.

On those cases, CAS decided that decisions rendered by the FIFA's Legal Bodies could not be enforced if it were challenged either before the ordinary courts or before CAS, because it was simply a Swiss Private Institution. It did not say that it could not be considered as an arbitral award, nor entered the discussion of the nature of FIFA's Judicial Bodies to the scope of arbitration.

What can be drawn from this understanding is that as long as the decisions are within the deadline for appealing to the CAS, the decision cannot be enforced, and that is all. The Panel did not go any further than this and did not say that, for this reason, the decision could not be considered of an arbitral nature.

Moreover, on the Fc. Sion vs FIFA & Al-Ahly case, there was no analysis of the proceedings of the DRC to effectively determine that it lacked the procedural scrutiny existent in true court proceedings and that it relied only on private autonomy.

According to case law of the Swiss Federal Tribunal, an actual award akin to the judgement of a state court supposes that the tribunal issuing it presents sufficient guarantees of impartiality and independence. In this respect, the decision taken by the body of a sport federation, which is a party to the case, even if this body is called "arbitral tribunal", constitutes a mere manifestation of will issued by the federation concerned; this is an act of governance and not a judicial act[60].

That was the Court's definition for the decision to be regarded as arbitral: that it provided sufficient guarantees of impartiality and independence. This case, 4A_374/2014, used a precedent from 1993. This 1993 case was the famous Gundel Case, where the claimant filled an appeal to the Swiss Federal Tribunal arguing that the CAS panel did not meet standards of impartiality and independence needed to be considered as a proper arbitral

[59] The subsequent case CAS 2003/O/486 explicitly stated: "The decision challenged is one made by a Swiss private association, and as such it cannot be legally enforced, if it is challenged, either before the ordinary courts, pursuant to Art. 75 of the Swiss Civil Code, or, as in the present case, before an arbitral tribunal, such as the CAS", relying on case 2003/O/460.

[60] Case 4A_374/2014, para. 4.3.2.1, also with reference to Case ATF 119 II 271. See note 46.

court. The Swiss Federal Tribunal did recognize CAS as a proper arbitral tribunal, but made several notes on the links existent between CAS and the International Olympic Committee ("IOC") and how the Court would be jeopardized of the IOC was a part to the proceedings before it[61].

To that point, it is vital to note that the DRC deals with disputes between parties that does not have any of the links found on the CAS x IOC relationship. That means that, following the argument of the ruling of the Swiss Federal Tribunal, the DRC is not attached to any of the parties on the proceedings and any party that stands before the committee do not have any power over the panel itself, in order to affect its impartiality and independence.

That is to say, according to the precedent established in the Gundel case of 1993, applying the abovementioned principles, the Court held in *that case* that an arbitral tribunal, which was a body of an association, which *was a party* to the proceedings, did not offer sufficient guarantees of independence. In *that case*, decisions taken by such body were, in fact, only a manifestation of the will expressed by the association in question. In *that case*, they were acts of governance and not judicial acts.

It is not the case today. In the DRC proceedings, FIFA is not a party in the proceedings and so the above argument, which was established in the Gundel case, does not apply. However, the conclusion reached in the Gundel case applies perfectly, which is that the IOC even had some influence over the CAS at the time, but since the IOC was not a party, the Court held that impartiality and independence were safeguarded. The same idea can be applied in the case of FIFA and DRC, when FIFA, as is repeated, is not part of the process.

As stated, there are arguments from both sides, but one has more doctrinal and jurisprudential weight. Still, the debate is valid, because the law is not static and evolves according to the need for evolution presented by the community.

[61] The Swiss Federal Tribunal FT drew attention to the numerous links which existed between the CAS and the IOC: the fact that the CAS was financed almost exclusively by the IOC; the fact that the IOC was competent to modify the CAS Statute; and the considerable power given to the IOC and its President to appoint the members of the CAS. In the view of the FT, such links would have been sufficient seriously to call into question the independence of the CAS in the event of the IOC's being a party to proceedings before it. The FT's message was thus perfectly clear: the CAS had to be made more independent of the IOC both organizationally and financially. See http://www.tas-cas.org/en/general-information/history-of-the-cas.html.

Therefore, in my opinion, this question of the "private institution" does not apply to the current reality of the DRC, because it is a thought built - and repeated - long ago and in another reality. Nevertheless, it is necessary to analyze the other requirements to reach an arbitration decision before going into the question of the nature of the decision itself.

However, before that, it is important to assess if there is any difference between the NDRC and the DRC, because the first has been accepted as an arbitral tribunal and the latter has not.

3.2 The DRC and the NDRC

Both CAS and the Swiss Courts recognized the NDRC as arbitral tribunals, but they do not recognize the DRC. CAS ruled the case 2010/A/2091 and acknowledged the decisions rendered by the Israeli Football Association ("IFA") as arbitral awards susceptible of recognition and enforcement through the NY Convention. According to the decision, the IFA Arbitration Institute administered true arbitral proceedings and, therefore, delivered fully-fledged arbitral awards[62]. Additionally, many of these courts provide for the possibility of appealing to the CAS of arbitration awards issued just as the DRC[63] does.

In a judgment in the year 2014, the Swiss Federal Tribunal recognized the Commission on Conciliation and Dispute Resolution ("CCDR") of the Mexican Football Federation ("MFF") as an arbitral tribunal, due to an arbitration clause in the employment contract. However, even though the Supreme Court recognized the CCDR as an arbitral tribunal, it did not recognize the decision issued by this body as valid by Swiss law because there was a clear violation of public policies[64].

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[62] According to the Court "[t]he IFA Statutes provide that the Arbitration Institute is independent in its decisions, provide for a mechanism to appoint the arbitrators for the individual cases, provide that the appointed arbitrators are subject to the arbitration laws of Israel and provide the Arbitration Institute regulations to establish a procedure to solve disputes between players and players' agents. Furthermore, two Israeli state courts have unequivocally found that the IFA Arbitration Institute's proceedings were genuine arbitral proceedings governed by Israeli arbitration laws. The IFA Arbitration Institute thus administers true arbitral proceedings and delivers fully fledged arbitral awards, capable of being recognized and enforced outside of Israel pursuant to the New York Convention".

[63] GUROVITIS, András. *The Sports Law Review – Second Edition (András Gurovitis ed.).* Law Business Research, 2016.

[64] SFT 4A_374/2014. Two Argentine coaches filed a complaint against a Mexican football team, with the CCDR. In 2009, the CCDR suspended the proceedings, informing the parties that they could seek resolution of the dispute before any other instance they considered appropriate. In 2011, the CCDR closed the proceedings for lack of action by the parties for two years. Likewise, in 2009 the coaches started a

There a case in Brazil, in an appeal judged by the 36ª Câmara Cível do Tribunal de Justiça do Estado de São Paulo (São Paulo's Civil Tribunal, 36th Chamber), recognized as arbitral a decision rendered by the Comitê de Resolução de Litígios ("CRL", the former Câmara Nacional de Resolução de Disputas, "CNRD") of the Confederação Brasileira de Futebol (Brazilian National Confederation, "CBF"), because of the existence of an arbitration clause[65].

It is important to repeat that, when FIFA released the NDRC Standard Regulations, the main purpose was so that members could create chambers in the same way as the DRC, with the same principles and, above all, the principle of equal representation between players and clubs. Therefore, the idea was to create several images of the DRC at national level, following the same line of rules, principles and procedures. And that is the idea sustained by CAS on case 2012/A/2983[66].

In 2005, three years before the NDRC Standard Regulations were issued, the FIFA Statutes stated that CAS could not deal with appeals arising from decisions against which an appeal to an independent and duly constituted arbitration tribunal recognized under the rules of an Association or Confederation may be made[67]. That raised questions from the associations, specially which criteria needed to be fulfilled for an arbitration tribunal to be classed as independent and duly constituted under the terms of the Statutes.

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dispute resolution in the PSC, which was admitted by the PSC Single Judge who, in 2012, issued a decision dismissing it for lack of jurisdiction *ratione personae*, not making any mention of eventual *res judicata*. The coaches appealed to CAS, which partially admitted the appeal and annulled the PSC's decision. The Mexican Club appealed to the SFT against the decision of CAS, claiming the existence of *res judicata*, that is, violation of procedural public policy. The Tribunal, as said, recognized the CCDR as an arbitral tribunal but that this specific decision could not be recognized as arbitral in the light of Swiss law and, therefore, having the effect of *res judicata* because of the violation of the parties to be heard.

[65] TJ/SP, 36ª Câmara Cível, Apelação n. 1005880-85.2015.8.26.0565, Rel. Des. Pedro Baccarat, julgamento: 27/07/2017. "Ação de cobrança. Contrato de representação firmado com jogador de futebol. Existência de cláusula compromissória no contrato que impõe sejam as divergências resolvidas no Juízo Arbitral. Questão submetida ao Comitê de Resolução de Litígios da CBF, que reconheceu a prescrição. Coisa julgada. Extinção do processo sem apreciação do mérito. Recurso desprovido." Free translation: "*Charging action. Representation agreement signed with soccer player. Existence of an arbitration clause in the contract that imposes the divergence resolved in the Arbitral Tribunal. Issue submitted to the Dispute Resolution Committee of CBF, which acknowledged the limitation. Res judicata. Dismiss of the proceedings without consideration of the merits. Appeal devoid.*".

[66] CAS 2012/A/2983, 2. "In order to be recognised as 'independent' and 'duly constituted', a national arbitration tribunal must, inter alia, a) respect the principle of equal representation of players and clubs, b) not provide for financial barriers that fail to ensure the highest possible level of access to justice, and c) respect the principle of the right to be heard."

[67] FIFA Statutes 2005, article 60(3) under c.

FIFA then issued the Circular No. 1010 determining that the terms 'independent' and 'duly constituted' in accordance with the FIFA Statutes require that an arbitration tribunal meet the minimum (international) procedural standard as laid down in several laws and rules of procedure for arbitration tribunals. The minimum standards comprised five requirements: (i) principle of parity when constituting the arbitration tribunal, (ii) right to an independent and impartial tribunal, (iii) principle of a fair hearing, (iv) right to contentious proceedings and (v) principle of equal treatment.

In 2007, FIFA issued Circular No.1129[68], which informed members about the creation of the NDRC Standard Regulations and, in its content, reported that in order to make the regulations as acceptable as possible and in keeping with the composition of FIFA's own Dispute Resolution Chamber, the regulations state that the NDRC members must be composed of an equal number of player and club representatives. The NDRCs must also guarantee fair proceedings. In this regard, there was a particular reference to circular no. 1010 of 20 December 2005.

This evolution of how FIFA treats the NDRC shows how close it has sought to be from an arbitral tribunal. Likewise, how much she sought to make the NDRC look like the DRC, precisely because the latter not only created the minimum standards for the first, but also respects them.

The importance of this comparison of the DRC in relation to the NDRC is due to the fact that both CAS and the SFT recognized a NDRC as an arbitral tribunal, in different opportunities, but they do not recognize the DRC. Based on these explanations, since the NDRC is a mirror of the DRC, following the same line of action of the same principles, there would be some lack of logic in accepting the first but not the second one.

This argument is not convincing in itself, requires that a few more requirements be met and will not characterize the DRC as an arbitral tribunal solely because the NDRC is. Nevertheless, it serves as another argument that adds to the discussion. Because of that, other elements of the arbitration must be debated, as it follows.

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[68] FIFA Governance. http://www.fifa.com/about-fifa/official-documents/governance/index.html. Last visited 01/06/2018.

3.3 Elements of the Arbitration Agreement

The definition of "arbitration agreement" is as uncertain as the definition of "arbitral award". Many institutions around the world have tried to provide their own definition, none of them as narrow as necessary to clear all doubts whether an agreement is valid to arbitration or not.

According to the NY Convention, an arbitration agreement is an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not[69].

To submit an award to the NY Convention a number of requirements are necessary[70] and "an agreement to arbitrate disputes that may arise" is the most important to this debate. A dispute resolution will only happen through arbitration, if there is an arbitration clause - or an agreement, which must be presented in written form[71].

Another important feature of arbitration is that it is a consensual process, a result of the free manifestation of the parties involved, through the arbitration agreement. However, there are exceptions, which will be discussed in moments.

Under Swiss law, according to the PILS, the agreement is valid in substance if it conforms with either (i) law chosen by the parties, or (ii) to the law governing the subject-matter of the dispute, in particular the law governing the main contract, or (iii) if it conforms to Swiss law. Moreover, for the agreement to be valid, it should include the manifestation of the parties that the dispute should be decided in arbitration and a specification of the dispute or of the legal relationship subject to arbitration[72].

Seven key points[73] must be analyzed on the arbitration agreement, to assess its validity: (a) the existence of an agreement to arbitrate, (b) scope of the disputes, (c) the use of an

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[69] NY Convention, art. II(1).

[70] BORN, Gary B. *International Arbitration: Law and Practice – Second Edition*. Kluwer Law International, 2016, p. 49.

[71] Article 7 of the UNCITRAL Model Law explains that the agreement is considered "in writing" if it is recorded in any form, even if the contract is concluded orally or by other means.

[72] ZUBERBÜHLER, Tobias, MÜLLER Christoph & HABEGGER Philipp. Swiss Rules of International Arbitration - Second Edition. Schulthess, 2013, with reference to the Swiss Federal Tribunal case DFT 129 III 675.

[73] BORN, Gary B. *Op. cit.* p. 34.

institution and its rules, (d) the seat of the arbitration, (e) the issues on the matter of the arbitrators, (f) the language of the arbitration and the aforementioned (g) choice of law.

The points "agreement to arbitrate" and the "issues on the matter of the arbitrators" have a section of their own to be discussed[74], while the other five can be found on the RSTP, as it follows:

Key point	Legislation
(b) scope of the disputes	RSTP Article 22
(c) institution and its rules	Rules Governing the Procedures of the PSC and the DRC
(e) seat of arbitration	Rules Governing the Procedures of the PSC and the DRC - Article 10
(f) language of the arbitration	Rules Governing the Procedures of the PSC and the DRC – Article 9 RSTP Article 28
(g) choice of Law	Rules Governing the Procedures of the PSC and the DRC - Article 2

3.3.1 Arbitration Agreement by reference

Here lies the one of the questions that gives validity and power to the DRC to arbitrate: does the FIFA Legislations contain an Arbitration Agreement, fulfilling the requirements needed?

The first and obvious answer is the easy way out, which is if there is a clause providing, in a simplified way that "disputes that may arise from the present contract must be

[74] The reason why the agreement to arbitrate and the issues concerning the arbitrators must be analyzed with scrutiny is that they are the most sensitive points to validate the arbitration within this discussion.

submitted to the DRC", the requirement to arbitrate on the DRC is fulfilled[75]. That would be the case of a dispute between a club and a player, considering that the contract between them is the trigger and this is instrument analyzed in order to establish the competence.

However, when it comes to disputes between clubs, when there is no contract between the parties, or when that clause does is not present in the contract – taking in consideration the previous mentioned dispute between a club and a player – the figure of the "arbitration agreement by reference" is the answer.

These arbitration clauses are not on the contract between parties or a special document for that purpose, but on a separate text, statute or contractual terms, which completes by reference the original contract[76]. The Swiss Society of Engineers and Architects ("SIA"), the International Federation of Consulting Engineers ("FIDIC") and the Grain and Free Trade Association ("GAFTA")[77] are examples of the existence and acceptance of the arbitration agreement by reference.

In the light of the Swiss law, Muller[78] on his analysis of the Chapter 12 of PILS, specially article 178, debates that two problems arise from the arbitration agreements by reference: (i) if the agreements comply with the formal requirements of the law (formal validity) and (ii) if a reference to another document is sufficient as to the issue of consent (substantive validity).

As to the first question, the existence of the arbitration clause in the document incorporated by reference does not need to be mentioned in the wording of the clause setting forth the reference. The formal requirement are complied with when both reference and its object of the reference are in text-form, provided the parties' consent also covers the object of the reference according to the law applicable pursuant to para. 2

[75] It is not the intent, at this moment, to discuss the other requirements, but simply assess if the DRC has the competence to "act" as an arbitral tribunal in light of the will of the parties' vis-à-vis the arbitration agreement.

[76] MULLER, Cristoph. *Arbitration in Switzerland – The Practitioner's Guide (Manuel Arroyo ed.)*. Kluwer Law International, p. 61, para. 27, 2013.

[77] LALIVE, POUDRET & REYMOND, pp. 319-320; ABDULLA, p. 17; WENGER & MÜLLER, art. 178, para. 18 *in ibidem*.

[78] MULLER, Cristoph. *Op. cit.*.

of the article 178 PILS. A written document signed by all parties is not required[79], as long as the clause exists in writing it meets the requirement.

On the matters of the second question, the substantive validity of arbitration must be examined within the specificity of sport.

When athletes and clubs join their national association, they comply with the rules set forth by the association, which provides that disputes will be settled by arbitration[80][81]. These statutes are in compliance with FIFA Legislation. That includes, for the purpose of this line of thought, the RSTP, which determines the competence of the DRC and the PSC to arbitrate (the cases established on article 22 in conjunction with articles 23 and 24). The idea is drafted this way: article 22 sets the competence of FIFA, stating, "FIFA is competent to hear" those set of cases. In addition, Article 23 sets the competence of the PSC, stating that it "shall adjudicate". Finally, article 24 also states the competence to "adjudicate", by the DRC, on its enlisted cases.

Joining these articles, as well as the definition given by FIFA on the DRC, which is a deciding body that *provides arbitration* and dispute resolution based on equal representation of players and clubs and an independent chairman, one could conclude that *there is* an arbitration agreement by reference on the RSTP.

When a club decides to become a member, joining the National Federation, it complies with the rules of the federation and consequently the rules of FIFA, namely the RSTP, and it agrees that the DRC is competent to *arbitrate*. On national level, the competence lies with NDRC[82].

When FIFA released the National Dispute Chamber Resolutions Standard Regulations[83], it repeated the idea stating on its preamble that it created the DRC, an arbitration tribunal based on the principle of equal representation of clubs (employers) and players

[79] POUDRET, Jean-François & BESSON, Sébastien. Comparative Law of International Arbitration. 2ed., n. 193 *in* ZUBERBÜHLER, Tobias, *et al. Op. cit.*, p. 239.

[80] MAVROMATI, Despina, e REEB, Matthieu. The Code of the Court of Arbitration for Sport: Commentary, Cases and Material. Ed. Wolters Kluwer Law & Business. 2015. P. 26.

[81] The arbitration clause is very commonly found on sports governing bodies' regulations, but it is not unanimous. For the sake of this work, we will consider those who have the clauses.

[82] The NDRC is competent handle disputes between clubs and players regarding employment and contractual stability as well as those concerning training compensation and solidarity contributions between clubs belonging to the same association.

[83] FIFA Laws and Regulations.

(employees), to offer players and clubs a faster and cheaper mechanism to resolve employment-related disputes of an international dimension.

The right to appeal to CAS follows the same logic. There is no arbitration clause itself, but the jurisdiction of the CAS is defined by reference to the FIFA Statutes, *inter alia*, in article 58, which provides that it is possible to appeal to the CAS against final decisions issued by FIFA judicial bodies, national confederations or federations, provided that there is no form of internal remedies.

The same happens with the World Anti-Doping Agency ("WADA"), which has the prerogative to appeal to CAS against any internally final and binding doping-related decision passed in particular by FIFA, the confederations, member associations or leagues in accordance with the provisions set out in the FIFA Anti-Doping Regulations[84].

Furthermore, as previously said, arbitration clauses contained in the statutes of an association are binding on its members for litigation[85], which means, a party who decides to join the FIFA is bound to the statues of the association and its clauses. Going even further on the will of the parties to consent, when they choose to initiate a procedure in the DRC, they prove the thesis that the consent was given, because they confess the will to see the dispute settled in that body.

Therefore, the second issue raised by Muller[86] is solved, the matter of consent, with the compliance of players and club with national association statutes and, by consequence, FIFA Statutes.

The Swiss Federal Tribunal recognized the existence of an arbitral clause by reference, on the case Dodô vs. FIFA & WADA[87]. It followed the notion above draw: Dodô, the

[84] FIFA Statues, Art. 58(6).
[85] LUCK, Corina. *Op. cit.*.
[86] MULLER, Cristoph. *Op. cit.*.
[87] Case 4A_460/2008. The player Ricardo Dodô tested positive for the use of a prohibited substance, after a random check and was suspended for 120 days by CBF. Dodô appealed to the Superior Tribunal de Justiça Desportiva ("STJD") and the Court granted the appeal. Both FIFA and WADA appealed to CAS and the Court held that it had jurisdiction, annulled the decision of the STJD and suspended the player for 2 years. Dodô appealed to the Federal Tribunal, which granted a stay but eventually rejected the appeal. One of the arguments used by the player was that CAS had no jurisdiction on the appeal, because the matter in discussion related to a purely national context without any international connection and that the decision was not a "CBF decision", but from a Brazilian Court, removing any jurisdiction entitled to FIFA or WADA. The Court ruled against this argument:
"6.
6.1 R47 of the CAS-Code reads as follows:

player, belonged to CBF, the national association, which is a member of FIFA, and the FIFA Statutes gives jurisdiction to CAS to adjudicate an appeal when a judicial body of a member issues a decision. In this case, the Tribunal affirmed that it was in line with the case law, which holds valid the global reference to an arbitration clause contained in the statutes of an association[88].

This argument was present in a previous case where the Court ruled that the reference need not explicitly cite the arbitration clause, but may include by way of general reference a document containing such a clause. Moreover, that it could also be assumed that a

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'An appeal against the decision of a Federation, Association or sports-related Body may be filed with the CAS insofar as the Statutes or Regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the Statutes or Regulations of the said sports-related Body.'
Art. 61 (1) of the FIFA Statutes (2007 edition) provides:
'Appeals against final decisions passed by FIFA, particularly the judicial bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question.'
According to Art. 61 (5) and (6) of the FIFA Statutes, FIFA and WADA have the right to appeal to the CAS against any internally final decision in doping matters.
6.2 These FIFA rules are binding for the Appellant. As a professional football player playing at the international level, he is a member of the Brazilian Football Association CBF, which for its part is a member of FIFA. Accordingly, the FIFA Rules, particularly the jurisdiction of the CAS according to Art. 61 of the FIFA Statutes, apply also to the Appellant. The CAS accurately acknowledged that. The Appellant is of the opinion that the requirement of R47 of the CAS-Code, according to which an appeal against a decision of an Association may be made to the CAS 'insofar as the Statutes or Regulations of the said Body so provide' is not met because the Rules of the Brazilian Association do not provide for any appeal to the CAS. (The Appellant) cannot be followed. Art. 1 (2) of the CBF Statutes provides, among other things, that a player belonging to the CBF must follow the FIFA Rules. Such a general reference to the FIFA Rules and thus to the appeal rights of FIFA and WADA contained in the FIFA Statutes is sufficient to establish the jurisdiction of the CAS pursuant to R47 of the CAS-Code, by analogy with case law which holds valid the global reference to an arbitration clause contained in the statutes of an association (Decision 4P.253/2003 of March 25, 2004 at 5.4, ASA-Bull. 2005 p. 128 ff., 136, and 4P.230/2000 of February 7, 2001 at 2a, ASA-Bull. 2001 p. 523 ff., 528 f., with references; also see BGE 133 III 235 at 4.3.2.3 p. 245 and 129 III 727 at 5.3.1 p. 735, with references).
6.3 The Appellant further argues that the STJD would be an independent Sport Court. Its decision would therefore not have to be considered as appealable decisions of a FIFA member within the meaning of Art. 61 of the FIFA Statutes. The argument fails simply because the factual findings of the lower court bind the Federal Tribunal (Art. 105 (1) BGG; at 5.1 in the beginning). The CAS concluded as a matter of fact that the STJD is an organ of the CBF on the basis of a letter from the President of the STJD of September 13, 2007, in which he said among other things: 'it (the STJD) is just one of the bodies of the CBF…'6. Against that factual finding, the Appellant raises no grievance within the meaning of Art. 190 (2) PILA. The Federal Tribunal must therefore assume that the STJD is an organ of the CBF, and that accordingly the CAS rightly held the decision of the STJD as a decision from a FIFA member within the meaning of Art. 61 of the FIFA Statutes. That the STJD exercises its jurisdictional activity independently and enjoys independence in its organisation changes nothing to the foregoing. The decisive factor is that the STJD is an organ of the CBF and that it is institutionalised by the CBF Statutes.
6.4 The Appellant's grievance that the CAS should not have accepted to entertain the appeals by FIFA and WADA proves to be unfounded. Therefore the appeal must be rejected."

[88] *Ibidem* and COCCIA, Massimo. International Sports Justice: The Court of Arbitration for Sport. European Sports Law and Policy Bulletin, International and Comparative Sports Justice. Issue 1, 2013, p. 35.

sportsman recognizes the regulations of a federation with which he is familiar if he applies to that federation for a general competition or playing license[89].

In addition to that, the German Courts stated on the Pechstein case, that mandatory arbitration in sport was not in itself problematic, nor did it constitute an abuse of a dominant position. The Court accepted that there might be good and valid legal reasons why sports federations would prefer to refer disputes to arbitration. It makes sense, for the sake of uniformity, that international sports disputes should be referred to a single forum and that different judgments of various national courts with diverse views should be avoided[90]. The BGH[91] confirmed that in sports matters, the need for international uniformity of decisions trumps the requirement of a "voluntary" arbitration agreement[92].

Another important point on the validity of the arbitration agreement is the absence of jurisdiction of state courts in favor of the DRC[93]. The Swiss Federal Tribunal decided that in order to be valid, the arbitration clause must at least include the essential elements that are the concurring will of the parties to submit their dispute to an arbitral tribunal to the exclusion of a state court and the description of the dispute(s) covered by the agreement[94].

The conclusion it can be reached here is that, even though there is no clause explicitly saying that disputes will be resolved by *arbitration* on the DRC, there is a clause saying that the DRC will resolve and that recourse to ordinary courts is denied. In addition, considering all that has been said, especially by own definition of FIFA, the DRC *is* a body that provides arbitration. Therefore, when it says it will *resolve*, it means it will *arbitrate*.

In accordance with the essential elements of an arbitration clause, FIFA legislation, which the players and clubs have chosen to be part of, contains the necessary provisions regarding (i) the intention to resolve disputes through the DRC, a chamber that provides arbitration and (ii) that recourse to ordinary court will not occur. The same logic idea that is provided by the Legislations to an appeal to CAS.

[89] SFT 4P.230/2000, 2.a.
[90] BLACKSHAW, Ian S. *Op. cit.* p. 140.
[91] BGH, judgment of 7 June 2016 – KZR 6/15.
[92] MARTENS, Dirk-Reiner and ENGELHARD, Alexander. Germany, *in* GUROVITIS, András. *Op. cit.* p. 96.
[93] FIFA Statutes, art. 59(2).
[94] Case 4A_676/2014.

On the previous mentioned Brazilian case, where the São Paulo's 36th Chamber recognized as arbitral a decision rendered by the CRL, the arbitration clause mentioned by the Court did not have the word *arbitration* in it and still was valid[95].

In the United Kingdom, membership of the Premier League shall constitute an agreement in writing between the league and clubs and between each of the clubs to submit all disputes, which arise between them, whether arising out of the rules of the Premier League or otherwise, to final and binding arbitration[96].

In Portugal, under the terms of the Statutes[97], at the time of registration or affiliation to the Federação Portuguesa de Futebol (Portuguese National Federation, "FPF"), the candidates subscribe a declaration of recognition to the Arbitral Tribunal of the FPF and the CAS. However, it is important to note that there is a specific declaration for this recognition at the time of registration[98].

Going back to the analysis of the article 178 PILS, as long as the requirements are met, the wording of the clause is not of importance. Therefore, it is reaffirmed that the agreement to arbitrate is valid.

3.3.2 The issues concerning the arbitrators

Here lies the most sensitive part of the discussion, because it is here that the theory of the arbitral nature of the decisions of the DRC can be overturned without recourse.

The article 190(2) PILS provides the grounds to challenge an arbitration award on the Federal Tribunal. Given that the DRC award is an arbitration award, for the sake of this

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[95] See note 65. The clause was written as follows: "As partes elegem os Comitês da FÉDÉRATION INTERNATIONALE DE FOOTBALL ASSOCIATION – FIFA e da CONFEDERAÇÃO BRASILEIRA DE FUTEBOL – CBF, para dirimir qualquer dúvida ou litígio oriundo do presente instrumento". Translated into English, is understood as follows: "The parties elect the Committees of FÉDÉRATION INTERNATIONALE DE FOOTBALL ASSOCIATION - FIFA and of the BRAZILIAN FOOTBALL CONFEDERATION - CBF, to resolve any doubt or litigation arising from this instrument".

[96] Premier League Handbook 2017-2018, Section X, article X.2.

[97] Estatutos e Regulamento Eleitoral da Federação Portuguesa De Futebol, art. 10(4). http://www.fpf.pt/Institucional/Documenta%C3%A7%C3%A3o. Last visited 04/06/2018.

[98] *Ibidem*, art. 10(5) under c.

particular discussion, the only reason I can see that would give motive to lodge an appeal to the Courts would be the wrongful appointment of the arbitral tribunal[99].

The composition of both PSC and DRC is determined according to article 4 of the Rules Governing the Procedures of the PSC and the DRC. It states that the chairman, deputy chairman and members of the PSC and of the DRC shall be chosen by the FIFA Council. Furthermore, the twenty-six members of the DRC, made up of an equal number of player and club representatives, shall be appointed on the proposal of the players' associations and the clubs or leagues. The number of members that will compose the panel to resolve the dispute is defined in the RSTP and in the FIFA Governance Regulations[100]. A crucial difference between the PSC and the DRC is what differentiates them from the point of view that is discussed here. While in the latter, the members are chosen with the participation of clubs and athletes, in the former they are not. This will be clarified in moments.

To be a member of the PSC, which is a standing committee, the rules are set on the Governance Regulations and it determines that members of the standing committees that require independence - and their immediate family members - cannot have any other official function in FIFA, a confederation or a member association, including during the four years that precedes the initial term. They also cannot have any material business relationship with FIFA, a confederation or member association and the same requirement of the four years applies here.

Nevertheless, the FIFA Legislations does not refer to the members as arbitrators. Yet, FIFA states that the DRC will arbitrate[101].

[99] It is perfectly reasonable that other options occur. However, within the scope of this paper, it can be seen that the first and the last today cannot occur, precisely because the DRC is not considered as an arbitral tribunal. Of the five grounds of Article 190 (2), the reasons set forth under b, c and d could be applied to the DRC because it is the Chamber that decides its jurisdiction, and it could be wrong in it; the Chamber could rule *ultra petita* or fail to rule in one of the claims and could fail in the equality of the parties and their right to be heard. As today the DRC is not treated as an arbitral tribunal, there is no discussion about its composition and there is no way of talking about annulling a decision of the DRC for violation of public policy. Therefore, as the purpose of the work is its recognition as an arbitral tribunal the issues outlined under a and e will arise.

[100] FIFA Governance Regulations, art. 33.

[101] By definition, once it recognizes the DRC as a chamber to arbitrate.

The agreement under discussion is the arbitration agreement by reference, where the parties comply with the rules set by FIFA Legislations. In that order, they also agree with the institution as the authority to appoint arbitrators[102].

As mentioned a few paragraphs above, the main difference between the PSC and the DRC for this chapter is the way in which its members are chosen. In the PSC the members are chosen by the FIFA Council, stripping from this judicial body the independence and representativeness needed for this discussion, because there is no participation whatsoever by the athletes or clubs.

The formation of the DRC is determined by the rules of article 24(2) of the RSTP in accordance to the Rules Governing the Procedures of the PSC and the DRC. The first is clear on the determination that the DRC shall consist of equal numbers of club and player representatives, except in those cases that may be settled by a DRC judge. The latter complements stating that the twenty-six members of the DRC, made up of an equal number of player and club representatives, shall be appointed on the proposal of the players' associations and the clubs or leagues[103].

As stated on the FIFA Commentary on the Regulations on the Status and Transfer of Players ("FIFA Commentary") DRC consists of members representing players and clubs with an independent chairman and it is based on the fundamental principle of equal representation of both stakeholders.

It is possible to challenge the appointment of an arbitrator. The parties may challenge members of the DRC if there is legitimate doubt as to their independence and impartiality[104].

Not only that, the parties can challenge the whole panel, in order to guarantee the impartiality and validity of the proceedings. If that would be the situation, if the DRC is no longer able to function as a consequence of challenges, the FIFA Council shall make a final decision on the challenges and, if necessary, appoint an ad-hoc committee to deal with the substance of the case[105].

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[102] BORN, Gary S. *Op. cit.* p. 38.
[103] FIFA Rules Governing the Procedures of the PSC and the DRC, art 4.
[104] *Ibidem*, art. 7(2).
[105] *Ibidem*, art. 7(3).

The reality of the CAS proceedings is not so different, in the sense that parties can appoint the arbitrators, but they must choose from a closed list provided by the International Council of Arbitration for Sport ("ICAS") and they cannot choose whoever is included on that list. Whenever a party nominates for a case an arbitrator who is not on the list, the CAS Court Office treats this situation as if no arbitrator had been chosen and invites the interested party to choose an arbitrator from the CAS list[106].

The ICAS is responsible for the inclusion and exclusion of the arbitrators to the list of CAS arbitrators[107]. To explain the absence of participation of the athletes or clubs on this list, the formation of ICAS should be analyzed: the first four members are appointed by the International Federations, the next four members by the Association of the National Olympic Committees and then four more are appointed by the International Olympic Committee. Only after the definition of this first twelve, are elected four to represent the interests of the athletes and the first twelve elect these four[108].

On the other hand, the members of the DRC are appointed *by* the parties, albeit indirectly, when they elect FIFPro representatives who will nominate the members to the chamber.

This situation follows the same reasoning as the arbitration agreement by reference. When players join the clubs, they become affiliated the national players associations and these

[106] COCCIA, Massimo. *Op. cit.*, p. 46.

[107] Statutes of ICAS and CAS, article C(1)S14: "The ICAS shall appoint personalities to the list of CAS arbitrators with appropriate legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language, whose names and qualifications are brought to the attention of ICAS, including by the IOC, the IFs, the NOCs and by the athletes' commissions of the IOC, IFs and NOCs. ICAS may identify the arbitrators with a specific expertise to deal with certain types of disputes."

[108] *Ibidem*, B(1) article S4.
"ICAS is composed of twenty members, experienced jurists appointed in the following manner:
1. four members are appointed by the International Federations (IFs), viz. three by the Association of Summer Olympic IFs (ASOIF) and one by the Association of the Winter Olympic IFs (AIOWF), chosen from within or outside their membership;
2. four members are appointed by the Association of the National Olympic Committees (ANOC), chosen from within or outside its membership;
3. four members are appointed by the International Olympic Committee (IOC), chosen from within or outside its membership;
4. four members are appointed by the twelve members of ICAS listed above, after appropriate consultation with a view to safeguarding the interests of the athletes;
5. four members are appointed by the sixteen members of ICAS listed above, chosen from among personalities independent of the bodies designating the other members of the ICAS". See http://www.tas-cas.org/en/icas/code-statutes-of-icas-and-cas.html.

associations are affiliated with the FIFPro[109], which is the responsible for appointing the members to the DRC[110]. When participating on the choosing of the FIFPro internally, they choose the internal representatives who will be the ones who will choose the DRC members[111].

In addition, pursuant article 24(2) of the RSTP, the members of the DRC shall designate a DRC judge for the clubs and one for the players from among its members when adjudicating a dispute, in order to assure the best interests of the parties and full impartiality and independence. The chamber will always have the same number of club and player representatives, except in cases that may be settled by a single judge.

The case law of the Swiss Supreme Court is based on the fundamental principle that an arbitral tribunal must offer, like any state court, sufficient guarantees of independence and impartiality[112][113]. This is so important that it has been repeated several times in this work. This means that as long as the panel's impartiality and independence are not at risk, the arbitrators appointed by the DRC to resolve the dispute do not endanger the integrity of the panel, noting that there will be representative of both the athletes and the clubs.

In my opinion, even if what was said above is supported and accepted, FIFA could adapt its legislation to suit the reality of the arbitration or at least to approximate the system that CAS has developed. One of the changes that would greatly facilitate the acceptance of an arbitral nature to the rewards of the DRC would be to give the parties the option of choosing the arbitrators within the list of DRC members as is done - and accepted - in CAS.

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[109] The players affiliate with the national entities, which are affiliated with FIFPro. Currently, FIFPro has 60 member-states affiliated, and that is way less than the number of affiliate FIFA has, but that does not take away the representative characteristic of the elected members of the DRC here discussed.

[110] FIFA Commentary, article 24. Composition, comment 2(2): "The ten members representing the players are proposed by FIFPro, the international players' union, whereas the ten club representatives are proposed by associations and leagues all around the world from amongst their clubs. The FIFA Executive Committee formally appoints the proposed members", with mention to article 4 of the Rules Governing the Procedures of the PSC and the DRC.

[111] FIFPro Statutes, article 10. https://www.fifpro.org/en/about-fifpro/statutes. Last visited 01/06/2018.

[112] RIGOZZI, Antonio. *Challenging Awards of the Court of Arbitration for Sport*. Journal of International Dispute Settlement, Volume 1, Issue 1, 2010, p. 236.

[113] See notes 46 and 60.

3.4 Qualification of the decision as arbitration award

The NY Convention presents the term "arbitral award" but does not explain it[114]. In fact, it does not make any objective comment to the point of defining exactly what characterizes an award as being arbitral. Thus, it is up to doctrine and jurisprudence to try to define its meaning.

It is necessary to say that the analysis is done on a broad scale, because the recognition of the award as arbitral will depend on the legal order where it is being enforced, precisely because of what determines the art. 1(1) of the NY Convention[115].

To Swiss law, the award rendered by the tribunal is final from its notification[116] and it has binding effect, which leads to its enforceability. To Swiss case law, to consider a decision of a private institution as an "arbitral award", it must be comparable to that of a state court. In this view, decisions taken by the body of sport federation, which is a party to the case, even if the body is called an "arbitral tribunal", constitute a mere manifestation of will issued by the federation concerned and thus this is an act of governance and not a judicial act. Therefore, it could not be considered as an "arbitral award" in any case[117].

However, despite this idea and after all that has been discussed, a number of factors must be analyzed to reach the conclusion concerning the nature of the DRC's decision.

As we have seen above, it is possible to say that we are dealing with a valid arbitration clause. Successively, the other requirements for the formation of an arbitral tribunal are satisfied, the most sensitive being the question of the choice of arbitrators, which, for the purposes of this study, will be considered as settled[118].

[114] New York Convention, art. I(2): The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

[115] *Ibidem*, art. I(1): This Convention shall 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, and arising out of difference between persons, whether physical or legal. It shall also apply to the arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

[116] PILS, art. 190(1).

[117] See note 60.

[118] Even though it would be much better if the suggested changes had already been made.

Equally resolved is the subject of characterization of the DRC's decision as being issued by a "private institution". As we have seen, this idea developed from a case in 1993, where the independence and impartiality of the panel could be questioned, which is not the case today, since FIFA is not part of the DRC procedures.

Therefore, we have a tribunal established based on a valid arbitration clause and with arbitrators appointed by representatives of the parties, guaranteeing their independence and impartiality. In addition, it presents clear principles of parity when constituting the arbitration court, with right to an independent and impartial court, fair hearing, contentious proceedings and equal treatment.

It seems that this is the scrutiny needed to compare the decision of a tribunal to the decision of a state court. Moreover, this is what the courts and the doctrine determine as necessary, this scrutiny. There is, on the other hand, no determination or guidance as to *who* will issue that decision. That is, the mere fact that a supposed "private institution" makes such a decision does not change its character. They do not change all the elements that formed the court and therefore do not change the nature of their decisions. As seen above, the DRC in filling all these elements acquires the arbitral nature for its decisions.

4. CONCLUSIONS

After all abovementioned, several scenarios can be presented to analyze the enforceability of the decision issued by the DRC. However, the mid-process analysis applies to all scenarios, which is the establishment of the arbitral tribunal, its procedures, and the path to the decision.

From what was seen in the case of Atlético Paranaense v. Metalist, it is important to start and continue the present discussion to avoid similar events. That is, the party wins a procedure in the DRC but fails to run the award, because of an event that can remove the competence of the FIFA Disciplinary Committee for this enforcement.

As stated in the introduction, it is unthinkable that the successful party appeals to CAS only for the award to have arbitration enforceability to pursue enforcement through the NY Convention. That is, it is not safe to depend on the loser's appeal for the award to have value.

In this regard, it was possible to see that the DRC has the minimum requirements and procedures expected from an arbitral tribunal, although there is some discussion as to how the arbitration panel is formed, considering the issue about the choice of arbitrators. Like the CAS - which today has a consolidated arbitration nature - the list of members, who may already be called arbitrators, is closed. However, *unlike* the CAS, the DRC arbitrators are appointed by the parties, albeit indirectly, which shows the equal protection of the interests of whoever litigates in the DRC, whether it be a club or a player. Moreover, as previously discussed, the DRC panel is in accordance with the international arbitration legislation and the Swiss legislation, by total attendance to the PILS.

CAS[119] already stated that in order to be recognized as "independent" and "duly constituted", a NDRC must respect, *inter alia*, the principle of equal representation of players and clubs. And this is exactly what the DRC offers, as sustained in this paper and seen in article 24 of the RSTP.

As to the nature of the decision, now that it has been established that the proceedings are consistent with an arbitral tribunal, it must be considered that, according to the provisions of the FIFA legislation, which determines that decisions are final and binding, those

[119] CAS 2012/A/2983.

decisions are arbitral in nature. This conclusion persists even though part of the doctrine and jurisprudence affirms that these decisions are merely administrative, or emanated by a private administrative institution. In the opinion of this writer, the leading cases judged so that this understanding lasted during the time did not portray correctly the procedures, nature and form with which the DRC established and treated the cases discussed on these leading cases. There was a lack of adequate analysis of the existence of a valid arbitration clause, the constitution of the arbitral tribunal and scrutiny during the procedure to reach the decision obtained. The mere definition that decisions of the DRC are administrative decisions issued by a private body is not sufficient to convince that such decisions are not arbitral in nature.

In the Gundel case, in 1993, the independence and impartiality of the panel could be questioned, which is not the case today, since FIFA is not part of the DRC procedures.

Therefore, the analysis must be made according to the manner in which the dispute is placed before the DRC. The first scenario, and that is the easiest to analyze, is if in the dispute submitted to the DRC contains an arbitration clause stating that the dispute resolution will occur in the DRC, giving it immediate jurisdiction to do so. Thus, the decision issued by the DRC in this case is arbitral in nature.

A second scenario would be the dispute submitted to the DRC without the existence of this arbitration clause, causing the arbitration clause by reference to be brought into discussion, granting jurisdiction to the DRC. The fact that one of the parties submits the case to the DRC already shows consensual manifestation, and the fact that the other party responds without disputing the procedure vis-à-vis the arbitration clause, also demonstrates consensus. Likewise, the decision is arbitral in nature.

Even if there were a manifestation of the non-existence of the clause, it is understood that the arbitration clause by reference would be invoked to resolve the issue, without changing the result.

On the matter of the possibility to submit an appeal to CAS, a dispute brought to the DRC that is not appealed to CAS is arbitral in nature. In the case of an appeal to the CAS, the jurisdiction of the CAS is already consolidated, so the arbitral nature is indisputable. Moreover, the competence of CAS is set by the FIFA regulations, on the same grounds as the arbitration agreement by reference to the DRC. And this possibility of an appeal to

CAS does not take the final and binding nature of the award issued by the DRC, because parties agreed on this possibility[120].

However, this analysis is general, since the enforcement of the decision under the NY Convention would be carried out in the country of the losing party and, therefore, the legislation of its country should be analyzed in order to know whether the decision would be recognized as an arbitration decision or not. However, for all that has been discussed, pursuant the international and Swiss law, in this writer's opinion, there is a great chance of recognition of the decision and little space for its refusal.

Finally, since the decision of the DRC is considered as arbitral and if such a decision is not appealed to the CAS, this DRC decision should be considered jurisprudence[121], which is an essential part in the formation of *lex sportiva*.

With the present discussion, I have tried to stick to the situations and arguments above. I am aware that there are several exceptions and specific situations that derive from what has been discussed, but that escape the scope of this moment and serve as fuel for future work, given the importance of the subject for the academic community, professionals working in the legal environment this issue, as well as to players who act directly in the construction, maintenance and evolution of the world of football.

[120] See note 52.

[121] FIFA even stated on the Preamble of the NDRC Standard Regulations: “The experience gained within the scope of the chamber’s work since its establishment in 2002 has been very positive *and the jurisprudence created* has contributed towards increasing legal certainty”. (italic inserted by the writer)

5. BIBLIOGRAPHY

Doctrine

AMORÉS MARTINES, Agustín & SAN TORCUATO CAFFA, Santiago. *Enforcement of CAS awards: A general review of the available options and its particularities*. Football Legal #4, 2015.

BLACKSHAW, Ian S. *International Sports Law: An Introductory Guide*. ASSER Short Studies in International Law. Asser Press. The Hague, 2017.

BORN, Gary B. *International Arbitration: Law and Practice – Second Edition*. Kluwer Law International, 2016.

COCCIA, Massimo. International Sports Justice: The Court of Arbitration for Sport. European Sports Law and Policy Bulletin, International and Comparative Sports Justice. Issue 1, 2013.

DE WEGER, Frans. *The Jurisprudence of the FIFA Dispute Resolution Chamber – Second Edition*. ASSER International Sports Law Series. Asser Press. The Hague, 2016.

GUROVITIS, András. *The Sports Law Review – Second Edition (András Gurovitis ed.)*. Law Business Research, 2016.

JAVALOYES SANCHIS, Vicente. *El régimen jurídico del Tribunal Arbitral del Deporte (Tesis Doctoral)*. Retrieved from Institut Nacional d'Educació Física de Catalunya (Lleida), 2014. Copyright deposit L. 1222-2014, available at <http://hdl.handle.net/10803/284835>.

LUCK, Corina. *Arbitration in football: issues and problems highlighted by FIFA's experiences with the court of arbitration for sports*. Schulthess, 2004.

MAVROMATI, Despina. *Res Judicata in Sports Disputes and Decisions Rendered by Sports Federations in Switzerland*. TAS/CAS Bulletin, 2015/1, pp. 40-52. Lausanne, 2015.

MAVROMATI, Despina, e REEB, Matthieu. *The Code of the Court of Arbitration for Sport: Commentary, Cases and Material*. Ed. Wolters Kluwer Law & Business. 2015.

MULLER, Cristoph. *Arbitration in Switzerland – The Practitioner's Guide (Manuel Arroyo ed.)*. Kluwer Law International, 2013.

POUDRET, Jean-François & BESSON, Sébastien. *Comparative Law of International Arbitration*. 2ed., n. 193, 2007.

RIGOZZI, Antonio. *Challenging Awards of the Court of Arbitration for Sport*. Journal of International Dispute Settlement, Volume 1, Issue 1, 2010, Pages 217–265, available at <https://doi.org/10.1093/jnlids/idp010>.

RIGOZZI, Antonio, BESSON, Sébastien & MCAULIFFE, William. *International Sports Arbitration*. GAR – The European, Middle Eastern and African Arbitration Review 2016. Global Arbitration Review, 2015.

RIGOZZI, Antonio & HASLER, Erica. *Sports Arbitration Under the CAS Rules*. Arbitration in Switzerland – the Practitioner's Guide, Chapter 5, arts R37 + R47 to R70 CAS Code, pp. 936-947 and 982-1083. Kluwer Law International, 2013.

RIGOZZI, Antonio & ROBERT-TISSOT, Fabrice. *"Consent" in Sports Arbitration: Its Multiple Aspects*. Sports Arbitration: A Coach for Other Players, edited by Elliott Geisinger and Elena Trabaldo-de Mestral. Asa Special Series No. 41, Chapter 4, pp. 59-95. New York, 2015.

VALLONI, Lucien W. & PACHMANN, Thilo. *Sports Justice in Switzerland*. European Sports Law and Policy Bulletin, International and Comparative Sports Justice. Issue 1, 2013, Pages 599-614, available at < http://www.pachmannlaw.ch/>.

WEATHERILL, Stephen. *Principles and Practice in EU Sports Law*. Oxford: Oxford EU Law Library, 2017.

YOUD, Kate. *The Winter's Tale of Corruption: The 2022 FIFA World Cup in Qatar, the Impending Shift to Winter, and Potential Legal Actions against FIFA*. Northwestern Journal of International Law & Business, Volume 35, Issue 1 Fall, 2014.

ZUBERBÜHLER, Tobias, MÜLLER Christoph & HABEGGER Philipp. *Swiss Rules of International Arbitration - Second Edition*. Schulthess, 2013.

Jurisprudence

Brazil, TJ/SP Appeal 1005880-85.2015.8.26.0565
CAS 2003/O/460
CAS 2003/O/486
CAS 2009/A/1880, 1881
CAS 2010/A/2267, 2278, 2279, 2280, 2281
CAS 2010/A/2091
CAS 2012/A/2983
CAS 2013/A/3297
DRC Ref. Nr. 14-00770/pam
Germany, BGH KZR 6/15.
Switzerland, ATF 119 II 271
Switzerland, BGE 127 III 279
Switzerland, DFT 129 III 675
Switzerland, SFT 4A_374/2014
Switzerland, SFT 4A_460/2008
Switzerland, SFT 4A_490/2009
Switzerland, SFT 4A_676/2014

Switzerland, SFT 4P.230/2000

Legislation

Estatutos e Regulamento Eleitoral of the *Federação Portuguesa De Futebol* – FPF. <http://www.fpf.pt/Institucional/Documenta%C3%A7%C3%A3o>.

Fédération Internationale de Football Association - FIFA

- Committees. <http://www.fifa.com/about-fifa/committees/index.html>.
- Congress. <http://www.fifa.com/about-fifa/fifa-congress/index.html>.
- Council. <http://www.fifa.com/about-fifa/fifa-council/index.html>.
- Dispute Resolution System. <http://www.fifa.com/governance/dispute-resolution-system/index.html>.
- FAQ. https://www.fifa.com/about-fifa/news/y=2014/m=6/news=faq-setting-the-record-straight-2363145.html.
- Governance. <http://www.fifa.com/about-fifa/official-documents/governance/index.html>.
- Laws and Regulations. <http://www.fifa.com/about-fifa/official-documents/law-regulations/index.html >.
- Organization. <http://www.fifa.com/about-fifa/index.html>.
- Statutes. <http://www.fifa.com/about-fifa/who-we-are/the-statutes.html>.

The Premier League Handbook 2017/18. <https://www.premierleague.com/publications>.

Statutes of the *Fédération Internationale des Associations de Footballeurs Professionnels* – FIFPro. <https://www.fifpro.org/en/about-fifpro/statutes>.

Federal Act on Private International Law – PILS. <https://www.admin.ch/opc/de/classified-compilation/19870312/index.html>.

Statutes of the International Council of Arbitration for Sport – ICAS and the Court of Arbitration for Sport – CAS. <http://www.tas-cas.org/en/icas/code-statutes-of-icas-and-cas.html>.

Swiss Civil Code of 10 December 1907 (Status as of 1 January 2018). <https://www.admin.ch/opc/en/classified-compilation/19070042/201801010000/210.pdf>

United Nations Commission on International Trade Law Model Law on International Commercial Arbitration – UNCITRAL Model Law. <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html>.

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958 – NY Convention. <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html>.

World Anti-Doping Agency – WADA Code. <https://www.wada-ama.org/en/what-we-do/the-code>.