



Arbitration CAS 2010/A/2140 FK Zeljeznicar v. Racing Club Dakar & Fédération Internationale de Football Association (FIFA), award of 8 September 2010

Panel: Prof. Luigi Fumagalli (Italy), Sole Arbitrator

Football

Failure to comply with a decision of a FIFA body

Failure of a club to comply with a payment obligation related to the transfer of a player

Breach of a financial obligation irrespective of the financial situation of the debtor

Review of the measure of a sanction

- 1. The debtor that failed to pay within the deadline originally set by the decisions of a FIFA body a given amount of money to the creditor for the transfer of a player, and who breached the settlement agreements concluded with the creditor detailing installments and due dates immediately after reaching them, has failed to comply with its payment obligations. Therefore, the debtor is responsible for the disciplinary infringement contemplated by Article 64 FDC.**
- 2. Difficult financial and sporting conditions are not a justification for the failure to pay a debt due under the DRC decisions. A breach of its financial obligation to the creditor by the debtor exists irrespective of its financial situation.**
- 3. The measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules can be reviewed only when the sanction is evidently and grossly disproportionate to the offence. In this respect, the fact that the debtor waited until disciplinary proceedings had been opened to start making overdue payments, and that the debtor breached the settlement agreements with the creditor immediately after reaching them are elements to be considered in the exercise of such discretion.**

FK Zeljeznicar (the “Appellant” or the “Debtor”) is a football club existing under the laws of Bosnia and Herzegovina and has its headquarters in Sarajevo. The Appellant is affiliated to the Football Federation of Bosnia and Herzegovina, which in turn is a member of the Fédération Internationale de Football Association.

Racing Club Dakar (the “First Respondent” or the “Creditor”) is a football club existing under the laws of Senegal and is based in Dakar, Senegal. The Respondent is affiliated to the Fédération Sénégalaise de Football, which is a member of the Fédération Internationale de Football Association.

The Fédération Internationale de Football Association (FIFA or the “Second Respondent”) is the governing body of international football. It exercises regulatory, supervisory and disciplinary functions over continental confederations, national associations, clubs, officials and players, worldwide. FIFA is an association under Swiss law and has its headquarters in Zurich (Switzerland).

On 14 April 2010, the FIFA Disciplinary Committee (the “DC”) issued a decision (the “DC Decision”) holding that:

- “1. *The club FK Zeljeznicar is pronounced guilty of failing to comply with a decision of a FIFA Body in accordance with article 64 of the FDC.*
2. *The club FK Zeljeznicar is ordered to pay a fine to the amount of CHF 15,000. The fine is to be paid within 30 days of notification of the decision. Payment can be made either in Swiss francs (CHF) to account [...] or in US dollars (USD) to account [...].*
3. *The club FK Zeljeznicar is granted a final period of grace of 30 days as from notification of the decision in which to settle its debt, which includes all outstanding amounts, to the creditor.*
4. *If payment is not made by this deadline, the creditor may demand in writing of the FIFA Disciplinary Committee that six (6) points be deducted from the debtor’s first team in the domestic league championship. Once the creditor has filed this request, the points will be deducted automatically without a further formal decision having to be taken by the FIFA Disciplinary Committee. The order to implement the points deduction will be issued on the association concerned by the secretariat to the FIFA Disciplinary Committee.*
5. *If the debtor still fails to pay the amount even after deduction of the points in accordance with point 4, the FIFA Disciplinary Committee will decide on a possible relegation of the debtor’s first team to the next lower division.*
6. *As a member of FIFA, the Football Federation of Bosnia and Herzegovina is reminded of its duty to implement this decision and, if so requested, provide FIFA with proof that the points have been deducted. If the Football Federation of Bosnia and Herzegovina does not comply with this decision despite being ordered to do so, the FIFA Disciplinary Committee will decide on appropriate sanctions on the member. This can lead to expulsion from all FIFA competitions.*
7. *The costs of these proceedings in the amount of CHF 2,000 are to be borne by the debtor.*
8. *The creditor is directed to notify the secretariat to the FIFA Disciplinary Committee of every payment received” [...].*

The DC Decision was rendered on the basis of Article 64 of the FIFA Disciplinary Code, 2009 edition (“FDC”), providing for sanctions on “*anyone who fails to pay another person (such as a player, a coach or a club) or FIFA a sum of money in full or part, even though instructed to do so by a body, a committee or an instance of FIFA or CAS (financial decision), or anyone who fails to comply with another decision (non financial decision) passed by a body, a committee or an instance of FIFA or CAS*” (see below). The DC, in fact, noted that the Debtor had failed to comply with two decisions issued by the FIFA Dispute Resolution Chamber (the “DRC”) on 10 January 2008 (the “DRC Decisions”), whereby the Debtor was ordered to pay to the Creditor a total amount of EUR 150,000.

More specifically, the DC remarked that:

- “1. On 10 January 2008, the Dispute Resolution Chamber (DRC) decided that the Bosnian club FK Zeljeznicar (hereinafter also referred to as the debtor) has to pay to the Senegalese club Racing Club Dakar (hereinafter also referred to as the creditor) within 30 days as from date of notification of decision the amounts of: EUR 90'000 relating to the transfer of the player Y. and EUR 60'000 relating to the transfer of the player D. In addition to that, 5% interest would apply in case the amounts were not paid within 30 days of notification of the decision.
2. The decisions were notified to the parties on 16 October 2008 and 4 November 2008. Subsequently, the debtor lodged two appeals against the decisions before the Court of Arbitration for Sport (CAS). Without entering into the substance of the matter, CAS closed the relevant appeal arbitration procedures by means of termination orders dated 23 January 2009.
3. Since no payment was made, on 24 November 2009, disciplinary proceedings were opened against the debtor.
4. On 2 December 2009 the debtor asked for a settlement. On 3 December 2009 the creditor proposed a payment plan in monthly rates. On 9 December 2009 the debtor proposed a different payment plan that the creditor rejected the same day. On 11 December 2009 debtor accepted the payment plan proposed by the creditor and asked for the bank details of the creditor, and on same day creditor informed him on the payment details. After an exchange of correspondence between the parties, on 8 January 2010 the creditor accepted to amend the payment plan.
5. On 12 January 2010 the debtor claimed the payment of the first instalment according to the amended payment plan and the same day the creditor confirmed the payment and asked for the disciplinary proceedings to be suspended.
6. On 13 January 2010 the disciplinary proceedings were suspended.
7. On 20 January 2010, at the request of the debtor, the creditor agreed to amend the payment plan again. On 2 February 2010 the creditor informed FIFA that the debtor has not respected the payment plan and requested the resuming of the proceedings against the debtor for the payment of the outstanding amount.
8. On 3 February 2010, the disciplinary proceedings were reopened. On 4 February 2010 the debtor claimed payment of the second instalment and the creditor confirmed the payment and asked for the suspension of the proceedings.
9. On 5 February 2010 the disciplinary proceedings were suspended again.
10. On 12 March 2010 the creditor informed FIFA that the debtor breached again the payment plan and requested the resuming of the proceedings against the debtor for the payment of the outstanding amount.
11. On 15 March 2010, the disciplinary proceedings were resumed.
12. On 15 and 19 March 2010 the debtor claimed payment of the third instalment of the payment plan (in two payments).
13. On 25 March 2010, a reminder was sent to the debtor. On the same day the creditor confirmed the payments claimed by the debtor and informed FIFA of value of the outstanding amount.
14. To date, the outstanding amount relating to the transfers of the players Y. and D. rises to EUR 98,066.30 plus the relevant interest.

15. *Due to the fact that the two cases have the same parties the FIFA Disciplinary Committee decided exceptionally to merge them together in one decision”.*

On the basis of the above, the DC considered that:

- “3. *As the debtor ignored the decisions passed by the FIFA Dispute Resolution Chamber on 10 January 2008 and is withholding money from the other party, it is considered guilty under the terms of art. 64 of the FDC.*
4. *The fine to be imposed under the above-referenced art. 64 par. 1 a) of the FDC is at least CHF 5,000. In view of the circumstances, namely of the facts that the two cases were merged together in one decision and that the club FK Zeljeznicar has to pay to the club Racing Club Dakar a total amount of EUR 110,262.30 relating to the transfer of the two aforementioned players, the committee regards a fine amounting to CHF 15,000 as appropriate. This amount complies with the committee’s established practice.*
5. *In application of art. 64 par. 1 b) of the FDC, the committee considers a final deadline of 30 days as appropriate for the amount to be paid.*
6. *In accordance with art. 64 par. 1 c) of the FDC, the debtor will be warned and notified that, in the case of default within the period stipulated, points will be deducted or demotion to a lower division be ordered. A points deduction will occur if the creditor informs the secretariat of the FIFA Disciplinary Committee of the non-payment within the stipulated deadline and demands in writing that points be deducted from the debtor’s first team in the national league. Once the creditor has filed this request, the points will be deducted automatically without a further formal decision having to be taken by the committee. The order to implement the points deduction will be issued on the association concerned by the secretariat to the FIFA Disciplinary Committee.*
7. *With regard to the amount of points to be deducted, art. 64 par. 3 of the FDC is applicable, whereby the number of points deducted must be proportionate to the amount owed. In the light of the foregoing criteria regarding the amount of the fine to be imposed and in keeping with the committee’s established practice, a deduction of six (6) points is considered appropriate.*
8. *The committee decides based on art. 105 par. 1 of the FDC that the costs and expenses in the amount of CHF 2’000 shall be borne by the debtor”.*

The DC Decision was notified on 12 May 2010 to the Debtor, to the Creditor and to the Fédération Sénégalaise de Football.

On 28 May 2010 the Appellant lodged a combined statement of appeal and appeal brief with the Court of Arbitration for Sport (CAS), pursuant to the Code of Sports-related Arbitration (the “Code”), to challenge the DC Decision. In its appeal the Appellant named as respondents the Creditor and FIFA (collectively referred to as the “Respondents”).

In a letter dated 7 June 2010 the CAS Court Office acknowledged the receipt of the appeal. It however invited the Appellant to comply with all the requirements set by Article R48 of the Code, and therefore requested that the Appellant provide copy of the decision appealed against, the name of the arbitrator of its designation and copy of the provisions providing for an appeal to the CAS.

On 9 June 2010, the Appellant provided the documents requested, indicated that it wished the case to be submitted to a sole arbitrator, and stated that, considering *“the facts of the case, there is no need for a hearing in the process”*.

In a letter dated 16 June 2010, the First Respondent indicated that it agreed that the dispute be referred to a sole arbitrator, to be appointed by the President of the Appeals Arbitration Division, and requested that an award be issued on the basis of the written submission of the parties.

In a letter of 21 June 2010, also the Second Respondent agreed to the appointment of a sole arbitrator to hear the dispute.

In light of the foregoing, the CAS Court Office informed the parties that a sole arbitrator would be appointed by the President of the CAS Appeals Arbitration Division.

On 2 July 2010, the First Respondent filed its answer seeking the dismissal of the appeal.

On 7 July 2010, FIFA filed its answer also requesting that the appeal be dismissed.

In letters respectively of 8 and 13 July 2010, the First Respondent and the Second Respondent confirmed to the CAS Court Office that the sole arbitrator could proceed and render an award without a hearing.

In a communication dated 19 July 2010, the CAS Court Office informed the parties, on behalf of the President of the CAS Appeals Arbitration Division, that Prof. Luigi Fumagalli had been appointed as Sole Arbitrator.

In a letter dated 12 August 2010, the CAS Court Office informed the parties that the Sole Arbitrator had decided, according to Article R57, second paragraph of the Code, to issue an award without a hearing. The present award is therefore rendered after consideration only of the written documents on file.

On 30 August 2010, the CAS Court Office, on behalf of the President of the Panel, issued an order of procedure (the “Order of Procedure”), which was countersigned by the parties.

The following outline of the parties’ positions is illustrative only and does not necessarily comprise every contention put forward by the parties. The Sole Arbitrator, however, has carefully considered all the submissions made by the parties, even if there is no specific reference to those submissions in the following summary.

In its appeal to the CAS, the Appellant requested that an award be rendered as follows:

“The request of the Appellant is accepted.

The decision of the Disciplinary Committee ref. 090524/090525 PST BIH ZH dated 14 April 2010 is annulled.

Racing Club Dakar is obliged to pay proceedings expenses within 10 days of receiving the decision”.

In support of its request for relief, the Appellant underlines that in its opinion the DC Decision “is groundless”, because “F.K. Zeljeznicar absolutely respects the decision of the DRC and its obligations, pursuant to this decision, fulfils entirely”.

On 2 July 2010 the First Respondent filed its answer, containing the following requests to the CAS:

“Declare the appeal admissible but unfounded;

Confirm the decision passed by the FIFA Disciplinary Committee on 14 April 2010 and notified on 12 May 2010 in its entirety;

Sentence FK Zeljeznicar to bear all of the costs of the proceedings, including arbitration costs;

Sentence FK Zeljeznicar to bear the legal costs and other costs incurred by Racing Club de Dakar in ensuring its defence, which are fixed ex aequo et bono at EUR 5,000”.

On 7 July 2010, FIFA filed its answer, requesting the CAS:

1. To reject the Appellant’s request to annul the decision hereby appealed against.

2. To order the Appellant to bear all costs incurred with the present procedure and to cover all legal expenses of the Second Respondent related to the present procedure”.

In support of its request for relief, FIFA preliminarily underlines that, “in view of the fact that the Appellant does not contest the decisions of the DRC or the amount due to the First Respondent, the only litigious point that should be established in the present proceedings is whether the Appellant has respected the mutual agreement reached with the First Respondent, which provided for the payment of the outstanding amount due in instalments”. In this connection, FIFA also maintains that, in order to verify the above, the Sole Arbitrator should take into consideration the amended payment plan agreed upon on 20 January 2010. In fact, the initial plan of 8 January 2010 had not been respected by the Appellant, so that the parties amended it, modifying the dates of payment of each instalment (due on the first day of each month starting from 1st February 2010).

LAW

Jurisdiction and Power of Review

1. The jurisdiction of CAS, which is not disputed, derives from Article 62 ff. of the FIFA Statutes, from Article 64 of the FDC and Article R47 of the Code. Furthermore, it is confirmed by the signature of the Order of Procedure by all parties.
2. According to Article R57 of the Code, the Arbitrator has full power to review the facts and the law of the case. Furthermore, the Arbitrator may issue a new decision which replaces the decision challenged or may annul the decision and refer the case back to the previous instance.

Appeal Proceedings

3. As these proceedings involve an appeal against a disciplinary decision issued by a federation (FIFA), whose statutes provide for an appeal to the CAS, they are considered and treated as appeal arbitration proceedings in a disciplinary case of international nature, in the meaning and for the purposes of the Code.

Admissibility

4. The Appellant's statement of appeal was filed within the deadline set down in the FIFA Statutes and the DC Decision. No further recourse against the DC Decision, rendered in application of Article 64 FDC, is available within the structure of FIFA. Accordingly, the appeal is admissible.

Applicable Law

5. Pursuant to Article R58 of the Code, the Arbitrator is required to decide the dispute:
"according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".
6. Pursuant to Article 62 para. 2, second sentence of the FIFA Statutes:
"CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".
7. In this case, accordingly, the FIFA rules and regulations fall to be applied primarily, with Swiss law applying subsidiarily.
8. The FDC rules relevant to these proceedings are the following:
 - i. Article 64:
 1. *Anyone who fails to pay another person (such as a player, a coach or a club) or FIFA a sum of money in full or part, even though instructed to do so by a body, a committee or an instance of FIFA or CAS (financial decision), or anyone who fails to comply with another decision (non-financial decision) passed by a body, a committee or an instance of FIFA or CAS:*
 - a) *will be fined at least CHF 5,000 for failing to comply with a decision;*
 - b) *will be granted a final deadline by the judicial bodies of FIFA in which to pay the amount due or to comply with the (non-financial) decision;*
 - c) *(only for clubs:) will be warned and notified that, in the case of default or failure to comply with a decision within the period stipulated, points will be deducted or demotion to a lower division ordered. A transfer ban may also be pronounced.*
 2. *If the club disregards the final time limit, the relevant association shall be requested to implement the sanctions threatened.*

3. *If points are deducted, they shall be proportionate to the amount owed.*
 4. *A ban on any football related activity may also be imposed against natural persons.*
 5. *Any appeal against a decision passed in accordance with this article shall immediately be lodged with CAS”.*
- ii. Article 15 [“Fine”]:
- “1. *A fine is issued in Swiss francs (CHF) or US dollars (USD). It shall be paid in the same currency.*
 2. *The fine shall not be less than CHF 300, or in the case of a competition subject to an age limit not less than CHF 200, and not more than 1,000,000.*
 3. *The body that pronounces the sanction decides the terms and time limits for payment [...]”.*

Merits

9. The Appellant challenges the DC Decision to sanction its failure to comply with the DRC Decisions, which imposed on the Debtor the obligation to pay a given amount of money (EUR 150,000, plus interest) to the Creditor. Having failed to pay within the deadline agreed with the Creditor, the Appellant was sanctioned by the DC pursuant to Article 64 FDC.
10. In support of its request to have the DC Decision set aside, the Appellant invokes one main reason: it submits that it did not fail to comply with the payment obligations, confirmed by the DRC Decisions, within the deadline agreed with the Creditor. The Appellant’s submissions are however challenged by the Respondents, which contend that the Debtor has not honoured its debt at the agreed deadlines.
11. The Sole Arbitrator notes that
 - i. under the DRC Decisions (notified on 16 October 2008), the Appellant was obliged to pay to the First Respondent the total amount of EUR 150,000 within 30 days of their notification, that is to say before 15 November 2008;
 - ii. the Debtor failed to pay the amount so ordered within the set deadline. It instead lodged two appeals with the CAS against the DRC Decisions. The appeals proceedings so started (CAS 2008/A/1713 and CAS 2008/A/1714) were however terminated by orders issued by the President of the CAS Appeals Arbitration Division of 23 January 2009, so that the DRC Decisions became final. That notwithstanding, no payment was thereafter made by the Debtor to honour its obligations, even though the DRC Decisions had become final;
 - iii. following negotiations between the parties and the beginning of disciplinary proceedings before the DC, on 8 January 2010 the parties entered into an agreement (hereinafter referred to as the “Initial Plan”) detailing instalments and due dates (from 12 January 2010 to 15 January 2011) of a payment plan. On the basis of such plan, the Debtor made a first payment (expected for EUR 30,000, but received by the First Respondent in the amount of EUR 29,938.72) within the agreed corresponding deadline (of 12 January 2010), but did not meet the deadline for the second payment, due by 15 January 2010;

- iv. as a result of the Debtor's failure to respect the Initial Plan, on 20 January 2010 the parties entered into a new agreement (hereinafter referred to as the "Amended Plan"), specifying new due dates for payment;
- v. the Debtor has (nearly) always been late in making the payments due under the Amended Plan, and the Creditor has never received the exact amounts due under the Amended Plan. In fact, the following can be remarked with regard to the various instalments due by the Debtor in the period January-July 2010 under the Amended Plan (following the first payment made on 12 January 2010 under the Initial Plan):

No.	Due Date	Date of Receipt of Payment	Amount Due	Amount Received
1	1 February 2010	3 February 2010	10,000	9,975.91
2	1 March 2010	17 March 2010 24 March 2010	10,000	4,978.92 4,978.92
3	1 April 2010	9 April 2010 15 April 2010	10,000	4,978.92 4,978.92
4	1 May 2010	25 May 2010	10,000	9,975.91
5	1 June 2010	1 June 2010	10,000	10,000
6	1 July 2010	5 July 2010	10,000	9,977.91

- 12. The Sole Arbitrator, therefore, concludes that the Debtor, that had failed to pay within the deadline originally set by the DRC Decisions, and had failed to pay within the deadlines provided in the Initial Plan, has failed to comply with its payment obligations, within the deadlines agreed with the Creditor in the Amended Plan. The DC Decision that so held is correct: the Debtor is responsible for the disciplinary infringement contemplated by Article 64 FDC.
- 13. At the same time, the Sole Arbitrator confirms that difficult financial and sporting conditions are not a justification for the failure to pay a debt due under the DRC Decisions. Lack of financial means, even though caused by sporting conditions, to satisfy an obligation of payment does not excuse the failure to make the required payment. The DC, therefore, rightly considered the Appellant in breach of its financial obligation to the Creditor, irrespective of the financial situation of the Debtor.
- 14. The Debtor, in these proceedings, is not challenging the measure of the fine imposed by the DC Decision for the disciplinary infringement contemplated by Article 64 FDC. Such amount, therefore, cannot be reviewed by the Sole Arbitrator. In any case, this Sole Arbitrator agrees with the CAS jurisprudence under which the measure of the sanction imposed by a disciplinary

body in the exercise of the discretion allowed by the relevant rules can be reviewed only when the sanction is evidently and grossly disproportionate to the offence (see, e.g. CAS 2004/A/690 § 86; CAS 2005/A/830 § 10.26; 2006/A/1175 § 90; and the advisory opinion of 21 April 2006, CAS 2005/C/976 & 986 § 143). And in this case, the Sole Arbitrator holds that the sanction (of CHF 15,000) imposed by the DC (in a range from CHF 5,000 to CHF 1,000,000) is not evidently and grossly disproportionate, taking in mind the elements that had to be considered in the exercise of such discretion: chiefly, that the Debtor only waited until disciplinary proceedings had been opened to start making overdue payments; and that the Debtor breached the settlement agreements with the Creditor immediately after reaching them.

Conclusion

15. In light of the foregoing, the Sole Arbitrator dismisses the appeal brought by the Appellant. The DC Decision is confirmed.

The Court of Arbitration for Sport rules:

1. The appeal filed by F.K. Zeljeznicar against the decision issued on 14 April 2010 by the FIFA Disciplinary Committee is dismissed.
 2. The decision adopted on 14 April 2010 by the FIFA Disciplinary Committee is confirmed.
- (...)
5. All other prayers for relief submitted by the parties are dismissed.