Arbitration CAS 2011/A/2476 Fotbal Club Timisoara SA v. Union des Associations Européennes de Football (UEFA), award of 24 August 2011 (operative part of 18 July 2011)

Panel: The Hon. Michael Beloff QC (United Kingdom), President; Mr Olivier Carrard (Switzerland); Prof. Luigi Fumagalli (Italy)

Football
Club license applications to play in UEFA Champions League
Time limit to file an appeal before the CAS (admissibility of the appeal)
Notion of appealable decision

1. **According to Article 62 para. 3 of the UEFA Statutes the time-limit for appeal to CAS is ten days from receipt of the contested decision. Article R51 of the CAS Code provides that within ten days following the expiry of the time limit for the appeal, the appellant shall file with the CAS an appeal brief or shall inform the CAS Court Office in writing that the statement of appeal shall be considered as the appeal brief, failing which the appeal shall be deemed withdrawn. An appeal filed after expiry of the ten days time-limit provided by the UEFA Statutes must be declined on the merits and declared not admissible. Further, where the appeal brief has been filed after expiry of the time-limit set forth by Section R51 of the CAS Code, the appeal must be deemed withdrawn. Therefore any observations made by a CAS panel on the merits would be *obiter*.**

2. **The issue of what constitutes an appealable decision is governed by Swiss adjectival law; and it is clear that it is substance, not form which constitutes a decision under that law. As such, the transcript of a hearing duly received by the parties is sufficient to constitute an appealable decision.**

This is an appeal by FC Timisoara SA (the "Club" or "FC Timisoara") against a decision of UEFA dated 6 May 2011 (the "Decision") insofar as it attached conditions to the granting of an exception to the so-called three year rule in the UEFA Club Licensing and Financial Fair Play Regulations 2010 (the "UEFA CLFFP Regulations").

The Club was founded in 1921 and finished in second place in the Romanian First League at the end of the 2010/2011 season.

The Union des Associations Européennes de Football (UEFA) was founded in 1954 and is the governing body of football in Europe.

Below is a summary of the main relevant facts based on the parties' written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations may be set out, where relevant, in connection with the legal analysis that follows. The Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings. However, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

Article 50 para. 1 of the UEFA Statutes empowers the UEFA Executive Committee to draw up regulations governing the conditions of participation in and the staging of UEFA competitions. In particular, the Executive Committee is to define a club licensing system which sets forth, inter alia, the minimal criteria to be fulfilled by clubs in order to be admitted to UEFA competitions and the licensing process (see Article 50 para. 1 bis of the UEFA Statutes).

On the basis of Article 50 para. 1 bis of the UEFA Statutes, the Executive Committee has enacted the UEFA CLFFP Regulations, which sets forth a club licensing system for the admission to the UEFA competitions such as the UEFA Champions League and UEFA Europa League.

Compliance with these rules is a condition of entry into club competitions such as the UEFA Champions League and UEFA Europa League (cf. Article 2.04/c of the Regulations of the UEFA Champions League 2011/12 and Article 2.07/c of the Regulations of the UEFA Europa League 2011/2012).

Article 51 bis para. 2 of the UEFA Statutes provides that *"in addition to qualification on sporting merit, a club's participation in a domestic league championship may be subject to other criteria within the scope of the licensing procedure, whereby the emphasis is on sporting, infrastructural, administrative, legal and financial considerations. Licensing decisions must be able to be examined by the Member Association's body of appeal"*.

The avowed purpose of the regulations is to promote financial fair play in UEFA club competitions by improving the economic and financial capability of the clubs, increasing their transparency and credibility and by ensuring that clubs settle their liabilities with players, social/tax authorities and other clubs punctually (Article 2 para. 2).

By virtue of these Regulations, clubs need a licence to participate in UEFA competitions such as the UEFA Champions League and UEFA Europa League. The criteria (sporting, infrastructure, personnel and administrative, legal and finance) are defined by the UEFA CLFFP Regulations. Licences are issued on a yearly basis for the following UEFA season (Article 14 para. 2 of the UEFA CLFFP Regulations).

The licence is granted by the national association, which is therefore referred to as the "licensor" (Article 5 of the UEFA CLFFP Regulations). As per this provision, each national association, as licensor, has to integrate the rules contained in part II of the UEFA CLFFP Regulations into its national club licensing regulations.

The RFF decided to have one single licence, for both the national football competitions and the UEFA competitions.

Articles 3 and 12 of the UEFA CLFFP Regulations define the licence applicant. The latter is the legal entity, fully and solely responsible for the football team participating in national and international club competitions, which applies for a licence. Such licence applicant is either a registered member of a UEFA member association and/or its affiliated league (Article 12 para. 1 lit. a) or has a contractual relationship with a registered member (Article 12 para. 1 lit. b). The licensee is defined as a licence applicant that has been granted a licence by its licensor (Article 3 para. 1).

For the granting of licences, each licensor must establish two decision-making bodies (first instance and appeals body: Article 7 of the UEFA CLFFP Regulations). The RFF has set up a Club Licensing Commission and an Appeal Commission.

Pursuant to Article 7 of the UEFA CLFFP Regulations, appeals may also be lodged by the licensor (the competent body of which must be defined by the national association, e.g. the RFF).

One of the mandatory licensing criteria requires the licence applicant to prove that as at 31 March preceding the licence season it has no overdue payables (as defined in Annex VIII) towards another club (that refer to transfer activities which occurred prior to the previous 31 December) or towards its employees or social and tax authorities (as a result of contractual and legal obligations towards its employees that arose prior to the previous 31 December) (See Articles 49 and 50 of the UEFA CLFFP Regulations).

Article 51 bis para. 3 of the UEFA Statutes provides: *"Altering the legal form or company structure of a club to facilitate its qualification on sporting merit and/or its receipt of a licence for a domestic league championship, to the detriment of the integrity of a sports competition, is prohibited. This includes, for example, changing the headquarters, changing the name or transferring stakeholdings between different clubs. Prohibitive decisions must be able to be examined by the Member Association's body of appeal".*

Pursuant to this statutory provision, Article 12 para. 2 of the UEFA CLFFP Regulations provides that *"the membership and the contractual relationship (if any) must have lasted – at the start of the licence season – for at least three consecutive years. Any alteration to the club's legal form or company structure (including, for example, changing its headquarters, name or club colours, or transferring stakeholdings between different clubs) during this period in order to facilitate its qualification on sporting merit and/or its receipt of a licence to the detriment of the integrity of a competition is deemed as an interruption of membership or contractual relationship (if any) within the meaning of this provision".*

The Panel recognises that this so-called three years rule has been adopted to avoid, as UEFA put it, *"circumvention of the UEFA licensing system"*. In particular, clubs are not to be permitted to create a new company or change their legal structure so as to "clean up" their balance sheet while leaving their debts in another legal entity (which is likely to go bankrupt). If allowed, this kind of device would obviously harm the integrity of competition and would contradict the interest of the sport as well as putting at risk the interests of creditors.

Pursuant to Article 4 of the UEFA CLFFP Regulations, the UEFA administration may grant exceptions to the provisions set out in part II of these regulations, within the limits which are found in Annex 1. Annex 1, Section A 1 d) provides for *"non applicability of the three year rule defined in Article 12 (2) in case of change of legal form or company structure of the licence applicant on a case by case basis"*. UEFA will always carefully scrutinize the circumstances said to justify an exception.

On 16 March 2011 FC Timisoara and one of its stockholders BK Management & InvestGroup SA incorporated a new legal identity, namely BKP & Faber SA ("the new entity").

The RFF informed UEFA on 7 April 2011 of the "spin-off process". *"FC Timisoara SA assigned to BKP & Faber SA its liabilities regarding the overdue payables to the State Budget (…). And B.K.P. Management and Invest Group SA assigned its assets regarding reimbursement of VAT to the new entity BKP & Faber SA"* (the "Spin-off").

The RFF considered that the membership of FC Timisoara (within the meaning of Article 12 para. 2 of the UEFA CLFFP Regulations) was deemed to be interrupted, as the spin-off process had been initiated by FC Timisoara, *inter alia*, in order to facilitate its receipt of a licence. In accordance with Annex 1, Section A 1 d) of the UEFA CLFFP Regulations, the RFF therefore applied for an exemption.

On the same day, UEFA asked for confirmation of pertinent factual issues and for some further information regarding the group structure and the overdue payables in order that it might understand the overall financial situation (Based on Article 46 and Annexe VII of the UEFA CLFFP Regulations).

On 11 April 2011, in response, the RFF provided UEFA with further documents. It indicated that FC Timisoara *"transferred part of liabilities to Fiscal Authorities to BKP & Faber SA to be compensated with receivables transferred by BKP Management and Invest. (…) The fiscal authorities contested the operation in Court but Fotbal Club Timisoara obtained a favourable decision in February 2011. (…) VAT receivable is LEI 7.7 million (…). Theoretically, the Fiscal Authorities has the obligation to reimburse the amounts within 45 days after the request was made (…). VAT and taxes on salaries are collected by State Budget. Employees related contributions are collected by Social Security Authorities. The law permits the compensation of receivables and payables between different Authorities. That means they are allowed to compensate VAT with employees related liabilities. The compensation is finalized when a Compensation Decision is issued by Fiscal Authorities. This may take a while because generally a Fiscal Inspection is made to verify receivables and payables that enter into compensation"*.

As it appeared from this letter, FC Timisoara intended to offset amounts owed to tax authorities with VAT reimbursements owed to its parent company B.K.P. Management and Invest Group SA. In order to achieve this objective, both FC Timisoara SA and B.K.P. Management and Invest Group SA decided to detach a part of the assets and liabilities of each company and created the new entity in order to transfer to that new entity the debts owed to the tax authorities (by FC Timisoara) and the VAT receivables (which were owed to B.K.P. Management and Invest Group SA) so as to enable the new entity to offset the VAT receivables against the payables owed to the tax authorities.

According to the information provided by the Romanian FF in the same letter, Romanian law permits to offset amounts which are due to different authorities, but subject to a "Compensation Decision" to be issued by tax authorities.

On April 13, 2011, UEFA requested to be provided with a copy of the final and binding compensation decision confirming that the fiscal authorities had allowed BKP & Faber SA to offset the VAT receivables with the social and tax payables. No such decision was provided (it being Timisoara FA's case that there was no obligation for one to be received under Romanian law).

On May 6, 2011, UEFA rendered its decision as regards the exception request submitted by the Romanian FF.

UEFA decided to grant the exemption but only under certain conditions.

The grounds for this decision were stated as:

> *"According to the description of this case by the RFF, we conclude that the change of legal structure operated by FC Timisoara is not in conflict with the main purpose of the "3-years rule" provided that FC Timisoara SA (licence applicant) as well as the newly created entity BKP & Faber SA are included in the reporting perimeter as defined in Article 46 of the UEFA CL & FFP Regulations, i.e. financial information in respect of both entities must be provided to and assessed by the licensor for the purpose of granting the licence to the club for entering the UEFA competitions as from the 2011/2012 season onwards.*
>
> *For the avoidance of doubt if BKP & Faber SA is not included in the reporting perimeter, i.e. if the financial information of BKP & Faber is not assessed for the purpose of granting the licence, then the whole operation is deemed to be concluded to facilitate the receipt of the licence by FC Timisoara and the exception is refused. As a consequence the membership of FC Timisoara SA to the RFF is deemed to be interrupted within the meaning of Article 12 (2) of the UEFA CL&FFP Regulations.*
>
> *Furthermore we would like to remind you that according to Article 51(3) of the UEFA Statutes "Altering the legal form or company structure of a club to facilitate (…) its receipt of a licence for a domestic league championship, to the detriment of the integrity of a sport competition, is prohibited (…)".*
>
> *Therefore, UEFA accepts the request of the RFF for an exception to FC Timisoara SA in relation to the "3-years rule" under the condition that the reporting perimeter is set and assessed as described above.*
>
> *It results that the criterion "No overdue payables towards employees and social/tax authorities" (Article 50 of the UEFA CL&FFP Regulations) is deemed to be fulfilled by the club if, and only if, a positive "compensation decision" from the fiscal authorities to offset the VAT receivables with the overdue payables to the State budget has been issued by 31 March 2011.*
>
> *UEFA reserves the right to carry out a compliance audit on this issue at any time"* (Emphasis added).

In accordance with Articles R47 and R48 of the Code, on 14 June 2011 the Appellant filed its statement of appeal.

In light of the fact that the First League of the Romanian Championship was due to start on 22 July 2011, by letters dated 24 and 27 June 2011, FC Timisoara and UEFA agreed to expedite the procedure.

UEFA agreed to the expedited procedural timetable *"without prejudice to any legal arguments that UEFA may choose to make regarding the admissibility of the appeal under the applicable time limits"*.

In accordance with Article R51 of the Code, on 4 July 2011 the Appellant filed its appeal brief.

In accordance with Article R55 of the Code, on 11 July 2011 the Respondent filed its answer.

A hearing was held on 13 July 2011 at the CAS headquarters in Lausanne. At the close of the hearing, the parties confirmed that they were satisfied as to how the hearing and the proceedings were conducted.

In summary, Appellant submits in support of its appeal that as a result of the Romanian law the spin-off ipso jure extinguished the debts owed by it to the State, and hence the requirement of a compensation decision was redundant. (It did not explicitly address the reporting perimeter requirement.)

Its prayer for relief requested the Panel to:

- Set aside the UEFA Decision.

In summary, Respondent submits the following in defense:

- The appeal and the appeal brief were both out of time;
- In any event, the conditions were both appropriate.

LAW

Jurisdiction of the CAS

1. Article R47 of the Code provides as follows:

   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.

2. Subject only to the issue of admissibility discussed below, jurisdiction is not disputed by UEFA. It arises from UEFA Statutes, Article 62:

CAS as Appeals Arbitration Body

Article 62

1 Any decision taken by a UEFA organ may be disputed exclusively before the CAS in its capacity as an appeals arbitration body, to the exclusion of any ordinary court or any other court of arbitration.

2 Only parties directly affected by a decision may appeal to the CAS. However, where doping-related decisions are concerned, the World Anti-Doping Agency (WADA) may appeal to the CAS.

3 The time limit for appeal to the CAS shall be ten days from the receipt of the decision in question.

4 An appeal before the CAS may only be brought after UEFA's internal procedures and remedies have been exhausted.

5 An appeal shall not have any suspensory effect as a stay of execution of a disciplinary sanction, subject to the power of the CAS to order that any disciplinary sanction be stayed pending the arbitration.

6 The CAS shall not take into account facts or evidence which the appellant could have submitted to an internal UEFA body by acting with the diligence required under the circumstances, but failed or chose not to do so.

Applicable Law

3. Article R58 of the Code provides as follows:

The Panel shall 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.

4. The applicable regulations in this appeal were the UEFA Statutes and UEFA CLFFP Regulations. Since UEFA is domiciled in Switzerland, Swiss law applies complementarily.

Admissibility

5. Admissibility is disputed. The relevant provisions of the UEFA Statutes are as follows:

"Article 62

[…]

3 The time limit for appeal to the CAS shall be ten days from the receipt of the decision in question.

[…]".

"Article 63

[…]

3 Moreover, proceedings before the CAS shall take place in accordance with the Code of Sports-related Arbitration of the CAS".

6. UEFA's short point is that under the CAS Code both the statement of appeal and the appeal brief are out of time and that there is no discretion to extend either period.

7. Article R49 of the CAS Code provides: *"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late".*

8. In the present case the UEFA Statutes provide a specific and abbreviated time-limit. The time-limit for appeal to CAS is ten days from receipt of the contested decision (Article 62 para. 3 of the UEFA Statutes).

9. Article R51 of the CAS Code provides: *"Within ten days following the expiry of the time limit for the appeal, the Appellant shall file with the CAS a brief stating the facts and legal arguments giving rise to the appeal, together with all exhibits and specification of other evidence upon which he intends to rely or shall inform the CAS Court Office in writing that the statement of appeal shall be considered as the appeal brief, failing which the appeal shall be deemed withdrawn".*

10. So only an additional ten days after the original ten days is permitted for the appeal brief.

11. UEFA argues as follows:

12. As noted above, the contested decision was rendered by UEFA on May 6, 2011. The decision indicates that it is subject to appeal to CAS within the set deadline upon receipt of the contested decision. It has been sent to the RFF on the same day.

13. The RFF forwarded the contested decision to the Appellant by mail on May 10, 2011 albeit it is said on the Club's behalf to the wrong address.

14. On 10 May 2011, a representative of FC Timisoara (Mr Chivorchian) attended a hearing before the Romanian Club Licensing Commission. During that hearing, the UEFA decision was mentioned. Mr Chivorchian confirmed that he had received it that day. Furthermore, it was e mailed to the admittedly correct address on the same day.

15. Therefore, the appeal against the contested decision should have been lodged on May 20, 2011 at the latest.

16. The statement of appeal made by the Appellant is dated June 14, 2011 and was sent to the CAS by facsimile and DHL on that date. Therefore, it is manifestly late.

17. The Appellant's first counter-argument was that it did not receive any notification of the decision until 7 June 2011 because only then was the original delivered. It was said that under Romanian rules relevant to decisions of this character only faxed documents could be treated as received. Whether that be so or not the issue of what constitutes an appealable decision is governed by Swiss adjectival law; and it is clear – as a CAS panel has recently confirmed – that it is substance, not form which constitutes a decision under that law. See CAS 2010/A/2315, paras 7.4-6, and ATF 90 II 346 and ATF 132 III 503.

18. The transcript of the hearing on 10 May 2011 satisfies the Panel that it was received at the latest by then. Moreover the second email was in the Panel's view correctly addressed and the Panel finds, duly received.

19. The second counter-argument was that the decision was received on June 7, 2011.

20. On June 6, 2011, FC Timisoara merely asked to be provided with originals of the decisions rendered by the Romanian Commission of Appeal (decision made on May 31, 2011) and by UEFA (decision of May 6, 2011) and was invited by the RFF to collect the requested documents on June 7, 2011 which it did.

21. Between May 10, 2011 (date of receipt of the UEFA decision, which conditionally granted the exemption) and June 6, 2011, the situation had changed in a material way: when FC Timisoara received the UEFA decision, on May 14, 2011 the RFF Licensing Committee granted the license to FC Timisoara; whereas on May 31, 2011 the Appellate body refused it. The Panel infers that the Appellant sought to revive the deadline by asking for the originals on June 6, 2011 after having received the decision of the appellate body. But whether that be so or not the Panel cannot overlook the objective facts.

22. On UEFA's analysis, the time-limit for the appeal expired on May 20, 2011. The appeal brief should have been lodged on May 30, 2011 at the latest; and on 27th July2011 on the Club's analysis.

23. It was in fact filed on July 4, 2011.

24. The Club's only response was to rely upon the CAS letter of June 28, 2011 suggesting an expedited procedure whereby the Appellant should file its appeal brief by July 4 2011.

25. As to this first the content of Section R51 of the CAS Code has been drawn to the parties' attention in its letter of June 16, 2011 (with the indication of the consequences of a late filing). In the Panel's view this letter was not intended, nor could reasonably be construed as enlarging the time limit under the CAS Code. In any event it would in law have been incapable of so doing.

26. Second, in its response to CAS suggestions, UEFA declared that the timetable could be accepted, *"however, only on the basis that filing of the appeal on 4 July is compliant with the relevant statutory and CAS deadlines [and] without prejudice to any legal argument that UEFA may choose to make regarding the admissibility of the appeal under the applicable time limits"* (UEFA's letter to CAS dated June 29, 2011).

27. The Panel concludes, in accordance with CAS jurisprudence (see for instance CAS 2004/A/574), that, since the appeal has been filed after expiry of the ten days time-limit provided by the UEFA Statutes, the Panel must decline to decide the case on the merits and declare the appeal not admissible.

28. Further, the appeal brief has been filed after expiry of the time-limit set forth by Section R51 of the CAS Code. As a consequence, the appeal must be deemed withdrawn – and the appeal must be declared not admissible.

29. Therefore any observations made by the Panel on the merits would be *obiter*.

Merits

30. The Panel will therefore content itself with saying that it can see nothing objectionable - still less unlawful - about the conditions to which the Club take exception, and which were, the Panel reminds itself, attached to a generally positive response to the Club's application made on its behalf by RFF.

31. In order to discharge its regulatory function and to ensure Clubs in UEFA competitions satisfied the criteria in the fair play regulations, it was entirely appropriate for UEFA to demand that the new entity be brought within the reporting perimeter and, whether or not as a matter of domestic Romanian law there was any requirement for formal acknowledgment by the fiscal authorities of the effectiveness of the set off scheme, to require for their own purposes such acknowledgment.

Remedy

32. In the wake of the Club's failure to obtain a licence from the RFF, which was a necessary, if not sufficient condition of entry to the Champions League, a substitute club was accorded its place; and had already played in the qualifying round one. At the hearing, Mr Marian, for the Club, realistically accepted that in consequence the Club's realistic ambitions should be restricted to the national, not international, football theatre. In the light of the Panel's findings on merits, the issue of remedy is moot.

Conclusion

33. The Appeal is inadmissible, and, in any event, without obvious merit.

The Court of Arbitration for Sport rules:

1. The appeal filed by Fotbal Club Timisoara SA on 14 June 2011 against the decision of the UEFA Deputy General Secretary dated 6 May 2011 is dismissed.

(…)

4. All other or further claims are dismissed.