



Arbitration CAS 2012/A/2689 SC Sporting Club SA Vaslui v. Fédération Internationale de Football Association (FIFA), award of 13 April 2012

Panel: Mr Mark Hovell (United Kingdom), President; Mr José Juan Pintó (Spain); Mr Luc Argand (Switzerland)

Football

Failure to comply with a CAS award

CAS scope of review in case of application of Article 64 FIFA Disciplinary Code

Principle of lis pendens

Enforcement of a CAS final decision by FIFA DC

- 1. The authority of the FIFA Disciplinary Committee (DC) is limited, pursuant to article 64 of the FIFA Disciplinary Code, to verifying whether anyone has failed to comply with a previous decision rendered by a FIFA body or CAS. In case of appeal before CAS, the panel's scope of review must be restricted to the same mandate, because an appeal may not go beyond the formal and substantive scope of the procedure and decision of first instance. In other terms, a CAS panel may only deal with the event which gave rise to the disciplinary proceedings culminated in the appealed decision and shall not be concerned with the merits that have previously been considered by another CAS panel that delivered a decision which became final.**
- 2. According to the principle of *lis pendens*, the parties should seek to avoid parallel proceedings which can result in conflicting awards. As long as the FIFA DC correctly disregarded an award taken by a national federation's body in favour of one party and only considered the award in favour of the other party taken by the competent FIFA body, it is not a situation where there is a claim and counterclaim; there is but one claim or dispute.**
- 3. As long as the CAS has already determined in an award that became final the prevalence of one decision over another, it is not for the FIFA DC (nor is it for the CAS panel in appeal) to do so. Once the time for any possible appeal to the Swiss Federal Tribunal has elapsed, the CAS decision becomes final and binding on the parties and in accordance with the FIFA Disciplinary Code, the FIFA DC's role is to deal with the enforcement of the CAS decision in case of failure to comply with it.**

1. THE PARTIES

- 1.1 S.C. Sporting Club S.A. Vaslui (hereinafter referred to as the “Appellant” or the “Club”) is a professional football club with its registered office in Vaslui, Romania. It is a member of the Romanian Football Federation (hereinafter referred to as the “RFF”) and plays in Romania’s top division, Liga I.
- 1.2 The Federation Internationale de Football Association (hereinafter referred to as the “Respondent” or “FIFA”) is the world governing body for the sport of football, having its headquarters in Zurich, Switzerland.

2. FACTUAL BACKGROUND

- 2.1 Below is a summary of the main relevant facts and allegations based on the parties’ written submissions, pleadings and evidence adduced in the present proceedings. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its award only to the submissions and evidence it considers necessary to explain its reasoning.
- 2.2 On 13 October 2010 the FIFA Dispute Resolution Chamber (hereinafter referred to as the “DRC”), adjudicating a dispute related to the termination of the employment relationship between the Club and Marko Ljubinkovic (hereinafter referred to as the “Player”) ruled as follows (hereinafter referred to as the “DRC Decision”):

“1. The claim of the Claimant, Marko Ljubinkovic, is partially accepted.

2. The Respondent, FC Vaslui, has to pay the Claimant, Marko Ljubinkovic, outstanding remuneration in the amount of EUR 96,535 plus 5% interest p.a. as from 29 January 2010, within 30 days as from the date of notification of this decision.

3. The Respondent, FC Vaslui, has to pay to the claimant, Marko Ljubinkovic, the amount of EUR 385,000 as compensation for breach of contract within 30 days as from the date of notification of this decision. In the event that this amount of compensation is not paid within the stated time limit, interest at the rate of 5% p.a. will fall due as of expiry of the above-mentioned time limit until the date of effective payment.

4. In the event that the above-mentioned amounts due to the Claimant, Marko Ljubinkovic, are not paid by the Respondent, FC Vaslui, within the stated time limits, the present matter shall be submitted, upon, request, to the FIFA Disciplinary Committee for consideration and decision.

5. Any further request filed by the Claimant is rejected.

6. The Respondent, FC Vaslui, shall be banned from registering any new players either nationally or internationally, for the two next entire and consecutive registration periods following the notification of the present decision.

7. The Claimant, Marko Ljubinkovic, is directed to inform the Respondent, FC Vaslui, immediately and directly of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received”.

- 2.3 The DRC Decision was notified to the relevant parties on 5 November 2010.
- 2.4 In parallel to the proceedings before FIFA, on 15 June 2010, the Dispute Resolution Chamber of the Romanian Professional Football League (hereinafter referred to as the “DRC of the RPFL”) passed a decision arising from exactly the same dispute between the Player and the Club and sanctioned the Player with an obligation to pay the Club EUR 502,458.50 combined with a suspension of 16 competition rounds (hereinafter referred to as the “RPFL Decision”).
- 2.5 On 24 November 2010, the Appellant filed a statement of appeal with the Court of Arbitration for Sport (hereinafter referred to as the “CAS”) against the DRC Decision and completed it with an appeal brief dated 5 December 2010.
- 2.6 Following a hearing held on 11 May 2011, the appointed CAS panel issued its award on case CAS 2010/A/2289 on 17 June 2011, ruling as follows (hereinafter referred to as the “CAS Decision”):
- “1. S.C Sporting Club S.A. Vaslui’s appeal against the decision dated 13 October 2010 of the FIFA Dispute Resolution Chamber is dismissed and the decision of FIFA Dispute Resolution Chamber is upheld.*
- 2. The costs of the arbitration to be determined and served on the Parties by the CAS Court Office shall be borne by S.C. Sporting Club S.A. Vaslui.*
- 3. S.C. Sporting Club S.A. Vaslui is ordered to pay CHF 6,000 (six thousand Swiss Francs) to Mr Marko Ljubinkovic as a contribution towards his legal and other costs in this arbitration.*
- 4. All other motions or prayers for relief are dismissed”.*
- 2.7 On 1 August 2011 the Club had the RPFL Decision affirmed in the Vaslui Court of Law. The Player was not heard or represented at the Vaslui Court of Law.
- 2.8 The relevant parties were notified of the CAS Decision on 3 August 2011.
- 2.9 On 15 August 2011 and on 8 September 2011, the RFF and the legal representative of the Appellant respectively petitioned the FIFA Disciplinary Committee (hereinafter referred to as the “FIFA DC”) to take into account the RPFL Decision. The RFF referred to Romanian Civil Law which provides for mutual debts between parties to be compensated up to the minor amount.
- 2.10 On 29 September 2011 the secretariat to the FIFA DC urged the Appellant to pay the outstanding amount by 4 October 2011 and informed the Appellant that failing this the case would be submitted to the FIFA DC on 13 October 2011.

2.11 On 13 October 2011 the FIFA DC passed decision 110441 PST ROU ZH (hereinafter referred to as the “FIFA DC Decision”) and decided that in the most relevant part:

“1. The club S.C. Sporting Club S.A. Vaslui is pronounced guilty of failing to comply with a decision of a FIFA body in accordance with art.64 of the FDC.

2. The club S.C. Sporting Club S.A. Vaslui is ordered to pay a fine to the amount of CHF 25,000. The fine is to be paid within 30 days of notification of the decision (...)

3. The club S.C. Sporting Club S.A. Vaslui is granted a final period of grace of 30 days from notification of the decision in which to settle its debt to the creditor.

4. If payment is not made by this deadline, the creditor may demand in writing from FIFA 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.

5. If the club S.A. Sporting Club S.A. Vaslui still fails to pay the amount due 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.

7. The costs of these proceedings amounting to CHF 2,000 are to be borne by the club S.C. Sporting Club S.A. Vaslui. (...).”

2.12 The relevant parties were notified of the FIFA DC Decision on 14 December 2011.

3. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

3.1 On 5 January 2012 the Club lodged a Statement of Appeal with the CAS against the FIFA DC Decision. It submitted the following motion for relief:

“The Appellant requests the Panel which will be appointed by CAS to cancel the decision taken on the 13 October 2011 by the FIFA Disciplinary Committee and state that this body has wrongly interpreted the legal situation existing in the case in which the attacked decision has been taken, respectively has omitted to take into consideration some legal elements which should have led this body to decline its competence to rule on the subject”.

3.2 On 14 January 2012 the Appellant filed its Appeal Brief with the following revised prayers for relief:

1. “State that the FIFA Disciplinary Committee has wrongly interpreted the legal situation currently existing in the case Marko Ljubinkovic v. S.C. Sporting Club S.A. Vaslui.

2. As a consequence of the above, declare that the decision taken by the Disciplinary Committee of FIFA on 13 October 2011 is null and void.

3. *Order to FIFA to compensate SC Vaslui for the legal costs incurred as a consequence of the wrong interpretation stated under point 1”.*

3.3 On 6 February 2012 FIFA submitted its Answer, together with various exhibits, seeking the following requests for relief:

“1. To reject the Appellant’s prayers for relief in their entirety.

2. To confirm the decision hereby appealed against.

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

4. THE CONSTITUTION OF THE PANEL AND HEARING

4.1 By letter dated 25 January 2012, the CAS informed the parties that the Panel to consider the appeal had been constituted as follows: Mr Mark Hovell, President of the Panel, Mr José Juan Pintó and Mr Luc Argand, arbitrators. The parties did not raise any objection as to the constitution and composition of the Panel.

4.2 Neither of the Parties requested a hearing and as per R57 of the Code of Sports-related Arbitration and Mediation Rules (hereinafter referred to as the “CAS Code”) the Panel concluded that a hearing was not required as it was sufficiently able to render this award from the written submissions and evidence.

4.3 The parties were informed of the Panel’s decision and signed the order of procedure accordingly.

5. THE PARTIES’ SUBMISSIONS

A. Appellant’s Submissions

5.1 In summary, Appellant submits the following in support of its appeal:

5.2 The Club started proceedings with the RFF as it was compelled to do so as per the contract signed with the Player. This made the DRC of the RPFL the competent body to deal with the case.

5.3 The DRC of the RPFL ruled in the Club’s favour, and this was not appealed by the Player even though he was entitled to do so.

5.4 By the DRC Decision based upon the same facts, the DRC declared that it could not recognize the RPFL Decision as it was not a body constituted with the fundamental principle of equal representation of players and clubs and that therefore had a lack of jurisdiction.

- 5.5 On 17 June 2011 when the CAS Panel upheld the DRC Decision, the Panel failed to take into consideration that the Club had no option but to address itself to the bodies of the RFF. The contract signed by both the Club and the Player clearly stipulated that bodies of the RFF had exclusive jurisdiction in any disputes.
- 5.6 At the same hearing the CAS Panel did not formally rule out the decision made by the DRC of the RPFL.
- 5.7 The RPFL Decision became enforceable due to the ruling by the Vaslui Court of Law. This has not been contested by the Player.
- 5.8 If the Player did not agree with the RPFL Decision, then he had a right of appeal to the competent body of the RFF and if required a subsequent appeal to FIFA or the CAS was available to him. As the Player went straight to FIFA he acted in violation of his contractual duties.
- 5.9 Since the total amount due to the Player as per the DRC Decision is less than the amount due to the Club as per the RPFL Decision, and also since the amounts of the debts which the two parties have towards each other should be set against each other, the Club has no obligation to make any payment to the Player.
- 5.10 The Club is in possession of a valid final decision in its favour taken by a Romanian Civil Court which cannot be ignored by FIFA.
- 5.11 Both Romania and Switzerland are parties to the Lugano Convention. According to Arts 32 and 33 of said Convention, Swiss Courts (such as the DRC and the FIFA DC) are bound to recognize a valid final decision taken by a Romanian Civil Court and such a decision is fully applicable to a body having its Headquarters in Switzerland and subject to Swiss Law as is the case with FIFA.
- 5.12 To avoid being sanctioned, the Club proposed to pay the amounts due to the Player on an escrow account under FIFA's control. FIFA refused this option and advised it would forward any monies received to the Player. In fact when the Club sent monies to FIFA they were returned to the Club.
- 5.13 The FIFA DC should in this case have declared that there was no reason for sanctions as there was no longer an obligation for Club to make payment to the Player.
- 5.14 The sanctions taken against the Club by the FIFA DC on the basis of the wrong interpretation of the legal situation have to be cancelled.

B. Respondent's Submissions

- 5.15 In summary, Respondent submits the following in defense:

- 5.16 According to Art. 62 par. 2 of the FIFA Statutes the provisions of the CAS Code shall apply to the proceedings. Consequently appeals to the CAS shall be subject to the FIFA Regulations on the Status and Transfer of Players (hereinafter referred to the “FIFA Regulations”) and Swiss Law and any argument based upon Romanian Law is not applicable to the present dispute.
- 5.17 As stated in the DRC Decision, the DRC considered that a decision passed by the DRC of the RPFL could not be recognized as the Romanian body did not comply with the prerequisites set forth in Art. 22 of the FIFA Regulations.
- 5.18 The CAS Decision upheld the decision of the DRC thus confirming that the DRC was competent to decide the matter at stake and also that any RPFL Decision (in this case) could not be recognized.
- 5.19 The CAS Decision was notified to the relevant parties on 3 August 2011 and became final and binding since no appeal was lodged against it with the Swiss Federal Court.
- 5.20 On 29 September the secretariat to the FIFA DC urged the Appellant to pay the outstanding amount to the Player. The Appellant did not pay to the Player the relevant sums.
- 5.21 As regards the Appellant’s request to hold monies within an escrow account, FIFA is unable to block any amount in favour of any party and informed the Appellant of this via letters dated 28 December 2011 and 9 January 2012 and re-iterated this on 16 January 2012.
- 5.22 The Appellant has failed to comply with Art. 64 of the FIFA Disciplinary Code by not complying with the CAS Decision and unlawfully withholding monies from the Player. The Appellant has shown no respect for the final and binding CAS Decision.
- 5.23 The DRC of the RPFL is solely responsible for the existence of two contradictory decisions on exactly the same issue and between the same parties. The DRC of the RPFL had a duty to suspend proceedings whilst proceedings with the DRC were already pending. This was confirmed by the CAS panel (see CAS 2010/A/2689, par. 76) in the CAS Decision.
- 5.24 When the Appellant lodged its claim with the Vaslui Court of Law, the CAS had already decided that the DRC was the competent judicial body to deal with the dispute between the Appellant and the Player.
- 5.25 Concerning the Appellant’s claim that the FIFA DC was bound to recognize the terms of the Lugano Convention, art. 1 par. 2 of the convention states that *inter alia* it “shall not apply to: (...) (d) arbitration”. The FIFA DC and the DRC are not considered “courts” in the sense of the Lugano Convention.
- 5.26 Finally as the Club has not complied with the decision of the FIFA DC, the Respondent requests the Panel to reject the Appellant’s claim.

6. JURISDICTION OF THE CAS

6.1 Art. R47 of the CAS 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”.

6.2 Art. 62.1 of the FIFA Statutes in force at the time of the Club’s appeal reads as follows:

- “1. FIFA recognizes the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, Clubs, Players, Officials and licensed match agents and players’ agents.*
- 2. The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and additionally, Swiss law”.*

6.3 Art. 63 par. 1 of the FIFA Statutes in force at the time of the Club’s appeal reads as follows:

“Appeals against final decisions passed by FIFA’s legal 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”.

6.4 Art. 64 par. 5 of the FIFA Disciplinary Code states that:

“Any appeal against a decision passed in accordance with this article shall be lodged with CAS directly”.

6.5 Further the jurisdiction of the CAS was confirmed by the signature of the Order of Procedure by the Parties. Therefore, the Panel is satisfied that the requirements set forth in Art. R47 of the CAS Code are met, and that the Panel has jurisdiction to decide the present dispute.

7. APPLICABLE LAW

7.1 Art. R58 of the CAS 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”.

7.2 Art. 62.2 of the FIFA Statutes provides the following:

“The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss Law”.

- 7.3 The Appellant has argued that Romanian Law and the Lugano Convention apply in this case, whereas the Respondent maintains that the Lugano Convention does not apply to appeals from decisions of arbitral bodies such as the DRC or the FIFA DC that FIFA regulations and Swiss law applies, not Romanian Law.
- 7.4 The “Federation” in the sense of Art. R58 of the CAS Code i.e. FIFA is domiciled in Switzerland, a fact that requires that Swiss Law be applied.
- 7.5 As there is a dispute to the law which applies, the Panel has decided that in this case, the FIFA regulations will be applied primarily, and Swiss law shall be applied subsidiarily.

8. SCOPE OF REVIEW

- 8.1 The CAS panel which rendered an award in case CAS 2010/A/2135 stated the following:

“(...) as the authority of the FIFA DC is limited, pursuant to article 64 of the FIFA Disciplinary Code, to verifying whether anyone has failed to comply with a previous decision rendered by a body, a committee or an instance of FIFA or CAS, the Panel’s scope of review in this appeal is restricted to the same mandate, because an appeal may not, by definition, go beyond the formal and substantive scope of the procedure and decision of first instance.

This means in particular that this CAS Panel has no authority to deal with the merits of the dispute between the IRIFF and the Coach which led to the decision of the FIFA PSC of 23 September 2008 and to the subsequent CAS award of 4 November 2009. Indeed, the merits of that dispute are clearly outside the scope of the review of this Panel.

In other terms, this Panel may only deal with the event which gave rise to the disciplinary proceedings culminated in the Appealed Decision (i.e. whether the IRIFF complied or not with the decision taken by FIFA PSC and confirmed by the CAS) and with the consequence thereof (i.e. whether the disciplinary sanction imposed on the IRIFF was appropriate, respectful of the applicable rules and the proportionate to the violation).

As a consequence, the Panel must discard as inappropriate and not consider all the arguments and exhibits submitted by the Appellant with reference to the substance of the dispute decided by the FIFA PSC and upheld in full by the CAS award of 4 November 2009”.

- 8.2 The Panel follows this previous decision of the CAS and has determined not to revisit the merits that have previously been considered by the panel that delivered the CAS Decision. Rather, this Panel will concern itself with the decision taken by the FIFA DC pursuant to the FIFA Disciplinary Code, which sought to enforce the CAS Decision, not review it.

9. MERITS OF THE APPEAL

9.1 In these present proceedings, the Panel had to determine the following:-

- (a) had the Appellant complied with the CAS Decision?
- (b) should the FIFA DC have “set off” the sums awarded to the Appellant from the Player pursuant to the Court of Vaslui’s award?
- (c) What amounts, if any, should be paid by the Appellant?

9.2 It is clear to the Panel, and not contested by the Appellant, that the financial sums awarded to the Player pursuant to the CAS Decision remain outstanding. The Panel notes the Appellant has attempted to discharge such sums, but that FIFA is unable to operate an escrow account in these circumstances.

9.3 The main issue to consider is whether the award in favour of the Appellant made by the DRC of the RPFL and confirmed by the Court of Vaslui should have been taken into account by the FIFA DC and set against the award in favour of the Player contained in the CAS Decision. The Appellant, referring to Romanian Law and the Lugano Convention, submits it should and, as the award in its favour is larger than that in favour of the Player, the FIFA DC should have determined that it had no obligation to pay anything further to the Player.

9.4 FIFA, on the other hand, point to the non-application of Romanian Law or the Lugano Convention in these proceedings or indeed those of the FIFA DC. FIFA also noted that the panel that delivered the CAS Decision had already expressed its opinion that the DRC of the RPFL should never have rendered a decision as it was the DRC that correctly seized jurisdiction of the original dispute between the Player and the Appellant.

9.5 The Panel notes that the applicable law in these proceedings is Swiss Law and that pursuant to Arts. 120 and 124 of the Swiss Code of Obligations the FIFA DC does have to consider “set off” claims.

Art. 120 states:

“If two persons owe each other a sum of money or another performance where the subject of the performance is of the same kind, each may set off his obligation against his claim, provided both claims are due.

The obligor may set off even if his counterclaim is contested.

A claim forfeited by the statute of limitations may be set off, if at the time when it could have been set off against the other claim, it was not yet forfeited under the statute of limitations”.

Art. 124 states:

“A set off only becomes effective to the extent that the obligor demonstrates to the oblige that he wishes to take advantage of his right of set off.

If this has occurred, it is considered that the claim and counterclaim, insofar as they compensate each other, have already been discharged at the earliest possible time they could have been set off.

The special practices of commercial transactions on current account remain reserved”.

- 9.6 The Panel further notes that in this particular instance the two awards both stem from exactly the same dispute between the Player and the Appellant. The CAS has already determined that the Appellant should not have taken its claim to the DRC of the RPFL; instead leaving the DRC to deal with the dispute. As such, that CAS panel did not recognize the decision of the DRC of the RPFL. As mentioned above, it is not in the scope of this Panel’s jurisdiction to review the CAS Decision, nor was it for the FIFA DC to do so either. Further the Panel notes the Appellant then continued to exacerbate the situation by asking (without the Player being present) the Court of Vaslui to confirm the decision of the DRC at the RPFL.
- 9.7 The Panel notes the principle of *“lis pendens”* and that the parties should seek to avoid parallel proceedings which can (and, in this case, have) resulted in conflicting awards.
- 9.8 The Panel determines that the FIFA DC correctly disregarded the award in favour of the Appellant and only considered the award in favour of the Player, as set out in the CAS Decision. This is not a situation where there is a claim and counterclaim; there is but one claim or dispute; but it has been dealt with in two separate forums. The FIFA DC correctly determined that only one award should prevail and there should not therefore be two awards to set against each other, just one. It was not for the FIFA DC (nor is it for this Panel) to determine which award should prevail, as that determination had already been taken by the CAS and, once the time for any possible appeal to the Swiss Federal Tribunal had elapsed, the CAS Decision became final and binding on the parties and in accordance with the FIFA Disciplinary Code, the FIFA DC’s role was to deal with the enforcement of the CAS Decision.
- 9.9 The Panel determines that the FIFA DC correctly dealt with the matter and upholds its decision entirely. Much as Swiss law recognizes the possibility of setting one claim off against another, in this case there is no application, as in reality there is one claim and one final and binding decision already taken in regard of that which is contained within the CAS Decision. The role of the FIFA DC was to see that award was enforced, which it did in the FIFA DC Decision.

CONCLUSION

- 9.10 The Panel determines to dismiss the Appellant’s appeal and uphold and confirm the FIFA DC Decision.
- 9.11 The Panel determines that all other claims or prayers for relief are hereby dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by S.C. Sporting Club S.A. Vaslui on 4 January 2012 against the decision of FIFA Disciplinary Committee dated 13 October 2011 is dismissed.
2. The decision of the FIFA Disciplinary Committee dated 13 October 2011 is upheld and hereby confirmed.
3. (...).
4. (...).
5. (...).
6. All other or further claims are dismissed.