



Arbitration CAS 2012/A/2786 FC Spartak a.s v. Fédération Internationale de Football Association (FIFA), award of 29 August 2012

Panel: Mr Mark Hovell (United Kingdom), Sole Arbitrator

Football

Disciplinary sanction for failing to comply with a FIFA decision

CAS scope of review regarding a final FIFA decision

According to Article 64 of the FIFA Disciplinary Code, the FIFA Disciplinary Committee (DC) has to determine if a club has failed to pay a player even though instructed by the FIFA Players' Status Committee (PSC) to do so. Where the time for any appeal against a PSC decision has passed, the latter becomes final and binding. The FIFA DC's role in this respect is to enforce that decision. In case of appeal against the FIFA DC decision before the CAS, the latter is unable to entertain an appeal against the PSC Decision which has become final.

1. THE PARTIES

- 1.1 FC Spartak a.s (hereinafter referred to as the "Appellant" or the "Club") is a professional football club with its registered office in Trnava, Slovak Republic. It is a member of the Slovak Football Association (hereinafter referred to as the "SFA") and plays in Slovak's top division, the Premier League.
- 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 Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, he refers in this award only to the submissions and evidence he considers necessary to explain its reasoning.

2.2 On 3 November 2010, the Appellant was notified that FC Sheriff had lodged a claim with the FIFA Players' Status Committee (hereinafter referred to as the "PSC") in connection with the transfer of Luis Antonio Rodriguez (hereinafter referred to as the "Player").

2.3 On 23 November 2010, the Appellant notified FIFA that the Player spent time with the Appellant in June and spent one month with them playing several friendly matches and underwent a medical. Further, the Appellant stated that following the medical results and the Player's performance in the friendly matches it was decided that the Player was not good enough and the Player was *"send back to his mother club FC Sheriff Tiraspol. On the basis above written, football club FC Spartak Trnava has not asked registration department. of Slovak Football Association to registry the Player for our club. There was not added transfer into TMS system..."*.

2.4 On 18 May 2011, the Single Judge of the PSC ruled as follows (hereinafter referred to as the "PSC Decision"):

- "1. The claim of the Claimant FC Sheriff, is partially accepted.*
- 2. The Respondent, FC Spartak Trnava, has to pay to the Claimant, within 30 days as from the date of notification of this decision, the amount of EUR 90,000 plus 5% interest per year as from 11 June 2010 until the date of effective payment.*
- 3. Any further claims lodged by the Claimant are rejected.*
- 4. If the aforementioned sum, plus interest, is not paid within the aforementioned deadline, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee, for consideration and a formal decision.*
- 5. The final amount of costs of the proceedings, amounted to CHF 5,000 are to be paid, within 30 days as from the date of notification of the present decision as follows:-*
 - 5.1 CHF 2,000 by the Respondent to FIFA....*
 - 5.2 CHF 2,000 by the Respondent to the Claimant.*
 - 5.3 CHF 1,000 by the Claimant to FIFA. Given that the Claimant has already paid the amount of €3,000 as advance of costs at the start of the present proceedings, the Claimant is exempted from paying the aforementioned costs of the proceedings.*
- 6. The Claimant is directed to inform the Respondent directly and immediately of the account number to which the remittances are to be made in accordance with the above points 2 and 5.2 and to notify the Players' Status Committee of every payment received".*

2.5 The FIFA PSC Decision also notified the Appellant that:

"Note relating to the findings of the decision (Article 15 and 18 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber).

A request for the grounds of the decision must be sent, in writing, to the FIFA General Secretariat within 10 days of receipt of notification of the findings of the decision. Failure to do so within the stated deadline will result in the decision becoming final and binding.

No costs (cf point 5 above) shall be charged if a party decides not to ask for the grounds of the decision and the advance of costs shall be reimbursed to the party concerned".

- 2.6 On 15 June 2011, the Appellant was notified of the PSC Decision. The Appellant did not request the grounds of the decision within the deadline of 10 days and therefore the Appellant did not have to pay the costs of the proceedings.
- 2.7 On 10 October 2011, FC Sheriff informed the PSC that they had not received payment and requested that the matter be passed to the FIFA Disciplinary Committee (hereinafter referred to as the “FIFA DC”).
- 2.8 On 13 October 2011, FIFA reminded the Appellant of its obligations pursuant to the PSC Decision and invited the Appellant to pay the amount and warned the Appellant that, if requested to do so by the creditor, the case would be transferred to the FIFA DC.
- 2.9 On 2 November 2011, FIFA informed the Appellant that the case had been transferred to the FIFA DC.
- 2.10 On 4 November 2011, the Appellant sent a letter to the FIFA General Secretariat and the FIFA DC notifying the same that the international transfer was, in its opinion, contrary to FIFA regulations and regulations at national level and therefore was invalid.
- 2.11 On 24 November 2011, as the Appellant had not paid the amount due to FC Sheriff, the secretariat to the FIFA DC opened disciplinary proceedings against the Appellant and notified the SFA of the same. Further, the Secretariat requested the SFA to forward the letter to the Appellant.
- 2.12 On 11 January 2012 the Secretariat to the FIFA DC urged the Appellant to pay the outstanding amount by 26 January 2012 and informed the Appellant that the case would be submitted to the FIFA DC on 7 February 2012 for a determination. Further, the Appellant was informed that the FIFA DC would take a decision using the file in its possession should the Appellant not submit a statement or pay the outstanding amount.
- 2.13 On 7 February 2012 the FIFA DC ruled as follows (hereinafter referred to as the “Appealed Decision”):
- “1. The club FC Spartak Trnava 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 FC Spartak Trnava 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....
 3. The club FC Spartak Trnava is granted a final period of grace of 30 days as from notification of the decision in which to settle its debts to the creditor and to FIFA.
 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. 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 club FC Spartak Trnava still fails to pay the amount due even after deduction of the points in accordance with point III/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 Slovak Football Association 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 Slovak Football Association 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 amounting to CHF 2,000 are to be borne by the club FC Spartak Trnava. The costs shall be paid according to the modalities established under point III/2 above.*
8. *The creditor is directed to notify the secretariat to the FIFA Disciplinary Committee of every payment received”.*

2.14 On 4 April 2012, the Appealed Decision was notified to the Appellant and the SFA.

2.15 On 3 May 2012, the Court of Arbitration for Sport (hereinafter referred to as the “CAS”) informed FIFA that the Appellant had lodged an appeal against the Appealed Decision.

3. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

3.1 On 25 April 2012 the Club lodged a Statement of Appeal with the CAS against the Appealed Decision. It submitted the following motion for relief:

“Spartak Trnava requests the Court of Arbitration for Sport (CAS) to annul the aforementioned disciplinary decision”.

3.2 On 27 April 2012 the Appellant filed its Appeal Brief with the CAS.

3.3 On 24 May 2012 FIFA submitted its Answer, together with various exhibits, seeking the following requests for relief:

1. *To reject the Appellant's request to annul the decision hereby appealed against.*
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 16 May 2012, the CAS informed the parties that the Panel to consider the appeal had been constituted as follows: Mr Mark Hovell, Sole Arbitrator. The parties did not raise any objection as to the appointment of the Sole Arbitrator.

- 4.2 A hearing was held on 19 June 2012 at the CAS premises in Lausanne, Switzerland. The attorneys for the Appellant attended the hearing and the Respondent was represented by Ms. Wilma Ritter and Ms. Sarit Ventura. In addition, Mr Fabien Cagneux, Counsel to the CAS, was also in attendance.
- 4.3 There were no witnesses or experts providing evidence or opinions at the hearing.
- 4.4 The parties were given the opportunity to present their cases, and submit their argument and to answer the questions posed by the Sole Arbitrator. A summary of the submissions is detailed below. After the parties' final, closing submissions, the hearing was closed and the Sole Arbitrator reserved his detailed decision to his written award. Upon closing the hearing, the parties expressly stated that they had no objections in relation to their rights to be heard and to have been treated equally in these arbitration proceedings. The Sole Arbitrator heard carefully and took into account in his subsequent deliberation all the arguments presented by the parties both in their written submissions and at the hearing, even if they have not been summarised in the present award.

5. THE PARTIES' SUBMISSIONS

A. Appellant's Submissions

- 5.1 In summary, the Appellant submits the following in support of its appeal:
- 5.2 In accordance with Article 12 paragraph 3 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (hereinafter referred to as the "Procedural Rules") "*any party claiming a right on the basis of notice of facts shall carry the burden of proof clause*". In accordance with the aforementioned Article, FC Sheriff had to prove the conclusion of the transfer agreement, fulfillment of its contractual obligations in connection with the international transfer of the Player and the breach of contract by the Appellant.
- 5.3 The claim of FC Sheriff had no legal basis or evidence that demonstrated the damage suffered or its quantity and therefore it failed to comply with the legal principle of the burden of proof according to which a party deriving a right from a stated fact has the obligation to prove the relevant fact. Therefore, the PSC failed to apply its own regulations correctly in knowing the fact that the transfer was not in accordance with FIFA regulations and regulations existing at national level and therefore was invalid.
- 5.4 In accordance with Article 12 paragraph 1 of the Procedural Rules, "*evidence consists of party testimony, witness testimony, documents, expert reports and all other pertinent evidence*". Further, Article 12 paragraph 4 of the Procedural Rules provides "*the Players Status Committee and the DRC may also consider evidence not presented by the party*". Therefore the PSC was able to conduct its own investigation to search for relevant evidence and to take such evidence into account in a decision making process. Further, in accordance with Article 5 paragraph 5 of the Procedural Rules, Article 12 paragraph 4 must be interpreted in light of Article 5 which provides "*the*

Players' Status Committee and the DRC shall determine the facts of the case according to their best judgment. All persons involved in the proceedings and all persons subject to the Regulations of FIFA shall assist in determining the facts of a case".

- 5.5 In the dispute with FC Sheriff, the PSC should have looked at its own records to check whether there had actually been a transfer of the Player. The PSC could have looked at its own transfer matching system. The FIFA Regulations on the Status and Transfer of Players (hereinafter referred to as the "FIFA RSTP") are of relevance. In accordance with annex 3 of the FIFA RSTP, the *"Transfer Matching System is a web based data information system with the primary objective of simplifying the process of international player transfers as well as improving transparency and the flow of information"*. Clearly the objective of the transfer matching system (hereinafter referred to as the "TMS") is to improve transparency of transfers. Further, the definition would not be complete without the objectives of the TMS defined in Article 1 paragraph 1 of annex 3 of the FIFA RSTP which stipulates that the TMS *"is designed to ensure that specific football authorities have more details available to them on international player transfers. This will increase the transparency of individual transactions, which will in turn improve the creditability and standing of the various Transfer Matching System"*. Information contained in the TMS does not have to be proven by any parties to a dispute, but shall be taken into account by FIFA judicial bodies *ex officio*, if it is relevant for the case at stake.
- 5.6 The Appellant acknowledged that the TMS was not in force when the transfer agreement regarding the Player was entered into, however the Appellant believed that these facts are all relevant to this issue because mandatory use of the TMS for international transfers of professional players with Slovak football clubs was established by the SFA instantly after the TMS administrators from the SFA were educated to work with the new system. Therefore the use of the TMS was mandatory at national level.
- 5.7 The PSC was obliged to initiate an investigation and had to search for the relevant evidence in the TMS according to Article 2 of the Procedural Rules and should have also asked the SFA to provide the relevant regulation existing at national level.
- 5.8 In accordance with Article 1 paragraph 5 of annex 3 of the FIFA RSTP *"the use of TMS is a mandatory step but whole international transfers of professional male players within the scope of 11 a-side football, and any registration of such a player without the use of TMS will be deemed invalid"*. Article 4 paragraph 1 of annex 3 of the said regulations provides *"clubs must use TMS for international transfers"*. Therefore the use of the TMS by international transfers is now mandatory. Any international transfer with no record in the TMS is invalid and *de jure* does not exist. Therefore, if any claim related to an international transfer is raised, the PSC shall *ex officio* verify its legitimacy through the information contained in the TMS. If no evidence relating to the transfer could be found in TMS, it is clear proof that the claim is not substantiated and according to Article 5 paragraph 4 of the Procedural Rules the claim should be refused. Ignoring such evidence is inconsistent with the principles of a fair and impartial trial.

- 5.9 According to Article 6 paragraph 3 of annex 3 of the FIFA RSTP, the PSC shall consider any documentation or evidence contained in TMS. The TMS would not contain any information regarding the transfer of the Player and that is also relevant proof.
- 5.10 Despite there being no relevant evidence proving that the transfer was realised and that the claim had no legal basis, the PSC partially accepted the claim of FC Sheriff. Therefore the decision passed by the PSC is unlawful.
- 5.11 A request was made to the FIFA DC not to start disciplinary proceedings against the Appellant in order to enforce an unlawful decision. The FIFA Disciplinary Code (hereinafter referred to as “the FDC”) or any other FIFA regulations do not prohibit the FIFA DC to examine the decision passed by another FIFA body as to the substance before taking any measures in order to enforce the decision which in this matter is unlawful and which validity is questioned. It is an exclusive competence of the FIFA DC to decide whether it will or will not enforce a concrete decision passed by a FIFA body.
- 5.12 The FIFA General Secretariat was asked to refer the matter to the competent decision making body for a decision declaring the aforementioned international transfer invalid. It was believed that the FIFA DC would not start disciplinary proceedings against the Appellant unless the competent decision making body rules determined whether the aforementioned international transfer was in accordance with the FIFA RSTP.
- 5.13 The Appellant acknowledged that it had not appealed the PSC Decision to the CAS, nor requested the full grounds of the PSC Decision, in accordance with the note to the PSC Decision. It claimed that its former management team were not skilled enough and did not know the law, rules and regulations of football. It was only after things changed that certain claims and cases were discovered.

B. Respondent’s Submissions

- 5.14 In summary, the Respondent submits the following in defence:
- 5.15 The Appellant did not request the grounds of the PSC Decision within or outside of the stipulated deadline of 10 days which results in the PSC Decision of the Single Judge becoming final and binding.
- 5.16 The Appellant was at liberty to request the grounds of the decision within the deadline and to challenge the motivated decision at CAS as provided by FIFA’s regulations. The Appellant failed to do so. The Appellant, by way of letter dated 4 November 2011, stated “*incorrect application of FIFA Regulations led to a final and binding decision without any further possibility to appeal, for which the football club Spartak Trnava be ultimately responsible failing to file an appeal on time*”.
- 5.17 The Appellant had the opportunity to state its case, to provide all documentary evidence it might deem appropriate and defend its legal rights in front of the Single Judge. Subsequently,

the Appellant had the opportunity to request the motivation of the decision and lodge an appeal at CAS, which would have heard the matter *de novo*. This was never done. Article 15 of the Procedural Rules does not infringe any fundamental rights nor any Swiss mandatory provision nor is it in contradiction with FIFA Statutes. Consequently, in line with well established jurisprudence of CAS, any appeal lodged at CAS against terms of decisions shall be declared inadmissible reinforcing the fact that such decisions becomes final and binding. The Appealed Decision concerned a disciplinary proceeding that had been opened against the Appellant for a violation of Article 64 of the FDC (failure to comply with a decision of a FIFA body or CAS).

- 5.18 Pursuant to Article 64 paragraph 1 of the FDC, anyone who fails to pay another person (such as a player, a coach, or a club) 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 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; c) if it is a Club, it will be warned and notified that, in the case of default or failure to comply with a decision within the period it stipulated, points will be deducted or relegation to a lower division ordered. A transfer ban may also be pronounced.
- 5.19 The spirit of Article 64 of the FDC is to enforce decisions which are final and binding. The possible sanctions stipulated in the Article are designed to put the debtor under pressure to finally comply with the decision. The Article provides FIFA with a legal tool ensuring, to a certain extent that the rights of the creditor will finally be respected and is consequently and ultimately intended to force the debtor to pay what, by means of a legally binding decision, has been established to be owed to the creditor.
- 5.20 The FIFA DC should be compared to enforcement proceedings pursuant to Swiss law and the committee should be regarded as acting similarly as an enforcement authority. Equal to the competence of any enforcement authority, the FIFA DC cannot review or modify as to the substance of previous decision which is final and binding and thus has become enforceable. The FIFA DC cannot analyse a case decided by the relevant body as to the substance to check if the Single Judge applied law correctly or took into account all the evidence but as a sole task to analyse if the debtor complied with the final and binding decision of the relevant body.
- 5.21 The question for the FIFA DC is whether or not the financial amounts provided in the enforceable decision have been paid. The FIFA DC can only take into account facts arising after the date on which the decision has been rendered.
- 5.22 The Appellant has not made payment to FC Sheriff. The Appellant has solely raised arguments relating to the substance of the matter. Therefore the statement of appeal is a weak and belated attempt to contest the PSC Decision which became final and binding.
- 5.23 The Appellant was aware of the opening of the disciplinary proceedings and was invited to submit a statement explaining why it had not paid the outstanding amount or demonstrated

that it had tried to find an alternative solution to the existing conflict. The Appellant did not participate in the disciplinary proceedings and did not send any correspondence to the FIFA DC. Therefore the Appellant accepted the fact that the FIFA DC would use the file in its possession when deciding the case.

- 5.24 The Appellant could and should have presented all of these arguments before the PSC and, if applicable, within the appeal at CAS.
- 5.25 The object of this appeal cannot go beyond the limits of a review of the disciplinary sanction imposed by the FIFA DC. As a result, only submissions relating to the fine and a potential points deduction imposed by the FIFA DC, such as its legal basis and the quantum, can be heard.
- 5.26 The Appellant's present request to reject the claim of the creditor as to the substance is made too late since it failed, with no reason whatsoever, to request the grounds of the decision of the PSC Decision and to lodge an appeal at the CAS.
- 5.27 The FIFA DC correctly applied Article 64 FDC in the present matter.

6. JURISDICTION OF THE CAS

- 6.1 Art. R47 of the CAS Code of Sports - related Arbitration and Mediation Rules (hereinafter referred to as "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".
- 6.2 Art. 63 par. 1 of the FIFA Statutes in force at the time of the Appellant'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".
- 6.3 Art. 64 par. 5 of the FDC states that:
"Any appeal against a decision passed in accordance with this article shall be lodged with CAS directly".
- 6.4 Further the jurisdiction of the CAS was confirmed by the signature of the Order of Procedure by the Parties. Therefore, the Sole Arbitrator is satisfied that the requirements set forth in Art. R47 of the Code are met, and that the Sole Arbitrator 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 did not make any written submissions in relation to the applicable law however the Sole Arbitrator noted that the Appellant referred to various FIFA regulations including the FIFA RSTP and the FIFA Procedural Rules. The Respondent stated that Article 62 paragraph 2 of the FIFA Statutes shall apply. Further the Respondent submitted that pursuant to the same article, and considering that the Appealed Decision was issued by the FIFA DC, whose corporate seat is in Zurich, Switzerland and that the Appellant is a member of the SFA which is a member of FIFA, the Sole Arbitrator shall apply the various regulations of FIFA and, additionally, Swiss law.

7.4 At the hearing the Appellant agreed with the Respondent’s submissions, and, there is no dispute to the law which applies, the Sole Arbitrator confirms that in this case, the FIFA regulations will be applied primarily, and Swiss law shall be applied subsidiarily.

8. MERITS OF THE APPEAL

8.1 The Appellant has appealed the FIFA DC decision, the Appealed Decision. It has acknowledged that it failed to request the grounds of the PSC Decision and failed to then appeal that decision to the CAS. The Respondent quite rightly states that the Appellant is out of time to appeal the PSC Decision.

8.2 The Sole Arbitrator notes the Appellant’s arguments regarding the Procedural Rules and what it believes the PSC was obliged to do with regards the TMS System. However, these arguments were advanced to the PSC before it came to its decision and should have been advanced to the CAS on appeal, not once the PSC Decision had become final and binding. The matter at hand is on appeal of the FIFA DC decision and the Sole Arbitrator is unable to entertain an appeal against the PSC Decision through the back door.

8.3 The Sole Arbitrator’s role in this matter is to review the Appealed Decision, made by the FIFA DC. The FIFA DC applied Article 64 of the FDC. It had to determine if a club had failed to pay another club, even though instructed to do so by the PSC. The time for any appeal had passed, the PSC Decision was final and binding upon the Club, the FIFA DC’s role was to enforce that decision, which, in the Sole Arbitrator’s determination, it did properly.

9. CONCLUSION

- 9.1 The Sole Arbitrator determines to dismiss the Appellant's appeal and uphold and confirm the Appealed Decision.
- 9.2 The Sole Arbitrator 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 FC Spartak a.s on 25 April 2012 against the decision of FIFA Disciplinary Committee dated 7 February 2012 is dismissed.
- 2. The decision of the FIFA Disciplinary Committee dated 7 February 2012 is upheld and hereby confirmed.
- (...)
- 5. All other or further claims are dismissed.