Arbitration CAS 2012/A/3032 SV Wilhelmshaven v. Club Atlético Excursionistas, award of 24 October 2013

Panel: Mr Michele Bernasconi (Switzerland), Sole Arbitrator

Football
Disciplinary sanction against a club based on Article 64 para. 1 lit. c. and para. 2 of the FIFA Disciplinary Code
Standing to be sued under Swiss law in football cases of disciplinary nature
Effect of Article R48 of the CAS Code on substantial failures
Concepts of "indirect" and "dynamic" reference to the rules and regulations of an international federation
Legality and proportionality of the sanctions provided for in Article 64 para. 1 lit. c. of the FIFA Disciplinary Code
Scope of the appeal against a disciplinary sanction imposed on a club for non-compliance with a FIFA decision

1. **Under Swiss Law, lack of standing to be sued is generally considered a reason to reject an appeal on the merits, and not a reason to declare such appeal inadmissible. As a principle, a party has standing to be sued ("légitimation passive") in CAS proceedings only if it has some stake in the dispute because something is sought against it in front of CAS. FIFA disciplinary proceedings, like basically all disciplinary proceedings of a sport association, are primarily meant to protect an essential interest of FIFA and FIFA's (direct and indirect) members, i.e. the full compliance with the rules of the association and with the decisions rendered by FIFA's decision-making bodies and/or by CAS. As a consequence, in an appeal against a decision of FIFA, by means of which disciplinary sanctions have been imposed on a party, only FIFA has standing to be sued, but not the (previously) opposing party in, e.g., a financial dispute before the competent FIFA bodies. In other words, only FIFA can be the correct respondent having standing to be sued.**

2. **According to Article R48 para. 3 of the CAS Code, a short deadline may be granted to an appellant in an appeal procedure in case the requirements for a statement of appeal, as outlined in Article R48 para. 1 of the Code, are not fulfilled. However, this provision is meant to help an appellant where it fails to provide some of the formal elements of a statement of appeal, but not to cure a substantial failure, such as – potentially – naming the wrong party as respondent.**

3. **Based on the concept of the "indirect reference" to the rule of an international federation, a club is, on the basis of its (direct or indirect) membership with the national federation, also bound to the applicable international regulations. Another aspect of this concept is generally known as a "dynamic reference": the applicable regulations generally refer to higher-ranking (or international) regulations in their currently applicable version, so that all athletes and clubs are always and equally bound to the most current version of the respective regulations. These concepts constitute one of the main pillars of sport in a structure based on the pyramid structure of regional, national**

and international sports federations, and both the indirect and dynamic references are necessary to ensure that all participants to national and international sports are bound to the same set of rules. As a consequence, these principles, not least, safeguard the equal regulatory treatment of all participants in sporting competitions.

4. In accordance with the principle of legality and, even more importantly, with the principle of proportionality, any sanction imposed must, next to having a sufficiently clear statutory basis, also be proportionate. The wording of art. 64 para. 1 lit. c of the FIFA Disciplinary Code, according to which, if a club fails to comply with a decision taken by FIFA, points will be deducted or relegation to a lower division ordered, precisely reflects this: a first sanction may, in principle, only be the deduction of points, since this is the less severe and therefore proportionate sanction for a first infringement of the obligation to comply with a decision of FIFA. However, in case of continued failure to comply with a decision, a more severe sanction must be possible, in order to take account of the continued disrespect of FIFA's judicial authority.

5. The issue at stake in case of appeal against a disciplinary sanction imposed on a club for non-compliance with a FIFA decision is only the question whether the appellant respected and fulfilled that decision, but no longer its content.

I. PARTIES

1. SV Wilhelmshaven ("Appellant") is a football club with its registered office in Wilhelmshaven, Germany. It is a member of the North German Football Federation (Norddeutsche Fußball-Verband e.V., "NFV") and so affiliated to the German Football Federation, i.e. the "Deutscher Fussball-Bund" (DFB), which is in turn affiliated to the Fédération Internationale de Football Association (FIFA).

2. Club Atlético Excursionistas ("Respondent" or as "CA Excursionistas") is a football club with its registered office in Bajo Belgrano, Argentina. It is a member of the "Asociación del Fútbol Argentino" (AFA), which is in turn affiliated to FIFA.

II. FACTUAL BACKGROUND

3. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced. Additional facts and allegations found in the parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While 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 his reasoning.

A. Proceedings before the FIFA Dispute Resolution Chamber

4. On 5 December 2008, the FIFA Dispute Resolution Chamber ("FIFA DRC") awarded CA Excursionistas training compensation in relation to the player S., who had been transferred to Appellant, in the sum of EUR 100,000 ("FIFA DRC Decision").

5. On 23 March 2009, the Appellant lodged an appeal with the Court of Arbitration for Sport ("CAS"), against the findings of the FIFA DRC Decision. The procedure under the reference *"CAS 2009/A/1810 SV Wilhelmshaven v. Excursionistas"* was opened and an award was delivered on 5 October 2009, which dismissed the appeal lodged by Appellant. As a result, the findings of the FIFA DRC Decision became final and binding.

B. Proceedings before the FIFA Disciplinary Committee

6. On 13 July 2011, the FIFA Disciplinary Committee ("FIFA DC") opened disciplinary proceedings against SV Wilhelmshaven as the latter failed to pay the amount ordered by the FIFA DRC.

7. On 13 September 2011, the FIFA DC passed a first decision which was notified to the parties on 14 November 2011. By means of that decision, the Appellant was ordered to pay a fine in the amount of CHF 15,000, and it was granted a final period of grace of 30 days in which to settle its debt towards the Respondent. Likewise, it was decided that if the payment is not made within the aforementioned deadline, the Respondent may demand in writing from FIFA that six points be deducted from the Appellant's first team in the domestic league championship.

8. On 1 February 2012, the Respondent informed FIFA that the Appellant had still not paid any amount, and it requested the deduction of points. On 20 February 2012, FIFA asked the DFB to deduct six points of the Appellant's first team.

9. On 22 March 2012, the Respondent informed FIFA that no payment had been done and that no agreement had been reached between the parties with regard to an amicable settlement.

10. By letter dated 15 August 2012, FIFA urged the Appellant to pay the outstanding amount immediately, and it informed it that otherwise, the matter would be presented to the next FIFA DC meeting for evaluation, in order to deliberate about a possible relegation of the Appellant's first team.

11. On 5 October 2012, the FIFA DC rendered a decision ("FIFA DC Decision" or the "Appealed Decision"), pronouncing the Appellant guilty of failing to comply with a decision of a FIFA body and, in accordance with Article 64 para. 1 lit. c and para. 2 of the FIFA Disciplinary Code, ordered the DFB to relegate SV Wilhelmshaven to the next lower division.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

A. General procedural steps

12. On 19 December 2012, the Appellant filed a statement of appeal with the CAS pursuant to Article R47 of the Code of Sports-related Arbitration (the "Code") against the Respondent with respect to the FIFA DC Decision dated 5 October 2012 and notified to the parties on 28 November 2012. The appeal brief of Appellant referred to *"SV Wilhelmshaven"* as Appellant and to *"Club Atlético Excursionistas"* as Respondent in these appeal proceedings.

13. In its statement of appeal, the Appellant requested a stay of the execution of the Appealed Decision, pursuant to Article R37 of the Code.

14. On 29 December 2012, Appellant filed its appeal brief.

15. The Respondent did not submit any written statement to CAS.

16. By order dated 24 January 2013, the application for a stay of execution of the Appealed Decision was rejected by the Deputy President of the Appeals Arbitration Division as the Appellant failed to meet the criteria of likelihood of success. In fact, the Deputy President of the Appeals Arbitration Division found that *"only FIFA, and not the Respondent* [Club Atlético Excursionistas]*, could be considered as the legitimate respondent to the present appeal proceedings"*.

17. On 21 August 2013, a Hearing was held in the offices of Bär & Karrer AG in Zurich, Switzerland. The Appellant was represented by its legal representative, while Respondent did not attend the Hearing. FIFA was invited by the Sole Arbitrator to take part, without any prejudice, in the Hearing as well and was represented by Mr. Marc Cavaliero, Head of the Disciplinary and Governance Department. The Appellant was able to ask questions to FIFA, and did in fact so. At the Hearing, the Appellant and FIFA confirmed that the Appealed Decision had not been enforced yet; in particular, the Appellant has not been relegated to a lower division or league yet and is still playing in the "Regionalliga Nord".

B. The parties to the present proceedings in particular

18. Upon being informed by the CAS Court Office about the filing of a statement of appeal against the FIFA DC Decision as well as about the aspect that the appeal is not directed against FIFA, the latter renounced, by letter dated 27 December 2012, to its right to intervene in the present arbitration proceedings, pursuant to Article R41.3 of the Code.

19. In addition, FIFA held, *inter alia,* that in case a party lodges an appeal against a decision of the FIFA DC, such appeal would have to be directed against FIFA. Should this not be the case, the appeal would, according to FIFA, have to be declared inadmissible.

20. On 4 January 2013, upon receipt of FIFA's aforementioned position, the Appellant submitted a statement, clarifying *"that the appeal is directed against FIFA"*. The Appellant held that this is necessarily implied by the fact that Appellant's requests for relief are directed against the

decision of the FIFA DC. According to the Appellant, this *"arguably indicates that FIFA was and is the intended Respondent"*. In addition, the Appellant held that CA Excursionistas had erroneously been named as Respondent because the cover of the FIFA DC Decision named as opposing parties *"Club Atlético Excursionistas, Argentina, versus SV Wilhelmshaven, Germany"*.

21. Upon being invited by the CAS Court Office to express whether it intends to accept being nominated as Respondent in the present proceedings or not, FIFA adhered to its previous statement and rejected to participate in these proceedings as Respondent.

22. By means of subsequent correspondence, the Appellant reiterated that its appeal is directed against FIFA and that CA Excursionistas is not the Respondent in the present proceedings. Accordingly, the Appellant requested that the appeal be forwarded to FIFA as Respondent.

23. By letter dated 10 January 2013, the CAS Court Office informed the parties that FIFA had not accepted to become Respondent in the present matter.

24. The Sole Arbitrator will revert below on the legal implications of this issue.

IV. SUBMISSIONS OF THE PARTIES AS TO THE SUBSTANCE OF THE DISPUTE

25. With regard to the substance of the present matter, the submissions of the Appellant can be best summarised as follows:

26. The Appellant holds that the FIFA DC is not allowed to sanction it, because there is no relation between the Appellant and FIFA. The Appellant is not a member of FIFA and did not submit to the latter's sanctioning power. Consequently, the Appellant argues that there is no legal basis for the sanctions against it. Further, the Appellant holds that even if reference was made to the statutes of the DFB and/or to the statutes of FIFA, this would constitute an illegal *"dynamic reference"*.

27. The Appellant also argues that even if Article 64 of the FIFA Disciplinary Code was applicable as a basis for the sanction in question, it would not be permissible to relegate the Appellant to a lower decision, since the aforementioned provision only allows to deduct points *or* to relegate a club and, in other words, this provision does not allow for an additional and/or repeated sanctions.

28. Finally, the Appellant holds that the decision of 5 December 2008 of the FIFA DRC is in breach of European Community Law. The Appellant holds that the *"transfer compensation system" [recte:* the training compensation system] is in breach of European Community Law, since the compensation for the costs of the training of players has to comprise only the actual training costs.

29. Therefore, the Appellant holds that also sanctions which are imposed on the basis of that decision and of this system are in breach of European Community Law. In this respect, the Appellant also refers to findings of the precedent CAS award (CAS 2009/A/1810), by means

of which the payment obligation of the Appellant towards the Respondent was confirmed, and the Appellant held that this award is erroneous.

30. In conclusion of the above, the Appellant therefore submits the following prayers for relief:

"1. The before-mentioned decision is lifted, the Respondent's claim granted by the FIFA Disciplinary Committee is dismissed.

2. The Respondent shall bear all costs before the CAS as well as the fees of the Appellant's counsel in the CAS procedure.

3. The execution of the before-mentioned decision of the FIFA Disciplinary Committee is suspended".

31. The Respondent did not submit a statement to CAS addressing the merits of the dispute.

V. ADMISSIBILITY

32. Article R49 of the Code provides as follows:

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.

33. The appeal against the FIFA DC Decision was filed within the deadline provided by the FIFA Statutes and stated in the Appealed Decision. Further, the Appellant complied with all the other requirements of Article R48 of the Code. The Appellant's appeal therefore is, in principle, admissible.

34. As mentioned above, FIFA argues that since the appeal has been directed against the Respondent, *i.e.* Club Atlético Excursionistas, and not against FIFA, the appeal shall not be admissible. The Sole Arbitrator will revert to this issue below. In any event, the Sole Arbitrator wishes to note that under Swiss Law, lack of standing to be sued is generally considered a reason to reject an appeal on the merits, and not a reason to declare such appeal inadmissible.

VI. JURISDICTION

35. 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.

36. The jurisdiction of CAS, which is not disputed, derives from Articles 66 *et seq.* of the FIFA Statutes, in conjunction with Article R47 of the Code.

VII. APPLICABLE LAW

37. 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.*

38. Pursuant to Article 66 para. 2 of the FIFA Statutes, *"CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law"*. As a consequence, the FIFA regulations will be applied primarily, and Swiss Law shall apply complimentarily *(cf.* CAS 2011/A/2484, paras. 20 *et seqq.)*.

VIII. MERITS

A. The parties to the present proceedings

39. As a preliminary issue, the Sole Arbitrator must address the question as to who has to be considered as Respondent in the present proceedings.

40. In this respect, the Sole Arbitrator firstly wishes to point out that he will, notwithstanding the Order on Request for Provisional and Conservatory Measures rendered by the Deputy President of the CAS Appeals Arbitration Division on 24 January 2013, fully address the issue as to whether the Appellant has named the right party as Respondent in the present proceedings and, in particular, whether FIFA is to be considered as a Respondent or not.

41. First, the Sole Arbitrator needs to consider, in general, which parties have standing to be sued in appeal proceedings concerning decisions taken by the FIFA DC.

42. As a principle, and as it has already been established in CAS jurisprudence, a party has standing to be sued *("légitimation passive")* in CAS proceedings only if it has some stake in the dispute because something is sought against it in front of CAS (*cf.* CAS 2008/A/1620, para. 4.1.; CAS 2007/A/1367, para. 37.). FIFA disciplinary proceedings, like basically all disciplinary proceedings of a sport association, are primarily meant to protect an essential interest of FIFA and FIFA's (direct and indirect) members, *i.e.* the full compliance with the rules of the association and, as here, with the decisions rendered by FIFA's decision-making bodies and/or by CAS (*cf.* CAS 2008/A/1620, para. 4.6.).

43. As a consequence, in an appeal against a decision of FIFA, by means of which disciplinary sanctions have been imposed on a party, only FIFA has standing to be sued, but not the (previously) opposing party in, *e.g.,* a financial dispute before the competent FIFA bodies (cf.

CAS 2008/A/1620, para. 4.7.; CAS 2007/A/1367, para. 43 *et seq.)*. In other words, only FIFA can be the correct Respondent having standing to be sued.

44. Having established the foregoing, the Sole Arbitrator notes that in its statement of appeal, Appellant had indicated the parties to the present proceedings as *"SV Wilhelmshaven (Appellant) (...) and Club Atlético Excursionistas (Respondent)"*. Likewise, the Sole Arbitrator acknowledges that, as soon as FIFA had indicated that it considers such appeal to be inadmissible, the Appellant clarified *"that the appeal is directed against FIFA"*.

45. In view of the above, the Sole Arbitrator first examines whether Article R48 para. 3 of the Code is applicable to the present matter. According to this provision, a short deadline may be granted to an Appellant in an appeal procedure in case the requirements for a statement of appeal, as outlined in Article R48 para. 1 of the Code, are not fulfilled. However, as established by previous CAS jurisprudence, the Sole Arbitrator is of the view that this provision is meant to help an Appellant where he fails to provide some of the formal elements of a statement of appeal, but not to cure a substantial failure, such as – potentially – naming the wrong party as Respondent. Consequently, Article R48 of the Code does not apply to the present set of circumstances, where it needs to be established whether the Appellant has named the right Respondent or not and, in particular, whether FIFA has been named as Respondent or not (CAS 2008/A/1620, paras. 4.8. *et seqq.;* CAS 2007/A/1329-1330, paras. 13 *et seqq.)*.

46. Having established the foregoing, the Sole Arbitrator proceeds to assess whether the Appellant's statement dated 4 January 2013, by means of which Appellant clarified that his appeal is directed against FIFA and not against Club Atlético Excursionistas, is to be considered as a substantive change of a party *("substitution de partie")* or as a mere change in the denomination of a party *("rectification de la désignation d'une partie";* see, *inter alia,* Swiss Federal Tribunal, ATF 131 I 57, para. 2 p. 61 *et seqq.)*.

47. This differentiation is decisive since a substantive change of a party would have to be viewed, in principle, as the filing of a new appeal altogether (*cf.* CAS 2007/A/1329-1330, para. 10). Consequently, such new appeal would have to meet the deadlines, as set out in the applicable provisions of the Code as well as of the FIFA Statutes. On the other hand, a mere change in the denomination of a party would not substantively change the parties to the present proceedings but only correct the previous, and wrong, denomination of the parties (in particular, of the Respondent). As a consequence, in case of a change in the denomination of a party, once the applicable deadlines have been respected and the arbitration proceedings have been set in motion, these proceedings continue, substantively, with the same parties, which are then correctly denominated.

48. The Sole Arbitrator acknowledges that the FIFA DC decision may have a somewhat confusing effect to a potential Appellant since its cover sheet indicates indeed as parties to such proceedings the Claimant and the Respondent of the preceding financial dispute. FIFA would be well advised to rectify such practice, because it is undeniable that indicating the parties to the preceding dispute – but not FIFA – in a statement of appeal may, at least to some extent, be influenced by the wording of the decision of the FIFA DC itself. However, as established above, from a legal standpoint, it is rather obvious that the parties to disciplinary proceedings

in front of FIFA consist, on the one hand, of FIFA as well as, on the other hand, of the party which is subject to the disciplinary proceedings and the potential sanction.

49. Further, the Sole Arbitrator is also of the view that in principle, it is common knowledge that FIFA Disciplinary Proceedings are to be distinguished from proceedings before the FIFA Dispute Resolution Chamber *(cf.* CAS 2007/A/1367, para. 43) or the FIFA Players' Status Committee. Accordingly, the Sole Arbitrator believes that parties to proceedings in front of CAS must also be aware of the differences with regard to the question as to who has standing to be sued in such proceedings. As a consequence, parties which name a wrong party as a respondent in such proceedings must, as a general rule, bear the respective consequences, *i.e.* they will see their appeals being rejected.

50. In this respect, the Sole Arbitrator also recalls that in case the wrong party is sued in appeal proceedings in front of CAS, *i.e.* a party which does not have standing to be sued, this would lead to the rejection of the respective appeal as to the substance, but not to the appeal being inadmissible, since a lack of standing to be sued or of *"légitimation passive"* does not concern an appeal's admissibility, but its legal justification and merits (see Swiss Federal Tribunal, ATF 126 III 59, para. 1.a. p. 63).

51. For reasons which will be outlined in the following paragraphs, the present appeal must, in any case, be rejected as to its substance. Therefore, the Sole Arbitrator is of the view that the question as to whether in the present case the Appellant a substantive change of a party *("substitution de partie")* or a mere change in the denomination of a party *("rectification de la désignation d'une partie")* can be left open. Accordingly, the issue whether*;* the right party has been named as a Respondent or not and, in other words, whether FIFA (being the party having standing to be sued) or Club Atlético Excursionistas (being the party not having standing to be sued) must be considered as Respondent, does not have to be decided in the present matter. Therefore, the Sole Arbitrator does also not have to decide whether Appellant validly *"clarified"* and/or changed its designation or, respectively, denomination of the respondent, which was initially designated as CA Excursionistas.

B. The substance matter of the dispute

52. The substance matter of the present appeal proceedings, in essence, concerns the question as to whether the FIFA DC was right in ordering that the Appellant be relegated to a lower decision, based on Article 64 para. 1 lit. c and para. 2 of the FIFA Disciplinary Code.

53. The Sole Arbitrator notes that the Respondent has not submitted its respective position to CAS, despite having been provided by the CAS Court Office with all the respective information. Pursuant to art. R55 para. 2 of the Code, the Sole Arbitrator nevertheless decided to proceed and render an award in the present matter.

54. The Sole Arbitrator first deals with the argument of the Appellant, according to which there is no relation between the Appellant and FIFA, since the Appellant is not a member of FIFA and did not submit to the latter's sanctioning power. The Sole Arbitrator also notes that the

Appellant argues that even if there is a reference to FIFA's regulations, this would constitute an illegal *"dynamic reference"* to FIFA's rules and regulations.

55. In this respect, the Sole Arbitrator notes that the Appellant is, as a member of the NFV, affiliated to the DFB and bound by the latter's rules and regulations (*cf.* para. 3 of the Statutes of the NFV). The DFB, in turn, is a member of FIFA and therefore bound by FIFA's rules and regulations (art. 13 para. 1 lit. a of the FIFA Statutes). In addition, as a member of FIFA, the DFB has the obligation to ensure that its own (direct or indirect) members, *i.e., inter alia,* the Appellant, comply with the Statutes, regulations, directives and decisions of FIFA bodies (art. 13 para. 1 lit. d of the FIFA Statutes). Accordingly, pursuant to § 3 para. 1 of the Statutes of the DFB, the latter's members are bound by the regulatory provisions enacted by FIFA. This concept is generally known, on the one hand, as an *"indirect reference"* to the rules and regulations of an international federation: a club is a member of *it*s national (or regional) federation and therefore bound by the applicable national regulations, while these regulations, *inter alia,* refer to the applicable international regulations and declare these regulations equally binding on a club at national level. As a result, the club is, on the basis of its (direct or indirect) membership with the national federation, also bound to the applicable international regulations (see HAAS/MARTENS, Sportrecht – Eine Einführung in die Praxis, p. 67 *et seq.).*

56. On the other hand, another aspect of this concept is generally known as a *"dynamic reference"*: the applicable regulations generally refer to higher-ranking (or international) regulations in their currently applicable version, so that all athletes and clubs are always and equally bound to the most current version of the respective regulations *(cf.* CAS 2009/A/1931, para. 8.8).

57. The Sole Arbitrator is of the view that these concepts constitute one of the main pillars of sport in a structure based on the pyramid structure of regional, national and international sports federations, and that both the indirect and dynamic reference are necessary to ensure that all participants to national and international sports are bound to the same set of rules. As a consequence, these principles, not least, safeguard the equal regulatory treatment of all participants in sporting competitions (*cf.* CAS 2007/A/1370 & 1376; CAS 2008/A/1575 & 1627; CAS 2009/A/1817 & 1844; see also Circular n° 1080 issued by FIFA on 13 February 2007).

58. Therefore, and in view of the fact that the Appellant did not bring forward convincing arguments as to why these fundamental principles should be put into question, the Sole Arbitrator concludes that the Appellant is validly bound to the rules and regulations of FIFA. As a consequence, the Sole Arbitrator holds that, at least in principle, there has been a valid regulatory basis to impose a sanction on the Appellant, *i.e.* the FIFA Disciplinary Code.

59. Further, the Sole Arbitrator notes that the Appellant argues that it is not possible to relegate it on the basis of art. 64 para. 1 lit. c of the FIFA Disciplinary Code, since this provision, in the reading of Appellant, only allows for the deduction of points *or* the relegation of a club but not, as in the matter at hand, first for a deduction of points and then for a relegation to a lower division.

60. Article 64 para. 1 of the FIFA Disciplinary Code reads as follows:

"Anyone who fails to pay another person (...) or FIFA a sum of money in full or in part, even though instructed to do so by a body, a committee or an instance of FIFA or a subsequent CAS appeal 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 by CAS (subsequent appeal decision):

a) will be fined 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 relegation to a lower decision ordered. A transfer ban may also be pronounced;

(…)".

61. The Sole Arbitrator infers from the file that the Appellant has failed to comply with a final decision rendered by the FIFA Dispute Resolution Chamber and subsequently confirmed by CAS, despite having been reminded and urged to do so on several occasions. As a consequence, a fine has been imposed on the Appellant, points have been deducted from Appellant's first team and, subsequently and after the Appellant had still not complied with said decision, a relegation to a lower league has been ordered by means of the Appealed Decision.

62. As any sanction imposed by an association, the sanctions imposed by the FIFA Disciplinary Committee must have a sufficiently clear regulatory basis (HAAS/MARTENS, *op. cit.,* p. 62, 98; CAS 2008/A/1545, para. 30). As a consequence, the Sole Arbitrator must establish whether art. 64 para. 1 lit. c of the FIFA Disciplinary Code can serve as such basis for the sanction imposed on the Appellant in the present matter. In particular, the Sole Arbitrator must assess whether the aforementioned provision only stipulates the possibility to either deduct points or to relegate a club to a lower division or whether it is permissible to impose both of these sanctions.

63. In this context, the Sole Arbitrator also recalls that any sanction imposed must, next to having a sufficiently clear statutory basis, also be proportionate (RIEMER H. M., Commentary on the Swiss Civil Code, Berne 1990, art. 70 margin 211). The Sole Arbitrator is of the view that the wording of art. 64 para. 1 lit. c of the FIFA Disciplinary Code precisely reflects this principle of proportionality: according to this provision, if – as it is undisputed in the matter at hand – a club fails to comply with a decision taken by FIFA, *"points will be deducted or relegation to a lower division ordered".*

64. The Sole Arbitrator reads this provision as follows: in accordance with the principle of legality and, even more importantly, with the principle of proportionality, a first sanction may, in principle, only be the deduction of points, since this is the less severe and therefore proportionate sanction for a first infringement of the obligation to comply with a decision of FIFA. However, in case of continued failure to comply with a decision, a more severe sanction

must be possible, in order to take account of the continued disrespect of FIFA's judicial authority. This interpretation has been shared by CAS in previous cases (*cf.* CAS 2005/A/944; 2011/A/2646). In the view of the Sole Arbitrator, this is precisely provided for in art. 64 para. 1 lit. c of the FIFA Disciplinary Code: as a more severe sanction, and as a second step, a relegation to a lower decision may be ordered.

65. To argue that art. 64 para. 1 lit. c of the FIFA Disciplinary Code only allows for either of these two sanctions would, to a certain extent, void this provision of its content: based on the principle of proportionality, it would, as a first sanction, always only be possible to deduct points from a club failing to comply with a decision. If it was not possible to then, in case of continued failure, impose a more severe sanction, *i.e.* to relegate a club to a lower division, as it is foreseen in the provision in question, it would not make sense to mention this possible sanction in this provision at all. The Sole Arbitrator is of the view that this cannot be the correct reading of art. 64 para. 1 lit. c of the FIFA Disciplinary Code.

66. As a consequence, the Sole Arbitrator comes to the conclusion that art. 64 para. 1 lit. c of the FIFA Disciplinary Code allows for a combination of the two sanctions in case of continued failure to comply with a decision of FIFA, provided that, in accordance with the principle of proportionality, a club is first only sanctioned with a deduction of points and only at a later stage, the relegation to a lower division is imposed.

67. In the present matter, the Appellant does not dispute that it did not comply with the FIFA DRC decision. In addition the Sole Arbitrator infers from the file that first, the Appellant was ordered to pay a fine, was granted a final period of grace in which to settle its debt, that subsequently, points have been deducted from the Appellant since it had still not complied with its payment obligation and that eventually, after Appellant had been urged for a final time to settle the outstanding amount and after the Appellant had still not made such payment, the Appellant has been relegated to a lower division, by means of the Appealed Decision.

68. As a consequence, the Sole Arbitrator considers that the regulatory prerequisites, as established in art. 64 para. 1 lit. c of the FIFA Disciplinary Code, to impose a relegation to a lower division, are fulfilled.

69. Finally, the Sole Arbitrator addresses the argumentation of the Appellant, according to which the payment obligation imposed is in breach of European Community law and according to which the CAS award confirming the Appellant's obligation to pay training compensation to Respondent (CAS 2009/A/1810), is erroneous.

70. In this respect, the Sole Arbitrator recalls, in general, that the issue at stake is whether or not a disciplinary sanction of FIFA shall be annulled. The background of such disciplinary sanction is non-respect by the Appellant of a decision of the FIFA Dispute Resolution Chamber, which has become final and binding, as confirmed by CAS in the first procedure. In other words, what is now at stake is only the question whether the Appellant respected and fulfilled that decision, but no longer its content. This has been recognised by CAS several times. So in CAS 2005/A/957 at para. 17 it was held:

"The object of this appeal cannot extend beyond the limits of a review of the disciplinary sanction imposed by the DC. The Panel cannot consider requests concerning the debt owed by the Appellant to the Mexican Club, the issues relating thereto having been decided by the final and binding CAS Award. As a result, only submissions relating to the fine imposed by the DC, such as its legal basis and quantum, can be heard. Any request by the Appellant to have its debt towards by the Mexican Club cancelled, postponed, rescheduled, or divided in several deferred portions, is precluded by the res iudicata implied in the CAS Award. It cannot be re-heard now, at the stage of enforcement of the obligation to pay".

71. The preclusion of *res iudicata* was confirmed in other CAS awards (*cf.* CAS 2004/A/1008, para. 37 *et seq.*; see also Decision of the Swiss Federal Tribunal of 5 January 2007, 4P.240/2006).

72. With all sympathy that one can have for rather small football clubs like Appellant and Respondent, the Sole Arbitrator does not see any legal or factual reason to deviate from the above positions and review a matter which has been judged, with *res iudicata* effect. As a consequence, Appellant's arguments which, directly or indirectly, refer to alleged flaws in the contents of this underlying decision, cannot be heard any longer at the present stage, as this would mean to reopen a matter in the merits which has been decided by a final and binding decision.

73. Overall, therefore, in the view of the Sole Arbitrator, the Appellant did not bring forward convincing arguments as to why the appeal of the Appellant should be upheld and the Appealed Decision overturned.

74. As a conclusion, the Sole Arbitrator is satisfied that the present appeal must be rejected. This conclusion, finally, makes it unnecessary for the Sole Arbitrator to decide the issue around the party named as respondent or to consider the other requests submitted by the Appellant. Accordingly, all other prayers for relief are rejected.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by SV Wilhelmshaven on 19 December 2012 against the decision issued by the FIFA Disciplinary Committee on 5 October 2012 is dismissed.

2. The decision adopted on 5 October 2012 by the FIFA Disciplinary Committee is confirmed.

3. (…)

4. (…)

5. All other prayers for relief are dismissed.