



Arbitration CAS 2013/A/3283 Fudbalski klub Partizan v. Sao Caetano Futebol LTDA, award of 1 April 2014

Panel: Prof. Martin Schimke (Germany), President; Mr Bernhard Heusler (Switzerland); Mr David Cairns (Spain)

Football

Transfer

Distinction between the contractual aspect of a case and the eventual disciplinary aspect of a case

The contractual aspect of a case, which is dealt with by the Players' Status Committee, should be differentiated from the eventual disciplinary aspect of a case, which is decided by the Disciplinary Committee. Those two proceedings are independent from each other, and both the decision from the Players' Status Committee and the Disciplinary Committee may be appealed to CAS. In case of a contractual dispute, the jurisdiction of the CAS derives from R47 of the Code and Article 67 of the FIFA Statutes.

I. INTRODUCTION

1. This appeal is brought by Fudbalski klub Partizan (the "Appellant" or "Partizan"), against a decision of the Single Judge of the Players' Status Committee (the "Single Judge") of the Fédération Internationale de Football Association ("FIFA") dated 21 January 2013 (the "Appealed Decision") imposing on Partizan the payment of EUR 600,000, plus interests, to Sao Caetano Futebol LTDA (the "Respondent" or "Sao Caetano") in the context of the transfer of the player Eduardo Ferreira Abdo Pacheco (the "Player") from Sao Caetano to the Partizan.

II. THE PARTIES

2. The Appellant is a Serbian football club, affiliated with the Football Association of Serbia, which in turn is affiliated with FIFA.
3. Sao Caetano is a Brazilian football club, affiliated with the Brazilian Football Confederation, which in turn is affiliated with FIFA.

III. FACTUAL BACKGROUND

4. The elements set out below are a summary of the main relevant facts, as established by the Panel on the basis of the written submissions of the Parties, and the exhibits filed. Additional facts may be set out, where relevant, in the legal considerations of the present award.
5. On 22 June 2011, the Parties entered into an agreement (the “Transfer Agreement”) regarding the permanent transfer of the Player.
6. For the transfer of the Player, the Appellant undertook to pay to the Respondent a total compensation of EUR 1,100,000 (one million and one hundred thousand Euros), as follows (clause 2.3 of the Transfer Agreement):
 - a) EUR 500,000 due by 1 July 2011; and
 - b) EUR 600,000 due by 21 August 2011.
7. On 12 July 2011, the Parties concluded an amendment to the Transfer Agreement (the “Amendment”). In essence, the Parties decided to confirm the payment of the compensation amount due as first instalment, i.e. EUR 500,000, had been successfully completed by the Appellant, as well as the remaining amount had to be paid into another bank account indicated by the Respondent for administrative reasons.
8. Furthermore, according to clause 2 of the Amendment, “[a]ll the other clauses of the Transfer Agreement shall remain unaltered”.
9. The Respondent later agreed to extend the payment deadline for the outstanding amount to 30 September 2011. According to a letter of intention signed by the Parties on 1 December 2011, the outstanding amount of EUR 600,000 had to be paid by 15 May 2012 in five monthly instalments.
10. The Appellant failed to pay the amount due as second instalment to the Respondent, i.e. EUR 600,000, despite the fact that the Respondent had on several occasions drawn the Appellant’s attention to such delay.
11. On 19 March 2012, and again on 17 May 2012, the Respondent lodged a claim with FIFA against the Respondent for breach of the Transfer Agreement. In this respect, the Respondent stated that the Appellant had only paid the first instalment of EUR 500,000, and therefore, had failed to pay the second and final instalments for an amount of EUR 600,000.
12. On 14/15 January 2013, the Parties signed a new agreement (the “Settlement Agreement”) according to which the Parties wished to transfer the player back to Sao Caetano. The main terms of this agreement are the following:

“We kindly inform you that Sao Caetano Futebol Ltda. is ready to accept the permanent transfer and to sign new employment contract with the player at hand with pre-fixed term until July 2015 upon the fulfilment by F.C. Partizan of the following conditions:

- (i) EUR 300,000 (three hundred thousand Euros) due as part of the remuneration to be paid to the player during the length of the new employment contract; and
- (ii) to forward our attention [...] copy of all bank swift transfers regarding the aforementioned amount, as well as the outstanding remuneration of EUR 20,000 (i.e. salaries, bonuses, etc.) to the player.

For the avoidance of doubt and in order to permit F.C. Partizan to properly fulfil with the obligations as stated in item (i) above, find below to your perusal and proceedings the bank account [...]

Upon the accomplishment of the aforementioned pre-requisites by F.C. Partizan, Sao Caetano Futebol Ltda. undertakes to forward draft of the referenced transfer agreement in which inter alia shall set that F.C. Partizan shall be entitled to 50% of any eventual and future amount to be received by Sao Caetano Futebol Ltda. as compensation for the permanent transfer of the player during the term of the new employment contract.

Equally and following the fulfilment of the conditions above, Sao Caetano Futebol undertakes to withdraw the claim lodged against F.C. Partizan and currently sub judice before the FIFA Players' Status Committee. [...]"

13. On 17 January 2013, the Appellant paid the amount of EUR 300,000 to the Respondent.
14. On 20 January 2013, the Parties reached an agreement regarding the permanent transfer of the Player, as well as the assignment of 50% of any eventual and future amount received in case of permanent transfer of the Player to a third football club (the "Retransfer Agreement").
15. On 21 January 2013, the Single Judge rendered the Appealed Decision, without grounds.
16. On 31 January 2013, the Appellant countersigned the Retransfer Agreement.
17. On 1 February 2013, the Player was registered for the Respondent, via the FIFA TMS system.
18. On 8 February 2013, the Appealed Decision was notified to the Parties.
19. On 5 March 2013, the Appellant requested to be provided with the grounds of the Appealed Decision.
20. On 16 July 2013, the Parties were provided by FIFA with the grounds of the Appealed Decision. In substance, the Single Judge considered that the Appellant failed to pay the second instalment of EUR 600,000 pursuant to the Transfer Agreement and that therefore the Appellant had to pay this amount to the Respondent, plus interests

IV. SUMMARY OF THE ARBITRAL PROCEEDINGS BEFORE THE CAS

21. Following the notification of the Appealed Decision, the Appellant filed a Statement of Appeal before the Court of Arbitration for Sport (the "CAS"), in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the "Code") on 5 August 2013.

22. On 15 August 2013, the Appellant filed its appeal brief, in accordance with Article R51 of the Code.
23. By letter dated 16 August 2013, the CAS Court Office notified the appeal brief to the Respondent and granted it, pursuant to Article R55 of the Code, a time limit of twenty days upon receipt of the appeal brief by courier to file its answer.
24. On 19 August 2013, the appeal brief was delivered to the Respondent by courier. The Respondent, however, failed to file its answer within the prescribed time limit.
25. On 18 September 2013, the Deputy President of the CAS Appeals Arbitration Division rejected the Appellant's request to stay the execution of the Appealed Decision.
26. On 7 October 2013, the Respondent requested an additional time limit to file its answer.
27. On 18 October 2013, the Respondent was informed that its request was rejected by the President of the CAS Appeals Arbitration Division.
28. On 12 November 2013, the Parties were informed that the following persons had been appointed as Arbitrators: Prof. Dr. iur. Martin Schimke, attorney-at-law in Düsseldorf, Germany, as President of the Panel, sitting with Dr. iur. Bernhard Heusler, attorney-at-law in Basel, Switzerland, and Mr David J.A. Cairns, attorney-at-law in Madrid, Spain, as Members of the Panel.
29. On 26 November 2013, the Respondent was granted, on behalf of the Panel and in agreement with the Appellant, a time limit of five days to file its answer.
30. On 2 December 2013, the Respondent filed its answer.
31. In its letter dated 13 December 2013, the Appellant requested CAS to hold a hearing in the case at hand.
32. On 14 December 2013, the Respondent sent a letter to CAS, informing that it considered that a hearing was not necessary to resolve the dispute.
33. On 19 December 2013, the Appellant was granted a time limit until 6 January 2014 to file its comments on the issues of jurisdiction raised by the Respondent's answer; however, no filing of such submission was received by CAS within the prescribed time limit.
34. On 23 January 2013, the Order of Procedure was transmitted to the Parties. Point 9 of this Order of Procedure reads as follows:

By signature of the present Order, the parties confirm their agreement that the Panel may decide this matter based on the parties' written submissions. The parties confirm that their right to be heard has been respected. Pursuant to Article R57 of the Code, it will be for the Panel to make the final decision as to whether a hearing is held.

35. On 28 January 2013, the Respondent signed the Order of Procedure.
36. On 30 January 2014, the Appellant signed the Order of Procedure.

V. POSITION OF THE PARTIES

37. The following outline of the Parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the Parties. The Panel, however, has carefully considered all the submissions made by the Parties, even if no explicit reference has been made in the following.

A. Football klub Partizan (Appellant)

38. The Appellant's position is, in substance, the following:
 - a. It is true that the Appellant owed the Respondent the amount of EUR 600,000 as the outstanding amount due following the transfer of the Player;
 - b. the Appellant fulfilled its obligation with respect to the Settlement Agreement;
 - c. the Respondent had therefore to withdraw its claims before FIFA;
 - d. the decision should be modified and the Respondent's claim rejected.

B. Sao Caetano Futebol LTDA (Respondent)

39. The Respondent's position is, in substance, the following:
 - a. CAS does not have jurisdiction as the Respondent has not exhausted all the legal remedies available before FIFA;
 - b. FIFA regulations are applicable to the case at hand and, additionally, Swiss law;
 - c. the Respondent has not fulfilled all the obligations contained in the Settlement Agreement as it did not pay the amount of EUR 20,000 which was to be paid for the Player's outstanding remuneration;
 - d. the Appealed Decision was issued on 21 January 2013, i.e. before the Appellant effectively fulfilled its obligation to pay the amount of EUR 20,000;
 - e. when the Appealed Decision was issued and notified to the Parties, it could no longer be enforceable, even though the Settlement Agreement was never transmitted to the FIFA Players' Status Committee.

VI. THE PARTIES' REQUESTS FOR RELIEF

40. The Appellant's requests for relief are the following:

"We think that the only right and juridical, correct decision, in this case is the modification of the FIFA decision, refusal of the Respondent claim with the obligation of the Respondent to take care of costs in this proceeding".

41. The Respondent's requests for relief are the following:

"In view of the above, the Respondent herein submits to the attention of the Panel the following requests for relief:

FIRST – To confirm that the Court of Arbitration for Sport has no jurisdiction to hear the ongoing arbitration since the necessary pre-conditions necessary were not attended by Respondent towards the various regulations of FIFA, and, in particular, Art. R47 of the CAS Code;

SECOND – To uphold, therefore, that the Court of Arbitration for Sport has no jurisdiction to the decided the appeal filed by the Appellant on 5 August 2013 with regards to the Appealed Decision issued by the Single Judge of the FIFA Players' Status Committee on 21 January 2013;

THIRD – To condemn the Appellant to the payment of the legal expenses incurred by the Respondent; and

FOURTH – To establish that the costs of this arbitration procedure before the Court of Arbitration for Sport will be borne by the Appellant.

Subsidiary and only in the event the above is rejected:

FIFTH – To fully dismiss the appeal lodged by the Appellant on 5 August 2013 since it is totally groundless towards the letter of intention signed on 14 January 2013;

SIXTH – To confirm that the Appellant failed to discharge its obligations prior to demand performance from the Respondent (cf. Art. 82 of the CAS Code of Obligations);

SEVENTH – To confirm that the Appellant has neither complied with the obligation to discharge the burden of proof regarding the payment of the amount due to the Player, as well as in the event such payment really occurred, that the Respondent was informed accordingly and towards the letter of inten[t]ion;

EIGHTH – To ratify that the Appellant had no legal obstacle to directly communicate the FIFA Player's Status Committee that the parties had reached signed a letter of intention; and

NINETH – To condemn the Appellant to the payment of the legal expenses incurred by the Respondent; and

TENTH – To establish that the costs of this arbitration procedure before Court of Arbitration for Sport will be borne by the Appellant".

VII. DECISION ON THE PARTIES WRITTEN SUBMISSIONS

42. The Appellant, in its letter dated 13 December 2013, expressly requested that a hearing be held in the case at hand. On the contrary, the Respondent considered that a hearing was not necessary since the submissions of the Parties covered all the relevant aspects of the case. Both Parties subsequently signed the Order of Procedure confirming their agreement that the Panel may decide this matter without a hearing.

43. In this regard, Article R57 of the Code reads as follows:

“After consulting the parties, the Panel may, if it deems itself to be sufficiently well informed, decide not to hold a hearing”.

44. In view of the written submissions of the Parties, and considering in particular that the parties do not contest the fundamental facts of the case, the Panel considered itself to be sufficiently well informed, and therefore decided not to hold a hearing in the present proceedings.

VIII. THE ADMISSIBILITY OF THE APPEAL AND CAS JURISDICTION

45. The admissibility of an appeal before CAS shall be examined in light of Article R47 of the Code, which reads 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”.

46. The same general principle is gathered in Article 67 of the FIFA Statutes, which states that:

“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”.

47. The Respondent contests CAS jurisdiction arguing that the Appellant has allegedly failed to exhaust the legal remedies available to him prior to the appeal as prescribed by Article R47 of the Code and 67 of the FIFA Statutes.

48. According to the Respondent, the Appellant should have brought the case to the FIFA Disciplinary Committee, arguing that point 4 of the conclusion of the Single Judge in the Appealed Decision reads as follows:

“If the aforementioned sum, plus interest as established above, 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”.

49. The Panel considers that the Respondent's position is wrong. The Respondent confuses the contractual aspect of a case, which is dealt with by the Players' Status Committee, and the eventual disciplinary aspect of a case, which is decided by the Disciplinary Committee. Those two proceedings are independent from each other, and both the decision from the Players' Status Committee and the Disciplinary Committee may be appealed to CAS.
50. The Panel holds that the case at hand involves a contractual and not a disciplinary dispute and that, therefore, the jurisdiction of the CAS to hear this case derives from R47 of the Code and Article 67 of the FIFA Statutes.
51. Under Article R57 of the Code, the Panel has the full power to review the facts and the law and may issue a de novo decision superseding, entirely or partially, the appealed one.

IX. APPLICABLE LAW

52. Article R58 of the Code provides that 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.
53. According to the evidence available in the present proceedings, the Parties have not chosen any particular regulations or rules of law.
54. The Panel therefore decided that the various Regulations of FIFA shall primarily apply to the case at hand and, additionally, Swiss law, given that FIFA, which issued the Appealed Decision, is domiciled in Switzerland

X. MERITS

55. The following refers to the substance of the Parties' allegations and arguments without listing them exhaustively. In its discussion of the case and its findings on the merits, the Panel has nevertheless examined and taken into account all of the Parties' allegations, arguments and evidence on record, whether or not expressly referred to in what follows below.

A. The Appellant's right to contest the Appealed Decision

56. The Respondent considers that the conclusion and the, even partial, execution of the Settlement Agreement by the Parties rendered the Appealed Decision moot, and that the appeal is therefore groundless. In this regard, the Respondent states, in its answer, the following:

"In this context, when the Appealed Decision is issued and finally communicated the parties, it was well-known that its effects were no longer valid or enforceable, despite to the fact a formal

communication about the execution of the letter of intention had never been effectively made by the Appellant nor the Respondent to the FIFA Players' Status Committee".

57. The Panel deems the Respondent's position erroneous. To the contrary, once the Appealed Decision was rendered, the Appellant had the right to contest it before CAS, as per Article 67 of the FIFA Statutes. In this context, the Panel considers that the question whether "[the Appealed Decision's] effects were no longer valid or enforceable" in view of the conclusion of the Settlement Agreement, is irrelevant in the context of the present dispute.

B. The Settlement Agreement

58. The Panel considers that in order to determine whether the Appealed Decision is to be confirmed or overturned, it shall determine whether the Settlement Agreement, which is subsequent to the facts taken into consideration by the Single Judge, is valid and binding, and whether it superseded all previous agreements concluded between the Parties.

59. As seen above, the Settlement Agreement states as conditions for signing the Retransfer Agreement:

- "(i) payment of the amount of EUR 300,000; and*
- (ii) a copy of the "bank swift transfers regarding the aforementioned amount, as well as the outstanding remuneration of EUR 20,000 (i.e. salaries, bonuses, etc.) to the player" as proof of payment".*

60. The next three paragraphs of the Settlement Agreement state the following:

"For the avoidance of doubt and in order to permit F.C. Partizan to properly fulfil with the obligations as stated in item (i) above, find below to your perusal and proceedings the bank account of Sao Caetano Lda [...]

Upon the accomplishment of the aforementioned pre-requisites by F.C. Partizan, Sao Caetano Futebol Ltda. undertakes to forward draft of the referenced transfer agreement [...]

Equally and following the fulfilment of the conditions above, Sao Caetano Futebol undertakes to withdraw the claim lodged against F.C. Partizan and currently sub judice before the FIFA Players' Status Committee".

61. The Panel deems that it is unclear from the wording of these provisions whether the reference to the "obligations as stated in item (i) above" meant the payment of the amount of EUR 300,000, together with proof of payment, was the sole condition for concluding the Retransfer Agreement, i.e. without the additional payment of the amount of EUR 20,000 to the Player, on the basis that item (i) was merely referred to in connection with the naming of the bank account required for the payment to Sao Caetano, or whether this reference was also intended to include the payment to the Player. The same applies to the question of the meaning of "aforementioned pre-requisites"; it is not clear whether it relates only to the payment of the amount

of EUR 300,000 to the Respondent, or additionally to the payment of the amount of EUR 20,000 to the Player together with the proof of payment.

62. It is undisputed that the Parties concluded the Retransfer Agreement promptly after the payment of the amount of EUR 300,000 to the Respondent, without (as per the Respondent's submission) proof of payment of the additional amount of EUR 20,000 to the Player.
63. It would be contrary to the Parties' intentions to interpret this in such a way that the payment of the EUR 20,000 was also to be regarded as a mandatory condition for the further implementation of the Settlement Agreement (conclusion of the Retransfer Agreement and withdrawal of the action). What therefore can be deduced from this in any event is that the Parties, with the conclusion of the Retransfer Agreement, had amended the Settlement Agreement [of 14/15 January 2013] in such a way that this agreement was to be implemented even without the payment of the EUR 20,000, and that the agreement with respect to the Retransfer Agreement had in fact been implemented in this manner.
64. The Panel is therefore of the opinion that the Respondent itself did not consider that the payment of the EUR 20,000 to the Player was a fundamental term of the Settlement Agreement. In addition, if the Respondent deemed that the payment of this sum to the Player was actually a fundamental term of the Settlement Agreement, it should have demanded payment of this sum, or even offered to return the amount of EUR 300,000 and the Player. It did not do so, because proof of the payment of EUR 20,000 to the Player was never a fundamental term of the Settlement Agreement.
65. It appears immaterial in this regard that the Settlement Agreement declares the payment of the EUR 300,000 as "*due as part of the remuneration to be paid to the player during the length of the new employment contract*" and not as the remainder of the original transfer price. Because why should the Appellant pay (reimburse) the Respondent remuneration that the Player would only be able to claim on the basis of the new employment contract with the Respondent and for which the Appellant, as the former employer, was no longer responsible in any way whatsoever? Therefore this sum is properly considered a settlement amount that discharged the Appellant's original payment obligations out of the first Transfer Agreement.
66. The fact that per Clause 2.1 of the Retransfer Agreement the Appellant has a claim to 50% of the new remuneration attained on any further transfer of the Player does nothing to change this. Neither from the wording of this provision nor from the objective commercial purpose of it can the conclusion be drawn that an interest in remuneration received on a future transfer presupposed that the Appellant first had to pay the originally agreed, full transfer price to the Respondent.
67. In view of the above, the Panel considers that the Settlement Agreement was not only effective and binding upon the Parties, but its fundamental obligations, i.e the payment of EUR 300,000 and the retransfer of the Player, were duly executed.
68. Furthermore, the Parties agree that the purpose of the Settlement Agreement was to definitely settle the matter pending between the Parties with regard to the transfer of the Player, and

that therefore the conclusion and execution of the Settlement Agreement superseded all previous agreements in this respect.

69. The Panel notes that it is not clear whether the Appellant has paid the amount EUR 20,000 due to the Player. If this has not been done, the Panel deems that the Respondent, or the Player, may take separate legal action to compel the Appellant to pay this amount. However, this does not affect the Appellant's right to set aside the Appealed Decision.
70. In view of all the above, the Panel concludes that the Appealed Decision, which was taken in ignorance of the effective and binding Settlement Agreement, shall be set aside and it shall be declared that the Appellant is not liable to pay any compensation to the Respondent with regard to the transfer of the Player.

XI. CONCLUSION

71. In view of all the above, the Panel concludes that:
- the Appellant had the right to contest the Appealed Decision, in accordance with Article 67 of the FIFA Statutes;
 - the Parties finally settled their dispute with regard to the transfer of the Player, by concluding the Settlement Agreement;
 - the fundamental terms of the Settlement Agreement were duly executed by the Parties;
 - the Appealed Decision shall be set aside and it shall be declared that the Appellant is not liable to pay any compensation to the Respondent.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed on 5 August 2013 by Fudbalski klub Partizan against the decision rendered by the Single Judge of the FIFA Players' Status Committee on 21 January 2013 is upheld.
 2. The decision rendered by the Single Judge of the FIFA Players' Status Committee on 21 January 2013 is set aside.
 3. Fudbalski klub Partizan is not liable to pay any compensation to Sao Caetano Futebol LTDA with regard to the transfer of the player Eduardo Ferreira Abdo Pacheco.
- (...)
6. All other requests or prayers of relief are dismissed.