Arbitration CAS 2014/A/3803 Emmanuel Eboué v. Fédération Internationale de Football Association (FIFA), award of 5 June 2015

Panel: Mr Michael Gerlinger (Germany), President; Mr Francois Klein (France); Mr Patrick Lafranchi (Switzerland)

Football
Disciplinary sanction due to non-compliance with the terms of a FIFA decision
Discretionary power of the FIFA DC to pronounce a ban under certain conditions
Pre-requisite for sanctions imposed under Article 64 of the FIFA Disciplinary Code
Principle of public policy in the light of Article 27 of the Swiss Civil Code
Limits to the judicial control over sanctions imposed by a sports federation
Criteria used to determine whether a disciplinary measure infringes the personality rights of a party

1. **Even though Article 64 (4) of the FIFA Disciplinary Code does open the possibility to let the creditor decide if a natural person should be banned from any football-related activity, it awards the FIFA DC discretionary power (*"may"*). This discretionary power also includes the power of the FIFA DC to pronounce a ban under certain conditions. This claims validity as long as the FIFA DC exercises its discretionary power in an appropriate manner.**

2. **Article 64 (1) of the FIFA Disciplinary Code does not distinguish between contractual claims and claims based on regulations. The pre-requisite for sanctions under said regulation is the fact that a person fails to pay a sum of money owed, which is not only the case if such claims are based on FIFA regulations, but also and in particular if they are based on contracts, in particular transfer contracts and commission agreements. In such sense, Article 64 of the FIFA Disciplinary Code serves as a tool of execution of awarded claims, no matter what the legal basis is for such claims.**

3. **Although Article 64 (1) of the FIFA Disciplinary Code provides the FIFA DC with the right to take such decision in general, there are further limits for imposing sanctions such as the personality rights of the persons involved. The fact that the decision that is to be enforced might be wrong, however, does not automatically mean that the enforcement was incompatible with public policy. The Swiss Federal Tribunal applied such defence very narrowly and for example ruled that even *"the manifestly wrong application of a rule of law or the obviously incorrect finding of a point of fact is still not sufficient to justify revocation for breach of public policy of an award made in international arbitration proceedings"*.**

4. **Arguments against the underlying decision, which has become final and binding, can generally not be heard. Such conclusion derives also from the aim of Article 64 (1) of the FIFA Disciplinary Code, i.e. the intention to confirm that it is a disciplinary duty to**

comply with such decisions. The mere fact that the application of the French regulations might lead to a different decision than the application of the FIFA regulations is not sufficient to establish incompatibility with public policy.

5. In order to establish whether a disciplinary measure infringes the fundamental personality rights of a party, one has to balance the relevant interests. Elements that have to be considered are amongst others the length of bondage, the economic implications of such bondage and the interest of the relevant association for the enforcement of the sanction at stake. In this respect, a ban of one year from all football-related activities cannot be equated to an unlimited ban that is imposed on a player until the amount is paid. An excessiveness of bondage shall not be accepted lightly because limitations of personal freedom are inherent in any legal relations. One has to consider the remaining freedom of the doer in regard to his future in order to being able to assess if the personality rights are violated.

I. PARTIES

1. Mr. Emmanuel Eboué (hereinafter referred to as the "Appellant") is a professional football player, born on 4 June 1983. The Appellant is currently employed by Galatasaray Spor Kubülü (hereinafter "Galatasaray"), a Turkish professional football club, which is member of the Turkish Football Federation (TFF) and participates in the Turkish Süper Lig.

2. The Fédération Internationale de Football Association (hereinafter "FIFA") is the world governing body of football headquartered in Zurich, Switzerland.

II. FACTUAL BACKGROUND

3. On 15 April 2010, the Appellant and his agent Sébastien Boisseau (hereinafter referred to as the "Agent") concluded an exclusive two-year "Representation Contract between Agent and Player" (hereinafter referred to as the "Agreement").

4. Article 3 of the Agreement stated that *"for the term of this Representation Contract the Player shall engage no other Authorised Agent (…) in relation to, or to provide, the Services without the written consent of the Authorised Agent"*.

5. Article 4 of the Agreement gave the Appellant the opportunity that *"the player shall not be obliged to use the services of the Authorised Agent during the term of this Representation contract and may represent himself in any Transaction or Contract Negotiation should he so desire"*. The Agreement further mentioned, in its article 5, that *"should the Player so represent himself in accordance with clause 4 above, the Player shall still be required to remunerate the Agent in accordance with clause 6 below"*.

6. Article 6 a of the Agreement regulated that the Appellant agreed to pay his Agent a commission of *"10% of the gross basic salary payable to the Player pursuant to any playing contract(s) entered into by the Player"*.

7. Article 27 of the Agreement provided that *"any dispute between the parties arising from this Representation contract which constitutes a breach of the Rules of Football Association in the first instance and referred to FIFA where appropriate. Any other dispute between the parties shall be dealt with as between the parties under Rule K (Arbitration) of the Rules of the Football Association"*. Furthermore, article 28 of the Agreement stipulated that *"this Representation Contract shall be governed by and construed and interpreted in accordance with the laws of England and Wales and, subject to clause 26 above, the parties hereby submit to the exclusive jurisdiction of the courts of England and Wales"*.

8. On 13 February 2012, the Agent lodged a claim against the Appellant at FIFA explaining that the Appellant had breached the Agreement when he was transferred in August 2011 from Arsenal FC to Galatasaray. The Appellant had decided to contact other licensed players' agents, i.e. Mr. Dalibar Lacina, Mr. Gilbert Francis Kacou and Mr. Ali Egesel, to help him finalize his transfer to Galatasaray. The Agent provided FIFA with a "Certificate of authorization" dated 6 August 2011 under the terms of which the Appellant gave *"the authority to contact and negotiate"* for him the terms and the conditions of the transfer contract exclusively to Galatasaray in Turkey. This Authorization stipulated that *"I acknowledge that I have a valid agents' contract with Mr. Sébastien Boisseau but I want the above mentioned people to negotiate my possible contract with Galatasaray. If any financial conflicts occur between myself and Mr. Boisseau I will be sole responsible and also according to FIFA regulations I have the right to make this decision. My wish is for Galatasaray to respect my decision if eventually the two clubs agree on a transfer fee and I am called to sign a contract. This contract gives Mr. Dalibor Lacina, Mr. Gilbert Francis Kacou and Mr. Ali Egesel, the right to receive fees and commissions"*.

9. The Agent further mentioned to have tried to contact the Appellant and to have eventually been told by him that *"whilst he understood there was a binding contract in place with the Claimant, he did not want the Claimant to deal with the transfer and despite the existence of the Representation Contract he would not pay the Claimant"*.

10. The Agent explained that in August 2011, the Appellant had concluded an employment contract without involving him. Although the Agent did not know the exact annual gross income of the Appellant, he claimed that the latter was entitled to a total salary of EUR 9,400,000 over four years. Consequently, the Agent claimed from the Respondent 10% of his salary with Galatasaray, i.e. EUR 940,000 and requested FIFA to impose sporting sanctions on the Appellant as well as on the players' agents Lacin, Kacou and Egesil.

11. On 26 April 2012, the Appellant rejected the claim of his Agent. He argued that FIFA was not competent to deal with the matter at stake since Articles 27 and 28 of the Agreement prevented the parties from lodging any claim in front of FIFA.

12. Alternatively, he argued that no third party should receive any payment in connection with the transfer of the Appellant to Galatasaray and provided FIFA with an email sent by the legal representative of Galatasaray to the legal representative of the Agent on 30 November 2011,

in which Galatasaray stated that: *"Neither Arsenal, nor Galatasaray SK engaged the services of a players' agent in connection with the Transfer of Eboué. No players' agent was involved in the negotiations between Arsenal and Galatasaray SK for the transfer of Eboué. Accordingly, no players' agent was entitled to be remunerated in connection with the transfer of Eboué from Arsenal to Galatasaray SK (…). No players' agent provided his services in connection with a view to negotiating the employment contract to be signed between Galatasaray SK and Eboué. Therefore, no players' agent was entitled to be remunerated in connection with the employment contract signed between Galatasaray AS and Eboué"*.

13. Moreover, the Appellant stressed that, according to article 19 par. 8 of the Players' Agents' Regulations, the Agent had conflicting interests because he represented both Arsenal and the Appellant. In this respect, the Appellant provided a "representation contract between AGENT, PLAYER and CLUB" dated 23 August 2010 which stipulated that *"the club is interested in entering into a new Standard Premier League Professional Playing Contract with the Player to entirely replace and supersede the Players' existing professional playing contract (…)"*. The Appellant was also of the opinion that this contractual relationship was terminated in December 2010 by his Agent breaching article 10 b of this "representation contract between AGENT, PLAYER and CLUB", because the Agent started negotiating with other clubs without the Appellant's consent. But this contract stipulated that *"the Authorised Agent shall keep the club and the Player respectively informed of any and all material information relating to the provision of the Services and shall not enter into negotiations with any third parties without the Club's and/or Players' consent"*.

14. For all those reasons, the Appellant was of the opinion that his Agent should not be entitled to any kind of remuneration.

15. In the event that FIFA would be competent and consider that the Appellant had breached any agreement, he deemed that the amount of remuneration should be deemed excessive and reduced accordingly. He was willing to offer an amount of EUR 100,000 to his Agent to settle.

16. On 23 July 2012, the Agent answered to the Appellants' positions and argued that FIFA had jurisdiction because that dispute had an *"international dimension"* and article 27 of the Agreement stated that *"disputes can be referred to FIFA where appropriate"*.

17. In the opinion of the Agent, the offer of a settlement demonstrated the liability of the Appellant.

18. Regarding the conflict of interests, the Agent deemed that article 19 par. 8 of the Players' Agents' Regulations *"only applies unless it conflicts with applicable legislation in the territory of the Football Federation in question"*. The FA Football Agents' Regulations *"specifically permits an authorized agent to undertake agency activity for more than one party in relation to a transaction of contract negotiation"*.

19. Based on the facts available on the Transfer Matching System (TMS), the Appellant signed a four-year employment contract with Galatasaray SK in August 2011 valid until 31 May 2015 and according to which he is entitled to receive from Galatasaray SK a total salary of EUR 9,400,000. Furthermore, the employment contract did not mention that the Appellant was represented by any other players' agents.

20. On 29 July 2013, the Single Judge of the Players' Status Committee decided the case between the Appellant and his Agent as follows (hereinafter the "PSC Decision"):

1. The claim of the Claimant, Sébastien Boisseau, is admissible.

2. The claim of the Claimant, Sébastien Boisseau, is accepted.

3. The Respondent, Emmanuel Eboué, has to pay to the Claimant, Sébastien Boisseau, the total amount of EUR 940,000 as follows:

a. EUR 470,000 ***within 30 days*** *as from the date of notification of this decision.*

b. EUR 470,000 ***within 60 days*** *as from the date of notification of this decision.*

4. If the aforementioned amounts are not paid within the aforementioned deadline, an interest rate of 5% per year will apply as of the expiry of the fixed time limit and the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.

5. The final costs of the proceedings in the amount of CHF 20,000 are to be paid by the Respondent, Emmanuel Eboué, ***within 30 days*** *as from the notification of the present decision as follows:*

5.1 The amount of CHF 15,000 has to be paid to FIFA to the following bank account with reference to case nr. Ide 12-00571:

[…]

5.2 The amount of CHF 5,000 has to be paid directly to the Claimant, Sébastien Boisseau.

6. The Claimant, Sébastien Boisseau, is directed to inform the Respondent, Emmanuel Eboué, immediately and directly of the account number to which the remittance under points 3 and 5.2 above is to be made and to notify the Players' Status Committee of every payment received.

21. The decision was communicated to the Parties on 14 August 2013. With respect to the Player, the Respondent sent the telefax to the Player's legal representative, Maître Laurent Denis. In the course of the proceedings before the FIFA Players' Status Committee, Maître Denis provided a Power of Attorney signed on 5 April 2012 by the Appellant and stating: *"Je soussigné, Monsieur Emmanuel EBOUE, […] donne mandat special à Maître Laurent DENIS, avocat […] pour agir en mon nom et pour mon compte dans le cadre du litige contractuel m'opposant à Monsieur Sébastien BOISSEAU […] devant la Commission du Statut du Joueur de la FIFA (dossier référence: 12-00571/lde) voire, si besoin, par devant la Cour d'Arbitrage pour le Sport. Je soussigné, Monsieur Emmanuel EBOUE sollicite que toute correspondance soit adressée auprès de l'office de mon conseil susmentionné. […]".*

22. By letter of 14 August 2013, Maître Denis requested the grounds of the decision on behalf of the Appellant. The grounds of the decision were then communicated to the Parties on 21 November 2013, again with respect to the Appellant to Maître Denis.

23. No appeal had been lodged against the grounded FIFA PSC Decision within 21 days before the CAS.

24. Until today the Appellant has not paid the above amounts.

25. With letter dated 10 January 2014, the Agent contacted the Players' Status & Governance department of FIFA and asked for disciplinary measures, since the Appellant had not paid the amounts due. By letter of 14 February 2014, Maître Denis informed FIFA that he had tried to contact the Appellant, but without success. He further informed FIFA that in case he wasn't able to contact the Appellant until 18 February 2014, he would cease his representation of the Appellant. FIFA received no further information from Maître Denis.

III. PROCEEDINGS BEFORE THE FIFA DISCIPLINARY COMMITTEE

26. On 5 May 2014, the FIFA Disciplinary Committee (hereinafter the "FIFA DC") opened disciplinary proceedings and on 13 May 2014, the TFF confirmed that the Appellant received the letter concerning the opening of disciplinary proceedings.

27. On 13 August 2014, the secretariat to the FIFA DC urged the Appellant for the final time to pay by 22 August 2014 at the latest and informed him that the case would be submitted to the FIFA DC.

28. On 28 August 2014, the secretariat to the FIFA DC informed the Parties that the evaluation of the FIFA DC would be on 9 September 2014.

29. On 4 September 2014, the secretariat to the FIFA DC informed the Parties that no oral hearing was deemed necessary in the present matter.

30. On its meeting held on 9 September 2014, the FIFA DC took the following decision:

- *the Appellant was pronounced guilty of failing to comply with a decision of a FIFA body in accordance with art. 64 of the FIFA Disciplinary Code;*

- *the Appellant was ordered to pay a fine to the amount of CHF 30,000 to FIFA within 120 days as from notification of the FIFA Disciplinary Committee's decision;*

- *the Appellant was granted a final period of grace of 120 days as from notification of the FIFA Disciplinary Committee's decision in which to settle its debt to the creditor, Mr. Sébastien Boisseau, and FIFA;*

- *if payment is not made by this deadline, the creditor may demand in writing from the secretariat to the FIFA Disciplinary Committee that a ban on any football-related activity be imposed on the Appellant, for a period of one year. Once the creditor has filed this request, the ban on taking part in any kind of football-related activity will be imposed automatically without a further formal decision having to be taken by the FIFA Disciplinary Committee. The associations concerned will be informed of the one-year ban on*

taking part in any kind of football-related activity. The ban on taking part in any kind of football-related activity will be issued on the Appellant by the secretariat to the FIFA Disciplinary Committee and will last for one year or until the total outstanding amount has been paid to the creditor, if this occurs before the one-year ban has elapsed;

- *if payment is not made by the end of the one year ban, the creditor may demand in writing from the secretariat to the FIFA Disciplinary Committee that the matter be resubmitted to the FIFA Disciplinary Committee, which may decide on further disciplinary measures such as extending the ban on taking part in any kind of football-related activity*

- *the costs and expenses of these proceedings amounting to CHF 3,000 shall be borne by the Appellant.*

31. On 13 October 2014, the grounds of the decision were communicated to the Appellant and the Agent by fax.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

32. On 31 October 2014, the CAS received a Statement of Appeal serving as Appeal Brief from the Appellant in relation to the Decision of the FIFA DC rendered on 9 September 2014. In the Statement of Appeal, the Appellant nominated Mr. François Klein as arbitrator and requested that the proceedings be conducted in French.

33. Together with its Statement of Appeal, the Appellant requested a stay of the decision appealed against.

34. On 7 November 2014, in view of the Respondent's indication that it did not object to the stay of the decision appealed against, the CAS Court Office, on behalf of the President of the CAS Appeals Arbitration Division, granted a stay of the execution.

35. On the same day, the Respondent asked the proceedings to be conducted in English but agreed that the Appellant could continue to address its submissions in French. It also requested the suspension of all deadlines given to the Respondent until the language of the procedure is determined.

36. On 13 November 2014, the CAS Court Office informed that the Appellant agreed that English shall be the language of the procedure while he be allowed to file his submissions in French.

37. On 17 November 2014, the Respondent nominated Mr. Patrick Lafranchi as arbitrator and requested an extension of the deadline for filing its Answer until 5 December 2014.

38. On 21 November 2014, the CAS Court Office confirmed that the Respondent's request for an extension was granted in the absence of objection in this respect from the Appellant.

39. By communication dated 4 December 2014, the CAS Court Office informed the parties, on behalf of the President of the CAS Appeals Arbitration Division, that the Panel had been

constituted as follows: Dr. Michael Gerlinger, President of the Panel, Mr. François Klein and Mr. Patrick Lafranchi, arbitrators.

40. On 5 December 2014, the Respondent submitted its Answer to the Appeal.

V. SUBMISSIONS OF THE PARTIES

41. The Appellant's written submissions may be summarized as follows:

42. The sanction that were imposed on the Appellant due to the non-compliance in the 120 days deadline is disproportionate for the following reasons:

- The FIFA DC has not taken into account relevant information and the good faith of the Appellant, since the Appellant only learnt of the underlying decision in May 2014.
- There was no violation of any FIFA regulation. The relevant dispute only concerned the contractual relationship between the Appellant and the Agent.
- The FIFA DC should have taken into account the invalidity of the Agreement and, therefore, the FIFA DC should have recognized that the Appellant did not have to pay the Agent.
- In any case, the potential sanction regarding the activity of the Appellant as a professional football player was an infringement of the *ordre public* principle, which is why such potential sanction needed to be declared null and void by the CAS. This derives from the decision of the Swiss Federal Tribunal in the *Matuzalem* case (Decision of 27 March 2012, 4A_558/2011, BGE 138 III, 322).

43. The Appellant made the following specific requests to the CAS:

I. to suspend the decision of the FIFA Disciplinary Committee until final decision by CAS.

II. to impose a reduced fine.

III. to set aside the ban of one year.

44. The Respondent's written submissions may be summarised as follows:

- There was a clear breach of the Article 64 (1) of the FIFA Disciplinary Code by the Appellant. The underlying decision had become binding and had not to be reviewed, so a potential sanction had to be imposed.
- The right to be heard of the Appellant has been respected, since all arguments were heard, which were anyway directed against the underlying decision. The Appellant presented a Power of Attorney regarding Maître Denis and Maître Denis acted on behalf of the Appellant. Therefore, the communication of the decision to Maître Denis was sufficient.

- The sanction imposed for non-compliance is proportionate. In general, the modalities of the sanction to be imposed lie in the discretion of FIFA. The chosen period of 120 was a very long period. The Appellant could have also negotiated different instalments with the Agent. In any case, the effectiveness of the sanction was totally in the hands of the Appellant due to four conditions, i.e.

    - The Appellant needed to fail with the payment;
    - The Appellant needed to fail on agreeing on instalments with the Agent;
    - The Agent demanded the sanction;
    - The whole amount needed to be outstanding.

45. The Respondent requests the following:

    I. To reject the Appellant's appeal in its entirety.

    II. To confirm the decision hereby appealed against.

    III. 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.

VI. THE HEARING

46. A Hearing was held at the CAS Headquarters in Lausanne, Switzerland, on 19 March 2015. The following persons attended the Hearing:

    - For the Appellant: The Appellant himself
      Maître Basile Besnard, counsel to the Appellant
    - For the Respondent: Valeria Hornya, legal counsel
      Jaime Cambreleng, legal counsel

47. The Panel was assisted by Mr William Sternheimer, Managing Counsel & Head of Arbitration at CAS.

48. No procedural issues were raised by the Parties at the Hearing.

49. The Parties were given the opportunity to present their cases, to make their submissions and arguments and to answer questions posed by the Panel. After closing submissions, the Parties expressly stated that they had no objections concerning their right to be heard.

VII. JURISDICTION

50. Article R47 of the Code of Sports-related Arbitration (hereinafter the "CAS Code") provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body".

51. Article 67(1) of the FIFA Statutes (August 2014 Edition) allows for appeals of the FIFA Disciplinary Committee's decision to be appealed to CAS (with various exceptions which do not apply in this case).

52. Article 64(5) of the FIFA Disciplinary Code states that:

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

53. The jurisdiction of the CAS is not disputed and was confirmed by the Parties' signing of the Order of Procedure. CAS is therefore competent to decide the present dispute.

VIII. ADMISSIBILITY

54. Article R49 of the CAS 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".

55. Article 67(1) of the FIFA Statutes (August 2014 Edition) provides:

"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".

56. The Decision was communicated to the Appellant and his Agent on 13 October 2014 and the Appellant's Statement of Appeal was filed on 31 October 2014. The Statement of Appeal was thus filed within 21 days following the notification of the Decision. It follows that the Appeal is admissible.

IX. APPLICABLE LAW

57. Pursuant to Art. 187 para. 1 of the Swiss Federal Code on Private International Law (hereinafter referred to as "CPIL"),

"The arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the law with which the case is most closely connected".

58. Article R58 of the CAS Code provides as follows:

"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, 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".

59. Article 66(2) of the FIFA Statutes (August 2014 Edition) provides:

"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".

60. Presently, in the Agreement, the parties made an explicit choice of law in favour of the laws of England and Wales (cf. article 28 of the Agreement). This choice of law however *in casu* cannot claim validity because present matter at stake is not a dispute arising out of the Agreement but a purely disciplinary issue in connection with FIFA as a Swiss association.

61. The parties have not objected to the application of FIFA rules or Swiss law in the CAS proceedings. The Panel will therefore apply FIFA rules and to the extent necessary, Swiss law. To what extent Swiss Law has to be applied shall be assessed by the Panel regarding each respective legal question at stake.

X. MERITS

A. Article 64(1) of the FIFA Disciplinary Code

62. The Decision of the FIFA DC is based on Article 64 (1) of the FIFA Disciplinary Code. Such article provides as follows:

"Anyone who fails to pay another person (such as a player, a coach or a club) or FIFA 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 a subsequent CAS appeal decision (financial 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 division ordered. A transfer ban may also be pronounced;

d) (only for associations) will be warned and notified that, in the case of default or failure to comply with a decision within the period stipulated, further disciplinary measures will be imposed. An expulsion from a FIFA competition may also be pronounced.

4. A ban on any football-related activity may also be imposed against natural persons".

63. It is not disputed between the Parties that the Appellant didn't pay the amounts awarded to the Agent in the PSC Decision. The criteria of Article 64 (1) of the FIFA Disciplinary Code are consequently met.

1. The ban as a sanction

64. It thus has to be examined if – in the light of Article 64 (4) of the FIFA Disciplinary Code – FIFA was allowed to determine the sanction it imposed with the challenged decision, and especially if it was allowed to ban the Player under the condition that the creditor would demand so. Even though Article 64 (4) of the FIFA Disciplinary Code does open the possibility to let the creditor decide if a natural person should be banned from any football-related activity, it awards the FIFA DC discretionary power ("…may…"). From the point of view of the Panel, this discretionary power also includes the power of the FIFA DC to pronounce a ban under certain conditions. This claims validity as long as the FIFA DC exercises its discretionary power in an appropriate manner.

65. Presently, the FIFA DC gave the creditor the discretion to decide if the Player should be banned or not. From the point of view of the Panel, this decision is an appropriate exercise of the FIFA DC's disciplinary power due to the fact that it is in the interest of both the Player and the creditor that a ban is not pronounced under every circumstance but only as an *ultima ratio*.

66. The ban as such consequently does not breach Article 64 (1) of the FIFA Disciplinary Code. Neither does it violate another FIFA regulation.

2. The disciplinary procedure/right to be heard

67. The Appellant does not claim an infringement of his right to be heard during the proceedings. He rather claims that due to the non-communication of the PSC decision by Maître Denis to him, the sanction imposed by the FIFA DC was disproportionate. For this reason, the Panel now turns to the question of the proportionality of the sanction.

3. Proportionality of the sanction

68. The FIFA DC first imposed a fine of EUR 30,000 on the Appellant. It, second, granted a further deadline of 120 days to the Appellant for paying the amounts awarded in the PSC Decision, failure of which the Agent may demand that a ban from any football-related activity for one year be imposed on the Appellant.

69. The Appellant does not deny that the FIFA DC exercises the assessment of potential sanction under the FIFA Disciplinary Code within a certain level of discretion. The Appellant, however, claims that the FIFA DC did not take into account all relevant facts when exercising such right and committed further mistakes when exercising its discretion.

a. The late knowledge of the PSC Decision

70. First, the Appellant argues that the FIFA DC should have taken into account the fact that the Appellant only learnt from the PSC Decision in May 2014, since Maître Denis did not communicate the decision to him. The Appellant, therefore, acted in "good faith".

71. The Panel, first, notes that the Appellant signed a Power of Attorney with Maître Denis on 5 April 2012. During that time, the dispute between the Appellant and the Agent had already started. The Appellant confirmed such fact during the Hearing when referring to Galatsaray's email of 30 November 2011. According to the Appellant, the Agent was harassing him already at that time, which is why he asked Galatasaray to send such confirmation. The Appellant signed the Power of Attorney in this context and was fully aware of the underlying dispute. In addition, the Power of Attorney mentions explicitly the case number of the PSC proceedings and determines Maître Denis' office address as the address for any communication. For this reason, the Panel is satisfied that the PSC Decision had been duly notified to the Appellant when notifying it to Maître Denis (see: CAS 2013/A/3135 and CAS 2008/A/1456).

72. Having established this, the Panel believes that the FIFA DC did not make a mistake in using its discretion when it did not reduce the sanction due to the late knowledge of the PSC Decision by the Appellant. On the one hand, potential difficulties in communication between the Appellant and his counsel solely concern their internal relationship. Maître Denis' letter of 14 February 2014 indicates that he himself had difficulties in contacting the Appellant. The latter pointed out in the Hearing that the communication might have been blocked by a former « friend » of him, the agent Gilbert Francis Kacou, who allegedly helped him with his move to Galatasaray but later broke with the Appellant over his desired status as the Appellant's agent. However, the Appellant confirmed that he neither took legal steps against Maître Denis nor against Mr Kacou. Therefore, the reason for such miscommunication could not be established at the Hearing either. On the other hand, the Appellant learnt about the PSC Decision at least in May 2014. Since then, the Appellant did not pay the amounts awarded in the decision, nor did he take any steps in finding a payment agreement with the Agent. For these reasons, the FIFA DC did not have to take into account the late knowledge of the PSC Decision by the Appellant and the Appellant's argument in this respect must be rejected.

b. The contractual character of the Agreement

73. The Appellant argues that the FIFA DC should have taken into consideration the fact that only contractual obligations had allegedly been breached when imposing the sanction, and no FIFA regulations. However, Article 64 (1) of the FIFA Disciplinary Code does not distinguish between contractual claims and claims based on regulations. On the contrary, the pre-requisite for sanctions under said regulation is the fact that a person fails to pay a sum of money owed,

which is not only the case if such claims are based on FIFA regulations (such as claims for training compensation or solidarity contribution), but also and in particular if they are based on contracts, in particular transfer contracts and commission agreements. In such sense, Article 64 of the FIFA Disciplinary Code serves as a tool of execution of awarded claims, no matter what the legal basis is for such claims.

74. Therefore, the fact that the Appellant only allegedly breached a contractual regulation and no FIFA regulation has no impact on the sanction to be imposed.

75. For this reason, the sanction imposed by the FIFA DC was also proportionate and the Appellant's arguments in this respect must also be rejected.

B. Ordre Public principle, in particular in the light of Article 27 of the Swiss Civil Code

76. Lastly, the Panel needs to turn to potential limits with respect to the discretionary power of the FIFA DC based on legal principles outside the FIFA regulations. Although Article 64 (1) of the FIFA Disciplinary Code provides the FIFA DC with the right to take such decision in general, there are further limits for imposing sanctions such as the personality rights of the persons involved.

77. The Appellant raises two additional arguments against the Decision of the FIFA DC in this respect:

- The Appellant argues that the decision was invalid since the underlying Agreement was null and void, which was to be taken into account in the present arbitration procedure, although the decision of the FIFA DC has not been appealed;
- The Appellant further argues that in line with the decision of the Swiss Federal Tribunal of 7 March 2012 *"Matuzalem"*, his fundamental personality right was infringed by the sanction imposed.

78. Article 190 (2) lit. e) CPIL that forms part of the presently applicable *lex arbitri*, states what follows:

"The award may only be annulled:

[…]

e) if the award is incompatible with public policy".

79. Therefore, it needs to be assessed what limits the principles of public policy might set regarding the sanction imposed by the FIFA DC and whether those limits would hinder such decision of the FIFA DC.

80. With respect to the invalidity of the Agreement, the strict wording of the FIFA Disciplinary Code only requires that the person/entity sanctioned does not comply with a decision defined

in Article 64 (1) of the FIFA Disciplinary Code. It does not require the decision to be correct or in compliance with the legal pre-requisites.

81. The Appellant argues that the decision of the FIFA PSC was wrong and that FIFA would now enforce a wrong decision. He invokes the French agents' regulations and the French Sports Code and argues that those would stipulate the invalidity of such agreements under the present circumstances.

82. The fact that the decision that is to be enforced might be wrong, however, does not automatically mean that the enforcement was incompatible with public policy. The Swiss Federal Tribunal applied such defence very narrowly and fore example ruled that even *"the manifestly wrong application of a rule of law or the obviously incorrect finding of a point of fact is still not sufficient to justify revocation for breach of public policy of an award made in international arbitration proceedings"* (see: MITTEN, M., The Court of Arbitration for Sport and its Global Jurisprudence: International Legal Pluralism in a World Without National Boundaries, Bulletin TAS/CAS Bulletin 2014/2, page 59). Consequently, and in accordance with standing CAS jurisprudence (CAS 2006/A/1008, para. 14; CAS 2008/A/1610, para. 5.12; CAS 2013/A/3323, para. 72), arguments against the underlying decision, which has become final and binding, can generally not be heard. Such conclusion derives also from the aim of Article 64 (1) of the FIFA Disciplinary Code, i.e. the intention to confirm that it is a disciplinary duty to comply with such decisions (see: CAS 2008/A/1610, para. 5.15).

83. It would, consequently, require additional reasons regarding the invalidity of the Agreement, to justify why the decision taken by the Single Judge would be incompatible with public policy. In that respect, the Appellant failed to specify such additional reasons. The mere fact that the application of the French regulations might lead to a different decision than the application of the FIFA regulations is not sufficient to establish incompatibility with public policy. The decision of the Single Judge was based on the principle of *pacta sunt servanda*, which is a general principle recognized by many legal systems. The Appellant did not bring forward any reason why the decision of the Single Judge should then infringe public policy.

84. With respect to the personality right of the Appellant, the Swiss Federal Tribunal (SFT) in its decision of 7 March 2012 *"Matuzalem"* (Decision of 27 March 2012, 4A_558/2011, BGE 138 III, 322) did base its assessment on the principles of Article 27 of the Swiss Civil Code (SCC). Art. 27 para. 2 SCC reads as follows:

"No person may surrender his or her freedom or restrict the use of it to a degree which violates the law or public morals".

85. In that respect, the SFT outlined:

"The limits to legal commitments due to the protection of privacy do not apply only to contractual agreements but also to the statutes and decisions of legal persons (BUCHER, a.a.O., nr. 18 to Art. 27 ZGB; see already BGE 104 II 6 at 2 p. 8 f). Sanctions imposed by a federation, which do not merely ensure the correct course of games but actually encroach upon the legal interests of the person concerned are subject to judicial control according to case law (BGE 120 II 369 at 2 p. 370; 119 II 271 at 3c; 118 II 12 at 2 p. 15 ff.; see already

BGE 108 II 15 E. 3 p. 19 ff). This applies in particular when sanctions issued by a federation gravely impact the personal right to economic development; in such a case the Federal Tribunal has held that the freedom of an association to exclude its members is limited by their privacy right when it is the body of reference for the public in the profession or the economic branch concerned (BGE 123 III 193 at 2c/bb und cc p. 197 ff.). This corresponds to the view that was adopted in particular for sport federations (BGE 123 III 193 E. 2c/bb p. 198 with references; see also BGE 134 III 193 at 4.5 p. 200). In such cases the right of the association to exclude a member is not reviewed merely from the point of view of an abuse of rights but also by balancing the interests involved with a view to the infringement of privacy in order to assess whether some important reason is at hand (BGE 123 III 193 at 2c/cc p. 198 f.; see also BGE 134 III 193 at. 4.4)".

86. Consequently, the Panel is obliged to examine if the disciplinary measures presently at stake infringe the fundamental personality rights of the Appellant.

87. In order to evaluate such question, one has to balance the relevant interests. Elements that have to be considered are amongst others the length of bondage, the economic implications of such bondage and the interest of the relevant association for the enforcement of the sanction at stake (cf. BUCHER A., in Berner Kommentar, N 276 and N 334 to Art. 27 SCC).

88. Presently, if the sanction of the challenged decision of the FIFA DC would be confirmed, the Appellant would be banned for one year from all football-related activities if the Agent would ask for the pronouncement of such ban. If the Player, after the expiry of the one-year-ban-period still would not have paid the requested sum of money, the FIFA DC would have to decide *de novo* if the ban should be extended or not. This situation is different than in the *Matuzalem* case, in which an unlimited ban was imposed on the player until the amount was paid.

89. In the matter at stake, it is not even sure if the Player will be banned. Rather, it depends on the will of the Agent. Already based on this aspect, one could ask himself if such a hypothetical ban is able to violate the Player's right of personality.

90. Even if one hypothetically emanates from such a one year ban it would – in the opinion of the Panel - not be excessive in the light of Art. 27 para. 2 SCC. This out of the following reasons:

91. Pursuant to Swiss legal doctrine, an excessiveness of bondage shall not be accepted lightly because limitations of personal freedom are inherent in any legal relations. Therefore, Art. 27 para. 2 SCC does at no point protect the doer from imprudent decisions he wants to get rid of. Rather, one has to consider the remaining freedom of the doer in regard to his future in order to being able to assess if the personality rights are violated (AEBI-MÜLLER R., in: Handkommentar zum Schweizer Privatrecht, 2012, N 8 to Art. 27 SCC).

92. Presently, the challenged decision does not infringe the personal rights of the Appellant in an illegitimate manner. On the one hand the Appellant – contrary than the situation in the *Matuzalem* case - would be financially capable of paying back his debts in order to prevent the questionable one year ban. Pursuant to the statements made during the Hearing, the Appellant confirmed that he received a yearly salary of around EUR 2.4 million net at his current club

Galatasaray. Further, the Appellant explained that he had not paid the controversial amounts since he wanted to be properly heard by FIFA. He did not refuse to pay because he was not able to. Consequently, the Panel considers it as established that the Appellant would be able to pay the questioned amount to the Agent. It would thus be in the discretionary power of the Appellant to prevent the pronounced ban.

93. If the Appellant would be capable of paying the controversial amounts, one can conclude that his personal freedom is not limited in an excessive way. Rather, it would be a decision of priorities and personal choice of the Appellant if he wants to pay the controversial sum of money and therefore if he wants to accept the conditionally pronounced one year ban or not. Deciding otherwise would mean that the Panel would protect the Appellant from an uncomfortable decision he made and now wants to get rid of due to its unpleasant financial consequences. As seen, such purpose is not protected by Art. 27 para. 2 SCC.

94. Under these circumstances and considering the fundamental differences in the *Matuzalem* case (in the latter case being the high amount to be paid by the player and the unlimited period of the sanction) the Panel is of the clear opinion that the challenged decision does not infringe the fundamental principles Art. 27 para. 2 SCC and public policy.

95. The Decision of the FIFA DC, therefore, has to be upheld.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by Emmanuel Eboué on 31 October 2014 against the decision of the FIFA Disciplinary Committee of 9 September 2014 is dismissed.

2. The decision of the FIFA Disciplinary Committee of 9 September 2014 is confirmed.

3. (…).

4. (…).

5. All other motions or prayers for relief are dismissed.