**Arbitration CAS 2015/A/4195 FK Senica v. PFC Ludogorets 1945 & Fédération Internationale de Football Association (FIFA), award of 15 February 2016**

Panel: Mr Manfred Nan (the Netherlands), Sole Arbitrator

*Football*
*Training compensation*
*Principle of venire contra factum proprium*
*Lack of a denial of justice*
*Lack of CAS jurisdiction*

1. **The doctrine of *venire contra factum proprium* provides that where the conduct of one party has induced legitimate expectations in another party, the first party is estopped from changing its course of action to the detriment of the second party. In this respect, the change of position of a party in a second appeal before the CAS, is indeed a violation of the principle of *venire contra factum proprium*.**

2. **Importantly, in the absence of a proof that a party contacted FIFA to be informed about the status of proceedings or of a decision, a party cannot legitimately claim that it has been waiting for a decision from FIFA more than 2 years after the withdrawal of an appeal and that only very recently a situation of denial of justice arose, legitimising it to file an appeal with CAS.**

3. **Absent any appealable decision and denial of justice, the CAS does not have jurisdiction to entertain an appeal.**

## I. PARTIES

1. Futbalovy Club Senica (hereinafter: the "Appellant" or "Senica") is a football club with its registered office in Senica, Slovak Republic. The Club is registered with the Slovakian Football Association (hereinafter: the "SFA"), which in turn is affiliated to the *Fédération Internationale de Football Association*.

2. PFC Ludogorets 1945 (hereinafter: the "First Respondent" or "Ludogorets") is a football club with its registered office in Razgrad, Republic of Bulgaria. The Club is registered with the Bulgarian Football Association (hereinafter: the "BFA"), which in turn is also affiliated to the *Fédération Internationale de Football Association*.

3. The *Fédération Internationale de Football Association* (hereinafter: the "Second Respondent" or "FIFA" – jointly with Ludogorets as the "Respondents") is an association under Swiss law and has its registered office in Zurich, Switzerland. FIFA is the governing body of international football and worldwide level. It exercises regulatory, supervisory and disciplinary functions over continental confederations, national associations, clubs, officials and players worldwide.

## II. FACTUAL BACKGROUND

4. Below is a summary of the main relevant facts, as established on the basis of the parties' written submissions and the evidence examined in the course of the present appeal arbitration proceedings. This background is made for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion.

5. On 16 August 2012, Senica filed a claim with FIFA regarding training compensation in connection with the registration of J. (hereinafter: the "Player"), a professional football player of Slovakian nationality, with Ludogorets.

6. On 30 August 2012, the administration of the FIFA Dispute Resolution Chamber (hereinafter: the "FIFA DRC") informed Senica as follows:

*"We acknowledge receipt of your correspondence dated 16 August 2012, and have taken due note that you intend to lodge a complaint regarding the training compensation in connection with the registration of the player, J., with the Bulgarian club, FC Ludogorets Razgrad.*

*In this context, please be informed that according to the information contained in the Transfer Matching System (TMS) at the time the player were registered with FC Ludogorets Razgrad, the said club belonged to the category IV in the sense of art. 4 par. 2 of the Annexe 4 of the Regulations on the Status and Transfer of Players […].*

*In this regard, we would like to refer you to the provisions of art. 2 of Annexe 4 of the Regulations, according to which training compensation is not due if the player is transferred to a category 4 club.*

*On account of the above, we regret having to inform you that we do not appear to be in a position to intervene on your behalf in the matter of reference.*

*Finally, please take note that the aforementioned information is based only on the documents and information currently in our possession and is without prejudice whatsoever".*

7. On 5 September 2012, Senica allegedly requested FIFA *"to continue in the formal investigation of the case and to submit the present matter to the FIFA DRC for a formal decision".*

8. On 20 September 2012, Senica sent a letter to FIFA, which reads as follows – as relevant:

*"On 16.08.2012, as a representative of the football club Senica, I turned to the DRC with the claim about settlement of the question related to the delay in payment of the training compensation.*

*On 30.08.2012 we have received the letter signed by the Group Leader / Legal Counsel Mr. Roy Vermeer, in which it was indicated that you did not appear to intervene in the matter.*

*On 05.09.2012 we have sent the request to the address of the committee in which we have explained our position in the case and asked to continue formal investigation. Unfortunately, till the present moment there was no reaction to our request.*

*[…]*

*Its evident that the Legal Counsel of Players' Status is not entitled to treat regulations and accordingly he may not take decisions whether the DRC or Players' Status are entitled to examine the present case, therefore, the formal decision should be taken in connection with this dispute.*

*Thus, I kindly ask you to continue investigation on the matter of reference and to provide formal consideration of the dispute by DRC".*

9. On 26 October 2012, Mr Marco Villiger, FIFA Director of Legal Affairs and Ms Maja Kuster Hoffmann, FIFA Head of Players' Status, informed Senica as follows – as relevant:

*"In this regard, we would like to refer you, once again, to the provisions of art. 2 par. 2 of Annexe 4 of the Regulations on the Status and Transfer of Players, according to which, as a general rule, training compensation is not due if the player is transferred to a category 4 club, regardless of whether this is the player's first registration as a professional or a subsequent transfer of the player as a professional.*

*On account of the above, we must reiterate that we do not appear to be in a position to intervene on your behalf in the matter of reference.*

*Finally, please take note that the aforementioned information is based only on the documents and information currently in our possession and is without prejudice whatsoever".*

10. On 16 November 2012, Senica filed a Statement of Appeal with the Court of Arbitration for Sport (hereinafter: the "CAS") against Ludogorets, which proceedings were registered as an appeals arbitration procedure under the reference *CAS 2012/A/2978 FK Senica v. FC Ludogorets Razgrad*.

11. On 26 November 2012, Senica filed its Appeal Brief submitting the following requests for relief – as relevant:

> *"1. To accept the present Statement of appeal and consequently, cancel the decision of FIFA DRC issued by means of sending of the letter dated 26.10.2012 that is specified above".*

12. On 14 December 2012, Ludogorets filed its Answer.

13. On 19 December 2012, Senica informed the CAS Court Office that it withdrew its appeal.

14. On 31 December 2012, the Deputy President of the Appeals Arbitration Division of CAS, ruling *in camera*, pronounced a Termination Order, in which the procedure *CAS 2012/A/2987 FK Senica v. FC Ludogorets Razgrad* was terminated and removed from the CAS roll.

## III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

15. On 24 August 2015, Senica filed a Statement of Appeal (*"Appeal against the absence of a decision"*) with the Court of Arbitration for Sport (hereinafter: the "CAS"), in accordance with Article R48 of the Code of Sports-related Arbitration (2013 edition) (hereinafter: the "CAS Code"). In this submission, Senica requested the matter to be submitted to a sole arbitrator and that its Statement of Appeal shall be considered as its Appeal Brief. Senica argued that it had *"exhausted all legal remedies internal to FIFA before the appeal to CAS, therefore, the CAS shall hear this case due to the absence of a final decision of FIFA"* and submitted the following requests for relief:

> *"1. The Respondent is ordered to pay to the Claimant the amount of 46,822 EUR in total as training compensation.*
>
> *2. The Respondent is ordered to pay Claimant's legal expenses and his legal counsel's fee incurred in connection with the present proceedings".*

16. On 11 September 2015, FIFA informed CAS that *"bearing in mind the fact that the Appellant withdrew its first appeal against FIFA's letter of 26 October 2012, we consider that CAS is not in a position to deal with the new appeal at stake as the current situation qualifies as a res judicata situation"* and requested CAS to *"take a preliminary decision as to the admissibility of the appeal at hand"*.

17. On 15 September 2015, Ludogorets concurred with FIFA's request *"to issue a preliminary decision as to the admissibility of the appeal",* arguing that the appeal is inadmissible due to the *res judicata* effect of the withdrawal of the first appeal in 2012.

18. On 23 September 2015, upon being invited by the CAS Court Office to comment on the content of the Respondents' letters, Senica informed the CAS Court Office that it maintained its position as *"expressed in the Statement of Appeal"*.

19. On 24 September 2015, the CAS Court Office informed the parties that the President of the CAS Appeals Arbitration Division had decided that the issues raised by the Respondents on 11 and 16 September 2015, would be dealt with by the Panel or the Sole Arbitrator.

20. On 28 and 29 September 2015 respectively, Ludogorets informed the CAS Court Office that it insisted on a three-member panel and FIFA informed the CAS Court Office that it preferred the appointment of a panel of three arbitrators.

21. On 2 October 2015, following an invitation from the CAS Court Office to express its opinion, Senica confirmed to agree with the bifurcation of the proceedings.

22. On the same date, the parties were informed by the CAS Court Office that in view of Senica's agreement, the proceedings were bifurcated and that the Panel or Sole Arbitrator, once constituted, would render a preliminary decision on the admissibility-related questions raised by Ludogorets and FIFA.

23. On 5 October 2015, the CAS Court Office informed the parties that the Deputy President of the CAS Appeals Arbitration Division had decided, in accordance with Article R50 of the CAS Code, to submit the present procedure to a sole arbitrator.

24. On 17 November 2015, in accordance with Article R54 of the CAS Code, and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that the arbitral tribunal appointed to decide the present matter was constituted by:

- Mr Manfred Peter Nan, Attorney-at-Law in Arnhem, the Netherlands, as Sole Arbitrator.

25. The Sole Arbitrator confirms that, in the context of the present preliminary decision, he carefully took into account all of the submissions, evidence, and arguments presented by the parties, even if they have not been specifically summarised or referred to in the present partial arbitral award.

## IV. SUBMISSIONS OF THE PARTIES WITH RESPECT TO THE PRELIMINARY ISSUE

26. Senica's submissions, in essence, may be summarised as follows:

- Regarding the jurisdiction of CAS, Senica insists that the FIFA DRC *"refused to issue a decision, which can be a denial of justice, opening the way for an appeal in front of CAS"* and relies on CAS jurisprudence in arguing that this opens the way for an appeal against the absence of a decision.
- Senica maintains that the FIFA DRC should have examined the possible incorrect categorisation of Ludogorets by the BFA *ex officio*, but only sent two letters (dated 30 September 2012 and 26 October 2012) in which it wrongly stated that it was not in a position to intervene in the training compensation-related matter between Senica and Ludogorets.
- In continuation, Senica argues that it *"has exhausted all legal remedies internal to FIFA before the appeal to CAS, therefore, the CAS shall hear this case due to the absence of a final decision of FIFA, which constitutes a denial of formal justice against which an appeal can be lodged. Certain final decisions do not examine the merits of the dispute but simply place an end to them on the basis of procedural issues"*.
- Finally, Senica submits that the fact that an appeal has been submitted to CAS and then withdrawn does not exclude the possibly to re-submit the appeal, if it happens within the prescribed time limit.

27. Ludogorets submissions, in essence, may be summarised as follows:

- Ludogorets argues that it entirely supports the content of FIFA's submissions.
- Ludogorets maintains that Senica already lodged an appeal with CAS regarding this matter and requested CAS to *"cancel the decision of FIFA DRC issued by means of sending of the letter dated 26.10.2012* […]*"*. As such, Senica then claimed that FIFA's letter dated 26 October 2012 was indeed a final decision appealable before CAS. Ludogorets maintains that the

different approach of Senica in treating the FIFA letter of 26 October 2012 as a final decision in the first appeal at CAS, and *"now as a lack of decision possibly leading to denial of justice, is contradictory to the venire contra factum proprium principle* […] *and therefore constitutes nothing more than manifest lack of good faith and abuse of rights, which should not be protected by law"*.

- Ludogorets insists that the appeal filed by Senica is inadmissible, as Senica already filed an appeal at CAS regarding the FIFA letter dated 26 October 2012, which appeal was withdrawn by Senica and that this withdrawal was *"confirmed by CAS with the Termination Order dated 31 December 2012"*. Ludogorets asserts that this Termination Order is *"binding the same way as an award, and the withdrawal of an appeal, on the other hand, has the effect of rejection (and res judicata respectively)"*.
- Finally, Ludogorets purports that *"there is currently no pending proceedings opened before FIFA's competent bodies"* for the payment of training compensation by Ludogorets in connection with the Player and *"therefore no situation of denial of justice could be grounded"*.

28. FIFA's submissions, in essence, may be summarised as follows:

- FIFA maintains that in view of the fact that Senica already lodged an appeal before CAS, but that such proceedings came to an end as a result of Senica's withdrawal of its appeal, which was confirmed by CAS via its Termination Order dated 31 December 2012, *"there cannot be any situation of denial of justice as there is currently no pending proceedings in front of FIFA's decision-making bodies in relation to the Appellant's claim for the payment of training compensation by PFC Ludogorets 1945 in connection with the player J."*.
- Furthermore, FIFA argues that *"bearing in mind the fact that the Appellant withdrew its first appeal against FIFA's letter of 26 October 2012, we consider that CAS is not in a position to deal with the new appeal at stake as the current situation qualifies as a res judicata situation"*.

## V. JURISDICTION

29. The Sole Arbitrator observes that Article R47 of the CAS Code 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"*.

30. Article 67(1) of the FIFA Statutes (2015 edition) determines the following:

*"1. 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"*.

31. The Sole Arbitrator observes that there is no challenged decision in the matter at hand. Rather, Senica challenges the lack of issuing a decision by the FIFA DRC.

32. The Sole Arbitrator observes that a previous CAS panel determined the following in respect of such situation:

*"If a body refuses without reasons to issue a decision or delays the issuance of a decision beyond a reasonable period of time, there can be a denial of justice, opening the way for an appeal against the absence of a decision"* (CAS/A/899; see also CAS award of 15 May 1997, published in Digest of CAS Awards 1986-1998, p. 539).

33. The Sole Arbitrator adheres to this precedent and finds that, in principle, if a claim has been filed with the FIFA DRC and the FIFA DRC fails to render a decision, at a certain moment in time, the possibility will arise that the claimant may file an appeal with CAS because of denial of justice.

34. However, in the specific case at hand, the Sole Arbitrator observes that Senica filed a statement of appeal with CAS already on 16 November 2012 (in the proceedings registered under CAS 2012/A/2987) with respect to FIFA's letter dated 26 October 2012, by which FIFA indicated that it did not appear to be in a position to intervene in the matter concerning Senica's request for training compensation from Ludogorets.

35. In continuation, the Sole Arbitrator notes that on 26 November 2012, Senica filed its appeal brief in the proceedings registered under CAS 2012/A/2987 between Senica and Ludogorets submitting the following requests for relief – as relevant:

*"1. To accept the present Statement of appeal and consequently, cancel the decision of FIFA DRC issued by means of sending of the letter dated 26.10.2012 that is specified above".*

36. Furthermore, the Sole Arbitrator observes that the appeal brief dated 26 November 2012 filed by Senica to CAS reads as follows – as relevant:

*"[…] The FIFA letter from the 26.10.2012 without any doubts shall be considered as a decision […].*

*If a body refuses without reasons to issue a decision or delays the issuance of a decision beyond a reasonable period of time, there can be a denial of justice, opening the way of an appeal against the absence of a decision […].*

*In this case the FIFA without any grounds has refused to examine the case and to take formal decision referring only to the "general rule" that is accordance to the Art. 2 of Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (DRC) is not considered to be a source of applicable material law for the FIFA bodies […].*

*The FIFA Statute, when recognizing the CAS jurisdiction, as it is mentioned above, does not provide possibility of the further appeal of decisions of the Players' Status Committee and of the Director of Legal Affairs in respect of the denial of justice to some higher FIFA bodies. From that it is possible to make legitimate conclusion that all legal remedies of settlement of the dispute within the bounds of the FIFA to the present moment has been exhausted, in the sense that it is presupposed by the art. R47 of the CAS Code.*

*Thus, the CAS has jurisdiction to re-examine essentially the dispute for which the FIFA has accepted decision that does not correspond to the active rules".*

37. From the reasoning in Senica's appeal brief dated 26 November 2012, the Sole Arbitrator understands that Senica considered FIFA's letter dated 26 October 2012 to be an appealable decision. Although Senica already referred to the concept of denial of justice in its initial appeal, this argument was based on the allegation that FIFA decided on 26 October 2012 that **the FIFA DRC would not render a decision**, which Senica considered to constitute a denial of justice and an appealable decision before CAS.

38. In the present appeal proceedings, Senica rather argues that there is a denial of justice because **the FIFA DRC failed to take a decision**, whereby it thus does not consider FIFA's letter dated 26 October 2012 to be an appealable decision.

39. The Sole Arbitrator finds that both situations of denial of justice need to be differentiated from each other.

40. Subsequently, on 19 December 2012, Senica informed the CAS Court Office that it withdrew its appeal, which resulted in a Termination Order dated 31 December 2012, pronounced by the Deputy President of the Appeals Arbitration Division, in which the procedure *CAS 2012/A/2987 FK Senica v. FC Ludogorets Razgrad* was terminated and removed from the CAS roll.

41. The Sole Arbitrator observes that Senica, in the present proceedings, filed a Statement of Appeal with CAS on 24 August 2015, which is 2 years, 8 months and 24 days after the issuance of the Termination Order, repeating its requests for relief to order Ludogorets to pay training compensation to Senica, arguing now however that FIFA's letter dated 26 October 2012 does not constitute an appealable decision, but rather that FIFA by its silence failed to render a decision and thereby *"opening the way for an appeal in front of CAS"*.

42. As maintained in CAS jurisprudence, the Sole Arbitrator understands that the doctrine of *venire contra factum proprium* is recognized by Swiss law, and provides that *"where the conduct of one party has induced legitimate expectations in another party, the first party is estopped from changing its course of action to the detriment of the second party"* (CAS 2008/O/1455, §16 of abstract published on CAS website).

43. The Sole Arbitrator agrees with Ludogorets that the change of position of Senica in this second appeal, is indeed a violation of the principle of *venire contra factum proprium*. Senica first maintained that FIFA's letter dated 26 October 2012 *"without any doubts shall be considered as a decision"* but did not wait for a final decision of CAS in this respect by withdrawing its first appeal. The Sole Arbitrator finds that one can then not sit still and wait for the FIFA DRC to render a decision, as FIFA was legitimately under the impression that the matter was definitely settled by the Termination Order issued by CAS on 31 December 2012.

44. Importantly, the Sole Arbitrator notes that Senica "buried" the case for 2 years, 8 months and 24 days, allegedly awaiting a decision of FIFA, without ever contacting FIFA in the meantime to be informed about the status of the proceedings or informing FIFA that it was still waiting

for a decision. Senica at least did not provide any evidence that it attempted to contact FIFA in the meantime. In the absence of such proof, the Sole Arbitrator finds that Senica cannot legitimately claim that it has been waiting for a decision from the FIFA DRC all this time and that only very recently a situation of denial of justice arose, legitimising it to file an appeal with CAS.

45. In any case, the Sole Arbitrator considers that the object of the proceedings in CAS 2012/A/2987 would have been to determine whether there had been a decision of FIFA on 26 October 2012 and to possibly rule on the merits of Senica's claim or to request FIFA to render a formal decision on Senica's claim in case it was found that there had been a denial of justice by FIFA. Therefore, the present appeal would indeed, as argued by the Respondents, be qualified as a *res judicata* situation.

46. In view of the above, since there is no appealable decision and because the Sole Arbitrator finds that this is not a situation of denial of justice from the FIFA DRC, the Sole Arbitrator finds that CAS does not have jurisdiction to entertain the appeal filed by Senica.

## ON THESE GROUNDS

**The Court of Arbitration for Sport rules that:**

1. The Court of Arbitration for Sport does not have jurisdiction to deal with the appeal filed by FK Senica on 24 August 2015 against PFC Ludogorets and FIFA.

2. (…).

3. (…).