



Arbitration CAS 2021/A/8014 Shanghai Shenhua FC v. Fédération Internationale de Football Association (FIFA), award of 14 January 2022

Panel: Mr Cesare Gabasio (Italy), Sole Arbitrator

Football

Disciplinary disputes

Suspension and restoration of a deadline

Proportionality of fines imposed by the FIFA Disciplinary Committee

Financial effects of the Covid-19 pandemic

1. Appeals against FIFA Players' Status Committee (PSC) decisions have a suspensive effect on deadlines provided in said decisions. However, deadlines are only suspended while the CAS proceedings are ongoing and start running again when the CAS award on cost for the relevant appeal is issued.
2. The purpose of Article 15 of the FIFA Disciplinary Code, is to serve as a deterrent to non-compliance with decisions passed by FIFA's body. Pursuant to Article 15, paragraph 1, a), of the FIFA Disciplinary Code in combination with Article 6, paragraph 4, of the FIFA Disciplinary Code, a fine imposed by the FIFA Disciplinary Committee shall not be less than CHF 100 and not more than CHF 1,000,000. In any case, a sanction imposed by a disciplinary body in the exercise of its discretion can be reviewed only when the sanction is evidently and grossly disproportionate to the offence. In order to assess the proportionality of a sanction, the outstanding amount of debt provides a first reasonable nexus between the severity of the violation committed and the sanctions to be imposed.
3. The alleged economic effects of the pandemic of Covid-19 have to be substantiated by evidence. That being said, difficult financial situation is not a justification for the failure to pay debts. Additionally, the FIFA Covid-19 Football Regulatory Issues specifies that the Covid-19 outbreak does not exempt a club from complying with financial decisions rendered by the PSC.

I. PARTIES

1. Shanghai Shenhua FC (the "Appellant" or "Shanghai") is a Chinese professional football club, affiliated to Chinese Football Association, which, in turn, is affiliated to the Fédération Internationale de Football Association.

2. The Fédération Internationale de Football Association (the “Respondent” or “FIFA”) is an association under Swiss law and has its registered office in Zurich, Switzerland. FIFA is the governing body of international football at worldwide level and exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials and players worldwide; The Appellant and the Respondent shall be jointly referred to as the “Parties”, where applicable.

II. FACTUAL BACKGROUND

3. Below is a summary of the relevant facts and allegations based on the Parties’ written submissions, pleadings and evidence adduced in these proceedings. References to additional facts and allegations found in the Parties’ written submissions, pleadings, and evidence will be made, where relevant, in connection with the legal analysis that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, the Award only refers to the submissions and evidence it deems necessary to explain its reasoning.

A. Backgrounds facts

4. On 27 February 2020, the Single Judge of the FIFA Players’ Status Committee (the “PSC”) decided that Shanghai had to pay to the coach Enrique Sánchez Flores (the “Creditor”) within 30 days from the date of notification of the relevant decision (the “PSC Decision”), the following amounts:
 - EUR 500,000, plus interest at a rate of 5% p.a, as from 5 July 2019 until the date of effective payment;
 - EUR 12,000,000 and USD 150,000, plus interest at a rate of 5% p.a, as from 16 September 2019 until the date of effective payment.
5. The PSC Decision also indicated that Shanghai “*must provide the Claimant with the relevant tax certificates indicating the specific tax withholding made on the amounts paid to the Respondent during the term of the contractual relationship between the parties*”.
6. The grounds of the PSC Decision were notified to Shanghai on 28 April 2020.
7. On 17 May 2020, the Appellant filed an appeal before Court of Arbitration for Sport (“CAS”) against the PSC Decision (with reference CAS 2020/A/7086).
8. On 29 January 2021, the Appellant informed the CAS Court Office that it was withdrawing its appeal.
9. On 8 March 2021, CAS issued an award on costs, by means of which the appeal filed by the Appellant against the PSC Decision was terminated and removed from the CAS roll.

B. Proceedings before the FIFA Disciplinary Committee

10. As the relevant amounts had not been paid, on 26 March 2021 the Creditor requested FIFA to open disciplinary proceedings against Shanghai.
11. On the same date, the secretariat of the FIFA Disciplinary Committee opened disciplinary proceedings against the Appellant for a potential failure to respect a decision passed by a body, a committee or an instance of FIFA or a CAS decision, inviting the Appellant to provide its position regarding the allegations made by the Creditor or proof of payment of the outstanding amounts within the following 6 days.
12. Following the opening of disciplinary proceedings, on 1 April 2021 Shanghai provided “*the corresponding tax certificate indicating the specific tax withholdings made during the term of the contractual relationship between the parties*”, while it did not give any evidence of its fulfilment of the financial obligations set out in the PSC Decision.
13. On 22 April 2021, the FIFA Disciplinary Committee passed a decision on the matter (hereinafter, also referred to as the “*Appealed Decision*”), stating as follows:
 - “1. *Shanghai Shenhua FC is found guilty of failing to comply in full with the decision passed by the Single Judge of the Players’ Status Committee on 27 February 2020.*
 2. *Shanghai Shenhua FC is ordered to pay to the coach Enrique Sánchez Flores as follow:*
 - *EUR 500,000, as outstanding remuneration, plus 5% interest p.a. as from 5 July 2019 until the date of effective payment;*
 - *EUR 12,000,000 and USD 150,000 as compensation for breach of contract, plus 5% interest p.a. as from 16 September 2019 until the date of effective payment.*
 3. *Shanghai Shenhua FC is granted a final deadline of 30 days as from the notification of the present decision in which to settle said amount. Upon expiry of the aforementioned final deadline and in the event of persistent default or failure to comply in full with the decision within the period stipulated, a transfer ban will be pronounced until the complete amount due is paid or the non-financial decision is complied with. The transfer ban will be implemented automatically at national and international level by the Chinese Football Association and FIFA respectively, without a further formal decision having to be taken nor any order to be issued by the FIFA Disciplinary Committee or its secretariat. In addition, a deduction of points or relegation to a lower division may also be ordered in addition to transfer ban in the event of persistent failure, repeated offences or serious infringements or if no full transfer could be imposed or served for any reason.*
 4. *Shanghai Shenhua FC is ordered to pay a fine to the amount of CHF 30,000. The fine is to be paid within 30 days of notification of the present decision”.*
14. The findings of the *Appealed Decision* were notified to the Appellant on 27 April 2021 and its grounds were notified to the Appellant on 17 May 2021.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

15. On 4 June 2021, the Appellant filed a statement of appeal with the CAS in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (hereinafter, also referred to as the “CAS Code”) against FIFA with respect to the Appealed Decision. The Appellant requested to submit this matter to a Sole Arbitrator and the Respondent agreed to such request.
16. On 7 July 2021, the Appellant filed its Appeal Brief in accordance with Article R51 of the CAS Code.
17. On 17 August 2021 the Respondent filed its Answer in accordance with Article R55 of the CAS Code.
18. On 14 September 2021 the Parties were informed that the President of the CAS Appeals Arbitration Division appointed Mr Cesare Gabasio as Sole Arbitrator in accordance with Article R54 of the CAS Code.
19. On 15 September 2021, after having consulted the Parties, the Sole Arbitrator decided to hold a hearing by video-conference, pursuant to Article R57 of the Code.
20. On 5 October 2021, the CAS Court Office, on behalf of the Sole Arbitrator, issued the Order of Procedure, which was duly signed by the Parties. By signing the Order of Procedure, the Parties confirmed the CAS jurisdiction to hear the appeal.
21. On 15 December 2021 a video-hearing took place, with the participation, in addition to the Sole Arbitrator and Mr. Antonio Quesada, CAS Head of Arbitration, of all Parties’ representatives. The Parties were given a full opportunity to present their case, submit their arguments/submissions and answer the questions posed by the Sole Arbitrator. In particular, pursuant to Article R59 of the CAS Code, FIFA requested the Sole Arbitrator to communicate the operative part of the award to the Parties prior to the delivery of the reasons. No Party objected to the constitution of the arbitral tribunal and at the conclusion of the hearing, the Parties expressly confirmed that their right to be heard was fully respected.

IV. SUBMISSIONS OF THE PARTIES

A. The Appellant

22. In its Appeal Brief the Appellant submitted the following requests for relief:

- “1. *Accept the present appeal against the decision passed by the FIFA Disciplinary Committee on 22 April 2021, grounds of which were notified to the Appellant on 17 May 2021, in the disciplinary proceedings opened against the Appellant registered in FIFA with reference number FDD-7891;*
2. *Set aside the Appealed Decision and refer the case back to FIFA*

On the alternative to point 2 above

3. *Set aside the Appealed Decision and issue a new decision in which the fine imposed on SHANGHAI SHENHUA FC is lowered in due consideration of the principle of proportionality, if at all imposed.*

In any case,

4. *to fix a minimum amount of CHF 20,000 (twenty thousand Swiss francs) to be paid by FIFA to SHANGHAI SHENHUA FC as contribution to its legal fees and costs.*
5. *Condemn FIFA to pay the whole CAS administration and the Arbitrators fees”.*

23. The submissions of the Appellant, in essence, may be summarized as follows.

- The 30-days deadline granted to Shanghai to comply with the PSC Decision would have start to run only from 8 March 2021, when the CAS award on cost was issued. Therefore, the FIFA Disciplinary Committee wrongly opened the disciplinary procedure against Shanghai, since on 26 March 2021 the aforesaid 30-days deadline had not yet expired.
- The fine of CHF 30.000 set out in the Appealed Decision, would be disproportionate, as the conduct of Shanghai does not inflict any damage to FIFA or to football as a sport and caused only little damage to the Creditor.

B. The Respondent

24. FIFA submitted the following requests for relief:

- “1. *To reject the Appellant’s appeal in its entirety;*
2. *To confirm the decision FDD-7891 rendered by the member of the FIFA Disciplinary Committee on 22 April 2021;*
3. *To order the Appellant to bear all costs incurred with the present procedure and to cover all the legal expenses of FIFA related to the present procedure”.*

25. The submissions of FIFA may be summarized as follows.

- By analogy to Article 190(1) PILA, the PSC Decision is final from the time when it is communicated.
- The 30-day deadline did not restart with the CAS award on costs issued on 8 March 2021, but it was only suspended while the CAS proceeding was ongoing and continued its course when the Appellant voluntarily withdrew its appeal on 29 January 2021 or, at least, when the CAS award on cost was issued on 8 March 2021. Therefore, when on 26 March 2021 the disciplinary procedure was opened against Shanghai, the 30-day deadline granted by the PSC Decision has elapsed.

- The fine of CHF 30.000 cannot be considered as evidently and grossly disproportionate to the offence, taking into account that the sum at stake represents the 0,2% of the total debt of Shanghai towards the Creditor and the Appellant failed to comply with its financial obligations since July 2019.

V. JURISDICTION

- 26. The jurisdiction of the CAS, which is not disputed by the Parties, derives from the Articles 57 *et seq.* of the applicable FIFA Statutes and Article R47 of the CAS Code. The jurisdiction is further confirmed by the Order of Procedure duly signed by the Parties.
- 27. It follows that the CAS has jurisdiction to decide on the present dispute.
- 28. Under Article R57 of the CAS Code, the Sole Arbitrator has the full power to review the facts and the law.

VI. ADMISSIBILITY

- 29. The appeal is admissible as it complies with all the requirements set forth by Articles R47 and R48 of the CAS Code and the Appellant submitted it within the deadline provided by Article R49 of the CAS Code as well as by Article 58 (1) of the applicable FIFA Statutes.
- 30. In particular, the grounds of the Appealed Decision were notified to the Appellant on 17 May 2021 and the latter filed the Statement of Appeal with CAS on 4 June 2021. Therefore, the appeal was timely filed. Furthermore, no objections were raised by the Respondent regarding the admissibility of the appeal.

VII. APPLICABLE LAW

- 31. Article R58 of the CAS Code provides the following:
“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.
- 32. Pursuant to Article 57 (2) of the applicable FIFA Statutes, “[t]he 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”.
- 33. As a result, the Sole Arbitrator remarks that the applicable regulations are FIFA regulations and that Swiss Law shall apply complementarily, whenever warranted.

VIII. MERITS

34. The main issues to be resolved by the Sole Arbitrator are:
- A. Has the 30-day deadline granted by the PSC Decision expired, when the disciplinary procedure was opened against Shanghai on 26 March 2021?
 - B. Is the disciplinary sanction imposed on the Appellant by the FIFA Disciplinary Committee disproportionate?
35. The Sole Arbitrator will address these issues in turn below.
- A. Has the 30-day deadline granted by the PSC Decision expired, when the disciplinary procedure was opened against Shanghai on 26 March 2021?**
36. According to the PSC Decision, Shanghai should have paid the Creditor the total amount of EUR 12,500,00 and USD 150,000, plus interest, *“within the next 30 days from the date of the notification of this decision”*. As the grounds of the PSC Decision were notified to the Appellant on 28 April 2020, the 30-days deadline granted to Shanghai began to run from this date.
37. When on 17 May 2020 the Appellant filed its statement of appeal against the PSC Decision before CAS, nineteen days of the 30-days deadline have already elapsed.
38. Even considering the fact that the appeal against the PSC Decision has a suspensive effect, it is in any case certain that the 30-day deadline could, at most, be only suspended while the CAS proceeding was on going and started running again on 8 March 2021, when the CAS award on cost was issued. On this regard the Sole Arbitrator observes that the provisions set forth in Articles 8, 24 and 53 of FIFA Statutes, invoked by the Appellant, do not support the Appellant’s argument, according to which a new 30-day deadline would have restarted with the CAS award issued on 8 March 2021.
39. Therefore, considering the nineteen days between the notification of the PSC Decision and the filing of the statement of appeal, the aforesaid deadline expired, at the latest, on 19 March 2021.
40. As it is not disputed that the Appellant did not pay the Creditor any amounts set out in the PSC Decision within the deadline of 19 March 2021, on 26 March 2021 FIFA Disciplinary Committee correctly opened the disciplinary procedure against Shanghai for a potential failure of Article 15 FIFA Disciplinary Code. Indeed, nowadays the Appellant has not yet paid the Creditor any of the amounts set out in the PSC Decision.
41. In the light of the above consideration, the Appellant’s arguments, according to which FIFA could not have opened disciplinary proceeding against the Appellant, as the 30-day deadline had not expired, are dismissed.

B. Is the disciplinary sanction imposed on the Appellant by the FIFA Disciplinary Committee disproportionate?

42. As highlighted by the Respondent, the Appellant only questioned the proportionality of the fine imposed by the Appealed Decision, while it did not dispute the transfer ban set out in the Appealed Decision. The transfer ban sanction is therefore out of the scope of this proceeding.
43. The Sole Arbitrator observes that, pursuant to Article 15, paragraph 1, a), FIFA Disciplinary Code in combination with Article 6, paragraph 4, FIFA Disciplinary Code, a fine imposed by the FIFA Disciplinary Committee shall not be less than CHF 100 and not more than CHF 1,000,000. The fine imposed on the Appellant therefore falls within the range provided for by the FIFA Disciplinary Code.
44. According to well-established CAS jurisprudence, *“the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules can be reviewed only when the sanction is evidently and grossly disproportionate to the offence”* (CAS 2018/A/6239; see also CAS 2018/A/6038; CAS 2017/A/3562; CAS 2009/A/1817). The CAS also stated that *“the outstanding amount of debt provides a first reasonable nexus between the severity of the violation committed and the sanctions to be imposed. The correlation between the “outstanding amounts due” and the measure of sanction satisfies the principle of predictability, equal treatment and procedural fairness: any club could expect in good faith that the more severe its violation, the more severe the sanction that it might be subjected to”* (CAS 2018/A/6239).
45. In view of the foregoing principles, the Sole Arbitrator considers that the fine of CHF 30,000 does not seem to be oppressive and appears to be fully justified in relation to the outstanding amount due to the Creditor.
46. Taking into account that the PSC Decision ordered Shanghai to pay the Creditor the amount of EUR 12,500,000 and USD 150,000, plus interests, the fine of CHF 30,000 is not disproportionate, as its amount is less than the 0,3% of the total amount due to the Creditor.
47. As regards the conduct of the Appellant, the Sole Arbitrator points out that from the notification of the PSC Decision almost two years have elapsed without Shanghai having paid any sum to the Creditor and that it appears that the Appellant is trying by all means to delay the payment in favor of the Creditor.
48. The amount of the aforementioned fine is also to be considered as falling within the purpose of Article 15 of the FIFA Disciplinary Code, that is to serve as a deterrent to non-compliance with decisions passed by FIFA’s body (CAS 2018/A/6239). In fact, on the one hand, the imposition of a more lenient disciplinary measure in the present case would risk losing its deterrent function and, on the other, a further debt of CHF 30,000 does not significantly aggravate or prejudice the Appellant’s financial situation, as the Appellant has already debts in an amount of at least equal to EUR 12,500,000 and USD 150,000.
49. Furthermore, the Sole Arbitrator notes that the Appellant’s statements that Shanghai suffered the economic effects of the pandemic of Covid-19 remained entirely unsubstantiated by any evidence. This argument cannot therefore be taken into account.

50. For the sake of completeness, the Sole Arbitrator observes in any case that: (i) according to CAS jurisprudence, difficult financial situation is not a justification for the failure to pay debts; (ii) Covid-19 Football Regulatory Issues specifies that the Covid-19 outbreak does not exempt a club from complying with financial decisions rendered by the PSC and that *“FIFA will continue to apply Article 15 of the FIFA Disciplinary Code in the event of failure to respect these decisions”*.
51. The Appellant’s request to reduce the fine due to its allegedly disproportional nature is thus rejected by the Sole Arbitrator.

C. Conclusions

52. Based on the foregoing analysis and after having taken into due consideration all the specific circumstances of the case, the evidence produced and arguments submitted by the Parties, the Appeal is dismissed, as the Sole Arbitrator concludes that:
 - a) FIFA Disciplinary Committee correctly opened the disciplinary procedure against Shanghai, after the 30-day deadline granted to Shanghai to comply with the PSC Decision has expired;
 - b) the fine imposed on Shanghai by the Appealed Decision is not disproportionate.
53. All other and further motions or prayers for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Shanghai Shenhua FC against the decision issued by FIFA Disciplinary Committee on 22 April 2021 is dismissed.
2. The decision issued by FIFA Disciplinary Committee on 22 April 2021 is confirmed.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.