



Arbitration CAS 2011/A/2484 Kauno Futbolo Ir Beisbolo Klubas v. Fédération Internationale de Football Association (FIFA), award of 2 November 2011

Panel: Mr Michele Bernasconi (Switzerland), Sole Arbitrator

Football

Disciplinary sanction against a club for non-compliance with a previous FIFA decision

Interpretation of Art. 64 para. 1 of the FIFA Disciplinary Code

Ne bis in idem

Absence of recognition and enforcement of a FIFA disciplinary decision by a national court

1. The fine provided for in paragraph a) of Art. 64 para. 1 of the FIFA Disciplinary Code can be imposed in case of failure to comply with any decision, either financial or non-financial, from a body, a committee or an instance of FIFA or CAS. This sanction may be imposed cumulatively with those provided for in paragraphs b) and c) of the same article.
2. The *ne bis in idem* principle means basically that no one shall be sanctioned twice because of the same offence. If there are two decisions, one rendered in the context of a disciplinary procedure and sanctioning a disciplinary infraction, namely the non compliance with a DRC decision, and one rendered in the context of a contractual dispute, ordering a compensation for breach of contract, the infractions are different and there is no violation of the *ne bis in idem* principle.
3. The *ratio legis* of art. 64 para. 1 of the FIFA Disciplinary Code is to sanction the non compliance with decisions of a body, a committee or an instance of FIFA or decisions of CAS in order to ensure that members of the family of football do comply with such decisions. The recognition and enforcement of awards by national courts under the New York Convention is designed to allow a party to seek measures forcing performance of the award in a given jurisdiction such as, for instance, the seizure of assets. Failure to comply with a FIFA decision which became final exposes a party affiliated with FIFA both to the possible enforcement proceedings at State level and to a possible disciplinary proceeding, in accordance with art. 64 para. 1 of the FIFA Disciplinary Code. These two proceedings are of a different nature and the one does not exclude the other. Consequently, on the basis of the FIFA regulations and in particular of art. 64 para. 1 of the FIFA Disciplinary Code, the potential difficulty of a FIFA decision to be recognised and enforced by a foreign court is not *per se* a justification for a party bound by FIFA regulations and that participated in that FIFA proceedings to refuse to comply with such FIFA decision.

Association Kauno Futbolo Ir Beisbolo Klubas (“the Appellant”) is a football club with its registered office in Kaunas, Lithuania. It is a member of the Lithuanian Football Federation (LFF), itself affiliated to the Fédération Internationale de Football Association (FIFA) since 1923.

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. It exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials and players world-wide.

On July 16, 2009, the FIFA Dispute Resolution Chamber (“the DRC”) decided that the Appellant had to pay to the player M. (“the Player”) the amount of EUR 404’000 and, in case the amount were not paid within 30 days of notification of the decision, interest at a rate of 5% as from the expiry of that time limit, would be due. The grounds of the decision were notified to the parties on March 3, 2010.

The Appellant appealed to the Court of Arbitration for Sport (CAS), which terminated the procedure by way of a Termination order dated 5 July 2010 (case CAS 2010/A/2087).

On March 8, 2011 the secretariat to the FIFA Disciplinary Committee asked the Appellant to pay the outstanding amounts by March 21, 2011 at the latest and informed it that the case would be submitted to the FIFA Disciplinary Committee on March 29, 2011.

The Appellant did not submit any position and/or comments to FIFA’s letter of March 8, 2011.

On March 29, 2011, the FIFA Disciplinary Committee passed the decision n°110028 PST LTU ZH (“the Appealed Decision”) and decided in particular that:

- “1. The club Association Kauno futbolo ir beisbolo klubas is pronounced guilty of failing to comply with a decision of a FIFA body in accordance with art. 64 of the FDC.*
- 2. The club Association Kauno futbolo ir beisbolo klubas is ordered to pay a fine to the amount of CHF 25,000. The fine is to be paid within 30 days of notification of the present decision. (...).*
- 3. The club Association Kauno futbolo ir beisbolo klubas is granted a final period of grace of 30 days as from notification of the decision in which to settle its debt to the creditor.*
- 4. If payment is not made by this deadline, the creditor may demand in writing from FIFA that six (6) points be deducted from the debtor’s first team in the domestic league championship. Once the creditor has filed this request, the points will be deducted automatically without a further formal decision having to be taken by the FIFA Disciplinary Committee. The order to implement the points deduction will be issued on the association concerned by the secretariat to the FIFA Disciplinary Committee.*
- 5. If the club Association Kauno futbolo ir beisbolo klubas still fails to pay the amount due even after deduction of the points in accordance with III./4. above, the FIFA Disciplinary Committee will decide on a possible relegation of the debtor’s first team to the next lower division.*
- 6. As a member of FIFA, the Lithuanian Football Federation is reminded of its duty to implement this decision and, if so requested, provide FIFA with proof that the points have been deducted. If the Lithuanian Football*

Federation [does] not comply with this decision despite being ordered to do so, the FIFA Disciplinary Committee will decide on appropriate sanctions on the member. This can lead to expulsion from all FIFA competitions.

7. The costs of these proceedings amounting to CHF 2'000 are to be borne by the club Association Kauno futbolo ir beisbolo klubas and shall be paid according to the modalities stipulated under III./2. above.

8. The creditor is directed to notify the secretariat to the FIFA Disciplinary Committee of every payment received”.

The Appealed Decision was notified to the parties on May 24, 2011.

On June 14, 2011, the Appellant filed a statement of appeal with the CAS. It challenged the Appealed Decision, submitting the following request for relief:

“The relief sought on the Appeal is, pursuant to Article R57 of the CAS Code, that CAS:

- (a) Accepts this Appeal against the Decision; and*
- (b) Annul the 29th March, 2011 FIFA Disciplinary Committee Decision (case ref. 110028 PST LTU ZH) imposing the sanction (par. 1.2.1. - 1.2.8.) upon the Association “Kauno futbolo ir beisbolo klubas”.*

On June 30, 2011, the Appellant filed an Appeal Brief, submitting the following request for relief:

“The Appellant requests the CAS to:

- (a) Annul the 29th March, 2011 FIFA Disciplinary Committee Decision (case ref. 110028 PST LTU ZH) imposing the sanction (par. 1.2.1. - 1.2.8.) upon the Association “Kauno futbolo ir beisbolo klubas”;*
- (b) Order the Respondent to pay costs before the CAS in an amount to be assessed by the CAS”.*

On August 2, 2011, FIFA filed an Answer, with the following request for relief:

- “1. To reject the Appellant’s request to annul the decision hereby appealed against.*
- 2. 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”.*

Pursuant to art. R57 par. 2 of the Code of Sports-related Arbitration (“the Code”), the parties were invited to inform the CAS Court Office whether their preference was for a hearing to be held or for an award to be rendered on the basis of the parties’ written submissions only. Both parties agreed to waive a hearing and the Sole Arbitrator decided to proceed on the basis of written submissions alone.

LAW

CAS Jurisdiction

1. The jurisdiction of CAS, which is not disputed, derives from art. 62 *et seq.* of the FIFA Statutes and art. R47 of the Code.
2. It follows that CAS has jurisdiction to decide on the present dispute.
3. Under art. R57 of the Code, the Sole Arbitrator has the full power to review the facts and the law.

Admissibility

4. The appeal was filed within the deadline provided by the FIFA Statutes and stated in the Appealed Decision. Further, it complied with all the other requirements of art. R48 of the Code.
5. It follows that the appeal is admissible.

Applicable law

6. Art. R58 of the Code provides the following:
“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.
7. Pursuant to art. 62 par. 2 of the 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”.*
8. In this case, accordingly, the FIFA regulations will be applied primarily, and Swiss law shall apply complementarily.
9. The facts object of the present proceedings took place between July 16, 2009 and March 29, 2011. The DRC took its decision on March 29, 2011 and communicated it to the parties on May 24, 2011. Based on the foregoing, the Sole Arbitrator finds that the 2009 edition of the FIFA DC, which was in force during this period of time is applicable to the present proceedings, which is undisputed.

Merits

10. The main issues to be resolved by the Sole Arbitrator in deciding this dispute are the following:
 - A. Does the Appealed Decision violate art. 64.1 of the FIFA DC by imposing sanctions not permitted under this rule?
 - B. Does the Appealed Decision violate the principle of *ne bis in idem*?
 - C. Did the Appealed Decision unduly sanction the Appellant as the latter's non compliance with the DRC decision of July 16, 2009 would be legitimated by the absence of recognition and enforcement of this decision by Lithuanian courts?
- A. Does the Appealed Decision violate art. 64.1 of the FIFA DC by imposing sanctions not permitted under this rule?*
11. The particular issue to be resolved by the Sole Arbitrator in that regard is whether in case of non-compliance with an instruction by a body, a committee or an instance of FIFA to pay a sum of money, the only sanction that may be imposed is the one foreseen in paragraphs b) and c) of art. 64.1 of the FIFA DC, to the exclusion of the sanction provided for in paragraph a) of art. 64.1 of the FIFA DC.
12. The Appealed Decision sanctioned the Appellant for failing to comply with the DRC decision of July 16, 2009 as the Appellant did not pay to the Player the compensation for breach of contract that was ordered by the DRC decision. The Appealed Decision imposed sanctions under paragraphs a), b) and c) of art. 64.1 of the FIFA DC.
13. Art. 64.1 of the FIFA DC 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 CAS (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 CAS:

 - a) will be fined at least CHF 5,000 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 demotion to a lower division ordered. A transfer may also be pronounced".*
14. The wording of art. 64.1 of the FIFA DC is clear and unambiguous. Art. 64 is aimed at ensuring that both financial and non financial decisions are complied with and does not treat distinctively the failure to comply with one or the other type of measures. Art. 64.1, in paragraphs a) to c), provides lists of sanctions that may be imposed in case of failure to comply with a financial

decision “or” a non-financial decision. In addition, there is no limitation specified in the list of sanctions but for paragraph’s c) sanction which is expressly limited to failure to comply by clubs.

15. Art. 64.1 provides no indication that the sanctions listed in paragraphs a) to c) are foreseen exclusively as alternative sanctions.
 16. Therefore, the FIFA DC’s interpretation of art. 64.1 is correct in the sense that (i) the fine provided for in paragraph a) can be imposed in case of failure to comply with any decision, either financial or non-financial, from a body, a committee or an instance of FIFA or CAS, and that (ii) this sanction may be imposed cumulatively with those provided for in paragraphs b) and c) of the same article.
 17. Consequently, the Sole Arbitrator finds that the Appealed Decision does not violate art. 64.1 of the FIFA DC.
- B. *Does the Appealed Decision violate the principle of ne bis in idem?*
18. The particular issue to be resolved by the Sole Arbitrator is whether the Appealed Decision rules on the same infraction which was ruled upon in the DRC decision of July 16, 2009.
 19. The *ne bis in idem* principle means basically that no one shall be sanctioned twice because of the same offence.
 20. According to art. 64 of the FIFA DC, the Appealed Decision sanctions the Appellant for not complying with the decision issued by the DRC on July 16, 2009. The Sole Arbitrator notes that the non compliance by the Appellant with the DRC decision of July 16, 2009 is not contested and that it is undisputed that the DRC is a judicial body of FIFA as provided under art. 64 of the FIFA DC.
 21. The DRC decision of July 16, 2009 did find that the Appellant violated art. 17.1 of the FIFA Regulations for the Status and Transfer of Players and as a result ordered the Appellant to pay the Player compensation for breach of contract.
 22. The Appealed Decision was rendered in the context of a disciplinary procedure and sanctions a disciplinary infraction, namely the non compliance with a DRC decision. The DRC decision of July 16, 2009 was rendered in the context of a contractual dispute, and ordered a compensation for breach of contract.
 23. Therefore, since the Appealed Decision concerns a different infraction from the contractual violation that was the subject of the DRC decision of July 16, 2009, the Sole Arbitrator finds that the Appealed Decision does not violate the principle of *ne bis in idem*.

- C. *Did the Appealed Decision unduly sanction the Appellant because the latter's non compliance with the DRC decision of July 16, 2009 would be legitimated by the absence of recognition and enforcement of this decision by Lithuanian courts?*
24. As the Sole Arbitrator exposed above, the Appellant, as an affiliated member of the LFF, accepted to be submitted to the FIFA regulations, including art. 64.1 of the FIFA DC.
 25. Art. 64.1 of the FIFA DC provides for disciplinary sanctions in case of failures to comply with decisions of a body, a committee or an instance of FIFA or CAS. Art. 64.1 of the FIFA DC does not require that such decisions be recognized and enforced by any national courts.
 26. The *ratio legis* of art. 64.1 of the FIFA DC is to sanction the non compliance with decisions of a body, a committee or an instance of FIFA or decisions of CAS in order to ensure that members of the family of football do comply with such decisions. The recognition and enforcement of awards by national courts under the New York Convention is designed to allow a party to seek measures forcing performance of the award in a given jurisdiction such as, for instance, the seizure of assets. Failure to comply with a FIFA decision which became final exposes a party affiliated with FIFA both to the possible enforcement proceedings at State level and to a possible disciplinary proceeding, in accordance with art. 64.1 of the FIFA DC. These two proceedings are of a different nature and the one does not exclude the other (see Judgment of the Swiss Federal Tribunal of January 5, 2007, 4P. 240/2006, ad 4.2).
 27. Consequently, on the basis of the FIFA regulations and in particular of art. 64.1 of the FIFA DC, the potential difficulty of a FIFA decision to be recognised and enforced by a foreign court is not *per se* a justification for a party bound by FIFA regulations and that participated in that FIFA proceedings to refuse to comply with such FIFA decision.
 28. In the present case, upon notification to the parties of the Termination order of 5 July 2010 in the case CAS 2010/A/2087, the FIFA DRC decision of July 16, 2009 became final and enforceable, and, *inter alia*, the Appellant owed the Player the compensation for breach of contract ordered by the FIFA DRC.
 29. The Appellant does not contest that it did not comply with the DRC decision of July 16, 2009 despite the requests made by FIFA.
 30. The FIFA DRC decision of July 16, 2009 is final, binding and enforceable and should therefore have been complied with in good faith by the Appellant, without the need for any further national court decision. Therefore, the FIFA Disciplinary Committee rightfully sanctioned the Appellant for not complying with the DRC decision of July 16, 2009.
 31. In light of the foregoing, the Sole Arbitrator dismisses the appeal brought by the Appellant and the Appealed Decision shall be fully confirmed. Accordingly, all other prayers and requests shall be rejected.

The Court of Arbitration for Sport rules:

1. The Appeal of Association Kauno futbolo ir beisbolo klubas against the decision issued on 29 March 2011 by the FIFA Disciplinary Committee is dismissed.
2. The decision issued on 29 March 2011 by the FIFA Disciplinary Committee is fully confirmed.
(...).
5. All other or further claims are dismissed.