

Decision of the FIFA Disciplinary Committee

passed on 4 May 2020

COMPOSITION:

Mr. Alejandro Piera, Paraguay (Deputy Chairman)

Mr. Gudni Bergsson, Iceland (Member)

Mr. Thomas Hollerer, Austria (Member)

TO DISCUSS THE CASE OF:

Esporte Clube Bahia, Brazil

Regarding the failure to comply with
art. 18bis of the FIFA Regulations on the Status and Transfer of Players (RSTP)

I. INFERRED FROM THE FILE

1. On 24 January 2019, Esporte Clube Bahia (hereinafter, EC Bahia or the Club) concluded a transfer agreement with the club Juazeirense (hereinafter, Juazeirense) in relation to the transfer of the player Gustavo Santos Costa (hereinafter, the Player) from EC Bahia to Juazeirense. According to this agreement, each club would hold 50% of the Player's economic rights.
2. Furthermore, on 24 July 2019, EC Bahia, Juazeirense and the club Apollon Larissas FC (hereinafter, Larissa) entered into a loan agreement (hereinafter, the Loan Agreement) for the transfer on loan of the Player from Juazeirense to Larissa. In particular, clause 13 of the Loan Agreement (hereinafter, the Clause) mentioned the following:

“ The CLUB [Larissa], or another professional football club that belongs to ONE THREE ISG, undertakes not to transfer the PLAYER to third clubs during the term of this Agreement without obtaining formal and express consent of JUAZEIRENSE and BAHIA (cf. Art 10, par. 3 of the FIFS RSTP)”

3. On 19 March 2020, following the investigations conducted by FIFA's TMS Global Transfers & Compliance Department¹ (hereinafter, the FIFA TMS) disciplinary proceedings were opened against EC Bahia with respect to a potential breach of art. 18bis par. 1 of the Regulations on the Status and Transfer of Players, (hereinafter: *the RSTP* or *the Regulations*). The Club was invited to provide its position within six (6) days of the notification of the opening of disciplinary proceedings.
4. On 25 March 2020, EC Bahia sent a correspondence to the secretariat of the FIFA Disciplinary Committee (hereinafter, the Secretariat), by means of which it, amongst others, requested a suspension of the proceedings or, alternatively, an extension of the deadline to provide its position in relation to the potential infringement of art. 18bis of the RSTP, due to the global situation caused by the COVID-19 pandemic.
5. Following the above, the Club was provided an extension until 11 April 2020 to provide its position with regard to the present matter.
6. On 11 April 2020, the Club provided its position, which, together with the arguments provided by the Club to the FIFA TMS on 13 November 2019, can be summarised as follows²:

I. Position provided to the FIFA TMS

¹ All documents included in the proceedings conducted by FIFA's TMS Global Transfers & Compliance Department were duly analysed and considered by the FIFA Disciplinary Committee in its discussion and deliberations.

² The summary does not purport to include every single contention put forth by the Club. However, the FIFA Disciplinary Committee has thoroughly considered in its discussion and deliberations any and all evidence and arguments submitted, even if no specific or detailed reference has been made to those arguments in the following outline of its position and in the ensuing discussion on the merits.

- EC Bahia is not a third party
- EC Bahia and Juazeirense both hold 50% of the Player's economic rights. For this reason, it would be unreasonable if the Player would be transferred to another club without the authorization of Bahia and Juazeirense.
- It is lawful that the formal express prior consent from Bahia is a requirement for the Player's transfer to another football club, since Bahia will be entitled to receive 50% of the economic benefit resulting from such transfer.

II. Position provided to the Secretariat

- EC Bahia did not have the intention to influence Larissa or control the future transfer of the Player. The intention of the parties when including the Clause was to ensure that EC Bahia would be notified and informed in the event that a future transfer would take place in order to verify that the percentage and payment related to the Players' economic rights held by EC Bahia was paid to the latter. The reason behind the notification was the protection of the economic rights or any other compensation the Club was entitled to from a future transfer of the Player.
- In this sense, it is possible that the misunderstanding as to which was the real intention of EC Bahia was caused by a grammatical mistake in the wording of the Clause.
- The mother tongue of EC Bahia is Portuguese and English mistakes can, therefore, easily be made. In particular, the word "consent" in the Clause was included by mistake since the intention when drafting the said clause was to make reference to the concepts of notification and communication.
- The Club and the rest of the parties involved are willing to testify over what was the real intention of the said parties when negotiating the Clause and are also willing to amend the wording of the Clause so as to reflect its real intention.
- Due to the situation caused by the COVID-19 pandemic the Club could not fully defend its innocence by providing evidence and accessing and analysing documents.
- The Club considers essential to hear the testimonies of the Player, Juazeirense and Larissa to understand and confirm the real intention of the parties when they negotiated the Clause.
- Finally, the Club points out that, in any event, no transfer had been made and therefore, the Clause did not produce any effects.

II. AND CONSIDERED

1. In view of the circumstances of the present matter, the FIFA Disciplinary Committee (hereinafter also referred to as *the Committee*) decides to first address the procedural aspects of the present matter, namely, the applicable law as well as its jurisdiction, before entering into the substance of the matter and assessing the potential breach of article 18bis of the Regulations by the Club, as well as the potential sanctions resulting therefrom.

A. Jurisdiction of the FIFA Disciplinary Committee

2. First of all, the Committee observes that at no point during the present proceedings did the Club challenge its jurisdiction or the applicability of the FIFA Disciplinary Code (FDC).
3. Notwithstanding the above and for the sake of good order, the Committee found it worthwhile to emphasise that, on the basis of art. 53 of the FDC as read together with arts. 25 par. 3, 18bis par. 2 of the RSTP and art. 9 par. 2 of Annexe 3 of the RSTP, it is competent to evaluate the present case and to impose sanctions in case of corresponding violations.

B. Applicable law

4. In order to duly assess the matter, the Committee would like to begin by recalling the content and the scope of the provision at stake, this is, article 18bis of the RSTP.
5. Article 18bis par. 1 of the RSTP establishes a prohibition on the so-called “third party influence”. As a matter of fact, this provision explicitly provides that “*No club shall enter into a contract which enables the counter club/counter clubs, and vice versa, or any third party to acquire the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams*”.
6. Consequently, the Committee emphasizes that this provision is addressed to clubs, which are undoubtedly responsible to ensure that they do not influence or are in any way influenced by the counter club (or a third party).
7. In other words, this prohibition aims at avoiding that a club concludes any type of contract influencing another club’s independence in employment and transfer-related matters, its policies or the performance of its teams. In particular, there should be no influence on the club’s ability to independently determine the conditions and policies concerning purely sporting issues such as the composition and performance of its teams. This provision applies to the influencing club as well as to the influenced club (*vice versa*).

C. Merits of the case

i. Analysis of violation of art. 18bis of the RSTP

8. The above been established, the Committee subsequently analyses the evidence at its disposal, in particular, the relevant loan agreement as well as the documents uploaded into the TMS and the ones gathered during the investigation conducted by the FIFA TMS in light of the aforementioned provisions.
9. For the sake of good order, the Committee wishes to stress that it is undisputed that EC Bahia concluded a loan agreement with Juazeirense and Larissa on 24 July 2019. The Committee also observes that the Club has not questioned or disputed the validity of the said loan agreement at any point.
10. Once having clarified the above, the Committee proceeds to analyse the content of clause 13 of the Loan Agreement.
11. In this respect, the Committee is convinced that this clause limits the freedom of Larissa in transfer-related matters. In fact, it appears to be clear that in case Larissa would want to transfer the Player to a third club, it could only do so with the authorization of EC Bahia and Juazeirense.
12. In light of the above, it is clear for the Committee that by means of the Clause, EC Bahia was granted the ability to influence in transfer-related matters the independence, the policies and the performance of Larissa's teams and hence, considers that the Club is in breach of article 18bis of the Regulations.
13. Notwithstanding the above, the Committee observes that the Club denies the violation of article 18bis of the RSTP. In this sense, the Committee will address, hereunder, the arguments provided by the Club to this respect.

ii. Analysis of the position provided by EC Bahia

14. According to the Club, the later cannot be considered to be in breach of article 18bis since it is not a third party in the sense described within the Regulations.
15. Furthermore, the Committee also notes that in the Club's opinion, since the latter holds a share of the economic Player's rights, it would be unreasonable if the Player would be transfer from Larissa to a third club without the authorization of EC Bahia and Juazeirense and, therefore, it is lawful for EC Bahia to demand Larissa for the express prior consent, should the former want to transfer the Player.
16. To this respect, the Committee would like to draw the attention of EC Bahia to the wording of article 18bis of the Regulations (cf. point II/B 5 *ut supra*), in which it is made very clear that clubs are prevented from concluding contracts which enable a third party or the counter club/clubs to acquire the ability to influence in the club/s employment and transfer-related matters. Therefore, this prohibition does not only concern third parties but the counter club (s) as well and it covers any kind of situations, clauses and/or agreements in which a club is granted the ability to influence another club.
17. With respect to the alleged grammatical mistake, which, apparently, could have induced to confusion as to what the real intention of the parties was, the Committee wishes to point out, firstly, that it is the responsibility of the party signing and therefore, accepting the terms of a contract, to ensure that the wording and content of the said contract is correct and accurate and that it reflects the real intention of the relevant party or parties.

18. In this sense, and according to the Club, it appears that the mistake would have been caused by the use of the word “consent” in the Clause, while the real intention of the parties was to actually reflect the concept of communication and/or notification instead. To this respect, the Club argues that its intention when including the Clause in the Loan Agreement was to make sure that, in case Larissa would transfer the Player, the Club would be informed about it.
19. In the Committee’s view, the intention and meaning of an agreement or a clause has to be determined by looking and analyzing the relevant text as a whole and not just word by word. In this sense, the Committee observes that the Clause establishes that Larissa “*undertakes not to transfer the PLAYER to third clubs during the term of this Agreement without obtaining formal and express consent of JUAZEIRENSE and BAHIA*”. In this sense, the Committee observes that the expression “*obtaining formal and express*” contained in the Clause is directly related to and describes the concept of consent, as in the sense of approval or authorization.
20. In addition, the Committee cannot help remarking that, in the correspondence that the Club sent to the FIFA TMS on 13 November 2019, not only did the Club not contest the content and wording of the Clause, but it even claimed that “*it is lawful that the formal and express prior consent from Bahia is a requirement for the Player’s transfer to another football club*” and that “*it would be unreasonable if the Player was transferred to another club without authorization of Bahia*”.
21. In light of the above, the Committee is of the firm opinion that the Club accepted and was aware of the wording and meaning of the Clause and is convinced that the Club’s intention when including the said clause in the Loan Agreement was to condition any possible transfer of the Player from Larissa to a third club, to the authorization of EC Bahia.
22. In any event, the Committee stresses that when it comes to interpreting a contract, it is presumed that a written instrument reflects the true intention of the parties. Therefore, in accordance with article 36 par. 2 of the FDC, if a party claims that the intention of the parties when concluding a contract is different than the one reflected by the wording of such contract, it shall provide the evidence to prove it.
23. In light of the foregoing, and since the Club has failed to prove that there was actually a grammatical mistake in the Clause and that the intention of the Club was not to influence Larissa on transfer-related matters, the Committee considers that the wording of the Clause is accurate and that it reflects the real intention of the parties.
24. In addition, the Committee observes that the Club believes that, in any event, there was no breach of art. 18bis of the Regulations since Larissa never transferred the Player and therefore, the Clause did not produce any effects.
25. To this respect, the Committee wishes to emphasize that a club is to be found in breach of art. 18bis of the Regulations whenever it concludes a contract in which any of its provisions enables or entitles

another club to influence the former's independency in transfer related and employment matters, at any level and regardless of whether or not the said influence materializes.

26. Finally, and for the sake of good order, the Committee would like to address the argument of the Club with respect to the impossibility of producing evidence, accessing and analyzing documents, or even identifying entirely the case to generate a proper and concise evidence due to the situation caused by the COVID-19 pandemic.
27. In this sense, the Committee refers once again to article 36 par. 2 of the FDC, according to which any party claiming a right on the basis of an alleged fact shall carry the burden of proof of this fact.
28. In these circumstances, the Committee considers that EC Bahia has not been able to demonstrate how the situation caused by the COVID-19 has prevented it from producing and analyzing documents or from generating any evidence.
29. In sum, the Committee considers that the Clause undoubtedly grants EC Bahia the ability to influence in employment and transfer-related matters the independence, policies and the performance of Larissa teams. Consequently, the Committee concludes that EC Bahia is liable for the breach of article 18bis par. 1 of the RSTP and considers that it shall be sanctioned for this violation.

D. The determination of the sanction

30. With regard to the applicable sanctions for the present case, the Committee observes, in the first place, that EC Bahia is a legal person, and as such, it can be subject to the sanctions described under art. 6 par. 1 and 3 of the FDC.
31. For the sake of good order, the Committee underlines that it is responsible to determine the type and extent of the disciplinary measures to be imposed in accordance with the objective and subjective elements of the offence, taking into account both aggravating and mitigating circumstances (art. 24 par. 1 of the FDC).
32. In these circumstances, the Committee considers that the relationship between the clubs involved in the present case in relation to the scope and effects of the relevant clause have to be taken into account. In fact, and as previously demonstrated above, the burden of such clause mainly lie on Larissa, while EC Bahia is undoubtedly benefitting from the provision described in said clauses.
33. In the same line, the Committee deems it necessary to distinguish between the influencing club's and the influenced club's responsibility in relation to art. 18bis of the RSTP. In this sense, the Committee considers that the influencer's behaviour is more reprehensible than the one of the influenced. In the matter at hand, the Committee notes that EC Bahia is the influencing club as it was only in its interest to impose such clauses.
34. Having said that, the Committee notes that EC Bahia does not have any precedents related to violations of art. 18bis of the RSTP.
35. In light of all the above, the Committee considers a fine to be the appropriate sanction.

36. With regard to the fine, according to the provisions of art. 6 par. 4 of the FDC, the Committee notes that it may not be lower than CHF 100 and greater than CHF 1,000,000.
37. Taking into consideration all the circumstances of the case, while keeping in mind the deterrent effect that the sanction must have on the reprehensible behaviour, the Committee deems a fine of CHF 15,000 to be adequate and proportionate to the offence.
38. In addition, a warning is also issued pursuant to art. 6 par. 1 lit. a) of the FDC in relation to the conduct of EC Bahia. In particular, EC Bahia is ordered to undertake all appropriate measures in order to guarantee that the FIFA regulations (in particular the FDC as well as the Regulations and its provisions related to third party influence) are strictly complied with. Should such infringements occur again in the future, the Committee would be left with no other option than to impose harsher sanctions on the Club.

III. THEREFORE DECIDED

1. The FIFA Disciplinary Committee found Esporte Clube Bahia responsible for the infringement of the relevant provisions of the Regulations related to third-party influence (art. 18bis par. 1).
2. The FIFA Disciplinary Committee orders Esporte Clube Bahia to pay a fine to the amount of CHF 15,000.
3. In application of art. 6 par. 1 lit. a) of the FIFA Disciplinary Code, Esporte Clube Bahia is warned on its future conduct.
4. The fine is to be paid within thirty (30) days of notification of the present decision.

FÉDÉRATION INTERNATIONALE
DE FOOTBALL ASSOCIATION



PIERA Alejandro
Deputy Chairman of the Disciplinary Committee

NOTE RELATING TO THE PAYMENT OF THE FINE:

Payment can be made either in Swiss francs (CHF) to account no. 0230-325519.70J, UBS AG, Bahnhofstrasse 45, 8098 Zurich, SWIFT: UBSWCHZH80A, IBAN: CH85 0023 0230 3255 1970 J or in US dollars (USD) to account no. 0230-325519.71U, UBS AG, Bahnhofstrasse 45, 8098 Zurich, SWIFT: UBSWCHZH80A, IBAN: CH95 0023 0230 3255 1971 U, with reference to case number above mentioned.

NOTE RELATING TO THE LEGAL ACTION:

According to article 49 together with article 57 par. 1e) of the FDC and article 58 par. 1 of the FIFA Statutes, this decision may be appealed against before the Court of Arbitration for Sport (CAS). The statement of appeal must be sent to the CAS directly within 21 days of receipt of notification of this decision. Within another 10 days following the expiry of the time limit for filing the statement of appeal, the appellant shall file a brief stating the facts and legal arguments giving rise to the appeal with the CAS.

The contact details of the CAS are the following:

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