

Decision of the Disciplinary Committee

passed in Zurich, Switzerland, on 24 September 2020

COMPOSITION:

Mr. Alejandro Piera, Paraguay (Deputy Chairman)

RESPONDENT:

Club Avai FC, Brazil

Regarding third-party influence and failure to enter correct information in TMS (Ref. FDD-5962)

Art. 18bis par. 1 of the FIFA Regulations on the Status and Transfer of Players (2019 ed.) (hereinafter, the "Regulations")

Art. 4 par. 3 of Annexe 3 of the Regulations

I. FACTS OF THE CASE

1. The following summary of the facts does not purport to include every single contention put forth by the club Avai FC at these proceedings. However, the Deputy Chairman of the FIFA Disciplinary Committee has thoroughly considered 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.
2. On 30 January 2020, the Brazilian club Avai FC (hereinafter referred to as, “Avai” or “the Club”) and the Portuguese club SL Benfica (hereinafter, “Benfica”) concluded a transfer agreement (hereinafter, “the Agreement”) in relation to the transfer of the player Vinicius de Lima Ferreira (hereinafter, “the Player”), who was transferred from Benfica to Avai. In particular, the Agreement contained the following clauses:

Clause 2.3:

“If the transfer PLAYER is for Futebol Clube do Porto - Futebol, SAD, for Sporting Clube de Portugal - Futebol, SAD or the Sporting Clube de Braga, Futebol, SAD, is hereby expressly agreed that the BENFICA SAD will be due the amount corresponding to the ownership of the right to 50 % (fifty percent) of the total value of the transfer, plus an additional compensation of €10.000.000 (ten million), plus the VAT due to rate legal, all to be settled within 30 (thirty) days from the registration of the PLAYER's employment contract with one of the sports companies identified here.”

Clause 3.1:

“[...] AVAÍ FC is obliged to notify BENFICA SAD of any renewal or change in the employment relationship between you and the PLAYER.

Failure to comply with the notification established in the previous paragraph will determine the same consequences provided for in clause four. [...]”

Clause 4.4:

“In the event that AVAÍ FC [...] agrees to terminate by mutual agreement the sports employment contract that it celebrates on this date with the PLAYER, or allow the latter to operate the termination with just cause of the sports employment contract, or in addition, it in any way removes the PLAYER'S federative and / or economic rights without granting BENFICA SAD the aforementioned right of preference, it will be obliged to pay BENFICA SAD, as a penal clause, which the parties freely adjust and clarified, compensation of €10.000.000 (ten million), plus the VAT due at the legal rate.”

3. On 6 February 2020, Avai entered a transfer instruction “engage permanently” in the Transfer Matching System (TMS) (TMS instruction: 276738).
4. In the context of the aforementioned transfer instruction, the Club indicated that it had not entered into a contract which enabled a 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.

5. On 21 July 2020, following an investigation conducted by FIFA's TMS Global Transfers & Compliance Department¹ (hereinafter, "*the FIFA TMS*"), disciplinary proceedings were opened against Avai with respect to a potential breach of art. 18bis par. 1 of the RSTP and art. 4 par. 3 of Annexe 3 of the RSTP.

II. RESPONDENT'S POSITION

1. On 27 July 2020, Avai provided its position, which can be summarized as follows:
 - Avai has never faced any disciplinary punishment from FIFA;
 - The clauses of the Agreement were imposed by Benfica and accepted by Avai without the intention to violate the RSTP;
 - The Club was looking for a free agent striker and the Player just seemed to fit. Avai had to respect a preference of Benfica to buy back the Player and a non-competition clause in case of an offer from the 3 mentioned clubs in clause 2.3;
 - Avai is not familiar with international transfers. The main international transfers made by Avai involved free agent players;
 - From Avai's perspective the clauses just correspond to the terms and conditions of the factual negotiation which allowed the free transfer of the Player. If another club makes an offer for the Player Benfica has to be notified due to its right of preference. If Benfica does not exercise this right the Player can be transferred to the club that made the offer;
 - In this sense, Avai had never concluded that the clauses could grant Benfica the power to influence Avai as the Club just needs to grant Benfica the preference for buying back the Player;
 - Based on good faith the Club indicated "no" in the declaration on influence in TMS;
 - There was no benefit for Avai to include a preference clause in the Agreement, however, those were Benfica's terms and Avai needed the Player. It is undisputed that the clubs had unequal bargaining powers when negotiating the terms and conditions of the Agreement;
 - Avai acted in good faith and therefore requests the FIFA Disciplinary Committee to impose only a warning or reprimand. Should a sanction be imposed it should comply with the "principle of proportionality";
 - Due to the unprecedented financial crisis due to the COVID-19 pandemic, Avai sincerely hopes that the punishment applied by the FIFA Disciplinary Committee will be as mild as possible.

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

III. CONSIDERATIONS OF THE DISCIPLINARY COMMITTEE

1. In view of the circumstances of the present matter, the Deputy Chairman of the FIFA Disciplinary Committee (hereinafter also referred to as “*the Deputy Chairman of the Committee*”) decided to first address the procedural aspects, namely, its jurisdiction and the applicable law, before entering into the substance of the matter and assessing the possible breach of art. 18bis and art. 4 par. 3 of Annexe 3 of the RSTP by Avai, as well as the potential sanctions resulting therefrom.

A. Jurisdiction of the FIFA Disciplinary Committee

2. First of all, the Deputy Chairman of the Committee observed 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 Deputy Chairman of 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, he was competent to evaluate the present case and to impose sanctions in case of corresponding violations.
4. Moreover, in line with art. 54 of the FDC, the present case can be decided by one member of the Disciplinary Committee acting as a single judge.

B. Applicable law

5. In order to duly assess the present matter, the Deputy Chairman of the Committee wanted to recall the content and the scope of the provisions at stake.

i. Article 18bis of the RSTP

6. The Deputy Chairman of the Committee firstly pointed out that art. 18bis par. 1 of the RSTP establishes a prohibition on 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.*”
7. Consequently, the Deputy Chairman of the Committee emphasized 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).
8. In other words, this prohibition aims at avoiding that a club concludes any type of contract, which influences another club’s independence, policy or performance of its teams in employment and transfer-related matters. In particular, there should be no influence on the club’s ability to determine independently the conditions and policies concerning purely sporting issues such as the composition and performance of its teams. Finally, it is reminded that this provision applies to the influencing club as well as to the influenced club (*vice versa*).

ii. Article 4 par. 3 of Annexe 3 of the RSTP

9. Annexe 3 of the RSTP analyses in a very detailed manner the procedure related to international transfers of professional players through TMS.
10. In particular, art. 4 par. 3 of Annexe 3 of the RSTP imposes the obligation on clubs to declare different information within the framework of an international transfer of a professional player. More specifically, *“Clubs must provide the following compulsory data when creating instructions, as applicable: [...] Declaration on third-party payments and influence [...]”*.
11. This means that should there be any influence from a counter club and/or third-party on a club (as per art. 18bis of the RSTP), the club concerned must indicate such influence in TMS when entering the relevant transfer instruction.

C. Merits of the case

I. Issues of review:

12. After having outlined the content and the scope of the aforementioned provisions, the Deputy Chairman of the Committee subsequently examined the evidence at his disposal (in particular the Agreement, the documents uploaded into TMS as well as those collected during the investigation carried out by FIFA TMS and during the present disciplinary proceedings) in light of the said provisions.
13. For the sake of good order, the Deputy Chairman of the Committee noted on the one hand that it was undisputed that Avai and Benfica entered into the Agreement on 30 January 2020 and, on the other hand, that Avai has not questioned or disputed neither the content nor the validity of the Agreement at any time.

II. Analysis of the transfer agreement in connection with art. 18bis of the RSTP

(1) Clause 2.3 of the Agreement

14. Bearing in mind the foregoing, the Deputy Chairman of the Committee proceeded to analyze the content of clause 2.3 of the Agreement, which reads as follows:

“If the transfer PLAYER is for Futebol Clube do Porto - Futebol, SAD, for Sporting Clube de Portugal - Futebol, SAD or the Sporting Clube de Braga, Futebol, SAD, is hereby expressly agreed that the BENFICA SAD will be due the amount corresponding to the ownership of the right to 50 % (fifty percent) of the total value of the transfer, plus an additional compensation of €10.000.000 (ten million), plus the VAT due to rate legal, all to be settled within 30 (thirty) days from the registration of the PLAYER's employment contract with one of the sports companies identified here.”

15. In this sense, the Deputy Chairman of the Committee took note that Avai argued that the clauses of the Agreement were imposed by Benfica and that Avai never had the intention to breach Art. 18bis of the RSTP.

16. In this respect, the Deputy Chairman of the Committee was of the firm opinion that this clause limits the freedom of Avai in transfer-related matters. In fact, it appears to be clear that Avai would have to pay Benfica a significantly high additional compensation (EUR 10,000,000), besides the agreed 50% sell-on fee, should it decide to transfer the Player to Futebol Clube do Porto, Sporting Clube de Portugal or Sporting Clube de Braga. Therefore, it is evident that in a scenario in which Avai receives two similar and/or identical offers for the transfer of the Player, it would be more inclined to accept the one not coming from one of the 3 abovementioned clubs, this, in order to make the most profitable operation from a purely financial point of view.
17. In light of the foregoing, the Deputy Chairman of the Committee first recalled the content of points III.7 and 8 above, in which it was stated that art. 18bis of the RSTP is addressed to clubs, which have the duty to ensure that they do not influence or are in any way influenced by the counter club or a third-party. Then, the Deputy Chairman of the Committee insisted on the fact that a violation of art. 18bis of the RSTP occurs whenever a club enters into a contract which enables a club to be influenced by another club (or by a third party), at any level and irrespective of whether or not such influence materializes and irrespective of who imposed such clause. Therefore, the mere fact of concluding a contract with the characteristics described above would constitute a breach of art. 18bis of the RSTP.
18. Moreover, the Deputy Chairman of the Committee underlined that clubs, in order to be considered truly independent, shall be free to transfer its players to any club they desire. In the case at hand, the Deputy Chairman of the Committee considered that, by the mere existence of this clause, Avai is influenced in its employment and transfer-related matters as demonstrated above
19. Consequently, the Deputy Chairman of the Committee found that clause 2.3 undoubtedly granted Benfica the ability to influence Avai's independence in employment and transfer-related matters, and therefore concluded that clause 2.3 infringed art. 18bis of the RSTP.

(2) Clause 3.1 of the Agreement

20. Subsequently, the Deputy Chairman of the Committee analyzed clause 3.1 of the Agreement, which reads as follows:

"[...] AVAÍ FC is obliged to notify BENFICA SAD of any renewal or change in the employment relationship between you and the PLAYER.

Failure to comply with the notification established in the previous paragraph will determine the same consequences provided for in clause four. [...]"

21. In this respect, the Deputy Chairman of the Committee considered that, in the context of the conditions set out in the Agreement, clause 3.1 would only grant Benfica a right to be informed of any renewal or change in the employment relationship between Avai and the Player.
22. As a result, the Deputy Chairman of the Committee considered that he was not in a position to conclude that clause 3.1 grants Benfica the possibility to influence Avai's independence in employment and transfer-related matters, its policies and the performance of its teams.

23. As such, the Deputy Chairman of the Committee deemed that clause 3.1 of the Agreement did not contravene art. 18bis of the RSTP.

(3) Clause 4.4 of the Agreement

24. Having established the above, the Deputy Chairman of the Committee went on to analyze clause 4.4 of the Agreement, which reads as follows:

“In the event that AVAÍ FC [...] agrees to terminate by mutual agreement the sports employment contract that it celebrates on this date with the PLAYER , or allow the latter to operate the termination with just cause of the sports employment contract, or in addition, it in any way removes the PLAYER'S federative and / or economic rights without granting BENFICA SAD the aforementioned right of preference , it will be obliged to pay BENFICA SAD, as a penal clause, which the parties freely adjust and clarified, compensation of € 10.000.000 (ten million), plus the VAT due at the legal rate.”

25. In this regard, the Club argued that clause 4.4 only granted Benfica a right of preference to buy back the Player.
26. In this sense, the Deputy Chairman of the Committee concluded that clause 4.4 would also seem to enable Benfica to influence Avai's independence in employment-related matters, since Avai would be obliged to pay Benfica a “*compensation*” of EUR 10,000,000 if it mutually agreed with the Player the termination of his employment contract
27. Consequently, the Deputy Chairman of the Committee concluded that clause 4.4 of the Agreement granted Benfica the ability to influence Avai's independence, policies and performance of its team in employment and transfer-related matters, and therefore infringes art. 18bis of the RSTP.

III. Analysis of the facts in light of article 4 par. 3 of Annexe 3 of the RSTP

28. The Deputy Chairman of the Committee further observed that in the relevant transfer instruction (TMS ref. 276738) the Club declared that it did not enter into a contract enabling a “third-party influence” as it was confident that the Agreement would not breach art. 18bis of the RSTP.
29. Bearing in mind that the Agreement at hand enabled Benfica to acquire the ability to influence Avai “*in employment and transfer-related matters its independence, its policies or the performance of its teams*”, the Deputy Chairman of the Committee found that Avai, by declaring in TMS that there was no third-party influence, failed to disclose complete and correct information in TMS, and thus breached art. 4 par. 3 of Annexe 3 of the RSTP.

IV. Summary

30. In view of the foregoing, the Deputy Chairman of the Committee concluded that the Club, by its conduct as described above, violated the following provisions of the RSTP:

- Art. 18bis of the RSTP, for entering into a contract enabling another club to influence the Clubs' independence;
- Art. 4 par. 3 of Annexe 3 of the RSTP, for failing to enter correct information in TMS.

31. Consequently, the Deputy Chairman of the Committee considered that Avai had to be sanctioned for the aforementioned violations.

V. The determination of the sanction

32. With regard to the applicable sanctions for the present case, the Deputy Chairman of the Committee observed, in the first place, that Avai was a legal person, and as such could be subject to the sanctions described under art. 6 pars. 1 and 3 of the FDC.
33. For the sake of good order, the Deputy Chairman of the Committee underlined that it was 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).
34. In these circumstances, the Deputy Chairman of the Committee deemed that account should be taken of the relationship between the two clubs with regard to the scope and effects of the relevant clauses of the Agreement. As a matter of fact, the burden of such clauses mainly lied on Avai, while Benfica was undoubtedly benefitting from the clauses of the Agreement.
35. In the same line, it was 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 Deputy Chairman of the Committee found that the behaviour of the club being influenced was less reprehensible than the one of the club with the ability to influence.
36. In the matter at hand, the Deputy Chairman of the Committee noted that Avai was the influenced club as it was mainly in Benfica's interest to impose such clauses.
37. Furthermore, the Deputy Chairman of the Committee observed that two clauses of the Agreement violated art. 18bis of the RSTP.
38. Having said that, the Deputy Chairman of the Committee noted that Avai does not have any precedents related to violations of art. 18bis of the RSTP.
39. Taking into account the relevant principles and conclusions set out above, the Deputy Chairman of the Committee considered a fine to be the appropriate sanction, which may not be lower than CHF 100 and greater than CHF 1,000,000 according to art. 6 par. 4 of the FDC.
40. In light of all the circumstances of the case, and bearing in mind the deterrent effect that the sanction must have on the reprehensible behaviour, the Deputy Chairman of the Committee regarded a fine of CHF 10,000 to be adequate and proportionate to the offences committed.

41. In addition, a warning was also issued pursuant to art. 6 par. 1 lit. a) of the FDC in relation to the conduct of Avai. In particular, the latter was ordered to undertake all appropriate measures to guarantee that the FIFA regulations (in particular the FDC as well as the RSTP 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.

IV. DECISION OF THE DISCIPLINARY COMMITTEE

1. The FIFA Disciplinary Committee found the club Avai FC responsible for the infringement of the relevant provisions of the Regulations related to third-party influence (art. 18bis par. 1) and the failure to declare mandatory information in TMS (art. 4 par. 3 of Annexe 3).
2. The FIFA Disciplinary Committee orders the club Avai FC to pay a fine to the amount of CHF 10,000.
3. In application of art. 6 par. 1 lit. a) of the FIFA Disciplinary Code, the club Avai FC is warned on its future conduct.
4. The above fine is to be paid within thirty (30) days of notification of the present decision.

FÉDÉRATION INTERNATIONALE
DE FOOTBALL ASSOCIATION



Alejandro Piera

Deputy Chairman of the FIFA 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

This decision can be contested, in accordance with art. 49 together with art. 57 par. 1 of the FIFA Disciplinary Code, 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 full address and the contact details of the CAS are the following:

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