Arbitration CAS 2022/A/8731 Shanghai Shenhua FC v. Fédération Internationale de Football Association (FIFA), award of 28 March 2023

Panel: Mr Lars Hilliger (Denmark), Sole Arbitrator

Football
Disciplinary sanction for against a club for failure to fulfil its payment obligation pursuant to a consent award
Validity of a transfer ban and compliance with Swiss public policy
Proportionality of a transfer ban
Revision of the substance of the consent award

1. **As an association under Articles 60 et seq. of the Swiss Civil Code, FIFA has extensive regulatory autonomy. Yet, FIFA must always respect the personality rights of its members as it is generally accepted that personality rights apply to the world of sport. Against this background, the Swiss Federal Tribunal has deemed lawful the system of sanctions used by FIFA in the event of non-compliance with its decisions or those of the CAS. In this respect, although it is true that the imposition of a transfer ban is a severe sanction and that relevant sporting and financial consequences may arise from its implementation, a club can avoid the imposition of such a transfer ban by paying the debt owed, given that the sanction will only apply once a final deadline granted in the appealed decision has elapsed. Moreover, and even if the transfer ban is eventually enforced, the club will still be able to continue its professional conduct and to compete in the relevant tournaments relying on other sources of financial income, e.g. through the sales of players, sponsorship deals and broadcasting rights. Therefore, there are no violations of the club's personality/economic rights, and thus no violation of the Swiss Public Order.**

2. **The CAS may amend a disciplinary decision of a FIFA judicial body only if the relevant FIFA judicial body exceeded the margin of discretion accorded to it by the principle of association autonomy, i.e. only where the relevant FIFA judicial body must be held to have acted arbitrarily. This is, however, not the case if the CAS panel merely disagrees with a specific sanction, but only if the sanction concerned is to be considered as evidently and grossly disproportionate to the offence. Based on Article 15 par. 1 c) of the FIFA Disciplinary Code (FDC) and taking into consideration, *inter alia*, the importance of the rule of law that is being protected, which is closely linked to the principle of *pacta sunt servanda*, the persistent failure by a club to respect a consent award can justify the decision to impose a transfer ban on the club. In this regard, the mere fact that the *"unlimited"* transfer ban imposed on the club pursuant to Article 15 of the FDC is different from the *"time-limited"* transfer ban set out in Article 24 of the FIFA Regulations on the Status and Transfer of Players does not automatically imply that the imposed transfer ban is disproportionate.**

3. In the context of enforcement proceedings according to Article 15 of the FDC, the FIFA Disciplinary Committee (DC) is, in principle, not allowed to review or to modify the substance of the decision that is being enforced. There can be no *révision au fond*, because otherwise this would undermine the binding nature of the decision resolving the dispute and legal security. Consequently, the FIFA DC cannot review or modify the substance of the consent award that has become final and binding.

I. THE PARTIES

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

2. The Fédération Internationale de Football Association ("FIFA" or the "Respondent") is the world governing body of football, whose headquarters are located in Zürich, Switzerland.

II. FACTUAL BACKGROUND

3. The facts set out below are a summary of the main relevant facts as established by the Sole Arbitrator on the basis of the decision rendered by the FIFA Disciplinary Committee (the "FIFA DC" or the "Committee") on 1 February 2022 (the "Appealed Decision") and based on the Parties' written and oral submissions and evidence. Additional facts and allegations found in the Parties' submissions and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.

4. On 16 November 2020, the Italian football club Genoa CFC ("Genoa") lodged a claim before FIFA against the Club, requesting *inter alia* solidarity contribution payment, in connection with the transfer of the player X.

5. By decision of 25 January 2021 (the "FIFA Decision") the Single Judge of the Sub-Committee of the FIFA Dispute Resolution Chamber (the "FIFA DRC") accepted the claim of Genoa and ordered the Club to pay to Genoa EUR 395,957.89 as solidarity contribution plus 5% interest per annum on that amount as from 19 August 2019 until the date of effective payment.

6. Following the notification of the grounds of the FIFA Decision, the Club lodged an appeal before the CAS, which issued a Consent Award (the "Consent Award") on 1 November 2021.

7. According to the Consent Award, Genoa and the Club had concluded a settlement agreement (the "Settlement Agreement") containing, *inter alia*, the following terms, which the two parties requested to have included in a consent award:

"[…] Without prejudice to the Parties' respective legal arguments and positions, Genoa and Shanghai Shenhua wish to recall a full and final settlement according to the conditions provided below. The Parties wish for the terms of the Agreement to be incorporated into a CAS Consent Award […].

The whereas clauses form an essential part of the Agreement

THE PARTIES AGREE AS FOLLOWS

[…]

IN WITNESS WHEREOF the Parties acknowledge their mutual consent by signing the Agreement".

8. Based on the above, the Consent Award ruled as follows:

*"*1. *The Settlement Agreement entered into by the Parties on 13 October 2021 is hereby ratified by the Court of Arbitration for Sport with the consent of the Parties and its terms are incorporated in this arbitral award.*

2. Both Parties are hereby ordered to perform their obligations and duties as per the Settlement Agreement.

3. The costs of the arbitration, to be determined and served on the Parties by the CAS Court Office, shall be borne by the Parties in equal shares.

4. Both Parties shall bear their own legal fees and other expenses incurred in relation to the present arbitration proceedings.

5. The Settlement Agreement is confidential.

6. All other and further motions or prayers for relief are dismissed".

III. PROCEEDINGS BEFORE THE FIFA DISCIPLINARY COMMITTEE

9. On 14 December 2021, and upon request by Genoa, the Secretariat of the FIFA Disciplinary Committee (the "Secretariat") opened disciplinary proceedings against the Club.

10. In its reply, the Club, *inter alia*, stipulated that it had requested Genoa to provide it with *"an updated invoice relating to the overdue payment"* and that it would *"facilitate the payment and duly send the corresponding proof of payment"* as soon as it received such invoice from Genoa.

11. In its response to the Club's initial comments, Genoa, *inter alia*, informed the Secretariat that the relevant invoice had already been issued and forwarded to the Club and, in any case, that the issuing of an invoice is a secondary obligation and cannot be relied on by a party to justify its delayed performance of a contract. In this regard, Genoa submitted a copy of an email of

10 November 2021 to the legal representative of the Club with the said invoice for the payment of the amount due by the Club in accordance with the Consent Award. Furthermore, Genoa additionally provided a further invoice to the Club *"updated to reflect the amounts accrued to date"*.

12. In this regard, Genoa also noted that clause 1.8 of the Settlement Agreement provides that in the event of the Club's failure to pay the first instalment by the due date, the entire capital amount of EUR […] would become due for immediate payment by the Club to Genoa without notice. Therefore, the said amount – plus applicable interest – is currently outstanding.

13. Based on this, the Club replied, *inter alia*, that its day-to-day operations, including its overseas banking operations, had been hindered due to the Omicron variant, but at the same time maintained that it would facilitate the payment to Genoa as soon as it received the invoice from Genoa.

14. The FIFA DC, having confirmed its competence and the application of the 2019 edition of the FIFA Disciplinary Code (the "FDC") then referred to the content and scope of Article 15 of the FDC and emphasised that, equal to the competence of any enforcement authority, the FIFA DC cannot review or modify as to the substance of a previous decision, which is final and binding and thus has become enforceable.

15. Having established the above, the FIFA DC noted that the Consent Award had ratified the Settlement Agreement between the Parties and had ordered the Parties to perform their obligations and duties as outlined therein. It was further recalled that no challenge was lodged before the Swiss Federal tribunal against the Consent Award, which is therefore enforceable.

16. As such, the only task of the FIFA DC was to analyse whether the Club had complied with the enforceable Consent Award.

17. In this regard, the FIFA DC considered the Club's submission and initially observed that the case file did not provide any documentary evidence which would duly corroborate and/or demonstrate such alleged hindrance.

18. Moreover, the FIFA DC referred to the principle of *pacta sunt servanda* and emphasised that clubs have a duty to conclude only contracts which can be fulfilled. Therefore, the sole fact that the Club may be encountering impediments to the usual operations of the club, such as the alleged hindrance to its overseas banking operations does not release it from its obligations to pay the outstanding amounts owed to Genoa. The fact that such alleged hindrance derives from the COVID-9 pandemic and the surge of the Omicron variant does not alter this.

19. With regard to the submission regarding the lack of receipt of the requested invoice, the FIFA DC referred to the invoices submitted by Genoa on which basis it found that this did not justify the non-payment, since the Club had in fact received the said invoices. In any case, the FIFA DC pointed out that the applicable payment details of Genoa had indeed been shared with the Club on the opening of the present disciplinary proceedings on 14 January 2022, and

the Club was therefore not prevented from making the payment in accordance with the Consent Award.

20. As such, the Club was found to have failed to pay to Genoa the outstanding amount due to it in accordance with the Consent Award and was therefore in breach of Article 15 of the FDC and, thus, guilty of non-compliance with a financial decision under the terms of the same article.

21. With regard to the applicable sanctions, the FIFA DC initially noted that the Club is a legal person and as such could be subject to the sanctions described under Article 6 par. 1 and 3 of the FDC.

22. In view of the circumstances pertaining to the present case and by taking into account the outstanding amounts, the FIFA DC regarded a fine amounting to CHF 20,000 as appropriate, which amount complied with the FIFA DC's established practice. Furthermore, a final deadline of 30 days was considered appropriate for the amounts due to be paid to Genoa.

23. Finally, the Club was warned and notified that, in the case of default within the period stipulated, a transfer ban would be automatically imposed until the complete amount due would be paid. A deduction of points or relegations to a lower division may also be ordered in addition to a transfer ban in the event of persistent failure, repeated offences or serious infringements, or if no full transfer can be imposed or served for any reason.

24. On 1 February 2022, and based on the abovementioned considerations, the FIFA DC rendered the Appealed Decision and decided that:

"1. Shanghai Shenhua FC is found responsible for failing to comply in full with the award issued by the Court of Arbitration for Sport on 01 November 2021 (Ref. CAS 2021/A/7990).

2. Shanghai Shenhua FC is ordered to pay to Genoa CFC the amount of EUR […] *plus interest to be calculated in accordance with the award issued by the Court of Arbitration for Sport.*

3. Shanghai Shenhua FC is granted a final deadline of 30 days as from 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 nonfinancial 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 a 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 20,000.

5. The fine is to be paid within 30 days of notification of the present decision".

25. On 18 February 2022, the grounds of the Appealed Decision were notified to the Club.

IV. PROCEEDINGS BEFORE THE CAS

26. On 10 March 2022, the Appellant filed its Statement of Appeal in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the "CAS Code"), and on 21 April 2022, it filed its Appeal Brief in accordance with Article R51 of the CAS Code.

27. By letter of 27 April 2022, Genoa requested to be allowed to submit an *amicus curiae* brief in the proceedings.

28. On 18 July 2022, FIFA filed its Answer in accordance with Article R55 of the CAS Code.

29. By letter dated 19 July 2022, the Parties were informed by the CAS Court Office that the Panel had been constituted as follows: Mr Lars Hilliger, Attorney-at-Law in Copenhagen, Denmark, as Sole Arbitrator.

30. By letter of 10 August 2022, and in line with the Parties' comments on the request, Genoa was informed that its request to submit an *amicus curiae* brief in the proceedings was rejected by the Sole Arbitrator *"as it was found that Genoa failed to establish the existence of any overriding public interest justifying its admission as an amicus curiae"*.

31. Also by letter of 10 August 2022, the Parties were informed that the Sole Arbitrator had decided to hold a hearing in this matter and that the hearing should be conducted by videoconference.

32. The Parties both signed and returned the Order of Procedure.

33. On 16 September 2022, a hearing was held, by videoconference.

34. In addition to the Sole Arbitrator, Mr Giovanni Maria Fares, Counsel to the CAS, and the following persons attended the hearing:

For the Club:

Mr Siddharth Gosain, Atorney-at-Law

For FIFA:

Mr Alexander Jacobs, Senior Legal Counsel

Ms Cristina Pérez González, Senior Legal Counsel.

35. At the outset of the hearing, the Parties confirmed that they had no objections to the appointment of the Sole Arbitrator.

36. The Parties were afforded ample opportunity to present their case, submit their arguments and answer the questions posed by the Sole Arbitrator.

37. After the Parties' final submissions, the Sole Arbitrator closed the hearing and reserved his final award. The Sole Arbitrator took into account in his subsequent deliberations all the evidence and arguments presented by the Parties although they may not have been expressly summarised in the present Award.

38. Upon the closure of the hearing, the Parties expressly stated that they had no objections in respect of their right to be heard and to have been treated equally and fairly in these arbitration proceedings.

V. THE PARTIES' SUBMISSIONS AND REQUESTS FOR RELIEF

39. The following outline of the Parties' requests for relief and positions is illustrative only and does not necessarily comprise every contention put forward by the Parties. The Sole Arbitrator has, however, carefully considered all the submissions and evidence filed by the Parties with the CAS, even if there is no specific reference to such submissions or evidence in the following summary.

A. The Club

40. In its Appeal Brief of 21 April 2022, the Club requested the CAS to:

"1) Accept the present appeal against [the Appealed Decision]*;*

2) To decide that the Appealed Decision must be set aside in full and consequently the case must be referred back to the FIFA Disciplinary Committee.

Alternatively to point 2

3) Decide that [the Club] *is only liable to pay Genoa CFC an amount of EUR* […] *plus 5% default interest p.a. to be calculated as from 19 June 2019.*

In any case

4) Fix a minimum amount of CHF 20,000 (twenty thousand Swiss Francs) to be paid by FIFA to [the Club] *as contribution to its legal fees and costs.*

5) Condemn FIFA to pay the whole CAS administration and Arbitration Fees".

41. In support of its requests for relief, the Club submitted, *inter alia*, as follows:

- The Appealed Decision contravenes the Swiss Public Policy (Ordre Public).

- According to the Swiss Federal Tribunal (the "SFT"), *"an award is contrary to the substantive public policy when it violated the fundamental principles of substantive law to the point of no longer being reconcilable with the determining legal order and systems of values; these principles include, in particular contractual fidelity, respect for the rules of good faith, the prohibition of abuse of rights, the prohibition of discriminatory or dispossession measures as well as the protection of persons who are civilly incapable"*.

- Article 27 par. 2 of the Swiss Civil Code (the "SCC") forms part of the Swiss Public Policy, and it has been held that a breach of public policy is thus conceivable in case of a violation of Article 27 of the SCC.

- Pursuant to the said article, a person may not surrender his freedom or restrict it in any way that limits the person's freedom, or in other words *"no person may surrender his or her freedom or restrict the use of it to a degree which violates the law or public morals"*.

- As such, the SFT has held in another football related case, *inter alia*, that *"*[…] *The free unfolding of personality is also guaranteed among others by the constitutional right to economic freedom, which contains in particular the right to choose a profession freely and to access and exercise an occupational activity freely"*.

- In this regard, Article 27 par. 2 of the SCC is applicable not only to contractual agreements but also to the decisions of legal persons.

- As such, FIFA's sanctioning power is limited by the said article, which has been confirmed by CAS jurisprudence; *"*[…] *Certainly, the autonomy of FIFA in this regard is not absolute.* […] *In particular, its power to impose sanctions under association law is limited by public policy ("ordre public"), and in particular by the fundamental rules protecting personality rights under Article 27 et seq. CC and competition law"*.

- The Appealed Decision violates the personality and economic rights of the Club.

- First of all, an unlimited and world-wide transfer ban is an excessive and unjustified interference with Article 27 par. 2 of the SCC, not least when the surge of the cases of the Omicron variant of the COVID-19 caused a lockdown, which hindered the Club's day-to-day operations, including banking operations.

- Furthermore, and in any case, the nature of the unlimited ban constitutes an obvious and serious interference with a party's right whilst disregarding the economic freedom which is protected by Article 27 par. 2 of the SCC. Such restrictions on the economic freedom will furthermore result in negative sporting implications.

- If the Club is not allowed to invest in new players, the following consequences are inevitable and will threaten the economic viability of the Club: (i) the sporting performances will plummet as the Club will find it extremely arduous to compete with other clubs in the division, and possibly leading to relegation; (ii) due to the poor sporting results, the players will explore options away from the Club; (iii) the interest of

the spectators will dwindle, thus resulting in a loss of sales; and (iv) the Club will eventually lose out on revenue from current sponsors and find it difficult to attract new sponsors.

- As such, an unlimited and world-wide transfer ban infringes the personality rights of the Club embodied in Article 27 par. 2 of the SCC.

- Furthermore, all sanctions imposed by FIFA have to be determined as per the principle of proportionality, and the sanctions under the Appealed Decision are not proportional to the default.

- As set out by CAS jurisprudence, *"a sanction must comply with the principle of proportionality in the sense that there must be a reasonable balance between the kind of misconduct and the sanction. This principle is recognised in the CAS jurisprudence and provides that the severity of a sanction must be proportionate to the offence committed. To be proportionate, the sanction must not exceed that which is reasonably required in the search of the justifiable aim".*

- Furthermore, in assessing the proportionality of a sanction, and in the absence of specific principles in the FDC, the following criteria should be considered; (i) the nature of the offence; (ii) the seriousness of the loss or damage caused; (iii) the level of culpability; (iv) the offender's previous and subsequent conduct in terms of rectifying and/or preventing similar situations; (v) the applicable case law and (vi) other relevant criteria.

- In view of the facts that, *inter alia*, the Club could not facilitate the payment of the amount due; that the Club requested an invoice for the updated amount; and that a fine of CHF 20,000 was also imposed on the Club, and since there are no aggravating circumstances and repeated offences, the imposed sanction on the Club cannot be considered proportional and is thus against the principle of proportionality.

- Based on these circumstances, the case should be referred back to the FIFA DC in order for the FIFA DC to render a decision that does not infringe the personality rights of the Club and is rendered in accordance with the principle of proportionality.

- Alternatively, the amount to be paid by the Club was miscalculated in the Appealed Decision, as it should correctly have been EUR […] and not EUR […], based on the deduction of EUR 9,500 as a contribution from Genoa to the advance of costs, which was the true intention of the Parties.

- In any case, the principle of *contra proferentem* must be applied in the present case, where the Settlement Agreement was drafted by Genoa.

B. FIFA

42. In its Answer of 18 July 2022, FIFA requested the CAS:

"a) To reject the Appellant's appeal in its entirety;

b) To confirm [the Appealed Decision]:

c) 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 procedures".

43. In support of its requests for relief, FIFA submitted, *inter alia*, as follows:

- First of all, the transfer ban determined in the Appealed Decision does not infringe Article 27 par. 2 of the SCC.

- In this regard it must be noted that the potential transfer ban will, up until the due amounts are duly paid, impede the Club from registering any new players, but the Club will still be able to count on other sources of financial income, e.g. through the sales of players, sponsorship deals and broadcasting rights, and the Club's economic freedom will by no means be endangered.

- Furthermore, the transfer ban is exclusively dependent on the Club not complying with its financial obligations according to the Consent Award within 30 days as from the Appealed Decision becoming final and binding.

- With regard to the arguments from the Club regarding the pandemic, it must be noted that the existence of the COVID-19 pandemic is a public and well-known fact, and the mere occurrence of this does not imply *per se* the impossibility of fulfilling obligations.

- Furthermore, the Club in fact failed to comply with its financial obligations towards Genoa since the moment the obligation to pay solidarity contribution arose in August 2019, i.e. well before the COVID-19 outbreak, and the (alleged) difficult financial situation of the Club is not a justification for failing to pay its debt to Genoa.

- In any case, in the FIFA COVID-19 Regulatory Issues, it was clearly set out that no exceptions would be granted with regard to the obligations to comply with financial decisions rendered by the FIFA DRC, the FIFA PSC or the FIFA DC, which is why FIFA will continue to apply Article 15 of the FIFA Disciplinary Code in the event of failure to respect these decisions.

- In view of the foregoing, besides the Club having failed to demonstrate that its financial situation could have been hindered by the outbreak of the Omicron variant, the Sole Arbitrator will have to agree that (i) the obligation to pay solidarity contribution arose well before the outbreak of COVID-19; (ii) FIFA continued applying Article 15 of the FDC; and (iii) in any case, the obligations deriving from the Settlement Agreement have to be fulfilled in accordance with the well-known principle of *pacta sunt serdanda*.

- With regard to the sanctions imposed on the Club for a violation of Article 15 of the FDC due to its failure to comply with the Consent Award, it must be noted that the

SFT has deemed that the system of sanctions established for the event of non-compliance with FIFA's decisions or those of the CAS is lawful.

- The spirit of the said article is to ensure the respect of decisions rendered by a body, a committee or an instance of FIFA or the CAS, and the sanctions are designed to serve as a means to put the debtor under pressure and encourage the debtor to comply with such decisions.

- Nonetheless, proceedings under Article 15 of the FDC are to be considered not as a remedy of enforcement but rather as the imposition of a sanction for breach of an association`s regulations within the meaning of association law.

- Furthermore, it must be stressed that the FIFA DC is not allowed to analyse a case decided by the relevant body as to substance, but has been assigned with the sole task of analysing whether the debtor complied with the final and binding decision of the relevant body.

- As such, the main question to be answered by the FIFA DC – and now by the Sole Arbitrator – is limited to whether or not the financial amounts as defined in the final and binding Consent Award have been paid, or whether, for a certain reason, the outstanding amounts are not due anymore.

- In the matter at hand, it is undisputed that the Settlement Agreement was ratified by the Consent Award with the consent of the Parties and that no payments were made from the Club to Genoa in this regard, nor has no further agreement on a payment plan ever been reached between the Club and Genoa.

- During the proceedings before the FIFA DC, the Club merely held that the Club's day-to-day operations, including its overseas banking operations, were hindered by a surge of the new Omicron variant of the coronavirus, but did not provide any proof of payment of the amount due, nor did it demonstrate that there were any reasons why the amounts would no longer have been due.

- As such, the FIFA DC applied Article 15 DC correctly, considering that the Club had breached the said article by not complying with the final and binding Consent Award.

- With regard to the sanctions imposed on the Club, it must be noted that in the context of challenges of associations' decisions to impose sanctions on individuals under Article 75 of the SCC, the courts are only allowed to declare such decisions void if the relevant association exceeded the margin of discretion accorded to it by association law, i.e. if it acted arbitrarily. This results from the fact that only grossly disproportionate decisions constitute violations of relevant laws and/or the associations' own statutes and other regulations and that only such violations may be claimed in the context of challenges under the said article.

- With regard to the fine imposed on the Club, the FIFA DC deals with its cases on a case-by-case basis, analysing and taking into account all the specific circumstances of each case.

- The Club has not provided any single piece of evidence that could demonstrate that the fine of CHF 20,000 could be disproportionate to the default.

- Furthermore, the FIFA DC always takes into consideration the outstanding amount due and decided in line with the longstanding jurisprudence of the FIFA DC, which has been repeatedly confirmed by the CAS.

- Also in line with CAS jurisprudence, a fine imposed on a club that is equal to fines imposed on other clubs for very similar violations, which is the case here, cannot be considered disproportionate.

- Based on the outstanding amount, the fine of CHF 20,000 is appropriate and proportionate.

- With regard to the potential transfer ban imposed on the Club, reference is made to the FIFA Circular no. 1681 dated 11 July 2019, where it is clarified that *"as a standard disciplinary measure, FIFA will impose a transfer ban on clubs not paying outstanding amounts until they have paid all of their debts. A transfer ban has shown to be the more effective instrument for this purpose"*.

- As such, and pursuant to Article 15 of the FDC, the transfer ban provided in the Appealed Decision constitutes a statutory time limit, which implies that there is no room to deviate from it, even if the Club does not agree with it.

- Furthermore, such a sanction is adequate and necessary considering the situation of the Club.

- However, if the Sole Arbitrator would deem that there is room to deviate, the CAS has already confirmed that in order to determine whether a sanction is to be considered proportionate *"various benchmarks seem appropriate: the gravity of the illegal act (…); the power to dissuade the offender from repeating the same illegality in the future; the importance of the rule of law that is being protected"*.

- Since the rule of law that is being protected is intimately linked to the principle of *pacta sunt servanda*, the imposition of a transfer ban until the payment of any overdue debt is the appropriate step in view of the unjustified and persistent failure to comply with the contractual obligations agreed upon with Genoa.

- With regard to the alleged restrictions on the Club's economic freedom, resulting in negative sporting implications, the CAS has already deemed that the transfer ban clearly does not impede the Club from transferring players to other clubs, which might in turn help it clear its debt.

- Moreover, it must be stressed that such a potential transfer ban does not infringe the Club's rights for the mere reason that the Club is not limited or impeded from settling the outstanding debt within the 30-day final deadline granted by Article 15 par. 1 of the FDC.

- As such, the imposition of the sporting sanction depends at all times on the Club's choice to comply with the Consent Award.

- Finally, and with regard to the alleged *"error in holding the capital amount under the Settlement Agreement as EUR* […] *instead of EUR* […]*"*, the Club omitted to mention clause 1.8 of the Settlement Agreement, under which the Club and Genoa agreed that *"Should (the Club) fail to pay the first instalment of the Capital Amount by the due date specified in clause 1.2.(i) above, the entire Capital Amount shall become due by (the Club) to Genoa immediately and without notice"*.

- As the Club failed to pay the first instalment by the due date, the Club now has to pay the entire Capital Amount, i.e. the amount of EUR […], on the basis of clause 1.8 of the Settlement Agreement as ratified in the Consent Award.

- In any case, it must be stressed that the Appealed Decision expressly referred to the CAS Consent Award when finding that the Club *"is found responsible for failing to comply with the award issued by the Court of Arbitration for sport on 01 November 2021 (ref. CAS 2021/A/7990)"*.

- As such, regardless of the specific amounts to be paid by the Club, it cannot be denied that the Club has failed to comply in full with the Consent Award, which was expressly mentioned in the Appealed Decision.

VI. JURISDICTION

44. Article R47 of the CAS Code states, *inter alia*, as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body".

45. With respect to the Appealed Decision, the jurisdiction of the CAS derives from Article 57 par. 1 of the FIFA Statutes, which reads as follows:

"Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question".

46. Neither of the Parties objected to the jurisdiction of the CAS, which was furthermore confirmed by the Parties signing the Order of Procedure.

47. It follows that the CAS has jurisdiction to decide on the Appeal.

VII. ADMISSIBILITY

48. The grounds of the Appealed Decision were notified to the Club on 18 February 2022.

49. The Club filed its Statement of Appeal on 10 March 2022, i.e. within the statutory time limit set forth by the FIFA Statutes, which is not disputed.

50. Furthermore, the Club' Statements of Appeal complied with all the requirements of Article R48 of the CAS Code.

51. It follows that the Appeal is admissible.

52. Under Article R57 of the CAS Code, the Sole Arbitrator has full power to review the facts and the law and may issue a de novo decision superseding, entirely or partially, the Appealed Decision.

VIII. APPLICABLE LAW

53. Article R58 of the CAS Code states as follows:

"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 the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

54. The Sole Arbitrator further notes that Article 56 par. 2 of the FIFA Statutes reads as follows:

"The 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".

55. Based on the foregoing, and in accordance with the submissions of the Parties, the Sole Arbitrator is satisfied to accept the application of the various regulations of FIFA, in particular the FIFA Disciplinary Code and, subsidiarily, the application of Swiss law.

IX. MERITS

56. Initially, the Sole Arbitrator notes that it is undisputed that the Club and Genoa entered into the Settlement Agreement, the content of which, on the request of the two clubs, was ratified by the Consent Award.

57. Furthermore, it is undisputed that the Club failed to fulfil its payment obligations towards Genoa pursuant to the said Consent Award, which is why, upon request from Genoa, the

Secretariat of the FIFA DC opened disciplinary proceedings against the Club on 14 December 2021.

58. On 1 February 2022, the FIFA DC rendered the Appealed Decision, which states:

"1. Shanghai Shenhua FC is found responsible for failing to comply in full with the award issued by the Court of Arbitration for Sport on 01 November 2021 (Ref. CAS 2021/A/7990).

2. Shanghai Shenhua FC is ordered to pay to Genoa CFC the amount of EUR […] *plus interest to be calculated in accordance with the award issued by the Court of Arbitration for Sport.*

3. Shanghai Shenhua FC is granted a final deadline of 30 days as from 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 nonfinancial 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 a 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 20,000.

5. The fine is to be paid within 30 days of notification of the present decision".

59. While the Club does not dispute that the FIFA DC was correct in finding that the Club is responsible for failing to comply in full with the Consent Award, in line with which the Club further does not object to the fine imposed on it, the Club, on the other hand, submits, *inter alia*, that the transfer ban imposed on it is disproportionate and breaches the Swiss Public Policy and violates the personality and economic rights of the Club. Furthermore, and alternatively, the Club submits that the FIFA DC made an error in calculating the capital amount payable by the Club under the Settlement Agreement.

60. With regard to the alleged breach of the Swiss Public Policy, the Sole Arbitrator initially notes that he agrees that an award is contrary to substantive public policy when it violates the fundamental principles of substantive law to the point of no longer being reconcilable with the determining legal order and system of values.

61. As an association under Articles 60 et seq. of the SCC, FIFA has extensive regulatory autonomy.

62. However, FIFA must always respect the personality rights of its members (cf. CAS 2011/A/2433, para. 51). It is generally accepted in jurisprudence that personality rights apply to the world of sport (cf. SFT 120 II 369; SFT 137 III 303; judgment of the SFT 4A_558/2011, dated 27 March 2012, cf. CAS 2017/A/5092, para. 128).

63. Moreover, it must be noted that the SFT has deemed lawful the system of sanctions used by FIFA in the event of non-compliance with its decisions or those of the CAS, which was applied in the present case (4P.240/2006 of 5 January 2007).

64. Having considered the facts and circumstances of the case at hand, the Sole Arbitrator finds that any possible restrictions on the Club's personality/economic rights in the present case imposed on it by the Appealed Decision are not contrary to the Swiss Public Policy.

65. The Sole Arbitrator does not disagree with the Club that the imposition of a transfer ban is a severe sanction and that relevant sporting and financial consequences may arise from its implementation.

66. However, the Club can avoid the imposition of such a transfer ban by paying the debt owed, given that the sanction will only apply once the final deadline of 30 days granted in the Appealed Decision has elapsed.

67. Moreover, and even if the transfer ban is eventually enforced, the Club will still be able to continue its professional conduct and to compete in the relevant tournaments relying on other sources of financial income, e.g. through the sales of players, sponsorship deals and broadcasting rights, even if such income might decrease over time due to the possible sporting consequences of the transfer ban.

68. Based on that, and also noting that the original payment obligation arose as early as August 2019, the Sole Arbitrator finds that there are no violations of the Club's personality/economic rights, and thus no violation of the Swiss Public Order.

69. Furthermore, and with regard to the sanctions imposed on the Club, the Sole Arbitrator finds that Article 15 of the FDC provides FIFA with a clear legal basis to sanction e.g. a club for failing to pay a sum of money to another club even though instructed to do so by an instance of FIFA or a CAS decision. Article 15 par. 1 of the FDC states 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 a CAS decision (financial decision), or anyone who fails to comply with another final decision (non-financial decision) passed by a body, a committee or an instance of FIFA, or by CAS:
a) will be fined for failing to comply with a decision; in addition:
b) will be granted a final deadline of 30 days in which to pay the amount due or to comply with the non-financial decision;
c) in the case of clubs, 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. A deduction of points or relegation to a lower division may also be ordered in addition to a 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.
d) in the case of associations, 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, additional disciplinary measures may be imposed;

e) in the case of natural persons, 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 ban on any football-related activity for a specific period may be imposed. Other disciplinary measures may also be imposed".

70. With regard to the alleged disproportionally of the transfer ban imposed on the Club, the Sole Arbitrator agrees with FIFA's position that the CAS may amend a disciplinary decision of a FIFA judicial body only in cases in which it finds that the relevant FIFA judicial body exceeded the margin of discretion accorded to it by the principle of association autonomy, i.e. only in cases in which the relevant FIFA judicial body must be held to have acted arbitrarily. This is, however, not the case if the Panel or Sole Arbitrator merely disagrees with a specific sanction, but only if the sanction concerned is to be considered as evidently and grossly disproportionate to the offence (CAS 2014/A/3562).

71. The FIFA disciplinary authorities always adopt a case-by-case approach and analyse and take into account all the specific circumstances of each case as foreseen under the FDC and as confirmed by the CAS: *"similar cases must be treated similarly, but dissimilar cases could be treated differently"* (cf. CAS 2012/A/2750).

72. As mentioned above, the Club does not object to the fine imposed on it as a consequence of its failure to comply in full with the Consent Award, and the Sole Arbitrator consequently finds no need to deal with this issue.

73. With regard to the imposition of the transfer ban in case of the Club's continued failure to pay the outstanding amount due to Genoa within the granted deadline, the Sole Arbitrator initially notes that Article 15 par. 1 c) of the FDC states, *inter alia*, as follows: *"in the case of clubs, 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.[…]"*

74. Furthermore, in the FIFA Circular no. 1681 dated 11 July 2019, it is stated that *"as a standard disciplinary measure, FIFA will impose a transfer ban on clubs not paying outstanding amounts until they have paid all of their debts. A transfer ban has shown to be the more effective instrument for this purpose (article 15 paragraph 1 c) FCD)".*

75. Based on that and taking into consideration, *inter alia*, the gravity of the failure to respect the Consent Award and the importance of the rule of law that is being protected, which is closely linked to the principle of *pacta sunt servant*, the Sole Arbitrator finds no reason to deviate from the above and is convinced that the decision to impose the transfer ban on the Club was made in accordance with the overriding principle of proportionality.

76. In this regard, and for the sake of good order, the Sole Arbitrator notes that the mere fact that the *"unlimited"* transfer ban imposed on the Club pursuant to Article 15 of the FDC is different from the *"time-limited"* transfer ban set out in Article 24 of the FIFA Regulations on the Status and Transfers of Player does not automatically imply that the imposed transfer ban is disproportionate.

77. With regard to the alleged *"error in calculation"* by the FIFA DC, the Sole Arbitrator initially notes that in the context of enforcement proceedings according to Article 15 of the FDC, the FIFA DC is, in principle, not allowed to review or to modify the substance of the decision that is being enforced. There can be no *révision au fond*, because otherwise this would undermine the binding nature of the decision resolving the dispute and legal security. Consequently, the FIFA DC cannot review or modify the substance of the Consent Award that has become final and binding. This understanding is also backed by CAS jurisprudence according to which the sole task of the FIFA DC is to determine whether the debtor has complied with the enforceable decision (cf. CAS 2018/A/5779, para. 51; cf. CAS 2016/A/4910, para. 44; cf. CAS 2013/A/3380, para. 81).

78. In other words, and in a disciplinary proceeding like the one at hand, the FIFA DC is in general limited to examining only the prerequisites of Article 15 par 1 of the FDC, and it is not disputed by Genoa that the FIFA DC was correct in finding that the Club had failed to comply in full with the Consent Award even when instructed to do so. This finding is set out in para. 1 of the Appealed Decision.

79. Based on that and on the wording of the Settlement Agreement, specifically the included definition of the *"Capital Amount"*, the Sole Arbitrator finds no basis to conclude that the FIFA DC intended to go into the merits of the case when stating the amount due in the second paragraph of the Appealed Decision.

80. The Sole Arbitrator further notes that the Club did not include Genoa in this appeal before the CAS, which is in line with the disciplinary nature of the Appealed Decision and, accordingly, of the dispute.

81. As such, and since the FIFA DC was not competent to review or modify the substance of the final and binding Consent Award, which the Sole Arbitrator also finds was not the intention of the said chamber when issuing the Appealed Decision, the Sole Arbitrator does not find himself competent to deal with the Club's alternative request for relief.

82. It must be stressed that the Sole Arbitrator has not considered whether the Club, upon fulfilment of the payment obligation in accordance with the Appealed Decision, might have possible grounds to file a claim of repayment against Genoa for the amount set out in clause 1.4 of the Settlement Agreement.

83. In conclusion of the above, the Sole Arbitrator finds that the transfer ban imposed on the Club by the FIFA DC in the Appealed Decision does not contravene the Swiss Public Policy, nor it violates the Appellant's personal rights, and cannot be considered disproportionate to the offence committed and, what is more, was imposed in compliance with the FDC, for which reason all arguments brought forward by the Club as regards the said sanction are rejected. Furthermore, the Sole Arbitrator does not find himself competent to deal with the Club's alternative request for relief.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed on 10 March 2022 by Shanghai Shenhua FC against the decision rendered by the FIFA Disciplinary Committee on 1 February 2022 is dismissed.

2. The decision rendered by the FIFA Disciplinary Committee on 1 February 2022 is confirmed.

3. (…).

4. (…).

5. All further motions or prayers for relief are dismissed.