


NEWS SECTION

Switzerland

FOOTBALL

Federal Supreme Court No.4P.240/2006,
January 5, 2007

 Fines; Football; Sporting organisations; Switzerland

Facts: A football player was transferred from a Brazilian club to a Spanish club. The Brazilian club addressed the FIFA Players Status Committee, claiming €373,226 from the Spanish club with regard to this transfer. The Committee confirmed that the Spanish club was obliged to pay this amount. As the Spanish club did not react, the Brazilian club addressed the FIFA Disciplinary Committee. This Committee also held that the Spanish club was obliged to pay the amount in question. It imposed a fine in the amount of CHF 25,000 on the Spanish club, payable to FIFA, and warned that, if the amount to be paid to the Brazilian club was not transferred within 30 days, the Spanish club would have to face sanctions like a deduction of points or a demotion to a lower division. An appeal against this decision, filed with the Court of Arbitration for Sport (CAS), was dismissed.

The Spanish club filed an action to set aside this award with the Swiss Federal Supreme Court (FSC), claiming that the CAS award was incompatible with Swiss public policy and therefore requesting the annulment of the CAS decision. It stated that the Swiss public debt enforcement monopoly (including the prohibition of private debt enforcement) did not allow FIFA with its registered offices in Switzerland to fine the Spanish club and to threaten to sanction it the way it did.

Held: The FSC rejected this action to set aside the CAS award. It held that it had not yet been decided if a breach of the public debt enforcement monopoly was indeed enough to constitute a breach of Swiss public policy, but that this question could remain unanswered in this case. The award that was challenged did not concern debt enforcement as such but rather sanction enforcement and, connected therewith, the question if a sports federation as powerful as FIFA was allowed to impose sanctions on its members.

FIFA is a private association established under Swiss law. Its members are the national associations worldwide (in our case, the Real Federación Española de Fútbol) of which, again, the local clubs are members. Therefore, Swiss corporate law, more precisely the chapter on the associations (Art.60 *et seq.* of the Swiss Civil Code), is applicable to the question of legality of FIFA sanctions.

The FSC cited Swiss prevailing literature and jurisprudence, which agree that an association may impose sanctions on its members if membership duties are broken. If a private association correctly establishes rules in order to reach its scope, and if its members are subject to these rules, it is generally accepted that sanctions are included in these rules ensuring that the members will follow the rules. Such subjection to rules is considered voluntary even in the case of FIFA, which profits from a dominant position in world football. The FSC compared the subjection to sanction rules with a contract clause on liquidated damages which is admissible under Swiss contract law.

Nevertheless, the FSC admitted that sanctions like a deduction of points or a demotion to a lower division cannot only be imposed on clubs but also be enforced by FIFA. The enforcement of a monetary sanction,

however, cannot be executed by FIFA which can only initiate it with a local (public) debt enforcement office. For this reason, the FSC considered the prohibition of private debt enforcement unbroken and held that—clear and valid rules given—FIFA may impose sanctions on its members.

Comment: The acceptance of membership sanctions by an association is indeed given under Swiss law even though there are discussions on some details which have not been discussed by the FSC in this case (such as the necessity of a fault of the member having broken a rule). It is a condition precedent, however, that membership sanctions are based on clear rules and regulations which are, on their turn, clearly and validly based on the by-laws of the association. General procedural rules are to be adhered to, in any case, rules like the principle of a fair and impartial trial, the right to be heard and the principle of *in dubio pro reo*.

Sanctions may not be against the law or violate *bonos mores*, namely violate personality rights. Besides these restrictions, any sanctions within the limits of the above-mentioned general principles of procedure and the legal framework of the association (by-laws and regulations) may be imposed on (direct and/or indirect) members who are subject to the disciplinary power of an association.

An interesting topic was treated as a side issue. The FSC mentioned, in half a sentence only, that FIFA indeed takes a dominant position in football and that a club intending to play in any league does not have the possibility to avoid being a member. This remark which was not followed any further does offer quite an explosiveness. It would be interesting to see what the FSC would hold if a similar question were to be decided from a competition law perspective. This Pandora's box has not been opened—yet. It remains to be seen if it ever will be.

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