



**Arbitration CAS 2004/A/659 Galatasaray SK v. Fédération Internationale de Football Association (FIFA) & Club Regatas Vasco da Gama & F. J., award of 17 March 2005**

Panel: Mr Luc Argand (Switzerland), President; Mr Jean-Pierre Morand (Switzerland); Mr Bard Racin Meltvedt (Norway).

*Football*

*Transfer*

*Definition of a decision according to the Swiss Federal Tribunal*

*Denial of justice in case of no jurisdiction*

*Power of review of the CAS and legal reasoning of the decision appealed against*

*Irregularity of decisions and consequences for the parties*

- 1. According to the jurisprudence of the Swiss Federal Tribunal, a decision is a unilateral act, sent to one or more determined recipients and is intended to produce legal effects. The filing of the request seeking a decision does not necessarily lead to a decision on the merits of the request. The authority may render a decision of inadmissibility as to form if a procedural rule precludes its handling. In this case, the decision does not go to the merits of the matter. In the absence of a decision, it is the denial of formal justice which permits the appeal.**
- 2. An appeal for denial of formal justice is possible when the authority refuses without reason to make a ruling or to delay a ruling beyond a reasonable period. If there is no jurisdiction, the authority can commit a denial of justice if it does not rule on its jurisdiction within a reasonable period. Certain final decisions do not examine the merits of the dispute but simply place an end to them on the basis of procedural issues.**
- 3. Based on Article R57 of the CAS Code, the Panel has a full discretion to review the issues raised in the appeal without being bound by the factual and legal appreciation of the body having rendered the decision. In particular and of course, the Panel is not bound by the legal reasoning on which the appealed decision is based.**
- 4. As a matter of principle, decisions should be, to be considered regular, reasoned, designated as such, notified to the parties and include an indication of the legal way in which they can be contested before the appeal authority. The consequence of informalities such as in particular the failure to mention appeal instructions is not necessarily the invalidity of the decision. The principle of good faith requires however that these informalities do not prejudice the procedural rights of the concerned parties. Classically, such informalities would lead for example to preclude an objection against an appeal based on the fact that it was filed past the normally applicable deadline.**

Galatasaray SK (“Galatasaray” or “the Club”) whose registered office is in Istanbul, is a football club in the Turkish first division.

Mr F. J. (“the Player”) is a professional football player.

Vasco Da Gama (“Vasco”) is a Brazilian football club whose registered office is in Rio de Janeiro in Brazil.

Fédération Internationale de Football Association (FIFA) is an association registered in the Registry of Commerce under Articles 60 ff of the Swiss Civil Code (CCS). The registered office of FIFA is in Zurich in Switzerland.

On July 1, 2002, Galatasaray, on one hand, and Vasco and e-football B.V. on the other hand, entered into a contract (the “Contract”) relating to the transfer of Mr F. J. Vasco was represented by Mr Alexandre Da Silva Martins (“Mr Martins”).

By virtue of Article 2 of the Contract, Galatasaray has paid USD 3 million to Vasco and e-football B.V. in order to obtain 50% of the economic and sportive rights relating to the Player.

Galatasaray made the payment of this amount in accordance with the instructions set forth in Article 4 of the Contract, providing as follows:

*“The ‘Buying Club’ should pay the amounts mentioned in the clauses 3 directly in the account of e-football B.V. (...)”.*

A contractual dispute arose between the Player and Galatasaray following the unilateral termination of the Contract by the Player on 9 January 2003. The dispute was resolved by an award of the CAS of 11 November 2003 (CAS 2003/O/453). Galatasaray filed an appeal based on public law against this decision with the Federal Tribunal (TF). By order of 6 May 2004, the TF dismissed the Club’s appeal.

On 1 July 2004, that is two years to the day after the signature of the Contract, Galatasaray introduced a request with the Dispute Resolution Chamber of FIFA (CRL) seeking that the CRL would put into action its investigation powers in order to require Vasco and the Player to produce all of the banking documents relating to the amount of USD 3 million paid by Galatasaray in Vasco’s favor to obtain the economic and sportive rights relating to the Player.

Once such an investigation would be completed and assuming that it would show that the totality of the USD 3 million had not effectively been cashed by Vasco, the Club has requested the CRL to order that the Player and Vasco be jointly and severally order to reimburse the “diverted” amounts.

By letter sent on 5 July 2004 to the Turkish football association, FIFA responded as follows:

*“As you will note, Galatasaray SK is asking FIFA to initiate an investigation into the transfer of the player F. J., given that it believes that the transfer fee paid was never remitted to the club Regatas Vasco da Gama but, instead, was paid to an off-shore firm.”*

*We kindly ask you to inform your affiliate that FIFA is not competent to investigate such an accusation and that this matter should therefore be referred to the competent criminal authorities”.*

The letter, prepared in the name and for the account of the Players’ Status Committee, was signed by Mr Heinz Tännler, Head of the Legal Department, and by Mr Gianpaolo Monteneri, Head of the Players’ Status Committee.

On 14 July 2004 Galatasaray gave notice of its intention to appeal to the CAS against the letter of 5 July 2004, which it considered to be a “decision”.

On 28 July 2004, counsel of the Player and of Vasco informed the First Counselor to the CAS that his clients did not accept the jurisdiction of the CAS to judge this matter. He therefore announced that his clients renounced appointing an arbitrator and did not file any prayers.

On 10 August 2004, FIFA submitted its position to the CAS.

In October 2004, the CAS submitted a Procedural Order to the Parties. In accordance with R 29 of the Code, the language of the present arbitration is English.

A Hearing was held in Lausanne on 11 January 2005. Only FIFA and Galatasaray were present.

Galatasaray has made the following prayers:

*That CAS “solicit that CRL initiate its powers of investigation in order to require the defendants to produce all of the banking documents relating to the transfer fee paid by Galatasaray to the theoretical benefit of Vasco”.*

To obtain the rights relating to the Player, Galatasaray has transferred to Vasco the funds necessary to obtain these rights. The Club thus specified its desire to respect the rules of FIFA, in particular Article 32 of the FIFA Regulations concerning the Status and the Transfer of Players (the “Players Regulations”). This article provides that *“Only the clubs and players have the right to an indemnity such as is foreseen in the present regulations”*.

During the investigation by the CAS, of Case 2003/O/453, Galatasaray has learned, through the press, that Mr Martins, representing Vasco, had been jailed for diverting funds acquired during the transfer of players.

Doubting the final destination of the funds, Galatasaray has thus wished to obtain confirmation that the funds paid had truly been received by Vasco as a *“transfer fee”*. The Club feared that these funds did not in fact correspond in reality to the necessary consideration for the assignment of the rights relating to the Player and that it would have thus transferred USD 3 million for a consideration which could have been obtained for a lesser sum.

In support of its request, Galatasaray has invoked the following assumption: If hypothetically the money had not been entirely paid to the Club, but to the contrary a part was paid to a third party, that would signify that the amount necessary for the granting of the rights relating to the Player would not in reality have served this purpose.

Galatasaray considers moreover that the “letter” of 5 July 2004 is a decision, since it affects its claims. The Club is of the opinion that FIFA is uniquely placed to rule on the merits or to render a decision of non-competence. However, it cannot declare itself to be without competence without handing down a formal decision.

In addition, the Club considers that the conditions for the application of the doctrine of *res judicata* raised by FIFA are not fulfilled in the present case, the parties to the present dispute not being the same as those having taken part in the procedure having ended in the CAS Judgment 2004/A/659 of 11 November 2003, then the ATF (decision) of 6 May 2004.

By letter of 10 August 2004, FIFA has made the following prayers:

*“In light of the aforementioned, FIFA primarily requests the CAS:*

1. *Not to consider the ‘appeal’ filed by the Club Galatasaray SK since there was no formal decision passed by FIFA that is subject to appeal;*
2. *To condemn Galatasaray to pay any and all costs of the present procedure;*
3. *To condemn Galatasaray to pay all legal costs of FIFA with regard to the present procedure.*

*Alternatively, if the CAS were to reject these requests, FIFA demands that:*

1. *The CAS rejects the ‘appeal’ since it refers to a res judicata, or*
2. *Declares FIFA not competent to investigate the alleged transactions;*
3. *To condemn Galatasaray to pay any and all costs of the present procedure;*
4. *To condemn Galatasaray to pay all legal costs of FIFA with regard to the present procedure”.*

FIFA considers that the CAS must hold that it is not competent insofar as the letter of 5 July 2004 (which does not mention the appeal possibility nor the competent authority) is not a “decision”, but a simple “communication” transmitted solely to the Turkish Football Federation.

By the latter it was only informing the Club that it was not in a position to initiate such investigations and that such allegations must be brought to the competent criminal authorities.

FIFA noted that many demands for information are sent to it each year. Thus, when it considers that these requests are not within its competence, it is content to reply by simple letter, in order to avoid being involved later in a subsequent appeal procedure.

FIFA has in addition noted that even if hypothetically the CAS would accept that the letter of 5 July 2004 was a formal decision, it would have neither competence nor the resources or the “technical” means necessary to undertake such steps.

In any case, the appeal must be rejected, on grounds of *res judicata*, the dispute between the parties having been already resolved by a definitive decision (ATF of 6 May 2004).

Finally, it has argued that Article 32 of the Player Regulations does not expressly mention the question of the “transfer fee” and cannot serve as a legal ground for the claims of Galatasaray.

## LAW

### Applicable law

1. Article R 58 of the Code of Arbitration for Sport (the “Code”) provides that  
*“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties, or in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled (...)”.*
2. In the present matter, the applicable regulations are the FIFA regulations, and more specifically the Players Regulation; the CRL Regulation and the Regulation on the Procedure of the Players’ Status Committee (“CSJ Regulation”).
3. In the absence of a choice of law by the parties, the Panel will decide the dispute according to the law of the domicile of FIFA. FIFA having its registered office in Zurich, the dispute will thus be submitted to Swiss law which thus constitutes the legal frame within which the FIFA regulations have to apply.

### Jurisdiction of the CAS

4. FIFA, Vasco and the Player contest the competence of the CAS on the ground that the letter of 5 July 2004 was not a decision. On this basis, Vasco and the Player have refused to nominate an arbitrator and were not present at the Hearing on 11 January 2005.
5. The jurisdiction of the CAS is based on Articles 59 ff of the FIFA Bylaws, on Article 47 of the Code, on Article 10 of the CRL Regulation as well as on Article 16 of the CSJ Regulation.
6. Article R 47 of the Code provides that an appeal may be filed to the CAS only *“against a decision [of last instance] of a federation, an association or other sports-related organization”* if the statutes or the regulations of the said organization provides for it and insofar as the available internal appeals have been exhausted.
7. Article 60 of the FIFA Bylaws, as well as Article 10 of the CRL Regulation and Article 16 of the CSJ Regulation also expressly refer to the notion of a “decision”.
8. The Panel has thus to consider if the letter of 5 July 2005 constitutes a decision in the sense of the code, susceptible to an appeal to the CAS, which is a necessary condition to the jurisdiction of the CAS to rule in the present matter.

9. According to the definition of the Federal Tribunal, “*the decision is an act of individual sovereignty addressed to an individual, by which a relation of concrete administrative law, forming or stating a legal situation, is resolved in an obligatory and constraining manner. The effects must be directly binding both with respect to the authority as to the party who receives the decision*” (cf. ATF 101 Ia 73).
10. A decision is thus a unilateral act, sent to one or more determined recipients and is intended to produce legal effects (cf. BOVAY B., Procédure administrative, Bern 2000, p. 254).
11. The filing of the request seeking a decision does not necessarily lead to a decision on the merits of the request. The authority may render a decision of inadmissibility as to form if a procedural rule precludes its handling. In this case, the decision does not go to the merits of the matter (cf. BOVAY B., *op. cit.*, p. 169).
11. In the absence of a decision, it is the denial of formal justice which permits the appeal. An appeal for denial of formal justice is possible when the authority refuses without reason to make a ruling or to delay a ruling beyond a reasonable period. (cf. BOVAY B., *op. cit.*, p. 170 and 253).
12. If there is no jurisdiction, the authority can commit a denial of justice if it does not rule on its jurisdiction within a reasonable period (cf. KNAPP B., Précis de droit administratif, 4<sup>th</sup> ed., Basle *et al.* 1991, p. 134, no. 634). Certain final decisions do not examine the merits of the dispute but simply place an end to them on the basis of procedural issues (cf. BOVAY B., *op. cit.*, p. 263).
13. FIFA has clearly informed Galatasaray, through the Turkish football federation, that it considered to have no competence to make criminal investigations and therefore in effect has rejected its request.
14. By so doing, FIFA has rendered a decision depriving Galatasaray of the object of its request and resolving in an obligatory manner the issue raised by the Club.
15. Such decision is further a definitive decision since it cannot be made the object of any challenge internally within FIFA.
16. The Panel thus holds that the letter of 5 July 2004 is a decision by which FIFA declined its jurisdiction to address Galatasaray’s request. Such a decision can be made the object of an appeal to the CAS.
17. Consequently, the Panel has jurisdiction to rule on the appeal to the extent at least it bears on the issue of the refusal of FIFA to address the request of the Club.

### Power of review of the CAS

18. Article R 57 of the Code provides that *“The Panel shall have full power to review the facts and the law (...)”*.
19. Based on this provision, the Panel has a full discretion to review the issues raised in the appeal without being bound by the factual and legal appreciation of the body having rendered the decision. In particular and of course, the Panel is not bound by the legal reasoning on which the appealed decision is based.

### On the merits

#### *A. Preliminary observation on formal aspects of the FIFA decision*

20. As a matter of principle, decisions should be, to be considered regular, reasoned, designated as such, notified to the parties and include an indication of the legal way in which they can be contested before the appeal authority.
21. The decision rendered in the name of the Players’ Status Committee does not indicate the means or the time limit for an appeal and is not expressly designated as such. Further, it has not been notified to Vasco or the Player.
22. Galatasaray has maintained, both in its submissions and at the Hearing, that the letter of 5 July 2004 must be held to be a decision. The Club has never, however, prayed that it be annulled on the grounds of violation of the provisions relating to the form of decisions, if by hypothesis the CAS would consider the letter of 5 July 2004 as such.
23. As FIFA obviously intended to avoid that its communication be considered as a decision in the hope to thus preclude the possibility for the Club to appeal it, it was logical that FIFA did not designate its “communication” as “decision” or otherwise observe the formal requirements which would have been typical of a decision.
24. The consequence of informalities such as in particular the failure to mention appeal instructions is not necessarily the invalidity of the decision. The principle of good faith requires however that these informalities do not prejudice the procedural rights of the concerned parties. Classically, such informalities would lead for example to preclude an objection against an appeal based on the fact that it was filed past the normally applicable dead-line.
25. In this case however, notwithstanding the fact that the FIFA decision is not presented as such nor includes any appeal instructions, the Club has appealed within the applicable time limit to the CAS. Thus, the fact that the decision of FIFA is affected by informalities has had effectively no consequence on the position of the Appellant.

26. The fact that FIFA acted in a way which is not formally correct can therefore be disregarded by the Panel. This being said, while the Panel may have understanding for the fact that FIFA may be overloaded by proceedings which can sometimes not be justified, it does not appear that the attempt to issue formal “non-decisions”, which can, materially, only be decisions constitutes an appropriate management of the decision making process which FIFA has to assume as the world ruling body. Clear and well-founded decisions are and will remain the only really appropriate way to keep challenges within reason.
27. Considering that the informalities have been cured, the Panel will thus hold that the decision of July 5, 2004 is valid as to form.

*B. Decision of FIFA not to address the request*

28. The issue the Panel has to examine in this appeal is whether FIFA was correct in refusing to address Galatasaray’s request to launch an investigation with the purpose of establishing whether the fee which Galatasaray paid in connection with the Player went entirely to the Club and/or the Player as required by FIFA regulations or were paid (in the Appellant’s words “diverted”) to third parties.
29. Preliminarily, the Panel observes that by signing the Contract, Galatasaray freely agreed to pay USD 3 million to Vasco in order to obtain the sporting rights on the Player.
30. Galatasaray obtained what it paid for, i.e. to sign an employment agreement with the Player (“the Player’s agreement”).
31. A third party being expressly mentioned in the Contract, one easily understands by reading its clauses that a company, apparently controlled by the Player’s agent, was to perceive, directly or indirectly, part of the payment provided for in the agreement (see in particular clauses 3 and 4 Contract).
32. The fact that the Player’s agreement was cancelled for reasons for which Galatasaray was found responsible in CAS award 2003/O/453, which is final and binding, is in that sense irrelevant.
33. The Panel notes that Galatasaray bases its request on an alleged violation of clause 32 of the Player Regulation which states that “*Only the clubs and players have the right to an indemnity such as is foreseen in the present regulations*”.
34. Whether the fact that part of the funds transferred were perceived by a third Party is in contradiction with clause 32 of the Player Regulation can be left open.
35. Indeed, the Panel observes that, at least as it presently stands, the wording of article 32 of the Player Regulation does not necessarily exclude that the party entitled to the payment may freely dispose in favor of other parties.



36. In any event and even if such was the case:
    - a. This would not make the underlying transaction null and void within the meaning of clause 20 of the Swiss Code of Obligations, as this is neither illegal under Swiss law, nor against good moral (in the meaning of the law).
    - b. Even if the transaction was to be considered as null and void, this would not create any claim in favor of Galatasaray as clause 32 of the Player Regulation is not meant to protect the paying club.
    - c. Finally, if an effectively criminal diversion was being at stake, the injured party would solely be the receiving club and not the paying club.
  37. From the perspective of the applicable FIFA provision, there is no rule which would give a club the entitlement to request an enquiry, in the absence of any apparent justification, simply because it “feels” that a provision has not been applied.
  38. If Galatasaray held that it had claims (irrespective of the fact that it appears completely ludicrous to sustain it under the circumstances), it could not submit an investigation request which had a mere exploratory character and reserve the possibility to submit claims. Indeed it should have done the reverse, i.e. affirm its claims before moving for evidentiary measures.
  39. It follows from the above that Galatasaray has obviously no claim to support its investigation request.
  40. Finally, and despite the fact that there is no *res judicata* (see hereafter under “C.”), the intent behind the move of Galatasaray is obvious: to put in question a decision which it did not accept through proceedings brought from a different angle.
  41. In this respect, the Panel wishes to underline that it finds that the Appellant acted daringly and in an abusive way by proceeding without merits.
  42. The obvious aim was to put the decision rendered in the case CAS 2003/O/453 in question. The Appellant should have realized that its maneuver had no chance to succeed and avoid unnecessary proceedings.
  43. For all the reasons set forth, The Panel will hold that FIFA was correct in deciding that it is not competent to investigate this matter and to reject Galatasaray’s request.
- C. *On the exception of res judicata*
44. FIFA raises the argument of *res judicata* against the award CAS 2003/O/453 in the dispute between Galatasaray and the Player.
  45. Even if the link between this decision and the claims which the Appellant attempts to build behind its request for investigation is obvious, the claims (possibly) at stake do not concern the same parties (at least with respect to Vasco) and are not based on the same legal grounds.

46. The Panel will thus hold that *res judicata* is not an issue here.

**The Court of Arbitration for Sport rules:**

1. The CAS panel affirms its jurisdiction on the appeal filed by Galatasaray;
2. The appeal is dismissed;
3. (...);
4. All other or further claims of the parties are dismissed.