



Arbitration CAS 2010/A/2148 Daejeon Citizen Football Club v. Fédération International de Football Association (FIFA), award of 22 December 2010

Panel: Mr Efraim Barak (Israel), President; Mr Jinwon Park (Korea); Mr Jacopo Tognon (Italy)

Football

Disciplinary sanction for non-compliance with a FIFA body decision

Limits of review of the FIFA Disciplinary Committee

No reduction of the fine imposed for an outstanding payment to FIFA according to the FIFA Disciplinary Code

- 1. The FIFA Disciplinary Committee (FDC) as a sanctioning and enforcement body lacks the competence to review the substance of final and binding FIFA Dispute Resolution Chamber (DRC) decisions when it imposes additional sanctions for the non-fulfilment of DRC decisions. The object of an appeal cannot extend beyond the limits of a review of the disciplinary sanction imposed by the FIFA Disciplinary Committee; hence, only submissions relating to the fine imposed by the FIFA Disciplinary Committee, such as its legal basis and quantum, can be considered.**
- 2. The enforcement measures enlisted in the FIFA Disciplinary Code (FDC) show and are understood as reflecting the great emphasis that FIFA places on the strict and timely compliance with and enforcement of its bodies' decisions. Article 64 of the FDC can in no way be interpreted to read that a fine imposed by the FDC may be subject to a later reduction or abatement if the outstanding payment is finally indeed made, however be it late. Considering that this provision does not provide for any other exception once the fine has been imposed, the fine may neither be reduced nor annulled on the basis of an ulterior payment by the debtor. The contrary would somehow undermine the dispute resolution and enforcement system as set out by the FIFA Statutes.**

Daejeon Citizen Football Club (the “Appellant”) is a professional football club in South Korea and is affiliated to the Korea Football Association, the governing body of football in South Korea, who in turn is a member of FIFA.

The Fédération Internationale de Football Association (FIFA, the “Respondent”), is the international sports federation governing the international football of all its member associations on a worldwide level. It exercises regulatory, supervisory, disciplinary and coordinating functions over national associations, clubs, officials and players, worldwide. FIFA is an association under Swiss law and has its seat in Zurich.

On 16 July 2009, the FIFA Dispute Resolution Chamber (DRC) issued a decision (the “DRC Decision”) against the Appellant and *inter alia* ordered Appellant to pay compensation in the amount of USD 75 000 to the player E. (the “Player”) as the Player’s outstanding salary. The Appellant was ordered to pay the aforementioned compensation within 30 days as from the date of notification of the DRC decision, along with 5% interest p.a. as of expiry of the 30 days’ time limit. The DRC further informed the Appellant that in the event the amount due to the Player was not paid by Appellant within the stated deadline, the matter would be submitted to the FIFA Disciplinary Committee (DC) for its consideration and decision.

Upon Appellant’s request, the grounds of the DRC Decision along with an instruction on the right to appeal to the CAS pursuant to Article 63 of the FIFA Statutes were notified to the Appellant via the Korean Football Association and to the Player on 19 October 2009.

No appeal against the DRC Decision was lodged before the CAS within the period of time set forth in the IFA Regulations to lodge an appeal. By this, the DRC Decision became final and binding.

The Appellant failed to pay the amounts ordered within the time-period set in the DRC decision.

Upon this failure, the FIFA DC opened disciplinary proceedings against the Appellant on 25 February 2010. On 23 March 2010, the Secretariat of the FIFA DC urged the Appellant to pay the outstanding amount by 1 April 2010.

By letter dated 1 April 2010, the Appellant voiced its concern whether its submission of 19 June 2009 had been considered seriously when the DRC issued its decision of 16 July 2009. In reply, the Secretariat of the FIFA DC, by letter dated 6 April 2010, informed the Appellant that the DRC Decision, notified to the parties on 19 October 2009, was final and binding. It further advised the Appellant that the disciplinary proceedings before the FIFA DC commenced pursuant to Article 64 of the FIFA Disciplinary Code (FDC) were merely in place in order to enforce final and binding decisions rendered by a FIFA body and that the DC could not review the substance of the DRC Decision. The Appellant was further informed that the current disciplinary proceedings against the Appellant submitted to the FIFA DC for evaluation on 14 April 2010.

On 14 April 2010, the FIFA DC found the Appellant guilty of failing to comply with a decision of a FIFA body in accordance with Article. 64 para. 1 of the FDC and notified this decision to the Appellant via the Korean Football Association and to the Player on 31 May 2010. The Appellant received this decision on 1 June 2010. Therein, the Appellant was ordered to pay a fine of CHF 10 000 to FIFA within 30 days as from notification of the decision. Furthermore, the Appellant was granted a final 30 day grace period as from the date of notification of the decision in which to settle its debt to the Player.

The FIFA DC also decided that should the Appellant fail to pay the aforementioned amounts within this final grace period, the Player may demand in writing to FIFA that points be deducted from the Appellant’s first team in the domestic league championship. Finally, if the Appellant continued to withhold payment of the aforementioned amounts still after the deduction of points, the FIFA DC would proceed to decide on a possible relegation of the Appellant’s first team to the next lower division.

The FIFA DC also noted that the DRC Decision had not been appealed by the Appellant and thus became final and binding.

On 18 June 2010, the Appellant filed an appeal at the Court of Arbitration for Sport (CAS) against the decision of the FIFA DC dated 14 April 2010 (the “Appealed Decision”), pursuant to Article R47 of the Code of Sports-related Arbitration (2010 edition) (the “Code”).

On 28 June 2010, the Appellant filed its Appeal Brief with the CAS. The Appellant’s legal reasoning may be briefly summarized, in essence, as follows:

- The Appellant argues that the fine imposed by the Appealed Decision is “*rather expensive*”, i.e. excessive. The Appellant refers to Article 64 para. 1 of the FDC wherein CHF 5 000 is the minimum fine stated and contends that the Respondent might have taken discretion to assess the amount fined somewhere within “*the range of CHF 5 000 to CHF 10 000*”.
- The Appellant requested a stay of the execution of the Appealed Decision on the grounds that the DRC misjudged the facts by its 16 July 2009 decision and thus incorrectly decided the latter case in favour of the Player. The salary awarded by the DRC Decision to the Player is allegedly not due.

Upon notification of the Statement of Appeal and Appeal Brief by the CAS’ letter of 29 June 2010, the Respondent by its letter of 2 July 2010 stated that it did not oppose the stay of execution as requested by the Appellant. Furthermore, the FIFA DC advised the Appellant and the Player that the disciplinary proceedings were suspended pending the outcome of the present CAS proceedings.

As the Appellant’s request for the stay of execution was unopposed by the Respondent, the request for stay was allowed *de facto* and no formal decision by the President of the CAS Appeals Division was required in accordance with Article R37 of the Code of Sports-related Arbitration (the “Code”).

The Respondent filed its Answer on 20 July 2010. The Respondent’s legal reasoning may be briefly summarized, in essence, as follows:

- The Respondent asks that the Appellant’s request for the reduction of the fine imposed by the FIFA DC be rejected. The Respondent argues that the fine of CHF 10 000 imposed is in line with the DC’s jurisprudence and is appropriate in light of the outstanding debt of USD 75 000 plus interest which had not even been partially paid by Appellant by 14 April 2010. Also, a smaller fine would contradict the purpose of the repression, prevention and encouragement of prompt fulfilment of debtors’ obligations.
- The Respondent further asks that the Appellant’s request for the CAS to review the substance of the case as judged upon by the DRC Decision be rejected. The Respondent argues that the FIFA DC cannot review or modify a decision of the relevant FIFA body as to its substance. Since the Appellant had failed to appeal the DRC Decision with the competent authority, i.e. the CAS within the given period of time for the appeal, the latter decision became final, binding and enforceable. The sole task of the FIFA DC’s is to review whether the Appellant had timely complied with the final and binding DRC Decision. In its deliberations, the FIFA DC would only have been allowed to take into

account new elements that arose after the DRC Decision. However, prior to the Appealed Decision being rendered, the Appellant never made any attempt to settle its debt of the payment of USD 75 000 and interest due to the Player. Thus, the FIFA DC rightfully sanctioned the Appellant for its non-compliance of the Appealed Decision. Furthermore, the object of the appeal before the CAS in this case cannot extend beyond the limits of a review whether the disciplinary sanction imposed by the FIFA DC was lawful and appropriate.

- Finally, the Respondent requests that the Appellant be ordered to bear all legal costs and expenses incurred with the Respondent in relation to the present procedure.

On 2 August 2010, the Appellant wired USD 75 000 to the account of the Player and notified the CAS of this payment – attaching the money transfer confirmation – of the principal amount awarded by the DRC’s 16 July 2009 decision (i.e. the salary to be paid to the Player). By the same letter, the Appellant requested CAS to reduce the fine of CHF 10 000 in consideration of this payment, “even though it is somewhat late”. In response thereto by letter dated 2 September 2010, the Respondent requested the Panel to disregard the Appellant’s letter of 31 August 2010 when making its decision in accordance with the provisions of Article R44.1 of the Code.

In accordance with Article R57 of the Code – and upon consultation of the parties through their respective letters of 28 and 22 July 2010 – the parties were advised by the CAS’ letter dated 14 September 2010 that the Panel would issue an award on the basis of the parties’ written submissions. By their signature of the Order of Procedure on 11 October 2010, the parties agreed that this matter be decided on the basis of the parties’ written submissions only and confirmed the CAS’ jurisdiction.

LAW

CAS Jurisdiction and Application of the Procedural Rules of the Code

1. The jurisdiction of the CAS has not been disputed by either party to these proceedings and derives from Article 63 para 1 of the FIFA Statutes and Article 64 para 5 of the FDC.
2. Pursuant to Article R27 of the Code, the procedural rules of the Code apply whenever the parties have agreed to refer a sports-related dispute to the CAS. Article 62 para. 2 of the FIFA Statutes provides that the provisions of the Code shall apply to the proceedings at CAS. Hence, the Code is applicable to the present case.

Admissibility of the Appeal

3. The Appellant's Appeal was filed within the deadline of 21 days of notification of the decision in question as set forth by the Article 63 para. 1 of the FIFA Statutes and Article 64 para. 5 of the FDC.
4. The Appeal complies with all further requirements provided by Article R48 of the Code. It follows that the Appeal is admissible.

Applicable Law

5. Article R58 of the Code provides as follows:
"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 or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".
6. According to Article 62 para. 2 of the FIFA Statutes, the substantive law primarily applied by the CAS shall thus be the various FIFA regulations and, additionally, Swiss law.
7. The Appealed Decision was issued by the FIFA Disciplinary Committee which is a body of FIFA which is located in Zurich, Switzerland. Therefore, the substantive law applicable to the merits is the various FIFA regulations and, additionally, Swiss law.

Merits of the Appeal

8. The Appellant's requests for relief as contained in its Statement of Appeal and its Appeal Brief, in conjunction with its letter of 31 August 2010, is basically threefold:
 - A. *Pending the CAS's decision, the Appellant requests a stay of the execution of the Appealed Decision;*
 - B. *Appellant appeals against the Appealed Decision sanctioning Appellant's failure to perform payment in accordance with the 16 July 2009 DRC decision, due to the alleged substantive incorrectness of the 16 July 2009 DRC decision;*
 - C. *The Appellant requests the reduction of the fine of CHF 10 000 imposed by the DC on the basis of its 2 August 2010 payment of USD 75 000 to the Player as well as on grounds that the amount of the fine is excessive in view of the range allowed for by Article 64 para. 1 FDC.*
9. The Panel will examine the Appellant's requests in the order stated above.

A. The Appellant's request for a stay of execution

10. According to Article 63 para. 4 of the FIFA Statutes, an appeal shall not generally have a suspensive effect but the appropriate FIFA body or, alternatively, CAS may order the appeal to have a suspensive effect.
11. The Respondent, by its letter of 2 July 2010, stated that it did not oppose the stay of execution as requested by the Appellant. Furthermore, by its letter of 2 July 2010, the FIFA DC advised the Appellant and the Player that the disciplinary proceedings were suspended pending the outcome of the current proceedings before the CAS. Therefore, the appropriate FIFA body, i.e. the FIFA DC decided to *de facto* to stay the execution of the Appealed Decision and thereby the Appeal acquires a suspensive effect. Therefore, in view of Appellant's request for a stay of execution having been dealt with by the appropriate FIFA body, this Panel is not required to take any other decision in this respect.

B. The Appellant's request for substantive review of the 16 July 2009 DRC decision

12. In its Appeal Brief, the Appellant argues substantive incorrectness underlying the DRC Decision dated 16 July 2009. The Respondent requests the CAS to reject the Appellant's appeal in this respect, considering that the DRC decision is final, binding and thus enforceable.
13. To the Panel, it is clear from the subject heading of the Statement of Appeal which only mentions the Decision "100055 PST KOR ZH", i.e. the Appealed Decision, that the Appellant solely appeals against the Appealed decision.
14. Furthermore, pursuant to Article 63 para. 1 of the FIFA Statutes, appeals against final decisions passed by FIFA's legal bodies shall be lodged with CAS within 21 days of notification of the decision in question. In accordance with Article 90 para. 2 of the FDC, the time limit to lodge an appeal against the DRC decision (notified to Appellant's association on 19 October 2009) thus started on 23 October 2009 and ended on 12 November 2009. Given that the Appellant did not lodge any appeal against the DRC Decision, and that the deadline to lodge such an appeal expired on 12 November 2009, the DRC decision is final and binding. Pursuant to Article 59 para. 2 of the FIFA Statutes, the functions of the DC are governed by the FDC. Articles 76 and 77 of the FDC define the jurisdiction of the DC which accordingly includes:
 - i) the sanctioning of any breach of FIFA regulations which does not come under the jurisdiction of another body (Article 76 FDC);
 - ii) as well as the sanctioning of serious infringements that escaped the match officials' attention; the rectifying of obvious errors in the referee's disciplinary decisions; the extension of automatic match suspension and the issuance of additional sanctions, such as fines (Article 77 a) to d) FDC).
15. Pursuant to the above, the DC as a FIFA sanctioning and enforcement body lacks the competence to review the substance of final and binding DRC decisions when it imposes additional sanctions for the non-fulfilment of DRC decisions in accordance with Article 77 d)

of the FDC. Instead, the DRC decisions are subject to a separate appeal before the CAS in accordance with Article 63 of the FIFA Statutes. As the Panel notes above, no timely appeal against the DRC Decision was filed by the Appellant with the CAS. Given that this Appeal deals with the decision of the DC dated 14 April 2010 and that the DC decision was not timely appealed, the Panel in this case will not examine the Appellant's arguments as to the substance of the DRC Decision.

16. The fine imposed by the Appealed Decision relates to the Appellant's failure to comply with the DRC Decision within the time limits fixed and was issued in accordance with the FIFA enforcement system as prescribed by Article 64 para. 1 (a) of the FDC.
17. In CAS 2008/A/1610 which presented facts similar to those at hand, the Panel confirmed that:
"the object of [an] appeal cannot extend beyond the limits of a review of the disciplinary sanction imposed by the FIFA Disciplinary Committee, hence, only submissions relating to the fine imposed by the FDC, such as its legal basis and quantum, can be considered. The Panel cannot consider requests concerning the debt owed by Appellant, the issues relating thereto having been decided by the FDC decision which is final and binding".
18. As a result, only submissions relating to the fine imposed by the DC, such as its legal basis and quantum, can be heard (CAS 2005/A/957; CAS 2006/A/1008).
19. The Panel, however, considers that, it is anyway not required to deal with the Appellant's arguments as to substance. The Panel infers from the Appellant's letter of 31 August 2010 that the Appellant actually withdrew its arguments as to the substance of the DRC Decision. By the aforementioned letter, the Appellant made reference to the Respondent's Answer and informed the CAS that on 2 August 2010, it had wired to the Player the principal amount awarded to the Player by the DRC Decision. However, the Panel notes that the interest due to the Player is still outstanding. The fact that the Appellant partially conforms to the DRC Decision with no formal statement that this payment is made without prejudice to its right to request the pay back of the amount pending the decision in this proceedings may be construed by the Panel as a waiver of the Appellant's argument as to the substantive incorrectness of the DRC's Decision by the Panel. Nevertheless, in the specific circumstances of this case this consideration will remain as an *obiter dictum*.
20. In conclusion, The Panel finds that the scope of its review of the Appealed Decision must be delineated. The Panel holds that the contentions as to the substance of the DRC Decision as invoked by the Appellant are facially untenable as grounds of appeal against the Appealed Decision. The issues relating thereto have been decided by the final and binding DRC Decision. Such grounds of substance are precluded by the *res indicata* effect of the DRC Decision. They cannot be re-heard now, at the stage of enforcement of the Appellant's obligation to pay. The Panel holds that the object of this appeal cannot extend beyond the limits of a review of the disciplinary sanction imposed by the DC.

C. *The Appellant's request to reduce the fine imposed by the DC*

21. The Appellant requests a reduction of the fine of CHF 10 000 imposed by the Appealed Decision (a) on the ground that the fine is excessive and (b) on the basis of its 2 August 2010 payment of USD 75 000 to the Player.

(a) Request for a reduction of the fine due to it being excessive

22. The Respondent argues that the sanction is appropriate and that the Appellant's late payment should not have any impact on the DC's sanction since this sanction was imposed for the Appellant's non-payment of the debt within the time limits fixed by the DRC and any facts including the late payment, which occurred after the decision of the DC should be disregarded.

23. The fine was imposed by the DC in accordance with Article 64 para. 1 (a) of the FDC. In accordance with Article 64 in conjunction with Article 15 para. 2 FDC, the DC possesses the discretion to impose a fine within the range of CHF 5 000 (as the minimum) and CHF 1 000 000 (as the maximum) as it deems appropriate in the circumstances. The Panel considers that the fine of CHF 10 000 does not seem to be oppressive and appears to be justified by the attitude of the Appellant to materially delay the payments due to the Player. The amount of CHF 10 000 as determined by the Appealed Decision cannot be said to be disproportional in light of the purpose for which it was imposed. The purpose of the fine is to serve as a deterrent to parties who do not wish to comply with decisions of FIFA bodies. The fact that the Appellant, for nearly one year after the DRC Decision, made no effort whatsoever to even partially pay the amount due to the Player, and did it only after the Player approached the DC and asked for the deduction of points to be imposed on the Appellant, suggests the need for a relatively severe sanction by the DC.

24. In these circumstances and in light of the conduct of the Appellant, the Panel is of the opinion that the fine was even low, however since FIFA itself considered the fine to be proportional, there is no need to discuss any further this question.

25. The Appellant's request to reduce the fine due to its allegedly excessive nature is thus rejected by the Panel.

(b) Request for a reduction of the fine due to the Appellant's payment to the Player on 2 August 2010.

27. Section 8 of the FDC specifically caters to the parties' failure to respect decisions of FIFA bodies. The consecutive enforcement measures enlisted in Article 64 para. 1 to 4 of the FDC show and are understood by the Panel as reflecting the great emphasis that FIFA places on the strict and timely compliance with and enforcement of its bodies' decisions.

28. At the time the FIFA DC rendered its Decision, the Appellant had not performed any part of the orders of the DRC Decision. Furthermore, at this point in time, the time limits for the

Appellant's respective performance had expired and the additional reminders by the Secretariat of the DC had remained without effect. Therefore, in view of the Appellant's non-compliance with the DRC Decision, the Panel concludes that the preconditions for the fine to be imposed on the Appellant by the DC had been met and that the Appealed Decision was lawfully rendered by the FIFA DC.

29. The Appellant argues that the payment of the principal amount due to the Player in terms of the DRC Decision that the Appellant wired to the Player on 2 August 2010 – and thus after enforcement of the DRC Decision by the Appealed Decision – should result in a reduction of the fine. In this regard, the Panel holds that the Appellant's late payment made after the rendering of the Appealed Decision cannot have any effect on the amount of the fine imposed, particularly in light of the fact that no explanations or justifications whatsoever were provided by the Appellant that may potentially excuse the fact that this payment was only made belatedly on 2 August 2010. Furthermore, it is clear for the Panel that the real motivation for this late payment at the time it was paid was the fact that the Player requested the DC to impose the deduction of points on the Appellant (the request of the Player was made on July 26 and the payment was made on August 2nd).
30. Article 64 of the FDC can in no way be interpreted to read that a fine imposed by the DC may be subject to a later reduction or abatement if the outstanding payment is finally indeed made, however be it late. Considering that Article 64 of the FDC does not provide for any other exception once the fine has been imposed, the Panel holds that the DC's fine may neither be reduced nor annulled on the basis of the Appellant's payment of 2 August 2010. This is due to the fact that the Appellant had yet to perform with regard to the stipulated terms of the DRC Decision at the time of the fine's imposition on 14 April 2010.
31. Whether a substantially late payment may serve to reduce a DC fine is also a question of policy. In this respect the Panel fully embraces the submission of FIFA i.e. If the Appellant's late payment were accepted as "*mitigating circumstances*" to reduce the fine, this would provoke a trend for debtors to disrespect the decisions of the DRC or other FIFA bodies and to only pay prior to the rendering of the CAS' decision in the appeal proceedings on the fine. Debtors would then become reliant on the later reduction of fines imposed by the DC. This would somehow undermine the dispute resolution and enforcement system as set out by the FIFA Statutes and Article 64 of the FDC. This Panel holds that this cannot have been the intention of the drafters of Article 64 of the FDC.
32. The Appellant's request to reduce the fine due to its payment of the principal amount of the 16 July 2009 DRC decision by 2 August 2010 is thus rejected.

The Court of Arbitration for Sport rules:

1. The appeal filed by Daejeon Citizen Football Club against the decision of the FIFA Disciplinary Committee dated 14 April 2010 is rejected.
2. The decision adopted on 14 April 2010 by the FIFA Disciplinary Committee is confirmed.
3. (...).
4. (...).
5. All other or further claims are dismissed.