



Arbitration CAS 2018/A/5596 Club Al Arabi SC v. KSC Lokeren & Fédération Internationale de Football Association (FIFA), award of 14 May 2018

Panel: Prof. Luigi Fumagalli (Italy), President; Mr Rui Botica Santos (Portugal); The Hon. Michael Beloff QC (United Kingdom)

Football

Disciplinary sanction for failure to comply with a previous decision

Condition of admissibility of an appeal to the CAS

Burden of proof that a telefax did not reach a party

Principle of legal certainty

1. **In order to be admissible, an appeal to CAS against the decision of the FIFA disciplinary committee has to be lodged within 21 days of the notification of its grounds.**
2. **When the telefax report shows that the facsimile went regularly through, the burden of proof to establish that the telefax did not reach a party must fall on that party itself. If no evidence (beyond bare assertion) is provided of any technical failure which allegedly prevented the fax transmission, the burden of proof is not discharged.**
3. **The principle of legal certainty provides that justice must be sought in any forum according to the rules governing its administration. The rule in CAS proceedings (as well as in any other appellate system) is that an appeal must be filed within a given (and reasonable) deadline. If the time limit has been missed, without any evidence justifying the delay, the appeal must fail.**

I. THE PARTIES

1. Club Al Arabi SC (“Al Arabi” or the “Appellant”) is a football club with seat in Doha, Qatar. It is affiliated to the Qatar Football Association (“QFA”), which is a member of the Fédération Internationale de Football Association (FIFA).
2. Koninklijke Sporting Club Lokeren Oost-Vlaanderen (“Lokeren” or the “First Respondent”) is a football club with seat in Lokeren, Belgium, affiliated to the Union Royale Belge des Sociétés de Football-Association (“URBSFA”), which in turn is also a member of Fédération International de Football Association.
3. The Fédération Internationale de Football Association (“FIFA” or the “Second Respondent”) is an association under Swiss law. Its registered office is in Zurich, Switzerland. FIFA is the global governing body for the sport of football. It exercises regulatory, supervisory and

disciplinary functions over continental federations, national associations, clubs, officials and football players worldwide.

4. Al Arabi, Lokeren and FIFA are hereinafter referred to as the “Parties”; Lokeren and FIFA are the Respondents.

II. BACKGROUND FACTS

5. Below is a summary of the main relevant facts and allegations based on the Parties’ written submissions and evidence adduced during these proceedings. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, he refers in this award only to the submissions and evidence he considers necessary to explain his reasoning.
6. On 17 January 2017, the Single Judge of the FIFA Players’ Status Committee (the “Single Judge”) issued a decision (the “Decision of the Single Judge”) ordering Al Arabi to pay Lokeren the amount of EUR 1,500,000, plus interest and costs, within 30 days of such decision.
7. On 30 January 2017, the Decision of the Single Judge was notified to Al Arabi. Al Arabi did not request that the grounds of such decision be communicated. The Decision of the Single Judge, therefore, became final.
8. On 24 October 2017, the Secretariat to the FIFA Disciplinary Committee opened disciplinary proceedings against Al Arabi, noting that it had failed to comply with the Decision of the Single Judge, and inviting it to settle the debt to Lokeren by 7 November 2017.
9. On 8 November 2017, Lokeren confirmed to FIFA that no payment had been received.
10. On 8 November 2017, therefore, a member of the FIFA Disciplinary Committee (the “DC Member”), acting pursuant to Article 78 par. 2 of the FIFA Disciplinary Code (the “Disciplinary Code”), issued a decision (the “Decision of the DC Member”) as follows:

- “1. *The club Al Arabi SC is pronounced guilty of failing to comply with the decision passed by the Single Judge of the Players’ Status Committee on 17 January 2017 and is, therefore, in violation of art. 64 of the FIFA Disciplinary Code.*
2. *The club Al Arabi SC is ordered to pay a fine to the amount of CHF 30,000. The fine is to be paid within 90 days of notification of the present decision. Payment can be made either in Swiss francs (CHF) to account no ... or in US dollars (USD) to account no*
3. *The club Al Arabi SC is granted a final period of grace of 90 days as from notification of the present decision in which to settle its debt to the creditor, the club KSC Lokeren OV.*
4. *If payment is not made by this deadline, the creditor may demand in writing from the secretariat to the FIFA Disciplinary Committee that six (6) points be deducted from the debtor’s first team in the domestic*

league championship. Once the creditor has filed this request, the points will be deducted automatically without a further formal decision having to be taken by the FIFA Disciplinary Committee. The order to implement the points deduction will be issued on the association concerned by the secretariat to the FIFA Disciplinary Committee.

5. *If the club Al Arabi SC still fails to pay the amount due even after deduction of the points in accordance with point 4. above, the FIFA Disciplinary Committee will decide on a possible relegation of the debtor's first team to the next lower division.*
 6. *As a member of FIFA, the Qatar Football Association is reminded of its duty to implement this decision and, if so requested, provide FIFA with proof that the points have been deducted. If the Qatar Football Association does not comply with this decision despite being ordered to do so, the FIFA Disciplinary Committee will decide on appropriate sanctions on the member. This can lead to expulsion from all FIFA competitions.*
 7. *The costs of these proceedings amounting to CHF 3,000 are to be borne by the club Al Arabi SC and shall be paid according to the modalities stipulated under point 2. above.*
 8. *The creditor is directed to notify the secretariat to the FIFA Disciplinary Committee of every payment received”.*
11. On 15 November 2017 the operative part of the Decision of the DC Member was notified by fax to Al Arabi (*i.e.*, via the QFA to the fax number +974 44 75 4300). and to Lokeren
 12. On 20 November 2017, Mr Nilo Effori, writing on behalf of Al Arabi, requested FIFA to communicate the grounds of the Decision of the DC Member. Mr Effori provided FIFA with copy of the power of attorney granted him by Al Arabi.
 13. On 12 December 2017, the grounds of the Decision of the DC member were issued. They read, in the relevant portion, as follows:
 - “5. *In the case at stake, the member of the Committee notes that the findings of the decision passed by the Single Judge of the Players’ Status Committee on 17 January 2017 had been duly communicated on 30 January 2017 to the debtor and that no grounds of the decision rendered by the Single Judge of the Players’ Status Committee had been requested within ten days of receipt of notification of the findings of the decision. Therefore, the decision became final and binding.*
 6. *... the member of the Committee is not allowed to analyse the case decided by the Single Judge of the Players’ Status Committee as to the substance, in other words, to check the correctness of the amount ordered to be paid, but has as a sole task to analyse if the debtor complied with the final and binding decision rendered by the Single Judge of the Players’ Status Committee. ...*
 8. *As the debtor did not comply with the decision passed by the Single Judge of the Players’ Status Committee on 17 January 2017 and is consequently withholding money from the creditor, it is considered guilty under the terms of art. 64 of the FDC.*
 9. *The fine to be imposed under ... art. 64 par. 1 a) of the FDC shall range between CHF 300 and CHF*

1,000,000. The debtor withheld the amount unlawfully from the creditor. Even FIFA's attempts to urge the debtor to fulfil its financial obligations failed to induce it to pay the total amount due. In view of all the circumstances pertaining to the present case and by taking into account the outstanding amount due, the member of the Committee regards a fine amounting to CHF 30,000 as appropriate. This amount complies with the Committee's established practice.

10. In application of art. 64 par. 1 b) of the FDC, the member of the Committee considers a final deadline of 90 days as appropriate for the amount due to be paid to the creditor.
11. In accordance with art. 64 par. 1 c) of the FDC, the debtor will be warned and notified that, in the case of default within the period stipulated, points will be deducted or demotion to a lower division be ordered. A deduction of points will occur if the creditor informs the secretariat to the FIFA Disciplinary Committee of the non-payment within the stipulated deadline and demands in writing that points be deducted from the debtor's first team in the national league. Once the creditor has filed this request, the points will be deducted automatically without a further formal decision having to be taken by the Committee. The order to implement the deduction of points will be issued on the association concerned by the secretariat to the FIFA Disciplinary Committee.
12. With regard to the amount of points to be deducted, art. 64 par. 3 of the FDC is applicable, whereby the number of points deducted must be proportionate to the amount owed. In the light of the foregoing criteria, regarding the amount of the fine to be imposed and in keeping with the Committee's well-established practice, a deduction of six (6) points is considered appropriate ...".
14. FIFA states that the grounds of the Decision of the DC Member were notified on 12 December 2017 for Al Arabi via fax to Mr Effori (+44 20 30 31 1150) and to the QFA (+974 44 75 43 00). Al Arabi denies receipt of such notification and states that it received the Decision of the DC Member with grounds only on 6 February 2018. In fact:
 - i. on 5 February 2018, the Appellant in a letter to FIFA requested "*once again the grounds of the decision communicated on 15 November 2017 ... since we have not received the fax message with said grounds (nor has the Club) despite the fact that we were informed today via telephone by the FIFA Disciplinary Committee that the grounds have been previously sent via fax*";
 - ii. on 6 February 2018, FIFA transmitted to Al Arabi for information and on a without prejudice basis a copy of the Decision of the DC Member, confirming, at the same time, that its grounds had been notified on 12 December 2017 by fax sent also to the number provided by Mr Effori.

III. THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

15. On 26 February 2018, pursuant to Article R47 of the Code of Sports-related Arbitration (the "Code"), Al Arabi filed with the Court of Arbitration for Sport ("CAS") a statement of appeal against the Decision of the DC Member. The statement of appeal contained, *inter alia*, the nomination of Mr Rui Botica Santos as an arbitrator.
16. On 7 March 2018, the CAS Court Office forwarded the statement of appeal to the Respondents.

17. On 7 March 2018, the Appellant requested an extension of the deadline to file its appeal brief. In support of such request, the Appellant indicated that on 28 February 2018 and on 2 March 2018 it had requested from the IT company which provides e-fax services an activity report concerning *“a possible e-fax message that was not received apparently on 12 December 2017 from the following sender: FIFA +41 43 2227878. The document contained 8 pages”*.
18. On 9 March 2018, the First Respondent objected to its standing to be sued with respect to the Decision of the DC Member.
19. On 12 March 2018, FIFA objected to the admissibility of the Appellant’s appeal and requested the CAS to render a preliminary decision on the point *“in order to terminate the present appeal procedure”*. In such letter, in addition, FIFA informed the CAS Court Office of the joint nomination by the Respondents of The Hon. Michael J. Beloff, QC as an arbitrator.
20. On 12 April 2018, the Appellant filed its appeal brief pursuant to Article R51 of the Code.
21. On 13 March 2018, the CAS Court Office invited the Appellant to comment on the Respondents’ objections of inadmissibility of the appeal.
22. On 19 March 2018, the Appellant addressed the Respondents’ objections, indicating that it maintained Lokeren as a respondent and insisting that its appeal against the Decision of the DC Member was admissible.
23. On 21 March 2018, the Parties were informed by the CAS Court Office that the issue of the admissibility of the appeal would be decided by the Panel, once constituted, and that in the meantime the appeal brief filed by the Appellant would not be notified to the Respondents.
24. On 16 April 2018, pursuant to Article R54 of the Code, the CAS Court Office, on behalf of the President of the CAS Appeals Arbitration Division, informed the Parties that the Panel appointed to hear the dispute between the Parties was constituted as follows: Professor Luigi Fumagalli, President; Mr Rui Botica Santos and The Hon. Michael Beloff QC, Arbitrators.
25. On 20 April 2018, the CAS Court Office informed the Appellant that the Panel had decided to grant it a deadline for a final submission strictly limited to the admissibility of the appeal.
26. On 27 April 2018, the Appellant provided its submission, as requested by the Panel.
27. On 30 April 2018, the CAS Court Office informed the Parties that the Panel would rule on the admissibility of the appeal as a preliminary matter.

IV. THE POSITION OF THE PARTIES

28. The following outline of the Parties’ positions is illustrative only and does not necessarily comprise every submission advanced by the Parties. The Panel confirms, however, that it has carefully considered all the submissions made by the Parties with respect to the admissibility of the appeal, which is the object of the present award, whether or not there is specific reference

to them in the following summary.

A. The Position of the Appellant

29. In its statement of appeal, the Club requested the CAS:

- “(a) to the present appeal to be admissible [sic];*
- (b) to change the sanction imposed by the FIFA Disciplinary Committee from 90 days to a minimum of 120 days to pay the amount owed;*
- (c) to change the consequence for the non-payment to only 3 (three) points initially to be deducted in the national league, instead of 6 (six);*
- (d) an order for the Respondents to bear the entire costs of these arbitration proceedings;*
- (e) an order for the Respondents to bear the entire costs of the Appellant’s legal costs and expenses with the present arbitration proceedings”.*

30. In support of the admissibility of its appeal, the Appellant contends that it did not receive the fax message sent by FIFA on 12 December 2017 with the grounds of the Decision of the DC Member, which were received only on 6 February 2018. Therefore, the appeal filed on 26 February 2018 was timely.

31. In rebuttal of FIFA’s assertion that the appeal was out of time, the Appellant underlines that it contacted the IT company in charge of the e-fax services on 6 February 2018, immediately upon receipt of the grounds. However, its initial attempt at a contact by telephone proved unsuccessful. After further contact with said company, the Appellant was advised to send a written request, which it did on 26 February 2018. Therefore, it did not simply “seat” on the information received on 6 February 2018: the true position is that it was simply not able, despite its efforts, to receive evidentiary support from the IT company to demonstrate the activity on that particular period. In this respect, the Appellant underlines that it is important to understand that e-fax companies (such as the one used by the Appellant) have a two-stage delivery system, *i.e.* (i) the inbound message from the sender, received by the e-fax company and (ii) then the e-mail message sent by the e-fax company to its customer. This system has as its consequence that sometimes the in-bound message does not necessarily always go through via email.

32. In any case, the Appellant emphasizes that, although the IT company was not able to provide an activity report, a decision denying the admissibility of its appeal would amount to a denial of justice, *“pursuant to the CAS decision 2015/A/4213 of 5 January 2016”.*

B. The Position of the Respondents

B.1 The Position of the First Respondent

33. In its letter of 9 March 2018, Lokeren requested the Panel to dismiss the appeal filed by Al

Arabi, at least to the extent it was addressed to it, for lack of standing to be sued.

34. At the same time, with respect to the timeliness of the appeal, the First Respondent confirmed that it received by fax on 12 December 2017 the grounds of the Decision of the DC Member.

B.2 The Position of the Second Respondent

35. In the letter of 12 March 2018, FIFA requested the CAS:

“to pass a (preliminary) decision on the admissibility of the appeal in order to terminate the present appeal procedure (art. R49 of the Code)”.

36. It is in fact the FIFA’s position that the appeal is out of time, and therefore not admissible, as it was filed past the applicable deadline of 21 days of receipt of the notification of the grounds of the Decision of the DC Member.
37. In that respect, FIFA explains that the Decision of the DC Member was rendered on 8 November 2017 and notified by fax to the parties on 15 November 2017, and that upon request from the Appellant’s legal representative (Mr Effori) its grounds were notified by fax to the parties on 12 December 2017. In these circumstances, FIFA submits that, contrary to the allegations of the Appellant, the said grounds were, according to the fax delivery notification, duly notified, on 12 December 2017, to the legal representative of the Appellant to its fax number as provided by the latter on 20 November 2017. Furthermore, FIFA notes that a CAS Panel has previously confirmed that when *“the telefax report shows that the facsimile went regularly through [...], the burden of proof to establish that the telefax did not reach the Appellant must fall on the Appellant itself”* (CAS 2016/A/4718, para 69). In this case, the Appellant, on whom the burden lay, failed to provide evidence proving that the fax did not reach it. Therefore, its appeal must be dismissed.

V. JURISDICTION

38. CAS has jurisdiction to decide the present dispute between the parties.
39. In fact, the jurisdiction of CAS is not disputed by the Parties and is contemplated by Article 57 *et seq.* of the Statutes of FIFA.

VI. ADMISSIBILITY

40. The object of the present award, as indicated in the letter to the Parties of 30 April 2018, is the admissibility of the appeal filed by Al Arabi against the Decision of the DC Member. On the one hand the admissibility of the appeal is disputed by FIFA, which contends that it was lodged after the deadline for an appeal had expired, and is also objected to by Lokeren. On the other hand, the Appellant contends that the appeal was filed within the applicable deadline, counted from the moment on which it actually received the notification of the grounds of the Decision

of the DC Member, *i.e.* from 6 February 2018.

41. Under Article R49 of the Code:

“In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against”.

42. Article 58 para. 1 of the Statutes of FIFA in that connection confirms that:

“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”.

43. Article 116 para. 2 of the FDC, then, provides that:

“If a party requests the grounds of a decision, the motivated decision will be communicated to the parties in full, written form. The time limit to lodge an appeal, where applicable, begins upon receipt of this motivated decision”.

44. As a result, an appeal to CAS against the Decision of the DC Member, in order to be admissible had to be lodged within 21 days of the notification of its grounds (HAAS U., *The “Time Limit for Appeal” in Arbitration Proceedings before the Court of Arbitration for Sport*, in *CAS Bulletin*, 2/2011, 238).

45. In that respect, the Panel notes by way of prologue that:

- i. it is undisputed that the Appellant received the operative part of the Decision of the DC Member, following its transmission by fax on 15 November 2017 to the QFA (fax number +974 44 75 4300); in fact
- ii. it is also undisputed that on 20 November 2017, Mr Effori, writing on behalf of Al Arabi (on the basis of specific powers of attorney) requested that the grounds of the Decision of the DC Member be communicated to the parties; consequently
- iii. on 12 December 2017, the grounds of the Decision of the DC Member were adopted.

46. The Panel next observes that:

- i. the letter whereby Mr Effori on 20 November 2017 requested the communication of the grounds of the Decision of the DC Member was sent from the fax number +44 20 3031 1150, and contained the indication of Mr Effori’s fax number (+44 20 3031 1150):
 - in the fax transmission sheet,
 - in the letterhead of the request to FIFA, and
 - in the cover page of the power of attorney, next to the signature of the general manager of Al Arabi;

- ii. on 12 December 2017, FIFA sent the grounds of the Decision of the DC Member *inter alia* to Mr Effori to the fax number +44 20 3031 1150. FIFA also sent the same communication to the QFA to the same fax number (+974 44 75 4300) used on 15 November 2017, as well as to Lokeren;
 - iii. on 12 December 2017, Lokeren received the fax sent by FIFA.
47. Al Arabi claims that it did not receive the fax sent by FIFA: only in February 2018, when it contacted FIFA, did it become aware that the grounds of the Decision of the DC Member had been adopted on 12 December 2017. In support of its position, the Appellant refers to technical problems, consequent upon the peculiarities of the e-fax services with which Mr Effori is provided by an IT company and, which make it possible that the email message forwarding the fax received was not transmitted.
48. The Panel, however, remarks that the Appellant, did not provide (beyond his bare assertion) any evidence of any technical failure which allegedly prevented him from receiving the fax transmitted by FIFA. In addition, no explanation is given as to why and how, unlike the previous communication of 15 November 2017, the fax sent to the QFA did not reach Al Arabi. This Panel endorses the position, noted by FIFA, taken by a predecessor CAS Panel (CAS 2016/A/4718, para 69): when the telefax report shows that the facsimile went regularly through, the burden of proof to establish that the telefax did not reach the Appellant must fall on the Appellant itself.
49. In point of fact, FIFA established that on 12 December 2017 the fax containing the grounds of the Decision of the DC Member was sent *inter alia* to Mr Effori's fax number and to the QFA; the Appellant failed to establish that the telefax did not reach it. The Appellant has to bear the consequences of the failure to discharge its burden.
50. As a result, the Panel finds that, in the absence of contrary evidence, the grounds of the Decision of the DC Member were communicated to the Appellant on 12 December 2017. The appeal filed on 26 February 2018 is therefore manifestly late. Accordingly, it is not admissible, both with respect to FIFA and to Lokeren.
51. The Appellant submits that such conclusion would amount to a denial of justice. The Panel does not agree. To accede to such submission would be destructive of legal certainty. It is in fact a basic principle that justice must be sought in any forum according to the rules governing its administration. The rule in CAS proceedings (as well as in any other appellate system) is that an appeal must be filed within a given (and reasonable) deadline. The Appellant missed the time limit, without giving any evidence justifying its delay. Its appeal must therefore fail.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Club Arabi SC on 26 February with respect to the decision taken by a member of the Disciplinary Committee of the Fédération Internationale de Football Association on 8 November 2017 is not admissible.
2. (...).
3. (...).
4. All other motions or prayers for relief are dismissed.