



Arbitration CAS 2005/A/899 FC Aris Thessaloniki v. FIFA & New Panionios N.F.C., award of 15 July 2005

Panel: Mr Beat Hodler (Switzerland), President; Mr Jean-Philippe Rochat (Switzerland); Mr Michele Bernasconi (Switzerland)

Football

Definition of a decision

Enforcement authority of a FIFA decision

Jurisdiction of the CAS to hear a “premature decision”

- 1. In order to determine whether there exists a decision or not, the form of a communication has no relevance. In particular, the fact that the communication is made in the form of a letter does not rule out the possibility that it constitute a decision subject to appeal. What is decisive is whether there is a ruling – or, in the case of a denial of justice, an absence of ruling where there should have been a ruling – in the communication.**
- 2. The purpose of the letter which is only to inform a party of the applicable FIFA rules and of the competence of the FIFA Disciplinary Committee to address disciplinary issues and to pronounce sanctions cannot be considered as a decision.**
- 3. CAS has jurisdiction when all legal internal legal remedies have been exhausted before the appeal to CAS. In the absence of a final decision of FIFA, the Panel does not have jurisdiction to hear the case.**

On November 2004 when the FIFA Dispute Resolution Chamber upheld a monetary claim filed by two Players against New Panionios N.F.C. (“Panionios”), a Greek football club. Considering that Panionios did not pay the requested amounts to the Players, the FIFA Disciplinary Committee decided on 14 February 2005 to grant Panionios a final period of grace of thirty days for the payment of the outstanding amounts and also ruled that if such payments were not made within this time limit, 12 points (6 for each case) would be deducted from the points obtained by Panionios in the A Division of the Greek Football League. Panionios paid the amounts due to the Players but only after the expiration of the time limit fixed by the FIFA Disciplinary Committee. However, no points were deducted from Panionios’ first team. Thereafter, the FC Aris Thessaloniki (“FC Aris” or the “Appellant”), which was ranked 14th in the Greek Championship with 25 points and was relegated in second division while Panionios finished 11th with 35 points, filed a complaint with FIFA.

On 3 June 2005, the Appellant's counsel wrote to FIFA, namely to its Secretary General and to the Disciplinary Committee. In its letter, the Appellant submitted that both Panionios and the Hellenic Football Federation (HFF) had breached FIFA's decisions of 14 February 2005: Panionios, because it hired 5 players in breach of the ban imposed by FIFA; the HFF, because it failed to deduct 6 points from Panionios' first team. At that stage FC Aris was not yet aware of the fact that a second decision of the DRC was pending against Panionios. According to the Appellant, these violations seriously affected its own situation, since if the decisions had been complied with, FC Aris would have remained in first division and Panionios would have been relegated to the second division. On this basis, FC Aris made the following formal requests:

- that, within 10 days, the decisions of 14 February 2005 be enforced;
- that the Disciplinary Committee open new disciplinary proceedings against Panionios;
- that sanctions be imposed on the HFF for voluntarily distorting the first division championship.

On 6 June 2005, the FIFA administration replied that the execution of a decision taken by a FIFA body fell under the competence of the relevant member association, namely the Hellenic Football Federation.

FC Aris filed an appeal with the Court of Arbitration for Sport (CAS) on 8 June 2005 requesting in particular an order against FIFA to execute the decisions of its Disciplinary Committee by instructing the HFF and the Hellenic Football League to deduct 12 points from the club Panionios.

The CAS Panel in charge of this matter has considered that the letter issued by FIFA on 6 June 2005 did not constitute a decision against which an appeal could be filed. The purpose of that letter was only to inform FC Aris of the applicable FIFA rules and of the fact that the FIFA Disciplinary Committee was competent to address disciplinary issues and to pronounce sanctions. The CAS Panel noted that the FIFA administration had immediately transmitted the case to the FIFA Disciplinary Committee and thus did not commit a denial of justice. Considering that FC Aris has not exhausted all legal remedies internal to FIFA before the appeal to CAS, the Panel concluded that it had no jurisdiction to hear this case in the absence of a final decision of FIFA.

On 8 June 2005, the Appellant filed with the CAS a statement of appeal, which was to be considered as the appeal brief.

The Appellant submits that FIFA's letters of 6 and 7 June 2005 constitute decisions issued by FIFA, which can be appealed to CAS. As its argumentation on this point, the Appellant quotes the award issued by CAS on 17 March 2004 (CAS 2004/A/659) in another matter, where CAS ruled that a certain letter written by FIFA constituted a decision under Article R47 of the Code. The Appellant also explains that the form of the decision, a letter, is irrelevant, as the decisive criteria are related to the content of the decision, not its form, and decisions could be issued in the form of letters.

Concerning the merits of the dispute, the Appellant argues that FIFA cannot ignore the non-execution of its decisions by the HFF against Panionios and has an obligation to make sure that its

decisions are promptly and fully enforced, especially where the non-execution affects the sporting and financial rights/interests of an indirect member, such as the Appellant.

The Respondent filed an answer on 29 June 2005.

The Respondent submits that its letter of 6 June 2005 did not contain any decision against which an appeal could be lodged. On the contrary, this letter was only meant to inform the Appellant of the situation. As a consequence, according to the Respondent, there is no “*valid subject*” for an appeal to CAS.

Upon its request, the appeal and the answer were transmitted to Panionios, which was invited to lodge on the same day an application to participate in the arbitration together with its own answer. On 29 June 2005, Panionios sent a memorandum to CAS, presenting its position on the dispute and informing CAS that it intended to participate in the proceedings and attend the scheduled hearing.

Panionios states that it eventually paid its football players and, therefore, there is no legal reason for it to be punished.

A hearing was held in Lausanne on 4 July 2005.

LAW

Applicable Law and Regulations

1. Article R58 of 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 or according to the rules of law, which the Panel deems appropriate. [...]”

2. Article 59 para. 2 of the FIFA Statutes reads as follows:

“The CAS Code of Sports-Related Arbitration governs the arbitration proceedings. With regard to substance, CAS applies the various regulations of FIFA, Confederation, Members, Leagues and Clubs and, additionally, Swiss law”.

3. Thus, in the present matter, the applicable regulations are the FIFA regulations, more specifically the FIFA Statutes and the FIFA Disciplinary Code. Swiss law shall apply complementarily.

CAS Jurisdiction

4. According to Article R47 of the Code, an appeal may be filed before 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 provide for it and insofar as the available internal appeals have been exhausted.
5. Article 60 para. 1 of the FIFA Statutes provides the following:
“Only CAS is empowered to deal with appeals against decisions and disciplinary sanctions of the last instance, after all previous stages of appeal available at FIFA, Confederation, Member or League level have been exhausted. The appeal shall be made to CAS within 10 days of notification of the decision”.
6. In accordance with this provision, CAS only has jurisdiction to hear appeals against decisions, provided the disputed decision is final, i.e., all otherwise available stages of appeal have been exhausted. In particular, the decision against which the appeal is lodged must not be subject to an appeal before an internal body of FIFA.
7. In the present case, there is a dispute between the parties as to whether FIFA’s letter of 6 June 2005 is a decision. The Appellant’s position is that the letter contains a decision. As an alternative, the Appellant submits that if there is no decision in FIFA’s letter, there is a denial of justice, since the Appellant expressly requested FIFA to issue a decision in its formal request of 3 June 2005. On the other hand, the Respondent alleges that its letter of 6 June 2005 only had an informative character and contained no decision. On the issue of the denial of justice, the Respondent points out that, as mentioned in its letter, it is the Disciplinary Committee which is competent to hear the Appellant’s request and that the matter will indeed be handled by this Committee.
8. It is therefore necessary to determine whether the Respondent’s letter of 6 June 2005 is a decision, within the meaning of Articles R47 of the Code and 60 of the FIFA Statutes and in case it is to be considered as a decision, whether it is final or not.

A. Is the letter of 6 June 2005 a decision?
9. The applicable FIFA regulations, in particular the FIFA Statutes, do not provide any definition for the term “decision”. Thus, in accordance with Article R58 of the Code and Article 59 para. 2 of the FIFA Statutes, the issue must be examined under Swiss law.
10. According to Swiss case law related to administrative procedure, cited in CAS 2004/A/659, *“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”.*

11. Although administrative procedural rules are not directly applicable to decisions issued by private associations, the Panel considers that the principles set out in the above-mentioned CAS precedent correctly define the characteristic features of a decision.
 12. In principle, for a communication to be a decision, this communication must contain a ruling, whereby the body issuing the decision intends to affect the legal situation of the addressee of the decision or other parties. However, there can also be a decision where the body issues a ruling as to the admissibility or inadmissibility of a request, without addressing the merits of such request.
 13. In addition, if a body refuses without reasons to issue a decision or delays the issuance of a decision beyond a reasonable period of time, there can be a denial of justice, opening the way of an appeal against the absence of a decision (see TAS 97/169, in Digest of CAS Awards 1986-1998, p. 539). If the body considers that it does not have jurisdiction over a certain matter, there can thus be a denial of justice if that body does not rule on its jurisdiction within a reasonable period of time.
 14. The Panel considers that the form of the communication has no relevance to determine whether there exists a decision or not. In particular, the fact that the communication is made in the form of a letter does not rule out the possibility that it constitute a decision subject to appeal. The form may only be an indication of the intent of the body issuing the communication, which may be taken into consideration. However, the form is not sufficient to find whether there is a decision or not. On the other hand, and quite obviously, not all correspondence may be deemed as decisions that can be appealed against. What is decisive is whether there is a ruling – or, in the case of a denial of justice, an absence of ruling where there should have been a ruling – in the communication.
 15. In its letter of 6 June 2005, the Respondent informed the Appellant that the enforcement of its decision falls under the competence of the relevant member association, in this case the HFF. It further informed the Appellant that, concerning disciplinary procedures, it is at the Disciplinary Committee's discretion to decide whether a disciplinary procedure is to be opened.
 16. The Panel considers that this letter contains no ruling that affects the legal situation of the Appellant. It only contains information as to which association/body is competent to handle the Appellant's request. In this respect, the Appellant's options to seek relief from the competent bodies remain unaffected.
- B. *Does the absence of a decision constitute a denial of justice?*
17. Having found that the letter of 6 June 2005 is not a decision, the Panel must now address the issue whether the absence of a decision constitutes a denial of justice against which an appeal can be lodged.

18. On 3 June 2005, the Appellant made a formal request to FIFA, asking the Respondent to:
 - enforce its decisions of 14 February 2005;
 - open disciplinary proceedings against Panionios;
 - open disciplinary proceedings against the HFF.
19. Concerning the Appellant's first request, the Panel considers that there is no undue refusal to issue a decision by the Respondent for the following reasons:
20. It is undisputed that the Respondent does not have the power to directly enforce decisions affecting clubs. Clubs are not members of the Respondent and the latter has no direct authority over them. On the contrary, for enforcement purposes, the Respondent must rely on its members, the national football associations, which have an obligation to assist FIFA in enforcing these decisions, in accordance with Article 70 para. 2 of the FIFA Disciplinary Code and Article 13 para. 1 lit. a and d of the FIFA Statutes. The Respondent's enforcement powers in these cases are limited to sanctioning the national federations that do not provide this assistance, pursuant to Article 74 of the FIFA Disciplinary Code.
21. In the present case, the Respondent did formally request the HFF to enforce its decisions of 14 February 2005, by letter dated 21 March 2005. If the HFF has failed to do so, the Respondent has no further enforcement authority and its powers are limited to sanctioning the HFF for breach of FIFA's applicable rules, if appropriate.
22. As a consequence, the Respondent's indication that *"the execution of a decision taken by a FIFA body falls under the competence of the relevant member association"* and the suggestion to the Appellant to contact the HFF in this regard cannot be seen as a refusal to issue a decision on the Appellant's request. This is especially so since the Respondent had already done what it could do to enforce its decisions of 14 February 2005, as requested by the Appellant, by formally requesting the HFF to *"immediately execute the decision and to send us proof that the six points have been deducted from the club's first team"*.
23. The Panel notes that the Appellant itself also submitted the matter directly to the HFF bodies, on 6 June 2005.
24. Concerning the Appellant's second and third requests, related to the opening of disciplinary proceedings against the HFF and Panionios, the Panel also considers that there is no undue refusal to issue a decision by the Respondent.
25. In its letter of 6 June 2005, the Respondent stated that it is at the Disciplinary Committee's discretion to decide whether a disciplinary procedure is to open. During the hearing, the Respondent confirmed that the matter will be transmitted to the Disciplinary Committee and will be handled by the latter, which will decide whether or not to open a procedure.
26. According to the applicable rules, it is indeed the Disciplinary Committee which is competent to address disciplinary violations and to pronounce the sanctions described in the FIFA

Statutes and the Disciplinary Code (see Articles 56 and 57 para. 3 of the FIFA Statutes and Article 79 of the Disciplinary Code).

27. By informing the Appellant that it is the Disciplinary Committee that is competent to handle the matter, the Respondent did not make a decision on the opening or non-opening of a disciplinary procedure. This decision will be made by the Disciplinary Committee itself. For the time being, there is no decision or refusal to decide that can be appealed against before CAS.
28. The situation might be different if the Respondent had refused to transfer the matter to the Disciplinary Committee. Indeed, Article 115 of the FIFA Disciplinary Code provides that disciplinary infringements are automatically prosecuted and that any person or authority may report conduct that he or it considers incompatible with the regulations of FIFA to the judicial bodies. However, this is not the case in the matter at hand. On the contrary, during the hearing, the Respondent confirmed that the matter was being transmitted. Therefore, the Respondent's letter does not constitute a denial of justice against which an appeal can be lodged.
29. Nevertheless, another issue arises: in view of the urgency of the matter, did the Respondent commit a denial of justice by not dealing in a more expeditious manner with the Appellant's request? The Respondent explained during the hearing of 4 July 2005 that its administration had not yet transferred the matter to the Disciplinary Committee, but would do so shortly. The Respondent explained this delay by the fact that June was an extremely busy month, notably due to the Confederations Cup and the World Youth Championship.
30. In accordance with the rules set out above, there can be a denial of justice if a body delays the issuance of a decision beyond a reasonable period of time. In the present case, the Appellant's request to the Respondent is dated 3 June 2005. Its appeal was formed on 6 June 2005. The Panel considers that this three-day period was certainly not sufficiently long to constitute a denial of justice.
31. The Respondent stated during these proceedings that on 4 July 2005, i.e., one month after the Appellant's request, the matter had still not been transferred to the Disciplinary Committee. The Panel considers that, in the circumstances of the case, this does not yet constitute a denial of justice, taking also into account the fact that the Respondent confirmed at the hearing that this matter would now be pushed forward.
32. However, the Panel also considers that the Respondent should not delay any further the handling of the Appellant's request. It is undisputed that the Respondent's decisions of 14 February 2005 were not complied with and that the HFF did not enforce the sanctions set out in these decisions, as instructed by the Respondent in its letter of 21 March 2005. The Panel notes that on 19 April 2005, the Respondent wrote to the HFF that "*the above-referenced case [Player Adam Majewski, Poland/Club Panionios N.F.C., Greece] is closed as regards to the dispute between the parties, since the amount due has been paid*". In view of the explanations given by Mr Monteneri, who represented FIFA at the hearing, the Panel does not understand this letter as

meaning that the matter was also closed regarding the issue of the non-compliance with the Respondent's decisions.

33. In accordance with Article 115 of the FIFA Disciplinary Code, the Respondent must deal with the Appellant's complaints, in the manner provided for in the applicable rules.

C. Does this decision or absence of decision constitute a final decision?

34. According to Article 58 para. 3 of the FIFA Statutes and Article 124 of the FIFA Disciplinary Code, an appeal may be lodged to the Appeal Committee against any decision passed by the Disciplinary Committee, unless the sanction pronounced is a warning, a reprimand, a suspension for less than three matches or of up to two months, a fine of less than CHF 15,000 imposed on an association or a club, and of less than CHF 7,000 in other cases, or a decision based on Article 70 para. 1 of the FIFA Disciplinary Code. As long as a decision issued by the Disciplinary Committee – or a refusal to make a decision – can be appealed to the Appeal Committee, CAS does not have jurisdiction (see Articles R47 of the Code and 60 para. 1 of the FIFA Statutes).

35. Therefore, even assuming that the disputed letters of FIFA were to be considered as a decision, such decision would in any event not be final as it could still be appealed against with the FIFA Appeal Committee. It follows that CAS would not have jurisdiction to hear such a premature appeal against the “decision” at stake.

D. Conclusion

36. In view of the considerations set out above, the Panel considers that it does not have jurisdiction and that it cannot proceed with the Appellant's appeal.

The Court of Arbitration for Sport rules:

1. The Court of Arbitration for Sports has no jurisdiction to decide upon the appeal filed on 8 June 2005 by FC Aris Thessaloniki with regard to the letters issued on 6 and 7 June 2005 on behalf of the President of the FIFA Disciplinary Committee and of the Secretary General of FIFA.

(...)