



Arbitration CAS 2005/A/957 Clube Atlético Mineiro v. Fédération Internationale de Football Association (FIFA), award of 23 March 2006

Panel: Prof. Luigi Fumagalli (Italy), President; Mr Jan Paulsson (France); Mr Michele Bernasconi (Switzerland)

Football

Club and player failure to comply with a FIFA DRC decision and CAS award

FIFA disciplinary sanction

Financial joint liability

Compensation

1. When the proceedings involve an appeal against a disciplinary decision issued by a federation (FIFA), whose statutes provide for an appeal to the CAS, they are considered and treated as appeal arbitration proceedings in a disciplinary case, in the meaning and for the purposes of the Code. The object of such appeal cannot extend beyond the limits of a review of the disciplinary sanction imposed by the Disciplinary Committee. The Panel cannot consider the issues already decided by the final and binding CAS Award.
2. The application of a principle such as the principle of joint liability which has been imposed by the DRC Decision, and was confirmed by the CAS Award, in accordance with the applicable FIFA rules is final and cannot be reviewed. The imposition of a joint liability between debtors, e.g. by the FIFA Rules, is obviously intended to protect the creditor, to give it the possibility to obtain payment from any of the debtors without bearing the adverse effect of a possible failure and/or insolvency of one of them. The unilateral declaration of one of the joint debtors cannot affect the position of the creditor, depriving it of the possibility to seek payment from the “released” debtor.
3. For a set-off to take place it is necessary that two subjects are at the same time debtor and creditor to each other. The Appellant thus cannot claim to offset against the debt to the Club a credit it alleges to have towards someone else. Nor can the Appellant’s claim be treated as a request to have its debt to the Club satisfied by way of assignment of a credit, since such form of payment would in any case require the consent of the Club.

On 29 August 2005 the FIFA Disciplinary Committee (the “DC”), acting pursuant to Article 57.3 of the FIFA Statutes, issued a decision (the “DC Decision”) whereby:

- “1. *The player E. and the club Atlético Mineiro are pronounced guilty of failing to comply with a decision of a FIFA body in accordance with art. 70 FDC.*
2. *The player E. and the club Atlético Mineiro jointly responsible to pay a fine to the amount of CHF 30,000 within 30 days of notification of the decision.*

[...]

4. *If payment is not made by this deadline, the creditor may demand in writing of the FIFA Disciplinary Committee that 6 points be deducted from the club Atlético Mineiro’s first team in the domestic league championship. Once the creditor has made this request, the points are to be deducted mandatorily in any case.*
5. *If payment is still not made even after deduction of the points in accordance with point 4, the first team from the club Atlético Mineiro will be relegated to the next lower division.*
6. *If the payment is not made by the deadline (cf. III.3), the creditor may demand in writing of the FIFA Disciplinary Committee that a ban on any football activity is imposed on the player E. Such a ban lasts until the amount due is fully paid.*
7. *As a Member of FIFA, the Confederação Brasileira de Futebol is reminded of its duty to implement this decision and, if necessary, to produce proof to FIFA that the points have been deducted or the team has been relegated. If the Confederação Brasileira de Futebol does not comply with this decision despite being ordered to do so by the FIFA Disciplinary Committee, the latter will inflict an appropriate sanction on the Member. This can lead to expulsion from all FIFA competitions. [...]*”

The DC Decision was rendered pursuant to Article 70 of the FIFA Disciplinary Code adopted on 8 March 2005, in force since 1 May 2005 (the “FDC”), providing for sanctions on “*anyone who fails to pay to pay another person (such as a player, a coach or a club) a sum of money in full, even though instructed to do so by a body of FIFA*”. The DC found that the Club and E. (the “Player”) had failed to pay to Club Sinergia Deportiva (Tigres) of Mexico (the “Mexican Club”) an amount of money, payable by virtue of a decision rendered by the FIFA Dispute Resolution Chamber on 14 January 2004 (the “DRC Decision”) and of an award rendered on 2 May 2005 (the “CAS Award”) by the Court of Arbitration for Sport (CAS).

More specifically, the DC reasoned that:

- “1. *On 15 January 2004, the FIFA Dispute Resolution Chamber ordered the player E. to pay USD 1,000,000 to the club Sinergia Deportiva Tigres (creditor) within 30 days of notification of the decision. If the player E. fails to pay the decided amount within the set deadline, the club Atlético Mineiro is considered jointly responsible for the payment. [...]*
2. *On 2 May 2005, the Court of Arbitration for Sport decided that the player E. has to pay USD 750,000 to the Club Sinergia Deportiva Tigres. If the player E. fails to pay the aforementioned financial compensation to the Club Sinergia Deportiva within 30 days from notification, the Club Atlético Mineiro shall be deemed jointly responsible for such payment. [...]*

3. *On 7 July 2005, the secretary to the FIFA Disciplinary Committee opened a disciplinary procedure against the player E. and against the Club Atlético Mineiro for not complying with the decision taken by the Court of Arbitration for Sport on 2 May 2005, and asked the debtors to immediately pay the outstanding amount as well as to send a payment proof.*
4. *[...].*
5. *[...] Finally, the club Atlético Mineiro requested that:*
 - *the Committee shall decide for the validity of the release given by the player E. to the club Atlético Mineiro as stated in the enclosed exhibits;*
 - *the Committee shall decide that the responsibility for the payment of USD 750,000 shall only lie upon the player; if not*
 - *although the cases have different creditors and debtors, a set off agreement having the associations (CBF, FMF and FIGC) as interveners be settled by the parties upon a consent order of the Committee; if not*
 - *an extension of the time limit of the objected payment, as well as to be allowed to pay the amount in 10 monthly instalments;*
 - *if a fine is imposed, the minimum amount of CHF 5,000 shall be decided in view of the club's record".*

In light of Article 70 FDC, the DC emphasised that the CAS Award had clearly stated that if the Player had failed to pay the financial compensation to the Mexican Club within 30 days from notification, the Club was to be deemed jointly responsible for such payment. The DC noted that the Player had not paid the amount due, and that one joint debtor cannot exempt the other debtor from the latter's duty to the creditor. Otherwise, the situation of the creditor would be compromised without his consent. Consequently, both the Player and the Club were deemed jointly responsible to pay the relevant amount, as it was decided in the CAS Award.

The DC emphasised that the case referred to by the Club in order to set off its debt towards the Mexican Club was a different case with different debtors and creditors, and that *"an offsetting could not be decided by the Committee anyway"*.

The DC decided that a fine amounting to CHF 30,000 was appropriate, consistently *"with the Committee's long standing established practice"*. The DC considered that Article 70 FDC provides a minimum fine in the amount of CHF 5,000 (and a maximum amount of CHF 1,000,000, pursuant to Article 16.2 FDC). The DC fixed the fine in the light of the circumstance that the amount of money due to the Mexican Club was substantial, and that its non-payment could cause considerable financial difficulty for the creditor club.

The DC confirmed that the Club and the Player – both debtors to the Mexican Club – were jointly responsible for the payment of the fine.

In conclusion, the DC, in accordance with Article 70.1(c) FDC:

"warned and notified the Club ... that, in the case of default within the period stipulated, 6 points will be deducted corresponding to two lost matches or relegation to the next lower division be ordered..."

On 12 September 2005, the Club filed a statement of appeal with the CAS. With the statement of appeal the Club requested the CAS:

- “a) to stay the execution of the appealed decision until the final award is rendered by the arbitrators.*
- b) ... that if sanctioned with a fine it shall be calculated by its minimum amount of CHF 5,000 in view of Atlético’s record.*
- c) An extension of the time limit of the objected payment, as well as the division of the amount in 10 (ten) monthly parcels to be determined by the Disciplinary Committee”.*

On 22 September 2005, the Appellant filed its appeal brief.

In support of its request for relief, the Appellant invokes a declaration, signed by the Player. On this basis the Appellant argues that it was freed of any liability because of the Player’s purported exemption of any responsibility on the part of the Appellant arising out of the DC Decision and the CAS Award.

At the same time, and in support of its request of a set-off, the Appellant emphasised that it was creditor of an amount due by an Italian Club for an amount relating to the unpaid training compensation of a player, and stressed the difficult financial situation it was facing.

On 26 October 2005, FIFA filed its answer to the appeal brief.

A hearing was held in Lausanne on 15 February 2006. During the hearing, the Appellant made clear that its ultimate objective was to find a settlement with FIFA, so that the payment of the debt to the Mexican Club be rescheduled.

LAW

CAS Jurisdiction

1. The jurisdiction of CAS, which is not disputed, derives from Art. 59 ff. of the FIFA Statutes and Art. R47 of the Code. It is further confirmed by the Order of Procedure duly signed by the Parties.
2. According to Art. R57 of the Code, the Panel has full power to review the facts and the law of the case. Furthermore, the Panel may issue a new decision which replaces the decision challenged or may annul the decision and refer the case back to the previous instance.

Appeal Proceedings

3. As these proceedings involve an appeal against a disciplinary decision issued by a federation (FIFA), whose statutes provide for an appeal to the CAS, they are considered and treated as appeal arbitration proceedings in a disciplinary case, in the meaning and for the purposes of the Code.

Admissibility

4. The Player's statement of appeal was filed within the deadline set down in the FIFA Statutes and the DC Decision. No further recourse against the DC Decision, rendered in application of Article 70.1 FDC, is available within the structure of FIFA. Pursuant to Article 70.5 FDC:
"Any appeal against a decision passed in accordance with par. 1 shall immediately be lodged to CAS".
5. The Respondent contends that the appeal is not compliant with the Code, and should be *"disregarded"*, because the Appellant's *"sweeping"* reference to a communication to the DC does not constitute a sufficient statement of reasons.
6. The provisions of the Code relevant in this respect are the following:

Article R48 [*"Statement of Appeal"*]

"The Appellant shall submit to the CAS a statement of appeal containing:

- *the name and full address of the respondent;*
- *a copy of the decision appealed against;*
- *the Appellant's request for relief;*
- *the appointment of the arbitrator chosen by the Appellant from the CAS list, unless the parties have agreed to a Panel composed of a sole arbitrator;*
- *if applicable, an application to stay the execution of the decision appealed against, together with reasons;*
- *a copy of the provisions of the statutes or regulations or the specific agreement providing for appeal to the CAS.*

Upon filing the statement, the Appellant shall pay the Court Office fee provided for under Article R65.2.

If the above-mentioned requirements are not fulfilled when the statement of appeal is filed, the CAS Court Office shall grant once only a short deadline to the Appellant to complete his statement, failing which it shall be deemed withdrawn".

Article R51 [*“Appeal Brief”*]

“Within ten days following the expiry of the time limit for the appeal, the Appellant shall file with the CAS a brief stating the facts and legal arguments giving rise to the appeal, together with all exhibits and specification of other evidence upon which he intends to rely, failing which the appeal shall be deemed withdrawn.

In his written submissions, the Appellant shall specify any witnesses and experts whom he intends to call and state any other evidentiary measure which he requests. The witness statements, if any, shall be filed together with the appeal brief, unless the President of the Panel decides otherwise”.

7. These provisions clearly invite any Appellant to specify in its written submissions, *inter alia*, its request for relief and the reasons as to the fact and the law that support it. The purpose of such rule, designed to ensure the integrity of the proceedings and corresponding to an essential feature of the CAS arbitration, is to define – *ab initio* – the scope of the dispute submitted to arbitration, so that the issues to be determined can be easily identified. The rule is intended to be of assistance to the panel, which has to adjudicate on the issues identified by the appellant, and the respondent, who has to be afforded a proper opportunity to defend its case. Consequently, an appeal must be declared as inadmissible when no claim is brought by the appellant, or when no reasons are given to support the requests to the panel: otherwise, neither the panel nor the respondent would be in a position to know what, and why, is asked of them.
8. In the present case, however, the relief requested and the reasons invoked by the Appellant can indeed be identified on the basis of its written submissions, even though to some extent by reference to their exhibits. These requests and reasons were certainly understood by the Respondent, which was able to file a detailed answer.
9. Accordingly, the appeal is admissible.

Applicable Law

10. According to Article R58 of the Code, the Panel is required to 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”.
11. Pursuant to Article 59.2 of the FIFA Statutes:
“CAS applies the various regulations of FIFA or, if applicable, of the Confederations, Members, Leagues and clubs and, additionally, Swiss Law”.
12. In this case, accordingly, the FIFA rules and regulations fall to be applied primarily, with Swiss law applying subsidiarily.

13. The FDC rules relevant to these proceedings are the following:

Article 70 [*“Payment of sums of money”*]:

- “1. *Anyone who fails to pay another person (such as a player, a coach or a club) a sum of money in full, even though instructed to do so by a body of FIFA:*
- a) *will be sanctioned with a minimum fine of CHF 5,000 for failing to comply with the instructions issued by the body that imposed the payment (cf. art. 55 par. 1 c) of the FIFA Statutes);*
 - b) *will be given a final time limit by the judicial bodies of FIFA in which to settle the debt;*
 - c) *if it is a club, it will be warned and threatened with deduction of points or relegation to the next lower division if it has not paid by the final time limit.*
2. *If the club disregards the final time limit, the body will request the national association concerned to implement the threat.*
3. *If points are deducted, they shall be proportionate to the amount owed.*
4. *A ban on any football related activity may also be imposed against natural persons [...].”*

Article 16 [*“Fine”*]:

- “1. *A fine is issued in Swiss francs (CHF) or in US dollars (USD). It shall be paid in the same currency.*
2. *The fine shall not be less than CHF 300, or in the case of a competition subject to an age limit not less than CHF 200, and not more than 1,000,000.*
3. *The body that pronounces the sanction decides the terms and time limits for payment. If the fine is added to a match suspension, it shall be paid before the suspension has ended.*
4. *Associations are jointly liable for fines imposed on representative team players and officials. The same applies to clubs in respect of their players and officials. The fact that a natural person has left a club or association does not cancel out joint liability”.*
14. The Appellant challenges the DC Decision to impose a fine for the failure to comply with the DRC Decision and the CAS Award which finally confirmed its joint obligation, together with the Player, to pay a given amount of money (USD 750,000) to the Mexican Club. Having failed to pay within the deadline specified in the CAS Award, the Appellant was sanctioned by the Respondent pursuant to Article 70 FDC.
15. In support of its request to have the fine reduced to its minimum amount and divided in several instalments, as well as to have the time limit for payment extended, the Appellant invokes the three main reasons that, by letter dated 25 August 2005, had already been brought to the attention of FIFA in the framework of the disciplinary proceedings:
- i. the effects of a declaration rendered by the Player, exonerating the Club from joint responsibility towards the Mexican Club;

- ii. its claim to offset its debt towards the Mexican Club against a debt owed in its favour by another club;
 - iii. its difficult financial situation.
16. The Panel finds that the reasons invoked by the Appellant are facially untenable as grounds of appeal.
17. The object of this appeal cannot extend beyond the limits of a review of the disciplinary sanction imposed by the DC. The Panel cannot consider requests concerning the debt owed by the Appellant to the Mexican Club, the issues relating thereto having been decided by the final and binding CAS Award. As a result, only submissions relating to the fine imposed by the DC, such as its legal basis and quantum, can be heard. Any request by the Appellant to have its debt towards by the Mexican Club cancelled, postponed, rescheduled, or divided in several deferred portions, is precluded by the *res iudicata* implied in the CAS Award. It cannot be re-heard now, at the stage of enforcement of the obligation to pay.
18. The Player's declaration to the purported effect of exonerating the Club from the joint responsibility towards the Mexican Club cannot possibly constitute grounds for the modification of the fine imposed by the DC Decision.
19. The principle of joint liability was imposed by the DRC Decision, and was confirmed by the CAS Award, in accordance with the applicable FIFA rules. Its application is therefore final and cannot be reviewed in these proceedings.
20. At any rate, the Panel observes that the joint nature of the obligation to the Mexican Club could not be affected by the declaration of the Player, and cannot be considered as a reason justifying the non-payment by the Club of the debt to the Mexican Club. The imposition of a joint liability between debtors, e.g. by the FIFA Rules, is obviously intended to protect the creditor, to give it the possibility to obtain payment from any of the debtors without bearing the adverse effect of a possible failure and/or insolvency of one of them. The unilateral declaration of one of the joint debtors cannot affect the position of the creditor, depriving it of the possibility to seek payment from the "released" debtor. The declaration of the Player, therefore, has not cancelled the obligation of the Club towards the Mexican Club. And the DC rightly considered the Appellant in breach of its financial obligation to the Club, notwithstanding that declaration.
21. In the same way, the Panel finds that the obligation of the Club to pay the Mexican Club the amount indicated by the CAS Award is not affected by the claim of the Club to offset it against a credit of the Appellant towards another club. The conditions for a set-off are clearly not satisfied.

22. According to Art. 120 [“*Compensation*”] of the Swiss Code of Obligations (CO):

¹ *Lorsque deux personnes sont débitrices l'une envers l'autre de sommes d'argent ou d'autres prestations de même espèce, chacune des parties peut compenser sa dette avec sa créance, si les deux dettes sont exigibles.*

² *Le débiteur peut opposer la compensation même si sa créance est contestée.*

³ *La compensation d'une créance prescrite peut être invoquée, si la créance n'était pas éteinte par la prescription au moment où elle pouvait être compensée”.*

In an unofficial translation published by the Swiss-American Chamber of Commerce, Art. 120 CO is rendered as follows:

¹ *If two persons owe each other a sum of money or another performance where the subject of the performance is of the same kind, each may set off his obligation against his claim, provided that both claims are due.*

² *An obligor may claim set-off even if his counterclaim is contested.*

³ *A claim forfeited by the statute of limitations may set off, if at the time when it could have been set off against the other claim, it was not yet forfeited under the statute of limitations”.*

23. In other words, for a set-off to take place it is necessary that two subjects are at the same time debtor and creditor to each other. The Appellant thus cannot claim to offset against the debt to the Mexican Club a credit it alleges to have towards someone else. Nor can the Appellant's claim be treated as a request to have its debt to the Mexican Club satisfied by way of assignment of a credit, since such form of payment would in any case require the consent of the Mexican Club (Articles 164 CO). The DC, therefore, rightly considered the Appellant in breach of its financial obligation to the Club, unaffected by the mentioned request for a set-off.

24. Finally, the Panel confirms that the difficult financial situation alleged by the Appellant is not a justification for its failure to pay its debt to the Mexican Club. Lack of financial means to satisfy an obligation of payment does not excuse the failure to make the required payment. The DC, therefore, rightly considered the Appellant in breach of its financial obligation to the Club, irrespective of the financial situation of the debtor.

25. The Panel concludes that the conditions for a fine to be imposed on the Club, which breached its duty to make timely payment of the CAS Award, its debt to the Mexican Club, have been met. Moreover, the amount of the fine appears to be proportionate.

26. It is undisputed in the present case that the Appellant failed to pay another club a sum of money, even though instructed to do so by a body of FIFA. It is equally undisputed that the Club is to be deemed liable for the disciplinary violation, triggering the consequences set forth in Article 70.1 FDC. The Club did not dispute that the rule contained in Article 70 FDC applies also to the failure to comply with a CAS award, rendered on appeal against a decision of a FIFA body, ordering a person to pay another a sum of money. In this respect, the Panel notes that CAS awards – as recognized by the Swiss Federal Court – are final and binding

arbitral awards, enforceable as such by State courts, *inter alia*, on the basis also of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. At the same time, the Panel remarks that, pursuant to Article 61.1 of the FIFA Statutes, “*the Confederations, Members and Leagues shall agree... to ensure that members, affiliated Players and officials comply with the decisions passed by the CAS*”. In other words, all subjects affiliated to FIFA, including clubs and players, are bound to comply with awards issued by CAS. Therefore, although CAS is assuredly not “*a body of FIFA*”, its awards are to be considered, under the FIFA Statutes and from its perspective, to have the same effect as a decision issued by a body of FIFA. As a result, the failure to comply with a CAS award, in addition to the possible enforcement proceedings available at State level, exposes a party affiliated with FIFA also to a possible disciplinary proceeding, in accordance with Article 70 FDC. Any different interpretation would seriously impair the efficiency and effectiveness of the FIFA disciplinary system: appeal to the CAS is intended to secure an external review of the FIFA decisions, and cannot be construed as a way to obtain *per se*, even on the basis of frivolous appeals, an immunity from the disciplinary sanctions for non-compliance with obligations imposed by FIFA rules.

27. As to the amount of the fine, the Panel confirms that the DC Decision is consistent with Articles 16 and 70 FDC: the amount of the fine, set at CHF 30,000 in a scale ranging from CHF 5,000, which is the minimum amount pursuant to Article 70 FDC, to CHF 1,000,000, which is the maximum amount pursuant to Article 16 FDC, does not seem to be oppressive, and appears to be justified by the attitude of the Club, which made no efforts to settle its debts, and proportionate to the rather substantial amount (USD 750,000) owed to the Mexican Club.
28. In light of the foregoing, the Panel dismisses the appeal brought by the Club; the DC Decision is confirmed.

The Court of Arbitration for Sport rules:

1. The appeal filed by Clube Atlético Mineiro against the decision issued on 29 August 2005 by the FIFA Disciplinary Committee is dismissed.
2. The decision adopted on 29 August 2005 by the FIFA Disciplinary Committee is confirmed.
3. All other prayers for relief are dismissed.
4. (...).