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Case Overview: CAS 2018/A/5910 Club Al Arabi SC v. Adolfo Sormani & FIFA

Lombardi Associates successfully represented the coach Mr Adolfo Sormani in an appeal submitted by Qatari club Al Arabi SC (“Al Arabi”) to the Court of Arbitration for Sport (“CAS”) against a decision of the FIFA Disciplinary Committee.

Factual Background

On 14th July 2015, Mr Sormani and Al Arabi entered into an employment contract (the “Employment Contract”), according to which Al Arabi engaged Mr Sormani as an assistant coach for its first team for the 2015/2016 and 2016/2017 football seasons.

Al Arabi subsequently failed to pay certain monthly salaries and bonuses due to Mr Sormani, thereby violating its obligations under the Employment Contract.

On 20th July 2016, Mr Sormani filed a claim with FIFA against Al Arabi for unpaid remuneration and requested compensation for breach of contract. Such claim resulted in a decision being passed by the Single Judge of the Players’ Status Committee on 11th October 2016 (the “PSC Decision”).

Pursuant to the PSC Decision, Al Arabi had to pay Mr Sormani the amount of €391,999, plus specified interest, by 24th November 2016. Such amount included €181,666 in outstanding remuneration and €210,333 as compensation for breach of contract.

Neither of the parties requested the grounds of the PSC Decision, and therefore it became final and binding.

Mr Sormani subsequently informed FIFA that Al Arabi had failed to pay the amounts due by the relevant deadline, and therefore requested that the matter be referred to the FIFA disciplinary department so that disciplinary proceedings could be initiated and the FIFA Disciplinary Committee could enforce the PSC decision.

On 26th July 2017, Mr Sormani received a copy of Al Arabi's letter requesting the Department of Liquidations in Qatar to start bankruptcy proceedings¹.

On the back of this letter, on 31st July 2017 Mr Sormani accepted to enter into a settlement agreement (the "Settlement Agreement") whereby Al Arabi agreed to pay Mr Sormani the lump sum of €200,000 in full as final settlement of any and all claims arising out of the Employment Contract.

Clause 2 of the Settlement Agreement provided the deadline for payment:

"The amount sets out in point "1" above, shall be paid, within seven days from the date of the signature of the present document (i.e. at the latest on 6 August 2017), in the following bank account: (...)"

Furthermore, clause 4 of the Settlement Agreement stated that:

"If the lump sum out in point "1" above isn't paid effectively on the Account within the time-limit, for any reason and without necessity of a prior warning, the decisions pronounced by PSC shall be without delay and automatically in force (amounts due as principal & interests)."

On 7th August 2017, Mr Sormani received a payment of €199,893.36.

Due to the payment being late and less than the amount due, Mr Sormani wrote to FIFA on 8th August 2017 requesting that the PSC Decision be enforced by the FIFA Disciplinary Committee pursuant to clause 4 of the Settlement Agreement.

On 21st August 2017, Al Arabi wrote to the FIFA Players' Status Committee stating that it had fulfilled its payment obligations to Mr Sormani under the Settlement Agreement and requested the termination of any disciplinary proceedings in the matter.

On 20th December 2017, the secretariat to the FIFA Disciplinary Committee opened disciplinary proceedings against Al Arabi and ordered the club to pay Mr Sormani the remaining amounts due according to the PSC Decision.

On 22nd January 2018, Al Arabi replied to the Disciplinary Committee and referred to the club's previous correspondence of 6th August 2017, by which it had submitted confirmation of a wire transfer in the amount of €200,000 made that day to the bank account of Mr Sormani. Al Arabi maintained that it had fully and timely discharged its payment obligations according to the Settlement Agreement by remitting the amount of €200,000 on 6th August 2017.

¹ Al Arabi ultimately did not enter insolvency proceedings and was granted a licence to take part in the Qatar Stars League for the 2017/18 season, which began on 15th September 2017.

On 23rd January 2018, Mr Sormani reiterated to the Disciplinary Committee that Al Arabi had not complied with the Settlement Agreement, as the settlement amount had not been paid in full or on time.

On 31st January 2018, the Disciplinary Committee decided that Al Arabi was in violation of article 64 of the FIFA Disciplinary Code (the “FIFA Decision”).

According to the FIFA Decision, Al Arabi was pronounced guilty of failing to comply with the PSC Decision and was ordered to pay a fine to FIFA of CHF 15,000 and granted a final grace period of 30 days in which to settle its debt to Mr Sormani.

The remaining debt consisted of €192,105.64 (*i.e.* the PSC Decision amount of €391,999 minus the amount of €199,893.36 that had been paid on 7th August 2017) plus the applicable interest according to the PSC Decision.

The FIFA Decision

In its decision, the Disciplinary Committee noted that the PSC Decision had become final and binding as no appeal had been lodged by Al Arabi against it. The Committee also acknowledged that a settlement agreement had been reached between the parties. This made it an exceptional case, as the Committee’s main task in this kind of case is to establish if a party has failed to respect a decision, rather than analysing agreements reached between the parties.

When analysing the agreement, the Committee acknowledged that according to clause 4, if the settlement amount was not effectively paid within the deadline, the PSC Decision would automatically come into force.

According to the relevant bank statement submitted by Mr Sormani, an amount of €199,893.36 was received on 7th August 2017. Therefore, the Committee determined that the payment by Al Arabi was not made in full, nor was it paid within the deadline of 6th August 2017. As a result, the PSC Decision was automatically in force and the full amounts were due according to such decision.

For the sake of good order, the Committee clarified that it was not allowed to analyse the PSC Decision as to the substance. The Committee’s sole task was to analyse if Al Arabi had complied in full with the PSC Decision.

Given that the PSC Decision had not been complied with, and Al Arabi was consequently withholding money from Mr Sormani, the Committee considered the Qatari club to be guilty under the terms of article 64 of the FIFA Disciplinary Code, which states that:

“Anyone who fails to pay another person (such as a player, a coach or a club) or FIFA a sum of money in full or part, even though instructed to do so by a body, a committee or an instance of FIFA or a subsequent CAS appeal decision (financial decision), or anyone who fails to comply with another decision (non-financial decision) passed by a body, a committee or an instance of FIFA, or by CAS (subsequent appeal decision):

a) will be fined for failing to comply with a decision;

b) will be granted a final deadline by the judicial bodies of FIFA in which to pay the amount due or to comply with the (non-financial) decision;

c) (only for clubs:) will be warned and notified that, in the case of default or failure to comply with a decision within the period stipulated, points will be deducted or relegation to a lower division ordered. A transfer ban may also be pronounced;

(...)”

Therefore, the Disciplinary Committee pronounced Al Arabi guilty of failing to comply with the PSC Decision and ordered the club to pay a fine of CHF 15,000 and granted a final deadline of 30 days for the club to pay the full amount due to Mr Sormani.

The grounds of the FIFA Decision were communicated to the parties on 29th August 2018.

On 17th September 2018, Al Arabi lodged an appeal with CAS against the FIFA Decision.

The CAS Award

In relation to the Panel’s scope of review, it was firstly noted in the Award that the Panel needed to establish whether the Settlement Agreement had been honoured or not. The answer to this question was directly connected to the enforceability of the PSC Decision, given the contents of clause 4 of the Settlement Agreement. Therefore, the Panel needed to examine whether Al Arabi paid Mr Sormani the settlement amount of €200,000 in accordance with the terms of the Settlement Agreement.

In this regard, the Panel noted that Al Arabi’s position was that it had fulfilled its obligations by placing an order for a wire transfer of €200,000 on 6th August 2017. Al Arabi acknowledged that Mr Sormani ultimately received €199,893.36 (€106.64 less than stipulated), but argued that such deficiency did not constitute defective performance as this amount was deducted due to wire transfer fees applied by the banks involved, which were not known in advance.

However, the Panel did not agree with Al Arabi that the small difference in the amount of payment was through no fault of its own. In this respect, the Panel followed consistent CAS jurisprudence regarding the responsibilities of the debtor:

“... the outmost obligation of the debtor is to duly transfer the amount to the bank account provided by the creditor, and therefore it is the responsibility of the debtor to do all relevant efforts to comply with its payment obligations...”²

In the present case, the Panel deemed that Al Arabi did not take reasonable care to make sure that the full amount of €200,000 would be successfully remitted to Mr Sormani. There was no provision in the Settlement Agreement stating which party would bear the cost of bank charges. Therefore, the Panel held that it was the sole responsibility of Al Arabi to pay the agreed amount in full. Al Arabi was not diligent enough to pay in advance the fees required for the transaction, and did not make any effort to ensure that Mr Sormani would receive the full amount without such deductions.

In relation to the payment deadline, Al Arabi argued that the Settlement Agreement became effective on 1st August 2017, when Mr Sormani returned his signed copy to Al Arabi by email. As a result, Al Arabi submitted that the deadline for payment actually expired on 8th August 2017, that being seven days from the date of signature.

However, the Panel held the view that the intention of the parties was that the Settlement Agreement would come into effect on 31st July 2017, and that the time-limit for payment was until 6th August 2017, exactly as stated in clause 2 of the Settlement Agreement. There was no documentation to suggest that the parties wished to extend the deadline, and because Al Arabi had in fact signed the Settlement Agreement on 31st July 2017, the club had accepted the stipulated time-limit of 6th August 2017. The Panel also clarified that the time-limit means the deadline by which Mr Sormani was to effectively receive payment.

The Panel noted that the differences in time and amount may not seem to be particularly serious. However, in light of the facts of the case, strict compliance with the Settlement Agreement was necessary. The Settlement Agreement provided for a settlement amount of €200,000 instead of €391,999 plus interest according to the PSC Decision. €200,000 is a considerably lower amount than the amount in the PSC Decision. Therefore, it was reasonable to expect Al Arabi to pay the settlement amount fully and timely, precisely as agreed, without any margin for error.

However, Al Arabi did not take the necessary steps to pay the amount correctly and without delay. On the contrary, the club waited until the very last day of the deadline to place an order for a wire transfer and did not take care to determine the details of any potential bank charges. Furthermore, Al Arabi did not show any particular interest in trying to remedy the situation when it became aware that the payment had not been duly made.

² CAS 2013/A/3323, par. 84

In conclusion, the Panel stated that Al Arabi had not complied with the terms of the Settlement Agreement, and thus the club was not released from its obligation to pay all remaining amounts under the PSC Decision. As a result, the club was in breach of article 64 of the FIFA Disciplinary Code.

It must also be noted that the Panel found that Mr Sormani had not acted in bad faith by requesting disciplinary proceedings in the matter. The Panel recalled that Mr Sormani had been pursuing disciplinary proceedings since 12th December 2016, *i.e.* before the conclusion of the Settlement Agreement, and also took into account the persistent failure of Al Arabi to pay the amounts ordered in the PSC Decision.

In relation to the sanctions imposed by the FIFA Disciplinary Committee, the Panel took into account Al Arabi's overall conduct, its persistent failure to make the required payments due to Mr Sormani, and the seriousness of the outstanding amounts. It concluded that the disciplinary sanctions were proportional, appropriate and justified. Therefore, the Panel dismissed Al Arabi's appeal and confirmed the FIFA Decision.

Conclusions

This case provides a very strong statement from both FIFA and CAS in relation to the payment obligations of debtors. The due amount is the due amount, and the deadline is the deadline. Regardless of how small a discrepancy may be, it is the responsibility of the debtor to effectively pay the correct amount within the applicable time limit. The fact that CAS confirmed the FIFA Decision, including the relevant sanctions, shows that the FIFA Disciplinary Committee is certainly not toothless when dealing appropriately with debtors.

This case also provides clarity regarding the obligations of debtors, particularly in relation to bank charges and other possible deductions when make a payment to a creditor. Unless it is expressly stipulated in an agreement between the parties, it will be considered that the debtor is responsible for any bank charges, given that it is the debtor's responsibility to do all relevant efforts to comply with its payment obligations.

The overall conduct of the debtor will be taken into account when assessing the proportionality of the disciplinary sanctions. In this case, it was not only the conduct of Al Arabi after the Settlement Agreement was executed that was taken into account. It was also the club's conduct before the Settlement Agreement, as the club had been avoiding its payment obligations under the PSC Decision (of approximately double the settlement amount) since 24th November 2016.

It is interesting that the CAS Panel took into account the large difference between the settlement amount and the amount due according to the PSC Decision when determining whether it was reasonable for Mr Sormani's to expect that Al Arabi paid the settlement amount fully and timely. Although over half of the amount awarded in the PSC Decision was for compensation rather than unpaid remuneration, the Panel only considered the overall amount due in the PSC Decision as a whole. Admittedly this was partly due to the Panel's limited scope of review

regarding the PSC Decision, but it also gives added strength to the FIFA Decision and indeed to the PSC Decision itself. It is abundantly clear that whatever the reason for the debt, as soon as a club is obligated to pay a certain amount according to a FIFA decision, and the decision subsequently becomes final and binding, nothing other than full compliance with the decision will be sufficient in order to avoid a violation of article 64 of the FIFA Disciplinary Code.

Lombardi Associates