

Decision of the FIFA Disciplinary Committee

passed on 21 February 2023

DECISION BY:

Anin YEBOAH (Ghana), Deputy Chairperson

ON THE CASE OF:

Cúcuta Deportivo FC
(Decision FDD-10946)

REGARDING:

Art. 21 of the FIFA Disciplinary Code, 2023 edition - *Failure to respect decisions*

I. FACTS OF THE CASE

1. The following summary of the facts does not purport to include every single contention put forth by the actors at these proceedings. However, the member of the FIFA Disciplinary Committee (**the Committee**) has thoroughly considered any and all evidence and arguments submitted, even if no specific or detailed reference has been made to those arguments in the following outline of its position and in the ensuing discussion on the merits.

A. The first disciplinary proceedings

2. On 28 July 2022, the FIFA Disciplinary Committee rendered a decision (**the First Decision**) against the club Cúcuta Deportivo FC (**the Respondent**) on the basis of art. 15 of the FIFA Disciplinary Code (**FDC**)¹. In particular, the Respondent was found responsible for failing to comply in full with the decision passed by the FIFA Dispute Resolution Chamber (**DRC**) on 15 July 2020 (Ref. no. 20-00717) according to which the Respondent was ordered to pay Mr. David Eduardo Achucarro Trinidad (**the Claimant**) the amount of USD 25,500 as outstanding remuneration plus 5% interest *p.a.* as from 31 January 2020 until the date of effective payment.
3. In addition, this First Decision granted the Respondent a final period of grace of 30 days to pay the amount owed to the Claimant, failing which a registration ban would be imposed on it until the complete amount due is paid.
4. On 2 August 2022, the terms of the First Decision were communicated to the Respondent and the Claimant.
5. On 6 September 2022, as the amounts due were still not paid, a registration ban at national and international level was implemented on the Respondent in accordance with the First Decision.

B. The second disciplinary proceedings

6. On 17 January 2023, the Respondent informed FIFA, among others, of the following:
 - The Respondent is currently undergoing a “*reorganisation process*” regulated by Colombian Law no. 1116 of 2006 (**the Colombian Law or Law 1116**).
 - In the context of this “*reorganisation process*”, a “*reorganisation agreement*” (**the Reorganisation Agreement**) was approved on 23 February 2022, such Reorganisation Agreement – binding upon all creditors, whether or not they have been admitted to the “*reorganisation process*” – regulating the payment of the various debts of the Respondent.
 - The Respondent’s creditors had a 20-day period, *i.e.*, from 04 December 2020 to 25 January 2021, to register their credit within the “*reorganisation process*” at national level.

¹ 2019 edition

- The Claimant did not present its claim within the “*reorganization process*” so that, in accordance with Colombian Law, its debt was postponed and will be paid once all the obligations contemplated in the Reorganisation Agreement are paid.
 - On the basis of these explanations, the Respondent requested the FIFA Disciplinary Committee to review the First Decision as it is prevented from complying with this decision due to the ongoing reorganisation process at national level. Moreover, the Respondent submitted various supporting documents to substantiate its allegations and request.
7. On 10 February 2023, the Claimant was invited to provide the Secretariat with its comments in relation to the communication received from the Respondent.
 8. On 15 February 2023, the Claimant submitted its position².

II. CLAIMANT’S POSITON

9. The positions submitted by the Claimant in the context of the second proceedings can be summarized as follows:

A. Background of the case

- In 2012, the Respondent went through an insolvency proceeding and restructuring process, which ended with a debt restructuring agreement with its creditors in 2013.
- The debt of the Respondent toward the Claimant dates from 30 January 2020 and, on 15 July 2020, FIFA ordered the Respondent to pay USD 25,500 to the Claimant.
- On 12 November 2020, the Respondent entered again in insolvency proceedings which ended on 23 February 2022 through the signature of a new restructuring agreement. However, the Respondent never informed the Claimant nor FIFA about the said procedure.
- As a result of the Respondent's failure to comply with the FIFA Dispute Resolution Chamber decision dated 15 July 2020, the FIFA Disciplinary Committee imposed a transfer ban on the club. However, this decision was neither respected as the club was able to register new players.
- Finally, according to the new restructuring plan, the Claimant, by not registering its credit in the national insolvency procedure, will not be paid in the same way as the rest of the workers, but will have to wait until the end of the reorganization plan, i.e., by 30 December 2036.

B. Claimant’s Remarks

- As mentioned, the Respondent never informed FIFA or the Claimant about the new insolvency proceedings and failed to register the Claimant credits in the said proceedings.
- The Respondent intends to use national regulation to avoid settling its debt towards the Claimant, despite various FIFA decisions.

² Said position is summarised in the following section.

- The above reveals the Respondent's bad faith and attempt to discriminate against those who requested FIFA's protection.
 - The Colombian Football Association, who was aware of the Respondent's situation, collaborated in this strategy by not implementing the transfer ban of the club.
 - The FIFA Disciplinary Committee has full discretion to close or continue disciplinary proceedings. However, in TAS 2019/A/6365 Club Atlético Independiente c. FIFA & Club América de Cali, the Court of Arbitration for Sport (**CAS**) dealt with a very similar case, which also involves Colombian insolvency law, and in which it was resolved that, once the restructuring agreement has been approved, the sanctions should be maintained (cf. § 93-98).
 - In the present case too, the reorganisation plan has been approved by the competent authority, which means that the Respondent is no longer under insolvency proceedings and enjoys full powers of administration.
 - In view of the above, there is no reason why the FIFA Disciplinary Committee should yield to Colombian law, especially once the insolvency situation has been overcome by the Respondent. Therefore, there is no reason to suspend or lift the registration ban currently imposed on the club.
 - As a result, the Claimant requested that the ban on registering new players be maintained and further sanction(s) imposed on the club.
10. The Committee once again reiterated that it had considered all the facts, allegations, legal arguments and evidence provided by the Claimant, and in the present decision had only referred to those observations and evidence for which he considered necessary to explain its reasoning

III. CONSIDERATIONS OF THE DISCIPLINARY COMMITTEE

11. In view of the circumstances of the present matter, the Committee decided to first address the procedural aspects of the present matter, namely, its jurisdiction as well as the applicable law, before entering into the substance of the matter, in particular to decide whether the transfer ban laid down in the First Decision should continue be implemented or lifted, or alternatively to determine the appropriate the next procedural step to be undertaken in the second disciplinary proceedings.

A. Jurisdiction of the FIFA Disciplinary Committee

12. First of all, the Committee noted that at no point during the present proceedings did the Respondent or the Claimant challenge its jurisdiction or the applicability of the FIFA Disciplinary Code.
13. Notwithstanding the above and for the sake of good order, the Committee found it worthwhile to emphasize that, on the basis of arts. 56 and 57 FDC, 2023 edition, it was competent to evaluate the present case and to impose sanctions in case of corresponding violations.

14. In addition, and on the basis of art. 51 (2) of the FIFA Statutes, the Committee may pronounce the sanctions described in the Statutes and the FDC on member associations, clubs, officials, players, football agents and match agents.

B. Scope of the second disciplinary proceedings

15. In view of the case at hand, the Committee noted that the second disciplinary proceedings were different from the first disciplinary proceedings, which concerned the Respondent's failure to comply with a financial decision and had resulted in the First Decision being issued for violation of art. 15 FDC, 2019 edition. In particular, the First Decision, *inter alia*, granted the Respondent a final period of 30 days to settle its debt to the Claimant, failing which a ban on registering new players would be imposed.
16. Due to the Respondent's failure to pay the amounts owed to the Claimant within the deadline, the abovementioned ban was implemented by the Secretariat on 6 September 2022. Now, more than four months later, the Respondent contacted the Secretariat claiming, *inter alia*, that it had undergone a "reorganisation process" and that this had resulted in a "reorganisation agreement" - *i.e.*, the Reorganisation Agreement - approved on 23 February 2022 by the relevant court. In particular, the Respondent explained that prior to the approval of the Reorganisation Agreement, creditors were given a 20-day period, from 04 December 2020 to 25 January 2021, to register their credit under the reorganisation process.
17. The Committee also observed that, according to the Respondent's explanations, this Reorganisation Agreement was binding on all creditors - whether or not they were admitted to the "reorganisation process" - and regulated the payment of the Respondent's various debts. With regard to the Claimant, the Respondent pointed out that the former did not submit its claim within the abovementioned deadline so that, in accordance with Colombian law, its claim had been postponed and would be paid once all the obligations envisaged in the Reorganisation Agreement have been complied with by the Respondent.
18. In reading the Respondent's position, the Committee noted that the former claimed that it could not comply with the First Decision, and consequently with the financial decision issued by the FIFA Dispute Resolution Chamber on 15 July 2020, due to the reorganisation process at national level.
19. The Claimant on the other hand, did not dispute that its claim was not part of the Reorganisation Agreement but rather explained that (i) the Respondent intends to use the Colombian Law to avoid settling its debt, (ii) it was prevented from registering its claim in the reorganisation process as no specific notification was received in this respect, (iii) the Respondent is acting in bad faith and attempt to discriminate against those who requested FIFA's protection, and (iv) the Respondent is no longer under insolvency since the Reorganisation Agreement was approved and enjoys full powers of administration. Accordingly, the Claimant requested that the registration ban be maintained on the Respondent until the debt is fully settled and further sanction(s) to impose on the former.
20. In view of the above, the Committee considered that the main question to be answered was whether the second disciplinary proceedings should be closed given that the Respondent

appeared to be prevented from complying with a “FIFA decision” due to ongoing insolvency-related proceedings at national level.

C. Applicable legal framework

21. With regard to the matter at hand, the Committee pointed out that the disciplinary offense, *i.e.* the potential failure to comply with the decision passed by the FIFA Dispute Resolution Chamber on 15 July 2020, was committed continuously prior to and after the entry into force of the 2023 edition of the FDC. In this respect, and keeping in mind the principles enshrined under art. 4 FDC, the Committee deemed that the merits as well as the procedural aspects of the present case should fall under the 2023 edition of the FDC.
22. Having established the above, the Committee recalled that pursuant to art. 59 FDC, “*proceedings may be closed when: (...) b) a party is under insolvency or bankruptcy proceedings pursuant to the relevant national law and is legally unable to comply with an order*”.
23. According to this provision and CAS jurisprudence, the Committee pointed out that it “*has discretion to close disciplinary proceedings if a club is involved in insolvency proceedings, but has no obligation to do so*”³.
24. Furthermore, in the context of insolvency and/or bankruptcy proceedings, an important consideration to be taken into account is whether the debtor - *i.e.*, the person ordered to comply with a financial decision - is able to manage and dispose of its assets.
25. More specifically, “*if, however, the insolvency debtor can no longer manage and no longer dispose of its assets as of the opening of insolvency proceedings and if the liquidator is bound by strict rules how to distribute the estate (subject to criminal sanctions), then it is not possible for fault to be attributed to either the liquidator or to the Respondent if they do not comply with the (possible) award (see also CAS 2015/A/4162 para. 79). In the face of such impossibility to freely dispose of the estate it would be contrary to public policy to sanction the debtor (or liquidator) for not complying with a CAS award (cf. also SFT (27.3.2012) 4A_558/2011). Therefore, no sanction can be imposed according to the FIFA Disciplinary Code to enforce any CAS award*”⁴.
26. In view of the above, the Committee deemed that it had to analyse the effect of the Reorganisation Agreement on the Respondent in order to assess whether the latter could freely dispose of its assets.

D. Effect of the Reorganisation Agreement

27. To begin with, the Committee noted that the Claimant argued that the Respondent intends to use the Colombian Law to avoid settling its debt in the second disciplinary proceedings. In this regard, the Committee found it necessary to clarify that Colombian law is not being applied in the present case but that the potential effect of ongoing national insolvency proceedings had to be taken into

³ CAS 2012/A/2750 – this award referred to art. 107 FDC [2009 edition, also found in the 2011 and 2017 editions]. This provision was covered under art. 55 FDC, 2019 edition and currently by art. 59 FDC, 2023 edition.

⁴ *Ibidem*.

consideration in accordance with art. 59 (b) FDC, which clearly states that disciplinary proceedings may be closed if the Respondent is *"under insolvency or bankruptcy proceedings pursuant to the relevant national law and is legally unable to comply with an order"*. As such, the Committee is requested to take into account the potential effects of such proceedings at national level when deciding to impose – in the present case potentially to (re)impose – disciplinary measures on a debtor for its non-compliance with a decision. This position is further confirmed by CAS case law⁵.

28. The Committee then turned its attention to the Reorganisation Agreement and to the Respondent's argument that the said Reorganisation Agreement was binding on all creditors, whether or not they were admitted to the *"reorganisation process"* and regulated the payment of the Respondent's various debts. Furthermore, the Respondent also pointed out that since the Claimant did not submit its claim in the *"reorganization process"*, its debt was deferred and will be paid once all obligations contemplated in the *"reorganization agreement"* have been paid. In this respect, the Committee noted that the Claimant did not contest this explanation but rather stated that it had been prevented from registering its claim since it had not been informed about said procedure.

29. In view of the foregoing, the Committee made the following observations:

- In view of the content of the Reorganisation Agreement and the Respondent's position, the Committee was comfortably satisfied that the Respondent could no longer freely manage its assets, or at least freely decide the order in which its debts should be paid without breaching the Reorganisation Agreement. Indeed, by not registering its claim in the relevant national proceedings, the Claimant's debt was deferred and will have to be paid once all obligations under the Reorganisation Agreement have been met.
- The common feature of *"insolvency proceedings are that they impact on a creditor's substantive and procedural position"*⁶, such as in the present case. As such, the issue of whether the Claimant was properly notified of the *"reorganisation process"* falls outside the scope of the present proceedings and should be addressed before the competent tribunal at national level. In any case, the Committee found that the Claimant's claim was not extinguished by the Reorganisation Agreement, but that the payment of the amounts due was only postponed to a later date, *i.e.*, once the obligations envisaged in the Reorganisation Agreement have been fulfilled by the Respondent.

30. In view of the above, the Committee therefore concluded to its comfortable satisfaction that the Respondent presented sufficient evidence that it could not settle its debt to the Claimant due to the Reorganisation Agreement, so that art. 59 FDC had to be applied in the present case.

31. As a result, the Committee decided that the registration ban laid down in the First Decision had to be lifted for the time being and the present disciplinary proceedings against the Respondent closed.

⁵ CAS 2020/A/6900 & 6902

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IV. DECISION OF THE DISCIPLINARY COMMITTEE

To close the disciplinary proceedings opened against the club Cúcuta Deportivo FC.

FÉDÉRATION INTERNATIONALE
DE FOOTBALL ASSOCIATION



Anin YEBOAH

Deputy Chairperson of the FIFA Disciplinary Committee

NOTE RELATING TO THE LEGAL ACTION:

According to art. 58 (1) of the FIFA Statutes reads together with arts. 52 and 61 of the FDC, this decision may be appealed against before the Court of Arbitration for Sport (CAS). The statement of appeal must be sent to the CAS directly within 21 days of receipt of notification of this decision. Within another 10 days following the expiry of the time limit for filing the statement of appeal, the appellant shall file a brief stating the facts and legal arguments giving rise to the appeal with the CAS.