Decision of the FIFA Disciplinary Committee

passed on 21 February 2023

DECISION BY:

YEBOAH Anin (Ghana), Deputy Chairperson

ON THE CASE OF:

Cúcuta Deportivo FC
(Decision FDD-6115)

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 08 October 2020, the FIFA Disciplinary Committee rendered a decision (**the First Decision**) against the club Cucuta 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 Players' Status Committee on 28 July 2020 (Ref. no. 20-00702) according to which the Respondent was ordered to pay Mr. Pablo Javier Garabello (**the Claimant**) as follows:

    - the amount of USD 10,500, plus 5% interest *p.a.* as from 21 September 2019 until the date of effective payment;
    - the amount of USD 10,500, plus 5% interest *p.a.* as from 21 October 2019 until the date of effective payment;
    - the amount of USD 10,500, plus 5% interest *p.a.* as from 21 November 2019 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 18 November 2020, 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

5. 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.

[1] 2019 edition

- 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.
- The creditors that did not present their claims within the *"reorganisation process"* so that, in accordance with Colombian Law, their debts were 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.

6. On 10 February 2023, the Claimant was invited to provide the Secretariat with its comments in relation to the communication received from the Respondent.

7. On 15 February 2023, the Claimant submitted its position.

II. CLAIMANT'S POSITON

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

A. Background of the case

- As the Respondent failed to comply with the decision issued by the Players' status Committee, the Claimant requested the FIFA Disciplinary Committee to sanction the Respondent, which said Committee eventually did and a transfer ban was imposed on the Respondent in November 2020.
- Throughout the entire proceedings, the Respondent has never indicated that it was facing financial difficulties or that a reorganisation plan/agreement prevented it to settle its debt to the Claimant.
- Moreover, despite the fact that a transfer ban was in place, the Respondent registered several players in August 2022.

B. Inapplicability of Colombian Law – Reorganisation plan is not binding

- The Respondent now intends to subject the Claimant to an agreement totally alien to the sporting regulations that always governed the relationship between the Claimant and the Respondent, and without even having made the Claimant aware of or in any way participating in the alleged agreement.
- The disciplinary proceedings stemmed from what was agreed by the parties in the employment termination agreement and in which Colombian law was not agreed as the applicable law. As a result, the Colombian Law cannot be applied in the present proceedings.
- According to the Respondent's reasoning, the Claimant was required to submit its claim to the relevant national court within 20 days after the publication of a general notice.

- However, by failing to do so, the Claimant's claim was postponed until all obligations under this new reorganisation agreement are paid, *i.e.*, 2036, which is a real aberration and an attack against good faith.
- Expecting a foreign creditor residing outside Colombia to be effectively notified through a simple notice published locally in Colombia is a real absurdity. The purpose of the Respondent was precisely that the Claimant would never be aware of it, and therefore, that it would not be able to verify his claim.
- As a result, the Claimant stressed that the alleged Reorganisation Agreement referred to by the club is not binding on it, and the only decisions to be taking into account are those that have been issued by FIFA.

C. Art. 24 (3) of the RSTP[2] is not applicable in the present case

- The Respondent was not subject to any insolvency, liquidation, bankruptcy or other such proceedings on 02 October 2020, which was its deadline to pay the amount owed to the Claimant.
- Even if the FIFA Disciplinary Committee considers that the Respondent was subject to the reorganisation agreement, which is not the case, the latter never informed FIFA that it was in a reorganisation process. On the contrary, it concealed this situation for an unholy purpose. Therefore, the application of art. 24 RSTP must also be ruled out due to the lack of compliance with the requirements set out in this provision.
- The sanctions envisaged by the FIFA Disciplinary Committee in the First Decision were and are appropriate, and must be applied with full rigour to the Respondent until such time as it pays the amount owed to the Claimant.

D. The Respondent bad faith

- The Claimant legally proceeded to claim the amount owed by the Respondent before FIFA's dispute resolution bodies, as required by the RSTP and FIFA's own Statutes, which urge affiliates to always resort to the sports justice system and refrain from resorting to the ordinary courts. It would therefore be incoherent and contradictory to argue that an Argentinean coach, with residence in that country, should have gone to the Colombian ordinary courts to register its debt and consequently participate in the *"liquidation"* procedure (which later became a *"reorganisation"* procedure), as this would be in open contravention of its obligations as a FIFA affiliate.
- Even if the Claimant had had resources, which he did not, it would not have been able to resort to the Colombian courts because he was never aware of the existence of the liquidation process in which the Respondent was immersed.
- The Respondent intended to take advantage of the ordinary jurisdiction in order to be subject only to the benefits offered by the sports law, without having to comply with the requirements imposed by the latter.

[2] FIFA Regulations on the Status and Transfer of Players (**RSTP**)

- In other words, the Respondent acted in bad faith and with a sole purpose: to prevent the Claimant from becoming aware of the scenario in Colombia in order to shred its debt, as well as to impudently evade FIFA's jurisdiction and its eventual disciplinary sanctions.
- Finally, although the Respondent claimed to be in the process of *"reorganisation"*, it is public knowledge that it is currently operating in a regular manner before the Colombian Football Federation, that it has regained its registration licence, and that it is currently competing in the Primera B category of the Colombian Football Major Division.
- It is completely unjustified and frankly aberrant that the Respondent refuses to pay the Claimant the amount owed of USD 31,500, claiming that it is in the process of *"reorganisation"*, when at the same time it is actively operating as a professional football club, maintaining a large roster of professional football players to whom it appears to be able to pay their salaries on time.
- Ultimately, press reports in Colombia reported that the Respondent has recently paid the debts owed to coaches Mr. Guillermo Sanguinetti and Mr. Jorge Ricardo Artigas, as well as to their respective coaching staffs. In that case, it would be more than clear that the argument used by the Respondent to justify its failure to pay the Claimant (who is legally prevented from doing so by virtue of the Reorganisation Agreement) is fallacious.

E. Conclusion and request

- The Respondent is a flagrant and permanent defaulter, and its disdain and disregard for the regulations of FIFA and its own national federation, are a clear and evident sign of the bad faith with which it conducts itself. Thus, if the FIFA Disciplinary Committee accepts the Respondent's request and lifts the disciplinary sanctions against it, thus allowing it to continue to default on its debt to the Claimant, it would essentially be rewarding the bad faith and illegality that the Respondent has displayed at all times and would do untold damage to the Claimant.
- There is no basis whatsoever for the FIFA Disciplinary Committee to lift the sanctions it has imposed on the Respondent as a consequence of its failure to comply with the Players' Status Committee's decision dated 28 July 2020. On the contrary, the lifting of these sanctions would only be to the detriment of the Claimant, whose access to justice would be completely denied, to the benefit of a club that has acted and continues to act in bad faith.
- In view of the foregoing, the Claimant requested the FIFA Disciplinary Committee to reject the Respondent's application and to effectively enforce the sanction of prohibiting the Respondent from registering new players and any other disciplinary sanction that may be applicable, until such time as the Respondent pays the amounts owed to the Claimant.

III. CONSIDERATIONS OF THE DISCIPLINARY COMMITTEE

9. 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 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

10. 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.

11. 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.

12. 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

13. 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.

14. 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 18 November 2020. Now, more than two years 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.

15. 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. Furthermore, the Respondent pointed out that creditors who did not submit their claims within the abovementioned deadline so that, in accordance with Colombian law, their claims had been postponed and would be paid once all the obligations envisaged in the Reorganisation Agreement have been complied with by the Respondent.

16. 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 Players' Status Committee on 28 July 2020, due to the reorganisation process at national level.

17. The Claimant on the other hand, did not dispute that its claim was not part of the Reorganisation Agreement but rather explained that (i) Colombian Law should not apply in the present proceedings, (ii) he 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 as the sole purpose of this reorganisation process is to evade FIFA's jurisdiction and circumvent FIFA's regulations, (iv) and the Respondent is operating its sporting activities normally, without particular restrictions. Accordingly, the Claimant requested that the registration ban continues to be implemented and any other disciplinary measure that may be applicable on the Respondent until the debt is fully settled.

18. 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

19. 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 Players' Status Committee on 28 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.

20. 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*".

21. 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].

22. 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.

23. 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*

[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.

(27.3.2012) 4A_558/2011). Therefore, no sanction can be imposed according to the FIFA Disciplinary Code to enforce any CAS award"[4].

24. 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

25. To begin with, the Committee noted that the Claimant rejected the application of Colombian law 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 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 law[5].

26. 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, and according to the case file, it would appear that the Claimant did not submit its claim in the *"reorganisation process"*, consequently its debt was deferred and will be paid once all obligations contemplated in the *"reorganisation agreement"* have been paid. In this respect, the Committee noted that the Claimant did not contest this explanation but rather stated that he had been prevented from registering its claim since it had not received a specific notification.

27. 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

[4] *Ibidem.*
[5] CAS 2020/A/6900 & 6902
[6] CAS 2020/A/6900 & 6902.

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.

28. 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.

29. 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.

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.