



Arbitration CAS 2008/A/1621 Iraqi Football Association v. Fédération Internationale de Football Association (FIFA) & Qatar Football Association, award of 29 September 2008

Panel: Mr. José Juan Pintó Sala (Spain), President; Mr. David Askinas (USA); Prof. Ulrich Haas (Germany)

Football

Eligibility of a player to represent a national team

Interpretation of procedural acts

Lack of payment of the appeal fee in due time

Force majeure

1. **Acts of procedure are open for interpretation in cases of uncertainty as are any other expressions of a person's will. The latter is expressly foreseen in article 18 of the Swiss Code of Obligations. According to the provision the real intent of the parties takes prevalence on literality. Similar principles apply in essence when it comes to the interpretation of procedural acts such as a statement of claim or an appeal brief.**
2. **If the consequence of the lack of payment of the appeal fee in due time (being that the appeal is not admitted) is expressly mentioned in the applicable regulations, it is not an excess of formalism to reject the appeal for non-compliance with the legal provision.**
3. **The mere reference to a general situation of troubles in a concrete place is not enough to justify a breach of rules on the basis of exceptional circumstances as the *force majeure*. The party asking for its application shall duly identify and accredit which specific and precise fact prevented it to perform a certain activity.**

Iraqi Football Association (IFA) is a national football association affiliated to FIFA with seat in Bagdad, Iraq.

Fédération Internationale de Football Association (FIFA) is an association submitted to Swiss Law governing the sport of football worldwide with seat in Zurich, Switzerland.

Qatar Football Association (QFA) is a national football association affiliated to FIFA with seat in Doha, Qatar.

On 26th March 2008 the national football teams of Iraq and Qatar played a match in Doha corresponding to the qualifying tournament for the World Cup of 2010 (the "Match"). The national

team of Qatar won the Match with the result of 2-0. The player Márcio Passos de Albuquerque “Emerson” (“Emerson”) played for Qatar in the Match.

On 9th May FIFA, having heard various media reports questioning the eligibility of Emerson, of Brazilian origins, to represent the QFA, asked the QFA for all relevant information or documentation at its disposal to justify Emerson’s eligibility to represent the QFA, which the QFA did, being the corresponding disciplinary proceeding opened in this respect.

On 21st May 2008 the IFA sent to FIFA a letter in which it stated the following:

“Our Association presents its Greetings and would like to present its objection about the result of our National Team’s match with Qatar, since we think that the player Emerson was illegally playing for the Qatari National Team, and breaching the laws and regulation of FIFA”.

On 9th June 2008 the FIFA Disciplinary Committee (FDC) passed the following decision regarding the above mentioned disciplinary proceedings:

“The FIFA Disciplinary Committee:

- 1. Has decided that the Qatar Football Association is acquitted of any accusation.*
- 2. Has ascertained that the player, Mr. Márcio Passos de Albuquerque “Emerson”, is ineligible to play for the Qatari national team.*
- 3. Has decided that the costs of these proceedings shall be borne by FIFA”.*

On 11th June 2008 the IFA wrote to FIFA announcing its intention of appealing the above mentioned FDC decision, and in it the following terms:

“Therefore, and in accordance with Article 126/1 of the FIFA Disciplinary Code, our Association would like to appeal the decision, and we will present all the proofs and documents in the next seven days”.

On 16th June 2008 the IFA informed FIFA that it had presented the appeal in proper time and that it had paid the required fee for the appeal.

On 1st July 2008 FIFA communicated to the IFA that it had not received the corresponding appeal fee and asked the IFA if despite of it, it wished that the appeal was submitted to the FIFA Appeal Committee.

On 2nd July 2008 the IFA informed FIFA that the appeal fee had been paid and sent to FIFA a receipt of transfer order with value date 4 July 2008 (according to the clean copy provided by FIFA to the present file).

The mentioned appeal fee was received by FIFA on 4th July 2008.

On 9th July 2008 the FIFA Appeal Committee decided not to admit the appeal against the above mentioned decision of the FDC dated 9 June 2008, as the appeal fee was not paid by the IFA within the time limits foreseen in article 130 of the FIFA Disciplinary Code.

On 21st July 2008 the IFA filed the corresponding Statement of Appeal before CAS, in which it was stated that an appeal was filed “against the decision of the Fédération Internationale de Football Association (FIFA) Disciplinary Committee (080141 QAT ZH) pertaining to the Eligibility of the player Marcio Passos de Albuquerque Emerson”. Notwithstanding this, the IFA attached as exhibit to the referred Statement of Appeal a copy of the Decision of the FIFA Appeal Committee dated 9th July 2008 (ref. 080141 APE QAT ZH).

On 8th August 2008 the IFA filed the Appeal Brief, according to which the following legal remedies were sought from CAS:

- “1. *The Decision of the FIFA Appeal Committee dated 09 July 2008 is to be repealed by the CAS. The CAS has to judge in the case.*
 2. *Declare the player Emerson was ineligible to represent the representative team of Qatar in the match played 26 March 2008, preliminarily competition for the 2010 FIFA World Cup match against the representative team of Iraq according to the article 15-18 of the FIFA Regulations Governing the Application of the Statutes.*
 3. *Subsequently, declare the March 26, 2008 match played between the representative team of Qatar and the representative team of Iraq is violating article 7 of the FIFA 2010 World Cup Regulations.*
 4. *According to article 7 of the FIFA 2010 World Cup Regulations and article 55 of the FIFA Disciplinary Code, forfeit such said match and award the resultant three points to the Iraqi team with the score of 3-0.*
 5. *If the match between the Iraqi team and the Qatari team is not forfeited by the CAS, the match has to be replayed because an ineligible player (Emerson) played for the Qatari team.*
 6. *All the matches of the Qatari team in the fourth round of the Asia preliminary competition of the 2010 World Cup South Africa have to be suspended until a judgement of the CAS is available.*
 7. *Alternatively, the case shall be sent back to the previous instance for reconsideration.*
- Costs and compensations resulting are to be borne by the respondents”.*

The Respondents opposed the provisional measures asked for by the IFA in point 6 of its Appeal Brief's request for relief, and the Panel in the present proceedings decided to reject such request for provisional measures by means of Order dated 27 August 2008.

The Respondents answered to the Appeal Brief by means of written submissions filed on 8th September 2008, pleading to CAS to render an award in the following terms:

“a) QFA:

PRELIMINARILY

1. *To declare that the exhibits to the Appeal Brief submitted by the Appellant on 15th August 2008 are not admissible.*
2. *To declare that the requests for relief under points 5 and 7 and the final conclusion related to the costs and compensation are not admissible.*

SUBSEQUENTLY

3. *To declare that the appeal filed by Iraqi Football Association on 21 July 2008 is not admissible.*
4. *For the effect of the above, to order that the aforementioned Appellant has to bear any and all the costs of the present Appeal Arbitration Proceedings, if any, as well as to pay the Second Respondent any and all the costs and expenses incurred in connection of this Arbitration, including -without limitation- attorney's fee, expenses and any eventual further costs.*

ALTERNATIVELY

5. *To dismiss in full the Appeal filed by Iraqi Football Association on 21 July 2008 and, consequently, to fully confirm the FIFA appealed decision.*
6. *For the effect of the above, in order that the aforementioned Appellant has to bear any and all the costs of the present Appeal Arbitration Proceedings, if any, as well as to pay to the Second Respondent any and all the costs and expenses incurred in connection of this Arbitration including -without limitation- attorney's fee, expenses and any eventual further costs.*

b) FIFA:

Preliminary requests:

1. *The Panel shall define which evidences are admitted.*
2. *All enclosures to the appeal brief sent by Appellant are not to be admitted to the file.*

Main requests:

1. *All enclosures to the appeal brief sent by Appellant are not to be admitted to the file.*
2. *All additional requests made by Appellant in his appeal brief shall not be admitted to the file.*
3. *The appeal is to be declared inadmissible.*
4. *Alternatively, the appeal is to be rejected.*
5. *Alternatively, the appeal is to be referred back to the FIFA Appeal Committee.*
6. *Appellant shall bear all costs related to the present procedure as well as the legal expenses of the First Respondent".*

The hearing corresponding to the present appeal took place in Lausanne (Switzerland) on 10th September 2008. In such hearing the parties made the allegations that they deemed convenient for their interest and evidence submitted by the parties was heard by the Panel.

At the beginning of the hearing the President of the Panel informed the parties that the Panel had noticed that some preliminary issues had been raised by the Respondents in their respective written submissions and that among them, the Panel considered that the most preliminary issue to be decided on with respect to the dispute was the one regarding the admissibility of the appeal, after which, if it was the case, the Panel would go through other matters of the case. The parties expressed their agreement in the Panel proceeding this way.

LAW

CAS Jurisdiction

1. Jurisdiction of CAS to decide on the present case arises from articles 60 and 61 of the FIFA Statutes (version 2007) and article R47 of the CAS Code. In addition such jurisdiction has been expressly accepted by the parties by signing the Order of Procedure of the present case.
2. Therefore the Panel considers that CAS is competent to decide on this case.

Applicable law

3. Article R58 of the CAS Code reads as follows:
“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, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.
4. Article 60.2 of the FIFA Statutes states the following:
“The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law”.
5. According to the mentioned provisions, FIFA regulations and additionally Swiss Law are applicable to this case.
6. Therefore the Panel considers that the present dispute shall be resolved according to FIFA regulations and additionally to Swiss Law.

About the dispute submitted to the panel by the parties

7. According to the parties' written submissions and to the declarations made by them in the hearing, the Panel, before entering into other issues of the dispute, shall firstly decide on the admissibility of the present appeal before CAS.
8. In this respect it is of paramount importance to decide at first on the discrepancy arisen between the parties concerning the concrete decision actually appealed in the present file (the FDC decision dated 9 June 2008 or the FIFA Appeal Committee Decision dated 9 July 2008), as the consequences regarding the admissibility of the appeal may be different in one or the other case.

9. The Appellant holds that the appeal is directed against the Decision of the FIFA Appeal Committee dated 9 July 2008, being the reference to the FDC decision made in the Statement of Appeal a mere misspelling error, and that therefore the appeal of such decision before CAS shall be admissible. On the contrary the Respondents contend that the appeal is filed against the FDC decision of 9 June 2008 as it is the decision that the Appellant expressly mentioned as appealed decision in its Statement of Appeal, which directly leads to the inadmissibility of the present appeal before CAS as the FIFA internal remedies have not been exhausted by the Appellant.
10. To decide on this point the Panel has carefully checked the written submissions of the parties (specially the Statement of Appeal and the Appeal Brief) and has taken into account the declarations made by them in the hearing. As a result of it the Panel has realised that:
 - a) Indeed the IFA expressly mentions in its Statement of Appeal that the appeal is directed against the decision of the FDC (ref. 080141 QAT ZH).
 - b) Notwithstanding the above mentioned, the decision attached to the Statement of Appeal as appealed decision was the one rendered by the FIFA Appeal Committee on 9th July 2008 (ref. 080141APE QAT ZH). The Panel has read in page 2 of the Appeal Brief that “*a copy of the decision appealed against is provided in Exhibit 1*”.
 - c) The first pleading of the Appeal Brief reads as follows: “*The Decision of the FIFA Appeal Committee dated 09 July 2008 is to be repealed by the CAS. The CAS has to judge in the case*”.
 - d) The Appellant expressly declared in the hearing that the appealed decision is the one issued by the FIFA Appeal Committee on 9th July 2008.
11. In view of it, the Panel finds that it is reasonable to understand that despite the confusion created in such respect, the decision appealed is the one of the FIFA Appeal Committee dated 9 July 2008.

First of all the Panel would like to point out that acts of procedure are open for interpretation in cases of uncertainty as are any other expressions of a person's will. The latter is expressly foreseen in article 18 of the Swiss Code of Obligation. According to the provision the real intent of the parties takes prevalence on literality. Similar principles apply in essence when it comes to the interpretation of procedural acts such as a statement of claim or an appeal brief (cf ATF 105 II 152; VOGEL/SPÜHLER, Grundriss des Zivilprozessrechts, 8th ed., Bern 2006, § 1 no. 79 ff.).

In light of the whole circumstances of the case, it seems to the Panel that the mention in the Statement of Appeal to the FDC decision is probably due to some *lapsus calami*, being it confirmed by (i) the fact that the decision attached to the Statement of Appeal was the FIFA Appeal Committee one, (ii) the statements made by the Appellant in the Appeal Brief and in the hearing and (iii) the fact that it is not logical to think that the Appellant wished to appeal the FDC decision before CAS when it had already appealed the same decision before the FIFA Appeal Committee.

In consequence the Panel considers that the real intent of the Appellant (proven to be to appeal the FIFA Appeal Committee decision) shall prevail on the literality of the reference

made in the Statement of Appeal to the FDC decision, which is in addition contradicted by the same exhibit attached to such Statement of Appeal and by posterior acts.

12. Therefore the Panel considers that the appeal is directed against the decision of the FIFA Appeal Committee dated 9 July 2008, which according to article 61 of the FIFA Statutes and R47 of the CAS Code, is likely to be appealed before CAS.
13. In consequence, the appeal filed by the IFA against the mentioned decision before CAS is declared admissible according to the mentioned articles.
14. Once it has been made clear that the appeal is directed against the decision of the FIFA Appeal Committee and that such appeal before CAS is admissible, the Panel understands that the next immediate step to be taken is the consideration of the grounds that led the FIFA Appeal Committee to declare that the appeal of the FDC decision was inadmissible (i.e. the lack of payment of the appeal fee in due time), as if the Panel gets convinced of the correctness and lawfulness of such inadmissibility, it will not be necessary to make further considerations on other issues raised by the parties in the present proceedings.
15. To such purpose the Panel has examined the provisions of the FIFA Disciplinary Code regarding the appeal of the decisions of the FDC and the written submissions and evidence produced by the parties, with special attention on the crossed correspondence between the IFA and FIFA dated June and July 2008.
16. The FIFA Disciplinary Code foresees in its article 125 that the decisions rendered by the FDC can be appealed before the FIFA Appeal Committee. The party wishing to appeal such decisions shall:
 - a) File and formalise the appeal within the time limits prescribed in article 127 of the FIFA Disciplinary Code, which reads as follows:
 - “1. Any party intending to appeal must inform the FIFA Appeal Committee of its intention to do so in writing within three days of notification of the decision.
 2. Reasons for the appeal must then be given in writing within a further time limit of seven days. This seven-day period begins after the first deadline of three days has expired.
 3. If this requirement has not been complied with, the appeal is not admitted.
 4. The association receiving the petition of appeal shall forward it immediately to FIFA”.
 - b) Pay to FIFA an appeal fee of CHF 3,000 as stipulated in article 130.1 of the FIFA Disciplinary Code:

“Anyone wishing to lodge an appeal shall transfer an appeal fee of CHF 3,000 to FIFA’s bank account before expiry of the time limit of seven days to formalise the appeal”.

17. The consequences of an eventual lack of payment of such appeal fee are expressly stipulated in paragraph 2 of the referred article 130:

“If this requirement has not been complied with, the appeal is not admitted”.

18. According to the mentioned provisions and in light of the arguments raised by the parties, the Panel shall check if in the present case, the appeal fee was paid by the IFA within the time limit stipulated in the mentioned article 130.

19. The Panel has learned from the written submissions and evidence produced by the parties that:

a) On 11th June 2008 the IFA announced to FIFA its intention of appealing the FDC decision of 9th June 2008 and that it would present all the proofs and documents within the next seven days (being seven days the time limit prescribed in article 127.2 of the FIFA Disciplinary Code).

b) On 16th June 2008 the IFA communicated to FIFA the following:

*“That is the core of our Appeal based on the articles of the FIFA Disciplinary Code and we want our right, especially **after we presented our Appeal** in the proper time stated by the Code **and paid the required fee”.***

c) On 1st July 2008 FIFA confirmed to the IFA that despite the announcement made by the IFA in such respect, it had not received the appeal fee.

d) On 2nd July 2008 the IFA informed FIFA of the payment of the appeal fee having been made, attaching to its communication a receipt of transfer order of CHF 3,000 to FIFA with value date 4 July 2008.

20. Taking into account the above mentioned, the Panel shall conclude that when the payment of the appeal fee was made by the Appellant (2nd July 2008 at the earliest according to the receipt of transfer order produced by the IFA), the time limit of 7 days to formalise the appeal had already expired.

According to the pieces of evidence produced by the parties, the Panel considers that the term to file the statement of appeal began on 11th June 2008, the date in which the IFA recognised being aware of the FDC decision of 9 June 2008 and in which it announced its intention to appeal it *“in accordance with article 126/1 of the FIFA Disciplinary Code”* (see letter of the IFA to FIFA of 11 June 2008). It means (i) that the term to formalise the appeal began on 15th June 2008 (three days after the expiration of the first deadline of three days, according to article 127 of the FIFA Disciplinary Code), and (ii) that the time limit for the payment of the appeal fee expired on 21st June 2008 (seven days after the expiration of the first three days period). It is therefore patent that the payment of the appeal fee was made by the IFA at least 11 days after the deadline (payment was made at the earliest on 2nd July 2008 and the term for payment expired on 21st June 2008).

21. Being clear that the appeal fee was not paid in due time, the Panel understands that the requirement foreseen in article 130.1 of the FIFA Disciplinary Code was not complied with, so the consequence foreseen in article 130.2 of the mentioned Code (*If this requirement has not*

been complied with, the appeal is not admitted) shall inexcusably apply. The consequence of the lack of payment of the appeal fee is expressly mentioned in the FIFA Disciplinary Code, which does not allow to hold that the inadmissibility of the appeal for non-compliance of such payment in due time implies an excessive formalism for rejecting the appeal. In this line, and interpreted *a sensu contrario*, the Panel shall mention for instance the following considerations made in the award of the case CAS 2003/O/481:

“Although Swiss jurisprudence can be very strict in the event of a failure to pay an advance of costs within a prescribed period (see, for example, art. 150, Paragraph 4 of the Federal Statute on the Organisation of the Judiciary), the Swiss Supreme Court has ruled that if the sanction for a failure to pay within the prescribed period is not expressly stated in the relevant provision, or known to the parties, it would be an excess of formalism to reject the claim, and that a short extension of the period in which to make the payment should be granted (see Jean-François POUURET, Commentaire de la Loi Fédérale d’Organisation Judiciaire du 16 décembre 1943, vol. V, art. 136-171, Bern (1992), in particular, note 4 to the commentary on art. 150, p. 107 and the references quoted in that note).

In the present case, it is clear that art. 24.3 of the Regulations does not make it clear, let alone expressly state, that the sanction for a failure to pay within the prescribed period would be the rejection of the appeal”.

Therefore if the consequence of the lack of payment of the appeal fee is stipulated in the legal provision (which in the present case happens) there is no room for discussion.

22. The Panel cannot share the Appellant’s arguments on which it intends to hold the admissibility of the appeal against the FDC decision of 9 June 2008 before the FIFA Appeal Committee despite not having paid the appeal fee until, at the earliest, 2nd July 2008.

First of all, the Panel considers that the IFA cannot hold that the time limit for the payment of the appeal fee has not started as it was not officially informed by FIFA about the decision to be appealed, because the IFA has expressly recognised being aware of the decision at least from 11th June 2008. The Panel shall recall in this respect the content of letter of the IFA to FIFA dated 11 June 2008, in which the IFA announced its intention to appeal the FDC decision of 9 June 2008. So if the IFA proclaimed its will of appealing the decision it shall be followed that the IFA knew about such decision. Therefore the time limits foreseen in the FIFA Disciplinary Code do have to apply from 11th June 2008.

Secondly, the Panel understands that the argument of the eventual confusion (and breach of the principle of confidence) created by FIFA on the IFA about the term in which the payment of the appeal fee could be made shall also fail in view of the facts occurred. On 11th June 2008 the IFA declared its intention of appealing the FDC decision in accordance with the FIFA Disciplinary Code. The day after, FIFA sent to the IFA a letter in which it discussed the IFA’s legitimacy to appeal such decision. And on 16th June 2008, the IFA expressly declared to FIFA that it had presented the appeal and paid the appeal fee. In the Panel’s view, the afore-mentioned shows that:

- a) The IFA knew from the very beginning that (i) the appeal had to follow the FIFA Disciplinary Code rules (and among them, the rules regarding the payment of the appeal fee), and (ii) FIFA contended its legitimacy to appeal.

- b) Despite it, the IFA insisted in the appeal and even announced on 16th June 2008 (that is to say, within the time limit prescribed in article 130 of the FIFA Disciplinary Code for paying the appeal fee) that such appeal was filed and that the appeal fee was paid.

It means thus that the IFA was conscious of the fact of having to pay the appeal fee within the Code's time limit. So conscious that it even announced having made such payment in due time, and it despite the challenge of legitimacy communicated by FIFA. But for whatsoever reason it actually did not make such payment in due time. It is proven that the IFA made the payment when the deadline had expired, on 2nd July 2008 at the earliest, as mentioned in point 20 of the present award.

Being the IFA's *factum proprium* so clear the Panel understands that no confusion or breach of the principle of confidence could be caused to the IFA regarding the payment of the appeal fee. The IFA understood the provisions of the FIFA Disciplinary Code, announced that the payment of the appeal fee was made in due time and it did not.

However, for more certainty, the Panel has checked the crossed correspondence between the IFA and FIFA (specially the letter dated 1st July from FIFA to IFA) to see if any confusion or confidence contrary to the provisions of the FIFA Disciplinary Code was created on the IFA, and has not found any element that could reasonably cause on IFA an impression that the time limit for the payment of the appeal fee was extended or should not be respected. Regarding the letter of 1st July 2008, in the Panel's view it shall be interpreted as a warning in good faith made by FIFA to the IFA to prevent it from incurring further costs, taking into account that it was almost sure that if the appeal was submitted to the FIFA Appeal Committee, it would be dismissed due to the lack of payment of the appeal fee in due time.

No abuse, bad faith or breach of the principle of confidence is thus found by the Panel in FIFA's behaviour. If the IFA did not make the payment of the appeal fee in due time, it shall bear the consequences of article 130.2 of the FIFA Disciplinary Code.

Lastly the alleged difficulties in making a bank transfer from Iraq due to the complicated situation of the country in June-July 2008 cannot justify, in the Panel's opinion, the admissibility of the appeal before the FIFA Appeal Committee, especially when those difficulties, in the referred period of time, have not been proven in the file. In addition, it shall be stated that the mere reference to a general situation of troubles in a concrete place is not enough to justify a breach on the basis of exceptional circumstances as the force majeure. The party asking for its application shall duly identify and accredit which specific and precise fact prevented it to perform a certain activity. And in this case, the IFA has not alleged any concrete fact occurred in a concrete moment that prevented it from making the transfer of the appeal fee to FIFA within the time limits prescribed in the FIFA Disciplinary Code.

Therefore the Panel finds that the referred arguments cannot excuse the strict applicability of the provisions of article 130 of the FIFA Disciplinary Code.

23. In consequence the Panel considers that the appeal filed by the IFA before the FIFA Appeal Committee against the FDC decision of 9 June 2008 is inadmissible and that the decision of FIFA Appeal Committee dated 9 July 2008 shall be confirmed.

24. In view of the above mentioned the Panel understands that it shall not enter into the other preliminary or substantial issues raised by the parties.
25. Finally, and only for dialectical purposes as the appeal filed by the IFA before CAS shall be rejected for the reasons above mentioned, the Panel wishes to point out that even in case it had considered that the decision appealed is not the FIFA Appeal Committee one but the FDC decision of 9 June 2008, the appeal would have been also dismissed. According to article 61.1 of the FIFA Statutes and R47 of the CAS Code, the party seeking to appeal a decision to CAS has to exhaust all internal remedies available to him prior to the appeal to CAS. In the present case, if it was understood that the IFA had appealed before CAS the FDC decision of 9 June 2008 (*quod non*), the Panel would have declared such appeal as inadmissible because the Appellant would have not exhausted all the internal remedies before FIFA (i.e. the appeal of the FDC decision before the FIFA Appeal Committee).

The Court of Arbitration for Sport rules:

1. The appeal filed by the Iraqi Football Association is dismissed.
 2. The Decision of the FIFA Appeal Committee dated 9 July 2008 (080141 APE QAT ZH) is confirmed.
 3. All further claims of the parties are rejected.
- (...)