



Arbitration CAS 2008/A/1621 Iraqi Football Association v. Fédération Internationale de Football Association (FIFA) & Qatar Football Association, order of 27 August 2008

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

Football

Provisional measures

Conditions to grant the provisional measures

Burden of proving the existence of the conditions

Authorisation to supplement the argument after the submission of the grounds for the appeal

- 1. The three conditions that shall be taken into account in order to determine if provisional measures are granted or not in an appeal proceeding are (i) the likelihood of success of the claim filed by the appellant, (ii) protection of the appellant from an irreparable harm and (iii) if the interest of the appellant outweighs the interest of the respondent. The three elements must cumulatively exist in a concrete case so that the requested provisional measures can be ordered.**
- 2. The burden of explaining and proving the existence of the conditions is on the side of the party applying for the measures. The CAS is not itself obliged to search for these conditions.**
- 3. According to art. R56 read in conjunction with art. R37 of the Code, the appellant cannot produce further statements after the submission of the grounds for the appeal to justify and explain which are the grounds on which it holds that the three conditions for granting the provisional measures exist in its case, if the other party has not agreed to such production or if it has not even mentioned or tried to explain which are the exceptional circumstances that would justify the admissibility of the new submissions.**

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 21st May 2008 the IFA claimed before FIFA that Emerson was ineligible to play the Match.

As a result of such claim FIFA Disciplinary Committee started the corresponding procedure and on 9th June 2008 passed the following decision:

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 the following:

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 1st July 2008.

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 FIFA Disciplinary Committee dated 9th 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 (the “Decision”).

The IFA appealed the Decision before the CAS by means of corresponding Statement of Appeal dated 21st July 2008 and Appeal Brief dated 8th August 2008.

According to the Appeal Brief the following legal remedies are sought by the IFA 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 born by the respondents.

The Respondents opposed not only to the main petitions asked for by the IFA in its appeal but also to the request for provisional measures referred in point 6.

Particularly, the opposition to the provisional measures was shown by means of written submissions dated 31 July 2008 (FIFA) and 6th August 2008 (QFA), which grounds and arguments can be jointly summarized as follows:

- a) The request for provisional measures filed by the IFA shall be rejected *ab initio* as it is unfounded and not motivated. Without a proper reasoning of the referred request it is not possible for the Respondents to answer to it.
- b) In addition such request for provisional measures shall be also dismissed as none of the necessary prerequisites established by the CAS jurisprudence for the granting of provisional measures (likelihood of success of the claim, protection of appellant from irreparable harm and interest of the appellant overweighing interest of the respondent) are met in the present case:
 - Likelihood of success of the claim: in view of the fact that the appeal fee was not paid in time, the body issuing the Decision had no other choice than not admitting the appeal against it, and no convincing argument has been produced by the IFA to contravene such circumstance.
 - Protection of the appellant from irreparable harm: no irreparable harm can exist in the present case as even if the claim of the IFA was successful, there would not be inconvenience in replaying the matches of the Qatari national team whose suspension the IFA is asking for, as those matches are not in the frame of a

knock-out tournament but in the frame of a group phase tournament which in addition, ends in June 2009.

- Balance of interest: interest in the due performance of the preliminary competition for the World Cup 2010 (not only considering sporting aspects but also commercial aspects – TV, marketing rights and tickets for matches already sold or currently in the market, ... –) shall exceed the interest of the IFA.

On 9th August 2008 the IFA filed an additional statement answering to the opposition filed by the Respondents against the request for provisional measures. The IFA opposed to the lack of motivation of the request alleged by the Respondents by saying that the request for provisional measures is well substantiated with arguments, law and evidence within the Appeal Brief, and also presented grounds to justify the existence in the present case of each of the above mentioned three prerequisites for the granting of the provisional measures.

On 13 and 15th August 2008 respectively, FIFA and the QFA opposed to the admissibility in the file of the additional statement filed by the IFA on 9th August 2008.

Of its part the IFA filed on 15th August 2008 another statement in the following terms:

FIFA filed a fax on 14 August 2008 with CAS, stating the fax attached, dated 31 July 2008, as at the said date sent to CAS. This fax obviously never arrived at CAS and the fax dated 14 August 2008 was sent to CAS after the deadline.

Therefore, if CAS wants to admit the document from FIFA, the fax from the IFA, dated 9 August 2008, has to be part of the file, too.

LAW

Jurisdiction of CAS

1. Jurisdiction of CAS to decide on the request for the present provisional measures arises from article R37 of the CAS Code.
2. In addition the Panel notes that none of the parties has challenged CAS's jurisdiction to deal with the mentioned request.
3. Therefore the Panel considers that CAS is competent to decide on the present request for provisional measures.

Applicable law

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. Article R58 of the CAS Code states the following:
“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in 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”.
6. In view of the mentioned provisions, the Panel considers that the law applicable to the present request on provisional measures shall be the FIFA Regulations and Swiss Law.

Legal considerations

7. The Panel shall determine in the present order if the provisional measures requested by the IFA (*i.e.* suspension of all the matches of the Qatari national team in the 4th round of the Asia preliminary competition of the 2010 World Cup until a judgement of CAS is available in the appeal filed by the IFA) shall be granted or not.
8. In view of the arguments and grounds raised by the parties to hold their positions, the Panel deems appropriate to primarily make the following considerations:
 - a) The jurisprudence of CAS regarding provisional measures has uniformly declared that the elements that shall be taken into account in order to determine if provisional measures are granted or not in an appeal proceeding are (i) the likelihood of success of the claim filed by the appellant, (ii) protection of the appellant from an irreparable harm and (iii) if the interest of the appellant outweighs the interest of the respondent (*ad exemplum*, CAS 2001/A/324, CAS 2005/A/916, or CAS 2006/A/1100). The three elements must cumulatively exist in a concrete case so that the requested provisional measures can be ordered.
 - b) Article R56 of the CAS Code states that *“unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorised to supplement their argument, nor to produce new exhibits, nor to specify further evidence on which they intend to rely after the submission of the grounds for the appeal and of the answer”.*
 - c) Paragraph 3 of article R37 establishes in its corresponding part that *“if an application for provisional measures is filed, the President of the relevant division or the Panel invites the opponent to express his position within 10 days or within a shorter time limit if circumstances so require. The President of the relevant Division or the Panel shall issue an order within a short time”.*

9. Having these preliminary considerations in mind the Panel has firstly examined the way in which the request for provisional measures has been presented by the Appellant.

Such request was roughly announced by the Appellant in page 4 of its Statement of Appeal and afterwards concreted within the Appeal Brief in a very concise and succinct way (page 25). In the referred Appeal Brief the Appellant indeed asks for the suspension of matches but does not justify the existence in the present case of the three elements (*fumus boni iuris*, *periculum in mora* and balance of interest) leading to the granting of provisional measures. In other words, when the IFA makes the request for provisional measures within its Appeal Brief, the IFA does not motivate or explain (i) why in its understanding, the appeal is likely to succeed, (ii) from which irreparable harm shall the IFA be protected and why shall it be protected, and (iii) which is the IFA's interest that shall outweigh the Respondents' interest either.

It is only after the complaint of the Respondents in their respective answers to the request of provisional measures that the IFA, in its additional statement dated 9th August 2008, intends to justify and explain which are grounds on which it holds that the three elements for the granting of the provisional measures exist in the present case.

10. As the Respondents disagree with the admissibility of the IFA's additional statement dated 9th August, the Panel shall decide if this statement shall be taken into account with regard to the request of provisional measures, or if on the contrary the sole allegations that shall be taken into consideration are the ones contained within the Statement of Appeal and the Appeal Brief.

In the Panel's opinion the answer to the mentioned matter shall be firstly searched at the light of article R56 of the CAS Code. This article only enables the parties to produce further statements after the grounds for the appeal and of the answer if (i) the parties agree on it or (ii) the President of the Panel orders it on the basis of exceptional circumstances.

With regard to the first exception foreseen in article R56, it is clear in the present case that there is no agreement between the parties with respect to the production of new written submissions (contrary to it, the Respondents have expressly opposed to such possibility). And regarding the second exception, the Panel has noticed that the Appellant has not even mentioned or tried to explain which are the exceptional circumstances that would justify the admissibility of those new submissions.

Consequently the Panel is of the opinion that the IFA's written submissions of 9th August shall not be admitted in the file, as the conditions foreseen in article R56 of the CAS Code are not met.

Furthermore such opinion is, in the Panel's view, reinforced by the content of article R37 of the CAS Code, according to which the Panel shall decide on the request for provisional measures once the opponent has expressed his position regarding the requested provisional measures, not being foreseen in the referred article any exchange of further submissions between the parties.

In connection with what has been said and to conclude, the Panel wishes to make reference to the statement filed by the IFA on 15th August related to the admissibility in the file of a fax sent by FIFA to CAS on 31st July and resent again to CAS on 14th August 2008. In this respect the Panel understands that the fact of FIFA having sent a fax on 31st July 2008 that was not then received by the CAS and that was therefore resent to CAS on 14th August 2008 is under no point of view comparable to the fact of the IFA having had the opportunity of making allegations about the request for provisional measures in due time (within the Statement of Appeal or the Appeal Brief), not having made them and trying to produce such allegations afterwards when deadlines are already expired.

In the first case, FIFA indeed has accredited having sent the fax in due time (the fax delivery confirmation produced by FIFA to the file certifies it), and it is only due to some administrative problems that such fax was not acknowledged by CAS and sent to the parties in the proceedings in due time. However, in the second case, the party having not motivated in due time the elements grounding the provisional measures has tried to do it late and only once the other parties have noted the lack of motivation of its request. Therefore, the Panel shall reject the IFA's position by virtue of which if the fax of FIFA dated 31st July 2008 is accepted in the file, the written submissions of the IFA dated 9th August 2008 shall be accepted as well, and shall admit and admits the fax of FIFA dated 31st July 2008 in the file.

11. Given the inadmissibility of the IFA's additional statement, the Panel shall only consider the grounds produced by the Appellant in its Appeal Brief with regard to the provisional measures applied for in it.

As mentioned in paragraph 9 of the present award, the Panel has noticed that the Appellant has not specified in neither its statement of appeal nor its Appeal Brief grounds and arguments to justify the cumulative existence of the three elements giving rise to the provisional measures. The burden of explaining and proving the existence of the mentioned elements is on the side of the party applying for the measures, and in the present case no proof or even plausible explanation in the referred sense has been contributed by the Appellant in its Appeal Brief. With regard to such explanatory activity to be performed by the applicant for the provisional measures, the Panel wishes to recall the following statement of the Order on Provisional Measures of the case CAS 2007/A/1317:

"First of all the Panel establishes that the Appellants did not contend in their request that they will suffer any irreparable harm. The Panel is not itself obliged to search for such an eventual irreparable harm threatening the Appellants. Upon due consideration of the Appellants' allegations, the Panel comes to the conclusion that the Appellants have neither contended nor demonstrated that they will suffer irreparable harm if the provisional measures requested are not granted".

And the following paragraph of the Order on Provisional Measures of the case CAS 2004/A/690:

"The Appellant shall make at least plausible that the facts and the rights cited exist and that the material conditions for a legal action are fulfilled".

Therefore in sight of the above mentioned the Panel understands that the request for provisional measures shall be rejected.

12. Before finalising this order, and only for dialectical purposes, as the request for provisional measures shall be rejected for the reasons explained in paragraph 11, the Panel wishes to point out that even in case the written submissions dated 9th August 2008 had been admitted in the file, the Panel believes that, considering the preliminary stages at which this case now rests, it is not in a position to consider the existence of the referred three elements giving rise to the provisional measures as proven.
13. The Panel expressly does not state at this stage a final opinion or decision on the ultimate outcome of the case, which will be decided after a full study of all the facts and legal considerations of it. Despite the rejection of the Appellant's request for provisional measures, the Panel understands the importance and time sensitive nature of this proceeding and resolves to move swiftly to consider the issues herein.

The Court of Arbitration for Sport orders:

1. The application for provisional measures filed by the Iraqi Football Association is rejected.
2. (...).