

Decision
of the
**Member of the FIFA Disciplinary
Committee**

Mr Alejandro Piera [PAR]

via telephone conference

on 20 February 2019,

to discuss the case of:

Club Cruzeiro Esporte, Brazil

(Decision 180908 PST BRA ZH)

regarding:

failure to comply with a decision passed by the Court of Arbitration for Sport on
14 May 2018 regarding a contractual dispute between the club Al-Wahda FC,
United Arab Emirates and the club Cruzeiro Esporte, Brazil relating to the player
Denilson Pereira Neves

(Art. 64 of the FIFA Disciplinary Code)

I. inferred from the file

1. On 29 August 2017, the Single Judge of the Players' Status Committee decided that the club Cruzeiro Esporte (hereinafter also referred to as the Debtor) had to pay to the club Al-Wahda FC (hereinafter also referred to as the Creditor) the amount of EUR 850,000 as well as 5% interest *p.a.* to be calculated as follows:
 - 5% *p.a.* over the amount of EUR 250,000 as from 1 August 2016 until the date of effective payment;
 - 5% *p.a.* over the amount of EUR 100,000 as from 11 August 2016 until the date of effective payment;
 - 5% *p.a.* over the amount of EUR 100,000 as from 11 September 2016 until the date of effective payment;
 - 5% *p.a.* over the amount of EUR 100,000 as from 11 October 2016 until the date of effective payment;
 - 5% *p.a.* over the amount of EUR 100,000 as from 12 October 2016 until the date of effective payment;
 - 5% *p.a.* over the amount of EUR 100,000 as from 13 October 2016 until the date of effective payment;
 - 5% *p.a.* over the amount of EUR 100,000 as from 11 January 2017 until the date of effective payment.

Furthermore, the Single Judge of the Players' Status Committee imposed costs of proceedings to the amount of CHF 15,000 to be paid within 30 days of notification of the decision by the Debtor to FIFA.

2. The findings of the decision were duly communicated, amongst others, to the parties on 8 September 2017. The grounds of the decision passed by the Single Judge of the Players' Status Committee on 29 August 2017 were requested by the Debtor and communicated, amongst others, to the parties on 27 November 2017.
3. On 18 December 2017, the Debtor appealed the decision of the Single Judge of the Players' Status Committee before the Court of Arbitration for Sport (CAS).
4. On 14 May 2018, the CAS rendered its Arbitral Award upholding the appeal lodged by the Debtor. The CAS amended the fifth and sixth indent of para. 2 of the decision of the Single Judge of the Players' Status Committee dated 29 August 2017 as follows:
 - *Interest at a rate of 5% per annum over the amount of EUR 100,000 as from 11 November 2016 until the date of effective payment; and*

- *Interest at a rate of 5% per annum over the amount of EUR 100,000 as from 10 December 2016 until the date of effective payment.*

The other elements of the decision passed by the Single Judge of the Players' Status Committee on 29 August 2017 were confirmed.

5. As the aforementioned amount was not paid to the Creditor, the secretariat to the FIFA Disciplinary Committee opened disciplinary proceedings against the Debtor on 13 December 2018.
6. Additionally, the secretariat to the FIFA Disciplinary Committee urged the Debtor to pay the outstanding amount by 14 January 2019 at the latest and informed the Debtor that the case would be submitted to a member of the FIFA Disciplinary Committee once the aforementioned time limit expired. Moreover, the Debtor was informed that a member of the FIFA Disciplinary Committee would take a decision based on the documents in its possession, should the Debtor fail to submit any statement or pay the outstanding amounts due by the specified deadline.
7. On 14 January 2019, the legal representative of the Debtor provided the secretariat to the Disciplinary Committee with a statement. In its statement the latter claimed that the Debtor intended to pay the outstanding amount as soon as possible but that it did not have the financial means to afford such payment. The Debtor considered that in the matter at stake "*exceptional circumstances*" should apply due to the following:
 - i. Even though the Debtor did not deny that it owed the outstanding amount, it is currently lacking the financial means to make such payment as the Brazilian economy underwent one of the most serious financial recessions and political crises, which resulted in the impeachment of the president. As a consequence, "*the country's monthly inflation reached unacceptable 10,67%, [...] the annual variation of the Brazilian currency and dollar had annual (increase) of 48% from year 2015 onwards, as well as [...] the unemployment rate reached the unbelievable rate of 8,5%*". The devaluation of the Brazilian currency led to a huge decrease of income for Brazilian football clubs.
 - ii. The legal representative of the Debtor further claimed that it would try to reach a payment plan with the Creditor in the upcoming weeks and requested the FIFA Disciplinary Committee to consider the special circumstances when considering the sanctions eventually

imposed on the Debtor. The Debtor also stressed its good faith by claiming that it “*always refused to use any sort of subterfuge based upon Brazilian law (e.g. bankruptcy or under administration procedure) to not comply with its obligations*” towards the creditor even though then the Disciplinary Committee would possibly decide to close the matter at hand in line with Art. 107 of the FDC.

- iii. The Debtor asked the Disciplinary Committee to impose a fair sanction without ignoring the mentioned “*exceptional circumstances*”, suggesting that a fair sanction would be to grant a period of grace of 120 days to comply with the decision, and in case of non-payment within such period of grace a transfer ban for 1 period, rather than a deduction of points, and to waive any costs related to the ongoing proceedings.

II. and considered

1. According to art. 53 par. 2 of the FIFA Statutes, the Disciplinary Committee (hereinafter also referred to as *the Committee*) may pronounce the sanctions described in the Statutes and the FIFA Disciplinary Code (hereinafter also referred to as *the FDC*) on member associations, clubs, officials, players, intermediaries and licensed match agents.
2. 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 (art. 64 par. 1 of the FDC):
 - 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;
 - c) if it is a club, it 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 demotion to a lower division ordered. A transfer ban may also be pronounced.

If the club disregards the final time limit, the relevant association shall be requested to implement the sanctions threatened (art. 64 par. 2 of the FDC).

3. Moreover, in line with art. 78 par. 2 of the FDC, cases involving matters under art. 64 of the FDC may be decided by one member of the Disciplinary Committee alone (hereinafter also referred to as *member of the Committee*).

4. The member of the Committee emphasises that equal to the competence of any enforcement authority, it cannot review or modify as to the substance a previous decision, which is final and binding and, thus, has become enforceable.
5. Having said that, the member of the Committee notes that the findings of the decision passed by the Single Judge of the Players' Status Committee on 29 August 2017 had been duly communicated on 8 September 2017, amongst others to the parties, and that the grounds had been requested by the Debtor and duly communicated on 27 November 2017 to the parties. The member of the Committee also notes that the Debtor lodged an appeal before the Court of Arbitration for Sport (CAS). On 14 May 2018, the CAS upheld the appeal and amended para. 2 (fifth and sixth indent) of the decision passed by the Single Judge of the Players' Status Committee on 29 August 2017. The member of the Committee finally notes that no appeal against the award passed by the Court of Arbitration for Sport was lodged before the Swiss Federal Tribunal. Therefore, the arbitral award of the Court of Arbitration for Sport became final and binding.
6. In view of what has been explained under paragraph II./4. above, the member of the Committee is not allowed to analyse the case decided upon by the CAS as to the substance, in other words, to check the correctness of the amount ordered to be paid, but has as a sole task to analyse if the Debtor complied with the final and binding award rendered by the CAS on 14 May 2018.
7. In this respect, the member of the Committee first acknowledges that the Debtor claimed that it is facing "*exceptional circumstances*" due to the financial recession and political crisis in Brazil as well as the devaluation of the Brazilian currency.
8. In light of these elements, the member of the Committee finds it worthwhile to emphasise that a club has the duty to be aware of its actual financial strength, constitute provision in anticipation of possible issues and finally conclude contracts that can be fulfilled. In other words, the principle of *pacta sunt servanda* – more relevant in the context of contractual dispute *per se* - is of paramount importance for FIFA and a key issue to be protected among others by the Regulations on the Status and Transfer of Players. To that end, the Committee equally refers to the content of art. 2 of the Swiss Civil Code, according to which "[e]very person is bound to exercise his rights and fulfil his obligations according to the principle of good faith" (cf. par. 45 ff. CAS 2010/A/2144 Real Betis Balompié SAD v. PSV Eindhoven). Thus, the sole fact that the Debtor may be undergoing financial problems does not exonerate it from its obligations to pay the outstanding amounts owed to the Creditor.

9. In addition to the above, the member of the Committee wishes to recall that the alleged financial difficulties the Debtor faces because of the economic crisis and the consequential loss of value of the local currency are not valid arguments, which has been confirmed by the CAS *"the Sole Arbitrator fails to see how the fall in value of the Brazilian currency can either be a justification for non-payment, or how it amounts to "exceptional circumstances". The fluctuations of foreign currency are a standard risk in business dealings and any entity dealing in foreign currency [...] ought to be aware of the possibility of it and should plan its financial dealings accordingly. Pursuant to the principle of pacta sunt servanda, the Club should have been aware of its financial situation"* (cf. par. 118 CAS 2018/A/5864 Cruzeiro E.C. v FIFA).
10. Concerning the Debtor's request to be granted a *"fair"* final period of grace of 120 days to pay the outstanding amount due to the Creditor, the member of the Committee recalls that due to the fact that the award rendered by the CAS is now final and binding, it cannot decide to grant a possible deadline extension to pay the outstanding amount due and/or to impose a possible payment plan. As a consequence, a possible deadline extension and/or a possible payment plan would have to be agreed upon directly with the Creditor, in the present case the club Al-Wahda FC, which at its own discretion can accept or not the deadline extension and/or payment plan proposed.
11. The member of the Committee subsequently emphasises that, as the Debtor did not fully comply with the award rendered by the CAS and is consequently withholding money from the Creditor, it is considered guilty under the terms of art. 64 of the FDC.
12. The fine to be imposed under the above-referenced art. 64 par. 1 a) of the FDC in combination with art. 15 par. 2 of the FDC shall range between CHF 300 and CHF 1,000,000. The Debtor withheld the amount unlawfully from the Creditor. Even FIFA's attempts to urge the Debtor to fulfil its financial obligations failed to induce it to pay the total amount due. In view of all the circumstances pertaining to the present case and by taking into account the outstanding amount due, the member of the Committee regards a fine amounting to CHF 30,000 as appropriate. This amount complies with the Committee's established practice.
13. In application of art. 64 par. 1 b) of the FDC, taking into consideration that the Debtor already owes money to the Creditor for a considerable period of time, the member of the Committee considers a final deadline of 90 days as appropriate for the amount due to be paid to the Creditor.
14. In accordance with art. 64 par. 1 c) of the FDC and with the Circular n° 1628, the Debtor is hereby warned and notified that, in the case of default within the period stipulated, points will be deducted, a transfer ban may also be pronounced or demotion to a lower division may be ordered.

15. A deduction of points from the Debtor's first team in the national league will be automatically implemented by the Brazilian Football Association in case of non-payment within the stipulated deadline. Thus, once the deadline has expired, the points will be deducted automatically by the Brazilian Football Association without a further formal decision having to be taken nor any order having to be issued by the Committee or its secretariat.
16. With regard to the amount of points to be deducted, art. 64 par. 3 of the FDC is applicable, whereby the number of points deducted must be proportionate to the amount owed. In the light of the foregoing criteria, regarding the amount of the fine to be imposed and in keeping with the Committee's well-established practice, a deduction of six (6) points is considered appropriate.
17. The Brazilian Football Association is hereby reminded of its obligation to automatically implement the abovementioned point deduction upon expiry of the final deadline without having received any proof of payment from the Debtor. In this respect, and for the sake of clarity, the Brazilian Football Association is referred to arts. 90 to 92 of the FDC in what concerns the calculation of time limits. Should the Brazilian Football Association fail to automatically implement said sanction and provide the secretariat to the FIFA Disciplinary Committee with the relevant proof of point deduction, disciplinary proceedings – which may lead to an expulsion from all FIFA competitions – may be opened against it.

III. has therefore decided

1. The club Cruzeiro Esporte (hereinafter, the Debtor) is found to have infringed art. 64 of the FIFA Disciplinary Code as it is guilty of failing to comply with the decision passed by the Court of Arbitration for Sport on 14 May 2018 according to which it was ordered to pay to the club Al-Wahda FC (hereinafter, the Creditor) EUR 850,000 plus 5% interest *p.a.* to be calculated in accordance with the decision passed by the Court of Arbitration for Sport on 14 May 2018.
2. The Debtor is ordered to pay a fine to the amount of CHF 30,000. The fine is to be paid within 90 days of notification of the present decision. Payment can be made either in Swiss francs (CHF) to account no. 0230-325519.70J, UBS AG, Bahnhofstrasse 45, 8098 Zurich, SWIFT: UBSWCHZH80A, IBAN: CH85 0023 0230 3255 1970 J or in US dollars (USD) to account no. 0230-325519.71U, UBS AG, Bahnhofstrasse 45, 8098 Zurich, SWIFT: UBSWCHZH80A, IBAN: CH95 0023 0230 3255 1971 U, with reference to case no. **180908 dth**.

3. The Debtor is granted a final deadline of 90 days as from notification of the present decision in which to settle its debt to the Creditor.
4. If payment is not made to the Creditor and proof of such a payment is not provided to the secretariat to the FIFA Disciplinary Committee and to the Brazilian Football Association by this deadline six (6) points will be deducted automatically by the Brazilian Football Association without a further formal decision having to be taken nor any order to be issued by the FIFA Disciplinary Committee or its secretariat.

In this respect, and for the sake of clarity, the Brazilian Football Association is referred to arts. 90 to 92 of the FDC in what concerns the calculation of time limits.

5. If the Debtor still fails to pay the amount due to the Creditor even after the deduction of points in accordance with point 4 above, the FIFA Disciplinary Committee, upon request of the Creditor, will decide on a possible relegation of the Debtor's first team to the next lower division.
6. As a member of FIFA, the Brazilian Football Association is reminded of its duty to implement this decision and provide FIFA with proof that the points have been deducted in due course. If the Brazilian Football Association does not comply with this decision, the FIFA Disciplinary Committee will decide on appropriate sanctions on the member. This can lead to an expulsion from FIFA competitions.
7. The Debtor is directed to notify the secretariat to the FIFA Disciplinary Committee as well as the Brazilian Football Association of every payment made and to provide the relevant proof of payment.
8. The Creditor is directed to notify the secretariat to the FIFA Disciplinary Committee as well as the Brazilian Football Association of every payment received.

Sent to: - Club Cruzeiro Esporte
 c/o Mr Breno Costa Ramos Tannuri;
 - Club Al-Wahda FC;
 - Brazilian Football Association;
 - United Arab Emirates Football Association.

LEGAL ACTION

According to art. 64 par. 5 of the FDC and art. 58 par. 1 of the FIFA Statutes, 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.

The full address and contact numbers of the CAS are the following:

Avenue de Beaumont 2
1012 Lausanne
Switzerland
Tel: +41 21 613 50 00
Fax: +41 21 613 50 01
e-mail: info@tas-cas.org
www.tas-cas.org

FÉDÉRATION INTERNATIONALE
DE FOOTBALL ASSOCIATION



Deborah Thuer
Deputy Secretary to the Disciplinary Committee