Arbitration CAS 2016/A/4402 Panthrakikos FC v. Fédération Internationale de Football Association (FIFA), award of 20 September 2016

Panel: Mr Sofoklis Pilavios (Greece), President; Prof. Luigi Fumagalli (Italy); Mr Hans Nater (Switzerland)

Football
Disciplinary sanction for failure to comply with a CAS award
Financial difficulties to meet payment obligations
Situations allowing the closing of disciplinary proceedings
Force majeure

1. **It is a well-known principle that financial difficulties to satisfy an obligation of payment does not excuse the failure to make the required payment.**

2. **According to Article 107 of the FIFA Disciplinary Code (FDC), disciplinary proceedings may be closed only in three specific events, namely: (a) if the parties reach an agreement; (b) if a party declares bankruptcy, or (c) if they become baseless. The enactment by the national government of urgent legislation imposing restrictions on the international transfer of capital through national banks, allegedly making it impossible to execute transfers of capital abroad is not a situation envisaged by Article 107 FDC. Accordingly, it is not a legitimate reason for the Disciplinary Committee to close the proceedings or to, somehow, suspend the proceedings and refrain from deciding the matter.**

3. **Strict regulatory restrictions placed on the operation of a national banking sector requiring specific authorisation and approval for the transfer of capital but not resulting in an outright ban on all international transfers of capital through national banks may involve a bureaucratic procedure but does not entail an undue burden ultimately making it impossible or extremely difficult to make payments abroad and cannot therefore be invoked by a party as a situation of force majeure, especially if these restrictions were enacted after the party had defaulted on its financial obligations.**

I. PARTIES

1. Panthrakikos FC is a professional football club with its registered office in Komotini, Greece (the "Appellant" or the "Club"). The Club is affiliated to the Hellenic Football Federation, which is turn is a member of the Fédération Internationale de Football Association.

2. The Fédération Internationale de Football Association (the "Respondent" or "FIFA") is the international federation governing the sport of football worldwide based in Zurich, Switzerland.

II. BACKGROUND FACTS

3. Below is a summary of the main relevant facts, as presented in the parties' written submissions in the course of the present proceedings. Additional facts may be set out, where relevant, in connection with the legal discussion.

4. On 17 January 2014, the FIFA Dispute Resolution Chamber (the "FIFA DRC") decided that the Appellant had to pay the club "Dauphins FC" training compensation for the player L. in the sum of EUR 72,500 within 30 days as from notification of the decision, as well as 5% interest p.a. as of 6 March 2010 until the date of the effective payment.

5. On 12 June 2014, the Appellant filed an appeal with the Court of Arbitration for Sport (the "CAS") against "Dauphins FC" with respect to the aforementioned decision of the FIFA DRC of 17 January 2014.

6. On 17 December 2014, the CAS delivered a Consent Arbitral Award (the "CAS Consent Award") ratifying a Settlement Agreement concluded between the Appellant and "Dauphins FC" on 20 November 2014 regarding payment of a settlement amount of EUR 70,000 by the Appellant in instalments as follows:

- *10,000 Euros will be paid by 5 December 2014;*
- *15,000 Euros will be paid by the end of January 2015;*
- *15,000 Euros will be paid by the end of February 2015;*
- *5,000 Euros will be paid by the end of April 2015;*
- *15,000 Euros will by paid by the end of May 2015;*
- *10,000 Euros will be paid within two days from the day Panthrakikos will receive the reimbursement by CAS of the amount of costs (since the entirety of the advance of costs have been paid by Panthrakikos) that will remain, following the payment of all expenses, fees and administrative costs by the CAS for the relevant arbitration pending before the CAS. […].*

III. PROCEEDINGS BEFORE THE FIFA DISCIPLINARY COMMITTEE

7. On 25 June 2015, following several reminders to the Appellant and several notifications to the FIFA Disciplinary Committee, the club "Dauphins FC" informed the secretariat of the FIFA Disciplinary Committee that the Appellant failed to comply with the CAS Consent Award of 17 December 2014, as it had paid only the first instalment in the sum of 10,000 Euros and all further instalments remained unpaid.

8. On 15 July 2015, the FIFA Disciplinary Committee opened disciplinary proceedings against the Appellant with respect to its failure to comply with the CAS Consent Award of 17 December 2014.

9. On 24 July 2015, the Appellant replied to the secretariat of the FIFA Disciplinary Committee on the matter and conceded that it had failed to comply with the payment schedule provided in the CAS Consent Award of 17 December 2014. Yet, with the same letter, the Appellant explained that it was unable to pay the outstanding amounts under the CAS Consent Award, as a result of the legislative restrictions on the international transfers of capital, imposed by the Greek Government since 28 June 2015. On those grounds, the Appellant requested the suspension of the respective disciplinary proceedings.

10. On 3 August 2015, the secretariat of the FIFA Disciplinary Committee requested the Hellenic Football Federation to provide information about the possibilities of the Appellant to comply with its financial obligations under the CAS Consent Award of 17 December 2014.

11. On 12 August 2015, the Hellenic Football Federation replied to such request presenting information about the procedure provided for the international payments and transfers of capital in Greece under the applicable Greek legislation that imposed restrictions on bank transactions.

12. On 13 August 2015, the secretariat of the FIFA Disciplinary Committee invited the Appellant to pay the amounts due by 20 August 2015, at the latest, and informed that the case would be submitted to the FIFA Disciplinary Committee on 4 September 2015.

13. On 28 August 2015, the Appellant replied to the secretariat of the FIFA Disciplinary Committee explaining that the payments due could be executed only upon approval by the Greek Committee for the Approval of Banking Transactions and such approval could not be expected in due time.

14. On 4 September 2015, the FIFA Disciplinary Committee passed its decision No 150449 PST GRE ZH on the aforementioned matter (the "Appealed Decision") with the following operative part:

> ***1)*** *The club Panthrakikos Komotini FC is pronounced guilty of failing to comply with the Consent Arbitral Award delivered by the Court of Arbitration for Sport on 17 December 2014 in connection with the decision passed by the Dispute Resolution Chamber on 17 January 2014 and is, therefore, in violation of art. 64 of the FIFA Disciplinary Code.*
>
> ***2)*** *The club Panthrakikos Komotini FC is ordered to pay a fine to the amount of CHF 7,500. The fine is to be paid within 30 days of notification of the present decision […]*
>
> ***3)*** *The club Panthrakikos Komotini FC is granted a final period of grace of 30 days as from notification of the present decision in which to settle its debt to the creditor, club Dauphins FC, and FIFA.*
>
> ***4)*** *If payment is not made by this deadline, the creditor ay demand in writing from the secretariat to the FIFA Disciplinary Committee that six (6) points be deducted from the debtor 's first team in the domestic league championship. Once the creditor has filed this request, the points will be deducted*

automatically without a further formal decision having to be taken by the FIFA Disciplinary Committee. The order to implement the point deduction will be issued on the association concerned by the secretariat to the FIFA Disciplinary Committee.

5) *If the club Panthrakikos Komotini FC still fails to pay the amount due even after deduction of the points in accordance with point 4 above, the FIFA Disciplinary Committee will decide on a possible relegation of the debtor's first team to the next lower division.*

6) *[…].*

7) *The costs of these proceedings amounting to CHF 1,000 are to be borne by the club Panthrakikos Komotini FC and shall be paid according to the modalities stipulated under point 2 above.*

8) *[…].*

15. On 23 December 2015, the grounds of the Appealed Decision were notified to the parties.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

16. On 13 January 2016, the Appellant filed a Statement of Appeal pursuant to Article R48 of the CAS Code of Sports-related Arbitration (the "Code"), with the CAS against FIFA with respect to the decision rendered by the FIFA Disciplinary Committee on 4 September 2015.

17. With its Statement of Appeal the Appellant submitted a request to stay the execution of the Appealed Decision and nominated Prof. Luigi Fumagalli, Professor and Attorney-at-law in Milan, Italy, as arbitrator in the present proceedings.

18. On 21 January 2016, the Appellant requested the CAS Court Office for a five-day extension of the time limit to file its Appeal Brief pursuant to Article R32 of the CAS Code.

19. On 22 January 2016, the CAS Court Office informed the parties that the Appellant's request for a five-day extension for filing an Appeal Brief was granted.

20. On 22 January 2016, the Respondent informed the CAS Court Office that it did not object to the Appellant's request to stay the execution of the Appealed Decision and subsequently, on that same day, the CAS Court Office informed the parties that the Appellant's request was granted.

21. On 27 January 2016, the Respondent informed the CAS Court Office that it nominated Dr Hans Nater, Attorney-at-law in Zurich, Switzerland, as arbitrator in the present proceedings.

22. On 28 January 2016, the Appellant filed its Appeal Brief pursuant to Article R51 of the CAS Code. The brief contained the following requests for relief:

1) *To annul the challenged decision;*

2) *To rule that the FIFA Disciplinary Committee had to refrain from taking a decision on the present matter and had to suspend the disciplinary proceedings against the Appellant;*

3) To condemn the Respondent to the payment in favour of the Appellant of the legal expenses incurred;

4) To establish that the costs of the arbitration procedure shall be borne by the Respondent.

Subsidiarily, and only in the event that the above is rejected:

1) To set aside the challenged decision;

2) To rule that the sanctions imposed by the FIFA Disciplinary Committee are disproportionate to the amount of the dispute and to the circumstances of the case and to reduce them to the appropriate level;

3) To suspend the effects and the execution of the sanction for as long as the Appellant is prohibited from making payments due to the strict capital controls that have been imposed in Greece;

4) To establish that the costs of the arbitration procedure shall be borne by the Respondent.

Subsidiarily, and only in the event that the above is rejected:

1) To set aside the challenged decision;

2) To rule that the sanctions imposed by the FIFA Disciplinary Committee are disproportionate to the amount of the dispute and to the circumstances of the case and to reduce them to the appropriate level;

3) To condemn the Respondent to the payment in the favour of the Appellant of the legal expenses incurred;

4) To establish that the costs of the arbitration procedure shall be borne by the Respondent.

23. On 19 February 2016, the Respondent filed its Answer with the CAS in accordance with Article R55 of the CAS Code, with the following requests for relief:

1) To reject the Appellant's appeal in its entirety.

2) To confirm in its entirety the Appealed Decision.

3) To order the Appellant to bear all costs incurred in connection with these proceedings and to cover all legal expenses of the Respondent in connection with these proceedings.

24. On 22 February 2016, pursuant to Article R54 of the Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that the Panel appointed to decide the present matter was constituted as follows:

President:	Mr Sofoklis P. Pilavios, attorney-at-law, in Athens, Greece
Arbitrators:	Prof. Luigi Fumagalli, Professor and attorney-at-law, in Milan, Italy Dr Hans Nater, attorney-at-law, in Zurich, Switzerland.

25. On 21 March 2016, and 30 March 2016, the Respondent and the Appellant, respectively, returned duly signed copies of the Order of Procedure to the CAS Court Office.

26. On 12 April 2016, a hearing was held in Lausanne, Switzerland. In addition to the Panel and Mr Antonio de Quesada, Counsel to the CAS, the following persons attended the hearing:

For the Appellant: Mr Konstantinos Zemberis, legal counsel

For the Respondent: Ms Audrey Cech, and Mr Bernardo Palmeiro, legal counsel.

27. The Panel confirms that it carefully took into account in its deliberations all of the submissions, evidence, and arguments presented by the parties, even if they have not been specifically summarized or referred to in the present award.

V. SUBMISSIONS OF THE PARTIES

28. The submissions of the Appellant, as contained in its written submissions and oral pleadings, may be summarized, in essence, as follows:

- The Appellant failed to comply with the payment schedule provided in the CAS Consent Award of 17 December 2014, due to unexpected and unforeseen incidents, and more specifically due to the fact that a significant amount of cash had been stolen after a burglary in the Club's offices.
- Following this incident the Appellant intended to pay the outstanding amounts out of the funds it expected to receive from the Superleague [Greek first division] in July and August 2015.
- However, on 20 July 2015, after a short term bank holiday, the Greek Government introduced urgent legislation imposing strict restrictions on the international transfers of capital through Greek banks.
- Within this legislative framework, the international transfer of capital through Greek Banks was possible only upon approval by the Greek Committee for the Approval of Banking Transactions.
- On 24 July 2015, the Club informed the FIFA Disciplinary Committee that under the newly enacted legislation and the restrictions in the transfer of capital, it was unable to proceed with the requested payment of the outstanding amounts for reasons of "force majeure", and, on those grounds, it requested the suspension of the disciplinary proceedings against it.
- On 25 August 2015, the Club submitted a formal petition with its local bank requesting authorization for the transfer of the outstanding amounts to the respective bank accounts of "Dauphins FC" and FIFA and such request was expected to be processed by the Greek Committee for the Approval of Banking Transactions in the following weeks.
- FIFA should not have submitted the matter to the Disciplinary Committee, since the Club had exhausted all means available to it under Greek legislation in order to proceed to the requested payments.
- Under these circumstances the sanctions imposed are disproportionate.

29. The submissions of FIFA, as contained in its written submissions and oral pleadings, may be summarized, in essence, as follows:

- The Appellant should have paid the outstanding amounts in accordance with the CAS

Consent Award by May 2015, namely before the capital controls and restrictions were implemented by the Greek Government since 28 June 2015.

- The Appellant failed to substantiate what kind of unexpected and unforeseen incidents caused its failure to comply with the payment schedule provided in the CAS Consent Award. In that regard, the Appellant did not present any document showing that it had reported the alleged burglary to the official authorities.
- The Appellant did not discharge its burden of proof to establish that it was prevented from executing payments of the outstanding amounts as a direct result of the capital controls and restrictions imposed in Greece since 28 June 2015.
- The capital controls and restrictions imposed by the Greek Government on 28 June 2015 did not prevent the Appellant from executing international payments upon authorization by the Greek Committee for the Approval of Banking Transactions.
- The Appellant failed to submit any document by the Greek Committee for the Approval of Banking Transactions showing that it had been denied approval to proceed with payment of the outstanding amounts.
- After the imposition of the capital controls and restrictions, the Appellant could have proposed an alternative payment schedule to FC Dauphins, in order to facilitate payment in instalments for smaller amounts.
- Article 107 of the FIFA Disciplinary Code provides that the FIFA Disciplinary Committee has discretion to close the proceedings only in the specific circumstances stipulated therein. In the present case there was no valid ground for the suspension of the proceedings by the FIFA Disciplinary Committee.
- The sanctions provided in the Appealed Decision are proportional in view of the significant amount owed by the Appellant.

VI. JURISDICTION

30. Article R47 of the Code provides as follows:

An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.

31. The jurisdiction of CAS derives from Article 67 par. 1 of the FIFA Statutes that provides as follows: *"Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question"* and Article R47 of the CAS Code.

32. The jurisdiction of CAS is further confirmed by the Order of Procedure duly signed by both parties. It therefore, follows that CAS has jurisdiction to decide on the present dispute.

VII. ADMISSIBILITY

33. Article R49 of the Code provides as follows:

In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.

34. The motivated part of the decision of the FIFA Disciplinary Committee of 4 September 2015 was notified to the Appellant on 23 December 2015 and the Appellant filed its Statement of Appeal on 13 January 2016. Therefore, the 21-day deadline to file the appeal was met.

35. The Panel, therefore, finds that the appeal is admissible.

VIII. APPLICABLE LAW

36. Article R58 of the Code provides 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.

37. The Panel The Panel notes that Article 66 par. 2 of the FIFA Statutes provides the following:

The provisions of the CAS Code of Sports related Arbitration shall apply to the proceedings. CAS shall apply the various regulations of FIFA and additionally Swiss law.

38. The Panel therefore finds that the relevant FIFA rules and regulations, and more specifically the FIFA Disciplinary Code, as in force at the relevant time of the dispute, shall be applied primarily, and Swiss law shall be applied subsidiarily.

IX. MERITS

39. The Panel notes that the Appellant does not contest the outstanding amount of its debt to the Club "Dauphins FC" under the CAS Consent Award of 17 December 2014. In fact, the Appellant admits having failed to pay the remaining part of the instalments since January 2015 in the aggregate amount of 60,000 Euros.

40. The Panel finds that the alleged unforeseen incidents and in particular the alleged burglary into the Club's offices, that supposedly made it difficult for the Appellant to meet its financial obligations, are not supported by any shred of evidence, and thus, cannot be taken into consideration. In any case, the Panel holds that, even if the Appellant had proven this burglary, such event would not have excused its failure to comply with the CAS Consent Award of 17 December 2014: it is in fact a well-known principle (applied *e.g.* in CAS 2006/A/1008, § 44)

that financial difficulties to satisfy an obligation of payment does not excuse the failure to make the required payment.

41. On this basis, the Appellant failed for most part to comply with the CAS Consent Award of 17 December 2014 without any valid justification, and hence, the Panel finds that all conditions provided in Article 64 par.1 of the FIFA Disciplinary Code for the imposition of disciplinary sanctions against a Club are met.

42. The Appellant, nevertheless, challenges the Appealed Decision arguing that the FIFA Disciplinary Committee should have suspended the proceedings against it, as a result of an extraordinary situation, and in particular due to the enactment of urgent legislation by the Greek Government that imposed restrictions on the international transfer of capital through Greek banks, and, allegedly made it impossible for the Appellant to execute transfers of capital abroad.

43. With regard to this matter, the Panel observes that according to Article 107 of the FIFA Disciplinary Code, disciplinary proceedings may be closed only in three specific events, namely: (a) if the parties reach an agreement; (b) if a party declares bankruptcy, or (c) if they become baseless.

44. In the present case, however, none of conditions provided for in Article 107 of the FIFA DC is fulfilled. Consequently, there was no legitimate reason for the Disciplinary Committee to close the proceedings or to, somehow, suspend the proceedings and refrain from deciding the matter.

45. The Panel, subsequently, turns to the related question whether the events cited by the Appellant, namely the restrictions on the transfer of capital via Greek banks constitute an event of "force majeure", that can be legitimately invoked as an adequate and sufficient ground for not imposing sanctions on the Appellant for its failure to pay the outstanding amounts under the CAS Consent Award of 17 December 2014.

46. After careful review of the applicable legislative acts that have been introduced by the Greek Government since 28 June 2015 concerning urgent provisions imposing restrictions on cash withdrawals and transfer of capital through Greek banks, as these have been subsequently amended in July 2015 and in August 2015, the Panel concludes that the operation of the Greek banking sector was indeed placed under strict regulatory restrictions.

47. However, to the understanding of the Panel, these restrictions did not result in an outright ban on all international transfers of capital through Greek Banks. In particular, since the reopening of the Greek banks on 20 July 2015, after a short-term bank holiday since 28 June 2015, international payments and transfers of capital abroad were made possible in certain instances and for specific purposes upon authorization and approval by the Greek Committee for the Approval of Banking Transactions.

48. The Panel notes that the Appellant was well aware of the fact that international transfers of capital were possible since 20 July 2015 on certain conditions, and upon authorization by the

Committee for the Approval of Banking Transactions, following a formal request by the interested party.

49. As a matter of fact, the Appellant contends that it had submitted such a formal petition to its bank for the first time on 25 August 2015 - clearly after the initiation of disciplinary proceedings against it, and, after the expiry of the deadline set by the FIFA Disciplinary Committee - requesting authorization to execute payments for the outstanding amounts to the Club "Dauphins FC" and to FIFA. However, the Appellant failed to submit to the Panel any relevant documentation evidencing whether this request has been processed by the competent Committee for the Approval of Banking Transactions, and whether the requested authorization has been ultimately granted, or denied, and if so, on what grounds.

50. In this respect, the Panel finds that the Appellant failed to discharge its burden of proof, as it did not sufficiently establish that Greek legislation, as in force since 20 July 2015, constituted such an absolute obstacle to the transfer of capital, that prevented it from settling its outstanding debt to the Club "Dauphins FC" under the CAS Consent Award, even after it had been invited to do so by the FIFA Disciplinary Committee on 20 August 2015.

51. And while the Panel recognizes that the respective legislation involved a bureaucratic procedure, it nevertheless considers that this did not entail an undue burden that ultimately made it impossible or, extremely difficult, for the Appellant to make payments abroad. Consequently, the Appellant cannot invoke a situation of "force majeure" for not making the outstanding payments under the CAS Consent Award of 17 December 2014, at any stage after the opening of the disciplinary proceedings against it.

52. In addition to the foregoing, the Panel notes that according to the payment plan agreed upon in the CAS Consent Award, the Appellant has undertaken to pay the total amount of 70,000 Euros in five monthly instalments on the due dates stipulated therein, in a period between December 2014 until the end May 2015, while a final instalment was scheduled to be paid within two days upon reimbursement by the CAS of the amount of costs for the respective appeal proceedings. This plainly means that the Appellant was supposed to have fully settled its financial obligations already by the end of May 2015.

53. Nevertheless, the events pleaded by the Appellant and the extraordinary circumstances that affected the Greek banking sector arose for the first time on 28 June 2015, namely, after the Appellant had defaulted on its financial obligations under the CAS Consent Award. As a result, the Appellant cannot benefit from a situation that occurred after its default and use it as a ground for defence.

54. In light of these considerations, the Panel finds that the Appellant cannot invoke to its avail these extraordinary circumstances that occurred after its default, in order to escape disciplinary responsibility, or to soften the consequences arising thereby. On all those grounds, after taking into consideration the specific circumstances of the case and the outstanding amount due, the Panel finds that the disciplinary sanctions imposed by the Appealed Decision were proportional, appropriate and justified.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by the Football Club Panthrakikos FC on 13 January 2016 against the Decision issued on 4 September 2015 by the Disciplinary Committee of the Fédération Internationale de Football Association is dismissed.

2. The Decision issued on 4 September 2015 by the Disciplinary Committee of the Fédération Internationale de Football Association is confirmed.

3. (…).

4. (…).

5. All other motions or prayers for relief are dismissed.