



Arbitration CAS 2018/A/5940 Baghdad Bounedjah & Al Sadd FC v. Asian Football Confederation (AFC), award of 14 February 2019

Panel: Mr Anthony Lo Surdo SC (Australia), President; Mr David Wu (China); Mr Alexis Schoeb (Switzerland)

Football

Disciplinary dispute

Definition of a decision

Burden of proof

1. **What constitutes a decision is a not question of form but of substance. A decision must be intended to affect the legal rights of a person, usually, if not always, its addressee. It is to be distinguished from a mere provision of information.**
2. **A party who seeks to substantiate claims bears the onus of affirmatively establishing the facts pertinent to and which support that claim.**

I. INTRODUCTION

1. Baghdad Bounedjah (“First Appellant”) and Al Sadd FC (“Second Appellant”) (collectively, Appellants) bring an appeal against the Asian Football Confederation (AFC) (“Respondent”) challenging the decision of the AFC Appeal Committee (“Appeal Committee”) passed on 3 August 2018 and notified with grounds on 13 September 2018 by which it confirmed a decision of the AFC Disciplinary and Ethics Committee (“D & E Committee”) of 10 July 2018.
2. In that decision, the D & E Committee found that a protest lodged by Al Ahli Saudi FC (“Protestor”) initially on 7 May 2018 and followed by a full written report on 9 May 2018 regarding the conduct of the First Appellant towards an assistant referee during an AFC Champions League (“Competition”) match between the Second Appellant and the Protestor on 7 May 2018 was admissible under Article 59 AFC Disciplinary and Ethics Code (November 2017 Edition) (“AFC Code”) and that the Respondent was therefore entitled to open disciplinary proceedings against the First Appellant under Article 119.1.3 of the AFC Code.
3. These proceedings accordingly concern, at their core, whether the protest is admissible.

II. THE PARTIES

4. The First Appellant is a professional football player with Algerian nationality currently registered to play with the Second Appellant.
5. The Second Appellant is a professional football club domiciled in Doha, Qatar and affiliated to the Qatar Football Association (QFA). The QFA is a member association of the Respondent.
6. The Respondent is the governing body for football, futsal and beach soccer in Asia and is the owner of all rights vesting in the Competition.

III. FACTUAL BACKGROUND

7. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence. Additional facts and allegations found in the parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

A. Overview

8. The dispute between the parties arises from an incident which occurred on 7 May 2018 during a fixture in the Competition. A protest was lodged by the Protestor under Article 59 of the AFC Champions League Competition Regulations ("AFC Regulations") which alleged that in the 72nd minute of the game the First Appellant made a hand gesture towards the Assistant Referee that suggested the Assistant Referee had received a bribe from the Protestor. That gesture consisted of the First Appellant repeatedly rubbing his left thumb against his left index finger or fingertips with his arm outstretched and pointing in the direction of the Assistant Referee shortly after he was adjudged to have been in an offside position (Incident).
9. The matter initially came before the D & E Committee because Article 59.6 of the AFC Regulations requires that committee to make decisions on protests. The decision of the D & E Committee was then the subject of an appeal to the Appeal Committee which, under Article 59.6 of the AFC Regulations, is responsible for deciding appeals against any decision of the D & E Committee that the AFC Regulations do not declare as final or referable to another body.

B. The salient facts

10. Article 59.1 of the AFC Regulations enables a protest to be lodged with the AFC. A "protest" is described as "*an objection of any kind to any matter that has a direct effect on Matches and any matters related to a breach of these Regulations or the AFC Disciplinary and Ethics Code*". Article 59.2 of the AFC Regulations provides, *inter alia*, that unless otherwise stipulated, to be considered valid, a protest is to be submitted in writing on the prescribed form within 2 hours of the end of the match in

question and is to be followed up by a “full written report” to the AFC General Secretariat within 48 hours of the match in question.

11. On 7 May 2018, Al Sadd SC (QAT) played a home fixture in the Competition against Al Ahli Saudi FC (KSA) at the Jassim Bin Hamad Stadium in Doha.
12. On 7 May 2018 at 10:21 pm, the Protestor lodged with the AFC a “Protest Form” by email.
13. On 9 May 2018, the Protestor lodged with the AFC General Secretariat a “full written report” (together with the “Protest Form” completed on 7 May 2018) providing particulars of the conduct of the First Appellant which it contended constituted a breach of the AFC Regulations or the AFC Code. Relevantly, the Protestor alleged that:
 - (a) in the 72nd minute of the match, the First Appellant, *“made with his fingers unsportsmanlike conduct towards the assistant referee, which indicates that the assistant referee has received a bribe”* from the Protestor;
 - (b) the Centre Referee did not see this conduct, but it was broadcast via beIN SPORTS where it was seen by the viewers; and
 - (c) the accusation to the Assistant Referee of a bribe is an indirect charge to the Protestor of bribing the Assistant Referee.

The Protestor requested the AFC General Secretariat to refer the file to the D & E Committee for further consideration and for the imposition of an appropriate penalty (“Protest”).

14. On 10 May 2018, the AFC General Secretariat referred the Protest to the QFA and to the Second Appellant and invited the First Appellant to urgently provide his written observations on the Protest by 13 May 2018.
15. On 12 May 2018, the QFA responded to the AFC General Secretariat’s letter of 10 May 2018 in which it indicated, relevantly, that:
 - (a) the First Appellant required copies of the Match Commissioner’s Report and the Match Referee’s Report before he could provide a response to the Protest;
 - (b) the First Appellant required an extension of time of at least three days after the receipt of the aforementioned documents to provide his response;
 - (c) the hand gesture did not have the meaning ascribed to it by the Protestor. The QFA contended that the video footage shows that the First Appellant *“was merely questioning the decision of the assistant referee for the offside given, showing with his fingers that in his opinion he was not offside for a few centimetres only. In fact, from the same footage, the assistant referee understood the gesture (...) in the same way as it was intended (...) and, as a response to him, indicated the same exact gesture that in his opinion he was slightly offside”*; and

- (d) the fact that the Centre Referee did not impose any caution after the Assistant Referee had seen the gesture demonstrates that a decision had been taken in this respect, which cannot be subjected to further review upon protest in accordance with the applicable regulations.
- 16. On 15 May 2018, the AFC General Secretariat furnished to the QFA copies of the Match Commissioner's Report and the Match Referee's Report. It requested that the First Appellant provide his comments, if any, by 21 May 2018.
 - 17. The only reference in the Match Commissioner's Report to the Incident is in the "Remarks" section. It simply records that about an hour after the match, Al Ahli Saudi FC approached the Match Commissioner indicating that it wanted to make a protest. The Match Commissioner printed the protest form which was submitted by the Protestor by email at 10.21pm on 7 May 2018, although, according to the Match Commissioner's Report, the Protest was received by email at 11:21pm. The Match Referee's Report contains no reference to the Incident.
 - 18. By letter dated 21 May 2018, the QFA on behalf of the First Appellant, provided what it refers to as *"supplementary comments, in addition to his observations as per his previous submission dated 12.05.2018, mainly related to the content of the MC Report and the Referee Report"*. The QFA notes that there is no reference in either the Match Commissioner's Report or that of the Match Referee to the Incident. It asserts that the Protest should be rejected as inadmissible on the following grounds:
 - (a) the Incident was not a matter that had escaped the Match Official's attention having regard to the video footage which discloses a direct interaction between the Assistant Referee and the First Appellant. The Referee, *"having considered the relevant circumstances, decided not to impose any sanction or caution against the Player"*. As the decision of the Match Referee was directly connected with play, such decision is final and, having regard to article 59.3 of the AFC Regulations, no protest can be lodged; and
 - (b) the Protest was filed outside of the 2-hour window permitted by article 59.2 of the AFC Regulations. The QFA contended that, having regard to the fact that the match commenced at 7.15 pm local time and had only two minutes of extra time in the first half and 4 minutes of extra time in the second half, the match should have finished at approximately 9.06 – 9.08pm. The Match Commissioner's Report revealed that the Protest was received at 11.21pm, that is, between 13 and 15 minutes outside of the 2-hour window.

C. Proceedings before the D & E Committee

- 19. On 24 May 2018, the Deputy Secretary to the D & E Committee wrote to the QFA noting that the matter was to be deliberated by that committee on 31 May 2018 and 1 June 2018.
- 20. On 6 June 2018, the Secretary of the D & E Committee wrote to the QFA notifying it that:

- (a) on 1 June 2018, the D & E Committee decided that the Protest was lodged in accordance with the relevant competition regulations, and that, in accordance with Article 119.1.3 of the AFC Code, the Secretariat to the AFC administration was now opening disciplinary proceedings against the First Appellant;
- (b) the First Appellant is charged with violating Article 50.1 of the AFC Code:

“whereas the Defendant participated in the AFC Champions League 2018 (Round of 16) match Al Sadd SC (QAT) v Al Ahli Saudi FC (KSA) on 7 May 2018, the Defendant gestured to the assistant referee with his hand in a manner that called into question his integrity, conduct which brings the game into disrepute, and therefore the Defendant has committed an offence” (“Charge Notice”); and

- (c) a written defence (if any) or, if no defence is to be raised in relation to the charge, a written statement by way of mitigation, is to be provided within 4 days of notification.

A copy of the decision passed by the D & E Committee was enclosed with the letter. That decision was rendered in accordance with Article 111.1 of the AFC Code which provides that a judicial body may decide not to communicate the grounds of a decision and instead communicate only the terms of the decision. However, a party is entitled to make a request for reasons within 10 days of receipt of the terms of a decision.

- 21. On 12 June 2018, the QFA wrote to the Deputy Secretary of the D & E Committee requesting that it be provided with grounds of the decision pursuant to Article 111 of the AFC Code and indicating that the First Appellant reserved his right to file an appeal against that decision. Pending receipt of the grounds of the decision and until the exhaustion of all available legal remedies, the QFA requested that the disciplinary proceedings opened by the AFC administration as per the Charge Notice be suspended.
- 22. On 13 June 2018, the Deputy Secretary of the D & E Committee informed the QFA that the disciplinary proceedings which had been opened on 6 June 2018 would be suspended until the resolution of any appeal proceedings.
- 23. On 10 July 2018, the QFA was provided with a copy of the Grounds of the Decision passed by the D & E Committee on 1 June 2018. On each of the major issues in contention, the D & E Committee found that:
 - (a) the Protest had been brought within the 2-hour window prescribed by Article 59.2.1 of the AFC Regulations. The match would have finished at approximately 9.10pm and, according to the email chain, was sent by the Protestor at 10.21pm. The D & E Committee found that the reference in the Match Commissioner’s Report to having received the Protest at 11.21pm was an error attributable to the fact that the Match Commissioner’s laptop was set to Oman time (+ 1 hour); and
 - (b) the Incident did not relate to a decision of the Referee. There was no evidence to suggest the Referee made a decision in this regard, or that he was even aware of the Incident.

Accordingly, the D & E Committee found that Article 59.3 of the AFC Regulations did not apply.

24. The D & E Committee observed that the allegation made by the Protestor could potentially constitute a breach of the AFC Code and that the AFC administration may therefore open disciplinary proceedings under Article 119.1.3 of the AFC Code.

D. The proceedings before the Appeal Committee

25. On 12 July 2018, in accordance with his obligations under Article 124.1 of the AFC Code, the First Appellant (via the Second Appellant) informed the Appeal Committee of his intention to appeal the decision of the D & E Committee.
26. On 19 July 2018, the First Appellant (via the Second Appellant) lodged his Reasons for Appeal with the Appeal Committee. The focus of the appeal was on the admissibility of the Protest and, in particular, as to whether the exception in Article 59.3 applied. The First Appellant contended, in summary, that:
- (a) the D & E Committee's confirmation of the admissibility of the Protest violated Article 59.3 of the AFC Regulations;
 - (b) a decision for the purposes of Article 59.3 of the AFC Regulations includes a decision not to sanction a player;
 - (c) if the Referee and/or the Assistant Referee had considered the gesture as a breach of the regulations, then the First Appellant could have received a caution as per Article 46.1.1 (unsporting behaviour) or Article 46.12 (dissent by word or action) or have been sent off in accordance with Article 47.1.6 (using offensive, insulting or abusive language and/or gestures);
 - (d) the D & E Committee erred in admitting the Protest on the basis that there was no evidence that the Referee had made a decision relating to the incident in question, or that he was even aware of the incident, in circumstances where the video evidence showed that the Assistant Referee responded to the gesture of the First Appellant and thus must have been aware of the Incident;
 - (e) the conduct consisted of a gesture to question the decision pronouncing him offside and was thus connected with play;
 - (f) the Assistant Referee responded to the gesture with the movement of his head, which showed his disagreement with the First Appellant's point of view as to the offside call;
 - (g) the Assistant Referee used his communication system at the time to speak with the Referee. Therefore, even after being aware of the circumstances, both officials decided to take no further action;

- (h) his conduct of questioning the decision of the Assistant Referee in respect of the offside call (using his fingers to make the relevant gesture) is a fact connected with play; and
 - (i) it was not a situation which had escaped the match officials' attention and therefore, article 79.1 of the AFC Code did not apply to confer upon the D & E Committee appropriate jurisdiction to consider the Incident.
- 27. The First Appellant requested that the Appeal Committee accept the appeal and set aside the determination of the D & E Committee.
- 28. The Appeal Committee passed its decision on 3 August 2018 ("AC Decision") with the grounds notified to the QFA and to the Second Appellant on 13 September 2018. It found that:
 - (a) for a protest to be prohibited by Article 59.3 of the AFC Regulations, it must relate to a decision of the Referee and that decision must relate to facts connected with play;
 - (b) there was no evidence to suggest the Referee made a decision relating to the Incident or that he was even aware of it. There is no evidence to explain what may or may not have been said between the Assistant Referee and the Centre Referee at the time of the Incident via the communication system;
 - (c) the hand gesture given by the First Appellant was not, as he contended, a hand gesture relating to a "*close call*" for offside, but rather the universal hand gesture for money. The implication of this kind of behaviour is clearly extraneous to any offside situation. Any decision taken or not taken by a match official in connection with this gesture has nothing to do with play; and
 - (d) the Protest had been lodged in accordance with Article 59.2 of the AFC Regulations and, accordingly, Article 119.1.3 of the AFC Code provided no impediment to the opening of disciplinary proceedings by the AFC administration.
- 29. The Appeal Committee accordingly dismissed the appeal and confirmed the decision of the D & E Committee.

IV. SUMMARY OF THE PROCEEDINGS BEFORE THE CAS

- 30. On 4 October 2018, the Appellants filed a Statement of Appeal against the Respondents in accordance with Article R48 of the Code of Sports-related Arbitration (2017 Edition) ("CAS Code") with respect to the AC Decision.
- 31. On 17 October 2018, the Appellants filed their Appeal Brief in accordance with Article R51 of the CAS Code.
- 32. On 24 October 2018, the CAS Court Office, on behalf of the Division President, pursuant to Article R54, notified the parties that the arbitral tribunal appointed to decide the present matter

was constituted as follows: Mr David Wu (arbitrator nominated by the Appellants), Mr Alexis Schoeb (arbitrator nominated by the Respondent) and Mr Anthony Lo Surdo SC (President of the Panel).

33. On 19 November 2018, the Respondent filed its Answer in accordance with Article R55 of the CAS Code.
34. On 23 November 2018, the Respondent requested that the Panel render an award based solely on the parties' written submissions and without a hearing being held.
35. On 26 November 2018, the Appellants expressed their preference that the Panel render an award based solely on the parties' written submissions and without a hearing being held. The Appellants also requested that the parties be afforded an opportunity to prepare a second round of written submissions and indicated that if that request was denied that it was nevertheless content for an award to be issued on the basis of the parties' written submissions alone.
36. On 27 November 2018, the CAS Court Office invited the Respondent to advise whether it agreed to the Appellants' request for a second round of written submissions. On 29 November 2018, the Respondent informed the CAS Court Office that it did not agree to the Appellants' request to a second round of written submissions. It further submitted that the Appellants had provided exhaustive written submissions and had not identified any reasoning in support of their request for a second round of written submissions nor shown that there are exceptional circumstances justifying a departure from the standard procedure set out in Article R56 of the CAS Code.
37. On 30 November 2018, the CAS Court Office notified the parties that, in the absence of agreement from the Respondent and where no exceptional circumstances had been shown by the Appellants in support of their request for a second round of written submissions, the President of the Panel had determined not to permit a second round of written submissions. Further, that in accordance with the parties' respective requests, pursuant to Article R57 of the CAS Code, the Panel deemed itself sufficiently well informed by the parties' written submissions and the evidence upon which each relies, to render an award without the need to hold a hearing.
38. On 6 December 2018, the parties signed the Order for Procedure by which, *inter alia*, they confirmed their agreement that the Panel may decide this matter based upon their respective written submissions and that their right to be heard has been respected.

V. THE PARTIES' POSITIONS

39. What follows is a summary of the parties' submissions. To the extent that it omits any contentions, the Panel notes that it has considered all of the evidence and arguments submitted by the parties.

A. The Appellants' submissions

40. In the Appeal Brief, the Appellants invoke Article R57 of the CAS Code and seek, in effect, that the Panel review the facts and the law and that it issues a fresh decision which replaces that the subject of the appeal.
41. The thrust of the Appellants' submissions is that, having regard to the provisions of Article 59.3 of the AFC Regulations, the Protest was inadmissible and that accordingly the sequelae of that conduct, in particular, the disciplinary proceedings opened by the AFC administration pursuant to Article 119.1.3 of the AFC Code, is not maintainable.
42. For the reasons that follow, the Appellants contend that the Protest is inadmissible.

1. Preliminary consideration – procedural deficiencies

43. The Appellants argue that the Charge Notice contains "*significant procedural infirmities*". They point, in particular, to the language used in the Charge Notice which they submit "*leads to the conclusion of an established prejudgment*". It is said that this is evident from the wording used in the Charge Notice itself which is relevantly in the following terms:

"the Defendant gestured to the assistant referee with his hand in a manner that called into question his integrity, conduct which brings the game into disrepute, and therefore the Defendant has committed an offence".

44. The Appellants contend that:
- (a) the wording of the Charge Notice discloses that there has been a "*clear legal determination of the [Player's] conduct*" by the Secretariat of the AFC of guilt which the Secretariat had no power or authority to adjudicate upon, it being a matter exclusively reserved by Article 76 of the AFC Code for determination by the AFC Judicial Bodies and that the Charge Notice is, in reality, a disguised form of determination (cf. CAS 2010/A/2401);
 - (b) the fact that a D & E Committee might further render a decision on this matter "*cannot cancel - and therefore cannot heal - the fact that the Secretariat to the AFC DEC prejudgment is illegitimate due to the fact that it is not competent to issue legal determinations of the Player's alleged offence*"; and
 - (c) in the circumstances, the CAS should set aside the challenged decision since the disciplinary proceedings initiated against the First Appellant, on the basis of that decision, cannot continue consistent with the applicable principles of law and due process.

2. Admissibility of the Protest

45. As to the admissibility of the Protest, the Appellants' submissions, in large measure, replicate those relied upon before the Appeal Committee and may be summarised as follows:

- (a) it is a general principle that decisions made on the playing field by judges, referees, umpires and other officials, who are responsible for applying the rules of a particular game, are not subject to appeal. That principle is fundamental to Article 59.3 of the AFC Regulations which renders inadmissible a protest relating to a referee's decision regarding facts connected with play. It also finds expression in Article 75 of the AFC Regulations;
- (b) a decision for the purposes of Article 59.3 of the AFC Regulations includes a determination arrived at after consideration and may include a decision not to sanction a player in respect of facts connected with play;
- (c) the video evidence clearly shows the First Appellant and the Assistant Referee interacting after the hand gesture in question. That gesture was not, as the Appeal Committee found, "*the universal hand gesture for money*" but conduct consisting of a gesture questioning the decision pronouncing him offside;
- (d) the Assistant Referee responded immediately to the First Appellant by showing him the same gesture with his fingers and with the movement of his head exhibited his disagreement with the First Appellant's view at being adjudged offside;
- (e) the video evidence also establishes that the Assistant Referee used the internal communication system with the Centre Referee immediately after the First Appellant's hand gesture, presumably, concerning that gesture;
- (f) if the Centre Referee and/or the Assistant Referee had considered the gesture as constituting a breach of the regulations, the First Appellant could have been sanctioned with a caution pursuant to Article 46.1.1 (unsporting behaviour) or Article 46.12 (dissent by word or action) or have been sent off in accordance with Article 47.1.6 (using offensive, insulting or abusive language and/or gestures);
- (g) the Assistant Referee made a final choice and judgement with relation to the First Appellant's conduct and, consequently, decided, in co-ordination with the Centre Referee, not to impose any sanction on the First Appellant in respect of the Incident;
- (i) the disciplinary authority during matches is expressly vested with and exclusively delegated to the Referee. In particular, Article 75 of the AFC Code provides that during matches, disciplinary decisions are made by the Referee and those decisions are final;
- (j) in the circumstances, the Panel should feel comfortably satisfied that the Protest is inadmissible, in which case, the disciplinary proceedings opened by the AFC administration pursuant to Article 119.1.3 as a consequence of the lodgement of the Protest are not maintainable; and
- (k) in the unlikely event that the Protest is admissible, the D & E Committee lacks jurisdiction to deal with the Charge Notice because under Article 79.1 of the AFC Code, the D & E Committee relevantly has jurisdiction to sanction "*serious infringements which*

have escaped the Match Officials' attention" and, for the reasons summarised in subparagraphs (c) to (g), the facts which could constitute a serious infringement had not escaped the attention of the Match Officials.

3. Relief sought by the Appellants

46. The Appellants accordingly seek the following relief:

- "1. To fully accept the present Appeal.*
- 2. As a consequence of the above, to fully set aside the Challenged Decision passed by the AFC Appeal Committee on 3 August 2018 (Decision 20180803AC02).*
- 3. To rule that the protest filed by Al Ahli Saudi FC on 07 May 2018 is inadmissible in the light of the relevant competition regulations, and therefore no disciplinary proceedings may be opened against the Player under Article 119.1.3 of the AFC Disciplinary and Ethics Code.*
- 4. For the effect of the above, to state that the Respondent shall be condemned to pay any and all costs of the present arbitral [sic] proceedings, if any, including, without limitation, attorney's fee as well as any eventual further costs and expenses for witnesses and experts.*

In this respect, the Appellants reserve the right to provide the Panel with all relevant documentation attesting the incurred amounts".

B. The Respondent's submissions

47. In its Answer, the Respondent, like the Appellants, also invokes Article R57 of the CAS Code and seek, in effect, that the Panel review the facts and the law and that it issues a new decision which replaces that the subject of the appeal.
48. The Respondent submits, for the reasons enumerated in its Answer and which are summarised below that, having regard to the provisions of Article 59.3 of the AFC Regulations, the Protest was admissible and that it is therefore entitled to proceed with the disciplinary proceedings opened by the AFC administration pursuant to Article 119.1.3 of the AFC Code.

1. Preliminary consideration – procedural deficiencies

49. In so far as the allegations of procedural deficiencies are concerned, the Respondent first, submits that these matters are irrelevant to the question as to whether the Protest is admissible and secondly, that in any event, the First Appellant's rights under the AFC Code have at all times been observed. It also contends that:
 - (a) the First Appellant has been afforded the opportunity, on multiple occasions, to state his case and to appeal the admissibility of the Protest and the Appellants have taken advantage of all rights to appeal without issue;

- (b) the disciplinary proceedings opened pursuant to Article 119.1.3 of the AFC Code have been suspended pending the determination of all appeals including the present proceedings;
 - (c) in the course of the disciplinary proceedings opened pursuant to Article 119.1.3 of the AFC Code, the First Appellant will again be afforded the opportunity to argue the merits of his case in relation to the Notice of Charge the subject of those proceedings;
 - (d) the process followed in connection with the Protest was carried out efficiently and with full regard to the rights of the First Appellant. At no point in the Appeal Brief do the Appellants prove any material breaches of the procedural/administrative rules set out in the AFC Code that have materially impacted the rights of the First Appellant; and
 - (e) in the circumstances, the First Appellant has suffered no prejudice.
50. The Secretariat to the D & E Committee issued the Charge Notice in accordance with standard practice and using the standard language employed in all disciplinary cases. Only the AFC Judicial Bodies have the power and standing to make any decision. Decisions are made independently as envisaged in Article 87 of the AFC Code. It is therefore impossible for the Secretariat to prejudge any case since it has no power to do so.

2. *Admissibility of the Protest*

51. As to the relevant facts, the Respondent contends, in summary, that:
- (a) the hand gesture by the First Appellant was not, as he argues, intended to indicate a close call with regard to an offside decision made by the Assistant Referee shortly before the Incident, that is, that he was “*just onside*” or that there was “*not a lot in it*”. Instead, and by reference to a book on the topic of gestures entitled “*The Field Guide to Gestures: How to Identify and Interpret Virtually Every Gesture Known to Man*”, the Respondent submits that the hand gesture made by the First Appellant is widely understood as a symbol for money. The gesture in question should be contrasted with the widely known hand gesture for “*small*” or “*close*”, that is, the holding of the thumb and index finger a small distance apart;
 - (b) in his witness statement dated 13 November 2018, the Assistant Referee indicates that he did not understand or appreciate the significance of the hand gesture of the First Appellant, he gestured back to the First Appellant that he did not understand the significance of the gesture, he raised his hands in a questioning manner and that he did not communicate with the Referee about the gesture;
 - (c) in his witness statement dated 12 November 2018, the Centre Referee indicates that he did not see the First Appellant make the hand gesture towards the Assistant Referee during the match, nor was he at any time during the match notified by the Assistant Referee or any other person that such incident had occurred. According to the Centre

Referee the incident was “*not on his radar*” and, accordingly, was not included in his match report. This statement corroborates the version of events put forward by the Assistant Referee in his witness statement in all respects; and

- (d) the Assistant Referee in question and the Centre Referee are accomplished professionals who have officiated in a significant number of matches both at national and international levels during their respective careers. Both are recognised by FIFA on its Panel of International Referees and their integrity and familiarity with their respective duties and functions are beyond reproach.

52. As to admissibility of the Protest, the Respondent submits, in summary, that:

- (a) it is not disputed that the Incident falls within the definition of a protest under Article 59.1 of the AFC Regulations, and it is also not in dispute that the procedural requirements of Article 59.2 of the AFC Regulations were satisfied;
- (b) based upon the witness statements from the Centre Referee and the Assistant Referee, it is clear that the Centre Referee was not aware of the Incident and made no decision in this regard. Consistent with Law 6 of the IFAB Laws of the Game (“LOTG”), only the Referee can take a disciplinary decision on the field of play. It was impossible for him to make a decision, whether positive or negative, about an issue of which he was not aware, and he expressly states that he made no decision regarding the Incident. For this reason alone, the prohibition under Article 59.3 of the AFC Regulations does not apply, since no decision was made by the Centre Referee (as is expressly required by the Article) and, accordingly, the opening of the disciplinary proceedings under Article 119.1.3 of the AFC Code is not prohibited by Articles 75.3 and 79 of the AFC Code;
- (c) the Incident was not solely related to an offside call. If it was, then it might have been considered to be “*connected with play*” in a direct sense. However, the use of a symbol for money has potential to bring the game into disrepute, calling into question the integrity of the officials, the opposition, the Competition and the AFC generally. The First Appellant’s gesture therefore connects to something much more serious than a disagreement about an offside decision. For this reason, the prohibition under Article 59.3 of the AFC Regulations does not apply as the Incident is not “*connected with play*”; and
- (d) it has discharged its burden of proof and established the admissibility of the Protest beyond the level of comfortable satisfaction.

3. *Relief sought by the Respondent*

53. The Respondent accordingly requests the following relief:

“* *rejecting the reliefs [sic] sought by the Appellants;*

* *confirming the Contested Decision;*

- * *ordering the Appellants to pay the full cost of this arbitration procedure;*
- * *ordering the Appellants to pay the costs and expenses of the Respondent, which amount to three thousand US dollars (\$3,000)."*

VI. JURISDICTION

54. The jurisdiction of the CAS derives from Article R47 of the CAS Code, Article 66 of the AFC Statutes, Edition 2017, Article 130 of the AFC Code and Article 60 of the AFC Champions League 2018 Competition Regulations ("AFC Competition Regulations").
55. According to Article R47 of the CAS Code, "[a]n appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body".
56. Article 66 of the AFC Statutes, Edition 2018, relevantly provides:
 - "1. *Any final decision made by an AFC body may be disputed exclusively before CAS in its capacity as an appeals arbitration body, to the exclusion of any ordinary court or any other court of arbitration.*
 2. *Recourse may only be made to the CAS after all other internal AFC channels have been exhausted. Appeals shall be lodged with CAS within twenty-one (21) days of notification of the decision in question".*
57. Article 130 of the AFC Code provides that the AFC Statutes stipulate which decisions passed by the judicial bodies may be appealed to the CAS and that the relevant competition regulations may contain further stipulations.
58. Article 60 of the AFC Competition Regulations, provides, relevantly, that once internal channels have been exhausted at the AFC, the sole recourse for any disputes shall be to the CAS and the language of the arbitration shall be English. Further, the jurisdiction of the CAS is only available where it has not been expressly excluded or a decision is declared as final and binding and not appealable.
59. In pursuing its appeal to the Appeal Committee, the Appellants have exhausted all internal AFC channels in accordance with Article 66 of the AFC Statutes. Further, the Panel is aware of no other stipulations in the AFC Statutes, the AFC Code or the AFC Competition Regulations relevant to or which may impact upon its jurisdiction nor did any party make any relevant submission in this regard.
60. None of the parties has contested the jurisdiction of the CAS. Indeed, by signing the Order of Procedure, each has confirmed that the CAS has jurisdiction.

61. The Panel accordingly holds that the CAS has jurisdiction to hear the appeal.

VII. ADMISSIBILITY

62. On 8 August 2018, the Appeal Committee, in accordance with Article 111 of the AFC Code notified the terms of its decision by which the appeal was dismissed.
63. On 13 September 2018, the Appeal Committee delivered its grounds for the decision dismissing the appeal pursuant to a request for grounds made by the Appellant pursuant to Article 111 of the AFC Code. Article 111.2 of the AFC Code provides that the time limit to lodge an appeal begins upon receipt of the grounds for a decision, referred to in Article 111 as the “*motivated decision*”.
64. According to Article R49 of the CAS Code, “[i]n the absence of a time limit set in the statute or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against”.
65. Article 65 of the AFC Statutes and Article 111.2 of the AFC Code each provide an appeal to the CAS shall be lodged within 21 days of notification of the decision in question.
66. The appeal to the CAS was filed on 4 October 2018, that is, within 21 days from the receipt of the motivated decision from the Appeal Committee for the filing of an appeal. Accordingly, the appeal is admissible. Further, none of the parties made any submissions to the contrary.

VIII. APPLICABLE LAW

67. Pursuant to Article R58 of the CAS Code, “[t]he Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.
68. Under Article 62.3 of the AFC Statutes, the CAS is to “*apply the various regulations of the AFC, and additionally where relevant, the Laws of Malaysia*”. The “*various regulations*” encompass the laws comprised in and by the AFC Statutes (Edition 2018), the AFC Code (January 2017 Edition) and the AFC Competition Regulations, 2017.
69. Accordingly, the Panel determines that it must decide the appeal in accordance with the AFC Statutes (Edition 2018), the AFC Code (November 2017 Edition) and the AFC Competition Regulations, 2018 and subsidiarily, Malaysian law.

VII. MERITS

A. Overview – issues for determination

70. Having regard to the *de novo* nature of the appeal, the arguments advanced by the Appellants, the submissions made by the Respondent and the evidence upon which each of the parties rely, these proceedings give rise to the broad issue as to whether the Protest lodged pursuant to Article 59 of the AFC Code which subsequently gave rise to the AFC administration opening disciplinary proceedings under Article 119.1.3 of the AFC Code against the First Appellant is admissible.
71. This in turn requires:
- (a) a consideration of the proper characterisation of the hand gesture at the heart of the Incident. In particular, was it in the nature of a mere remonstration for an offside call or was it, as the Respondent contends, “*the universal hand gesture for money*”?
 - (b) an evaluation as to whether the Centre Referee was aware of the Incident and made a decision not to sanction the First Appellant in relation to it for the purposes of Article 59.3 of the AFC Regulations; and
 - (c) an examination as to whether, assuming the Centre Referee had made a decision not to sanction, that decision was regarding “*facts connected with play*” for the purposes of Article 59.3 of the AFC Regulations.
72. The Panel addresses each of these issues below to the extent that may be necessary to determine the appeal. In doing so, it has had regard to the submissions made by each of the parties. The Panel will refer to such of those submissions and supporting materials as is necessary to dispose of the issues the subject of this appeal.
73. Before it does so, the Panel will briefly address the “Preliminary considerations” referred to by the Appellants in their submissions and summarised at paragraphs above of this Award and the issue of the burden and standard of proof in this appeal.

B. Preliminary considerations – alleged procedural deficiencies

74. The gravamen of the Appellants complaint is that the wording of the Charge Notice contains “*significant procedural infirmities*” in that it reveals “*an established prejudgment*” by the Secretariat of the AFC of the guilt of the First Appellant which it not only had no power or authority to make but which would taint the disciplinary proceedings opened pursuant to Article 119.1.3 of the AFC Code.
75. The first and most significant issue with this contention is that it is, in the Panel’s view, quite extraneous to the question the subject of the appeal, being whether the Protest was admissible.

76. Secondly, the complaint contains a fundamental misconception of both the purport of the Charge Notice and the role of the Secretariat and, in particular, a mischaracterisation of the Charge Notice as a *“decision, in disguise of a charge notice”*.
77. Reference is made by the Appellants to CAS 2010/A/2401 which contains a summary of the characteristics or indicia of a decision. The Sole Arbitrator in that case determined that *“(i) what constitutes a decision is a question of substance not form (ii) a decision must be intended to (...) affect the legal rights of a person, usually, if not always, the addressee (iii) a decision is to be distinguished from the mere provision of information”*. For the reasons that follow, the Panel is of the opinion that there has been no decision as to guilt or innocence or that otherwise affects the legal rights of the First Appellant pursuant to the Charge Notice.
78. The Charge Notice is nothing more than an allegation or assertion by the AFC of facts which it contends constitutes the offence of bringing the game into disrepute. It does not assume guilt nor prejudice it. It will be for the AFC to establish to the satisfaction of any D & E Committee constituted to hear the charge whether the facts have been proved to the requisite standard and it is expected that the First Appellant will be afforded every reasonable opportunity to be heard in relation to that charge.
79. The Secretariat has no power or authority to make determinations. Article 39 of the AFC Statutes provides that the *“General Secretariat shall carry out all the administrative work of the AFC”* Further, Article 86 of the AFC Code prescribes that the AFC General Secretariat provides the judicial bodies with a secretariat whose responsibility is limited to taking charge of the administrative work, writing the minutes and decisions of meetings and the filing or storage of decisions passed by the judicial bodies of the Respondent.
80. The power to make relevant decisions is the function of the judicial bodies of the Respondent. Article 57 of the AFC Statutes and Article 76 of the AFC Code provides that the judicial bodies of the Respondent are, relevantly, the *“AFC Disciplinary and Ethics Committee and AFC Appeal Committee”* whilst Articles 79 & 81 of the AFC Code prescribe the responsibilities of each of those bodies. Article 87 of the AFC Code requires that decisions of the judicial bodies are passed entirely independently and, in particular, that they shall not receive instructions from any other body.

C. Burden and standard of proof

81. It appears to be common ground that the Respondent bears the onus and burden of proving the admissibility of the Protest. The Appellants contend that that burden arises pursuant to Article 103.1 of the AFC Code which provides that the Respondent bears the burden of proving disciplinary infringements. However, the AC Decision the subject of these proceedings does not concern a disciplinary infringement. It concerns the admissibility of the Protest. Of course, one of the consequences of the Protest being admissible is that the Respondent is entitled under Article 119.1.3 of the AFC Code to open disciplinary proceedings.
82. The Panel is of the view that the Respondent bears the onus of proving the admissibility of the Protest because it seeks to uphold and rely upon the Protest as a means of justifying the

disciplinary proceedings which were subsequently opened and which have been stayed pending the determination of this appeal. Article 103.2 of the AFC Code provides that the burden of proof in the case of a protest rests on the protesting party. Whilst the Respondent is not the protesting party, nevertheless, given that it has admitted the protest and seeks to rely upon it in opening disciplinary proceedings, it carries the corresponding burden of proving the admissibility of the Protest. Further, and notwithstanding the provisions of Article 103.2, it is a well understood principle that a party who seeks to substantiate claims bears the onus of affirmatively establishing the facts pertinent to and which support that claim (see, for example, CAS 2003/A/506; CAS 2007/A/1380; CAS 2009/A/1810 & 1811; CAS 2013/A/3207).

83. Article 101.3 provides that the applicable standard of proof “*shall be comfortable satisfaction (...) bearing in mind the seriousness of the allegation which is made*”.

D. The applicable regulation

84. Article 59 of the AFC Regulations is relevantly in the following terms:

“59. Protest

59.1 A protest is an objection of any kind to any matter that has a direct effect on Matches and any matters related to a breach of these Regulations or the AFC Disciplinary and Ethics Code.

59.2 Unless otherwise stipulated, to be considered valid, protests shall be:

59.2.1. submitted in writing on the Protest Form to the AFC Match Commissioner within two (2) hours of the end of the Match in question;

59.2.2. followed up with a full written report, including a copy of the original protest, sent to the AFC General Secretariat within forty eight (48) hours of the end of the Match; and

59.2.3. accompanied by a non-refundable fee of USD500 submitted within forty eight (48) hours of the end of the Match.

59.3 No protest shall be lodged relating to the Referee’s decisions regarding facts connected with play. Such decisions are final and binding and not appealable, unless expressly otherwise stipulated in the AFC Disciplinary and Ethics Code.

59.4 (...)

59.5 If any of the formal conditions of a protest as set out in these Regulations are not met, such protest shall be disregarded. Following the completion of the final Match of the Competition, all protests shall be disregarded”.

85. Article 59.3 of the AFC Regulations is consistent with Article 75 of the AFC Code which is, relevantly, in the following terms:

“75. Referee

75.1. During Matches, disciplinary decisions are made by the Referee.

75.2. These decisions are final”.

E. The proper characterisation of the hand gesture

86. The video footage discloses that the Incident was immediately preceded by the First Appellant having been adjudged by the Assistant Referee to have been offside. The First Appellant can be seen repeatedly rubbing his left thumb against his left index finger or fingertips with his arm outstretched and pointing in the direction of the Assistant Referee.
87. The Appellants contend that the gesture was not, as the Appeal Committee found, *“the universal hand gesture for money”* but conduct consisting of a gesture questioning the decision pronouncing him offside. The Respondent argues that the hand gesture by the First Appellant was not intended to indicate a close call with regard to an offside decision made by the Assistant Referee shortly before the Incident, that is, that he was *“just onside”* or that there was *“not a lot in it”*.
88. The Respondent has referred the Panel to a book on the topic of gestures entitled *“The Field Guide to Gestures: How to Identify and Interpret Virtually Every Gesture Known to Man”* and submitted that the hand gesture is widely understood as a symbol for money. It contends that the gesture in question should be contrasted with the widely known hand gesture for *“small”* or *“close”*, that is, the holding of the thumb and index finger a small distance apart.
89. The Panel finds that the action of rubbing the thumb against the index finger or fingertips is a commonly used gesture all over the World relating to money. The context for this gesture may vary significantly, including, it may indicate a request for payment, that an item is too expensive, that money has been used for or attained through illegal means or as a money expectancy which may carry negative connotations.

F. Was the Referee aware of the Incident and made a decision not to sanction the First Appellant in relation to it?

90. Both the video footage and the stills from that footage show the Assistant Referee No. 2 (AR 2) reacting to the hand gesture of the First Appellant by making a similar action, extending his left arm away from his body and slightly raising both shoulders in a gesture commonly understood as body language consistent with a failure to understand or appreciate something that has been observed. He is also seen shaking his head towards the First Appellant indicating that he stood by his offside call.
91. The actions observed by the Assistant Referee on the video footage and the stills are consistent with his witness statement in which he, relevantly said:

“The gesture involved him [the First Appellant] repeatedly rubbing his thumb against his index and middle fingers... At the time the incident occurred, I was not sure why the player was making such a hand gesture

to me. The match was ongoing and I was occupied in carrying out my role. I recall that I gestured back to the player to show that I did not understand what he was doing, including raising my hands in a questioning manner. Also, since I was unsure about the player's action, I repeated his hand gesture back to him, seeking clarification as to what he was communicating to me".

92. According to his witness statement, the Assistant Referee did not say anything about the Incident to the Centre Referee at any stage during the match, whether using the radio equipment or otherwise. Indeed, he did not become aware of the Incident until the following day.

93. In his witness statement, the Centre Referee, relevantly states:

"I did not see [the First Appellant] making a hand gesture towards...the Assistant Referee No. 2) during the above-mentioned match. At no time during the above-mentioned match was I notified by [AR 2] or any other person that such incident had occurred. Only the next day did I become aware of the incident... I watched the footage of the above-mentioned match in the airport lounge on our way home, and I saw the incident. During the above-mentioned match, this incident was not on my radar at all. Accordingly, I did not include it in my match report".

94. If the Centre Referee or the Assistant Referee had seen or otherwise become aware of the Incident and considered the gesture as constituting a breach of the regulations, the First Appellant could have been sanctioned with a caution as per Article 46.1.1 (unsporting behaviour) or Article 46.12 (dissent by word or action) or have been sent off in accordance with Article 47.1.6 (using offensive, insulting or abusive language and/or gestures) of the AFC Regulations. Alternatively, the Centre Referee could have reported pertinent facts in his match report.
95. The witness statement of the Centre Referee makes plain that he did not see the Incident and nor was he informed by the Assistant Referee of the Incident at the time that it occurred. Therefore, this is not a case, as the Appellants speculated, where the Centre Referee had either been informed of the Incident or had otherwise observed it and made a decision to either not sanction the First Appellant on the field of play, or otherwise alternatively include facts pertinent to the Incident in his match report.
96. Similarly, the witness statement of the Assistant Referee establishes that whilst he saw the hand gesture, he did not understand the significance or otherwise of it and nor did he bring the Incident to the attention of the Centre Referee. Again, this is not a case where, as the Appellants contend, the Assistant Referee witnessed and understood the hand gesture the subject of the Incident and made a determination not to report it or to otherwise bring it to the attention of the Centre Referee for the purpose of the imposition of a relevant sanction.
97. The Panel is accordingly comfortably satisfied that, in these circumstances, the exemption in Article 59.3 of the AFC Regulations is not enlivened with the consequence that:

- (a) the Protest is admissible; and

- (b) the AFC administration may proceed with disciplinary proceedings against the First Appellant pursuant to Article 119.1.3 of the AFC Regulations.

F. Assuming the Referee made a decision not to sanction the First Appellant, was the decision regarding “*facts connected with play*”?

98. Given the view that the Panel has formed in relation as to whether the Centre Referee had made a decision not to sanction the First Appellant in relation to the Incident, the question as to whether that determination was in respect of “*facts connected with play*” does not arise for determination.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Baghdad Bounedjah and Al Sadd FC on 4 October 2018 is dismissed.
2. The decision rendered by the Asian Football Confederation Appeal Committee on 3 August 2018 (Decision 20180803AC02) is confirmed.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.