



FIDE ETHICS AND DISCIPLINARY **COMMISSION**

Case 2/2023: "Alleged unfounded accusations of cheating and disparagement of the interests and good name of chess as a sport".

MOTIVATION FOR GRANTING A STAY OF PROCEEDINGS

The First Instance Panel of the Ethics & Disciplinary Commission (hereafter called “the EDC Panel”), sitting in the following composition -

Chairperson: Mrs Yolander Sammy

Members: Mr. Khaled Arfa
Mr Pedro Dominguez

1. In this matter the EDC Panel has **granted** a temporary stay of proceedings on the 18th April 2023 for a period of 6 months, i.e. until 18th October 2023. Herewith are the reasons for the ruling.
2. In an *in limine* application Mr. Carlsen’s lawyers requested the EDC Panel to declare the IP Report as inadmissible and close the EDC proceedings, alternatively to grant a stay of the EDC proceedings until 31 December 2023 to allow for further developments in the civil suit instituted by GM Niemann against GM Carlsen.
3. Concerning the Respondent’s request to hold the IP report inadmissible, it is not the practice of the EDC to bring out a final decision regarding the admissibility of the complaint or report separate from its decision on the merits of the allegations against a Respondent. The EDC Chairman has ruled the case to be provisionally admissible on the basis that the requirements of Art. 5.1(a) – (e) of the Ethics and Disciplinary Code (“the Code”) are satisfied. This is sufficient to initiate proceedings and put the Respondent on his defence. Procedural *Rule 12.8* requires the final decision on admissibility of the complaint to be taken by the First Instance Panel, at the end of the proceedings before it. As such the EDC Panel must consider the issue of admissibility at the end of the proceedings, together with the merits of the case. This approach avoids



a piecemeal adjudication of the issues and the possibility of an appeal of the EDC Panel's decision before the case is decided in its entirety.

4. The Respondent's request to stay the proceedings is a preliminary issue that must be addressed in view of *Article 4.12* of the Code and *Rule 17* of the EDC Procedural Rules, both of which addresses the provisions relating to a possible stay of proceedings.

Rule 17.1 states that "The EDC may, of its own accord or upon request, stay its own investigations or proceedings pending the outcome of investigations or proceedings being conducted by other relevant sport authorities or bodies, such as the International Olympic Committee (IOC), a National Olympic Committee (NOC) or the sports justice organ of a national federation. However, the mere existence of another investigation or proceeding does not entitle the subject thereof, as of right, to a stay of investigations or proceedings being carried out by the FIDE under the Code."

Rule 17.2 states that "This power will not be exercised, save for in special and compelling circumstances, in instances of pending investigations by a national government or its department of sport, or pending legal proceedings in national civil or criminal courts."

5. In the present instance the EDC is dealing with a request for a stay of the disciplinary proceedings before it in the light of the concurrent legal proceedings in a US civil court where GM Niemann sues GM Carlsen for damages in a significant amount. Therefore, the burden is on the Respondent to show the presence of "special and compelling circumstances", which would warrant a stay of proceedings, as contemplated in *Rule 17.2*.
6. In interpreting the phrase "special and compelling circumstances" the starting point is *Article 16.10* of the Code which makes it clear that generally the EDC Panel does not act in an investigative capacity, but only considers the evidence presented by the parties (but see *Art 16.11* of the Code and *Rules 10, 33 and 34* of the Procedural Rules) and *Art 16.9* of the Code which allows the EDC panel to draw an adverse inference against an accused party if he fails, "without compelling justification" to present his case properly in reply to the allegations made against him.
7. In the present case, in the EDC Panel's Notice to Respondent of 22 February 2022, the Respondent was requested to "refer to the contents of the IP Report and draw our attention to any factual allegations or conclusions that you do not agree with together with your motivation", and further warned that "...if no representations are received from you by the above deadline, the EDC may nevertheless proceed and judge the case based upon the information in front of it, in particular the IP Report". In other words, for purposes of fact-finding the EDC Panel relies almost exclusively on the evidence presented by the parties but must be conscious of the possibility that the accused party



is hindered by compelling circumstances or reasons from presenting the facts in support of his defence fully.

8. As mentioned in *Rule 17.1*, the mere fact that a civil litigation case is pending is not enough to justify the granting of a stay of proceedings; the sports justice system runs parallel to, and unaffected by any concurrent proceedings in civil courts of any jurisdiction. *Article 4.12* of the Code and *Rule 17* makes it clear that proceedings simultaneously occurring in the state courts and sports disciplinary tribunals are running in parallel, as the objects are different, and it is not open for the accused party in the disciplinary proceedings to raise the exception of *lis pendens*.
9. The object of the present disciplinary proceedings is integrity and fair play in the sport of chess with the aim to impose a sanction in the event of a guilty verdict, whereas the object of the civil suit instituted by Niemann against Carlsen is the protection of Niemann's reputation and the enforcement of monetary damages. However, *Rule 17* recognizes that in certain circumstances it may be beneficial, mainly to obtain the benefit of a full ventilation of the relevant facts in another forum, but possibly for other reasons as well, to keep the disciplinary proceedings in abeyance (to temporary stay or suspend proceedings) until conclusion of the proceedings in the other forum.
10. A stay of proceedings is not for the mere asking or a matter of a mere formality. In terms of *Rule 17.2* the applicant for a stay must persuade the EDC Panel of the existence of "special and compelling circumstances" (mirroring the requirement set out in *Art. 16.9* of the Code), which exempts the case from being heard concurrently with ongoing civil litigation proceedings.
11. It is correct, as pointed out by Carlsen's lawyers, that there is no precedent in the jurisprudence of the EDC of the correct meaning of the term "special and compelling circumstances", but disappointing that the lawyers did not use the opportunity to make submissions, perhaps with reference to CAS case law, as to how this test must be interpreted by the EDC Panel.
12. In the CAS Code *art. R32* (last paragraph) and *art. R39 & R55* (for ordinary and appeal procedures, respectively) provision is made for a suspension of proceedings on "justified grounds" (*art R32*) or "substantive grounds" (*art. R39 & R55*). See also *Arbitration CAS 2019/A/6626 Club Al Arabi SC v. Ashkan Dejagah*, award of 12 November 2020 [headnote paras 3 & 4; Award paras 84 – 109].
13. In the CAS ruling of 18 March 2022 on the request for stay by the Football Union of Russia (FUR), it was noted that the general rule when deciding whether to grant a request for provisional measures in accordance with CAS jurisprudence, is to consider if the requested measure leads to protection of the applicant's interest and that the



interests of the applicant outweigh those of the opposite party and third parties. The onus is on the applicant to demonstrate that the harm or inconvenience it would suffer from a refusal of the requested provisional measures would be comparatively greater than the harm or inconvenience suffered by the other parties in the granting of such measures.

14. It would be theoretically possible for an applicant for a stay of EDC proceedings to rely on the provisions of Art. 12 of the Code and Procedural Rule 18 [Provisional Measures], in particular as a means to preserve the rights of a party, or to prevent prejudice or an imminent harm, or to safeguard the integrity of the proceedings or evidence. However, as a tailor-made remedy to obtain a stay is specifically catered for in Art. 4.12 of the Code and Procedural *Rule 17*, the latter procedure is the more appropriate.
15. Given that *Rule 17* of the EDC Procedural Rules does not provide any definition or clarification about the terms "special and compelling circumstances", the panel enjoys a great deal of latitude in interpreting those terms and a discretion in granting or rejecting such a request. Having regard to the ordinary dictionary meaning of the words "special" and "compelling", one can conclude as follows. The word "special" in *Rule 17.2* is used to convey the meaning of "different from what is usual" or "extra-ordinary". The word "compelling" could mean either convincing (persuasive, cogent, well-founded), or urgent (serious, demanding or overriding), or forcing (coercing, obliging, pressing, or threatening). On reflection, and when the word "compelling" is used in conjunction with "special" the Panel believes its true meaning is indeed "forcing" in the sense of something which causes a person to give in to pressure.
16. The question and whether "special and compelling circumstances" "in fact exist, is established in accordance with the merits of each case. To demonstrate the existence of "special and compelling circumstances", the respondent must prove that the stay is necessary to protect his rights and / or that the continuance of the proceedings would cause him serious prejudice.
17. The Respondent has made several arguments to support his request for a stay. He has *inter alia* asserted that FIDE has only heard GM Niemann's side of the story, that GM Niemann will attempt to use an adverse finding to unfairly prejudice GM Carlsen in the U.S. Litigation, that special confidentiality measures (of the EDC) cannot sufficiently mitigate the risk of unfair prejudice due to the wide-ranging discovery procedures available within the US legal system, and that there is no need for immediate action by the EDC. In essence, the Respondent desires a stay of the EDC proceedings to allow time for the US court to decide the Respondent's motion to dismiss the civil claim out of hand whereafter the Respondent would be free to provide a full account of his position to the EDC.
18. The Panel is satisfied that a "compelling circumstance" is to be found in the nature of the US civil suit (for defamation) and the extensive US discovery process which may



expose GM Carlsen to further civil claims if he speaks freely. This may inhibit him from defending himself, with the risk that the EDC panel reaches a conclusion on an incomplete understanding of all the facts. In other words, the Respondent is muzzled by the forcing nature of the circumstances surrounding the civil litigation in the US courts. Especially considering the high quantum of damages claimed in the suit (US\$ 100 million), a submission by the Respondent on the merits of his case may severely prejudice the Respondent, where anything disclosed to the EDC may be used to bolster the amount of damages claimed. A conclusion arrived at by the EDC without being able to consider the full defence of the Respondent may also cause him undue reputational harm in the FIDE family.

19. This case furthermore satisfies the criteria of “special circumstances” in the mind of the Panel if regard is had to the profile of the protagonists, the subject-matter of the allegations and the extra-ordinary public interest in the outcome of the case. The case concerns Grandmasters, who are regarded highly in the chess world, and serious allegations of cheating. It should not be taken lightly that the highest lauded professionals in the sports of chess are entangled in such a public and sensational issue. The FIDE family highly anticipates the Respondent’s grounds for the allegations made and the expression of his opinions, as well as the outcome of the EDC’s case. If indeed there has been a means of bypassing stringent security measures in place which GM Carlsen is aware of, it would benefit the chess community to hear his justification of his allegations.
20. The EDC is mindful that a finding which may be based upon an incomplete understanding of the facts of the case may cause significant harm to the Respondent and have ancillary negative effects on the civil suit. The concern is not that there may be different findings arising from the EDC proceedings and civil suit, but that one may unfairly influence the other. The EDC finds this to be substantive grounds for a temporary stay to be granted.
21. Accordingly, upon due consideration, the EDC Panel, by unanimity of its members, finds regarding the request for stay of proceedings:
 - 21.1 The EDC Panel seeks to strike a balance between satisfying its obligations to FIDE and the chess community in bringing finality to this matter, and upholding due process, where it has the chance of coming to a fair verdict with all facts before it.
 - 21.2 When considering the impact of granting a stay, the Panel is satisfied that FIDE nor its family will suffer any prejudice or harm to stay proceeding briefly. It is important to note however, that there is a need to bring finality to these disciplinary proceedings expeditiously as this matter is a widely publicized, high-profile case in the chess community and has garnered worldwide attention.
 - 21.3 The Panel finds that the cumulative conditions of *Rule 17.2* of the EDC Procedural Rules are fulfilled and drives the Panel to make the exceptional decision to grant a



stay of proceedings. The Panel is mindful that a stay, even if granted, cannot be indefinite.

21.4 Therefore, a temporary stay of proceedings of **6 months** is granted, i.e., until the 18th October, 2023 on the further terms set out in the EDC Panel's ruling of 18 April 2023

DATED ON THIS the 25th April 2023

Yolander Persaud-Sammy

Panel Chair

Deputy Chair- FIDE Ethics & Disciplinary Commission