



Arbitrations CAS 2007/A/1370 FIFA v. Superior Tribunal de Justiça Desportiva do Futebol (STJD) & Confederação Brasileira de Futebol (CBF) & Mr Ricardo Lucas Dodô & CAS 2007/A/1376 WADA v. Superior Tribunal de Justiça Desportiva do Futebol (STJD) & Confederação Brasileira de Futebol (CBF) & Mr Ricardo Lucas Dodô, order on provisional measures of 10 December 2007

Panel: Prof. Massimo Coccia (Italy), President; Mr Peter Leaver QC (United Kingdom); Mr José Juan Pintó (Spain)

Football

Provisional measures

Conditions to order provisional measures

Balance of convenience condition in anti-doping cases

- 1. When deciding whether provisional measures should be ordered, a CAS Panel should consider, inter alia, the following factors: (i) whether the measure is useful to protect the applicant from irreparable harm (“irreparable harm” test), (ii) whether the applicant is likely to succeed on the merits (“likelihood of success” test) and (iii) whether the interests of the applicant outweigh those of the opposite party and of third parties (“balance of convenience” or “balance of interests” test).**
- 2. With specific regard to anti-doping cases, when weighing the balance of convenience a CAS panel must also consider the public interest of the fight against doping.**

Whereas on 6 September 2007 the Fédération Internationale de Football Association (FIFA or the “Appellant”) filed with the Court of Arbitration for Sport (CAS) an appeal against the Superior Tribunal de Justiça Desportiva do Futebol (STJD), the Confederação Brasileira de Futebol (CBF) and Mr Ricardo Lucas Dodô (the “Player”) (collectively “the Respondents”) with respect to the STJD’s decision dated 2 August 2007 by which the Player had been acquitted of an anti-doping rule violation charge.

Whereas FIFA in its statement of appeal submitted an application for provisional measures, requesting that the CAS suspend immediately the Player from all football activities on a provisional basis, pursuant to Articles R37 and R48 of the CAS Code of Sports-related Arbitration (the “CAS Code”).

Whereas on 11 September 2007 WADA filed with the CAS an appeal against the same three Respondents with respect to the same STJD’s decision dated 2 August 2007.

Whereas, with the agreement of all parties, the two proceedings have been consolidated by the CAS and are being conducted jointly by a single Panel.

Whereas by letter dated 13 September 2007 the CBF contested the CAS's personal jurisdiction over itself and did not take a position on FIFA's request for provisional measures against the Player.

Whereas by letter dated 17 September 2007 the STJD contested the CAS's personal jurisdiction over itself, recognized that the CAS had subject-matter jurisdiction and opposed FIFA's request for provisional measures against the Player.

Whereas by letter dated 24 September 2007 the Player requested the CAS to decide on a preliminary basis the jurisdictional issue and opposed FIFA's application for provisional measures against him.

Whereas on 24 October 2007 the Panel determined to grant the opportunity to submit additional briefs on the preliminary issue of the CAS's jurisdiction and informed the parties that it would have dealt with FIFA's request for provisional measures only if and when it decided to retain jurisdiction over the case.

Whereas FIFA reiterated its request for provisional measures against the Player in its letter dated 19 November 2007.

Whereas in its submissions FIFA contended:

- that in light of the Player's adverse analytical finding and of the circumstances of the case, its *"chances of success on the merits of the appeal are irrefutable"*;
- that FIFA would be irreparably harmed by a failure to enforce an immediate suspension against the Player because *"this would give the entire football world a wrong signal, i.e. that players who have taken prohibited substances are not duly and promptly sanctioned"*;
- that *"the interests of FIFA as the world football governing body, as well as that of the participants in this game, regarding a fair and proper conduct of all members of the football family vis-à-vis the applicable regulations and general principles governing the fight against doping outweigh any interest the Respondent may have"*, and to be *"unable to identify any legitimate interest that the Respondents may possibly carry in the issue at stake"*.

Whereas on 6 December 2007 the Panel informed the parties that it had determined that it had jurisdiction to entertain the present appeals proceedings and that the order on provisional measures would be communicated to the parties shortly.

LAW

1. Pursuant to Article 183 of the Swiss Private International Law Act, an international arbitral tribunal sitting in Switzerland is empowered to order provisional or conservatory measures at the request of one party.
2. Pursuant to Article R37 of the CAS Code, the Panel may, upon application by one party, issue an order for provisional or conservatory measures.
3. Pursuant to Article R48 of the CAS Code, the Panel may, upon application by the appellant, provisionally stay the execution of the appealed decision.
4. In accordance with CAS jurisprudence (*ex multis*: CAS 2006/A/1088; CAS 2003/O/486; CAS 2002/A/378; CAS 2001/A/324), when deciding whether provisional measures should be ordered, the Panel should consider, inter alia, the following factors:
 - whether the measure is useful to protect the applicant from irreparable harm (“irreparable harm” test): the applicant must demonstrate that the requested measures are necessary in order to protect its position from damage or risks that would be impossible, or very difficult, to remedy or cancel at a later stage;
 - whether the applicant is likely to succeed on the merits (“likelihood of success” test): the applicant must demonstrate that it has a reasonable chance eventually to win the case;
 - whether the interests of the applicant outweigh those of the opposite party and of third parties (“balance of convenience” test): the applicant must demonstrate that the harm or inconvenience it would suffer from the refusal of the requested provisional measures would be comparatively greater than the harm or inconvenience the other parties would suffer from the granting of the provisional measures.
5. In addition, with specific regard to anti-doping cases, the Panel is of the view that in weighing the balance of convenience a CAS panel must also consider the public interest of the fight against doping.
6. In accordance with CAS jurisprudence, each of the mentioned factors (irreparable harm, likelihood of success and balance of convenience) is relevant, but any of them may be decisive on the facts of a particular case (CAS OG 02/004).
7. Having considered all aspects of FIFA’s application, the Panel finds that it is not satisfied that FIFA has discharged the burden on it of demonstrating that provisional measures are necessary to protect its position or that the harm or inconvenience that it would suffer from the refusal of the provisional measures would be greater than the harm or inconvenience that

would be suffered by the Player if such measures were ordered. The Panel has particularly considered:

- that a relatively short delay in the imposition of a sanction (if such was the outcome of the appeal) would not lessen in any way the punitive impact of that sanction on the Player and, thus, it would not by any means harm FIFA's stance against doping;
 - that the Player is a professional athlete who would be undoubtedly harmed if he were to be provisionally suspended and then acquitted by the final decision on the merits;
 - that each anti-doping case involving a footballer must be evaluated on its own merits in accordance with the principle of individual case management advocated by FIFA (*see* CAS 2005/C/976 & 986), with the consequence that no CAS anti-doping decision acquitting a single player, let alone a decision denying a provisional suspension, may send any wrong signal to the football world;
 - that a relatively lengthy period since the decision appealed against was rendered by the STJD has already elapsed while a relatively short period of time will elapse before the Panel will render its final award.
8. As a result, the request submitted by FIFA to suspend the Player immediately on a provisional basis, pending the decision on the merits of the appeal, is dismissed.

The Court of Arbitration for Sport rules:

1. The application for provisional measures submitted by FIFA to suspend immediately Mr Ricardo Lucas Dodô from all football activities on a provisional basis is dismissed.
2. (...).