



Arbitration CAS 2013/A/3199 Rayo Vallecano de Madrid SAD v. Real Federación Española de Fútbol (RFEF), award of 22 October 2013

Panel: Mr Romano Subiotto QC (United Kingdom), President; Prof. Luigi Fumagalli (Italy); Mr José Juan Pintó (Spain)

Football

National Federation's refusal to grant a UEFA License to a club due to insolvency

CAS jurisdiction

In order for the CAS to have jurisdiction to hear an appeal, there must exist either a specific arbitration agreement between the parties, or the jurisdiction of CAS must be expressly recognized in the statutes or regulations of the sports-related body. The FIFA or UEFA Statutes merely constitute a recommendation to introduce a regulation providing for CAS arbitration and do not by themselves grant jurisdiction to CAS over appeals against decisions passed by national federations or leagues. Accordingly, CAS does not have jurisdiction to hear disputes between Spanish clubs and the RFEF in the absence of a specific arbitration agreement referring to CAS.

1. THE PARTIES

- 1.1 Rayo Vallecano de Madrid, S.A.D. ("**Rayo Vallecano**" or the "**Club**") is a Spanish professional football club with its registered offices in Madrid, Spain. It plays in the Spanish Primera División of the Liga Nacional de Fútbol Profesional ("**La Liga**").
- 1.2 The Real Federación Española de Fútbol (the "**RFEF**", and together, the "**Parties**") is the national football association governing the sport of football in Spain.

2. FACTUAL BACKGROUND

- 2.1 On 14 May 2013, the First Instance Licensing Committee of the RFEF unanimously refused to grant Rayo Vallecano the UEFA License for the 2013/2014 season (the "**First Decision**"). The Committee found that Rayo Vallecano presented unpaid debts relating to employees, the social security system, the tax authorities, and transfer fees of players. The Committee declined to issue the license in accordance with Articles 86.3(b) and (c) of the RFEF's Regulation on Club Licenses for UEFA Competitions (the "**RFEF Club Licensing Regulations**").

- 2.2 On 17 May 2013, Rayo Vallecano appealed the First Decision before the Second Instance Licensing Committee of the RFEF (the “**Second Committee**”). On 21 May 2013, the Second Committee rendered a new decision dismissing Rayo Vallecano’s appeal (the “**Appealed Decision**”). The Second Committee found that, notwithstanding Rayo Vallecano’s recent efforts to obtain the approval of a creditors’ agreement in the near future, the Club’s insolvency debts were “*liquid, due and payable*”, and the First Decision must be confirmed.
- 2.3 If Rayo Vallecano’s license application had been accepted, Rayo Vallecano would have been able to participate in the UEFA Europa League, because they had come eighth in La Liga for the 2012/2013 season (Málaga Club de Fútbol, who came seventh, were refused the UEFA License, and so the opportunity passed to the club below – Rayo Vallecano).
- 2.4 Rayo Vallecano challenged the Second Committee’s refusal to grant it the UEFA License in the Madrid Commercial Court No. 3 (Ordinary Insolvency 392/2011). Rayo Vallecano asked (*inter alia*) the court to determine whether the right to participate in the UEFA Europa League constituted part of the assets available to its creditors. On 23 May 2013, and again on 8 July 2013, the Madrid Commercial Court denied the Club’s request, and held that:
- “The petition of the insolvent party and the Board of Insolvency Trustees requesting the court to serve notice on the RFEF on the terms requested asking for the grant of the UEFA licence to Rayo Vallecano de Madrid S.A.D is rejected”.*

3. PROCEEDINGS BEFORE THE CAS

- 3.1 On 10 June 2013, Rayo Vallecano submitted its Statement of Appeal to the Court of Arbitration for Sport (the “**CAS**”) against the RFEF with respect to the Appealed Decision, pursuant to R48 of the Code of Sports-related Arbitration, 2013 Edition (the “**Code**”). Rayo Vallecano requested an expedited procedure in accordance with R52 of the Code, as well as Spanish as the language of the procedure and the appointment of a sole arbitrator.
- 3.2 On 14 June 2013 the RFEF objected to the Appellant’s request for an expedited procedure and requested English as the language of this appeal.
- 3.3 On 17 June 2013, in view of the parties’ disagreement and pursuant to Article R52 of the Code, the CAS Court Office confirmed that no expedited procedure would be implemented and the regular deadlines initially established by the CAS would apply. The CAS Court Office further confirmed that English would be the language of the procedure, pursuant to Article R29 of the Code.
- 3.4 On 17 June 2013, the Respondent objected to the appointment of a sole arbitrator, in view of the complexity of the case.
- 3.5 On 20 June 2013, Rayo Vallecano filed its Appeal Brief and, within it, applied for provisional measures under R37 of the Code. Rayo Vallecano requested that, because the

Europa League had not yet started (but would do so imminently), the CAS order the RFEF and UEFA to hold Rayo Vallecano's place in the Europa League provisionally, pending the outcome of this arbitration.

- 3.6 On 26 June 2013, the RFEF wrote to the CAS disputing the CAS's jurisdiction to hear the matter, and requesting a preliminary decision in which the President of the Appeals Arbitration Division of the CAS, prior to the formation of the Panel, or the Panel upon its constitution could rule on jurisdiction.
- 3.7 On 27 June 2013, the CAS wrote to the parties explaining that the RFEF could raise a defence of lack of CAS jurisdiction within its reply to the application for provisional measures, following which the President or Deputy-President of the Appeals Arbitration Division of the CAS would decide *prima facie* on the issue of CAS jurisdiction.
- 3.8 On 27 June 2013, the RFEF wrote to the CAS informing that the Appellant was simultaneously seeking relief before Spanish courts in order to obtain the UEFA License for the 2013/2014 season.
- 3.9 On 1 July 2013, the RFEF filed its answer to the Club's request for provisional measures. The RFEF submitted (*inter alia*) that the CAS did not have jurisdiction to hear the matter. On 4 July 2013, Rayo Vallecano provided written submissions as to the CAS's alleged lack of jurisdiction.
- 3.10 On 11 July 2013, the Deputy President of the Appeals Arbitration Division of the CAS rejected Rayo Vallecano's application for provisional and conservatory measures, ruling that:
"1. The application for provisional and conservatory measures filed by Rayo Vallecano de Madrid S.A.D. on 20 June 2013, in the matter CAS 2013/A/3199 Rayo Vallecano de Madrid S.A.D. v. RFEF is rejected.
2. The costs of the present Order shall be determined in the final award or in any other final disposition of this arbitration".
- 3.11 The Deputy President found that Rayo Vallecano would not suffer "*irreparable harm*" if the provisional measures were not granted. This was because well-established CAS jurisprudence demonstrated that economical or financial damage *per se* cannot constitute an irreparable harm which might lead to provisional measures, since it can be compensated at a later stage (see, e.g., CAS 2005/A/916; CAS 2012/A/2925 and CAS 2012/A/2830).
- 3.12 In the reasoning of his Order, the Deputy President assessed the jurisdictional competence of the CAS *prima facie* on the basis of Article 186.1 of the Swiss International Private Law. The Deputy President expressly reserved the final decision on jurisdiction to the panel of arbitrators to be designated to decide on the present arbitration proceedings (the "**Panel**").
- 3.13 On 11 July 2013, the CAS Court Office informed the Parties that the Panel was constituted as follows: Mr. Romano Subiotto QC, President; and Mr. Jose Juan Pintó and Prof. Luigi

Fumagalli as arbitrators. The Parties confirmed they had no objection to the constitution of the Panel.

- 3.14 On 26 July 2013, the RFEF submitted its Answer to the Appeal. The RFEF contested the CAS's jurisdiction to hear the matter; it argued that the matter was *res judicata* because of the rulings of the Spanish Courts; it requested the joinder of Sevilla Club de Fútbol S.A.D. and/or UEFA; and it challenged Rayo Vallecano's substantive arguments.
- 3.15 On 29 July 2013, both parties signed the Order of Procedure without any remarks.
- 3.16 Following a consultation with parties, a hearing was fixed by the Panel, pursuant to Article R57 of the Code and took place on 30 July 2013. In addition to the Panel, the Parties and their legal representatives, the following people attended the hearing: Mr. Pedro Fida, Counsel to the CAS; Mr. Henry Mostyn, *ad hoc* clerk to the Panel; and Mr. Juan Torres, interpreter for Rayo Vallecano. Rayo Vallecano called Mr. Plaza Jose Baltasar, insolvency administrator, as a witness. At the close of the hearing, the Parties confirmed that their right to a fair hearing had been respected.
- 3.17 Because the third qualifying round of games of the UEFA Europa League (to which the UEFA License in the dispute relates) was scheduled for 1 August 2013, on 31 July 2013 the Panel notified the operative of the award to the parties, pursuant to Article R59 of the Code. The Panel held that there was no valid arbitration clause and it therefore lacked jurisdiction to hear the matter.

4. SUBMISSIONS OF THE PARTIES AS TO THE ISSUE OF CAS JURISDICTION

A. Rayo Vallecano's Submissions

- 4.1 In its written submissions, Rayo Vallecano presented four arguments to establish CAS jurisdiction.
- 4.2 First, the RFEF licensing committees which rejected Rayo Vallecano's UEFA License are not independent bodies. Instead, they are simply administrative organs of the RFEF. Therefore, unless CAS jurisdiction is established, Rayo Vallecano will never have had a real opportunity to challenge the RFEF's decision before an independent and impartial body, because it is the RFEF that decides UEFA Licensing requests. This denies Rayo Vallecano access to justice and "*fair process*".
- 4.3 Second, FIFA and UEFA Statutes recognize the jurisdiction of CAS and compel their associations to recognize that jurisdiction, and where FIFA and/or UEFA Statutes contradict rules of national federations, the former should prevail. The relevant FIFA and UEFA Statutes provide as follows:
- 4.3.1 Article 62 of the FIFA Statutes provides:

“FIFA recognizes the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, Clubs, Players, Officials and licensed match agents and players’ agents”.

4.3.2 Articles 62 and 63 of the FIFA Statutes contain provisions regarding the procedure for an appeal to CAS, and provide that confederations shall agree to recognize CAS as an independent judicial body, and ensure that their members comply with decisions passed by CAS.

4.3.3 Article 60 of the UEFA Statutes provides:

“Associations shall include in their statutes a provision under which disputes of national dimension arising from or related to the application of their statutes or regulations shall, subject to their national legislation, be referred to in the last instance to an independent and impartial court of arbitration to the exclusion of any ordinary court” (emphasis added).

4.3.4 Article 1.4 of the RFEF Statutes provides that the RFEF shall:

“respect at all times the statutes, regulations and decisions of FIFA and UEFA”.

4.4 Third, by Article 1 of the RFEF Club Licensing Regulations for UEFA Competitions, the RFEF grants the UEFA License by means of a delegation of UEFA. Jurisdiction then follows from Articles 61 and 62 of the UEFA Statutes, which provide:

“Article 61 of the UEFA Statutes

The CAS shall have exclusive jurisdiction, to the exclusion of any ordinary court or any other court of arbitration, to deal with the following disputes in its capacity as an ordinary court of arbitration:

- a) disputes between UEFA and associations, leagues, clubs, players or officials;*
- b) disputes of European dimension between associations, leagues, clubs, players or officials.*

Article 62 of the UEFA Statutes

“...any decision taken by a UEFA organ may be disputed before the CAS in its capacity as an appeals arbitration body, to the exclusion of any ordinary court or any other court of arbitration”.

4.5 Fourth, Article 103(f) of the RFEF Statutes provide that every Spanish Club is entitled to:

“appear before the Court of Arbitration for Sport (CAS), based in Lausanne (Switzerland), in the cases and with the requirements established by FIFA and UEFA”.

4.6 At the hearing, Rayo Vallecano recognized that the RFEF Statutes or regulations do not include an arbitration clause to CAS. However, Rayo Vallecano submitted that by this omission the RFEF: (1) denied Rayo Vallecano due process; and (2) violated UEFA and FIFA statutes. Moreover, the CAS had shown that it had jurisdiction by hearing Rayo Vallecano’s application for provisional measures, and through the signed Order of Procedure. Rayo Vallecano did not further elaborate on the third and fourth ground of appeal at the hearing.

B. The RFEF's Submissions

- 4.7 The RFEF submits that CAS does not have jurisdiction. R47 of the Code establishes that, in order to initiate CAS arbitral proceedings, there must be a valid arbitral clause in favour of CAS in the statutes or regulations of the body which issued the decision appealed against, or the parties must have concluded a valid arbitral agreement. The RFEF submits that there is no such arbitration agreement in the present proceeding:
- 4.7.1 The recognition in the RFEF Statutes is limited exclusively to disputes between the RFEF, FIFA and/or UEFA. Article 1.4 of the RFEF Statutes (of the version applicable at the relevant time) provides:
- “The RFEF recognizes the jurisdiction of the Court of Arbitration for Sport (CAS) exclusively in those disputes which may arise between the RFEF, FIFA, and/or UEFA”.*
- 4.7.2 This limitation in the RFEF Statutes stems from an amendment approved by the General Assembly on 6 July 2011. The amendment repealed a far wider and more general arbitral clause, which stated that the RFEF
- “d) Recognize the jurisdiction of the Court of Arbitration for Sport (CAS)”.*
- 4.7.3 It is clear that the legislative intention by the amendment was to limit the jurisdiction of CAS solely and exclusively to disputes between the RFEF, FIFA and/or UEFA.
- 4.7.4 Rayo Vallecano recognized at the hearing that there was no valid arbitration clause in the RFEF's statutes.
- 4.8 CAS jurisprudence has repeatedly confirmed that the statutes or regulations of the sports-related body from whom the decision is appealed must *“expressly recognize the CAS as an arbitral body of appeal”* (See, e.g., CAS 2008/A/1602; CAS 2009/A/1910 and CAS 2008/A/1708).
- 4.9 As to the arguments raised by Rayo Vallecano, the RFEF submits:
- 4.9.1 The RFEF licensing committees are independent and impartial, and Rayo Vallecano has not been denied due process:
- (a) The Second Committee of the RFEF is an independent organ from the RFEF. Article 22 of the RFEF Club Licensing Regulations regulates the composition and manner of appointment of the Second Instance Committee, which comprises a total of 7 members, 4 appointed by the RFEF and 3 appointed by the National Professional Football League. In addition, Article 23 of the same Regulations provides that members of decision making bodies – such as the Licensing Committees – must be independent and impartial. The impartiality of any member of the UEFA

Licensing Committees has at no point been challenged by Rayo Vallecano during the proceedings.

- (b) Spanish clubs have the opportunity to challenge the decision of the licensing committees. These decisions can be challenged before the Spanish Courts. This right is conferred by Article 24.1 of the Spanish Constitution. (The prohibition in FIFA Statutes on taking legal action in the ordinary courts does not apply where binding legal provisions specifically provide for recourse to ordinary courts of law, *see* Article 68.3 FIFA Statutes.) Rayo Vallecano repeatedly availed itself of this right by seeking the protection of the Madrid Commercial Court.

4.9.2 Article 1 of the RFEF Club Licensing Regulations does not amount to an implication that the RFEF is subject to the CAS as a delegate of UEFA; it is a mere recognition of an institutional nature. Were RFEF's membership of UEFA to amount to being unconditionally subject to the CAS, the clauses of submission contained in the Code would be unnecessary. The appointment of 3 members of the Second Instance Committee by the Professional Football League is a further indication that RFEF does not exercise a role as a UEFA delegate, as UEFA would not delegate to a body composed of persons appointed by a non-UEFA member.

4.9.3 Article 103(f), which the Appellant refers to, is in fact Article 103(f) of the RFEF General Regulations not the RFEF Statutes. Under the principles of normative hierarchy and *lex posterior derogate priori*, the new wording of the RFEF Statutes, declaring that the jurisdiction of CAS is exclusively limited to cases between the RFEF, UEFA and/or FIFA, prevails over the subsidiary General Regulations.

5. CAS JURISDICTION AND ADMISSIBILITY

5.1 R47 of the Code states that:

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

5.2 According to settled CAS jurisprudence, in order for the CAS to have jurisdiction to hear an appeal, there must exist either a specific arbitration agreement between the parties, or the jurisdiction of CAS must be expressly recognized in the statutes or regulations of the sports-related body (See, *e.g.*, CAS 2008/A/1602; CAS 2009/A/1910; CAS 2008/A/1708 and CAS 2005/A/952).

5.3 In the present case, no specific arbitration agreement was concluded and, moreover, neither the statutes nor the regulations of the RFEF recognize the competence of CAS to deal with disputes between clubs and the RFEF. Rayo Vallecano recognized this at the hearing.

- 5.4 The only agreement to arbitrate to the CAS in the RFEF Statutes is found at Article 1.4:
“The RFEF recognizes the jurisdiction of the Court of Arbitration for Sport (CAS) exclusively in those disputes which may arise between the RFEF, FIFA, and/or UEFA”.
- 5.5 This provides that only for disputes between the RFEF, FIFA, and/or UEFA can there be an appeal to CAS. This excludes an appeal by clubs against the RFEF. Therefore there is no valid arbitration agreement in the present case. The Panel is fortified in reaching this view when it considers the clause that Article 1.4 replaced and repealed on 6 July 2011. That wider and more general arbitral clause stated that the RFEF
“d) Recognize[s] the jurisdiction of the Court of Arbitration for Sport (CAS)”.
- 5.6 This limitation to the RFEF Statutes enacted on 6 July 2011 demonstrates a deliberate legislative intention that the jurisdiction of the CAS should be limited exclusively to those disputes between the RFEF, FIFA and UEFA.
- 5.7 The Panel finds that none of the arguments raised by Rayo Vallecano confers jurisdiction on the CAS to hear this matter.
- 5.8 First, as to Rayo Vallecano’s argument that it has been denied access to justice and due process, any alleged lack of independence and impartiality of the RFEF’s licensing committees is a matter to be resolved between FIFA and RFEF; it is insufficient to confer jurisdiction for the CAS to hear the present matter in the absence of a valid arbitration clause. The Panel notes there is no document in the file, nor has it heard any evidence, that the RFEF’s licensing committees do not act independently and impartially. On the contrary, the RFEF’s Regulations expressly provide that committee members must act independently and impartially, and 3 of the 7 licensing committee members are appointed by the National Professional Football League.
- 5.9 Precisely the same argument as to the alleged lack of impartiality of a national federation’s UEFA licensing committee was raised in Joined Cases CAS 2010/A/2170 and CAS 2010/A/2171. In that case, the panel held that, in the absence of a valid arbitration clause:
“any such alleged lack of independence and impartiality [of the Greek UEFA licensing committee] would have to be solved by FIFA with the [Greek national football federation], respectively before Greek courts, if Greek law provides so. This cannot create a nibilo a jurisdiction clause for CAS”.
- 5.10 Second, Rayo Vallecano submits that CAS jurisdiction is primarily given by Articles 62 and 63 of the FIFA Statutes and Article 60 of the UEFA Statutes. Of the FIFA Statutes, Article 63 attributes jurisdiction to CAS, and Article 62 recognizes CAS as an independent arbitration tribunal for resolving disputes between *“FIFA, Members, Confederations, Leagues, Clubs, Players, Officials and licensed match agents and players’ agents”*. Article 63 FIFA Statutes reads as follows:

“1. 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.

2. Recourse may only be made to CAS after all other internal channels have been exhausted.

3. CAS, however, does not deal with appeals arising from:

(a) violations of the Laws of the Game;

(b) suspensions of up to four matches or up to three months (with the exception of doping decisions);

(c) decisions against which an appeal to an independent and duly constituted arbitration tribunal recognised under the rules of an Association or Confederation may be made”.

5.11 It is true that this is intended, in principle, to ensure that footballing decisions can be appealed to the CAS. However, consistent CAS jurisprudence is clear that the FIFA or UEFA Statutes merely “constitute an instruction to introduce a regulation providing for CAS arbitration” (CAS 2004/A/676, paras. 2.6 and 2.7) and do not by themselves grant jurisdiction to CAS over appeals against decisions passed by national federations or leagues (See CAS 2004/A/676; CAS 2005/A/952; CAS 2004/A/676; CAS 2002/O/422 and Joined cases CAS 2010/A/2170 and CAS 2010/A/2171). Indeed, as stated in Joined Cases CAS 2010/A/2170 and CAS 2010/A/2171, para. 47:

“[N]othing in Article 63 FIFA Statutes can lead to the conclusion that it is directly applicable and therefore forms part per se of the national association’s rules. The members of FIFA remain independent legal entities with their own sets of rules”.

5.12 Consequently, if the RFEF Statutes are deemed non-compliant with the FIFA or UEFA Statutes, it is for FIFA or UEFA to take the necessary steps to ensure compliance. As was stated in Joined Cases CAS 2010/A/2170 and CAS 2010/A/2171, para. 55:

“If FIFA finds that the jurisdictional system of a national federation does not comply with article 63 of its Statutes, it will then take the necessary measures towards the national association in order for it to introduce a valid jurisdiction clause in favor CAS and/or establish an arbitration court which meets FIFA’s criteria on independence and impartiality. In the meantime, it will be a matter of domestic law [...] to decide whether a party concerned by a decision issued by a [sporting] body has the right to appeal against such decision before a competent state court”.

5.13 Accordingly, while it might be advisable for the RFEF to introduce an arbitration clause to the CAS for (*inter alia*) disputes between the clubs and the RFEF, this is a matter for the RFEF and FIFA. However, until such a clause is introduced, CAS does not have jurisdiction to hear disputes between clubs and the RFEF.

5.14 Third, the Panel does not consider that Article 1 of the RFEF Club Licensing Regulations confers CAS jurisdiction by the RFEF acting as a delegate of UEFA. Rayo Vallecano submits that the RFEF acts as a delegate of UEFA, and so Articles 61 and 62 of the UEFA Statutes, which provide for CAS jurisdiction for disputes between (*inter alia*) the RFEF and UEFA, apply. The Panel agrees with the RFEF that, if this were the case, it would then render the statutes of national associations which confer CAS jurisdiction unnecessary.

Article 1 is the mere recognition of the institutional nature of the RFEF to UEFA, and is insufficient to confer CAS jurisdiction.

- 5.15 Fourth, the Panel agrees with the RFEF that Article 103(f) of the RFEF General Regulations is subsidiary to Article 1.4 of the RFEF Statutes: (1) the normative hierarchy principle applies so that the Article 1.4 of the RFEF Statutes (approved by the RFEF General Assembly) are superior to the General Regulations (approved by a Delegated Committee of the RFEF); (2) the amendment to Article 1.4 of the RFEF of Statutes of 6 July 2011 was enacted more recently than the RFEF General Regulations, and so the principle of *lex posterior derogat priori* applies; and (3) Article 1.4 of the RFEF Statutes deals with the specific case of disputes involving the RFEF, while Article 103(f) only recognizes CAS jurisdiction more generally, and so Article 1.4 of the RFEF Statutes is a *lex specialis* (see Joined Cases CAS 2010/A/2170 and CAS 2010/A/2171, para. 63). Because Article 1.4 of the RFEF Statutes demonstrates a clear legislative intention to exclude an appeal to the CAS for disputes between the RFEF and clubs, this overrides any provision in the RFEF General Regulations.
- 5.16 Finally, in response to Rayo Vallecano's argument that the CAS has shown that it has jurisdiction by hearing Rayo Vallecano's application for provisional measures and through the signed Order of Procedure, the Panel reminds Rayo Vallecano that the decision that the appeal for provisional measures was admissible was made "*without prejudice of any other decision that the Panel could take once constituted*" (Order for Provisional Measures, para. 6.3). The Order of Procedure also recognized that jurisdiction of the CAS was disputed by the RFEF.
- 5.17 Based on all of the above, the Panel concludes that the CAS has no jurisdiction to proceed on the appeal filed by Rayo Vallecano.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. It does not have jurisdiction to decide on the appeal filed on 10 June 2013 by Rayo Vallecano de Madrid S.A.D. against the decision rendered on 21 May 2013 by the Committee of Second Instance of License UEFA of the Real Federación Española de Fútbol.
2. (...)
3. (...)
4. All other motions or prayers for relief are dismissed.