



Arbitration CAS 2003/O/486 Fulham FC / Olympique Lyonnais, preliminary award of 15 September 2003

Panel: Mr Jean-Philippe Rochat, President (Switzerland); Mr Jan Paulsson (France); Mr Dirk-Reiner Martens (Germany)

Football

Transfer of player

Compensation fee

Interim measures

- 1. The decision challenged is one made by a Swiss private association, and as such it cannot be legally enforced, if it is challenged, either before the ordinary courts, pursuant to Art. 75 of the Swiss Civil Code, or, as in the present case, before an arbitral tribunal, such as the CAS.**
- 2. According to the dominant Swiss doctrine, the anticipated execution of a monetary claim is not a provisional measure that a tribunal is entitled to issue.**

On 28 June 2003, the FIFA Executive Committee issued a decision (“the Decision”) whereby Fulham Football Club (“Fulham”) was ordered to pay FF 30,000,000, corresponding to EUR 4,573,470.52 (“the monetary award”) to Olympique Lyonnais SASP (“OL”), as a compensation fee further to the international transfer of the player Steve Marlet.

The Decision was notified to the parties on 1 July 2003.

On 21 July 2003, Fulham filed a request for arbitration with the Court of Arbitration for Sports (“CAS”) to challenge the Decision. Such request for arbitration mentioned OL as respondent. As plea for relief, it submitted that the Decision be cancelled and that OL be ordered to pay FF 90,000,000 to Fulham. The latter also applied to stay the execution of the Decision.

On 8 August 2003, OL filed its answer, whereby it submitted that Fulham be ordered to pay the Monetary award, plus interest at 8% per annum from 14 December until the date of the CAS award. OL also maintained that the petition for a stay should be dismissed. Eventually, OL requested that:

In the event the Arbitral Tribunal considers some or all of Claimant's demands to require examination on the merits, Respondent respectfully request that the Arbitral Tribunal direct Claimant to fulfil its payment obligations in accordance with the terms of the parties' contract prior to examination of Claimant's demands. This order should contain provisions imposing daily penalties for an amount of no less than 1,000 Euros per day of non-compliance.

LAW

Jurisdiction

1. Art. R27 of the Code of Sports-related arbitration (“Code”) provides that the Code applies whenever the parties have agreed to refer a sports-related dispute to the CAS. Such disputes may arise out of a contract containing an arbitration clause, or be the subject of a later arbitration agreement.
2. The Decision provided that:
“This decision may be appealed before the Court of Arbitration for Sports (CAS) within 20 days of receiving notification of this decision by contacting the court directly in writing.”
3. Such provision must be considered as an offer by FIFA to conclude an ad hoc arbitration agreement (cf. CAS 2002/O/422, pp. 6-7).
4. In the present case, Fulham has filed a request for arbitration. OL has unconditionally proceeded by filing its answer. Therefore, both parties have agreed to refer this case to CAS.
5. It follows that CAS has jurisdiction to decide the present dispute with regard to Fulham and OL.

Applicable Law

6. Art. R45 of the Code provides that the Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss Law.
7. In the present matter, the parties refer exclusively to FIFA's regulations. They have not agreed on the application of any other particular law. They have not either specified that Swiss conflict law could determine the law applicable to the merits.
8. Contrary to what OL maintains in its answer, unless parties agree otherwise, art. R45 of the Codes provides for the application of the Swiss substantive law in the absence of the choice of any other law. Indeed, as a general rule, provisions containing an election of law refer to substantive law, including, when Swiss law is chosen, the international treaties concluded by Switzerland, but excluding the conflict law provided by the chosen legislation (see Jean-François POUDRET/Sébastien BESSON, *Droit comparé de l'arbitrage international*, Genève 2002, p. 614, § 684, and the quoted references).

9. Therefore, FIFA's regulations shall primarily apply and Swiss law shall apply complementarily.

Admissibility

10. The request of arbitration of Fulham was filed within the deadline, stated in the Decision, of twenty days after notification of the Decision itself. It complies with the requirements of art. R38 of the Code.
11. It follows that the request for arbitration is admissible.

Application for a stay

12. Fulham has applied for a stay of execution of the Decision. Within the framework of an Ordinary Arbitration Proceedings, such application of a stay is treated as a request for provisional and conservatory measures, pursuant to art. R37 of the Code.
13. The view of this Panel is that there is, in the present case, no need, and thus no legal basis, to stay the Decision. According to the Decision, Fulham should pay to OL a certain sum of money. To execute and enforce such a decision, OL would need the assistance of the competent official state authorities. However, because of the present pending ordinary arbitration, OL is not legally in the position to enforce the Decision (cf. CAS 2003/O/453). The Panel relies upon and adopts the reasoning of CAS in its decision dated 16 June 2003 (CAS 2003/O/460, § 5.3): *“The Panel has concluded that it need not make any ruling on this application. The Decision is one made by a Swiss private association, and as such it cannot be legally enforced, if it is challenged, either before the ordinary courts, pursuant to Art. 75 of the Swiss Civil Code, or, as in the present case, before an arbitral tribunal, such as the CAS (see Margareta BADDELEY, *L'association sportive face au droit – Les limites de son autonomie*, Basel 1994, pp. 224-226 and pp. 309-312; Jean-François PERRIN, *Droit de l'association (art. 60-79 CC)*, Fribourg 1990, pp. 141-142)”* (see also CAS 2003/O/460; CAS 2003/O/469; CAS 2003/O/482).
14. Consequently, the Panel dismisses Fulham's application for interim measures aiming at the stay of the Decision's execution.

OL's request aiming at the immediate payment of the monetary award

15. OL also apparently requests that the Panel orders Fulham to pay immediately to OL the monetary award. This would indeed amount to ordering, the immediate execution of the Decision, as a provisional measure.
16. Art. R37 of the Code does not define specifically in which circumstances CAS is to issue some provisional measures.

17. According to the CAS jurisprudence, as a general rule, when deciding whether to grant provisional measures, it is necessary to consider whether the measure is useful to protect the Appellant from irreparable harm, the likelihood of success on the merits of the appeal and whether the interests of the Appellant outweigh those of the opposite party. It is necessary to compare the risks incurred by the Appellant in the event of immediate execution of the decision with the disadvantages for the Respondent in being deprived such execution (balance of convenience or interests). The Appellant must make at least a plausible case that the facts relied on by him and the rights which he seeks to enforce exist and that the material conditions for a legal action are fulfilled (CAS 2000/A/274, in *Digest of CAS awards II*, p. 757; see also CAS 98/200, *ibidem*, pp. 38-41).
18. OL does neither maintain nor prove, not even *prima facie*, that it would suffer irreparable harm should Fulham not execute immediately the Decision. Neither does it address the question of the likelihood of success of its position on the merits.
19. In any event, according to the dominant Swiss doctrine, the anticipated execution of a monetary claim is not a provisional measure that a tribunal is entitled to issue (see Sébastien BESSON, *Arbitrage international et mesures provisoires*, Zurich 1998, p. 32, § 21 and the quoted references; Vincent PELET, *Réglementation fédérale des mesures provisionnelles et procédure cantonale contentieuse*, Lausanne 1986, pp. 244 ff.). The Panel adopts this view and considers that it is not in the position to issue the provisional measure as requested by the Respondent OL.
20. It follows that the application of OL must be dismissed.

The Court of Arbitration for Sport rules that:

1. The Court of Arbitration for Sports (CAS) has jurisdiction to decide the present dispute between Fulham Football Club (“Fulham”) and Olympique Lyonnais SASP (“OL”).
2. The request for arbitration filed on 27 May 2003 by Fulham, in connection with the decision issued on 28 June 2003 by FIFA is admissible.
3. The applicable law to the present dispute is primarily FIFA legislation and complementarily Swiss substantive law.
4. The application by Fulham for granting provisional measures equalling to a stay of such decision is dismissed.
5. The application by OL for granting provisional measures equalling to the immediate execution of the challenged decision issued on 28 June 2003 by FIFA is dismissed.
6. The costs of the present preliminary award will be determined in the final award.