



Arbitration CAS 2013/A/3139 Fenerbahçe SK v. Union des Associations Européennes de Football (UEFA), order of 3 May 2013

Football

Request for a stay of the decision

Irreparable harm caused by a sanction deferred for a probationary period

Harm capable of financial compensation

1. A sanction that is deferred for a probationary period and that is therefore purely hypothetical cannot constitute an irreparable harm.
2. Any harm which can be financially compensated cannot be considered as an irreparable harm. A reputation or image loss can be financially compensated and cannot therefore constitute an irreparable harm.

1. THE PARTIES

- 1.1 Fenerbahçe SK (the “Appellant”) is a Turkish football club affiliated with the Turkish Football Federation, having its seat in Istanbul, Turkey.
- 1.2 UEFA (the “Respondent”) is an association under Swiss law having its registered office in Nyon, Switzerland. UEFA is the continental confederation governing football in Europe.

2. FACTUAL BACKGROUND

- 2.1 On 27 February 2013, following incidents during the 2012/2013 European League match between the Appellant and FC BATE Borisov on 21 February 2013 played behind closed doors but during which fireworks from outside the stadium landed inside the stadium causing the interruption of the game, the UEFA Control and Disciplinary Body decided:

- “1. To order Fenerbahçe SK to play its next UEFA competition match as host club behind closed doors. This applies to the following match:
 - a. Fenerbahçe SK v FC Viktoria Plzeň of 14.03.2013.
2. The club is excluded from participating in the next UEFA club competition for which it would otherwise qualify. This sanction is deferred for a probationary period of two years.

3. *To fine Fenerbahçe SK €60,000.*
(...)”.

- 2.2 Following an appeal by the Appellant, the UEFA Appeals Body, on 11 March 2013, decided to reject such appeal and uphold the above decision of the UEFA Control and Disciplinary Body.
- 2.3 It is undisputed between the parties that the Appellant has played its game of 14 March 2013 against FC Viktoria Plzeň behind closed doors.

3. PROCEEDINGS BEFORE THE CAS AND THE PARTIES’ SUBMISSIONS

- 3.1 On 4 April 2013, the Appellant filed an appeal against the decision of the UEFA Appeals Body of 11 March 2013 and requested, *inter alia*, the stay of the decision following which it is excluded from participating in the next UEFA club competition for which it would otherwise qualify whereas such sanction is deferred for a probationary period of two years.
- 3.2 Pursuant to Article R37 of the Code of Sports-related Arbitration (the “Code”), the CAS Court Office invited the Respondent to file its position with respect to the Appellant’s request.
- 3.3 On 17 April 2013, before the Respondent’s answer on the Appellant’s request for a stay was due, the Appellant filed its appeal brief and requested that any and all factual arguments presented in its appeal brief be taken into account for deciding on its request for a stay.
- 3.4 The Respondent was therefore granted a additional deadline of three days to file its observations on the Appellant’s request for a stay.
- 3.5 The Respondent filed its comments to the Appellant’s application for a stay on 25 April 2013, requesting that the Appellant’s request be rejected.
- 3.6 The Deputy President of the CAS Appeals Arbitration Division has studied the parties’ submissions on the Appellant’s application and shall refer to the parties’ arguments if and when necessary.

4. JURISDICTION OF THE CAS

- 4.1 In accordance with the Swiss Private International Law (Article 186), the CAS has power to decide upon its own jurisdiction.
- 4.2 The extent of the jurisdictional analysis at this point is to assess whether on a *prima facie* basis the CAS can be satisfied that it has jurisdiction to hear the appeal. The final decision on jurisdiction will be made by the Panel.
- 4.3 Article R47 of the Code states that, “*An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body*”.
- 4.4 In the absence of a specific arbitration agreement, in order for the CAS to have jurisdiction to hear an appeal, the statutes or regulations of the sports-related body from whose decision the appeal is being made must expressly recognise the CAS as an arbitral body of appeal.
- 4.5 Article 62 of the UEFA Statutes provides for an appeal to the CAS against any decision taken by a UEFA organ.
- 4.6 Furthermore, the Respondent does not dispute that CAS has jurisdiction in relation to the present procedure.
- 4.7 Based on the foregoing, in principle, CAS has jurisdiction to decide on the present dispute.

5. ADMISSIBILITY

- 5.1 According to Article R49 of the Code, “*In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against*”.
- 5.2 In accordance with Article 62 of the UEFA Statutes, the time-limit for the appeal to the CAS shall be ten days from the receipt of the decision appealed against.
- 5.3 The decision of the UEFA Appeals Body of 11 March 2013 was notified to the Appellant on 28 March 2013. The statement of appeal was filed on 4 April 2013, that is to say in a timely manner. The admissibility of the appeal is further confirmed by the Respondent.

6. LEGAL DISCUSSION

- 6.1 The Deputy President of the CAS Appeals Arbitration Division has the ability to consider an application for provisional measures pursuant to Article R37 of the Code.
- 6.2 The Deputy President of the CAS Appeals Arbitration Division reminds the relevant criteria for successfully grounding an application for a stay: according to well established CAS jurisprudence, the Panel may grant provisional relief if (1) the party seeking such relief would suffer irreparable harm if the relief were not granted, (2) that party has a likelihood of success on the merits of the appeal, and (3) the interests of the Appellants outweigh those of the other party (award of 15 September 2003, CAS 2003/O/486; order of 25 May 2001, CAS 2001/A/329; order of 15 March 2001, CAS 2001/A/324; order of 12 July 2007, CAS 2007/A/1317; and order of 6 April 2010, CAS 2010/A/2071).
- 6.3 The three requirements for the grant of provisional measures (*i.e.* irreparable harm, likelihood of success on the merits of the appeal and balance of interests) are cumulative (order of 12 December 2007, CAS 2007/A/1403; order of 27 October 2007, TAS 2007/A/1397; and order of 6 April 2010, CAS 2010/A/2071).

IRREPARABLE HARM

- 6.4 The Deputy President of the CAS Appeals Arbitration Division needs to determine whether the Appellant would suffer an irreparable harm if the decision of the UEFA Appeals Body of 11 March 2013 is not stayed. As stated by the Appellant, only the irreparable harm concerning its exclusion from participating in the next UEFA club competition for which it would otherwise qualify whereas such sanction is deferred for a probationary period of two years shall be assessed (the “sanction”). In fact, (i) the Appellant has already played its game of 14 March 2013 against FC Viktoria Plzeň behind closed doors, and (ii) according to the well-established CAS jurisprudence, a decision of a financial nature issued by a private Swiss association is not enforceable while under appeal.
- 6.5 The Deputy President of the CAS Appeals Arbitration Division notes that the Appellant argues, in summary, that should the sanction not be stayed, there is a risk that, in the event of a potential future disciplinary incident maybe even out of its control, it would suffer a huge reputation and image loss which may result in huge financial losses.

- 6.6 The Deputy President of the CAS Appeals Arbitration Division can only come to the conclusion that such arguments have no bearing. In fact, as correctly stated by the Respondent and admitted by the Appellant itself, the sanction is purely hypothetical and cannot, therefore, constitute an irreparable harm: the sanction is deferred for a probationary period in the event of a potential future disciplinary incident for which the Appellant would be held liable.
- 6.7 In any event, the Deputy President of the CAS Appeals Arbitration Division reminds that, according to the constant CAS jurisprudence, any harm which can be financially compensated cannot be considered as an irreparable harm: the reputation and image loss alleged by the Appellant, even though purely hypothetical at this stage as stated in the paragraph above, as correctly stated by the Respondent in its submission, could be compensated.
- 6.8 For reasons of procedural economy, the Deputy President of the CAS Appeals Arbitration Division will not address the other above-mentioned criteria set forth at paragraph 6.2 of the present Order.
- 6.9 On the basis of the lack of irreparable harm, the Deputy President of the CAS Appeals Arbitration Division dismisses the Appellant's request for a stay.

7. COSTS

- 7.1 (...).

8. MISCELLANEOUS

- 8.1 This decision is a procedural order, not an award. As a result, it may not be challenged in court pursuant to Article 190 Swiss Private International Law Act.

ORDER

The Deputy President of the CAS Appeals Arbitration Division, ruling *in camera*, decides that:

1. The application for a stay filed by Fenerbahçe SK on 4 April 2013, completed on 17 April 2013, in the matter *CAS 2013/A/3139 Fenerbahçe SK v. UEFA* is dismissed.

(...).