



Arbitration CAS 2013/A/3372 S.C. FC Sportul Studentesc SA v. Asociatia Club Sportiv Rapid CFR Suceava, award of 28 April 2015 (operative part of 4 July 2014)

Panel: Mr Olivier Carrard (Switzerland), Sole Arbitrator

Football

Disciplinary sanction imposed by a national federation

Application of the principle “jura novit curia” in arbitrations with their seat in Switzerland (jura novit arbiter)

Standing to be sued under Swiss law

1. According to well-established case law of the Swiss Federal Tribunal, the principle *jura novit curia* must be respected not only by Swiss courts, but also by arbitral tribunal with their seat in Switzerland (*jura novit arbiter*).
2. Under Swiss law, the defending party has standing to be sued (*légitimation passive*) only if it is personally obliged by the “*disputed right*” at stake. According to the Swiss Federal Tribunal, the standing to sue or to be sued in civil proceedings pertains to the substantive basis of the claim; it relates to the (active or passive) entitlement of the right claimed and its absence does not entail the inadmissibility of the claim but rather its dismissal. The question of the standing to be sued relates to the merits of the case, and not to the admissibility of the appeal.

I. THE PARTIES

1. The Appellant, SC FC Sportul Studentesc SA (hereinafter referred to as the “Appellant”) is a professional football club with its headquarters in Bucharest (Romania), affiliated to the Romanian Football Federation (hereinafter referred to as the “RFF”).
2. The Respondent, Asociatia Club Sportiv Rapid CFR Suceava (hereinafter referred to as the “Respondent”) is also a professional football club with its headquarters in Suceava (Romania), affiliated to the RFF.

II. THE FACTS

3. Below is a summary of the factual background of the case, as it has been presented by the Appellant in his statement of appeal, and as it has developed in the course of the present proceedings.

4. By decision dated 29th May 2013, the RFF decided to cancel a match opposing the Parties, scheduled on 30th May 2013, until payment by the Appellant of certain “*financial obligations*”. According to the Appellant, those financial obligations were fulfilled on 30th May 2013. The match against the Respondent was therefore rescheduled for 8th June 2013.
5. On 30th May 2013, the Respondent lodged an appeal at the Disciplinary Commission of the RFF (hereinafter referred to as “the Disciplinary Commission”), claiming that the rescheduling of the match did not comply with the applicable regulation.
6. By decision dated 7th June 2013 (decision n. 41/CD/2013), the Disciplinary Commission condemned the Appellant to pay, within ten days, to the Respondent an amount of LEI 9’473.80 representing travel, accommodation and meal expenses incurred by the latter in relation with the match, initially scheduled on 30th May 2013. It also decided to reschedule the match between the Parties in accordance with the terms provided by the Regulation for the Organization of the Football Activity (“ROAF”).
7. On 13th June 2013 – as explained below, such date is disputed by the Appellant –, the latter filed an appeal against the decision of the Disciplinary Commission. The appeal brief was sent by fax from a hotel reception located in Cluj-Napoca. In its pleadings, the Appellant explained that the date and time appearing in the pages of its appeal brief were incorrect. It argued that such mistake was probably due to a wrong setting of the fax machine.
8. By decision dated 19th June 2013 (decision n. 49/CR/2013), the Appeal Commission of the RFF (hereinafter referred to as “the Appeal Commission”) rejected the appeal lodged by the Appellant on the ground that it had been brought out of time. The Appeal Commission ruled that the evidence adduced by the Parties showed that the appeal brief had been sent by fax on 13th June 2013, at 4.01 AM.
9. On 11th September 2013, the Appellant lodged an application for revision based on Article 121 of the Disciplinary Code of the RFF, alleging that, further to the decision of the Appeal Commission, it had discovered new evidence proving that the appeal had been lodged on time, *i.e.* on 12th June 2013, at 10:40 PM.
10. By decision dated 19th September 2013 (decision n. 93/CR/2013) (hereinafter referred to as “the Appealed Decision”), communicated by facsimile on 3rd October 2013, the Appeal Commission declared the application for revision lodged by the Appellant inadmissible on the ground that it had not been filed within the time limit provided in Article 121 of the Disciplinary Code according to which the application for revision must be lodged within ten days from the discovery of the ground for revision.
11. The operative part of the Appealed decision indicated that an appeal could be lodged before the CAS within twenty one days from the date of its communication.

III. PROCEDURE BEFORE CAS

12. On 24th October 2013, the Appellant filed a statement of appeal with the Court of Arbitration for Sport (hereinafter referred to as the “CAS”) against the Appealed Decision pursuant to Article R47 of the Code of Sports-related Arbitration (hereinafter referred to as “the CAS Code”) with the following prayers for relief:
- *the Decision no. 93 issued on September 19, 2013, by the Appeal Commission of the Romanian Football Federation is set aside;*
 - *the petition for revision of the Decision no. 49 issued on June 19, 2013, by the Appeal [sic] Commission of the Romanian Football Federation, submitted by SC FC Sportul Studentesc SA is admissible;*
 - *SC FC Sportul Studentesc SA has submitted the appeal against the Decision no. 41 issued on June 06, 2013, by the Disciplinary Commission of the Romanian Football Federation, in due time;*
 - *The appeal [sic] submitted by SC FC Sportul Studentesc SA against the Decision no. 41 issued on June 06, 2013, by the Disciplinary Commission of the Romanian Football Federation is grounded;*
 - *The decision is partially set aside, (the part by which the appellant [sic] was ordered to pay to the second respondent the amount (sic) of 9473,80 lei) and SC FC Sportul Studentesc SA does not owe any amount to Asociata Club Sportiv Rapid CFR Suceava;*
 - *All the arbitration costs shall be borne by the respondents.*
13. The statement of appeal indicated that the respondents were the following parties: (1) the Romanian Football Federation (First Respondent) and (2) Asociata Club Sportiv Rapid CFR Suceava (Second Respondent).
14. On 29th October 2013, the CAS Court Office acknowledged receipt of the statement of appeal filed by the Appellant and required to be informed, within five days, of the arbitrator chosen by the Appellant and to be provided with a translation of the Appealed Decision into English.
15. On 4th November 2013, the Appellant informed the CAS Court Office about its preference for a sole arbitrator to decide the matter. It also requested an extension of time to file its appeal brief.
16. On the same day, the CAS Court Office took note of the Appellant’s preference for a sole arbitrator and granted to the Appellant a five-day extension to file its appeal brief.

17. On 11th November 2013, the Appellant filed its appeal brief, which mentioned the following on its front page:

“As a preliminary statement, we wish to mention that this appeal is not directed against the Romanian Football Federation. This entity was mentioned by error in our statement of appeal since, from the beginning, in front of the Romanian Committees the parties involved were the undersigned and Asociata Club Sportiv Rapid CFR Suceava (named hereinafter ACS Rapid CFR Suceava)”.

18. On 12th November 2013, the CAS Court Office informed the Parties that the arbitration was to be dealt with according to Article R47 *et seq.* of the Code of Sports-related Arbitration (2013 edition) (hereinafter referred to as “the CAS Code”) and invited, *inter alia*, the Respondents to inform the CAS Court Office, within five days, whether they agreed with the appointment of a sole arbitrator.
19. On 15th November 2013, the CAS Court Office acknowledged receipt of the appeal brief and invited the Respondents to submit their answers within the twenty-day deadline provided in Article R55 of the CAS Code.
20. On 18th November 2013, the RFF informed the CAS Court Office that it did not agree with the appointment of a sole arbitrator.
21. On 22 November 2013, the CAS Court Office noted that the Second Respondent had not replied within the above mentioned deadline and therefore advised the Parties that pursuant to Article R50 of the CAS Code, the President of the Division, or his Deputy, would decide on the number of arbitrators, taking into account the circumstances of the case.
22. On 29th November 2013, the RFF requested that the time limit to file its answer be set once the advance of costs had been paid by the Appellant.
23. On 2nd December 2013, the CAS Court Office informed the Parties that pursuant to Article R55 para. 3 of the CAS Code, the time limit referred to in the letter dated November 15th, 2013, was annulled until the payment by the Appellant of its share of the advance of costs. Thereafter, the RFF will be granted a new time limit to file its answer once the payment is made by the Appellant.
24. On 5 December 2013, the CAS Court Office informed the Parties that in light of the Appellant’s withdrawal of the appeal against the RFF, the procedure was to be referred to as “CAS 2013/A/3372 SC FC Sportul Studentesc SA v. Asociata Club Sportiv Rapid CFR Suceava” in all future correspondence, which would no longer be addressed to the RFF.
25. On 9th December 2013, the Respondent requested that the time limit to file its answer be fixed once the advance of costs had been paid by the Appellant and informed the CAS Court Office that it would not pay its share of the advance of costs given the “*abusive character*” of the procedure initiated by the Appellant.
26. On the same day, the CAS Court Office informed the Parties that pursuant to Article R55 para. 3 of the CAS Code, the time limit fixed for the Respondent to file its answer was annulled

until payment by the Appellant of its share of the advance of costs. The CAS Court Office further noted that the Respondent would not pay its share of the advance of costs and informed the Parties that the CAS Finance Director would shortly write to the Appellant to request payment of the Respondent's share in accordance with Article R64.2 of the CAS Code.

27. On 24th December 2013, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division had decided that the matter would be submitted to a sole arbitrator given the low amount in dispute and in order to reduce the costs incurred by the Parties during the proceedings.
28. On 17th January 2014, the CAS Court Office issued a Notice of Formation of a Panel to resolve the dispute according to which was composed as follows:

Sole Arbitrator: Mr Olivier Carrard, attorney-at-law in Geneva, Switzerland.
29. On the same day, the CAS Court Office informed the Parties that the Appellant had paid the advance of costs and, consequently, invited the Respondent to file, within twenty days, its answer in accordance with Article R55 of the Code.
30. On 28 February 2014, the CAS Court Office noted that the Respondent had not filed its answer within the time limit set out by letter dated 17th January 2014. It further added that, after review of the file, it appeared that the Respondent had never received the appeal brief and its annexes due to an administrative oversight. Accordingly, the Respondent was granted another twenty-day time limit to file its answer.
31. On 1 April 2014, the CAS Court Office noted that the Respondent had failed to file its answer within the above-mentioned time limit and invited the Parties to inform it, before April 8th, 2014, whether they wished the holding of a hearing.
32. On 8 April 2014, the Appellant requested the holding of a hearing.
33. On 27 May 2014, the CAS Court Office informed the Parties that in view of the Appellant's request to hold a hearing, they were advised that the Sole Arbitrator would be available on 25th and 26th June 2014, and invited to indicate if they were available at these dates.
34. On 30 May 2014, the Appellant stated that it would prefer the hearing to be held on 25 June 2014. The Respondent did not state its availability for such hearing.
35. On 23 June 2014, the CAS Court Office addressed to the Parties an Order of Procedure informing them, *inter alia*, that they would be heard on 25 June 2014, in Lausanne.
36. On 24 June 2014, the Appellant returned a signed copy of the above Order of Procedure while the Respondent neither acknowledge receipt of it, nor returned it to the CAS Court Office
37. A hearing took place in Lausanne on 25 June 2014 in presence of the following persons:

- For the Appellant: Mr Bogdan Lucan, Counsel.

38. The Respondent did not attend the hearing.
39. At the beginning of the hearing, the Appellant's Counsel enquired whether the Sole Arbitrator had invited the RFF to provide an English translation of the decisions n. 41/CD/2013, 49/CR/2013 and 93/CR/2013.
40. The Sole Arbitrator responded that it was the Appellant's duty to submit the evidence supporting its case. Moreover, the Sole Arbitrator observed that the Appellant had provided English translation of the above decisions.
41. For the rest, the Appellant's Counsel declared *inter alia* the following:
 - He was aware of the fact that the fax machine from which the appeal was sent was set incorrectly. He did not file an appeal to the CAS, because no evidence was available at that time.
 - The RFF was mentioned by mistake as a respondent on the declaration of appeal.
 - The Appellant had been downgraded from the second division to the third division because of the non-payment of the amount of LEI 9'473.80 to the Respondent. This amount was finally paid by the Appellant.
 - The Appellant and the Respondent played the match that had been previously cancelled.
 - The Appellant respected the ten-day time limit provided in Article 121 of the Disciplinary Code.
 - The Appellant's sought to have the Appealed decision set aside in order to participate to the second division championship starting in July 2014.

IV. OVERVIEW OF THE APPELLANT'S SUBMISSIONS

42. In summary, the Appellant contends that the appealed decision was ill-founded due to misinterpretation by the Appeal Commission of Article 121 of the Disciplinary Code.
43. According to the Appellant, the Appeal Commission wrongly considered that the review petition had to be filed within a ten-day time limit starting from the date of communication of the decision to the Parties.
44. The Appellant further asked the CAS to state, firstly, that the appeal lodged against the decision of the Disciplinary Commission was filed in due time and, secondly, that the Disciplinary Commission misinterpreted Article 79.7 of the Disciplinary Code by condemning the Appellant to pay an amount of LEI 9'473.80 for the travel, accommodation and meals expenses of the Respondent.

V. LEGAL DISCUSSION

A. Jurisdiction of the CAS

45. The jurisdiction of the CAS, which is not disputed, derived from Article R47 of the CAS Code.

46. Article R47 of the CAS Code reads as follow:

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.

47. The Appellant relies on Article 36.17 of the Romanian Regulations on the Status and Transfer of Players, which provides the following: *“The Decisions made by the RFF/LFP’s Appeal Commission are final and enforceable internally beginning with their pronouncement date, and they may be attacked only in the Sports Arbitral Court within 21 days after communication”*.

48. In light of the above, the Sole Arbitrator finds that he has jurisdiction to rule over the present matter.

B. Admissibility

49. Pursuant to Article R49 of the CAS 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.

50. The Appealed Decision was notified on 3rd October 2013 and the Statement of Appeal was filed on 24th October 2013, that is to say within the prescribed time limit

51. In addition, the appeal complies with the prerequisites set forth by Articles R48 and R64. 1 of the CAS Code.

52. It follows that the appeal is therefore admissible.

C. Applicable law

53. Article R58 of the CAS Code provides as follows:

The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, the rules of law chosen by the parties or, in the absence of such choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

54. The Appellant has referred in its submissions to the regulations of the RFF and of the RPFL, which are the regulations applicable to the case at hand.
55. Further, the Sole Arbitrator does not find any evidence that the parties have agreed on the application of any specific national law. It is comforted in its position by the fact that, in its submissions, the Appellant refers exclusively to the RFF and RPFL Regulations. As a result, subject to the primacy of applicable RFF and RPFL Regulations and to the extent necessary for the resolution of this dispute, Romanian Law shall apply complementarily.

D. Standing to be sued

56. The Sole Arbitrator notes that the Appellant, while requesting the CAS to exercise its jurisdiction on the decision of the Appeal Commission, made clear in its appeal brief that the appeal was not directed against the RFF, but exclusively against the Respondent.
57. None of the parties have specifically addressed the question of the Respondent's standing to be sued. However, according to well-established case law of the Swiss Federal Tribunal, the principle *jura novit curia* must be respected not only by Swiss courts, but also by arbitral tribunal with their seat in Switzerland (*jura novit arbiter*) (Decision of the Swiss Federal Tribunal dated 19 December 2001, 4P.114/2001, para. 5.a; Decision of the Swiss Federal Tribunal dated 2 March 2001, 4P.260/200, para. E.5.b; BERGER/KELLERHALS, *International Domestic Arbitration in Switzerland*, 2006, para. 1310, p. 374; KAUFMANN-KOHLER/RIGOZZI, *Arbitrage international – Droit et pratique à la lumière de la LDIP*, 2nd ed., 2010, para. 654a, p. 421).
58. Under Swiss law – which is not the law applicable to the dispute – the defending party has standing to be sued (*légitimation passive*) only if it is personally obliged by the “disputed right” at stake (CAS 2012/A/2981, para. 43; ZÜRCHER A., in: *Kommentar zur Schweizerischen Zivilprozessordnung (ZPO)* (Teil 1), 2010, N 67 ad Art. 59 ZPO; S. 382; GRAF D., in: *GesKR* 2012 S. 380; BGE 107 II 82 E. 2a). The Swiss Federal Tribunal has defined the standing to be sued as follows (BGE 128 III 50, quoted in: BERGER/KELLERHALS, *International Domestic Arbitration in Switzerland*, 2006, para. 332, p. 92; see also CAS 2012/A/2906, para. 78):
- “The standing to sue or to be sued in civil proceedings pertains to the substantive basis of the claim; it relates to the (active or passive) entitlement of the right claimed and its absence does not entail the inadmissibility of the claim but rather is dismissal”.*
59. In light of the above and taking into consideration the jurisprudence of the CAS (see CAS 2013/A/3140, para. 8.15; CAS 2012/A/2906, para. 78; CAS 2008/A/1639, para. 11.1), the Sole Arbitrator holds that the question of the standing to be sued relates to the merits of the case, and not to the admissibility of the appeal.
60. Furthermore, the Sole Arbitrator holds that the appeal should have been directed against the RFF for the following reasons:

- a) The appealed decision was rendered by the RFF.

- b) The Appellant is not claiming anything against Asociata Club Sportiv Rapid CFR Suceava.
 - c) The proceedings has no impact on the Respondent because (a) it received the amount of LEI 9,473 and (b) the match against the Appellant was finally played.
 - d) The Appealed Decision does not deal with the Respondent's behavior, but only with the admissibility of the application for revision filed by the Appellant.
 - e) The only stake involved in the proceedings is to decide whether the Appellant should be allowed to play in the second division during the upcoming season. This is obviously a question that concerns in first place the RFF.
 - f) The RFF is nevertheless no longer a party to the present proceedings.
 - g) The absence of the RFF as a party to the proceedings is a serious problem from a due process perspective, in the sense that the RFF was unable to present its case.
 - h) Finally it is the responsibility of the Appellant to fulfil the prerequisites of an appeal.
61. In light of the above, the Sole Arbitrator comes to the conclusion that the Appellant should have directed its appeal against the RFF.
62. As a result, the Sole Arbitrator holds that the Respondent has no standing to be sued in this case. The appeal filed by the Appellant is therefore without merit.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by S.C. FC Sportul Studentesc on 24th October 2013 against the decision n. 93 issued by the Appeals Commission of the Romanian Football Federation on 19th September 2013 is dismissed.
 2. The decision n. 93 issued by the Appeals Commission of the Romanian Football Federation on 19 September 2013 is confirmed.
- (...)
5. All other motions or prayers for relief are rejected.