



Arbitration CAS 2014/A/3831 Mersin Idmanyurdu Spor Kulübü v. PFC CSKA Sofia EAD, award of 23 April 2015

Panel: Mr Rui Botica Santos (Portugal), President; Prof. Ulrich Haas (Germany); Mr Jacques Radoux (Luxembourg)

Football

Disciplinary proceedings for failure to comply with a decision rendered by a FIFA body

Standing to be sued

In line with CAS constant jurisprudence, a party has standing to be sued and may thus be summoned before the CAS only if it has some stake in the dispute because something is sought against it. In this respect, where a club requests that the sanctions and fines imposed upon it by a FIFA PSC decision be revoked and that the said decision be set aside, the prayers and reliefs sought can practically and legally speaking only be made against FIFA as the body charged with imposing and enforcing disciplinary sanctions on clubs who contravene the FIFA Disciplinary Code. The club benefiting from the FIFA PSC decision has no standing to be sued.

1. THE PARTIES

- 1.1. Mersin Idmanyurdu Spor Kulübü (hereinafter referred to as “Mersin” or the “Appellant”), is a Turkish professional football club and a member of the Turkish Football Federation. The latter is a member of the Fédération Internationale de Football Association (hereinafter referred to as “FIFA”).
- 1.2. PFC CSKA Sofia EAD, (hereinafter referred to as “CSKA”, the “Respondent” or the “Creditor”), is a Bulgarian professional football club and a member of the Bulgarian Football Union. The latter is also a member of FIFA.

2. THE FACTUAL BACKGROUND

- 2.1 On 12 January 2012, CSKA and Mersin signed an agreement (hereinafter referred to as the “Transfer Agreement”) for the transfer of the Player S. (hereinafter referred to as the “Player”) from the Respondent to the Appellant in consideration for EUR 800,000 to be paid in four equal instalments of EUR 200,000.

- 2.2 On 25 April 2013, CSKA filed a claim against Mersin before the FIFA Players' Status Committee (hereinafter referred to as the "FIFA PSC"), requesting the payment of the second, third and fourth instalments, amounting to EUR 600,000, plus interest at 5% *p.a.* and expenses.
- 2.3 On 12 July 2013, Mersin filed its defence before the FIFA PSC.
- 2.4 On 2 October 2013, the FIFA PSC rendered its decision (hereinafter referred to as the "FIFA PSC Decision") partially accepting CSKA's claim on the doctrine of *pacta sunt servanda* and ordered Mersin to pay CSKA EUR 600,000 plus 5% interest *p.a.* on said amount as of 25 April 2013 until the date of effective payment.

3. THE FIFA DISCIPLINARY COMMITTEE PROCEEDINGS

- 3.1 On 22 September 2014, the secretariat to the FIFA Disciplinary Committee (hereinafter referred to as the "Disciplinary Committee") opened disciplinary proceedings against Mersin following its failure to comply with the FIFA PSC Decision.
- 3.2 On 28 October 2014, the FIFA Disciplinary Committee found Mersin guilty of failing to comply with the FIFA PSC Decision, and therefore in violation of Article 64 of the FIFA Disciplinary Code, and rendered the following decision (hereinafter referred to as the "Appealed Decision") against the Appellant:

"(...)

2. The Club, Mersin (...) is ordered to pay a fine to the amount of CHF 25,000. The fine is to be paid within 60 days of notification of the present decision (...).

*3. The Club, Mersin (...) is granted a final period of grace of 60 days as from notification of the present decision in which to settle its debts [EUR 600,000 plus 5%*p.a.*] to the creditor, the club PFC CSKA Sofia EAD and to FIFA.*

4. If payment is not made by this deadline, the creditor may demand in writing from the secretariat to the FIFA Disciplinary Committee that six (6) points be deducted from the debtor's first team in the domestic league championship. Once the creditor has filed this request, the points will be deducted automatically without a further formal decision having to be taken by the FIFA Disciplinary Committee (...).

5. If the club, Mersin (...), still fails to pay the amounts due even after deduction of the points in accordance with point 4. Above, the FIFA Disciplinary Committee will decide on a possible relegation of the debtor's first team to the next lower division.

"(...)"

4. THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

- 4.1 On 1 December 2014, the Appellant filed its Statement of Appeal before the Court of Arbitration for Sport (hereinafter referred to as the "CAS") pursuant to Article R47 of the

Code of Sports-related Arbitration (hereinafter referred to as the “CAS Code”) and nominated Ulrich Haas, Professor in Zurich, Switzerland, as arbitrator.

- 4.2 On 4 December 2014, the Respondent objected to the Appellant’s request for a stay.
- 4.3 On 9 December 2014, FIFA informed the CAS Court Office that it had renounced to its right of intervene in the present arbitration proceeding pursuant to Article R41.3 of the CAS Code.
- 4.4 On 10 December 2014, the Appellant filed its Appeal Brief.
- 4.5 On 10 December 2014, the President of the Appeals Division issued an order (hereinafter referred to as the “Order on Request for a Stay”) and dismissed the Appellant’s request for stay on grounds that (i) the Appellant had failed to motivate its application for a stay and (ii) the Appellant had failed to substantiate its likelihood of succeeding on the merits of the case since the President of the Appeals Division was of the opinion that the Respondent lacked standing to be sued.
- 4.6 On 30 December 2014, the Respondent filed its Answer.
- 4.7 By letter dated 13 January 2015, the Appellant informed the CAS Court Office that it had paid the amounts due to the Respondent (and annexed proof thereof) in accordance with the FIFA PSC Decision and that a hearing was not necessary in the present matter, which had “*become also devoid of essence*”. In particular, the Respondent stated that “*Mersin (...) made the payment of the amount of EUR 200,000 before 9 January 2015 in extent of related decisions. Therefore, the dues amount of the penalty which is EUR 451,000 including as well as 5% interest of p.a (...) which was specified in the Disciplinary Committee’s decision also paid on 9 January 2015 (...9 for that reason, Mersin (...) is no longer be debtor in related decisions of Single Judge of Players’ Status Committee and FIFA Disciplinary Committee (...) the liability and/or obligations is vanished on behalf of Mersin (...) consequently related instant case on CAS became also devoid of essence*”.
- 4.8 On 13 January 2015, the CAS Court Office granted the Appellant a deadline of 16 January 2015 to state whether it intended to withdraw its appeal in view of the arbitration having become “*devoid of essence*”.
- 4.9 Following the latter’s failure to reply to the letter dated 13 January 2015, the CAS Court Office sent a similar reminder on 19 January 2015, informing the Appellant that failure to clarify its position would lead to the continuity of the arbitration proceedings.
- 4.10 On 22 January 2015 the parties were advised that the Panel to decide this matter was constituted as follows:

President:	Mr. Rui Botica Santos, Attorney-at-law in Lisbon, Portugal
Co-Arbitrators:	Mr. Ulrich Haas, Professor in Zurich, Switzerland Mr. Jacques Radoux, Attorney-at-law, Luxembourg

- 4.11 On 5 February 2015, the CAS Court Office granted the Appellant 10 days to reply to the Respondent's position on standing to be sued after which an award would be rendered on the basis of the Parties' written submissions. The Appellant's attention was also drawn to an award issued in CAS 2007/A/1329-1330.
- 4.12 Following the Appellant's failure to submit on the issue of the Respondent's standing to be sued, on 17 February 2015, the CAS Court Office informed the parties that the Panel will render an award on the basis of the Parties' written submissions.
- 4.13 On 17 February 2015, the CAS Court Office sent the Order of Procedure, which was signed by the Respondent on 3 March 2015. Despite receiving further reminders from the CAS Court Office on 4 and 12 March 2015, the Appellant never signed the Order of Procedure.

5. THE PARTIES' POSITIONS

A. Appellant's Position

- 5.1 The Appellant states that the Appealed Decision is based on a wrong assessment of facts.
- 5.2 In addition, the Appellant avers that the Transfer Agreement is wrongly construed and claims to have suffered irreparable harm due to its financial conditions.
- 5.3 The Appellant therefore requests the CAS to revoke the sanctions and fines imposed by the Appealed Decision as well as the annulment of the latter by making the following prayers:
"(...) all the sanction and fine imposed by the decision of FIFA Disciplinary Committee must be revoked; The execution of the decision of FIFA Disciplinary Committee must be stayed until final verdict of the CAS; The annulment of the decision given by FIFA Disciplinary Committee".

B. Respondent's Position

- 5.4 The Respondent agrees with the Order of Request for a Stay, which found CSKA to lack standing to be sued. The Respondent states that the only legitimate Respondent to the Appeal brought before CAS is FIFA.
- 5.5 The Respondent also states that the decision on the merits of the dispute between the parties is final and binding and cannot be reviewed or modified.
- 5.6 The Respondent also argues that the Appellant cannot oppose its obligation to pay to the Respondent the amounts stated in the FIFA Decision rendered on 2 October 2013, which entered into force, because the Appellant has already paid the debt to the Respondent. Therefore, its current conduct would contradict the legal principle of *venire contra factum proprium*.

5.7 In closing, the Respondent makes the following prayers and requests:

- “1. To reject entirely the appeal of the Appellant as well as all his claims and motions stated in his Appeals Brief;*
- 2. To order the Appellant to bear all costs incurred with the present procedure;*
- 3. To order the Appellant to cover all legal and other expenses of the Respondent related to the present procedure”.*

6. LEGAL ANALYSIS

A. Jurisdiction of the CAS

6.1 The Panel notes that it has jurisdiction to decide on this matter in accordance with the article R47 of the CAS Code, which states that “[a]n appeal against the decision of a federation, association or sports related body may be filed with CAS if the Statutes or Regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the Statutes or Regulations of that body”.

B. Admissibility

6.2 The Panel notes that this appeal is admissible in accordance with Article R49 of the CAS Code, which states that “[i]n the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against”.

C. Issues for determination

6.3 The Panel notes that this matter springs from the decision rendered by the FIFA PSC, which ordered Mersin to pay CSKA EUR 600,000 plus 5% interest *p.a.* Whereas Mersin failed to immediately comply with the FIFA PSC Decision, CSKA requested the FIFA Disciplinary Committee to impose disciplinary sanctions on Mersin, which led to the Appealed Decision. It however appears – as alleged by Mersin – that it has complied with the FIFA PSC Decision and paid CSKA the amounts ordered therein, but still insists on maintaining these appeal proceedings against the Creditor.

6.4 In view of the above, determinations must be made on the following issues in order to resolve this matter:

- a) Does the Respondent have standing to be sued?
- b) Depending on the findings to the above, what are the legal consequences?

- a) Does the Respondent have standing to be sued?
- 6.5 CSKA denies standing to be sued, arguing that nothing in these proceedings has been claimed from it by Mersin, who only seeks orders against FIFA and the Appealed Decision.
- 6.6 Despite having been granted an opportunity to submit on the Respondent's standing to be sued, Mersin failed to do so and has only left the Panel with requests to the effect that the sanctions and fines imposed in the Appealed Decision be revoked and that the said decision be set aside.
- 6.7 As a general rule of procedural law, the doctrine of *locus standi* requires that a party named as a respondent stands to be sufficiently affected by the matter at hand in order to qualify as a proper respondent within the meaning of the law.
- 6.8 The duty or burden of proving that a party stands to be sufficiently affected by a matter such that it needs to be named as a respondent lies with the claimant or the appellant as the case may be.
- 6.9 The test traditionally applied in establishing that a prospective respondent has or stands to be sufficiently affected and/or connected with a matter is whether:
- a) the prospective respondent has a personal stake in the outcome of the dispute because something is sought against it; and
 - b) there exists a real, actual and justiciable dispute between the parties that will actually be determined by the prayers and relief sought.
- 6.10 Indeed, the above principles and in particular principal (a) above has been established and settled at the CAS, which has long held that “[u]nder Swiss law, applicable pursuant to Articles 60.2 of the FIFA Statutes and R58 of the CAS Code, the defending party has standing to be sued (*légitimation passive*) if it is personally obliged by the “disputed right” at stake (see CAS 2006/A/1206 *Milan Zivadinovic vs. Iraqi Football Association*). In other words, a party has standing to be sued and may thus be summoned before the CAS only if it has some stake in the dispute because something is sought against it (cf. CAS 2006/A/1189 *IFK Norrköping vs. Trinité Sports FC & Fédération Française de Football*; CAS 2006/A/1192 *Chelsea FC vs. Adrian Mutu*)” (cf. CAS 2007/A/1329 & 1330).
- 6.11 Looking at the facts, it is undisputed that the Appealed Decision was rendered as a result of Mersin's failure to pay CSKA the amount ordered in the FIFA PSC Decision. This in itself does not give rise to any right personally obliging CSKA to be named and take part in these proceedings as a respondent.
- 6.12 This is because in opening enforcement disciplinary proceedings, FIFA does so *ex officio* (cf. Article 108.1 of the FIFA Disciplinary Code), or at the creditor's request, in order to “*protect an essential interest of FIFA, i.e. full compliance with the decisions rendered by its bodies*” (cf. CAS 2007/A/1329 & 1330), *in casu* the enforcement of the FIFA PSC Decision.

- 6.13 Pursuant to Article 110.1 of the FIFA Disciplinary Code, CSKA's role as a creditor in enforcement proceedings is exclusively limited to requesting the opening of the procedure and "(...) *collaborat[ing] to establish the facts*".
- 6.14 It is therefore apparent that the only party with a disputed right and stake in these proceedings is FIFA, who have a legitimate interest to ensure that Mersin complies with the Appealed Decision.
- 6.15 For the record, the Panel wishes to clarify and draw the Appellant's attention to two clearly distinct legal aspects which it might have confused and/or misunderstood in these proceedings.
- 6.16 Whereas the Panel does not question Mersin's apparently legitimate claims of having paid off the entire debt due to CSKA, it does not follow that the said payment qualifies CSKA being named as a legitimate respondent in these proceedings. The only remedy available to the Appellant *vis-à-vis* the Respondent in relation to the Appealed Decision would be to draw the FIFA Disciplinary Committee's attention to the said payment and ask it to close the disciplinary proceedings.
- 6.17 To the contrary, if the Appellant is as a matter of fact not questioning the debt owed to the Creditor but is rather dissatisfied with the sanctions imposed in the Appealed Decision (as a result of an erroneous assessment of the background facts or a disproportional imposition of sanctions), then any appeal against the said decision can only be directed against FIFA.
- 6.18 In its prayers, Mersin requests that the sanctions and fines imposed in the Appealed Decision be revoked and that the said decision be set aside.
- 6.19 The nature of these requests suggests that they cannot evidently be made against CSKA, who obviously lack power to enforce or comply with the orders sought, which as a matter of fact do not seek anything against the Creditor.
- 6.20 To the contrary, the prayers and reliefs sought can practically and legally speaking only be made against FIFA as the body charged with imposing and enforcing disciplinary sanctions on clubs who contravene Article 64 of the FIFA Disciplinary Code.
- 6.21 And also looking at the status of the FIFA PSC Decision, the Panel notes that the same has long become final and binding, meaning that there actually exists no real and/or justiciable dispute between Mersin and CSKA.
- 6.22 In view of the foregoing, the Panel finds that the only party which has a legitimate and personal stake in the outcome of these proceedings and has standing to be sued as a prospective respondent is not CSKA but FIFA.

- b) What are the legal consequences of the above?
- 6.23 Having found CSKA to lack standing to be sued in these proceedings, it follows that the appeal as filed by Mersin against the FIFA Disciplinary Committee Decision dated 10 December 2014 naming CSKA as the respondent must be dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. PFC CSKA Sofia EAD lacks standing to be sued.
2. The Appeal filed by Mersin Idmanyurdu Spor Kulübü against the FIFA Disciplinary Committee Decision dated 10 December 2014 is dismissed.
3. (...).
4. (...).
5. Any and all other prayers for relief are dismissed.