



Arbitration CAS 2017/A/5227 Sporting Clube de Braga v. Club Dynamo Kyiv & Gerson Alencar de Lima Junior, award of 8 March 2018

Panel: Mr Sofoklis Pilavios (Greece), President; Mr João Nogueira Da Rocha (Portugal); Mr André Brantjes (The Netherlands)

Football

Disciplinary proceedings for failure to comply with a CAS award

Standing to be sued

Purpose of disciplinary proceedings

1. 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. 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. Under Swiss law, the defending party has standing to be sued if it is personally obliged by the “disputed right” at stake. 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.
2. FIFA disciplinary proceedings, like basically all disciplinary proceedings of a sport association, are primarily meant to protect an essential interest of FIFA and its members, i.e. the full compliance with the rules of the association and with the decisions rendered by FIFA’s decision-making bodies and/or by the CAS. As a consequence, in an appeal against a decision of FIFA, by means of which disciplinary sanctions have been imposed on a party, only FIFA has standing to be sued, but not the (previously) opposing party in e.g., a financial dispute before the competent FIFA bodies.

I. PARTIES

1. Sporting Clube de Braga (the “Appellant”) is a football club, with its seat in Braga, Portugal. The Appellant is affiliated to the Portuguese Football Federation, which is a member of the Fédération Internationale de Football Association (FIFA).
2. Club Dynamo Kyiv (the “First Respondent”) is a football club, with its seat in Kyiv, Ukraine. Club Dynamo Kyiv is affiliated to the Football Federation of Ukraine, which is a member of FIFA.

3. Mr. Gerson Alencar de Lima Junior (the “Player” or the “Second Respondent”) is a professional football player of Brazilian nationality.

II. FACTUAL BACKGROUND

4. Below is a summary of the relevant facts and allegations based on the parties’ written submissions, pleadings and evidence adduced. Additional facts and allegations found in the parties’ written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

A. Proceedings before the FIFA Dispute Resolution Chamber

5. On 27 February 2013, the FIFA Dispute Resolution Chamber (hereinafter referred to as the “FIFA DRC”) decided that the claims filed by the Player and by the First Respondent were rejected.
6. Such decision was appealed with the Court Arbitration for Sport (the “CAS”) by the First Respondent and proceedings were opened under the reference *CAS 2013/A/3309 FC Dynamo Kyiv v. Gerson Alencar de Lima Júnior & SC de Braga*.
7. On 22 January 2015, the CAS rendered an award in the proceedings *CAS 2013/A/3309 FC Dynamo Kyiv v. Gerson Alencar de Lima Júnior & SC de Braga* and decided that the abovementioned decision of the FIFA DRC was partially reformed in the sense that the Player had to pay to First Respondent the amount of EUR 1,299,255. Furthermore, the decision stated that Sporting Clube de Braga was jointly and severally liable for the payment of the aforementioned amount.

B. Proceedings before the FIFA Disciplinary Committee

8. On 8 November 2016, the FIFA Disciplinary Committee (hereinafter referred to as the “FIFA DC”) opened disciplinary proceedings against the Appellant and the Player, as they failed to comply with the decision passed by the CAS on 22 January 2015.
9. On 15 March 2017, the FIFA DC found the Appellant and the Player guilty of failing to comply with the award rendered by the CAS on 22 January 2015, and therefore in violation of art. 64 of the FIFA Disciplinary Code, and rendered the following decision (hereinafter referred to as the “Appealed Decision”) against the Appellant and the Player:

“(…)

2. *The club Braga SC and the player Gerson Alencar de Lima Junior are jointly and severally ordered to pay a fine to the amount of CHF 15,000. The fine is to be paid within 60 days of notification of the present decision (...).*
3. *The club Braga SC and the player Gerson Alencar de Lima Junior are granted a final period of grace of 60 days as from notification of the present decision in which to settle their debts to the creditor, the club Dynamo Kyiv.*
4. *If payment is not made by this deadline, the creditor may demand in writing from FIFA for six (6) points to be deducted from the first team of the club Braga SC in the domestic league championship and/or for the case with regard to the player Gerson Alencar de Lima Junior to be resubmitted to the FIFA Disciplinary Committee. Once the creditor has filed this/these request(s), the points will be deducted automatically from the first team of the club Braga SC without a further formal decision having to be taken by the FIFA Disciplinary Committee and/or the case will be resubmitted with regard to the player Gerson Alencar de Lima Junior. The order to implement the points deduction will be issued on the association concerned by the secretariat to the FIFA Disciplinary Committee.*
5. *If the club Braga SC still fails to pay the amount due even after the deduction of the points in accordance with the point 4 above, the FIFA Disciplinary Committee will decide on a possible relegation of the first team of the club Braga SC to the next lower division.*

(...)"

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

10. On 4 July 2017, the Appellant filed its statement of Appeal before the CAS pursuant to Article R47 of the Code of Sports-related Arbitration (the "Code"), challenging the Appealed Decision and directed against the First and the Second Respondent.
11. With its statement of appeal, the Appellant nominated Mr João Nogueira da Rocha, attorney-at-law in Lisbon, Portugal, as arbitrator.
12. On 12 July 2017, FIFA wrote a letter to the CAS Court Office stating *inter alia* that "in line with the longstanding jurisprudence of CAS, should a party lodge an appeal against a decision of the FIFA Disciplinary Committee, said appeal shall be directed against FIFA, which is the respondent in such disciplinary related proceedings and, as a consequence, is the only party that has standing to be sued, but not the previously opposing party in a financial case before the competent FIFA bodies. (...) As a consequence, should such appeal not be directed against FIFA, which is the only party with a dispute right and stake in these proceedings and consequently has a legitimate interest to ensure that the Appellant complies with the appealed decision (...), it results that the appeal shall be rejected (...)"
13. On 14 July 2017, the Appellant filed its appeal brief.
14. On 4 August 2017, the CAS Court Office noted that the Respondents had failed to nominate an arbitrator within the time limit granted and informed the parties that the President of the CAS Appeals Arbitration Division would nominate an arbitrator *in lieu* of the Respondents.

15. On 8 August 2017, the First Respondent requested the CAS to dismiss the appeal based on the fact that it was directed against “improper defendant” as FIFA stipulated on its letter dated 12 July 2017. The First Respondent further requested that the time limit for the filing of the answer be set after the payment by the Appellant of its share of the advance of costs. Such request was dismissed by the CAS Court Office on the same date, in view of the applicability of the provision of Article R65 of the Code to this proceedings.
16. On 16 August 2017, following the Respondents’ failure to file their answers by the time limit granted, the CAS Court Office informed the parties that the Panel may nevertheless proceed with the arbitration proceedings. In addition, the CAS Court Office invited the parties to state, by 23 August 2017, whether they preferred a hearing to be held.
17. On 28 August 2017, the CAS Court Office granted the parties a final deadline until 1 September 2017 to state whether they preferred a hearing to be held. The parties never responded to the invitation of the CAS Court Office.
18. On 6 September 2017, the CAS Court Office informed the parties that Mr André Brantjes, attorney-at-law in Amsterdam, Netherlands, has been appointed as arbitrator by the President of the CAS Appeal Arbitration Division, *in lieu* of the Respondents.
19. On 13 September 2017, the CAS Court Office, on behalf of the President of the CAS Appeals Arbitration Division, informed the parties that the Panel appointed to decide on this matter was constituted as follows:

President: Mr Sofoklis P. Pilavios, attorney-at-law in Athens, Greece
Arbitrators: Mr João Nogueira da Rocha, attorney-at-law in Lisbon, Portugal
Mr André Brantjes, attorney-at-law in Amsterdam, Netherlands
20. On 18 October 2017, the CAS Court Office informed the parties that the Panel had decided not to hold a hearing in this matter and to render an Award based on the parties’ written submissions.
21. On the same date, the CAS Court Office sent the Order of Procedure to the parties. Despite receiving further reminders from the CAS Court Office, none of parties signed and submitted the Order of Procedure to the CAS Court Office.

IV. SUBMISSIONS OF THE PARTIES

22. The following outline of the parties’ positions is illustrative only and does not necessarily comprise every submission advanced by the parties. The Panel has nonetheless carefully considered all the submissions made, whether or not there is specific reference to them in the following summary.

A. The Appellant

23. The Appellant's submissions, in essence, may be summarized as follows:

- The Appellant states that the FIFA DC has rendered its decision based on a wrong assessment of facts.
- The Appellant avers that the payment of EUR 1.331.754,22 was made to the First Respondent and nothing else is owed.
- In addition, the Appellant argues that despite the fact that the payment was made, there was no agreement between the Appellant and the First Respondent regarding the payment of the amount mentioned.
- The Appellant therefore requests the CAS to:

“(A) Issue an arbitral award setting aside the decision under appeal and acquitting the Appellant from any condemnation, thus, holding that the Respondent Club Dynamo Kyiv is not entitled to any compensation or sum of another kind and that Sporting Clube de Braga – Futebol Sad did not fail to comply with a previous TAS – CAS decision.

(B) Order the Respondent Club Dynamo Kyiv to pay a contribution towards legal costs and other related expenses of the Appellant, at least in the amount of 15,000 CHF”.

B. The Respondents

24. The First and Second Respondent did not file an answer, or any communication in this regard, (see par. 16 above).

V. JURISDICTION

25. The jurisdiction of CAS, which is not disputed, derives from Article R47 of the CAS Code, as it determines that *“an 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”.*

26. Moreover, Article 58 of the FIFA Statutes (2016 edition) stipulates that: *“Appeals against final decisions passed by FIFA’s legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of notification of the decision in question”.*

27. It follows that CAS has jurisdiction to decide on the present dispute.

VI. ADMISSIBILITY

28. The appeal against the FIFA DC Decision was filed within the deadline provided by Article 58 of the FIFA Statutes (see para. 26 above) and stated in the Appealed Decision. Further, the Appellant complied with all the other requirements of Article R48 of the Code and filed its appeal brief within the time limit stipulated by Article R51 of the Code. The Appellant's appeal therefore is, in principle, admissible.
29. As mentioned above, the FIFA argues that since the appeal has not been directed against FIFA, the appeal shall be rejected. The Panel will revert to this issue below. In any event, the Panel wishes to note that under Swiss Law, lack of standing to be sued is generally considered a reason to reject an appeal on the merits, and not a reason to declare such appeal inadmissible (CAS 2012/A/3032, para. 34).

VII. APPLICABLE LAW

30. Article R58 of the Code provides as follows:

“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

31. Pursuant to Article 57 para. 2 of the FIFA Statutes, *“CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law”*. As a consequence, the FIFA regulations will be applied primarily and Swiss law shall apply subsidiarily.

VIII. MERITS

32. The Panel notes that this matter springs from the decision rendered by the CAS, which stated that Appellant and the Player were jointly and severally liable for the payment of the amount of EUR 1,299,225,50 with 5% interest *p.a.* to the First Respondent. Consequently, by means of the Appealed Decision, the FIFA DC pronounced the Appellant and the Player guilty of failing to comply with the award rendered by the CAS on 22 January 2015 in the proceedings *CAS 2013/A/3309 FC Dynamo Kyiv v. Gerson Alencar de Lima Júnior & SC de Braga*.
33. As a preliminary issue, the Panel must address the question as to who has the standing to be sued in the present proceedings.
34. In this respect, the Panel wishes to point out that it will fully address the issue as to whether the Appellant has named the right parties as Respondents in the present proceedings and, in particular, whether the appeal should have been directed against FIFA as a respondent.

35. 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. 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.
36. Indeed, the above principles have already been established in CAS jurisprudence, which has long held that “*under 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 if it is personally obliged by the “disputed right” at stake (see CAS 2006/A/1206 [...]). 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/1192; CAS 2007/A/1329 & 1330).
37. In the present matter, it appears that the Appealed Decision was rendered on the assumption that the Appellant did not pay to the First Respondent the amount ordered in the award issued by the CAS on 22 January 2015. However, such factual element, whether it is correct or not, does not have any consequence in this appeal.
38. FIFA disciplinary proceedings, like basically all disciplinary proceedings of a sport association, are primarily meant to protect an essential interest of FIFA and its members, i.e. the full compliance with the rules of the association and, as here, with the decisions rendered by FIFA’s decision-making bodies and/or by the CAS (cf. CAS 2008/A/1620, para. 4.6).
39. As a consequence, in an appeal against a decision of FIFA, by means of which disciplinary sanctions have been imposed on a party, only FIFA has standing to be sued, but not the (previously) opposing party in e.g., a financial dispute before the competent FIFA bodies.
40. In view of the foregoing, the Panel finds that the only party which has a legitimate stake in the outcome of these proceedings and has standing to be sued as a prospective respondent is FIFA. The Panel notes that the appeal filed by the Appellant was not directed against FIFA but only against the First Respondent (Dynamo Kyiv) and the Player, which were not involved in the disciplinary proceedings before FIFA.
41. Having found that the First Respondent (Dynamo Kyiv) and the Player lack standing to be sued in these proceedings, it follows that the appeal as filed by Sporting Clube de Braga against the FIFA DC Decision dated 15 March 2017 must be rejected.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Sporting Clube de Braga on 4 July 2017 against the decision issued by the FIFA Disciplinary Committee on 15 March 2017 is dismissed.
2. The decision issued by the FIFA Disciplinary Committee Decision on 15 March 2017 is confirmed.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.