



Arbitration CAS 2015/A/4166 Al Ain FC v. Esporte Clube Vitória & Club Atlético Lanús, award of 29 April 2016

Panel: Mr João Nogueira da Rocha (Portugal), Sole Arbitrator

Football

Solidarity contribution

Standing to be sued

Scope of review of the CAS

Financial burden of the solidarity contribution

1. Neither FIFA Regulations nor the CAS Code contain any specific rule regarding a party's standing to be sued. As a principal, the question of the standing to be sued is a question on the merits which means that in case the standing to be sued is denied, an appeal has to be dismissed. According to CAS jurisprudence and to Swiss law, the defending party has standing to be sued if it is personally affected by the "disputed right" at stake. In this respect, a club which was not a party to the proceedings before the body that issued the decision appealed against is not affected by the appealed decision and therefore has no standing to be sued.
2. The CAS power of review an appeal on a *de novo* basis is, in essence, the foundation of the CAS appeals system. However, such *de novo* power of review cannot be construed as being wider than the power of the body that issued the decision appealed against and the general limits of Article 190.2 of the PILA (and in particular the principle of *ne ultra petita*) should be respected. Furthermore, the power of review of CAS is also determined by the relevant legal statutory basis and limited with regard to the appeal against and the review of the appealed decision, both objectively and subjectively. It means that if a motion was neither object of the proceedings before the previous authorities, nor in any way dealt with in the appealed decision, the panel does not have the power to decide on it and that motion must be rejected.
3. The provisions concerning solidarity mechanism are set out in Annexe 5 of the FIFA RSTP. Accordingly, the club responsible for the payment of the solidarity contribution to the training club(s) is the "new club" of the player regardless of an agreement concluded between the new club of the player and the club having transferred said player, since the agreement does not bind the club creditor of the solidarity contribution.

I. PARTIES

1. Al Ain FC (the “Appellant” or “Al Ain”) is a professional football club with its registered office in Al Ain, United Arab Emirates. Al Ain is a member of the UAE Football Association, which in turn is affiliated to FIFA.
2. Esporte Clube Vitória (the “First Respondent” or “Vitória”) is a professional football club with its registered office in Salvador, Brazil. Vitória is a member of the CBF – Brazilian Football Confederation, which in turn is affiliated to FIFA.
3. Clube Atlético Lanús (the “Second Respondent” or “Lanús”) is a professional football club with its registered office in Lanús, Argentina. Lanús is a member of the AFA – Argentinean Football Association, which in turn is affiliated to FIFA.

II. FACTUAL BACKGROUND

4. Below is a summary of the main relevant facts, as established on the basis of the parties’ written submissions and the evidence examined in the course of the present appeal arbitration proceedings. This background is made for the sole purpose of providing a synopsis of the matter in dispute.
5. On 7 August 2009, Al Ain concluded a transfer agreement with Lanús (the “Transfer Agreement”) for the definitive transfer of the Player J. (the “Player”). Al Ain paid € 5,250,165 to Lanús as a transfer fee.
6. The Player was born in 1980.
7. According to the Player’s passport, the Player was registered with Vitória from 23 August 2001 until 28 May 2002.

III. PROCEEDINGS BEFORE THE FIFA DRC

8. On 21 July 2011, Vitória lodged a claim against Al Ain with the Dispute Resolution Chamber of FIFA (the “FIFA DRC”) requesting the payment of its share of the solidarity mechanism in connection with the Transfer Agreement, in particular, the amount of USD 50,000 corresponding to 0.5% of the total transfer compensation in the alleged amount of USD 10,000,000, plus interest.
9. Although having been invited to do so, Al Ain did not file its answer to the claim lodged by Vitória with the FIFA DRC.
10. On 28 August 2014, the FIFA DRC rendered a decision (the “Appealed Decision”), the operative part of which reads as follows:

“1. The claim of the Claimant, Esporte Clube Vitória, is partially accepted.

2. The Respondent, Al Ain FC, has to pay to the Claimant Esporte Clube Vitória, the amount of EUR 28,403 within 30 days as from the date of notification of this decision, plus 5% interest p.a. as of 21 July until the date of effective payment”.

11. On 7 July 2015, the grounds of the Appealed Decision were communicated to the parties, determining, *inter alia*, the following:

- *The DRC took into account that according to the transfer agreement signed between the Argentinean club, Club Atlético Lanús and the Respondent, a compensation of EUR 5,250,165 was agreed upon between said clubs for the transfer of the player.*
- *Furthermore, the DRC noted that the Respondent has not replied to the claim of the Claimant, although having been invited to do so by FIFA. In this respect, the DRC deemed that, in this way, the Respondent renounced to its right of defence and accepted the allegations of the Claimant.*
- *The DRC recalled that the CBF had confirmed that the player, born on 17 July 1980, was registered with the Claimant as from 23 August 2001 until 28 May 2002.*
- *Furthermore, and considering that the player moved from Argentina to Brazil in August 2001, the Chamber confirmed that the season of the player’s 21st birthday lasted from 1 July 2001 until 31 December 2001, i.e. 6 months.*
- *On account of the above and in accordance with art. 1 of Annexe 5 of the Regulations, the DRC considered that the Claimant is, thus, entitled to receive solidarity contribution for the period as from 23 August 2001 until 28 May 2002, i.e. for 4 months of the season of the player’s 21st birthday and for 5 months of the season of the player’s 22nd birthday. In terms of the percentage of the 5% solidarity contribution, the DRC calculated that, on a pro rata basis, this corresponds to 10.62% of 5%.*
- *In view of all the above, the DRC decided to partially accept the claim of the Claimant and held that the Respondent is liable to pay the amount of EUR 28,403 to the Claimant as solidarity contribution in relation to the transfer of the player from Club Atlético Lanús to the Respondent.*
- *In addition, taking into consideration the Claimant’s claim, the Chamber decided to award the Claimant interest at the rate of 5% p.a. on the amount of EUR 28,403 as of the day on which the claim was lodged in front of FIFA, i.e. 21 July 2011, until the date of effective payment.*

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

12. On 26 July 2015, Al Ain filed its statement of appeal with the Court of Arbitration for Sport (“CAS”), pursuant to Articles R47 and R48 of the CAS Code of Sports-related Arbitration (the “CAS Code”) (Edition 2013), against Vitória and Lanús with respect to the Appealed Decision.
13. On 9 August 2015, the Appellant filed its appeal brief, pursuant to Article R51 of the CAS Code.
14. On 2 September 2015, the First Respondent filed its answer, pursuant to Article R55 of the CAS Code.

15. On 10 September 2015, after consulting the parties, the CAS Court Office informed the Parties that the Division President had decided to submit these arbitration proceedings to a Sole Arbitrator.
16. By letter dated 15 September 2015, the CAS Court Office informed the parties that the President of the Appeals Arbitration Division had appointed Mr João Nogueira da Rocha, attorney-at-law in Lisbon, Portugal, as a Sole Arbitrator.
17. On the same date, the Second Respondent filed its answer, pursuant to Article R55 of the CAS Code.
18. By letter dated 22 October 2015, the CAS Court Office informed the parties that the Sole Arbitrator, after consulting the parties, had decided to render an award on the sole basis of the parties' written submissions, pursuant to Article R57 of the CAS Code.
19. On 9 November 2015, the CAS Court Office sent to the parties the Order of Procedure, which was duly signed by the Appellant and the Second Respondent. The First Respondent, in turn, did not sign the Order of Procedure despite having been invited to do so.

V. SUMMARY OF THE PARTIES' POSITIONS

20. The Appellant submitted the following request for relief:
 - a) *Accept the present Appeal.*
 - b) *Revoke the decision of FIFA's Dispute Resolution Chamber.*
 - c) *Decide that the second Respondent is solely liable to pay to the First Respondent the Solidarity Contribution.*
 - d) *Decide that the Second Respondent solely or jointly with the First Respondent must bear all the costs of the present arbitration.*
 - e) *Decide that the Second Respondent solely or jointly with the First Respondent to pay and reimburse to the Appellant the costs of the proceedings before the FIFA an amount CHF 5,000.*
 - f) *Decide that the Respondents must compensate the legal costs of the Appellant incurred in the present proceeding in their full amount.*
21. Al Ain FC's position is summarized as follows:
 - Al Ain argues that Articles 2 and 4 of the Transfer Agreement state as follows:

"Article 2: The First Party [The Appellant] commits itself to pay to the Second Party [The Second Respondent] a lump sum and all-inclusive amount equivalent to EUROS 5.250.165 (FIVE MILLIONS TWO HUNDRED FIFTY THOUSAND ONE HUNDRED SIXTY FIVE EUROS) against the definitive / permanent transfer of the Player to the First Party, to be paid as follows:

[...]

Article 4: The amounts indicated in Article 2 hereinabove are the gross amounts that the Second Party shall receive due to this relevant transaction. Any and all amounts that might be charged regarding this transfer related to FIFA's solidarity mechanism or any other amounts, which may become due to any third party, shall be borne exclusively by the Second Party who might not claim any reimbursement from the First Party in this regard".

- Article 21 of the FIFA Regulations on the Status and Transfer of Players (the "FIFA RSTP") only provides that the percentage of 5% of any solidarity contribution is to be distributed to Players' former clubs on the basis of FIFA solidarity mechanism. Although it appears logical that acquiring clubs should in general withhold such 5% from the amount paid to former clubs, FIFA RSTP do not prevent clubs to agree otherwise (i.e. to convene that a transfer fee could be paid without any deduction).
- The Appellant underlined that art. 19 of the Swiss Code of Obligations states as follows:
"Clauses that deviate from those prescribed by law are admissible only where the law does not prescribe mandatory forms or wording or where deviation from legally prescribed term would contravene public policy, morality or rights of personal privacy" (Appellant's free translation).
- The Appellant considers that under this provision parties have the right to agree who will be responsible to distribute solidarity contributions to former clubs.
- The Appellant also argues that the Second Respondent had to know that it was its duty to pay Vitória 5% of the transfer fee as a solidarity contribution.
- The Appellant states that the FIFA DRC did not take into account the terms of the Transfer Agreement when it rendered the Appealed Decision.

22. In its answer, the First Respondent submitted the following request for relief:

- a) Dismiss all the allegations put forward by Al Ain in its appeal brief;*
- b) Uphold in totum the decision rendered by the FIFA DRC on 28.08.2014;*
- c) In case the Panel upholds the present appeal and considers that Lanús is the actual debtor of the proportion of solidarity contribution due to Vitória, maintain the procedural costs in the amount of CHF 2,000.00 (two thousand Swiss Francs) that Vitória was ordered to bear in accordance with the decision rendered by the FIFA DRC; and*
- d) Order Al Ain to bear any and all CAS administrative and procedural costs, which have already been incurred or may eventually be incurred by Vitória.*

23. The First Respondent's position is summarized as follows:

- The main and only argument raised by the Appellant is that Lanús should be considered as the sole responsible for the payment of the solidarity contribution due to Vitória, pursuant to the terms of the Transfer Agreement.
- It is undisputed that Vitória has the right to receive its proportion of the solidarity mechanism, being only at stake whether Al Ain or Lanús is the club obliged to pay.

- In support of its position, the First Respondent refers to paragraphs 1 and 2 of article 2, Annex 5 of the FIFA RSTP, which reads as follows:
“1. The new club shall pay the solidarity contribution to the training club(s) pursuant to the above provisions no later than thirty days after the player’s registration or, in case of contingent payments, 30 days after the date of such payments.
2. Is the responsibility of the new club to calculate the amount of the solidarity contribution and to distribute it in accordance with the player’s career history as provided in the player passport. The player shall, if necessary, assist the new club in discharging this obligation”.
 - Al Ain contends that the FIFA RSTP *“only provides that the proportion of 5% of any transfer fee is to be distributed”*, fact which was previously rebutted by FIFA since the FIFA RSTP expressly establish that the distribution of the solidarity mechanism shall be made by the new club.
 - Vitória’s right to receive a solidarity contribution is undisputed.
24. In its answer, the Second Respondent submitted the following request for relief:
- “a) I have to be: submitted in a timely manner due to the accompanying documentation, adequately answered by the transfer conferred and made the relevant allegations as set forth in Article R55 of your Code;*
- b) It dictates the appeal filed by the appellant as dismissed and confirm in its entirety, the decision of the Dispute Resolution Chamber of FIFA, dated August 28, 2014.*
- c) Sentence Al Ain FC to pay all costs and other accessories of the process, providing the certain conformity, it will be justice”.*
25. The Second Respondent’s position is summarized as follows:
- In the proceedings before the FIFA DRC, Vitória filed a claim against Al Ain only.
 - Despite being duly notified by the FIFA DRC, Al Ain did not exercise its right of defence.
 - Lanús argues that as it had not been a party to the proceedings before the DRC, neither should it be summoned as a Respondent to these CAS proceedings.
 - The Second Respondent also argues that it could not exercise its right of defence because it had not been named as a party to the appropriate procedural instance, this is, before the FIFA DRC.
 - Al Ain had to pay Vitória the amount due as solidarity contribution and, then, it may ask Lanús to reimburse such amount.

VI. JURISDICTION

26. The jurisdiction of the CAS, which is not disputed by the parties, derives from article 67.1 of the FIFA Statutes and Article R47 of the Code.

27. It follows that the CAS has jurisdiction to decide on the present dispute.
28. Under Article R57 of the Code, the Sole Arbitrator has the full power to review the facts and the law.

VII. ADMISSIBILITY

29. The appeal was filed within the time limit of 21 days set by Article 67.1 of the FIFA Statutes. The appeal complied with all other requirements of Article R48 of the CAS Code.
30. It follows that the appeal is admissible.

VIII. APPLICABLE LAW

31. Article R58 of the CAS Code provides the following:
“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, the application of which the Panel deems appropriate. In the later case, the Panel shall give reasons for its decision”.
32. Pursuant to Article 66 .2 of the FIFA Statutes, *“The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law”.*
33. Therefore, the Sole Arbitrator considers that the present dispute shall be resolved in accordance with FIFA Regulations and, subsidiarily, Swiss law.

IX. MERITS

34. The main issues to be resolved by the Sole Arbitrator in this matter are as follows:
 - A. Second Respondent’s standing to be sued;
 - B. The Appellant’s responsibility to pay a solidarity contribution to the First Respondent.

A. Second respondent’s standing to be sued

35. The Appellant named Lanús as a Second Respondent to these CAS proceedings.
36. The Sole Arbitrator notes, however, that Lanús was not a party to the FIFA DRC proceedings and, therefore, it is not affected by the Appealed Decision.

37. The Sole Arbitrator notes that neither FIFA Regulations nor the CAS Code contain any specific rule regarding a party's standing to be sued. As a principal, the question of the standing to be sued is a question on the merits which means that in case the standing to be sued is denied, an appeal has to be dismissed (see CAS 2008/A/1639; CAS 2007/A/1329 & 1330). According to the CAS jurisprudence and to Swiss law, the defending party has standing to be sued if it is personally affected by the 'disputed right' at stake (see CAS 2009/A/1919).
38. In this regard, the Sole Arbitrator notes that his power of review an appeal on a *de novo* basis is well established principle in a long line of CAS jurisprudence. Indeed, this basis of review is, in essence, the foundation of the CAS appeals system. However, the Sole Arbitrator considers pertinent to note that such *de novo* power of review cannot be construed as being wider than the power of the body that issued the decision appealed against and the general limits of Article 190.2 of the PILA (and in particular the principle of *ne ultra petita*) should be respected (MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials).
39. Furthermore, the Sole Arbitrator notes that the power of review of CAS is also determined by the relevant legal statutory basis and limited with regard to the appeal against and the review of the appealed decision, both objectively and subjectively. It means that if a motion was neither object of the proceedings before the previous authorities, nor in any way dealt with in the appealed decision, the Panel does not have the power to decide on it and that motion must be rejected (CAS 2006/A/1206). The Panel is therefore limited to the issues arising from the Decision (see CAS 2013/A/3331 and CAS 2012/A/2874).
40. It is undisputed by the parties that Lanús was not a party to the proceedings before the FIFA DRC. Therefore and in light of the consistent jurisprudence of the CAS, the Sole Arbitrator is of the opinion that Lanús has no standing to be sued in these arbitration proceedings (*légitimation passive*).
41. In this respect, the Sole Arbitrator considers pertinent to refer to MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials (page 409) whereby it is stated that "*The respondent should be the counterparty initially involved in the lower-instance proceedings*".
42. Based on the foregoing, the Sole Arbitrator finds that the claims brought by the Appellant against Lanús in these arbitration proceedings shall be rejected.

B. The Appellant's responsibility to pay a solidarity contribution to the First Respondent

43. The provisions concerning Solidarity Mechanism are set out in Annexe 5 of the FIFA RSTP.
44. As an initial matter, the Sole Arbitrator notes that the Appellant does not object that solidarity contribution is due to Vitória. In this regard, the Sole Arbitrator also notes that the Appellant

only contends that the club responsible for the payment of the solidarity contribution to Vitória is Lanús only.

45. In this regard, the Sole Arbitrator considers pertinent to refer to Article 1 of Annexe V of the FIFA RSTP, which relevant part reads as follows:

*If a professional moves during the course of a contract, 5% of any compensation, not including training compensation paid to his former club, shall be deducted from the total amount of compensation and distributed by the **new club** as a solidarity contribution to the clubs involved in his training and education over the years [...].*

46. Furthermore, the Sole Arbitrator notes that the relevant part of Article 2 of Annexe V of the FIFA RSTP reads as follows:

The new club shall pay the solidarity contribution to the training club(s) pursuant to the above provisions [...].

47. In accordance with these provisions, the club responsible for the payment of solidarity contributions is the “new club”, which in this case, it is undisputed that it was the Appellant.
48. The Sole Arbitrator considers that regardless of the Transfer Agreement concluded between Lanús and Al Ain, the club responsible to for the payment of the solidarity contribution *vis-à-vis* Vitória is the Appellant, pursuant to Annexe 5 of the FIFA RSTP. It is obvious that the Transfer Agreement does not bind Vitória since it was not a party to such agreement.
49. In case the Appellant considers that the sole responsible for the payment of a solidarity contribution *vis-à-vis* Vitória was Lanús, the Appellant should have filed a claim against Lanús with the FIFA DRC. In other words, the Appellant should have involved Lanús as a party to the relevant proceedings before FIFA.
50. In light of the above, the Sole Arbitrator concludes the appeal filed by Al Ain is dismissed and the Appealed Decision is confirmed.

ON THESE GROUNDS

The Court of Arbitration for Sport hereby rules:

1. The appeal filed on 26 July 2015 by Al Ain FC against the decision issued on 28 August 2014 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association is dismissed.
2. The decision issued on 28 August 2014 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association is confirmed.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.