



Arbitration CAS 2012/A/2981 Clube Desportivo Nacional v. FK Sutjeska, award of 27 March 2013

Panel: Prof. Luigi Fumagalli (Italy), President; Mr João Nogueira Da Rocha (Portugal); Mr Patrick Lafranchi (Switzerland)

Football

FIFA disciplinary proceedings

Purpose of proceedings before the Disciplinary Committee

Standing to be sued of a club in disciplinary proceedings

Inadmissibility of a posterior inclusion of FIFA in the arbitration

1. The proceedings before the FIFA Disciplinary Committee (DC) intended to protect primarily an essential interest of FIFA, *i.e.* the full compliance by the affiliates of the decisions rendered by its bodies. In other words, the core of a DC decision and of the appeal brought against it, regards only the existence of a disciplinary infringement and the power of FIFA to sanction it.
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. Therefore, a club cannot be considered as the “passive subject” of a claim brought before the CAS by way of appeal against a DC decision, as its rights are not concerned by the DC decision and it has no power whatsoever to sanction a failure to comply with FIFA and CAS decisions. It is hence clear that a club cannot, as such, be identified as a respondent.
3. The inclusion of FIFA in the arbitration after the deadline for filing an appeal has elapsed is not admissible as (i) the Code of Sports-related Arbitration provides that the name of the respondent has to be contained in the statement of appeal (Article R48 of the Code) and does not allow a “correction/substitution” of respondent; (ii) the joinder of a third party by the appellant is not contemplated by the Code, which grants such possibility only to the respondent; and (iii) the possibility for a party to be authorized in exceptional circumstances to amend its requests or argument after the submission of the appeal brief and the answer (in accordance with Article R56 of the Code) does not extend to the substitution of a respondent, *i.e.* to a modification of the parties to the arbitration.

I. PARTIES

1. Clube Desportivo Nacional (hereinafter referred to as “Nacional” or the “Appellant”) is a Portuguese football club with seat in Funchal, Portugal, affiliated to the Portuguese Football Federation, which is a member of the Fédération Internationale de Football Association (hereinafter referred to as “FIFA”).
2. FK Sutjeska (hereinafter referred to as the “Sutjeska” or the “Respondent”) is a Montenegrin football club, with seat in Niksic, Montenegro, affiliated to the Football Federation of Montenegro, which is also a member of the FIFA.
3. As a result, Nacional and Sutjeska are subject to and bound by the applicable rules and regulations of the FIFA. FIFA is the world governing body of football. It exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials and players, worldwide. FIFA is an association under Swiss law and has its headquarters in Zurich, Switzerland.

II. FACTUAL BACKGROUND

4. On 5 October 2012 the FIFA Disciplinary Committee (hereinafter referred to as the “DC”) issued a decision (hereinafter referred to as the “DC Decision”) holding that:
 - “1. The club CD Nacional is pronounced guilty of failing to comply with a decision of a FIFA body in accordance with art. 64 FDC.
 2. The club CD Nacional is ordered to pay a fine to the amount of CHF 20,000. The fine is to be paid within 30 days of notification of the decision. Payment can be made either in Swiss francs (CHF) to account [...] or in US dollars (USD) to account [...].
 3. The club CD Nacional is granted a final period of grace of 30 days as from notification of the decision in which to settle its debt to the creditor.
 4. If payment is not made by this deadline, the creditor may demand in writing from FIFA that Committee that six (6) points be deducted from the debtor’s first team in the domestic league championship. Once the creditor has made this request, the points will be deducted automatically without a further formal decision having to be taken by the FIFA Disciplinary Committee. 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 CD Nacional still fails to pay the amount due even after deduction of the points in accordance with point 4, the FIFA Disciplinary Committee will decide on a possible relegation of the debtor’s first team to the next lower division.
 6. As a member of FIFA, the Federação Portuguesa de Futebol is reminded of its duty to implement this decision and, if so requested, provide FIFA with proof that the points have been deducted. If the Federação Portuguesa de Futebol does not comply with this decision despite being ordered to do so, the FIFA Disciplinary Committee will decide on appropriate sanctions on the member. This can lead to expulsion from all FIFA competitions.

7. *The costs of these proceedings amounting to CHF 2,000 shall be borne by the Club Nacional.*
 8. *The creditor is directed to notify the secretariat to the FIFA Disciplinary Committee of every payment received”.*
5. The DC Decision was rendered on the basis of Article 64 of the FIFA Disciplinary Code (hereinafter referred to as the “FDC”), providing for sanctions on “*anyone who fails to pay another person (such as a player, a coach or a club) or FIFA a sum of money in full or part, even though instructed to do so by a body, a committee or an instance of FIFA*”. The DC, in fact, noted that Nacional had failed to comply with a decision issued by the Dispute Resolution Chamber of the FIFA Players’ Status Committee (hereinafter referred to as the “DRC”) on 10 August 2011 (hereinafter referred to as the “DRC Decision”), whereby Nacional was ordered to pay to Sutjeska an amount of money (EUR 335,000). The DRC Decision had become final as the appeal to the Court of Arbitration for Sport (hereinafter referred to as the “CAS”) was declared inadmissible on 30 March 2012.
6. More specifically, the DC held that:
- “7. *As the debtor ignored the decision passed by the Dispute Resolution Chamber on 10 August 2011 and is, therefore, withholding money from the other party, it is considered guilty under the terms of art. 64 of the FDC.*
 8. *The fine to be imposed under the above referenced art. 64 par. 1 a) of the FDC in combination with art. 15 par. 2 of the FDC shall range between CHF 300 and CHF 1,000,000. The fine has to be increased because the amount of money due is substantial. Non-payment of such an amount can cause the creditor financial difficulty. The debtor withheld the amount unlawfully from the creditor. Even FIFA’s attempts to urge the debtor to fulfil its financial obligations failed to induce it to pay. In view of the circumstances and, in particular, by also by taking into account the outstanding amount due, the Committee decides to impose a fine amounting to CHF 20,000. This amount is in line with the Committee’s well-established practice.*
 9. *In application of art. 64 par. 1 b) of the FDC, the Committee considers a final deadline of 30 days as appropriate for the amount to be paid to the creditor.*
 10. *In accordance with art. 64 par. 1 c) of the FDC, the debtor will be warned and notified that, in the case of default within the period stipulated, points will be deducted or demotion to a lower division be ordered. A points deduction will occur if the creditor informs the secretariat to the FIFA Disciplinary Committee of the non-payment within the stipulated deadline and demands in writing that points be deducted from the debtor’s first team in the national league. Once the creditor has filed this request, the points will be deducted automatically without a further formal decision having to be taken by the Committee. The order to implement the points deduction will be issued on the association concerned by the secretariat to the FIFA Disciplinary Committee.*
 11. *With regard to the amount of points to be deducted, art. 64 par. 3 of the FDC is applicable, whereby the number of points deducted must be proportionate to the amount owed. In the light of the foregoing criteria, regarding the amount of the fine to be imposed and in keeping with the Committee’s well-established practice, a deduction of six (6) points is considered appropriate”.*
7. The DC Decision was notified to Nacional on 23 October 2012.

III. THE ARBITRAL PROCEEDINGS

A The Appeal

8. On 12 November 2012, Nacional filed a statement of appeal with the CAS, pursuant to the Code of Sports-related Arbitration (hereinafter referred to as the “Code”), to challenge the DC Decision. The statement of appeal filed by Nacional contained the appointment of Mr João Nogueira Da Rocha as arbitrator and included an application for the stay of the DC Decision.
9. On 16 November 2012, the CAS Court Office transmitted to the Respondent the statement of appeal filed by Nacional.
10. On the same date, the statement of appeal filed by Nacional was also forwarded to the FIFA. In the relevant letter the CAS Court Office noted that *“the appeal is not directed at FIFA, despite of the fact that the appealed decision was rendered by the FIFA DC. However, [...] if FIFA intends to participate as a party in the present arbitration, it shall file with the CAS an application to that effect [...]”*.
11. On 23 November 2012, the Appellant informed the CAS that the statement of appeal was to be considered as its appeal brief in accordance with Article R51 of the Code.
12. On 26 November 2012, Sutjeska filed its answer to the Appellant’s application for provisional measures, seeking its dismissal.
13. In a letter of 27 November 2012, the FIFA informed the CAS Court Office that it had decided to *“renounce our right to intervene in the present arbitration proceeding”*. In addition, the FIFA noted 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. As a consequence, should such appeal not be directed against FIFA, it results that the appeal shall be declared inadmissible and CAS cannot review the decision of the first instance. For the sake of completeness, we wish to also highlight that FIFA is not automatically party to any CAS procedure and cannot be forced to be a party if not called by the appellant”.
14. In a letter of 29 November 2012, Sutjeska appointed Mr Patrick Lafranchi as arbitrator.
15. On 19 December 2012, the Deputy President of the CAS Appeals Arbitration Division issued an order on the Appellant’s request for provisional and conservatory measures (hereinafter referred to as the “Order on Provisional Measures”). It stated as follows:
“1. The application for provisional and conservatory measures requested by CD Nacional on 13 November 2012 in its statement of appeal, in the matter CAS 2012/A/2981 CD Nacional v. FK Sutjeska is rejected.

2. *The costs of the present order shall be determined in the final award or in any other final disposition of this arbitration”.*
16. On 19 December 2012, Sutjeska filed its answer to the statement of appeal lodged by Nacional, seeking *inter alia* its dismissal because of lack of standing to be sued of the Respondent.
17. By communication dated 8 January 2013, the CAS Court Office informed the parties, on behalf of the President of the CAS Appeals Arbitration Division, that the Panel had been constituted as follows: Prof. Luigi Fumagalli, President of the Panel; Mr João Nogueira Da Rocha and Mr Patrick Lafranchi, arbitrators.
18. In a letter of 11 January 2013, the CAS Court Office, writing on behalf of the President of the Panel, invited the Appellant to submit *“its comments limited exclusively to the Respondent’s arguments concerning its standing to be sued”*, as mentioned also in the Order on Provisional Measures. At the same time, the CAS Court Office forwarded to the parties copy of three awards rendered by the CAS which had been mentioned in the Order on Provisional Measures.
19. In a letter of 21 January 2013, the Appellant noted that *“despite not identifying FIFA as a party in the present proceedings, it is obvious from its Request for Relief in the Statement of Appeal, that – alongside Sutjeska – only FIFA can be a party in these proceedings”*. Hence the Appellant requested the following:
 - i. *“that FIFA should take part in the present arbitration proceedings, and it could not renounce its right to participate”*, and
 - ii. *“that based on Article R58 of the CAS Code, and due to exceptional circumstances, the President of the Panel should authorize the Appellant to correct its identification of the Respondent, replacing Sutjeska for FIFA”*.
20. On 30 January 2013, the CAS Court office informed the parties that:
“the Panel has considered the Appellant’s application, but must note that the Appellant clearly indicated only and exclusively FK Sutjeska as a Respondent in the statement of appeal and in the appeal brief. Consequently, since the CAS Code provides no legal basis for the Appellant’s request to order FIFA to participate in these proceedings as a party, or to amend the name of the respondent at this stage of the proceedings, the arbitration shall continue exclusively with CD Nacional as the Appellant and FK Sutjeska as the Respondent”.
21. In the same letter, the parties were requested to indicate whether they wished a hearing to be held in this arbitration.
22. On 6 February 2013, the Respondent informed the Panel that a hearing was not necessary and requested the Panel to issue an award based on the parties’ written submissions. As for the Appellant, it remained silent and only manifested on 27 December 2012 its wish that a hearing be held in the present case.
23. With notification issued on 19 February 2013, the CAS Court Office informed the parties

that, after consulting them, the Panel had considered itself sufficiently well informed and had decided pursuant to Article R57, second paragraph of the Code to issue an award on the basis of the parties' written submissions only.

24. On 27 February 2013, the CAS Court Office, on behalf of the President of the Panel, issued an order of procedure (hereinafter referred to as the "Order of Procedure"), which was accepted and countersigned by the parties.
25. On 12 March 2013, the Respondent filed with the CAS a submission, detailing the costs incurred in connection with this arbitration, whose reimbursement it seeks (as per the relief specified at § 32 below).
26. In a letter of 13 March 2013, the CAS Court Office, writing on behalf of the Panel, invited the Appellant to submit its statement on costs. Such letter remained without an answer.
27. On 22 March 2013, the Appellant was invited to provide its comments on the Respondents submission on costs. At the same time, the parties were informed that upon receipt of the Appellant's comments or, in any case, upon the expiry of the deadline for their submission, the Panel would issue its award.
28. By letter dated 26 March 2013, the Appellant wrote to the CAS Court Office requesting that the Respondent be ordered to pay the entire amount of the arbitration costs, as well as to pay a reasonable contribution towards the legal fees and other expenses incurred by the Appellant in relation to the present proceedings.

B. The Position of the Parties

29. The following outline of the parties' positions is illustrative only and does not necessarily comprise every contention put forward by the parties. The Panel, indeed, has carefully considered all the submissions made by the parties, even if there is no specific reference to those submissions in the following summary.

a. The Position of the Appellant

30. The Appellant's prayers for relief are the following:
 - "a) *to reform the appealed decision, recognizing the amicable settlement of the matter at hand, according to which the Appellant will pay the outstanding amount in four instalments, having already paid the first one. By deciding in such fashion the Dispute Resolution Chamber, failed to uphold one FIFA's missions and goals, which is to help clubs reach amicable solutions to their disputes;*
 - b) *alternatively, to reform the appealed decision, with respect to the heavy fine in which the Appellant was convicted by FIFA's Dispute Resolution Chamber. Said fine is manifestly excessive and disproportionate, as it takes no account of the amount in debt and completely ignores the difficult*

economic situation smaller clubs are facing, in the case of the Appellant partly due to the great number of cases to be decided by the DRC in which Nacional is creditor to other clubs”.

31. The grounds for appeal indicated by the Appellant therefore refer to:
- i. the fact that Nacional and Sutjeska have reached an amicable settlement of the underlying dispute: according to its terms, the amount owed by Nacional would be paid in four instalments, one of which already settled;
 - ii. the measure of the sanction imposed, held to be manifestly excessive and disproportionate, as it does not take into account the difficult situation small clubs face and the credits claimed by Nacional towards other clubs.

b. The Position of the Respondent

32. In its answer, Sutjeska submitted the following requests:
- “1. *The Appeal of the Appellant is not admissible.*
In the alternative, the Appeal of the Appellant is to be dismissed.
 2. *The Appellant shall pay for the costs of the present arbitration proceedings and for the legal fees and further costs (such as interpreter etc.) of the Respondent”.*
33. In support of its request, the Respondent submits first that the appeal is not admissible. In the Respondent’s opinion, in fact, the Appellant failed to specify the facts and legal argument supporting it, contrary to the provisions set by the Code.
34. The Respondent, then, contends that the appeal has to be dismissed as it was addressed to the “*wrong party*”: Sutjeska, more specifically, lacks standing to be sued. In that respect, in fact, the Appellant notes that the DC Decision was rendered by the FIFA in a disciplinary matter. Therefore, the Appellant could seek relief only against the FIFA. However, it did not name FIFA as a respondent.
35. In any case, the Respondent submits that the appeal is to be dismissed as it challenges the DRC Decision, which is final and binding. The appeal against the Decision cannot imply a review of the decision which confirmed that the Appellant was in debt to Sutjeska.
36. Finally, the Respondent, after noting that the Appellant is not challenging the deduction of six points applied by the Decision, submits that the fine imposed on Nacional is appropriate and cannot be reduced.

IV. LEGAL ANALYSIS

A. Jurisdiction

37. According to Art. 176 para. 1 of Switzerland's Federal Code on Private International Law (hereinafter referred to as the "CPIL"), Chapter 12 of the CPIL shall apply to an arbitration if the seat of the arbitral tribunal is in Switzerland and if at least one of the parties at the time the arbitration agreement was concluded was neither domiciled nor habitually resident in Switzerland.
38. Pursuant to Article R28 of the Code, the seat of the CAS is in Lausanne, Switzerland. In addition no party is domiciled in Switzerland. Thus, in the present case Chapter 12 of the CPIL is applicable.
39. According to Article 186 para. 1 CPIL, the arbitral tribunal shall rule over its own jurisdiction. This norm is mandatory and it is also found in Article R39 of the Code.
40. An arbitration tribunal only has to examine its jurisdiction if it is declined by the Respondent. Without such pleading, the tribunal assumes its jurisdiction (KELLERHALS/BERGER, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz*, 2006, N. 627 f.).
41. In the present case the jurisdiction of the CAS is not disputed by the Respondent.
42. The Panel therefore does not examine if the Respondent is bound by the presently relevant arbitration clause as a formal precondition ("*Eintretensvoraussetzung*", cf. BGE 4P.137/2002, c. 3.2). It rather accepts its jurisdiction.

B. Standing to be sued

43. Under Swiss law, applicable pursuant to Article R58 of the Code, the defending party has standing to be sued (*légitimation passive*) only if it is personally obliged by the "disputed right" at stake (ZÜRCHER A. in: *Kommentar zur Schweizerischen Zivilprozessordnung (ZPO)* (Teil 1), 2010, N. 67 zu Art. 59 ZPO; GRAF D. in: *GesKR* 2012 p. 380; BGE [Digest of the decisions of the Swiss Federal Tribunal] 107 II 82 E. 2a).
44. The Panel notes that the Articles 67 para. 1 of the Statutes of the FIFA in connection with the Article 64 para. 5 FDC allow a challenge of a decision rendered by the DC at the CAS.
45. The Panel remarks that the Appellant, while requesting the CAS to exercise its jurisdiction on the DC Decision, named Sutjeska and not the FIFA as a Respondent. This emanates unequivocal from the Statement of Appeal dated 12 November 2012 and the letter of 23 November 2012.
46. Even though Sutjeska *de facto* is interested in the outcome of this appeal, it was not party to

the FIFA proceedings leading to the DC Decision presently challenged. In fact, the FIFA proceedings:

- i. were not directed against Sutjeska,
- ii. did not deal with Sutjeska's behaviour, and
- iii. were solely meant to sanction Nacional for not complying with the DRC Decisions finally settling the dispute between Nacional and Sutjeska.

47. Sutjeska's rights, in other words, were not the object of the dispute before the DC: Sutjeska was not a party to the FIFA proceedings leading to the DC Decision and is not concerned by it.
48. The proceedings before the DC, indeed, intended to protect primarily an essential interest of FIFA, i.e. the full compliance by the affiliates of the decisions rendered by its bodies. In other words, the core of the DC Decision and of the appeal brought in these proceedings against it, regards only the existence of a disciplinary infringement by Nacional and the power of FIFA to sanction it.
49. Therefore, Sutjeska cannot be considered as the "passive subject" of the claim brought before this Panel by way of appeal against the DC Decision, as Sutjeska's rights are not concerned by the DC Decision and Sutjeska has no power whatsoever to sanction Nacional's failure to comply with the DRC and CAS decisions. It is hence clear that Sutjeska does not have any standing to be sued (*légitimation passive*) and cannot, as such, be identified as a respondent in the present arbitration. The appeal filed against it is therefore not admissible. Such conclusion is consistent with a long standing jurisprudence of CAS (CAS 2006/A/1189; CAS 2006/A/1206; CAS 2007/A/1367).
50. In order to avoid a declaration of inadmissibility of its appeal, the Appellant sought, in a letter of 21 January 2013 (§ 19 above), to have the FIFA included in this arbitration. As communicated to the parties on 30 January 2013 (§ 20 above), however, the Panel finds that the inclusion of FIFA in this arbitration is not admissible due to the following reasons:
- i. the Code provides that the name of the respondent has to be contained in the statement of appeal (Article R48) and does not allow a "correction/substitution" of respondent; in particular after the deadline for the filing of an appeal has elapsed (see CAS 2007/A/1367, § 50);
 - ii. the joinder of a third party by the Appellant is not contemplated by the Code, which grants such possibility only to the respondent (Article R41.2, applicable in appeals proceedings pursuant to Article R54, last paragraph);
 - iii. the possibility for a party to be authorized in exceptional circumstances to amend its requests or argument after the submission of the appeal brief and the answer (in accordance with Article R56 of the Code) does not extend to the substitution of a respondent, i.e. to a modification of the parties to the arbitration.

C. Conclusion

51. In light of the foregoing, the Panel concludes that the appeal brought against Sutjeska with respect to the DC Decision is not admissible. Therefore, it has to be dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Clube Desportivo Nacional against the decision issued on 5 October 2012 by the FIFA Disciplinary Committee is dismissed.
- (...)
4. All other prayers for relief are dismissed.