



Arbitration CAS 2012/A/2948 Claudio Daniel Borghi Bidos v. Fédération Internationale de Football Association (FIFA), order of 12 October 2012

Football

Request for provisional measures

Manifest lack of CAS Jurisdiction

According to article 67 para. 3 lit (b) of the FIFA Statutes the CAS does not deal with appeals arising from suspensions of up to four matches. In case of an appeal against a decision that sanctions a player or a coach for a total of four matches, CAS has manifestly no jurisdiction to decide the dispute.

1. THE PARTIES

- 1.1 Mr Claudio Daniel Borghi Bidos (the “Appellant”) is an Argentine national and the professional coach of the Chilean National Football team.
- 1.2 The Fédération Internationale de Football Association (“FIFA” or “Respondent”) is an association under Swiss law and has its registered office in Zurich, Switzerland. FIFA is the governing body of international football. It exercises regulatory, supervisory and disciplinary functions over continental confederations, national associations, clubs, officials and players worldwide.

2. FACTUAL BACKGROUND

- 2.1 The Appellant was allegedly involved in an incident during the match played between the national teams of Chile and Venezuela on 9 June 2012 (the “Match”). In said game, the Appellant was expelled by the match official at the 85th minute.
- 2.2 On 28 June 2012, the FIFA Disciplinary Committee issued a decision, which imposed on the Appellant a fine of CHF 7’000 and a suspension of five FIFA competition matches.
- 2.3 On 8 October 2012, following the Appellant’s appeal, the FIFA Appeal Committee rendered a decision (the “Decision”) by which the Appellant’s appeal was partially admitted. Therefore, the Appellant’s sanction was reduced from five to four matches, having the automatic suspension already been served in the match Chile vs. Colombia of 11 September 2012. Consequently, the remaining suspension should be served in the following matches of the Chilean National Team on the qualifiers to FIFA’s World Cup Brazil 2014 (the “Competition”):

Ecuador vs. Chile of 12 October 2012, Chile vs. Argentina of 16 October 2012 and Peru vs. Chile of 22 March 2013. Furthermore, the fine imposed to the Appellant was upheld.

3. PROCEEDINGS BEFORE THE CAS AND PARTIES' SUBMISSIONS

- 3.1 On 10 October 2012, the Appellant filed a statement of appeal with the CAS pursuant to Article R47 of the Code of Sports-related Arbitration (the "Code"), against the Respondent with respect to the Decision. Together with his statement of appeal, the Appellant filed an application for a stay of the Decision.
- 3.2 The Appellant justifies his request for a stay on the following grounds:
 - 3.2.1 Irreparable harm: the Appellant alleges that the Decision (i) endangers his position as trainer of the Chilean Football Federation, since he will be deprived from coaching his team during four matches; (ii) affects his right to work, if at the end of the arbitral proceeding the CAS award revokes the Decision; and (iii) deprives his right of work in 25% of the matches to be played during the Competition.
 - 3.2.2 Likelihood of success: The Appellant alleges that without knowing the grounds of the Decision it is difficult to argue *prima facie* the reasons that could apparently lead to the success of the appeal. However, the Appellant addresses that with the video footage to be provided in this arbitration by him, the Panel would be satisfied to confirm that the Appellant did not commit any infraction.
 - 3.2.3 Balance of interests: The Appellant submits that his interest in obtaining the stay of the Decision outweighs the interest of the Respondent in being deprived of the immediate execution of the Decision, since the Appellant could still serve the sanction at a later stage in view of the remaining eight Chile's National Team qualifying matches to be played during the Competition.
- 3.3 On 11 October 2012, when initiating the case, the CAS Court Office granted a deadline until 11 October 2012 to the Respondent to comment on the Appellant's application for a stay of the Decision.
- 3.4 On the same day, pursuant to Article R37 of the Code, the Respondent filed its response to the Appellant's application for provisional measures.
- 3.5 The Respondent concludes that the Appellant's application shall be rejected. FIFA alleges that the CAS is not competent to hear the present appeal, pursuant to Article 67 par. 3 lit b. of the FIFA Statutes, 2012 Edition (the "FIFA Statutes"), according to which CAS does not deal with appeals arising from suspensions of up to four matches. Therefore, the Respondent considers that the application does not pass the likelihood of success test, because CAS is not competent to enter into the merits of the case. Consequently, since the condition of likelihood of success is not fulfilled, the analysis of the second and third conditions is superfluous and, therefore, the probability of the Appellant to win the case on the merits is equal to zero. Finally, the

Respondent addresses that the Appellant can only appeal against motivated decisions, pursuant to Article 116 par. 2 of the FIFA Disciplinary Code.

4. JURISDICTION OF THE CAS

- 4.1 In accordance with the Swiss Private International Law (Article 186), the CAS has power to decide upon its own jurisdiction.
- 4.2 The extent of the jurisdictional analysis at this point is to assess whether on a *prima facie* basis the CAS can be satisfied that it has jurisdiction to hear the appeal.
- 4.3 Article R47 of the CAS Code states that, “*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*”.
- 4.4 In the absence of a specific arbitration agreement, in order for the CAS to have jurisdiction to hear an appeal, the statutes or regulations of the sports-related body from whose decision the appeal is being made must expressly recognise the CAS as an arbitral body of appeal.
- 4.5 Article 67 para. 1 of the FIFA Statutes provides that “*Appeals against final decisions passed by FIFA’s legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question*”.
- 4.6 Article 67 para. 3 lit (b) of the FIFA Statutes provides that “*The CAS however, does not deal with appeals arising from suspensions of up to four matches or up to three months (with the exception of doping decisions)*”.
- 4.7 Based on the foregoing and because the Decision sanctioned the Appellant for a total of four matches, the President of the CAS Appeal Arbitration Division acknowledges that CAS has manifestly no jurisdiction to decide the present dispute.

5. ADMISSIBILITY

- 5.1 In view of the lack of jurisdiction for CAS in this matter, the arguments raised by FIFA with respect to the admissibility of the appeal do not need to be examined.

6. LEGAL DISCUSSION

- 6.1 The President of the CAS Appeals Arbitration Division has the ability to consider an application for provisional measures, pursuant to Article R37 of the Code, in the event the Panel is not yet

constituted. In accordance with the same provision, he may terminate the arbitration procedure if he rules that the CAS has manifestly no jurisdiction.

- 6.2 In view of the above, the President of the CAS Appeals Arbitration Division considers that the CAS has manifestly no jurisdiction to adjudicate the present dispute between Mr. Claudio Daniel Borghi Bidos v. FIFA.
- 6.3 As a consequence, the application for stay of the Decision shall be dismissed.
- 6.4 Pursuant to Art. R37 of the Code, the President of the CAS Appeals Arbitration Division hereby terminates the present procedure.

ORDER

The Deputy President of the CAS Appeals Arbitration Division, ruling *in camera*, decides that:

1. The Court of Arbitration for Sport has manifestly no jurisdiction to decide the dispute between Mr. Claudio Daniel Borghi Bidos and FIFA.
2. The application for provisional and conservatory measures filed by Mr Claudio Daniel Borghi Bidos on 8 October 2012, in the matter *CAS 2012/A/2948 Claudio Daniel Borghi Bidos v. FIFA* is dismissed.
3. The arbitration procedure *CAS 2012/A/2948 Claudio Daniel Borghi Bidos v. FIFA* is terminated and deleted from the CAS roll.
4. This Order is rendered without costs, except for the Court Office fee of CHF 1'000 paid by Mr Claudio Daniel Borghi Bidos, which is retained by the CAS.