



**Arbitration CAS 2008/A/1503 Clube de Regatas do Flamengo, Sao Paulo FC, Fluminense FC, Santos FC & Cruzeiro Esporte Clube v. CONMEBOL, award on jurisdiction of 7 April 2008**

Panel: Mr. José Juan Pintó (Spain), President; Mr. Hendrik W. Kesler (The Netherlands); Mr. Francisco González de Cossío (Mexico)

*Football*

*Application of FIFA regulations to the “Copa Libertadores”*

*CAS Jurisdiction*

*Party to the arbitration*

- 1. For CAS having jurisdiction it is required that the parties have agreed on CAS acting as an arbitration Court or that the statutes or regulations of the body issuing the decision foresee the possibility of an appeal before CAS. Even if the FIFA Statutes compel the Confederations to provide for a right of appeal from their decisions, no right of appeal to the CAS exist until the Confederation concerned has made provision for this right in its own Statutes or regulations.**
- 2. For the purpose of ruling on its own jurisdiction, the CAS can only take into account the regulations of the federation against which the appeal is directed. Had another federation foreseeing the right to appeal before CAS been called as a party to the arbitration and a decision of this other federation been challenged, the CAS would have been able to take the regulations of this other federation into consideration to rule on its jurisdiction.**

Clube De Regatas Do Flamengo, Sao Paulo FC, Fluminense FC, Santos FC, and Cruzeiro Esporte Clube (the “Clubs” or the “Claimants” or the “Appellants”) are Brazilian football clubs affiliated to the Confederação Brasileira de Futebol (CBF).

Confederación Sudamericana de Fútbol (CONMEBOL) is a Private Law Civil Association made up of the National Football Associations of South America.

On 16<sup>th</sup> January 2008 Clube De Regatas Do Flamengo (“Flamengo”) asked to CBF to contact CONMEBOL so that this institution applied to the tournament “Copa Libertadores” 2008 the measures related to matches to be played at extreme altitude dealt with in FIFA Executive Committee of 15 December 2007. Apparently CONMEBOL had not considered such measures in the rules of the tournament and some matches were to be played in places which altitude exceeds 2.750 metres above sea.

On 18<sup>th</sup> January 2008 the Clubs, through the CBF, made the same claim to CONMEBOL.

These claims were unattended by CONMEBOL.

On 17<sup>th</sup> January 2008 Flamengo filed another claim before FIFA asking for the issuance of a provisional injunction to prevent any “Copa Libertadores” 2008 match from taking place at an altitude in excess of 2.750 metres above sea.

On 21<sup>st</sup> January FIFA answered to Flamengo stating that FIFA was not competent to deal with the referred matter as “Copa Libertadores” is a competition organised by CONMEBOL.

On 24<sup>th</sup> January 2008 Flamengo wrote again to FIFA opposing to its intended lack of jurisdiction and reiterating again its former petition.

On 28<sup>th</sup> January 2008 FIFA answered the above mentioned letter of 24<sup>th</sup> January in the same sense expressed in its letter dated 21<sup>st</sup> January, and adding that *“for the sake of completeness, may we remind you that the recommendation tabled by leading international medical specialists on high altitude at a seminar in Zurich at the end of October 2007 was indeed a recommendation, the application of which the world football governing body took into consideration in the scope of the matches and tournaments organised by FIFA”*.

On 12<sup>th</sup> February 2008 Flamengo claimed again before FIFA that such institution was competent to rule on the referred affair and that immediate action had to be taken by FIFA to protect the athletes health and life by preventing “Copa Libertadores” 2008 matches from being played at an altitude exceeding 2.750 metres above sea.

On 13<sup>th</sup> February 2008 FIFA responded to Flamengo insisting in its inability to intervene in the mentioned issued.

In view of the mentioned circumstances (CONMEBOL not even formally answering to their claim and FIFA declining to intervene in the matter), the Clubs commenced proceedings before the CAS on 20<sup>th</sup> February 2008 against FIFA and CONMEBOL asking for the recognition of following pleas for relief:

- a) To recognise that CONMEBOL has failed to pass a decision or to react to the letters addressed by the Appellants on January 16th and February 18th within a reasonable period of time and therefore has committed a denial of formal justice;
- b) To recognise that by doing so CONMEBOL has deprived the Appellants of the object of their request;
- c) To recognise that such behaviour is further a definitive decision since it cannot be made the object of any challenge within CONMEBOL and therefore shall be considered as a definitive and final decision;

- d) Based of Articles 20, 60 and 61 of the FIFA Statutes and Article R47 of the Code, to recognise that such “final decision” from CONMEBOL is subject to an appeal to the CAS;
- e) That CAS shall affirm its jurisdiction on the appeal filed by the Appellants and enters into the merits of the present appeal proceeding in order to prevent any future match of Copa Santander Libertadores 2008 from taking place at an altitude in excess of 2,750m above sea level;
- f) If CAS decides not to enforce its jurisdiction over the merits, the Appellants respectfully request the Panel to refer the case back to the previous instance, i.e. CONMEBOL, for a formal decision on the subject-matter in a timely manner. Such decision shall be subject to an appeal to the CAS.

Alternatively:

- g) To recognise that FIFA letters dated as January 21st and 28th and February 13th constitute decisions depriving the Appellants of the object of its request and thus resolving in an obligatory manner the issue raised by them;
- h) To recognise that such decisions are to be considered definitive decisions since they cannot be made the object of any challenge within FIFA;
- i) To recognise that such decisions can be made the object of the present appeal to the CAS;
- j) Based on Article R57 of the Code, that CAS shall affirm its jurisdiction on the present appeal and enters into its merits, proceeding in order to determine FIFA to impose its decisions in connection with the matter at hand on its affiliate Confederation CONMEBOL, imposing a ban and preventing any future match of Copa Santander Libertadores 2008 from taking place at an altitude in excess of 2,750m above sea level;
- k) If CAS decides not to enforce its jurisdiction over the merits, the Appellants respectfully request the Panel to refer the case back to the previous instance, i.e. FIFA, for a formal decision on the subject-matter in a timely manner. Such decision shall be subject to an appeal to the CAS.
- l) That the Respondents shall bear with all arbitration and legal costs incurred by the Appellants.

In the same written submissions dated 20<sup>th</sup> February 2008 the Clubs asked for a provisional measure consisting of the CAS ordering to prevent any future match of “Copa Libertadores” 2008 from taking place at an altitude in excess of 2.750 metres above sea, until the merits of the present proceeding were fully appreciated and exhausted.

On 28<sup>th</sup> February 2008 CAS sent to FIFA and CONMEBOL the claim filed by the Clubs and, in view of the uncertainty related to the existence of an arbitration clause related to CAS in the rules and regulations of CONMEBOL, invited CONMEBOL to produce a copy of its Statutes and Bylaws and any information or observation with respect to the jurisdiction of CAS in this matter.

On 3<sup>rd</sup> March 2008 CONMEBOL declared to the CAS that there is no arbitral clause in its Statutes and therefore it was not in a position to accept the possibility of discussing a CONMEBOL decision within the frame of CAS.

On 4<sup>th</sup> March 2008 the Clubs requested to CAS to disregard the claim made towards FIFA and therefore to exclude it from the procedure, leaving CONMEBOL as sole defendant.

On 7<sup>th</sup> March 2008 CAS took note of the fact of CONMEBOL not accepting CAS jurisdiction in this matter, but as CONMEBOL had not produced its Statutes and Regulations, it was decided to start a procedure to examine whether CAS had jurisdiction or not in the present case.

On 11<sup>th</sup> March 2008 the Clubs confirmed that, in their view, CAS was competent to deal with this case.

On 13<sup>th</sup> March 2008 CAS invited CONMEBOL to appoint an arbitrator in the present case, invitation which was rejected by CONMEBOL by means of its letter of 17<sup>th</sup> March 2008 as CONMEBOL understood that CAS has no jurisdiction to deal with this issue. In consequence, the CAS proceeded to make such appointment in its lieu.

On 28<sup>th</sup> March 2008 the Statutes of CONMEBOL were received by CAS.

## LAW

1. Article 186 of the Loi fédérale sur le droit international privé (LDIP) states that the arbitral tribunal shall rule on its own jurisdiction (*“le tribunal arbitral statue sur sa propre compétence”*).
2. Article R47 of the Code of Sports-related arbitration (the “Code”) reads as follows:  
*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.*  
*An appeal may be filed with the CAS against an award rendered by the CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules applicable to the procedure of first instance.*
3. It is therefore clear that for CAS having jurisdiction it is required that whether the parties have agreed on CAS acting as arbitration Court or the statutes or regulations of the body issuing the decision foresee the possibility of appeal before CAS. CAS jurisprudence has repeatedly confirmed this position, specially with regard to the necessary recognition of CAS jurisdiction

in the regulations of the deciding body, in for instance, the award on jurisdiction rendered in the case *CAS 2005/A/952*:

*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. [...]*

*In the present case, the statutes or regulations of the relevant body -the FALP- do not contain any reference to a right of appeal to the CAS. In fact, FALP Rule R63 states that the decision of an appeal board shall be final. The CAS therefore has no jurisdiction to hear an appeal from a decision of the FAPLAC, on the basis of the statutes or regulations of the FALP.*

4. In ruling on CAS jurisdiction the Panel shall firstly state that it is evident that there is not an agreement between the parties to submit the case to the jurisdiction of CAS, as CONMEBOL has expressly challenged such jurisdiction.
5. Secondly, the Panel shall examine if the statutes or regulations of CONMEBOL (the institution which has decided not to apply the limitation on matches being played in certain altitude) provide that an appeal before the CAS can be filed.
6. It has been noticed that in the CONMEBOL Statutes produced in the present file there is no reference to the possibility of appeal of CONMEBOL's decisions before the CAS. In fact the Panel has realised that the referred Statutes are dated February 2000, that is to say, are prior to the recognition of CAS as appeal body by the FIFA Statutes and have not been adapted to this new situation despite article 62.1 of the FIFA Statutes stipulates that "*the Confederations [...] shall agree to recognise CAS as an independent judicial authority and to ensure that their members, affiliated Players and Officials comply with the decisions passed by CAS [...]*". In addition it is pointed out that it has not been produced either to the file any other document or regulation from which such a reference to an eventual appeal before the CAS is made. It impedes therefore to appreciate that CAS has jurisdiction in the case.
7. In the Panel's view, the arguments of the Claimant by virtue of which CONMEBOL is bound by the arbitration provisions of the FIFA Statutes cannot justify CAS jurisdiction in the present case, as the important aspect to be taken into consideration according to article R47 of the CAS Code is that the Statutes or Regulations of the deciding body foresee the right of appeal to CAS. In this respect, we refer to the reasons already explained in the award on jurisdiction rendered in the case *CAS 2005/A/952* which in its relevant part states the following:

*The Appellant has submitted that pursuant to FAPL Rule B12.6, the Respondent is bound by the terms of the FIFA statutes. However the FIFA Statutes do not contain any mandatory provision that obliges the Respondent to allow a right of appeal from its decision. Articles 59-61 of the FIFA Statutes, the FIFA Circular 827 and the FIFA press releases of 12 December 2002 and 19 October 2003 cannot be interpreted as providing for such a mandatory right of appeal from FAPL decisions. Moreover, the CAS jurisprudence suggests that if the FIFA Statutes did compel the Respondent to provide for a right of appeal from its decisions, no right of appeal to the CAS would exist until the Respondent had made provision for this right in its statutes*

*or regulations.*

8. In the same line the award in the case *CAS 2004/A/676* reads as follows:  
*It is only with the implementation by the individual confederations of the new FIFA statutes, that the CAS can be held to have jurisdiction. The FIFA rules that came into force on 1 January 2004 do not constitute per se a basis for arbitration.*
9. To be sure, and without detriment of the decision taken by the Panel in this award, it is to be highlighted that, for the purposes of ruling on its own jurisdiction according to article R47 of the CAS Code, the Panel has only taken into account the CONMEBOL's regulations produced to the file, as the appeal is only directed against CONMEBOL and its decision not to apply certain limitations related to matches to be played in altitude. It has not taken into account FIFA regulations in this respect as the claim was expressly disregarded against FIFA. If FIFA had been a party and FIFA decision declining to decide on the matter had been challenged, the Panel would have taken into consideration FIFA regulations to rule on its jurisdiction. And it shall be noticed that FIFA regulations do foresee the right to appeal before CAS (article 61 of the FIFA Statutes).
10. It follows that, event though the subject matter of the dispute is *important* (due to its health implications), *urgent* (given the stringent time considerations) and it would have been advisable that it be resolved in a neutral forum (like CAS), given that the conditions of article R47 of the CAS Code are not satisfied, the Court of Arbitration for Sport has no jurisdiction to take cognizance of the present case, and is therefore halted from assessing the substance of the claim.

#### **The Court of Arbitration for Sport rules:**

1. CAS has no jurisdiction to decide the present dispute between Clube de Regatas do Flamengo, Sao Paulo FC, Fluminense FC, Santos FC & Cruzeiro Esporte Clube and Confederación Sudamericana de Fútbol.
2. The arbitration procedure CAS 2008/A/1503 Clube de Regatas do Flamengo, Sao Paulo FC, Fluminense FC, Santos FC & Cruzeiro Esporte Clube vs. CONMEBOL shall be removed from the CAS roll.

(...)