



Arbitration CAS 2005/A/952 Ashley Cole v. Football Association Premier League (FAPL), award of 24 January 2006

Panel: Mr Hans Nater (Switzerland), President; Mr Stuart McInnes (England); Mr Jan Paulsson (France)

Football

CAS jurisdiction

Decision rendered by a national federation or league

No right of appeal to the CAS if the national federation or the league does not provide for such right in its statutes or regulations

- 1. As art. R47 of the Code of Sports-related Arbitration states, the statutes or regulations of the sports-related body from whose decision the appeal is being made, must expressly recognize the CAS as an arbitral body of appeal, in order for the CAS to have jurisdiction to hear an appeal.**
- 2. The FIFA Statutes do not contain any mandatory provision that obliges a national federation or a league to allow a right of appeal from its decisions. 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. Moreover, the CAS jurisprudence suggests that if the FIFA Statutes did compel the national federation or the league to provide for a right of appeal from its decisions, no right of appeal to the CAS would exist until the national federation or the league had made provision for this right in its statutes or regulations. In any event, the possible adoption of an arbitration clause that confers jurisdiction on the CAS is not solely dependent upon the will of the national federation or the league, as it is also subject to the law of the country where the body in question has its seat.**

On 27 January 2005, a meeting took place at the Royal Park Hotel in London, between, amongst others, Mr Ashley Cole (the “Appellant”), a professional footballer who plays for Arsenal FC and the English national football team, and representatives of Chelsea Football Club.

Arising from that meeting, the Disciplinary Commission (DCFAPL) of the Football Association Premier League (FAPL, the “Respondent”) rendered a decision on 1 June 2005, which adjudged the Appellant to have been in breach of FAPL Rule K5. This rule prevents a player who has entered into a written contract of employment with a club, from making an approach to another club with a view to negotiating a contract with such club, without having obtained the prior written consent of his club. The DCFAPL imposed a fine of GBP 100,000 on the Appellant.

The Appellant subsequently appealed the DCFAPL decision to the FAPL Appeals Committee (FAPLAC). The hearing before the FAPLAC took place on 10 August 2005 and the decision was notified to the Appellant on 23 August 2005. The decision of the FAPLAC was to reduce the fine imposed upon the Appellant from GBP 100,000 to GBP 75,000.

On 31 August 2005, the Appellant filed an appeal with the Court of Arbitration for Sport (CAS) against the decision of the FAPLAC.

LAW

Competence of the CAS to rule on its own jurisdiction

1. In accordance with Swiss Private International Law, the CAS has the power decide upon its own jurisdiction.
2. Article 186 of the Swiss Private International Law Act states:
 - ¹⁾*The arbitral tribunal shall rule on its own jurisdiction.*
 - ²⁾*The objection of lack of jurisdiction must be raised prior to any defence on the merits.*
 - ³⁾*In general, the arbitral tribunal shall rule on its jurisdiction by means of an interlocutory decision.*
3. According to Swiss legal scholars, this provision “*is the embodiment of the widely recognized principle in international arbitration of ‘Kompetenz-Kompetenz’. This principle is also regarded as corollary to the principle of the autonomy of the arbitration agreement*” [ABDULLA Z., The Arbitration Agreement, in: KAUFMANN-KOHLER/STUCKI (eds.), International Arbitration in Switzerland – A Handbook for Practitioners, The Hague 2004, p. 29]. “*Swiss law gives priority to the arbitral tribunal to decide on its own competence if its competence is contested before it (...). It is without doubt up to the arbitral tribunal to examine whether the submitted dispute is in its own jurisdiction or in the jurisdiction of the ordinary courts, to decide whether a person called before it is bound or not by the arbitration agreement*” [MÜLLER C., International Arbitration – A Guide to the Complete Swiss Case Law, Zurich et al. 2004, pp. 115-116]. “*It is the arbitral tribunal itself, and not the state court, which decides on its jurisdiction in the first place ... The arbitral tribunal thus has priority, the so-called own competence*” [WENGER W., n. 2 ad Article 186, in: BERTI S. V., (ed.), International Arbitration in Switzerland – An Introduction to and a Commentary on Articles 176-194 of the Swiss Private International Law Statute, Basel et al. 2000]. The provisions of Article 186 are applicable to CAS arbitration [RIGOZZI A, L'arbitrage international en matière de sport, Basel 2005, p. 524].
4. Furthermore, the parties have expressly accepted the competence of the CAS to rule on its own jurisdiction in the present case. The Appellant has repeatedly recognised, in correspondence and submissions, the competence of the CAS to decide both the preliminary

issue of jurisdiction as well as the substantive issues in question. In its letter to the President of the CAS Appeals Arbitration Division dated 8 September 2005, the Respondent recognised the jurisdiction of the CAS, “solely for the purpose of resolving the jurisdictional issue”.

5. In accordance with CAS procedure, when a request for arbitration or a statement of appeal is filed with the CAS, a preliminary examination of the file is undertaken by the CAS Court Office, in order to identify cases where there is manifestly no arbitration agreement referring to the CAS. Pursuant to articles R39 and R52 of the Code, if there is manifestly no arbitration agreement referring to the CAS, the parties are informed as such in writing by the CAS Court Office and, in the absence of an alternative agreement between the parties, the arbitration procedure is discontinued. In the present case, no such preliminary examination by the CAS Court Office was undertaken, as the parties expressly accepted the competence of the CAS to rule on its own jurisdiction, as described in paragraph 4 above.

Competence of the CAS to rule on the substantive issues on appeal

6. Article R47 of the 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*”.
7. 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. This interpretation of article R47 is supported by the CAS jurisprudence. In the case *CAS 2002/O/422*, the Appellant filed an appeal with the CAS against a decision rendered by the FIFA Special Committee, prior to 11 November 2002. The significance of this date is that FIFA had stated in the FIFA Circular 827, that the CAS would hear appeals of FIFA decisions rendered after 11 November 2002. The articles of the FIFA Statutes had not yet been amended to expressly recognise the CAS. Instead, article 63 of the FIFA Statutes recognised an arbitral body referred to as the Arbitration Tribunal for Football (TAF).
8. In reference to the article in question, the Panel held that, “*This provision does not establish the CAS as an arbitral body ... We must therefore conclude that the FIFA regulations relevant to this case contain no arbitration clause establishing the CAS’ jurisdiction. When Besiktas filed its statement of appeal on 22 October 2002, neither the FIFA Statutes nor the aforementioned FIFA Regulations contained any provision establishing the CAS’ jurisdiction to hear a dispute between FIFA and one of its members or any third party, whether through ordinary or appeal arbitration proceedings concerning a decision of the last instance issued by a FIFA organ*”.
9. In the present case, the statutes or regulations of the relevant body – the FAPL – do not contain any reference to a right of appeal to the CAS. In fact, FAPL 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 FAPL.

10. 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 decisions. 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.

11. In the case *CAS 2004/A/676*, paragraphs 2.6 and 2.7 of the award state:

“It is only with the implementation by the individual confederations of the new FIFA statutes into their individual 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. Instead, they constitute an instruction to introduce a regulation providing for CAS arbitration. This was implemented by the coming into force of the new C.A.F. regulations on 1 September 2004. It follows that the Court of Arbitration for Sport has no jurisdiction with regard to the decision of the C.A.F. Appeal Committee and that therefore, it cannot proceed with the present arbitration.”

In any event, the possible adoption of an arbitration clause that confers jurisdiction on the CAS, by a National Federation or a League, is not solely dependent upon the will of such a body, as it is also subject to the law of the country where the National Federation or League in question has its seat.

12. Although the FIFA Disciplinary Code was discussed in the Respondent’s submissions, in the present case there was no question of any attempt by FIFA, successful or otherwise, to intervene in accordance with article 76.2 of the FIFA Disciplinary Code. Any possible right of appeal arising from such an intervention is therefore irrelevant for the purposes of the present case.
13. The FIFA Statutes were amended on 12 September 2005, with amendments coming into force on 1 December 2005. The question of what version of the FIFA Statutes to apply in the present case was therefore considered by the Panel during its deliberations. According to Swiss law, in particular the principle of *perpetuatio fori*, the jurisdiction is determined as of the time when the request was made, even if the circumstances have subsequently changed [ATF 129 III 404 c. 4.3.1; HOHL F., Procédure civile, T. II, Berne 2002, para. 1772]. The Statutes applicable in the present case are therefore those which were in existence when the Appellant filed its appeal with the CAS. Any conflict which arises between the two versions of the FIFA Statutes is effectively a false conflict for the purposes of the present case, as the application of either version of the Statutes will result in the same outcome. Accordingly, no submissions were invited from the parties in this regard.

Conclusion

14. In order for the CAS to have jurisdiction to rule on an appeal, article R47 of the Code requires that a direct reference to the CAS be contained in the statutes or regulations of the body whose decision is being appealed against.
15. The FAPL Rules do not provide for a right of appeal to the CAS.
16. The FIFA Statutes contain no provision which obliges the FAPL to allow a right of appeal of its decisions to the CAS.
17. If the FAPL was subject to such a mandatory provision, no right of appeal to the CAS would exist until the FAPL amended its statutes or regulations to incorporate such a right of appeal.
18. There is no specific agreement between the parties to allow the CAS to rule on the merits of this particular dispute.
19. The CAS does not have jurisdiction to rule on the appeal filed by the Appellant in the present arbitral proceedings.

The Court of Arbitration for Sport rules:

1. The Court of Arbitration for Sport has no jurisdiction to decide the present dispute between Ashley Cole and the Football Association Premier League.
 2. The appeal filed by Ashley Cole on 31 August 2005 is inadmissible.
 3. The arbitration procedure *CAS 2005/A/952* shall be removed from the CAS roll.
- (...)