



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

Arbitration CAS 2023/A/9943 Qingdao Hainiu FC v. Uros Deric & Fédération Internationale de Football Association (FIFA), order of 6 May 2024

Panel: Mr Ken Lalo (Israel), Sole Arbitrator

Football

Request for provisional measures

Cumulative conditions for granting a request for provisional measures

Lack of substantiation of irreparable harm

1. In accordance with Article R37 of the CAS Code, when deciding whether an application for provisional measures should be ordered, the CAS panel should, in general, consider the following factors: (i) whether the requested provisional measure is necessary to protect the appellant from irreparable harm (“irreparable harm test”); (ii) whether the appellant has reasonable chances to succeed on the merits (“likelihood of success test”); and (iii) whether the interests of the appellant outweigh those of the opposite party and of third parties (“balance of interests test”). These three requirements are cumulative.
2. It is upon the appellant to demonstrate that the “irreparable harm test”, the “likelihood of success test” and the “balance of interests test” have all been met. If the appellant did not substantiate its general claim that the requested measure is necessary to protect it from irreparable harm, the first requirement is not met and, therefore, the request for provisional measures should be rejected.

I. THE PARTIES

1. Qingdao Hainiu FC (the “Appellant” or the “Club”) is a Chinese football club, affiliated to the Chinese Football Association (“CFA”).
2. Uros Deric (the “First Respondent” or the “Player”) is a Serbian professional football player, born on 28 May 1992.
3. The Fédération Internationale de Football Association (the “Second Respondent” or “FIFA”) is the international governing body of football. FIFA is an association under Articles 60 *et seq.* of the Swiss Civil Code (“SCC”) with its headquarters in Zürich, Switzerland.
4. The Player and FIFA shall be jointly referred to as the “Respondents”. The Appellant and the Respondents shall be referred to as the “Parties”.

II. FACTUAL BACKGROUND

5. Below is a summary of the main facts and allegations based on the Parties' written submissions and evidence presented, as these may be relevant for the purposes of this Order. Additional facts and allegations may be set out in the final award. Although the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings to date, he refers in this Order only to the submissions and evidence he considers necessary to explain the reasonings of the decision on the request for provisional measures.
6. On 19 February 2022, the Club and the Player allegedly signed a "Letter of Intention" (the "LOI") by means of which the Club expressed its interest in the Player's services.
7. On an unspecified date, the Player also allegedly signed a contract titled "Employment Contract for Professional Football Player (2022 version)", which largely reproduced the contents of the LOI (the "Contract").
8. On 20 and 21 March 2022, the Player allegedly signed four letters in both Chinese and English, titled: (i) "Commitment Letter of the working experience"; (ii) "Commitment letter of the highest education certificate"; (iii) "Commitment Letter of the Body Examine Result"; and (iv) "Non-Criminal Commitment letter".
9. According to the Player, despite the fact that he had already taken all the procedures to move to China, the Club decided not to honour the LOI and the Contract and not to provide the Player any employment.
10. The Club claims that it has no information about the alleged offer or Contract and that its management did not know the Player. The Club indicates that *"it has doubts about and denies the authenticity of the Offer"* of employment allegedly made to the Player.
11. On 16 March 2023, the Player allegedly sent a letter to the Club demanding the total value of the LOI (i.e., USD 280,000 net) for the Club's failure to comply with the conditions stipulated therein. The Club has not settled this claim or any part thereof.
12. On 5 April 2023, the Player filed a claim before the Dispute Resolution Chamber of the FIFA Football Tribunal (the "DRC") requesting that the Club pay him USD 280,000 net plus default interest at the rate of 5% *per annum* on the amount due.
13. The Club did not to provide its position before FIFA.
14. On 5 June 2023, FIFA notified the DRC decision FPSD-9854 passed on 1 June 2023 (the "DRC Decision"), which accepted the Player's Claim as follows:

"1. The claim of the Claimant, Uros Deric, is accepted."

2. *The Respondent, Qingdao Hainiu FC, must pay to the Claimant USD 280,000 net as compensation for breach of contract without just cause plus 5% interest p.a. as from 5 April 2023 until the date of effective payment.*
 3. *Full payment (including all applicable interest) shall be made to the bank account indicated in the enclosed Bank Account Registration Form.*
 4. *Pursuant to art. 24 of the Regulations on the Status and Transfer of Players, if full payment (including all applicable interest) is not made within 45 days of notification of this decision, the following consequences shall apply:*
 1. *The Respondent shall be banned from registering any new players, either nationally or internationally, up until the due amount is paid. The maximum duration of the ban shall be of up to three entire and consecutive registration periods.*
 2. *The present matter shall be submitted, upon request, to the FIFA Disciplinary Committee in the event that full payment (including all applicable interest) is still not made by the end of the three entire and consecutive registration periods.*
 5. *The consequences shall only be enforced at the request of the Claimant in accordance with art. 24 par. 7 and 8 and art. 25 of the Regulations on the Status and Transfer of Players.*
 6. *This decision is rendered without costs” (emphasis omitted).*
15. Neither the Player nor the Club requested the grounds of the DRC Decision and, therefore, the DRC Decision became final and binding.
 16. On 29 July 2023, the Player requested FIFA to impose the sanctions provided in the DRC Decision pursuant to Article 24 of the FIFA Regulations on the Status and Transfer of Players (the “RSTP”), since the Club failed to pay the amounts provided in the DRC Decision.
 17. On 3 August 2023, FIFA imposed on the Club a registration ban for its non-compliance with the DRC Decision, issuing decision FDD-15519 (the “Registration Ban Decision”) and imposing a ban from registering new players internationally and at national level.
 18. The Club argues that it was not able to participate in the proceedings before the DRC or submit a defence and evidence because it did not receive any correspondence from the Player and the DRC and was unaware of the proceedings, including the DRC Decision and the Registration Ban Decision.
 19. The Club argues that only on 16 August 2023 it received from the CFA a copy of the Registration Ban Decision and only on 17 August 2023 it established an account approved by FIFA and was able to access the case information.
 20. The Club claims that at this point it conducted an investigation and found out that communication in this case was address to an e-mail address of Mr Chen Suijie, a former employee of the Club, who left the Club due to illness in April 2023. The Club claims that prior

to his departure, Mr Chen Suijie was responsible for managing the FIFA Transfer Matching System for the Club and that he submitted his resignation on 20 March 2023, but failed to properly handover his work to other colleagues at the Club because “*he was ill in hospital*”.

21. The Club argues that it was not able to present its defence and position in front of the DRC due to such reasons which are “*not attributable to the Appellant*”.
22. The Club also alleges that the Player entered into an employment relationship with a third party, a club in another country, valid from July and until December 2022, and was therefore not entitled to receive the amounts claimed by him before the DRC. The Club claims that the Player was to receive income from a third party under a new employment contract and should not have made a duplicate claim against the Club.
23. Therefore, the Club’s appeal of both the DRC Decision and the Registration Ban Decision before CAS, alleges, *inter alia*, that it was unaware of the proceedings held before the DRC.

III. PROCEEDINGS BEFORE THE CAS

24. On 22 August 2023, the Appellant filed with the Court of Arbitration for Sport (“CAS”) its Statement of Appeal, pursuant to Articles R47 *et seq.* of the CAS Code of Sports-related Arbitration (2023 edition) (the “CAS Code”), appealing both the DRC Decision and the Registration Ban Decision. The Appellant requested to refer the matter to a Sole Arbitrator. The Statement of Appeal was notified to the Respondents on 31 August 2023.
25. On 13 September 2023, the Appellant filed an Appeal Brief, pursuant to Article R51 of the CAS Code.
26. On 10 October 2023, the First Respondent filed his Answer, in accordance with Article R55 of the CAS Code. Such Answer was uploaded to the CAS e-Filing platform only on 30 October 2023 and may, therefore, be inadmissible for non-compliance with Article R31 of the CAS Code. This matter will be addressed in the final award and has no influence on the current Order which may also stand based solely on the pleadings of the Appellant and of the Second Respondent.
27. On 11 December 2023, the Second Respondent filed its Answer, in accordance with Article R55 of the CAS Code.
28. On 12 December 2023, the CAS Court Office informed the Parties of the constitution of the Sole Arbitrator.
29. All three Parties have provided their preference that the Sole Arbitrator issue an award based solely on the Parties’ written submissions.
30. On 18 January 2024, the Appellant requested, *inter alia*, the grant of provisional measures; namely, a provisional lifting of the registration ban imposed in the Registration Ban Decision.
31. On 26 January 2024, both the First Respondent and the Second Respondent filed their respective objections to the provisional measures sought by the Appellant and requested that

the Appellant's request be rejected.

IV. THE PARTIES' SUBMISSIONS

32. In the Club's application of 18 January 2024, it is seeking provisional measures and requesting that the registration ban be provisionally lifted. More specifically, the Club requests:

"As the award of this case is still pending, in order to avoid any irreparable damage on the Appellant due to the registration ban, the Appellant respectfully requests that the registration ban be provisionally lifted to allow the Appellant to proceed with the transfer registration for the 2024 season".

33. The Club explains that on 3 January 2024 the CFA announced the competition calendar for the 2024 Chinese Super League, which season will start on 1 March 2024 and end on 2 November 2024. Thus, the first registration window for the 2024 season being from 4 January 2024 to 28 February 2024.

34. The Club indicates that granting such provisional measure will not prejudice the interests of the Respondents, as the Club *"may pay a certain amount as a deposit to the designated bank account in order to ensure the proper implementation of the award"*.

35. FIFA objects to granting the requested provisional measures, referring to Article R37 para. 5 of the CAS Code and indicating that when considering if a provisional measure should be granted, *"it is necessary to consider (i) whether the measure is necessary to protect the Appellant from irreparable harm (periculum in mora), (ii) the likelihood of the Appellant succeeding in the substantive appeal (fumus boni iuris), and (iii) whether the interests of the Appellant outweigh those of the Respondent(s)"*.

36. FIFA highlights that these are cumulative, and if one is not met, the request cannot be granted and that *"[c]onsequently, and in line with Article 8 SCC, the Appellant had to prove that all three requirements are cumulatively satisfied before an application for provisional measures may be granted"*.

37. FIFA indicates that the Club has not explained – let alone proven – any of these three requirements and that it has not substantiated nor corroborated these arguments and merely made allegations and assumptions.

38. FIFA concludes by requesting that:

"Since the Appellant failed to submit specific arguments, let alone substantiate them, about the actual and real (not hypothetical)³ harm that might arise in this particular factual scenario, the Appellant's request for provisional measures shall be rejected".

39. The Player argues that the request for provisional measures was not presented with the appeal brief or in a timely manner immediately thereafter and is, therefore, untimely and should be rejected.

40. The Player highlights that *"Periculum in mora' and 'Fumus boni iuris' must guide the judge in analyzing the request for the provisional measure in question (registration of athletes and suspension of FIFA's decision) [...] The configuration of 'periculum in mora' requires demonstration of the existence or possibility of damaging*

the party's right to obtain effective judicial protection in the main action (APPEAL BEFORE CAS). 'Fumus Boni Iuris' accurately stands for as 'smoke of good law'. It is a sign or indication that the claimed right actually exists".

41. The Player argues that since the Club cannot succeed in its appeal, no provisional measure should be granted.

42. The Player concludes by requesting that:

"In light of the foregoing, the FIRST RESPONDENT kindly requests that:

- *THE REQUEST FOR PROVISIONAL MEASURE BE DENIED.*

It is pertinent that this honorable Sports Court orders the APPELLANT to pay legal fees and other procedural costs, given the total abusiveness of the request presented".

V. JURISDICTION OF THE CAS

43. In accordance with Article 186 of the Swiss Private International Law Act ("PILA"), the CAS has the power to decide upon its own jurisdiction.

44. The extent of the jurisdictional analysis at this point is to assess whether, on a *prima facie* basis, the Sole Arbitrator can be satisfied that he has jurisdiction to hear the appeal. The final decision on jurisdiction will be made in the final award.

45. Article R47 of the Code provides that:

"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body".

46. 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.

47. Article 57(1) of the FIFA Statutes (May 2022 edition) (the "FIFA Statutes"), provides that:

"Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, members associations or leagues shall be lodged with CAS within 21 days of notification of the decision in question".

48. FIFA has accepted CAS jurisdiction in this matter and the Player did not argue against it.

49. In view of the foregoing, the Sole Arbitrator, *prima facie*, has jurisdiction to decide the present dispute which will be further elaborated in the final award or any other disposition terminating the present proceedings.

VI. ADMISSIBILITY

50. On 22 August 2023, the Appellant appealed both the DRC Decision and the Registration Ban Decision before CAS, alleging, *inter alia*, that it was unaware of the proceedings held at FIFA.
51. The First Respondent argues that the appeal is inadmissible as it was filed beyond any applicable deadline.
52. The Second Respondent argues that the appeal against the DRC Decision is inadmissible, since the DRC Decision was notified on 5 June and the appeal was filed only on 22 August 2023, after the expiration of the 21-day deadline to file an appeal pursuant to Article 57 FIFA Statutes and Article R49 CAS Code.
53. The Second Respondent stated, however (Second Respondent's Answer, para. 22 at Section III.A.), that "[t]he admissibility of the Appellant's appeal is not contested by FIFA", presumably referring to the appeal against the Registration Ban Decision.
54. The appeal as it relates to the Registration Ban Decision was filed within the 21-day deadline to file an appeal pursuant to Article 57 FIFA Statutes and Article R49 CAS Code.
55. This appeal is, therefore, at least as it relates to the Registration Ban Decision, in principle, admissible, without prejudice to any other decision that the Sole Arbitrator could take in the final award or any other disposition terminating the present proceedings.

VII. APPLICABLE LAW

56. According to Article R58 of the CAS Code "[t]he 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".
57. According to Article 56(2) of the FIFA Statutes, "[t]he 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".
58. The DRC Decision and the Registration Ban Decision were rendered by FIFA, and, therefore, the FIFA Statutes and regulations shall constitute the applicable law to this dispute, including the RSTP and the Procedural Rules of the Football Tribunal. Swiss law shall be applied, subsidiarily.

VIII. LEGAL DISCUSSION

59. Pursuant to Article 183 of PILA, an international arbitral tribunal in Switzerland is empowered to order provisional or conservatory measures at the request of a party:

“(1) Unless the parties have agreed otherwise, the arbitral tribunal may, at the request of a party, order provisional or conservatory measures.

[...]

(3) The arbitral tribunal or the state court may make the order of provisional or conservatory measures conditional on the provision of appropriate security”.

60. Article R37 para. 5 of the CAS Code reads as follows:

“When deciding whether to award preliminary relief, the President of the Division or the Panel, as the case may be, shall consider whether the relief is necessary to protect the applicant from irreparable harm, the likelihood of success on the merits of the claim, and whether the interests of the Applicant outweigh those of the Respondent(s)”.

61. In accordance with Article R37 of the CAS Code and CAS jurisprudence (see for example, *CAS 2001/A/324*; *CAS 2001/A/329*; *CAS 2007/A/1370 & 1376*; *Order in CAS 2011/A/2479*; *Orders in CAS 2013/A/3199*; *Order in CAS 2014/A/3765*), when deciding whether an application for provisional measures should be ordered, the Sole Arbitrator should, in general, consider the following factors:

- a) whether the requested provisional measure is necessary to protect the Appellant from irreparable harm (“irreparable harm test”): the Appellant must demonstrate that the requested provisional measures are necessary in order to protect its position from damages or risks that would be impossible, or very difficult, to remedy or cancel at a later stage;
- b) whether the Appellant has reasonable chances to succeed on the merits (“likelihood of success test”): the Appellant must demonstrate that its position is not obviously groundless and that it has reasonable chances to eventually succeed and win the case; and
- c) whether the interests of the Appellant outweigh those of the opposite party and of third parties (“balance of interests test”): the Appellant must demonstrate that the harm or inconvenience it would suffer from the refusal to grant the provisional measures would be comparatively greater than the harm or inconvenience other parties would suffer from the granting of the provisional measures.

62. The Sole Arbitrator notes that the three requirements for the grant of a stay (i.e., irreparable harm, likelihood of success of the appeal on the merits and balance of interests) are cumulative (See for example, *Order in CAS 2011/A/2479*; *Orders in CAS 2013/A/3199*; *Order in CAS 2014/A/3765*).

63. The Sole Arbitrator further notes that it is upon the Appellant to demonstrate that the “irreparable harm test”, the “likelihood of success test” and the “balance of interests test” have all been met.

64. The Appellant did not substantiate its general claim that the requested measure is necessary to

protect it from irreparable harm. The Appellant should have presented and evidenced the importance of the Club's ability to participate in the current players registration window for the 2024 season, concretely evidencing the potential harm it may sustain if it is not able to register players during such window. This has not been alleged with any specificity, let alone evidenced.

65. CAS 2005/A/916 indicated that “[i]ndeed, if it were sufficient to allege the existence of irreparable harm to obtain the suspensive effect, without it being necessary to provide concrete evidence of such harm, this would be equivalent for the CAS to systematically pronounce a suspensive effect each time a club is prohibited to recruit” (translation to English).
66. The Club failed to substantiate any actual harm that might arise to it if the provisional measure is not granted, and, therefore, the Club's request for provisional measures should be rejected (see, CAS 2013/A/3139, Order of 3 May 2013; CAS 2014/A/3861, Order of 29 January 2015).
67. In view of the above, for the sake of procedural economy, it is not necessary to address the other two requirements set out above, i.e. likelihood of success on the merits and balance of interests.
68. Pursuant to Article R37 (5) of the CAS Code the three conditions are cumulative and should all be met. Since, at least, the irreparable harm test has not been met, the application for provisional measures is rejected by the Sole Arbitrator.

IX. COSTS

69. In accordance with standard CAS practice, the cost of this part of the proceedings will be settled in the final award or in any other final disposition of this arbitration.

ORDER

The Court of Arbitration for Sport rules that:

1. The application for Provisional Measures filed by Qingdao Hainiu FC on 18 January 2024 in the matter CAS 2023/A/9943 *Qingdao Hainiu FC v. Uros Deric and Fédération Internationale de Football Association (FIFA)* 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.