FIFA Legal Journal

ISSUE 1/2026

FIFA Legal Journal

1/2026
legaljournal.fifa.com

Edita: Tirant lo Blanch
C/ Artes Gráficas, 14 - 46010 - Valencia

Telfs.: 96/361 00 48 - 50
Fax: 96/369 41 51
Mail: tlb@tirant.com
http://www.tirant.com
ISSN : 3101-5476
Maqueta: Innovatext

TABLE OF CONTENTS

INTRODUCTION

Emilio García Silvero
Chief Legal and Compliance Officer
FIFA

Welcome to the FIFA Legal Journal, a new legal publication from FIFA that aims to mark a turning point in the way football law is studied, understood, and applied. This initiative, led by FIFA's Legal and Compliance Division, is part of a broader effort to promote transparency, legal training, access to knowledge, and institutional strengthening in sport.

In an increasingly interconnected and complex environment, where legal decisions directly affect the integrity of competitions, players' rights, and fairness between clubs and federations, legal knowledge is no longer a technical resource reserved for the few. Rather, it has become an essential pillar for ensuring governance, sporting justice, and the sustainable development of global football.

Why a legal journal specifically about football? Because modern football can no longer be understood or managed without a solid, transparent, and constantly evolving legal framework. Player transfers, contracts, dispute resolution systems, sport discipline, governance mechanisms, and compliance principles—all of these elements are regulated by legal rules that require interpretation, analysis, and debate. And for that debate to be of high-quality, pluralistic, and accessible, an institutional reference tool was needed. That tool is the FIFA Legal Journal.

This publication has a clear mission: to bring football law closer to the global community, share specialized knowledge, encourage critical reflection, and strengthen the principles of legality, integrity, and fairness in sport. Because sharing knowledge also means sharing responsibility. And an informed football community is a community that is better prepared to defend its rights, assume its duties, and build a fairer game.

The FIFA Legal Journal is an open-access publication, edited twice a year, with an approach that combines academic depth with a practical perspective. The journal is underpinned by essential values: editorial independence, academic rigor, diversity of perspectives, ethical commitment, conceptual clarity, and a pedagogical vocation.

Our objectives are multiple and complementary. First, to create a stable and rigorous channel for specialized legal analysis in sport. Second, to actively contribute to the dissemination of a culture of legality, transparency, ethics, and good governance. Third, to strengthen FIFA's institutional role as a driver of global standards in sports law. And finally, to facilitate access to quality legal content for a truly international audience.

In addition, the FIFA Legal Journal is part of a broader FIFA strategy aimed at strengthening the legal capacity of sports institutions, improving understanding of regulatory processes, enhancing the quality of decision-making, and ensuring public access to the rules and principles governing the game. Through its pages, it offers a plural, cross-cutting, and up-to-date view of the issues that shape the legal agenda of world football.

We hope that you enjoy the first edition of the FIFA Legal Journal.

ARTICLES

legaljournal.fifa.com

HOW TO RECONCILE CONTRACTUAL STABILITY IN FOOTBALL WITH FREE COMPETITION? LESSONS FROM THE DIARRA CASE

Gustavo Albano Abreu

Lawyer by the National University of La Plata (UNLP), Argentina
Master in Business Law and Administrative Law from Universidad Austral, Argentina
Doctor in Law from Universidad Rey Juan Carlos, Spain
Arbitrator of TAS-CAS

ABSTRACT

This article analyses the implications of the recent Diarra ruling, aiming to examine how the decision redefines the tension between the pursuit of contractual stability in football and the principles of free movement of workers and free competition, as established in the Treaty on the Functioning of the European Union (TFEU). The analysis focuses on how FIFA regulations, designed to protect employment contracts, may restrict players' rights and competition among clubs. The ruling argues that Article 17 of the Regulations on the Status and Transfer of Players (RSTP) may impose restrictions on free movement and competition, both in its objectives and effects. This rule would limit players' ability to change clubs and clubs' ability to sign contracted players, violating Articles 45 and 101 of the TFEU. The decision of the Court of Justice of the European Union (CJEU) criticises the compensation system for contract termination, considering it disproportionate and discretionary, questioning the joint liability of the new club and the use of the International Transfer Certificate (ITC) as unjustified pressure tools.

This work contributes to the debate on FIFA's role as the governing body of world football and proposes a review of Article 17 of the RSTP to balance contractual stability with players' rights and competition among clubs, advocating for alternatives that protect contracts without violating the principles of the TFEU.

KEYWORDS

Contractual Stability, Free Movement, Free Competition, TFEU (Treaty on the Functioning of the European Union), Indemnification, Proportionality, Diarra, Sports sanctions.

HOW TO RECONCILE CONTRACTUAL STABILITY IN FOOTBALL WITH FREE COMPETITION? LESSONS FROM THE DIARRA CASE

Gustavo Albano Abreu
Lawyer by the National University of La Plata (UNLP), Argentina
Master in Business Law and Administrative Law
from Universidad Austral, Argentina
Doctor in Law from Universidad Rey Juan Carlos, Spain
Arbitrator of TAS-CAS

Summary: 1. Introduction. 2. Facts. 3. Presentation of Diarra before the ordinary courts. The prejudicial question. 4. Conclusions of Advocate General Maciej Szpunar. 5. The judgement of the Court of Justice of the European Union. 6. Analysis of the aforementioned regulations. 7. Brief comments on contractual stability and some history. 8. Are the Bosman and Diarra rulings comparable in their effects? 9. Suggested changes. 10. Conclusions.

1. INTRODUCTION

The Court of Justice of the European Union (hereinafter CJEU) gave a judgement on October 4, 2024, ruling on a reference for a preliminary ruling from the *Cour d'appel de Mons* (hereinafter the Mons Court of Appeal) in case C-650/22 concerning an action brought by the former professional

football player of French nationality, Lassana Diarra, against FIFA and the Royal Belgian Football Federation.

The CJEU held that certain articles of the FIFA Regulations on the Status and Transfer of Players (hereinafter RSTP) adopted in 2014 are contrary to Union law insofar as they (i) may hinder the free movement of professional football players (Article 45 of the Treaty on the Functioning of the European Union[1] (hereinafter TFEU); and (ii) aim to restrict cross-border competition of clubs in the transfer market (Article 101 TFEU-).

The purpose of this paper is to analyse whether, in the light of the ruling in case C-650/22, it is appropriate to amend the rules of the RSTP that are incompatible with the TFEU, and whether this is possible without irreparably damaging the contractual stability and balance of the international system of transfers of professional football players

2. FACTS

French footballer Lassana Diarra, known for his time with Chelsea, Arsenal and Real Madrid, among others, was transferred from Anzhi Majachkala to Lokomotiv Moscow (hereinafter Lokomotiv) in 2013. However, a year later, the Russian club decided to terminate his contract citing a breach by the player.

In August 2013, Diarra signed a four-year contract with Lokomotiv. At the beginning he had a remarkable performance that led him to be elected as the best player of the Russian league in the months of November and December of that year. However, after the winter break, the player did not perform as well and only played a few minutes in five out of 11 games.

The peak of tension occurred in the summer of 2014, when the club proposed a salary reduction for the following season (2014-2015), which the player did not accept, refusing even to show up for training.

Faced with Diarra's position, on August 22, 2014, Lokomotiv terminated the player's contract and a few weeks later asked the FIFA Dispute Resolution Chamber (hereinafter the DRC) to order the player to pay compensation of

[1] The TFEU is the Treaty on the Functioning of the European Union, one of the fundamental treaties establishing the legal and organisational basis of the European Union (EU). This treaty, together with the Treaty on European Union (TEU), is one of the main texts governing the functioning, competences and objectives of the EU. It was signed in Rome in 1957 under the name Treaty of Rome and has been amended several times to adapt to the evolution of the Union, adopting its current name after the Treaty of Lisbon in 2009.

€20 million, claiming that he had breached and terminated his contract "without just cause".

In September 2014, the footballer filed a counterclaim against Lokomotiv requesting payment of wages owed and compensation equal to the remuneration he would have received until the termination of the contract on June 30, 2017.

Between August 2014 and early 2015 Diarra had several important offers from clubs in Italy (Inter Milan), England (Queens Park Rangers and West Ham United) and Scotland (Celtic Glasgow). However, negotiations did not prosper because those teams feared being held jointly and severally liable for compensation that could have been awarded by the CRD; since, according to the provisions of Article 17 of the RSTP, if a professional player must pay compensation, he himself and his new club have a joint and several obligation to make the payment, with the regulations providing for the possibility of imposing financial and sporting sanctions on both the player and the club itself.

On February 19, 2015, Diarra received a new offer: Royal Charleroi were interested in signing him, but with two cumulative suspensive conditions:

(1) that he should be registered and meet the regulatory requirements to play for the first team of Royal Charleroi in any official competition organised by the URBSFA [Union royale belge des sociétés de football association ASBL (Royal Belgian Football Federation; hereinafter "URBSFA")], UEFA and FIFA, no later than March 30, 2015; and

(2) that (before the same date) there should be written and unconditional confirmation that Royal Charleroi could not be considered a joint debtor in respect of any indemnity (in particular, for contractual termination) that BZ may be required to pay to Lokomotiv.

The respective lawyers of Diarra and Royal Charleroi requested, in February and March, confirmation from FIFA and URBSFA that the player could be registered and meet the regulatory requirements to play in the first team and that Article 17 (2) and (4) of the RSTP would not apply against the latter.

FIFA, by letter of February 23, 2015, replied that only the competent body, and not its administrative body, has the power to apply the provisions of the RSTP. For its part, the URBSFA communicated on March 6, 2015, that, in accordance with FIFA rules, the registration of the player could not take place as long as his former club did not issue a jurisdictional International Transfer Certificate (hereinafter referred to as ITC).

On May 18, 2015, the DRC partially accepted Lokomotiv's request and set the compensation to be paid by Diarra at €10.6 million and declared that

"Article 17.2 of the RSTP would not be applied to the player in the future". This decision would be ratified by the Court of Arbitration for Sports (hereinafter CAS) in May 2016. Finally, on July 14, 2015, Diarra was signed by Marseille of France.

3. PRESENTATION OF DIARRA BEFORE THE ORDINARY COURTS. THE PREJUDICIAL QUESTION.

In December of the same year, with the support of the International Federation of Professional Football Players (hereinafter FIFPRO), Diarra filed a lawsuit against FIFA and the Belgian Football Association before the Commercial Court of Hainaut (Belgium) claiming 6 million euros in damages for loss of profit suffered as a result of the application of provisions that he considers contrary to European Union Law.

The two provisions invoked by the player in support of his request were as follows:

The first is the one that enshrines the principle of free movement of workers within the Union, i.e., Art. 45 TFEU, which provides as follows:

> *"1. The free movement of workers shall be assured within the Union.*
> *2. Freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.*
> *3. Subject to limitations justified on grounds of public policy, public security and public health, freedom of movement for workers shall include the right: to respond to effective offers of employment; to move freely for this purpose within the territory of the Member States; to terminate in one of the Member States in order to take up employment there, in accordance with the laws, regulations and administrative provisions applicable to the employment of national workers.*
> *(...).".*

The second is Art. 101 TFEU. which establishes which decisions, agreements or practices will be contrary to the right to free competition, stating:

> *"1. All agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States, and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which consist in:*
> *a) directly or indirectly fixing purchase or sale prices or other transaction conditions;*
> *b) limiting or control production, market, technical development or investments;*
> *c) sharing markets or sources of supply;*
> *d) applying unequal conditions for equivalent services to third parties, causing them a competitive disadvantage;*

e) subordinating the conclusion of contracts to the acceptance by the other contracting parties of supplementary services which, by their nature or according to commercial usage, have no relation whatsoever with the object of such contracts.
2. Agreements or decisions prohibited by this article shall be null and void.
However, the provisions of paragraph 1 may be declared inapplicable to:
– any agreement or category of agreements between companies, - any decision or category of decisions of associations of companies
– any concerted practice or category of concerted practices, which contribute to improving the production or distribution of products or to promoting technical or economic progress, while allowing users an equitable share of the resulting benefit, and without:
a) imposing restrictions on the enterprises concerned that are not indispensable to the attainment of such objectives;
(b) affording such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question".

On January 19, 2017, the Belgian court declared his claim to be founded in principle and ordered FIFA and URBSFA to pay a provisional amount of €60,001. In the judgement, the court ruled that article 17.2 of FIFA violates EU Community law, in particular, the right to free movement of workers, and urged the highest international football body to compensate the footballer.

FIFA appealed the judgement to the Mons Court of Appeal, arguing mainly that the court lacked jurisdiction over the player's claim because the matter fell under the exclusive jurisdiction of CAS, or at least not under Belgian international jurisdiction. Alternatively, FIFA asked the court to declare the claim inadmissible or unfounded.

URBSFA joined the case and supported FIFA's arguments. Royal Charleroi filed a voluntary intervention in support of FIFA and the player filed a counterclaim requesting the court to declare that Article 17 of the RSTP, Article 9 (1) of the RSTP and Article 8.2.7 of Annex 3 of the RSTP violate Articles 45 and 101 of the TFEU, and .to establish that FIFA and URBSFA are liable jointly and severally for the damages caused by the existence and application of these rules.

In its referral decision, the Mons Court of Appeal upheld the decision of the Hainaut Commercial Court to declare itself competent to hear Diarra's claim for damages in Belgium and concluded that the CAS arbitration agreement invoked by FIFA was not valid under Belgian law because the relevant FIFA statutes were too general and unclear to provide for such an agreement.

The court also found that it had international jurisdiction over URBSFA because its headquarters were in Belgium and the alleged damage occurred in Charleroi, where the player was unable to play football despite the job offer from Royal Charleroi.

In addition, the court rejected the argument that Diarra had artificially created a conflict in Belgium by securing a fictitious job offer, stating that the player had made genuine efforts to secure employment at various clubs throughout the European Union.

The court found Diarra's claim admissible, as he had sufficiently demonstrated his interest in pursuing the case, given the alleged harm caused by the conduct of FIFA and URBSFA.

Finally, the court confirmed that the case raised the question of whether the damage suffered by the player when he was prevented from playing professional football, during the 2014/2015 season, was caused by the misapplication of rules in violation of Articles 45 and 101 TFEU.

Beyond the grounds invoked by the player, FIFA and URBSFA, the Mons Court of Appeal considered that these rules could indeed violate freedom of movement and competition and referred the preliminary question to the Court of Justice of the European Union.

By order of 19 September 2022, received at the Court of Justice on 17 October 2022, the Mons Court of Appeal referred the following question to the Court for a preliminary ruling:

> "Are Articles 45 and 101 of the Treaty on the Functioning of the European Union to be interpreted as prohibiting:
> – the principle of solidarity in the payment, by the player and the club wishing to contract him, of the compensation owed to the club with which the contract has been terminated without just cause, as regulated in article 17.2 of the [RSTP], in connection with the sporting and financial sanctions provided for, respectively, in paragraphs 4 and 1 of the same article;
> – the possibility that the federation of the player's former club may refuse to issue the international transfer certificate required for a new club to sign the player if there is a dispute between the former club and the player (Article 9.1 of the [RSTP] and Article 8.2.7 of Annex 3 of the above-mentioned Regulations)?" .[2]

4. CONCLUSIONS OF ADVOCATE GENERAL MACIEJ SZPUNAR

In the preliminary question, the Advocate General intervened by presenting his legal opinion after analysing the case in detail and examining

[2] Comments were submitted by FIFA, BZ, URBSFA, the Fédération internationale des associations de footballeurs professionnels ("FIFPro"), FIFPro Europe, the Union nationale des footballeurs professionnels ("UNFP"), the Greek, French, Italian and Hungarian Governments and the European Commission. FIFA, Diarra, URBSFA, FIFPro, FIFPro Europe, UNFP, the Greek Government and the European Commission also participated in the hearing held on 18 January 2024.

the legal and contextual aspects of the preliminary question, offering his interpretation on how European law should be applied or interpreted in the case in question.

This opinion was thorough and impartial and analysed the case both from the point of view of European Union law and its impact on the legal system of the Member States. Although his opinion is influential, the Advocate General did not participate in the deliberation or in the final decision of the judges of the Court and his opinion remained indicative and non-binding, although the final judgement is often aligned with his analysis.

4.1. THE BOTTOM LINE

The Advocate General held that: "What is decisive is that players are effectively prevented from being able to sign for clubs in other Member States". As was the case with Diarra, a French footballer who was an employee and intended to take up a job in Belgium, a country of which he is not a national, and the controversial provisions effectively prevented him from being able to do so.[3]

It then considered it necessary to analyse whether the provisions at issue, Article 17 (1), (2) and (4) and Article 9(1) of the EUTR and Article 8 (2) (7) of Annex 3 to the EUTR, pursuant to Article 101 (1) TFEU, can be equated to conduct that has as its object or effect the prevention, restriction or distortion of competition within the internal market.

To this end, it noted that the contested provisions constitute decisions of associations of undertakings within the meaning of Article 101 (1) TFEU[4] , which may affect trade between Member States within the meaning of the same provision, clarifying that this conclusion is not undermined by the fact that the contested provisions involve what is commonly regarded as labour law.[5]

According to Article 17 of the RSTP, as soon as a player terminates a contract without just cause, he is obliged to pay compensation and serious sporting sanctions apply. In addition, pursuant to Article 8.2.7 of Annex 3 of the RSTP, such a player shall not receive an international transfer certificate in order for a club to field him.

---

3 See point 44 of the Conclusions.

4 Art- 101 par. 1 of the TFEU states: "All agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market shall be incompatible with the internal market and shall be prohibited."

5 See point 46 of the Conclusions.

The provisions in question, according to the reasoning of the Advocate General, are designed to have a deterrent effect on any player and the same applies to clubs potentially interested in acquiring players when they still have a contract in force because the price to be paid for such a transaction would be extremely high.

Following this argument, the regulations in question limit the possibility for players to change clubs upon termination of their contract without just cause and, correlatively, for other clubs to hire those players, when they have terminated their contract without just cause.

Thus, the contested provisions, by limiting for clubs the possibility of hiring workers, necessarily affect competition between clubs in the market for the acquisition of professional players.[6] While there are other situations in which players can change clubs and be hired, as is usually the case in most cases, when a contract is terminated without just cause, by the application of the contested rules, competition is doomed to disappear.[7]

According to the Advocate General, contrary to the European Commission's interpretation[8], these elements constitute strong indications that there is a restriction of competition by object and, in the light of this analysis, he considered that the contested provisions also have, at the very least, the effect of restricting competition.

On this question, it concluded that Article 101(1) TFEU precludes the provisions at issue and, in the event that the Court of Justice declares that there is a restriction to competition not by object but by effect, the next step would be to assess such provisions in the light of their objectives in accordance with the judgement in Wouters et al., in order to determine whether they are justified in pursuing one or more legitimate objectives in the general interest which are not, in themselves, anti-competitive.[9]

6 See point 52 of the Conclusions.

7 See point 56 of the Conclusions.

8 See point 52 of the Conclusions where the Advocate General admits *that "The Commission considers that there is a restriction of competition by effect. It argues that the provisions at issue cannot be considered to have the object of restricting competition, having regard to their content, their economic and legal context and the aims they pursue, given that they apply only in the event of termination of contract without just cause. They therefore do not affect the possibility for clubs to compete freely by signing players at the end of their contract with their former club and during the term of those contracts, provided that all interested parties agree to such a transfer and that it complies with the various temporal and substantive rules governing the registration of players"* (emphasis added).

9 See point 59 of the Conclusions.

4.2. JUSTIFICATION OF THE RESTRICTION

In this regard, according to the Advocate General, a restriction on the free movement of workers can only be justified if, firstly, it is based on one of the grounds listed in Article 45(3) TFEU[10] or on an overriding reason relating to the public interest[11] and, secondly, if it complies with the principle of proportionality, which implies that it is appropriate to ensure, in a consistent and systematic manner, the achievement of the objective pursued and that it does not go beyond what is necessary to achieve it.[12]

4.2.1. Identification of a compelling reason of general interest.

FIFA and URBSFA argued, as a reason of general interest, that the disputed provisions are intended to preserve contractual stability in the professional football sector and, more specifically, to ensure compliance with the obligations assumed by both players and clubs.

On this point, the Advocate General saw no problem in accepting these reasons as overriding reasons of general interest, insofar as they do not constitute objectives of a purely economic nature.

Moreover, the Advocate General recognized that contractual stability is supposed to help ensure a certain level playing field between clubs and recalls that the Court of Justice has expressly accepted the objective

---

10 Art. 45 of the TFEU establishes:
"(...)
Without prejudice to limitations justified for reasons of public order, public safety and public health, the free movement of workers shall imply the right: a) to respond to effective job offers;
(b) to move freely for this purpose within the territory of the Member States; (c) to reside in one of the Member States for the purpose of pursuing employment there, in accordance with the laws, regulations and administrative provisions applicable to the employment of national workers; (d) to remain in the territory of a Member State after having pursued employment there, under the conditions laid down in regulations made by the Commission".

11 *"Over the years the Court of Justice has resorted to different terminology to describe the non-economic reasons considered as grounds of justification that have been (and are being) accepted in case law. See Martucci, F., Droit du marché intérieur de l'Union européenne, Presses Universitaires de France, Paris, 2021, paragraph 261».* Cited in footnote 39 of the Conclusions.

12 See, to that effect, in essence, the judgements of 15 December 1995, Bosman (C-415/93, EU:C:1995:463), paragraph 104; of 16 March 2010, Olympique Lyonnais (C-325/08, EU:C:2010:143), paragraph 38; and of 10 October 2019, Krah (C-703/17, EU:C:2019:850), paragraph 55.

of maintaining a balance between clubs, preserving a certain equality of opportunity and uncertainty of outcome.[13]

4.2.2. Proportionality

In accordance with the principle of proportionality, limitations may be imposed only where they are necessary and actually meet the objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.

The burden of proving the proportionality of the contested provisions, in this case, lies with FIFA, which must substantiate why they are appropriate to ensure, in a consistent and systematic manner, the achievement of the objectives pursued and that they do not go beyond what is necessary to achieve them. It is then up to the referring court to assess the proportionality of the contested provisions.

Generally speaking, it appears that the disputed provisions may promote contractual stability and thus contribute both to the stability of the composition of teams in sports competitions and to the objective related to the maintenance of a balance between clubs in sports competitions, while also preserving a certain equality of opportunities.

Finally, regarding adequacy, the Advocate General admitted that the obligation of the player and the new club to pay compensation[14] should encourage players not to terminate their contracts without just cause and discourage clubs from signing players who have terminated their contracts early without just cause. The same applies to sporting sanctions[15] and the International Transfer Certificate[16], the non-issuance of which worsens the situation of the player concerned, creating a technical obstacle to his joining a new club belonging to another federation.[17]

4.2.3. Need

With respect to the need for the disputed provisions not to go beyond what is necessary to achieve the objective of contractual stability, the payment of compensation for termination without just cause, according to

13 See the judgement of 15 December 1995, Bosman (C 415/93, EU:C:1995:463), paragraph 106.
14 Article 17, paragraphs 1 and 2, of the RSTP.
15 Article 17, paragraph 4, of the RSTP.
16 Article 8.2, paragraphs 7 and 4, letter b) of Annex 3 of the RSTP.
17 See point 65 of the Conclusions.

the Advocate General, may be considered reasonably necessary to achieve the objective of contractual stability.

However, such compensation must be calculated in such a way that the amount owed by the party to whom the lack of just cause is attributed does not exceed the amount that could reasonably be considered necessary to compensate the other party for the prejudice suffered as a result of the termination of that contract and to dissuade, in this case, the player from terminating the contract without just cause.[18]

With regard to the solidarity of the new club[19], the Advocate General considers that systematically holding the new contracting club responsible for this goes beyond what is necessary to achieve the legitimate objective, especially when the new club has not been involved in any way in the termination of the contract. The presumption in Article 17(4) of the RSTP that the new club has induced the player to terminate the contract seems draconian.

While it may be argued, as FIFA does, that it is possible to derogate from the application of Article 17(2) of the RSTP, since the DRC is empowered to restrict the application of the principle of joint and several liability, conferring this power on the DRC does not provide players and clubs with the necessary legal certainty, since everything depends on the feasibility and speed of a procedure that is difficult to assess.

With respect to the issuance of the CTI, Article 8(2)(7) of Annex 3 of the RSTP, in the opinion of the Advocate General, entails the risk that the issuance of the CTI may be refused on the basis of the mere allegation that the player has not respected the terms of his contract and that the club had to terminate it due to his alleged failure to comply with his contractual obligations.

Again, it could be argued that this system is sufficiently flexible in that, in the event of a dispute between the player and his former club, FIFA may take interim measures at the request of the new club in exceptional circumstances.[20] However, the Advocate General considers that these arguments are too weak to conclude that such provisions are necessary to achieve contractual stability.

---

18 According to Article 17(1) of the RSTP, the criteria to be taken into account for the purpose of calculating compensation include the remuneration and other benefits due to the player under the existing contract or the new contract, the remaining contractual time, up to a maximum of five years, the fees and expenses paid by the former club (amortized over the term of the contract), as well as the question of whether the termination of the contract occurs within a protected period.

19 Article 17, paragraph 2, of the RSTP and sports sanctions, Article 17, paragraph 4, of the RSTP.

20 In practice, if the player requests the provisional CTI from FIFA, it is in all cases granted.

4.3. CONCLUSION OF THE ADVOCATE GENERAL.

On the basis of the foregoing, the Advocate General proposed that the Court of Justice answer the questions referred for a preliminary ruling by the Mons Court of Appeal as follows:

"Article 101 TFEU must be interpreted as precluding rules adopted by an association responsible for the organisation of football competitions at world level and applied both by that association and by the national football associations which are members of it, which provide that a player and a club wishing to sign him are jointly and severally liable for compensation owed to the club with which the player has terminated his contract without just cause and that the federation to which the player's former club belongs may refuse to issue the international transfer certificate, required for a new club to be able to sign the player, if there is a dispute between the former club and the player, provided that it is established, on the one hand, that such decisions by associations of undertakings are liable to affect trade between Member States and, on the other hand, that their object or effect is to restrict competition between professional football clubs, unless, in the latter case, it is shown by convincing arguments and evidence that they are justified in order to achieve one or more of their legitimate aims and that they are strictly necessary for that purpose.
Article 45 TFEU must be interpreted as precluding rules adopted by an association responsible for the organisation of football competitions at world level and applied both by that association and by the national football federations which are members of that association,
– which provide that a player and the club wishing to employ him are jointly and severally liable for compensation owed to the club with which the player has terminated without just cause the contract, unless it can be shown that it is actually possible, within a reasonable time frame, not to apply that principle if it is established that the new club was not involved in the early and unjustified termination of that player's contract, and
– which provide that the federation of the player's former club may refuse to issue the international transfer certificate required for a new club to sign the player if there is a dispute between the former club and the player, unless it can be shown that effective, real and expeditious interim measures can be taken if it is merely alleged that the player has not respected the terms of his contract and that the club had to terminate his contract because of his alleged failure to fulfil his contractual obligations.

5. THE JUDGEMENT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

The Tribunal (Second Chamber) ruled:

"(1) Article 45 TFEU must be interpreted as precluding rules adopted by a private law association whose purpose, in particular, is to regulate, organise and control football at world level and which provides:
– firstly, that a professional player who is part of an employment contract, to whom a termination without just cause of this contract is attributed, and the new club that hires him after this termination are jointly and severally liable for the payment of

the compensation due to the first club for which this player worked and which will be fixed on the basis of sometimes imprecise or discretionary criteria, sometimes devoid of an objective link with the employment relationship in question and sometimes disproportionate;
– secondly, that, in the event that the incorporation of the professional player takes place during a period protected by the terminated employment contract, the new club incurs a sporting sanction consisting in the prohibition to register new players for a given period, unless it proves that it did not encourage this player to break this contract, and
– thirdly, that the existence of a dispute relating to this breach of contract prevents the national football association of which the former club is a member from issuing the international transfer certificate necessary for the player's registration with the new club, with the consequence that this player cannot participate in football competitions on behalf of this new club, unless it is established that such rules, as interpreted and applied in the territory of the European Union, do not go beyond what is necessary to achieve the objective of ensuring the regularity of football competitions inter-club while maintaining a certain degree of stability in the membership of professional football clubs.
(2) Article 101 TFEU must be interpreted as meaning that such rules constitute a decision by an association of undertakings which is prohibited by paragraph 1 of that Article and which can only benefit from an exemption under paragraph 3 of that Article if it is shown, by convincing arguments and evidence, that all the conditions required for that purpose are met."

5.1. GENERAL ANALYSIS OF THE SENTENCE

The court, in line with the opinion of the Advocate General, decided that FIFA's regulations are contrary to the movement of workers and infringe competition in the market.

Following the Advocate General's Opinion at[21], the Court decided that the solidarity provided for in Article 17.2 of the EULA, together with the presumption of Article 17.4 and the sporting sanctions foreseen for the new club, together with the non-issuance of the international transfer certificate, effectively prevent players from signing for clubs in other Member States.

According to their reasoning, the combination of the aforementioned regulations configures a legal and financial situation that is unpredictable and potentially very burdensome for the new club, which, added to the possible sporting sanctions, is sufficient to discourage the contracting of players.[22]

In addition, the regulations provided for in Articles 9 of the RSTP and 8.2.7 of Annex 3 of the RSTP, which prohibit the issuance of a CTI while there is a dispute between the player and his former club for the early termination

[21] See, in particular Points 43 and 44.
[22] See Point 92 of the judgement.

without cause of the employment contract, may prevent such players from exercising their economic activity in any Member State, other than their Member State of origin, preventing the sporting and economic interest of any club in another Member State from hiring them, contrary to the principle of free movement of workers within the Union .[23]

The judgement, based on recent decisions on the matter[24], also inferred that the aforementioned regulations have the purpose of restricting or even preventing competition within the European Union.

Although it is recognised that such regulations are designed to prevent poaching practices by clubs with greater economic resources, in practice, such rules are comparable to a general, absolute and permanent ban on unilaterally hiring players already under contract, imposed by the decision of an association of companies to all professional football clubs and whose weight falls on the workers, who are the said football players.

The distribution of these resources is thus restricted to the possible transfers negotiated between these clubs, thus constituting a flagrant restriction of the competition that these clubs could develop if the aforementioned restrictions did not exist, generating a compartmentalisation of the market to the benefit of these same clubs.[25]

In short, according to the ruling, the regulation analysed is, by its very nature, detrimental to the competition that professional football clubs could carry out by unilaterally hiring players already under contract with a club or players whose contracts have been terminated without just cause.

6. ANALYSIS OF THE AFOREMENTIONED REGULATIONS

6.1. SOLIDARITY ESTABLISHED IN ART. 17.2 OF THE RSTP

In its pertinent part, the regulation states:

"If a professional player is obligated to pay compensation, the professional and his new club shall be jointly and severally liable for its payment."

This rule was designed to discourage players from breaching contracts and to provide sporting and financial protection to the club that has invested time and money in selecting the best players, securing their availability or

[23] See Point 93 of the judgement.

[24] Judgements of December 21, 2023, Royal Antwerp Football Club, C-680/21 and December 21, 2023, European Superleague Company, C-333/21.

[25] See point 146 of the judgement.

eligibility (often at a significant transfer fee), and signing them for a specific period of time to secure their sporting services.

The solidarity of the new employer for indemnity payments in cases of termination of contract without just cause is a principle recognised in labour law in several countries. This principle is most frequently applied in situations of company transfer, labour continuity or outsourcing, where there is a direct or indirect relationship between the old and the new employer with respect to the employee's employment relationship.

However, it is fair to recognise that the purpose of solidarity in labour law is to protect the rights of the worker against corporate manoeuvres that could deprive him of his rights. That is to say, to prevent the change of employer or corporate ownership from implying a loss of labour rights and to protect the worker against unfair practices, such as fraudulent transfers or simulations aimed at evading responsibilities or violating his acquired rights.

The case of professional football players is clearly different. As we have seen, the direct protection is towards the previous club, but it is important to highlight that, although indirectly, the worker is also protected by guaranteeing contractual stability, so important in the world of professional football, and high salaries that are usually due to the clubs investing a lot of economic effort into "buying their passes" and then in paying salaries in accordance with those investments.

Following this reasoning, it does not appear that the solidarity of the new club, by itself, constitutes a restriction on competition for the object. This is so because it has not been regulated with the sole purpose of deliberately limiting the mobility of players or dissuading clubs from competing with each other. In fact, when there are clubs interested in contracting players with current contracts, if both clubs and the player agree, the transfer of the professional services of a contracted player is possible and it is common for this to happen.

The solidarity of the new club seems more of an accessory measure to protect contractual stability and compliance with sporting rules and to prevent the new club from taking advantage of or enriching itself without cause[26], than a regulation to deliberately restrict player mobility or deter clubs from competing with each other. The key may lie in analysing the proportionality, purpose and actual effects of such regulation on the market.

[26] Lassana Diarra joined Lokomotiv Moscow in August 2013, after Anzhi Makhachkala decided to sell its entire squad due to budget cuts. Although the exact figures of the transfer were not officially disclosed, it is estimated that Lokomotiv paid around €12 million for his signing. One wonders whether Royal Charleroi, had they acquired Diarra's services without paying a transfer fee, would not have been unjustly enriched.

Finally, it should be noted that the principle of proportionality -and this ruling is no exception-, since it has not always been adequately weighed, confuses strictly general labour matters with the specifics of football, in which not only are the workers special subjects, but proportionality must also be weighed against the rights of the clubs and the investments made, both in the transfers to acquire the services of the football players and in the significant salaries agreed with them.

There is no other field, outside of sports, in which an employee is "invested in" as in this area, and this investment must also be an extreme of proportionality, as the principle of contractual stability, which has been so weakened, must also be.

6.2. THE CALCULATION OF THE COMPENSATION ESTABLISHED IN ARTICLE 17.1 OF THE RSTP

In this respect, the judgement questions this regulation because, according to its understanding, the indemnities are fixed:

> *"...on the basis of criteria that are sometimes vague or discretionary, sometimes devoid of an objective link to the employment relationship in question and sometimes disproportionate."*

According to the judgement, the compensation system regulated by FIFA allows the relevant courts to impose compensation for breach of contract with sometimes imprecise, discretionary and disproportionate criteria. An analysis of section 17 (1) shows that this is not the case.

First, the FIFA system allows the parties (clubs and players) to agree on liquidated damages clauses in the employment contract to regulate the economic consequences of a unilateral termination without just cause. That is, clubs and players are free to include clauses in the contract that predefine the amount of compensation in the event of termination without cause, both on the part of the player and the club.

These clauses, known as termination clauses, contractual compensation clauses or liquidated damages clauses, seek to provide certainty and predictability to both parties in the event of breach of contract. They must respect certain basic principles in order to be valid, such as proportionality between the agreed amount and the damages that the breach may cause, with respect to FIFA regulations and applicable labour laws in the country where the contract is entered into, and the contract must clearly detail how it will be calculated or what will be paid in case of breach.

If such a clause exists in the contract, it will be the main basis for calculating compensation, provided it is valid. FIFA generally respects such

agreements, unless it is considered abusive, disproportionate, or contrary to the general rules of law.

Only in the event that the parties have not incorporated any specific provision regarding the indemnity due in the event of premature termination of the contract, the indemnity for breach of contract shall be due on the basis of article 17.

Unlike what happens in the labour laws of most professional sports around the world, FIFA's regulatory system for determining compensation for breach of contract without just cause can be considered comprehensive and effective in addressing the problems related to breach of contract, as it establishes clear and detailed rules to protect both players and clubs.

The regulation addresses all key elements: calculation of compensation, mitigation of damages, and protection of contractual stability. It also allows the inclusion of liquidated damages clauses in players' and clubs' employment contracts, provided they are reasonable and respect the general rules of the RSTP and national laws.

In addition, the case law of the Court of Arbitration for Sport (CAS) on compensation for termination without just cause of the contract of professional football players can be described as evolutionary, reasoned and balanced, since it has applied general principles of sports and labour law, taking into account the particularities of the football market

CAS general jurisprudence has shifted from favouring player mobility (Webster) to a more balanced approach that protects contractual stability and club rights (Matuzalém and El Hadary), while maintaining key principles such as mitigation of harm and proportionality, always seeking to establish compensation proportional to the actual harm suffered, avoiding excessive punishment or arbitrary compensation.

All this, in addition, adapted to the sports context and recognizing the specificity of the football market, where the mobility of players and the investments in them are fundamental. In sum, the analysed regulation plus the briefly summarised jurisprudential path, allow the undersigned to disagree with the arbitrary way in which the indemnities for early termination without just cause of the employment contracts of professional football players are allegedly established.

6.3. THE SPORTING SANCTIONS ESTABLISHED IN ART. 17.3 AND 4 OF THE RSTP

In its pertinent part, the regulation establishes with respect to the player:

"17. 3. In addition to the obligation to pay compensation, sporting sanctions shall be imposed on a player who terminates a contract during the protected period. The sanction shall consist of a four-month restriction on his eligibility to play in any official match."

Regarding the club:

17.4. "...sporting sanctions should be imposed on a club that terminates a contract during the protected period or has induced the termination of a contract. Any club signing a contract with a professional player who has terminated his contract without just cause shall be presumed, unless proven otherwise, to have induced the professional player to terminate the contract. The sanction shall be to prohibit the club from registering new players, both domestically and internationally, for two complete and consecutive registration periods."

The judgement challenges this regulation only in relation to the club because, according to its understanding:

"...in the event that the incorporation of the professional player occurs during a period protected by the terminated employment contract, the new club incurs a sporting sanction consisting of a ban on registering new players for a specified period, unless it proves that it did not encourage this player to break this contract,..."

6.3.1. Analysis of sports sanctions

For many years, the sports sanction has been designed to protect the stability of employment contracts in football, which is a fundamental pillar of the professional sports system. Without this measure, clubs could directly incentivise players to break contracts without cause, upsetting the competitive and contractual balance by simply offering a higher salary.

The main objective is to discourage clubs from acting as "facilitators" of contract breaches, thereby promoting an environment where labour relations are respected. By imposing a severe ban, FIFA has always sought to discourage clubs from seeking to gain undue advantage by signing players who have broken contracts without just cause.

This forces clubs to be more diligent and responsible in their negotiations with players under contract. In this way, the sporting sanction complements the compensation obligations that already exist, ensuring that the new club not only compensates the former aggrieved club financially, but also faces a serious sporting consequence.

Since the origin of organised football, contractual stability has been and is crucial in professional football to ensure the predictability of clubs' investments in players, and this sanction is intended to reinforce that principle. In this way, the new club's solidarity (economic and sporting) prevents players from acting

unilaterally without considering the consequences for their former clubs, especially if the new club encourages or tolerates such actions.

However, it is also fair to recognise that the transfer ban for two transfer windows may be perceived as excessively severe, especially in cases where the new club did not deliberately act as an incentive to break the contract. If this were the case, the new clubs could be disproportionately punished and, in addition to the sporting sanction, have to pay compensation.

The ban on squad reinforcements during transfer windows has a very negative impact on the competitiveness of the sanctioned club, severely limiting its ability to compete in the transfer market and affecting its sporting and financial performance for at least one year. Although sporting sanctions are not so common in practice, for both players and clubs, the fact is that the sanction is in force and, ultimately, it is the members of the DRC or the members of the arbitration panels who make the final decision.

Perhaps it is time to look at less restrictive solutions and, instead of banning transfers, less restrictive sanctions could be implemented, such as significant sporting fines or partial restrictions on the transfer market (e.g., limiting the number of transfers in a window instead of banning them altogether).

One possible improvement would be to adjust the sanction to be more flexible, depending on the degree of responsibility of the new club. This would ensure that the measure is fair and does not disproportionately affect market dynamics and club competitiveness.

The sanction of a transfer ban for two transfer windows is reasonable from the point of view of protecting contractual stability, deterring unjustified breakups and holding clubs accountable for encouraging such behaviour. However, its proportionality may be questioned in cases where the new club has not acted maliciously or consciously.

6.4. THE SPORTS SANCTIONS ESTABLISHED IN ARTICLES 9 OF THE RSTP AND 8.2.7 OF ANNEX 3 OF THE RSTP

In its pertinent part, the regulation states:

"9. International Transfer Certificate (RSTP)
1. *Players registered with one association may be registered with a new association only after the latter has received the international transfer certificate (hereinafter referred to as "the ITC") from the previous association".*
"Art. 8.2 Creation of an ITC for a professional player (Annex 3 of the RSTP)
7. The former association shall not deliver an ITC if a contractual dispute has arisen due to the circumstances provided for in annex 3, article 8.2 paragraph 4 b) between the former club and the professional player, in which case, at the request of the new association, FIFA may take interim measures in exceptional circumstances".

The ruling questions the validity of this regulation because it prevents the player in conflict with his former club from participating in football competitions for another club:

> *"...the existence of a dispute related to this breach of contract prevents the national football association of which the former club is a member from issuing the international transfer certificate necessary for the player's registration with the new club, with the consequence that this player cannot participate in football competitions on behalf of this new club..."*

6.4.1. Analysis of sports sanctions

The purpose of the rule preventing the national association of the former club from issuing the International Transfer Certificate (ITC) in cases where a player has terminated his employment contract without just cause has always been to protect the contractual stability and to ensure that FIFA regulations on the Status and Transfer of Players are effectively enforced.

This mechanism has several specific purposes, one of the fundamental principles of FIFA's Regulations on the Status and Transfer of Players (RSTP) is the stability of employment contracts in football. By blocking the issuance of the ITC in the event of a breach without cause, FIFA seeks to discourage conduct that undermines the integrity of contracts and to ensure that parties respect the agreed terms, promoting greater accountability in the transfer market.

The idea is that, if a player breaks his contract without just cause and the national association issues the ITC automatically, the player could benefit from his breach by being eligible to play for another club without facing immediate consequences. By prohibiting the issuance of the ITC in these cases, the contractual dispute is forced to be resolved first, preventing the player and the new club from benefiting from the breach.

Thus, the retention of the ITC obliges the parties (player, former club and new club) to resolve the dispute in an appropriate manner, generally through possible direct agreements between the parties or otherwise by requesting a decision from the FIFA Football Tribunal and, ultimately, through the intervention of CAS.

Although the player cannot be immediately sanctioned without due process, the non-issuance of the ITC acts as a deterrent by preventing the player from participating in official competition until the situation is resolved. This protects the rights of the former club while it is determined whether or not there was a justified breach.

If the dispute is not resolved within a reasonable period of time, FIFA may authorise a provisional registration of the player with the new club, in order to prevent his career from being suspended indefinitely. This occurs

in absolutely all cases where it is requested under the principle of the protection of the player's professional career.[27]

The refusal to issue the ITC is also intended to put pressure on the new club, which may be held jointly and severally liable in the event of a termination without just cause, by encouraging quick settlements or resolutions.

In summary, the rule preventing the national association of the former club from issuing the ITC in cases of breach of contract without cause is aimed at preserving contractual stability, promoting respect for employment contracts, and preventing players or clubs from taking undue advantage of breaches of contract. While protecting the rights of the former club, it also seeks to maintain a balance between protecting the player's career and enforcing contractual rules.

However, even if the objective of the rule to maintain contractual stability is very defensible, this should not prevent the player in question from exercising his professional activity, nor should it prevent the new club from registering the player for the sole reason that there is a dispute between the player and his former club concerning a breach of contract that may not have just cause.

Such a situation violates the principle of proportionality, in particular because its application ignores the specific circumstances of each individual case, in particular the factual context in which the breach of contract occurred, the respective behaviour of the player in question and his former club, as well as the role or lack of role played by the new club, which, however, ultimately influences the ban on registering this player and fielding him in competitions.[28]

7. BRIEF COMMENTS ON CONTRACTUAL STABILITY AND SOME HISTORY

The CJEU has considered that maintaining a certain degree of stability in a club may constitute a legitimate objective, provided that the principle of proportionality is respected. In this regard, and although the final decision is left to the discretion of the rosters of the Mons Court of Appeal of, the CJEU seems to suggest that the current regulation cannot be considered proportionate, given that it is not based on objective elements.

27 It is striking that the player Diarra did not use this route, in practice very accessible, to apply for registration at Royal Charleroi.

28 See Point 112 of the judgement.

While arguing that contractual stability should not be considered as a legitimate general interest objective in itself, it should be considered as one of the possible means to contribute to the achievement of the objective valid general interest of ensuring the regularity of inter-club football competitions.[29]

It is clear, then, that the Diarra case is centred on the contractual stability of the contracts of professional football players, considered by the CJEU as one of the possible means to ensure regularity in competitions. In other words, the centrality and importance of this legal principle for the international system of football competitions is not disputed, but some aspects of the regulation that, more than twenty years after its creation, should be corrected, are highlighted.

Contractual stability emerged as a compromise between clubs and players to balance the freedom of movement of players with the need to protect the contracts and investments of clubs. Until the Bosman ruling, it had not been necessary to regulate contractual stability because, in the first place, international transfers were not as frequent as they are now, and secondly, in most countries there was still the right of retention.

With the Eastham vs. Newcastle ruling, the lien was repealed for England[30], and this jurisprudence soon led other countries to follow suit, but only at the national level. Thus, in Argentina, they ceased to apply lien at the national level in 1973 with the enactment of Decree Law 20.160: in Spain in 1979, when the AFE-Clubs agreement was signed and then Royal Decree

---

29 See Point 102 of the judgement, where it is further held that: *"given that the composition of the teams constitutes one of the essential parameters of the competitions in which the clubs compete (judgement of 21 December 2023, Royal Antwerp Football Club, C-680/21, EU:C:2023:1010, paragraph 61), that objective may justify the adoption not only of rules relating, inter alia, to the time-limits for the transfer of players during the competition, referred to in paragraph 100 of this judgement, but also, in principle and without prejudice to their actual content, rules intended to ensure the maintenance of a certain degree of stability in club membership, which serve as a breeding ground for the composition of the teams which those clubs may field during inter-club football competitions".*

30 For an in-depth study of the *retention and transfer system*, see, among others, Chapter 12, entitled "Sport and contracts of employment" of Sports Law (Cavendish Publishing, London, Second Edition, 2001, pp. 527-572) and Professional Sport in the EU: Regulation and Re-regulation (Caiger and Gardiner Editors, TMC Asser Press, The Hague, 2000) where the cases "are analysed in detail. Eastham v. Newcastle" and "Bosman" An analysis of the doctrine of restraint of trade, in the cases of Eastham v. Newcastle in football, Grieg v. Insole in Cricket and Adamson v. New South Wales Rugby League Ltd. in Rugby, can be found in the book Sports Law by BELOFF, KERR and DEMETRIOU, Hart Publishing, Oxford, 1999, p. 83.

318/81 was enacted; and in Italy in 1981, with the enactment of Legge 91/81, to give a few examples.

However, with the Bosman ruling, the European transfer system was analysed, which still contained many countries, including Belgium, that maintained a right of retention at the local level that affected the rules throughout the European Union and had an international impact, as it involved not only clubs from different countries, but also national federations and the UEFA.

The Bosman case had wider implications, not only for European football, but also for other sports, setting precedents on the application of free movement rules to professional athletes and revolutionising European football by allowing players to move freely between clubs at the end of their contracts without transfer fees. It also removed limits on the number of foreign players from the European Union, promoting a more open labour market in European football.

The system of competitions and transfers had returned to the stage before the Retain and Transfer System, which the English had created in 1893 to bring order to the competition and establish, for seventy years (until 1963), a kind of "English-style contractual stability".

As a matter of strict necessity, in 2001, FIFA introduced major reforms to its Regulations on the Status and Transfer of Players (RSTP), consolidating the principle of contractual stability as a pillar of the system through the Agreement between FIFA, UEFA and the European Union. These reforms were partly driven by negotiations with the European Union, mainly due to the effects of the Bosman case, which forced the transfer system to be reconfigured and adapted to the principles of the European single market.

The origin of contractual stability in FIFA's regulations is linked to the need to regulate professional football in a balanced manner, after the disappearance of the lien[31], protecting both the rights of players and the

[31] By way of background information, it is necessary to clarify that, although the right of retention was eliminated at the time, there are still remnants of retention in Argentina and in other countries. For example, article 207 of the General Regulations of the Argentine Football Association (AFA) establishes for players the following "amateur": *"Every year, those registered players who are included in any of the following cases shall be classified as "free" amateur players: a) They have not been classified by the club in whose favour they are registered in the registry. b) They have not participated in an official match of the club in which they are registered for two years. This period shall be counted from the last match played, without counting the term of suspensions applied by the A.F.A.- c) That they have been declared free of action by the respective club and that the A.F.A. has been informed in writing of their decision".* (the underlining belongs to me).

interests of clubs. Its implementation since the 2001 reforms, in the context of the RSTP, reflects a commitment to fostering trust and respect for contracts, consolidating a predictable system that benefits football as a whole.

8. ARE THE BOSMAN AND DIARRA RULINGS COMPARABLE IN THEIR EFFECTS?

Both the Bosman and Diarra rulings, although referring to different specific circumstances, apply general legal principles that impact contractual relationships in professional football. When comparing the legal effects of both decisions, remarkable similarities and differences can be identified.

From the first, the restriction of freedom of movement, both judgements recognise the fundamental right to free movement of workers, enshrined in the Treaty on the Functioning of the European Union, and how sports rules can restrict it.

In "Bosman", the CJEU declared that the rules on transfer fees and the limitation of foreign players violated this right. In "Diarra", the same court also recognised that FIFA rules, articles (in particular article 17) and concordant of the Regulations on the Status and Transfer of Players (RSTP), may hinder the freedom of movement of players.

Both decisions sought to strike a balance between the contractual autonomy of clubs and the rights of players. In "Bosman", the CJEU limited the ability of clubs to impose restrictions on player mobility. In "Diarra", the CJEU analysed the validity of the FIFA rules establishing the joint and several liability of the player and the new club in case of breach of contract without just cause and the corresponding sporting sanctions.

In both cases, the CJEU required an objective justification for any restriction on the free movement of workers. In "Bosman", the court rejected justifications based on the protection of competitive balance and the promotion of the training of young players. In "Diarra", it also analysed whether FIFA's rules complied with the principle of proportionality, i.e., whether they were necessary and appropriate to achieve their legitimate objectives.

As for the differences, these seem to be much greater. The Bosman ruling had a broader and more direct impact on the system, invalidating the rules on transfer compensation and the limitation of foreign players. In contrast, in the Diarra case, the CJEU did not invalidate the FIFA rules, but asked the national court to assess whether the relevant specific rules of the case complied with the requirements of EU law.

"Bosman" focused on restrictions on freedom of movement imposed by the transfer rules and "Diarra", on the other hand, focused on the joint and several liability of the player and the new club in case of breach of contract without just cause and on sporting sanctions, more specific aspects of the RSTP.

Both "Bosman" and "Diarra" demonstrate the complex interaction between EU law and the rules of professional sport. Both decisions contribute to case law that seeks a balance between the interests of clubs and the rights of players, ensuring free competition and the protection of fundamental rights.

The Bosman case transformed transfer rules, while the Diarra case reaffirmed the importance of contractual stability and severance payments by confirming that it remains FIFA's responsibility to establish, protect and enforce an efficient regulatory system for international football to protect the integrity of international sporting competition.

"Bosman" had a transformative impact on European football, changing the rules of the transfer market in a fundamental way; while "Diarra", although important, focused on a more specific area (breach of contract) and its impact is clearly more limited in terms of systemic scope. This is further confirmed by the statistics that, of the total number of transfers, those with unilateral breach of contract do not reach 5% of international transfers.

Following this reasoning, it can be inferred that the Bosman and Diarra rulings are not directly comparable due to their differences in legal context, objective and systemic impact. However, both cases are examples of how players' rights and football regulations are constantly evolving.

9. SUGGESTED CHANGES

The following changes are suggested for the sole purpose of providing ideas:

1) To eliminate the automatic joint and several liability in case of breach of contract without just cause, leaving such a possibility only for cases in which it can be demonstrated that the new club actually induced the breach of contract.
2) Ensure a fair and equitable procedure for the issuance of the ITC that allows the player to demonstrate the existence of just cause for the breach of contract or the lack of merit of the dispute, or eliminate the rule prohibiting the issuance of the ITC in the event of a contractual dispute between the player and his former club.
3) Eliminate the automatic sporting sanctions imposed on clubs and players that hire players who have broken their contracts without

just cause, leaving such a possibility only for cases in which the effective inducement of the new club to break the contract can be demonstrated.[32]

4) Establish objective, less discretionary criteria for determining severance pay. For example, the player's salary, the length of the remaining contract, the player's age and the value of the transfer.

Given that a possible elimination of automatic new club solidarity and sporting sanctions in the context of breach of contract without just cause may discourage clubs from paying high transfer fees and offering contracts with high salaries as hitherto[33], the formation of a guarantee fund, aimed at compensating clubs whose players break their contract without cause, could be an innovative and balanced solution to address this type of conflict in professional football.

This fund could guarantee compensation to the affected clubs while protecting the players' freedom to work for other clubs. This system should ensure that the affected clubs receive compensation commensurate with the financial loss suffered by the breach of contract. With respect to the players, this fund should protect the players' rights by preventing financial sanctions from unfairly impeding the players' labour mobility, without prejudice to the labour liability that may correspond to them.[34]

The fund should be managed independently and be financially sustainable; it could also be administered by FIFA or an independent entity supervised by FIFA, guaranteeing neutrality and compliance with

---

32 However, if inducement is not proven, it should not be forgotten that the new club also has knowledge from the TMS that it is contracting a player with a unilateral breach of contract whose just cause has not yet been determined. In such cases, it seems reasonable that this club assumes, not on the basis of solidarity, but on the basis of unjust enrichment without cause (the Swiss Code of Obligations foresees it in articles 62, 119 and others) consisting of the duty to compensate for a lawful act (hiring a player without having done anything wrong), the obligation to compensate the previous club in case it is determined that the player dissolved the contract without cause. For these purposes, perhaps the ITC itself, or through the TMS, can inform the new club of the eventual parameters of a compensation (at least the amount invested in his record, bonuses, salaries, termination clause, age).

33 If the values of the international transfers of football players were to be substantially lowered, the income from the Solidarity Mechanism would be drastically reduced, seriously harming the training clubs all over the world, especially those in South America and Africa; and of course the salaries, in general, of all professional football players.

34 A neutrally managed and collectively financed fund could provide a fair and sustainable solution to compensate clubs in cases of contractual breaks without cause. This mechanism would strengthen the stability of the international transfer system and reduce tensions between clubs, players and federations.

international regulations. The sources of financing could be contributions from the clubs, a percentage of international transfer revenues, contributions from federations and leagues with a portion of their revenues from television rights or commercials, fines for non-compliance imposed on players or clubs that violate contractual regulations, etc.

10. CONCLUSIONS

The Diarra case, which does not constitute a new Bosman case, only raises crucial questions about the compatibility of the RSTP with EU law, especially with regard to free movement of workers and the competition.

The CJEU's ruling in the Diarra case sets an important precedent by ruling that certain regulations of the RSTP are incompatible with Articles 45 and 101 of the TFEU. This decision has the potential to transform the transfer system in professional football.

The regulations analysed, while seeking to protect contractual stability, negatively affect the ability of players to seek new opportunities and of clubs to compete on a level playing field.

The automatic joint and several liability of the new club in the event of a breach of contract without just cause and the associated sporting sanctions, such as a ban on signing players, or a ban on issuing the ITC, are considered disproportionate restrictions on the free movement of labour and competition.

However, the CJEU decision does not completely invalidate the RSTP, but rather urges FIFA to amend it in order to bring it into conformity whith EU law, opening a space for a constructive dialogue between FIFA and the European institutions, with the aim of finding a balance between the interests of clubs, players and fair play in football.

The Diarra case, while marking a new milestone in the relationship between EU and professional law, and its in-depth analysis may provide valuable insights into the future of football, does not call into question FIFA's position as world football's governing body or its legitimacy to regulate international football.

It is now up to FIFA to initiate a comprehensive dialogue with key stakeholders to determine what conclusions should be drawn from the Diarra decision and what are the most appropriate and desirable changes to be made to Article 17 and the concordant provisions of the FIFA RSTP in order to continue to provide, as in the past, a modern, robust and legitimate regulatory framework for international football.

ISSUES OF STANDING BEFORE THE COURT OF ARBITRATION FOR SPORT

Massimo Coccia

Law Professor, University of Rome Sapienza, Italy
Founding Partner, Coccia De Angelis & Associati Law Firm
(Rome-Milan, Italy)
CAS Arbitrator

ABSTRACT

This article examines the legal doctrine of standing to sue and to be sued before the Court of Arbitration for Sport (CAS), clarifying distinctions between jurisdictional issues and standing issues, and between formal and substantive standing. The analysis also covers FIFA's specific standing to be sued, the implications under Swiss law and CAS jurisprudence. Standing issues, although not jurisdictional, are treated as preliminary merits issues in CAS procedures. The article suggests that CAS panels should adopt a liberal approach with regard to the existence of the so-called legal (or legitimate) interest, which should only be denied if the appealing party would have no benefit whatsoever, not even reputational, in obtaining a judgement in its favour. The article also outlines the consequences of a finding of lack of standing and it draws attention to the distinct approaches under Article 75 of the Swiss Civil Code and CAS appeal proceedings.

KEYWORDS

Standing, CAS, jurisdiction, Swiss law, locus standi, arbitration, FIFA, appeals

ISSUES OF STANDING BEFORE THE COURT OF ARBITRATION FOR SPORT

Massimo Coccia
Law Professor, University of Rome Sapienza, Italy
Founding Partner, Coccia De Angelis & Associati Law Firm (Rome-Milan, Italy)
CAS Arbitrator

Summary: 1. Introduction: standing to sue and to be sued before the CAS. 2. Distinction between CAS appeals and avoidance actions under Article 75 of the Swiss Civil Code. 3. Distinction between formal standing and substantive standing. 4. Formal standing to sue or be sued (*legitimatio ad causam*) in CAS appeals proceedings. 5. Substantive standing to sue (legal or legitimate interest). 6. Substantive standing to be sued. 7. Mandatory standing to be sued. 8. FIFA's standing to be sued before the CAS. 9. Concluding remarks.

1. INTRODUCTION: STANDING TO SUE AND TO BE SUED BEFORE THE CAS

Anyone acting to be, or summoned to be, a party to any CAS arbitration proceedings must have *«standing» (also known as locus standi*), i.e., they must be legally entitled to appear before the CAS.

The notion of standing or *locus standi* is applicable in all CAS arbitration procedures (ordinary, appeal and Olympic) and to both the suing party and the summoned party. Accordingly, a party wishing to bring a case before the CAS must have «standing to sue» («active legitimation» in civil law terminology), and it must summon to the CAS one or more respondents that have standing to be sued («passive legitimation» in civil law terminology).

It is important to point out right away that, under Swiss law, an issue of standing is not an issue of jurisdiction but, rather, an issue that falls within the scope of the merits of the case. This has been clarified by the jurisprudence

of the Swiss Federal Tribunal («SFT»): «standing to sue and to be sued in a civil trial relates to the material basis of the action; it belongs to the subject (active or passive) of the right invoked in court».[1] CAS panels have followed suit: «the Panel deems convenient to clarify that the issue of the standing to sue indeed refers to the merits of the case».[2]

In CAS arbitration proceedings the issue of jurisdiction *ratione personae* can sometimes be confused with the issue of standing, particularly in CAS appeals cases; therefore, one should be careful in distinguishing those legal notions. Indeed, a CAS panel has jurisdiction *ratione personae* over a given entity or individual, who can thus be allowed or compelled to be a party to the arbitration, if that individual or entity is bound by an arbitration agreement that is also binding for the opposing side. However, a party, even if subject to the jurisdiction *ratione personae* of the CAS, can in certain circumstances lack standing to sue or to be sued (as will be seen *infra*); in these situations, the CAS does have jurisdiction but the claim brought by or against that party must be rejected on the merits.

Having spelled out that issues of standing are not jurisdictional and pertain to the merits of the case, a terminological clarification is opportune.

Indeed, issues of standing must definitely be considered as *preliminary* issues to the merits *stricto sensu* of the case (i.e., the ultimate substance of a dispute, where the parties' substantive rights and obligations are determined on the basis of the *lex causae*, i.e., the law applicable to the merits). Accordingly, when we say that issues of standing pertain to the merits, the term «merits» is to be intended *lato sensu* (i.e., in a broad sense), as encompassing all those issues that are not jurisdictional.

Unfortunately, there is some terminology confusion in CAS jurisprudence. In particular, it is often repeated in CAS awards that issues of standing are part of the merits; as said, this is absolutely correct if one refers to the merits *lato sensu* (which includes standing issues), but might become inaccurate if one has in mind the merits *stricto sensu* (which does not include standing issues). In short, issues of standing, although part of the merits, remain preliminary issues that must be determined by a CAS panel before addressing the merits *stricto sensu* of a case. Indeed, if either party argues that the other side lacks standing, an arbitral tribunal must logically analyse this matter before dealing with the full merits of the dispute, that is, before determining who is right and who is wrong in terms of the parties' underlying substantive rights and obligations.

---

1 SFT 128 III 50, 55; the original French text of this judgment so reads: «La légitimation active ou passive dans un procès civil relève du fondement matériel de l'action; elle appartient au sujet (actif ou passif) du droit invoqué en justice».

2 CAS 2018/A/5888 *Centro Atlético Fénix et al. v. FIFA & CONMEBOL & AUF*, para. 154.

Therefore, if a CAS panel considers *prima facie*, either *sua sponte* or because prompted by a party, that there is a relevant problem of standing either to sue or to be sued at stake, which could be dispositive of the case, it might well decide to bifurcate the arbitration proceedings and adjudicate such an issue of standing by means of a preliminary or partial award.

It is also opportune to clarify that, in CAS appeal proceedings, the lack of standing to appeal does not entail the inadmissibility of the appeal but, rather, its rejection on the merits (as a preliminary issue). In particular, there should not be a distinction between an appellant's initial lack of standing (*i.e.*, when filing the statement of appeal), which would lead to the inadmissibility of the appeal, and a lack of standing befallen during the proceedings, which would lead to the rejection of the appeal on the merits. This is a distinction made by the SFT (i) with respect to its own proceedings and (ii) based on the Swiss Law on the Federal Tribunal,[3] and need not, and should not, be applied in CAS proceedings, which have a very different legal nature from that of the SFT proceedings.[4]

The fact that issues of standing do not pertain to jurisdiction, but are to be examined as a preliminary point of the merits, entails four important consequences.

First, a party losing a CAS case may not ask the SFT to set aside the CAS award under Article 190.2(b) of the Swiss Private International Law Act («PILA») if the panel erred on an issue of standing, given that an arbitral tribunal's decision on a merits issue may not be reviewed. Indeed, the SFT stated as follows: «Whether or not a party has standing to appeal the decision of a [sports] body according to the applicable statutory and legal provisions does not affect the jurisdiction of the arbitral tribunal concerned but the issue of standing to sue. [...] The CAS reviewed the conditions of an appeal against the decision of the [sports body], denied the Appellant's standing to appeal and therefore rejected its submissions. The SFT does not review whether or not the Arbitral Tribunal rightly applied the law on which its decision rests. The Appellant's arguments therefore come to nothing».[5]

---

3 See the SFT judgments 4A_620/2015 of 1 April 2016, para. 1.1, and 4A_426/2017 of 17 April 2018, para. 3.1, both making reference to Article 76.1.b LTF.

4 Hence, it does not appear legally justified or appropriate the distinction – advocated by FIFA and accepted by the panel in the award TAS 2025/A/11314-11315-11316 *Club de Fútbol Pachuca, Club León c. FIFA*, para. 142 – between an appellant's lack of standing to sue *ab initio*, which would lead to the inadmissibility of the appeal to the CAS, and a lack of standing occurred during the proceedings, which would lead to the rejection of the appeal on the merits.

5 SFT, judgement 4A_424/2008 of 22 January 2009, *Azerbaijan Field Hockey*, para. 3.3 (translated in English from the original text in German).

Second, given that Article 186.2 PILA does not apply to issues of merits,[6] a party which does not immediately raise an issue of standing in its first submission to the CAS is not precluded to later argue the lack of standing of the other party (subject, of course, to the procedural preclusions of Article R56 of the CAS Code).

Third, contrary to what occurs for jurisdictional issues (where, under Swiss law, a party not objecting to the jurisdiction of an arbitral tribunal is considered to have accepted it), a CAS panel may address issues of standing *sua sponte*, on its own motion, even if the parties have not raised them in their submissions. Of course, to avoid taking the parties by surprise and, thus, to avoid violating their right to be heard, a CAS panel must give the parties the opportunity to comment upon such issues of standing before dealing with them in an award.[7]

Fourth, if an arbitral tribunal declares that a claimant, appellant or respondent lacks standing, the underlying substantive dispute may not be litigated again in another arbitral or judicial forum; while, on the contrary, if an arbitral tribunal declines to adjudicate a case for lack of jurisdiction, the underlying substantive dispute remains unadjudicated and could in principle be relitigated before the competent judge, for example a State court (unless this is precluded by some other legal obstacle, such as a statute of limitation).

2. DISTINCTION BETWEEN CAS APPEALS AND AVOIDANCE ACTIONS UNDER ARTICLE 75 OF THE SWISS CIVIL CODE

As a preliminary point, which is specifically relevant to the issue of standing to be sued in appeals proceedings, it must be recalled that, under Article 75 of the Swiss Civil Code (CC), when a member of a Swiss association challenges an association decision before a Swiss court, bringing a so-called «action for avoidance», the only party having standing to be sued is the association itself and not any other member of the association.

---

6 Under Article 186.2 PILA: «Any objection to [the arbitral tribunal's] jurisdiction must be raised prior to any defence on the merits».

7 SFT, judgement 4A_400/2008 of 9 February 2009, *Urquijo Goitia*: «Generally, according to the principle *jura novit curia*, state or arbitral tribunals are free to assess the legal relevance of factual findings and they may adjudicate based on different legal grounds from those submitted by the parties. [...] Exceptionally, the parties must be invited to express their position if the court or the arbitral tribunal considers basing its decision on a provision or legal consideration, which has not been discussed during the proceedings and which the parties could not have suspected to be relevant. [...] In this case, the Appellant claims, with reason, to have been taken by surprise» (paras. 3.1-3.2, translated from the French original).

As will be seen *infra*, CAS panels have tackled the issue of standing to be sued in appeals proceedings – with regards to the decisions of sports bodies incorporated as Swiss associations, as is the case of FIFA – in a distinctive way, different in several respects from the way the same issue is dealt with by Swiss cantonal courts under Article 75 CC. Interestingly, the SFT has recognised the peculiarities of sports arbitration and has not objected to this differentiation in terms of standing to be sued between appeals arbitration proceedings before CAS panels and Article 75 CC proceedings before Swiss courts.

It is true that the SFT stated that «the proceedings in front of the CAS, in which the Respondent challenged the denial by FIFA of the compensation sought, are nothing else than the arbitral adjudication of a challenge against a decision of a Swiss association».[8] However, the SFT never said in any of its judgments that a challenge against a sports association's decision brought before a Swiss court and an appeal brought before the CAS (on the basis of an arbitration clause included in the association rules) must be considered as having the same legal nature and involving the same procedure.

Even if the substantive right to challenge a Swiss association's decision derives in any case from Article 75 CC, the two actions – the one before Swiss courts and the one before the CAS – are different in several respects.

One important difference, in particular, concerns the power of review. In the case of a standard action for avoidance of a resolution of a Swiss association under Article 75 CC, the competent Swiss ordinary courts may only annul the association decision (in French legal parlance, they only have a «*pouvoir cassatoire*»); whereas CAS panels have a *de novo* power of review and are allowed not only to annul the decision, but also to issue a new decision which replaces the challenged decision (Article R57 of the CAS Code). Another important difference specifically concerns standing to be sued. When an association resolution is challenged before a Swiss court, only the association and not the other members of the association must be sued; whereas in CAS appeals proceedings, other members may have standing to be sued besides the association itself. Indeed, in appeals before the CAS, the other interested parties to a horizontal dispute do have standing to be sued and must be summoned in the proceedings.

All this confirms that CAS appeal proceedings, based on complex and detailed regulatory frameworks of sports associations, are quite different

8 SFT Judgement no. 4A_490/2009 of 13 April 2010, *Atletico v. Benfica*, para. 2.2.1, translated from the original German text: «Beim Verfahren vor dem TAS, in dem sich [Benfica] gegen die von der FIFA verweigerte Zusprechung der verlangten Entschädigungszahlung wehrt, handelt es sich letztlich um nichts anderes als eine schiedsgerichtliche Beurteilung der Anfechtung eines von einem schweizerischen Verein gefassten Beschlusses».

from the actions for avoidance of a resolution of a Swiss association under Article 75 CC and, therefore, the legal solutions to be given to the various issues related to standing to sue and to be sued can be specifically tailored on the peculiarities of CAS appeals proceedings.

3. DISTINCTION BETWEEN FORMAL STANDING AND SUBSTANTIVE STANDING

The notion of standing in CAS arbitration is characterised by both a *formal* requirement and a *substantive* requirement.

On the one hand, the «formal standing» element, also known as «*legitimatio ad causam*», requires that the party suing or being sued has, under the applicable rules, the legal status entitling it to bring a legal action as claimant/appellant or to be summoned as respondent; however, the applicable rules do not always set out this requirement and, thus, this is not always a relevant element in the analysis.

On the other hand, the «substantive standing» element, also known as «legal interest» or «legitimate interest» («interest to act» in civil law parlance), must always be present and requires that the suing or responding party has something at stake in the dispute that deserves legal protection. It must be noted that, when the applicable regulations of the sports organisation that adopted the appealed decision do not provide anything with regard to formal standing, not even implicitly, the only relevant requirement to be fulfilled is that of substantive standing.

The FIFA Disciplinary Code («FDC») is quite interesting because it makes reference to both the formal standing and the substantive standing requirements. Indeed, paragraph 1 of Article 62 (labelled «Standing to appeal») of the 2025 edition of the FDC so provides: «Anyone who has been a party to the proceedings before the Disciplinary Committee may lodge an appeal with the Appeal Committee [*formal standing*], provided this party has a legally protected interest in filing the appeal [*substantive standing*]». Although Article 62.1 FDC only makes reference to internal FIFA appeals, CAS panels have applied this rule *pari passu* to appeals to CAS against the decisions of the FIFA Appeal Committee: «The Panel is of the view that both common sense and the reference included in Art. 49 [now 52] FDC to the "*provisions of this Code*" [...] render the standing to appeal requirements set forth by Art. 58 [now 62] FDC applicable not only to the internal appeals to the FIFA Appeal Committee, but also to the external appeals to the CAS».[9]

[9] TAS 2022/A/9175 *FPF c. FEF & FIFA*, TAS 2022/A/9176 *FFC c. FEF, Castillo Segura & FIFA*, para. 146; see also CAS 2008/A/1658 *FC Timisoara v. FIFA & RFF*, para. 111.

4. FORMAL STANDING TO SUE OR BE SUED (*LEGITIMATIO AD CAUSAM*) IN CAS APPEALS PROCEEDINGS.

In CAS appeal proceedings, the parties must often comply with a requirement of formal standing or *legitimatio ad causam*. Indeed, if the regulations of the sports body adopting the contested decision include rules specifying who may and who may not appeal, those rules determine who has formal standing to sue.

A typical example of this is Article 13.2.3 of the World Anti-Doping Code (WADC), which explicitly lists who is entitled to appeal: «[...] the following parties shall have the right to appeal to CAS: (a) the Athlete or other Person who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) the relevant International Federation; (d) the National Anti-Doping Organisation of the Person's country of residence or countries where the Person is a national or licence holder; (e) the International Olympic Committee or International Paralympic Committee, as applicable, where the decision may have an effect in relation to the Olympic Games or Paralympic Games, including decisions affecting eligibility for the Olympic Games or Paralympic Games; and (f) WADA».

Interestingly, this provision of the WADC implicitly excludes that a competitor of the athlete accused of doping may challenge before the CAS the decision imposing or not a doping sanction. This is illustrated by a CAS case where the panel stated that both appellants (an athlete and its National Olympic Committee) lacked standing to appeal as they were not mentioned in the applicable anti-doping rules (identical to the WADC) listing the parties entitled to appeal a doping decision to the CAS: «It is evident that neither a competitor (of the athlete subject to an anti-doping decision) nor his National Olympic Committee are among the individuals or organisations listed therein. This interpretation is confirmed by the Comment on the WADA Code [...] which unambiguously states that such list of persons or organisations having standing to appeal "does not include Athletes, or their federations, who might benefit from having another competitor disqualified"».[10]

An analogous situation occurred in a case decided by an *ad hoc* CAS panel at the Olympic Games of Beijing 2008, where the Azerbaijan National Olympic Committee, the Azerbaijan Field Hockey Federation and the players of the Azerbaijan National Field Hockey Team were unsuccessful in bringing a case against the International Hockey Federation (FIH) attempting to have the Spanish female hockey team excluded from the Olympic Games, since they failed to demonstrate that they had formal standing to sue under

[10] CAS 2004/A/748 *ROC & Ekimov v. IOC, USOC & Hamilton*, para. 119.

the applicable rules. In particular, the CAS panel reasoned (a) that Article 13.2.3 of the FIH Anti-Doping Policy (modelled on the WADC) provided an exhaustive list of parties entitled to appeal a decision of the FIH Disciplinary Commission, and (b) that such list included the accused athletes, the FIH, the IOC and WADA, but made no room for an appeal from other parties: «the Applicants were not a party, nor were they entitled to be an interested party before the Disciplinary Commission. Once the Disciplinary Commission has issued its Decision [...] the Applicants have no rights of appeal under Art. 13, and more particularly, under the applicable Art. 13.2.3. The Panel must conclude that the Applicants have no standing to make this Application to the CAS ad hoc division».[11]

Sometimes, the requirement of formal standing can also be relevant with regard to a respondent's standing to be sued. This occurs whenever the pertinent sports rules specifically state who must be summoned as a respondent in case of an appeal to the CAS. This is the case, for example, of Article 64 of the Euroleague Basketball Disciplinary Code, which provides that it is possible to file an appeal before the CAS against «rulings for serious infringements» and specifies that the «defendant to be named in such appeals is [Euroleague Properties S.A.] and any other party to the proceedings before the hearing bodies».

When a party has formal standing to sue or to be sued, this may or may not be sufficient *per se* to establish its standing. In fact, it depends on how the applicable sports regulations are drafted. Usually, the *substantive* standing requirement (i.e., the existence of a *legitimate or legal interest* to be a party in the arbitration), which will be dealt with *infra*, must also be satisfied in addition to the formal standing requirement.

Sometimes, however, the applicable sports regulations, in granting formal standing to a given party (or category of parties), explicitly or implicitly exclude the need to also prove the existence of a legal interest. It can be said that, when the applicable sports regulations explicitly provide that a given party has standing to sue regardless of any demonstration of legal interest, that party is conferred a sort of «constructive legal interest».

It must also be pointed out that – notwithstanding the general principle that a party has standing only to protect its own rights and not those of another party[12] – sometimes the applicable sports rules grant the right to

[11] CAS OG 08/01 *ANOC, AFHF, et al. v. FIH, RFEH, IOC, WADA & Spanish Olympic Committee*, paras. 3.10-3.12.

[12] See CAS 2005/A/889 *Mathare United FC v. Al-Arabi FC*, paras. 16-17: «the Appellant claims compensation both for the period in which the Player played for Mathare United and for the years in which the Player played as an amateur within MYSA. Yet, the Appellant has not provided any evidence of a legal proxy given by

appeal not only to the party directly affected by a decision but also to a different party. This is exactly what is provided by Article 62.2 of the FDC, allowing clubs or national federations to challenge – not only before the FIFA Appeal Committee but also, subsequently, before the CAS – a disciplinary sanction imposed by FIFA on one of their players, officials or members: «Member associations and clubs may appeal against decisions sanctioning their players, officials or members». This is an interesting provision, which determines a situation that can be legally qualified as one of *procedural substitution*, as explained by a CAS panel: «The Panel considers that Article 58.2 [now 62.2] FDC establishes a situation of "procedural substitution" (a legal situation known in various national legal systems, when a person is allowed to act in his or her own name by exercising a claim that originally belongs to a third party). In essence, this provision grants the Club the right to "put itself in the Player's shoes" and exercise in its name all the rights the Player would have had as if he had himself appealed the Appealed Decision. The Panel acknowledges that, without Article 58.2 FDC, the Club would not have had standing to appeal the decision against the Player because, in principle, one can only resort to the CAS to protect one's own rights and not those of third parties (see CAS 2005/A/889). However, as already stated, Article 58.2 FDC grants the appealing club formal standing to sue by granting it the power to procedurally substitute the Player»[13].

Sakayonsa FC and/or MYSA to Mathare United in order to represent their claims before the CAS. Indeed, the Panel sees no evidence nor legal guarantee that any compensation eventually granted to Mathare United in reference to the Sakayonsa FC and MYSA training years would actually be received by Sakayonsa FC or by MYSA. 17. Accordingly, the Panel is of the opinion that the Appellant is not entitled to properly bring a claim for compensation against the Respondent in reference to the Player's training periods with Sakayonsa FC and MYSA. The Panel thus holds that the Appellant has standing to claim compensation only in reference to the Player's training period with Mathare United».

13 TAS 2021/A/7650 *Club Atlético de Madrid S.A.D. c. FIFA*, paras. 76-77; the quoted passage is translated from the Spanish original: «La Formación considera que el Artículo 58.2 del CDF determina una situación de "sustitución procesal" (situación jurídica conocida en distintos ordenamientos nacionales, cuando se permite a una persona actuar en nombre propio ejercitando una pretensión que pertenece en principio a un tercero). En esencia, esta disposición otorga al Club el derecho de "ponerse en los zapatos" del Jugador y ejercer en nombre propio todos los derechos que tuviera el Jugador como si él mismo hubiera recurrido la Decisión Apelada. La Formación reconoce que, sin el artículo 58.2 del CDF, el Club no hubiera estado legitimado para apelar la decisión contra el Jugador porque, en principio, solo se puede acudir ante el TAS para proteger sus propios derechos y no los derechos de terceros. Sin embargo, como ya se ha dicho, el artículo 58.2 del CDF le da al club Apelante legitimación activa estatutaria al otorgarle el poder de sustituir procesalmente al Jugador» (paragraph numbers and citations omitted).

A form of procedural substitution has also been customarily allowed in CAS proceedings taking place before the CAS ad hoc division that has been established for each and every edition of the Olympic Games since 1996. Indeed, in CAS Olympic proceedings, national olympic committees or national federations sometimes bring or oppose claims on behalf of their athletes, or on their side, and this has never been opposed by anybody in terms of lack of standing[14].

As a matter of course, these forms of procedural substitution in CAS proceedings only grant formal standing to sue and do not exclude the need to prove the interested party's substantive standing to sue (*i.e.*, its legal or legitimate interest)[15].

5. SUBSTANTIVE STANDING TO SUE (LEGAL OR LEGITIMATE INTEREST)

Some CAS panels have characterised the notion of substantive standing – often defined as «legal interest» or «legitimate interest» – as an «aggrievement requirement», stating that «only an aggrieved party, having something at stake and thus a concrete interest in challenging a decision adopted by a sports body, may appeal to the CAS against that decision».[16] In other words, a party has no standing to sue if it «is not directly affected by the decision appealed from».[17] As said in French, «*pas d'intérêt, pas d'action*» (i.e., «no interest, no action»).

Indeed, as stated by a CAS panel, «the above described "aggrievement requirement" is an essential element to determine the legal interest and the standing of a party to appeal before the CAS a sports body's decision, because the duty assigned to a panel by the CAS Code rules governing the appeal arbitration procedure is that of solving an actual dispute and not that of delivering an advisory opinion to a party that has not been aggrieved by the appealed decision».[18]

Another CAS panel stated as follows: «A court shall only have to decide the merits of a request, if the applicant has a sufficient legal interest in the outcome of the decision. If, on the contrary, the request is not helpful in

---

14 See, e.g., CAS OG 12/10 *Swedish National Olympic Committee, Swedish Triathlon Federation v. ITU*; CAS OG 12/04 *Federación Española Piragüismo v. ICF*; CAS OG 02/006 *New Zealand Olympic Committee v. Salt Lake Organizing Committee, FIS, IOC*.

15 See TAS 2021/A/7650 *Club Atlético de Madrid S.A.D. c. FIFA*, paras. 78-81.

16 CAS 2009/A/1880-1881 *FC Sion & El-Hadary v. FIFA & Al-Ahly SC*, Final Award, para. 153.

17 CAS 2006/A/1206 *Zivadinovic v. IFA*, para. 31.

18 CAS 2009/A/1880-1881 *FC Sion & El-Hadary v. FIFA & Al-Ahly SC*, Final Award, para. 154.

pursuing the applicant's final goal, the judicial resources shall not be wasted on such matter».[19]

It is important to note that such legal (or legitimate) interest must be present not only at the beginning of the case, but also at the time of the final award.[20] As stated by a CAS panel: «This legitimate interest must exist not only at the time the appeal is filed, but also when the decision is issued and, therefore, if the interest disappears during the proceedings, the appeal must be dismissed»[21]

The requirement of a sufficient interest at stake in the dispute can be of a financial or a sporting nature or even merely reputational. A CAS panel so stated: «The requirement of standing to sue or standing to appeal has been dealt with many times by CAS panels, in particular in connection with appeals against decisions of sporting bodies. In principle, standing to sue is recognised if a person appealing against a certain decision has an interest worthy of protection, i.e., a sufficient interest in the matter being appealed (cf. CAS 2008/A/1674; CAS 2010/A/2354). In other words, an appellant has to demonstrate that he or she is sufficiently affected by the appealed decision and has a tangible interest, of financial or sporting nature, at stake».[22]

With regard to disciplinary cases, the imposition of a sanction can be deemed to always generate a reputational damage for the sanctioned individual or entity: « Any disciplinary sanction – including, as in this case, the extension of its scope of application – also entails damage to the reputation of the sanctioned person»[23]

The requirement of legal (or legitimate) interest to appeal has been discussed in several CAS awards, and the jurisprudence has been varying, some panels being more rigorous and other panels being more liberal

19 CAS 2020/A/7590-7591 *Hungarian and Russian Canoe Federations v. International Canoe Federation*, para. 84.

20 See CAS 2018/A/5746 *Trabzonspor v. TFF, Fenerbahçe, FIFA*, para. 173; SFT, Judgment 4A_426/2017 of 17 April 2018, para. 3.1.

21 TAS 2021/A/7650 *Club Atlético de Madrid SAD c. FIFA*, para. 8; the quoted passage is translated from the following Spanish original: «este interés legítimo debe existir no únicamente en el momento en que se presente el recurso sino también cuando se emita la decisión y que, por ende, si el interés desaparece durante el procedimiento, la apelación debe ser desestimada».. See also CAS 2018/A/5746, para. 173, and SFT 4A_426/2017, para. 3.1, and 4A_620/2015, para. 1.1.

22 CAS 2013/A/3140 *A. v. Club Atlético de Madrid SAD & RFEF & FIFA*, para. 8.3.

23 TAS 2021/A/7650 *Club Atlético de Madrid S.A.D. c. FIFA*, para. 81; the quoted passage is translated from the following Spanish original: «cualquier sanción disciplinaria – inclusive, como en este caso, la ampliación de su ámbito de aplicación – conlleva también un daño a la reputación de la persona sancionada».

in determining the presence of a legal interest and, thus, of substantive standing to sue.

It is submitted that a liberal approach is appropriate in CAS arbitration and that, therefore, the presence of a legal interest, and thus of standing to appeal, should only be denied if the appealing party would have no benefit whatsoever, not even reputational, in obtaining a judgement in its favour. The rationale for this approach has been clearly spelled out in an award written by a prominent CAS arbitrator, Professor Ulrich Haas: «In order for the claim to be admissible, the Appellant must have a legal interest ("*Rechtsschutzinteresse*", "*intérêt d'agir*"). Since the requirement of a legal interest determines in a given case whether a claimant has access to justice, *the bar must be set with prudence and – in any respect – not too high*. The requirement of a legal interest is of a procedural nature. [...] In principle, the Sole Arbitrator finds that the threshold for a legal interest must be set low before an arbitral tribunal. The prerequisite of a legal interest is designed to protect the courts from being deadlocked with needless disputes. The prerequisite, thus, helps to manage the work load of the courts and to protect scarce public resources. The answer to the question, however, what disputes shall be considered "needless" is very different in cases in which the state provides and pays for courts that adjudicate a dispute compared to cases where the parties mandate and pay (in full) a private institution to adjudicate the matter. In the latter case, *a legal interest should only be denied if there is no benefit for the party whatsoever in obtaining a judgement in this matter in his or her favour*».[24]

In line with the said liberal approach, in some cases, even a party who was not present during the previous instance's proceedings, but who acquired the legal interest to appeal after the appealed decision was issued, may be deemed to have legal interest and, thus, standing to appeal (as was stated by a panel chaired by another prominent CAS arbitrator, Professor Luigi Fumagalli): «The Panel, however, notes that the Player only signed his employment contract with the Club on 16 July 2014, i.e., after the FIFA decisions had been adopted. Up to that moment, the Club did not have any direct interest, which became actual only when the employment contract was signed. Therefore, FC Barcelona could not participate in the FIFA proceedings. The Panel is of the view that in a case where the FIFA authorities are issuing a sanction against a player and such sanction affects direct financial interests of a club, such club must have the possibility to appeal (within the applicable deadline) such decision in order to be able to protect its legal interests, even if these interests became actual after the challenged decision was issued. For this reason and in the specific circumstances of the

[24] CAS 2017/A/5054 *Martin Fenin v. FC Istres Ouest Provence*, paras. 71-74 (emphasis added).

case at hand, the Panel finds that the Club has a standing to sue, even if it was not a party to the proceedings before the first and second FIFA instance; the direct legally protected interest of the Club justifies its own request for an amendment or cancellation of the Appealed Decision».[25]

A recent CAS award corroborates the here advocated liberal approach: «the Panel considers that, while limiting access to public judicial dockets is an understandable policy concern which warrants a strict application of the matter of standing, such considerations diminish or lose weight in the context of proceedings before private arbitral institutions. [...] as the cited CAS precedent aptly puts it, the bar to access to justice must be set with *prudence* (*i.e., reasonableness*). In exercising this standard, the Panel is fully aware that an appellant seeking redress from an arbitral tribunal must hold a legitimate interest worthy of protection when filing its appeal. On this point, the Panel is sufficiently satisfied – in attention of the circumstances of this case – by the First Appellant's contention that its interest lies in the reputational consequences of the First Appealed Decision».[26]

6. SUBSTANTIVE STANDING TO BE SUED

Obviously, exactly as the claimant or appellant must have standing to sue, a respondent summoned into a CAS arbitration must have substantive standing to be sued, i.e., it must have some stake in the dispute. The CAS Code does not contain any specific rule about this matter, but it is a very clear principle under Swiss law that «the defending party has standing to be sued (*légitimation passive*) if it is personally obliged by the "disputed right" at stake [...]. In other words, a party has standing to be sued and may thus be summoned before the CAS only if it has some stake in the dispute because something is sought against it».[27]

For example, in a CAS case, a Swedish club lodged an appeal against a FIFA decision, naming as respondents both a French club and the French Football Federation (FFF). The FFF asked to be excluded from the case and the sole arbitrator remarked that the FFF was not a party to the case before FIFA and,

---

25 CAS 2014/A/3665, 3666 & 3667 *Luis Suárez, FC Barcelona & AUF v. FIFA*, paras. 48-49. As background to this case, FC Barcelona hired the Uruguayan striker Luis Suárez when the FIFA decision sanctioning him for having bitten an opposing player during the Uruguay-Italy match of the 2014 FIFA World Cup had already been adopted.

26 TAS 2025/A/11314-11315-11316 *Club de Fútbol Pachuca, Club León c. FIFA*, paras. 143-145 (paragraph numbers omitted).

27 CAS 2007/A/1329 & 1330 *Chiapas F.C. v. Cricuma Esporte Clube & Reinaldo de Souza*, para. 3.

moreover, that «the Appellant is not claiming anything against the FFF and [...] the FFF has nothing at stake in this dispute. Accordingly, the Sole Arbitrator finds that the Appellant erred in summoning the FFF as a respondent because the FFF lacks standing to be sued in connection with this case».[28]

In another case, a football coach filed an appeal before the CAS challenging a decision of the appeal commission of the Romanian Professional Football League (RPFL) that had adjudicated a dispute between the coach and a club and summoning as respondents the interested club and the Romanian Football Federation (RFF), but not the RPFL. The CAS panel held that the RFF did not have standing to be sued because it was a separate entity from the body that had ruled on the dispute (the RFPL) and did not have anything to do with the appealed decision.[29]

An interesting situation occurred in a case where a party to a disciplinary case before FIFA appealed to the CAS, trying to also summon as a respondent a player who had not been a party to the FIFA disciplinary case, asking the panel to impose on him a sanction.[30] The panel rejected such attempt by observing that «the FIFA Disciplinary Committee, in exercising its discretion under Article 52 [now 55] FDC, decided not to bring charges and open a proceeding against the Player [and] that no FIFA rule allows the FFC to start before the CAS a disciplinary action against the Player. Accordingly, the Panel holds that the FFC could not summon the Player as a respondent because he lacks standing to be sued in connection with the present proceedings. To hold otherwise would essentially mean granting the FFC the unfettered authority to decide in the place of FIFA whether and when to bring charges and open a disciplinary proceeding against someone else (here the Player) pursuant to Article 52 [now 55] FDC. Under that provision, however, said authority rests solely in the hands of FIFA, as was confirmed in CAS 2017/A/5001 & 5002».[31]

7. MANDATORY STANDING TO BE SUED

In some CAS cases, the claimant or appellant does not summon into the case as respondent a third party whose rights would be affected by all or

28 CAS 2006/A/1189 *IFK Norrköping v. Trinité Sports FC & FFF*, para. 5.

29 CAS 2009/A/1974 *N. v. S.C.F.C. Universitatea Craiova & RFF*. See also the award CAS 2020/A/7590 & 7591 *Hungarian Canoe Federation & Russian Canoe Federation v. ICF*, where the panel held that the ICF had no standing to be sued because the relevant decision affecting the appellants had been made by the IOC.

30 TAS 2022/A/9175-9176 *FPF c. FEF & FIFA, FFC c. FEF, Castillo Segura & FIFA*, paras. 161 et seq.

31 *Ibidem*.

part of the relief requested. However, a CAS panel may not adopt an award that would impact on the rights of a third party.

This can be defined as a situation of «passive mandatory litisconsortium» (or «passive mandatory joinder»). This means that a claimant or appellant, when filing with the CAS a request for arbitration (ordinary arbitration procedure) or a statement of appeal (appeal arbitration procedure), must necessarily summon as respondents all the parties against whom it is seeking some relief or whose rights would be inevitably affected by an award upholding its motions for relief. If the claimant or appellant fails to pursue that procedural course, the CAS panel is bound to reject the pertinent motions for relief.

Of course, the various motions for relief submitted by the claimant or appellant must be examined separately; if any of them could be upheld without affecting the rights of any third party, the CAS panel may deal with those requests for relief on their merits (*stricto sensu*) and only reject on a preliminary basis (i.e., as part of the merits *lato sensu*) those requests for relief that would unavoidably affect the rights of a third party.

The above has been acknowledged in CAS jurisprudence, as can be seen in the following three examples.

First, in the context of a dispute involving two different Kenyan factions, both claiming to be the true and legitimate Kenyan football federation and asking to be recognised as such by FIFA, one of the factions started a case against FIFA without summoning as respondent the other faction; the CAS panel so stated: «In the Panel's view, it could be considered that the sort of requests made by KFF in this arbitration procedure necessitate it addressing its claim not only against FIFA but also against FKL, acknowledging a sort of *passive mandatory litisconsortium*. Accordingly, some requests would be raised against FIFA, i.e., KFF's request to be recognised as a FIFA member; other requests would have to be raised against FKL, i.e., KFF's request to be the one and only Kenyan member recognised by FIFA and KFF's request to have FIFA be prevented to interfere in the Kenyan membership of KFF. [...] FKL should have had the chance to intervene and defend its case, and this was in the Claimant's hands, as it was the one who decided to start the claim and to determine which parties had to be involved in it. The above mentioned status of FKL and its non-participation to these proceedings could be considered as an issue of *passive mandatory litisconsortium* and could lead to the dismissal of KFF's claim»[32].

Second, in the context of a dispute between two national football federations, where the federation of Namibia contended that the federation

[32] CAS 2008/O/1808 *KFF v. FIFA*, paras. 68-70, paragraph numbers omitted, emphasis added.

of Burkina Faso had fielded an ineligible player in the qualifiers for the 2012 Africa Cup of Nations, the federation of Namibia appealed against the decision by which the African Football Confederation (CAF) rejected its complaint; the CAS panel so stated: «The Appellant did not bring the Burkina Faso FF into these proceedings and the scope of the Panel's review is limited to those prayers that the Respondent [CAF] is the subject of. The Appellant's prayers for relief included the request that the Panel determine that "*(...) Burkina Faso should lose the two matches by penalty (3-0). This again would have the consequence that the team of the Namibian Football Association would take part in the final round of the Africa Cup of Nations instead [of] the team of Burkina Faso*". The Panel noted that it was ultimately the choice of the Appellant against whom it appealed, but by not including the Burkina Faso FF as a party, the Panel has determined that its scope of review is limited to a review of the Appealed Decision alone. In the event that, on the merits, it is determined to overturn the Appealed Decision, then this Panel would be unable to go further and issue an award that would have the effect of replacing Burkina Faso with Namibia at AFCON 2012. [...] The Panel does not consider the CAF as the "passive subject" of the claim brought before CAS by way of the appeal against CAF's decision, as CAF's rights are not relevant to the relief sought by the Appellant. The Panel are satisfied that the CAF does not have the standing to be sued in relation to the entirety of the Appellant's prayers for relief».[33]

Third, in the context of a dispute where the football federations of Chile and Peru contended that the federation of Ecuador had fielded an ineligible player in the qualifiers of Conmebol (the South-American Confederation) for the 2022 FIFA World Cup, the Chilean and Peruvian federations appealed against the FIFA's decision to reject their complaints and summoned as respondents FIFA and the Ecuadorian Federation; FIFA argued that they should have summoned also the other national federations who had taken part in the South-American qualifiers. The CAS panel so stated: «FIFA argues that the present appeal must be dismissed because there is a lack of standing to be sued of the current Respondents due to the lack of so-called "passive mandatory joinder", also referred to as "passive mandatory litisconsortium". [...] The Panel finds that it was not necessary for the Appellants to name as respondents the other member federations of Conmebol for the following reasons. [...] With regard to CAS cases concerning disciplinary sanctions, the duty to name other competitors in addition to the sports body that issued the appealed decision is dependent on the applicable sports regulations. When the applicable sports regulations do not address this issue, CAS jurisprudence

[33] CAS 2011/A/2654 *Namibia FA v. CAF*, paras. 16-18, paragraph numbers omitted, italics in the original.

shows that third parties must be named by an appellant only when something is requested directly against them (typically, in cases when an appellant seeks to take the place of another participant in a competition). Therefore, the issue raised by FIFA can be relevant only in cases where some motions for relief put forward by an appellant, if upheld, would directly and irremediably affect in a significant way the direct, personal and actual rights of a third party that has not been summoned as a respondent. [...] this is not the case in the present proceedings. [...] the other member federations of CONMEBOL could only derive benefits but not any disadvantages from the Panel's eventual decision. Indeed, if the Panel were to sanction the FEF with a point deduction, forfeiture of matches or exclusion from the FIFA World Cup, those national federations could actually move up the standings of the World Cup Qualifiers, but not suffer any negative effects such as being demoted in the standings from a qualifying position. Therefore, their direct, personal and actual rights could not be affected by the appeals filed by the FFC and the FPF. As a result, the Panel can deal with the requests for relief sought by the Appellants without violating the right to be heard of any third party. [...] the Panel observes that, unlike in CAS 2017/A/5001 & 5002, in the present case the World Cup Qualifiers for CONMEBOL had already finished by the time the complaint was filed by the FFC, meaning that the final outcome of the standings was already known. Accordingly, it was already known that these other member federations of CONMEBOL (i) would not be negatively affected by whatever outcome of the present case and (ii) would not finish in a qualifying position even if they were to obtain additional points from the FEF being imposed a point deduction, forfeiture or exclusion from the FIFA World Cup».[34]

To conclude on this point, CAS jurisprudence shows that parties must be very careful in deciding whom to summon in a CAS case; of course, in case of doubt, it is better to summon a party and then let the CAS panel exclude that party from the case, rather than risking the dismissal of the case for not having summoned as a respondent a party whose rights would be affected by the relief requested.

8. FIFA'S STANDING TO BE SUED BEFORE THE CAS

Many CAS cases have dealt with the issue of FIFA's standing to be sued in appellate proceedings deriving from decisions issued by FIFA justice bodies. In this connection, a distinction must be drawn between decisions

[34] TAS 2022/A/9175-9176 *FPF c. FEF & FIFA, FFC c. FEF, Castillo Segura & FIFA*, paras. 165-171, paragraph numbers omitted.

on «vertical disputes» and decisions on «horizontal disputes». A decision on a «vertical dispute» occurs when a sports governing body adopts a measure affecting its relationship with a natural or legal person subject to its authority (typically a disciplinary, eligibility or membership decision targeting a direct or indirect member of that body). A decision on a «horizontal dispute» occurs when a sports governing body acts merely as a neutral adjudicator and adopts a decision resolving a dispute between individuals or entities subject to its authority (typically a contractual dispute between two or more of its direct or indirect members). Of course, there are also cases encompassing both a horizontal and a vertical dispute.

On the one hand, there can be no doubt that FIFA has standing to be sued and must be summoned before the CAS as respondent whenever there is an appeal against a FIFA decision ruling on a «vertical dispute», that is to say a dispute between FIFA itself and one of its direct members (a national football federation) or indirect members (in particular, a club, a player or a coach). This certainly occurs whenever FIFA exerts its disciplinary authority over one of its direct or indirect members,[35] but it also occurs in disputes related to membership, admission, recognition, eligibility or corporate matters between FIFA and one of its direct or indirect members, even if other direct or indirect members of FIFA can be affected and thus summoned as respondents into the case.[36]

In this connection, in a case concerning the issuance of a provisional ITC, a CAS panel so stated: «The issuance of a provisional registration for a player with a national federation touches upon the relationship between FIFA and its members. It does not interfere with the relationship among clubs. The proceedings put in place to accord or refuse an ITC, in the Panel's view, are meant to protect an essential interest of FIFA. [...] when assuming the competences conferred on it according to the RSTP FIFA is exercising an administrative function and, thus, having an impact on the rights and duties of its individual members in the sense of Article 75 CC. The mere fact that several (and not just one) member is affected by FIFA's administrative act does not change the nature of the "appealed decision". If one applies the principles laid down in Article 75 CC to the case at hand then the

[35] See for example the awards CAS 2014/A/3665, 3666 & 3667 *Luis Suárez, FC Barcelona & Asociación Uruguaya de Fútbol v. FIFA*, CAS 2017/A/5001 & 5002 *Federación Boliviana de Fútbol v. FIFA*, CAS 2017/A/5003 *Jérôme Valcke v. FIFA*, CAS 2019/A/6301 *Chelsea Football Club Limited v. FIFA*.

[36] See for example the awards CAS 2014/A/3776 *Gibraltar Football Association v. FIFA*, CAS 2014/A/3744 & 3766 *Nigerian Football Federation v. FIFA*, CAS 2017/A/5166 & 5405 *Palestine Football Association v. FIFA*.

dispute must be considered to be a membership related dispute with the consequence that it must (also) be directed against FIFA».[37]

On the other hand, some doubts have arisen in relation to appeals against FIFA decisions on «horizontal disputes», that is to say disputes between FIFA direct or indirect members (national federations, clubs, players, coaches, etc.) in which FIFA performs – through its justice bodies – the function of a neutral adjudicative entity.

In those cases, what happens if the appellant only calls as respondent its «horizontal» counterpart and fails to also call FIFA as a respondent? Can the CAS panel proceed and issue a decision on the merits even if FIFA, i.e., the entity that adopted the appealed decision, has not been summoned into the case? It must be noted that no FIFA rule specifies against whom an appeal against a decision adopted by a FIFA body should be directed. As there is no specific FIFA rule, this question of standing to be sued must be addressed on the basis of Swiss law, which is «additionally» applicable under Article 56, para. 2, of the FIFA Statutes.

CAS jurisprudence is nowadays very clear in stating that the appointed CAS panel may proceed to examine the matter and adjudicate the horizontal dispute on its merits, issuing an arbitral award which binds the parties, even if FIFA has not been summoned as one of the respondents.[38] This is so because a decision adopted by a FIFA body on a horizontal dispute (typically a decision of a chamber of the Football Tribunal), being a resolution of an association,[39] has a *contractual value* for the members of the association. Indeed, considering the legal framework created by FIFA rules, a FIFA decision on a horizontal dispute has the potential to modify the parties' contractual relations *between each other*, in particular affecting their reciprocal pecuniary rights and obligations. Accordingly, a CAS panel may well deal with such a contractual dispute and grant the parties a definitive configuration of their reciprocal rights and obligations, even if FIFA has not been summoned in the arbitration.[40]

---

37 CAS 2008/A/1639 *RCD Mallorca v. FA & Newcastle United*, paras. 33-34.

38 See for example the awards CAS 2014/A/3489 & 3490 *Sociedade Esportiva Palmeiras v. David Braz de Oliveira Filho and Panathinaikos FC*, CAS 2014/A/3690 *Wisla Kraków S.A. v. Tsvetan Genkov*.

39 See the SFT Judgement no. 4A_490/2009 of 13 April 2010, *Atletico v. Benfica*, at paras. 2.2.1 and 2.2.2, where a decision of a FIFA body on a horizontal dispute between two clubs is qualified as a «resolution of an association» («*Vereinsbeschluss*» in the original German text).

40 See CAS 2014/A/3489 & 3490 *Sociedade Esportiva Palmeiras v. David Braz de Oliveira Filho & Panathinaikos FC*, CAS 2014/A/3690 *Wisla Kraków S.A. v. Tsvetan Genkov*.

However, the fact that CAS panels may proceed, in appeal proceedings, to adjudicate horizontal disputes on their merits even if FIFA has not been summoned as one of the respondents, does not mean that in those cases FIFA has no standing to be sued. In fact, any decision issued by a FIFA body on a horizontal dispute – as are the decisions issued by the chambers of the FIFA Football Tribunal on disputes involving clubs, players, coaches and/or national federations – in any case involves the «association life» of FIFA, because such a decision is (i) adopted by a body of FIFA, (ii) on the basis of the rules of FIFA as set out in its statutes and regulations, and (iii) addressed to direct or indirect members of FIFA. This has been confirmed by several CAS panels.

For example, in an appeal before the CAS involving a dispute between two clubs concerning the ITC released by the Single Judge of the FIFA Players' Status Committee, the CAS panel pointed out that a «membership relation is not just one-dimensional. Instead, the rights and obligations resulting from membership in an association point in several directions, i.e. towards the association as such but also towards the other individual members. Disputes between members of an association can, therefore, not be excluded from the outset from the membership related sphere. This is all the more true in view of the fact that an association which settles disputes between its members in application of its own rules and regulations is of course (also) pursuing goals of its own and, hence, is also acting in a matter of its own»[41].

Therefore, FIFA always has standing to be sued in appeals against a decision issued by one of its justice bodies, even if the dispute appears to be purely horizontal; indeed, the fact itself that such decision could be set aside or modified by the CAS confers sufficient interest for FIFA to be summoned as a respondent. Of course, once summoned before the CAS in a purely horizontal dispute, FIFA is always at liberty to decline to take active part in the case (and, in practice, this frequently happens). FIFA remains, in any event, bound by the arbitral award because it was originally called into the case as a respondent and, at any rate, its own regulations provide that CAS decisions must be respected.

9. CONCLUDING REMARKS

Issues of standing and standing to be sued can sometimes be quite intricate, as they involve both factual and legal aspects. As practical advice

41 CAS 2008/A/1639 *RCD Mallorca v. FA & Newcastle United*, para. 32.

for any party wishing to commence an arbitration before the CAS, either as a claimant in an ordinary procedure or as an appellant in an appeal procedure, in case of doubt it is always preferable to summon all potential respondents.

A caveat is necessary, though: a party who improperly summons as a respondent into a CAS case a party who lacks standing to be sued might eventually be ordered to pay legal costs to that respondent.

However, considering in terms of costs/benefits that, on the one hand, it is customary in CAS cases that contributions to the costs of the other parties are not particularly high and that, on the other hand, not summoning the right respondent(s) might irremediably lead to the rejection of the claim, it appears preferable, in case of doubt, to err on the side of caution and summon into the case all potential respondents.

VULNERABLE WITNESSES BEFORE THE COURT OF ARBITRATION FOR SPORT: STRIKING A BALANCE BETWEEN COMPETING RIGHTS

Luigi Fumagalli

Professor of International Law at the State University of Milano, Italy
CAS Arbitrator

ABSTRACT

The paper deals with the solutions adopted before the Court of Arbitration for Sport (CAS) to deal with a peculiar evidentiary challenge faced in cases concerning corrupt practices, such as match-fixing. In some of them it might happen that a party presenting a witness in support of its case submits that there are reasons not to disclose the identity of the witness, who might be otherwise exposed to threats and dangers. The use of anonymous witnesses, however, impacts on the other party's right to rebut such evidence, assess its credibility and cross-examine the witness. In such cases, therefore, two rights conflict: the right of the witness to have their life and security protected; and the right to be heard of the other party. The paper examines the attempt to strike a balance between those conflicting rights. For such purposes, some considerations are offered regarding the fundamental role played by the "right to be heard" in the adjudication proceedings. Then, focus is put on the principles and practice relevant to the protection of "vulnerable" witnesses in CAS arbitration, before offering some final considerations.

KEYWORDS

Match-fixing; evidence; witnesses; protection of witnesses; anonymous witnesses; right to be heard; European Convention on Human Rights; Court of Arbitration for Sport

VULNERABLE WITNESSES BEFORE THE COURT OF ARBITRATION FOR SPORT: STRIKING A BALANCE BETWEEN COMPETING RIGHTS

Luigi Fumagalli

Professor of International Law at the State University of Milano, Italy
CAS Arbitrator

Summary: 1. Evidentiary challenges in the fight against corruption. 2. The right to be heard as a fundamental right: the legal framework. 3. The right to be heard in the jurisprudence of the Swiss Federal Tribunal and of the European Court of Human Rights. 4. Vulnerable witnesses in CAS jurisprudence. 5. Final considerations and FIFA rules. Notes. Bibliography.

1. EVIDENTIARY CHALLENGES IN THE FIGHT AGAINST CORRUPTION.

The fight against corrupt practices (such as match-fixing, illegal betting, bribery, but also sexual harassment or other major ethical violations) and the enforcement of the rules adopted to contrast them in the world of football poses arduous challenges for all the entities involved, from investigators to adjudicators, at all levels, from a domestic to an international dimension.

Such challenges are of various nature and origin. They go from practical difficulties to the complexity of purely legal issues. Indeed, sporting authorities do not enjoy the powers of criminal prosecutors (wiretapping, searches, seizures, etc.) and therefore face difficulties in identifying whether violations have been committed by an entity bound by the sporting rules. In addition, some behaviours (such as offering gifts) might be felt to be socially permissible (if not due, as a sign of respect and deference to an authority) and perfectly legal from a disciplinary point of view and therefore difficult to detect and distinguish from plainly illegal activities (such as offering bribes).

In general terms, those difficulties stem from the very nature of the illegalities to be fought. Match-fixing or other corrupted practices are by their nature elusive: "corruption is, by nature, concealed as the parties involved will seek to use evasive means to ensure that they leave no trail of their wrongdoing".[1] As a result, evidence is difficult to gather, since little documentary evidence is left and the parties involved in (for instance) match-fixing go to great lengths to conceal their involvement in illegal schemes; and when evidence collected in criminal proceedings (such as transcripts of intercepted phone conversations, or printouts of messages exchanged) is brought to the attention of the sporting authorities, its admissibility and interpretation might be doubtful (and in many cases is challenged).

As a consequence, in the absence of contemporary evidence, sporting authorities have, to a very large extent, to rely on witness depositions, mainly offered by the victims of the violations. Consider, for instance, sexually related offences: in many cases, the only person in a position to expose the crime and testify is the offended individual. Depositions, however, are rendered *post-factum* and may be fallacious (also if rendered by eye witnesses and in good faith). In addition, they may be influenced by other elements, including the fear of retaliation, and chiefly so when the corrupt practice is implemented in the framework of organised crime or the offence was committed by a person holding a powerful position. Hence, the need arises to protect the witnesses and secure their deposition in a "secure" environment, free of the threats to which the testifying persons might be subject as a result of their exposure to the investigated alleged perpetrator, also because otherwise the witness would be reluctant to testify. Only on that basis can evidence be collected and the observance of the rules (together with the corresponding right to enforce them) be secured, in the interests of the system.

In that context, however, other fundamental interests (and corresponding rights) come into play and must be respected. In particular, the imperatives

[1] The point has been expressed by CAS 2010/A/2172, *Oriekhov*, award of 18 January 2011, § 54.

of "due process", which imply the right to be heard and the right to contradict, have to be protected. In fact, as will be seen, the accused must be put in a position to defend themselves and to provide evidence in support of their plea. At the same time, they have the right to confront the evidence brought by deposition by the other party. Such a right, therefore, seems to be in conflict with the interests of the system that infringements are effectively punished and the expectation of the witnesses that their cooperation with law enforcement does not expose them to threats and dangers.

In summary, diverging rights have to be reconciled, keeping in mind the overall interest that the law (in all its aspects) is guaranteed.[2]

The observations which follow examine the solutions adopted before the Court of Arbitration for Sport (CAS) to deal with such challenges, in an attempt to strike a difficult balance between those conflicting rights. For such purposes, in the next section, some considerations are offered regarding the fundamental role played by the "right to be heard" in the adjudication proceedings: for such purposes, its meaning and scope is explored in the relevant normative context, as defined by domestic and supranational rules. The sections which follow, then, focus on the principles, and their implementation in CAS arbitration, relevant to the protection of "vulnerable" witnesses, before offering some final considerations regarding the FIFA rules adopted in that regard.[3]

2. THE RIGHT TO BE HEARD AS A FUNDAMENTAL RIGHT: THE LEGAL FRAMEWORK

The examination can start with a basic observation: there is no doubt that the "right to be heard" is a fundamental right, recognised by international instruments, such as the European Convention on Human Rights (ECHR),

---

2 In general terms see on this matter the overall examination conducted by Soublière, Hessert, *Safeguarding and beyond – The role of sports regulations, human rights and the balance between the rights of the interested parties in sports investigations and the disciplinary proceedings that arise therefrom*, in *CAS Bulletin*, 2024/1, 6-32.

3 As already underlined, the problem examined in this paper is often linked to another challenge posed to the effective prosecution of corrupt practices: the difficult interplay (from conflict to cooperation) between sporting investigation and criminal proceedings conducted by domestic authorities. Such challenges will not be further examined. For an overview of the experience of another arbitral institution see Feris, Torkomyan, *Impact of Parallel Criminal Proceedings on Procedure and Evidence in International Arbitration. Selected ICC Cases*, in *ICC Dispute Resolution Bulletin*, 2019/3, 50-70.

as well as at national level, including by Swiss law.[4] In fact, in any regulatory framework defining it, the "right to be heard" is treated as a part of the broader concept of the "right to a fair trial": its respect marks the conduct of adjudication proceedings as "just", and applies therefore in court proceedings as well as in arbitration (including CAS arbitration). In other words, the right to be heard is an obvious feature of every dispute settlement system wishing to be defined as "fair". It is therefore more than obvious that the "product" of such proceedings (the judgment, the award) cannot stand scrutiny (and can therefore be nullified) if that right is disregarded, and rightly so, because no justice is done if that fundamental right is not respected. Indeed, no arbitration can be defined to be fair if the parties' right to be heard is not respected.

As mentioned, the right to be heard is protected by the ECHR under its Article 6, regarding the "right to a fair trial". More specifically, it falls within the scope of application of Article 6(1) (under which everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law), which covers both civil and criminal proceedings; and is mentioned by Article 6(3), applicable to criminal proceedings (providing that everyone has the following minimum rights: to be informed promptly of the nature and cause of the accusation; to have adequate time and facilities for the preparation of their defence; to defend themselves; to examine witnesses against them and to obtain the attendance and examination of witnesses against them).

In that respect, it is to be noted that in the ECHR system the requirements inherent to the concept of a "fair hearing" are not necessarily the same in cases concerning the determination of civil rights and obligations as they

4 The relevance of Swiss law in CAS proceedings is obvious, since the seat of CAS arbitration is in Switzerland (Article R28 of the Code). Switzerland is a Contracting State to the ECHR, opened for signature in Rome on 4 November 1950, having ratified it in 1974. The ECHR guarantees the respect in the Contracting States of fundamental rights, such as the right to life, the prohibition of torture, the right to liberty and security, the right to a fair trial, the right to respect for private and family life, freedom of expression, and the prohibition of discrimination. The ECHR is supplemented by various Additional Protocols, which extend the catalogue of protected rights. In general terms, on the ECHR see Jacobs, White, *The European Convention on Human Rights*, 7th ed., Oxford, 2017; Schabas, *The European Convention on Human Rights: A Commentary*, Oxford, 2015. The relevance of the ECHR with respect to CAS proceedings has also been considered by the European Court of Human Rights (ECtHR) in its well known decision of 2 October 2018, in the case of *Mutu and Pechstein v. Switzerland* (applications No. 40575/10 and No. 67474/10). In general terms on the relations between arbitration and the "right to a fair trial" under the ECHR see Benedettelli, *Human rights as a litigation tool in international arbitration: reflecting on the ECHR experience*, in *Arbitration International*, 2015, 631–659.

are in cases concerning the determination of a criminal charge. In fact, the requirements of Article 6(1) as regards cases concerning civil rights are less onerous than they are for criminal charges. However, some points have to be noted: with respect to civil cases, inspiration can be drawn from principles applicable to criminal cases; the core tenets of the right to a fair trial (including chiefly the right to be heard) cannot be sacrificed even in civil cases; sporting disciplinary proceedings, even though based on a "contract" (linked to the consent expressed by the individuals through their affiliation to the sports system), share many aspects of criminal proceedings and therefore call for a regulation akin to that applicable in criminal cases.[5]

As a result, also in civil cases (and chiefly so in disciplinary proceedings), the parties have the fundamental right to present the observations which are relevant to their case, and this right can be seen as effective only if their observations are actually "heard" by the adjudicator. In addition, the concept of a fair trial in civil cases comprises the fundamental right to adversarial proceedings, *i.e.*, to have knowledge of and the right to comment on all evidence adduced and observations filed, with a view to presenting their case to the court. In other words, it may be submitted that the ECHR mandates a fully-fledged respect of the right to be heard before Swiss courts and tribunals.

As also mentioned, the right to be heard is recognised not only as a fundamental principle by the ECHR. It is similarly (and directly) affirmed in Swiss law, and chiefly by the Swiss Federal Constitution of 18 April 1999, in its Article 29(2), as part of the general procedural guarantees, under which "each party to a case has the right to be heard".

In the Swiss international arbitration context, then, the "right to be heard" is mentioned by Article 182(3) of the Swiss Federal Act on Private International Law of 18 December 1987 (PILA),[6] which expressly states that "irrespective of the procedure chosen, the arbitral tribunal shall accord equal treatment to the parties and their right to be heard in adversarial proceedings".[7] In other

5 It is well known that the so called "Engel criteria" have been adopted by the ECtHR to identify the criminal nature of the proceedings. They involve the application of three tests to the case under scrutiny: 1) the legal classification of the offence in domestic law; 2) the nature of the offence; 3) the degree of severity of the possible sanction. See the judgment of 8 June 1976, *Engel and Others v. The Netherlands* (applications No. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72), at § 82.

6 CAS arbitration proceedings are indeed most likely to be governed by the provisions set by Chapter 12 of the PILA, since the seat of CAS arbitration is in Switzerland and in the majority of cases at least one of the parties at the time the arbitration agreement was concluded was neither domiciled nor habitually resident in Switzerland (Article 176(1) of the PILA).

7 Lalive, Poudret, Reymond, *Le droit de l'arbitrage interne et international en Suisse*, Lausanne, 1989, 353-354.

words, the mandatory nature of the guarantee to reserve the right to be heard does not allow departures: the parties and/or the tribunal can define, directly or by reference, the procedural rules applicable to the arbitration, but in any case the right to be heard must be respected. As a result, and being consistent with this approach, disrespect of such a right leads to the annulment of the award. Under Article 190(2)(d) of the PILA, an award may be annulled if the principle of equal treatment of the parties or the right to be heard is violated.[8] In that respect, it is to be underlined that the mere observance of the applicable procedural rules is not sufficient, since the right to be heard must, in any case, be respected.

Corresponding provisions, then, can be found with respect to domestic arbitration in the Swiss Code of Civil Procedure,[9] in Article 373(4), dealing with the conduct of the arbitration and the procedural rules applicable thereto, and in Article 393(d), setting the grounds for the annulment of the award.[10]

It is to be noted, finally and moving back to the international level, that the disrespect of the right to be heard may lead to a denial of enforcement abroad of an arbitral award under the New York Convention of 10 June 1958: enforcement can be refused if the party against which it is sought proves that said party was unable to present its case (Article V(1)(b) of the Convention), or if the award is contrary to the public policy of the country of enforcement (Article V(2)(b) of the Convention).[11]

---

8 Kaufmann-Kohler, Rigozzi, *Arbitrage international. Droit et pratique à la lumière de la LDIP*, 2e éd., Berne, 2010, 512-522.

9 The provisions on arbitration set by the Swiss Code of Civil Procedure apply the proceedings before arbitral tribunals based in Switzerland, unless the provisions of the PILA apply (Article 353(1) of the Swiss Code of Civil Procedure).

10 Article 373(4): "The arbitral tribunal must guarantee the equal treatment of the parties and their right to be heard in adversarial proceedings." Article 393: "An arbitral award may be contested on the following grounds: ... (d) the principles of equal treatment of the parties or the right to be heard were violated."

11 Van den Berg, *The New York Arbitration Convention of 1958*, Deventer-Boston, 1981, 306-310, underlining, for the purposes of the New York Convention, that the equal opportunity to be heard does not imply that in each and all cases an oral hearing must take place, that short time limits for the preparation of a defence are generally not a violation of the right to be heard, and that denials of requests to postpone a hearing because of the unavailability of a witness do not lead to the refusal of enforcement of the award. In essence, the principle of due process implies that the tribunal informs a party of the arguments and evidence adduced by the other party and allows them to express their position on them. However, a violation of the due process requirement is grounds for denial of enforcement only in the most serious cases.

3. THE RIGHT TO BE HEARD IN THE JURISPRUDENCE OF THE SWISS FEDERAL TRIBUNAL AND OF THE EUROPEAN COURT OF HUMAN RIGHTS

In light of the relevance of Swiss law and of the ECHR for the CAS proceedings, understanding the point of view of the Swiss Federal Tribunal (the SFT) and of the European Court of Human Rights (ECtHR) as to its scope is therefore vital.

Under Swiss law, the SFT found that the right to be heard in contradictory proceedings combines two aspects: [12] the right to be heard in a narrow meaning, which gives each party the right to state its arguments as to the facts and the law on the disputed matter, to submit the necessary evidence, to participate in the hearings and to be represented before the Tribunal; and the right to contradict, which gives each party the right to express its views on the evidence and arguments brought by the other party, as well as to rebut the other party's evidence by submitting contrary evidence. In that regard, it is stressed[13] that, in the field of international arbitration, it has been found that, on its basis, each party has the right to express their views on the facts essential for the decision, to submit their legal arguments, to propose evidence on pertinent facts, to participate in the hearings, and to access the record.

However, the right to be heard calls for regulation: even though it cannot be derogated from by the parties when setting the rules applicable to the procedure, it must be exercised according to the relevant rules of procedure. As a result, it has been held that the right to produce evidence must be exercised timely and according to the applicable formal rules. Therefore, the arbitral tribunal can refuse to examine evidence, without violating the right to be heard, if the evidence proposed is unfit to ground a persuasion, if the fact to be proven has already been established or is irrelevant, or, lastly, if the tribunal, assessing the evidence in advance, reaches the conclusion that it is already convinced and that the result of the evidentiary measure would not modify its conclusion. In addition, the right to be heard does not encompass an unlimited right, in time and substance, to interrogate an expert called by the other party. As a result, a tribunal is not prevented, in principle, from putting time limits on the interrogation by a party or from refusing certain questions, if already asked, irrelevant, or unnecessary.

---

12 SFT, 4 September 2003, 4P.100/2003.

13 The point is underlined in nearly all decisions of the SFT dealing with the matter: see 7 January 2011, 4A_440/2011; 17 February 2011, 4A_402/2010; 17 March 2011, 4A_600/2010; 19 September 2012, 4A_274/2012; 8 October 2014, 4A_199/2014. On the right to access the record: SFT, 24 February 2015, 4A_544/2014.

Such jurisprudence corresponds, by and large, to the principles that can be derived from the case law of the ECtHR with respect to the ECHR.

The ECtHR has always emphasised the prominent place held in a democratic society by the right to a fair trial, of which the right to be heard is a part.[14] This guarantee, indeed, "is one of the fundamental principles of any democratic society, within the meaning of the Convention".[15] Therefore, and *inter alia*, the desire to save time and expedite the proceedings does not justify disregarding such a fundamental principle.[16]

It is to be noted that the ECtHR has stressed the importance of appearances in the administration of justice; it is important to make sure that the fairness of the proceedings is apparent. The ECtHR made it clear, however, that the standpoint of the persons concerned is not in itself decisive; the misgivings of the individuals before the courts with regard to the fairness of the proceedings must be capable of being held to be objectively justified.[17]

As a result, it is stressed that the parties to the proceedings have the right to present the observations which they regard as relevant to their case. This right can only be seen to be effective if the observations are actually "heard", that is to say duly considered by the trial court.[18] In other words, the "tribunal" has a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties.[19] However, while the parties have the right to present the observations which they regard as relevant to their case, Article 6(1) of the ECHR does not guarantee a litigant a favourable outcome.[20]

The concept of a fair trial comprises the fundamental right to adversarial proceedings. This is closely linked to the principle of equality of arms.[21] It is to be noted that the requirements resulting from the right to adversarial proceedings are in principle the same in both civil and criminal cases.[22] The right to adversarial proceedings means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on

14 Judgments of 9 October 1979, *Airey v. Ireland* (application No. 6289/73), § 24; and of 17 January 2012, *Stanev v. Bulgaria* [GC] (application No. 36760/06), § 231.

15 Judgment of 8 December 1983, *Pretto and others v. Italy* (application No. 7984/77), § 2.

16 Judgment of 18 February 1997, *Niederöst-Huber v Switzerland* (application No. 18990/91), § 30.

17 Judgment of 19 April 1993, *Kraska v. Switzerland* (application No. 13942/88), § 32.

18 Judgment of 7 March 2006, *Donadze v. Georgia* (application No. 74644/01), § 35.

19 Judgments of 19 April 1993, *Kraska v. Switzerland* (application No. 13942/88), § 30; and of 12 February 2004, *Perez v. France* [GC] (application No. 47287/99), § 80.

20 See judgment of 9 October 1997, *Andronicou and Constantinou v. Cyprus* (application No. 86/1996/705/897), § 201.

21 19 September 2017, *Regner v. Czech Republic* [GC] (application No. 35289), § 146.

22 24 November 1997, *Werner v. Austria* (application No. 21835/93), § 66.

all evidence adduced or observations filed, with a view to influencing the court's decision.[23]

However, the ECHR does not lay down rules on evidence as such.[24] The admissibility of evidence and the way it should be assessed are primarily matters for regulation by national law and the national courts.[25] The same applies to the probative value of evidence and the burden of proof: it is also for the national courts to assess the relevance of proposed evidence.[26]

4. THE PROTECTION OF VULNERABLE WITNESSES IN CAS CASE-LAW

In light of the foregoing, a difficult question arises whenever a party, presenting a witness in support of its case, submits that there are reasons not to disclose the identity of the witness. Such a request impacts the other party's right to rebut such evidence, to assess the credibility of the witnesses and eventually to cross-examine them.

The matter is not new or peculiar only to sporting investigation. In fact, it was analysed by the SFT and by the ECtHR, which came to the conclusion, mainly with respect to criminal investigations, that anonymous witness statements do not breach the right to be heard, when they support the other evidence provided to the court.

More specifically, according to the SFT,[27] if the applicable procedural code provides for the possibility to prove facts by witness statements, a party cannot be prevented from relying on anonymous witness statements. However, the use of such statements must be subjected to strict conditions: the right to be heard and to a fair trial must be ensured through other means, namely by cross examination through audio-visual protection and by an in-depth check of the identity and the reputation of the anonymous witness by the court.

---

23 23 June 1993, *Ruiz-Mateos v. Spain* (application No. 12952/87), § 63; 24 February 1995, *McMichael v. United Kingdom* (application No. 16424/90), § 80; 20 February 1996, *Vermeulen v. Belgium* [GC] (application No. 19075/91), § 33; 20 February 1996, *Lobo Machado v. Portugal* [GC] (application No. 15764), § 31; 7 June 2001, *Kress v. France* [GC] (application No. 35594/98), § 74.

24 19 March 1997, *Mantovanelli v. France* (application No. 21497/93), § 34.

25 23 October 1990, *Moreira de Azevedo v. Portugal* (application No. 11296/84), §§ 83-84; 21 January 1999, *García Ruiz v. Spain* [GC] (application No. 30544/96), § 28.

26 7 June 2012, *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC] (application No. 38433/09), § 198.

27 Judgment of 2 November 2006, 6S.59/2006, ATF 133 I 33, § 4.

In the same way, the ECtHR allowed the use of "protected" or "anonymous" witnesses in criminal cases, provided procedural safeguards are adopted.[28] More specifically, it was held that Article 6(1) of the ECHR does not require in itself that the interests of the witnesses are taken into consideration. However, the interests of the witnesses (with regard to their life, liberty and security) may be protected by other provisions of the EHCR (*e.g.*, Article 8). This means that States must organise criminal proceedings in a way that these interests are not unjustifiably put in danger. The relevance of the right to a fair trial implies that the interests of the defence must be balanced against those of the witnesses. In any case, a conviction cannot be based either solely or to a decisive extent on anonymous statements; the party should not be prevented from testing the witness' reliability, and the evidence derived should be treated with extreme care.

The matter also came before CAS, and the CAS panel have consistently found that, when evidence is offered by means of anonymous witness statements, the right to be heard, guaranteed by Article 6 of the ECHR and Article 29(2) of the Swiss Constitution, is affected, but that a panel may still admit the deposition of anonymous witnesses without violating such right, if the circumstances so warrant and provided that some conditions are met.

In such regard, in the *Pobeda* case, for example, the CAS held that the use of anonymous witnesses, although held admissible, had to be made subject to strict conditions (CAS 2009/A/1920, award of 15 April 2010). Relying on the jurisprudence of the SFT and ECtHR, therefore, the CAS adopted measures to ensure the right to be heard and to a fair trial of the party opposed to the witnesses' anonymity: the witnesses were heard through "audiovisual protection" and an in-depth check of the identity and the reputation of the anonymous witnesses was conducted by the court. The panel, in other words, sought to strike a balance between the procedural rights of the party opposed to the witnesses' anonymity, on the one hand, and the necessity to protect the life and personal safety of the witnesses, on the other.

Similarly, in the *Contador* case (CAS 2011/A/2384 & 2386, award of 6 February 2012), the CAS held that the use of protected witnesses could be allowed subject to the following conditions: (i) that the witnesses motivate their request to remain anonymous in a convincing manner; (ii) that the witnesses would concretely face a risk of retaliation by the party they are testifying against, if their identities were known; (iii) that the panel had the possibility to see the witnesses; (iv) that the witnesses would be questioned

[28] 26 March 1996, *Doorson v. The Netherlands* (application No. 20524/92); 23 April 1997, *van Mechelen and others v. The Netherlands* (applications No. 21363/93, 21364/93, 21427/93 and 22056/93); 28 February 2006, *Krasniki v. Czech Republic* (application No. 51277/99); 23 June 2015, *Balta and Demir v. Turkey* (application No. 48628/12).

by the panel itself, which had the opportunity to check their identities and the reliability of their statements; and (v) that the witnesses be cross-examined, even though through an "audiovisual protection system".

On that basis, in *Karim* (CAS 2019/A/6388, award of 14 July 2020, § 130), the panel noted, in line with the *Pobeda* and *Contador* cases, that "*it [was] a necessary step [to] assess stated existing/potential threats and after that to find a proper balance between the position of witnesses and the right of an accused to cross exam[ine] witnesses*". The panel therefore found that all such conditions for the admission and the hearing of protected witnesses were satisfied.

In the *Karim* case, the first question was whether the party presenting the witnesses had proven that their anonymity was necessary. In this regard, the panel noted that the witnesses were alleged victims of serious crimes, including sexual harassment, assault and rape from an individual with significant political power in Afghanistan, still at large notwithstanding an arrest warrant pending on him, and who had, according to their witness statements, directly threatened their lives (even at gun point). Moreover, the panel noted that, because of their alleged situations, all of the witnesses had fled their country of origin and obtained asylum – a protective status which, generally speaking, is only granted to individuals that demonstrate a legitimate fear of persecution and threat or danger to his or her physical integrity and life. The panel found this to be sufficient proof that disclosing their identity would create a serious potential threat to the lives and personal safety of the witnesses. Given the circumstances of the case, the panel had no reasons to ignore those fears and could not disregard the possibility of such threats and the assertion that the life and/or the personal safety of the witnesses and their families were at risk.

In light of the witnesses' interest in keeping their identities anonymous, the panel found that it could strike a proper balance between the accused's right to be heard and to a fair trial and the necessity to protect witnesses' interest. It did so by checking the identity, through a CAS counsel, of the witnesses, and giving the accused the opportunity to confront the anonymous witnesses as required under Article 6(1) ECHR, while placing certain limitations to protect them. Indeed, the panel granted the accused the opportunity to directly cross-examine the witnesses over the phone, while protecting the identities of the witnesses by (i) having them use a voice scrambler, and (ii) requiring the accused to provide the panel, in advance of the hearing, the questions he intended to ask the witnesses in order for the panel to ensure that they were not aimed at, or have even the unintentional effect of, identifying the witnesses, all the while allowing the accused to ask additional questions not sent in advance so long as they were not translated/posed until after the panel had an opportunity to approve them. The panel also sent a CAS

counsel to the secret location from which the protected witnesses testified to properly identify them and ensure that they testified without any undue interference from any third party during the cross-examination. In summary, the panel found that the limitations imposed on the accused, linked to the fact that he was not given the names of the witnesses adduced by the prosecuting authority, was counterbalanced by the measures adopted to guarantee the sincerity of the depositions.[29]

5. THE 2023 GUIDELINES FOR THE HEARING OF VULNERABLE WITNESSES AND TESTIFYING PARTIES IN CAS PROCEEDINGS

The importance and sensitivity of the issue called for regulation, in order to allow predictability and consistency. As a result, in December 2023, the International Council of Arbitration for Sport (ICAS) (the legal entity governing the CAS system) adopted the Guidelines for the hearing of vulnerable witnesses and testifying parties in CAS proceedings (the Guidelines), in order to recommend best practices for the protection of vulnerable witnesses and parties in CAS arbitrations, more specifically in relation to CAS hearings.[30] It was noted, in fact, that special procedural safeguards are necessary in cases in which a witness giving testimony may be vulnerable, so that testimony can be delivered in a safe manner, and reluctant vulnerable witnesses are incentivised to testify.

There is a preliminary point to be underlined: the Guidelines are not binding on the parties and the panels. In other words, they do not have the same legal force and effect as the provisions set in the Code of Sports-related Arbitration (the CAS Code), which governs the procedure before CAS. In other words, the Guidelines do not constitute mandatory procedural rules and, consequently, cannot be used by the parties seeking to challenge their application or non-application by any CAS panel. In principle, in fact, the Guidelines are recommendations with respect to the implementation of Articles R44.2 and R57 (hearing), as well as Articles R46 and R59 (publication of award) of the CAS Code, when there is a vulnerable witness, but do not prevail over the Code. Each CAS panel (sitting in an ordinary or an appeal

29 A similar approach was taken by the CAS in CAS 2016/A/4650, *Skënderbeu*, award of 26 July 2018; CAS 2019/A/6669, *Aghazada*, award of 28 April 2022; and CAS 2021/A/7661, *Jean-Bart*, award of 14 February 2023.

30 Their presentation was the object of a report disseminated at the CAS Seminar held in Geneva on 1 December 2023 by Alma M. Mozetic (*Protecting Witnesses & Other Vulnerable Persons in CAS Arbitrations: Best Practices*). The Guidelines can be read in the CAS website (*www.tas-cas.org*).

arbitration) is however encouraged to take them into account when facing a situation involving vulnerable witnesses, bearing in mind its duty to comply with the parties' right to a fair trial, including the right to be heard and to benefit from equal treatment.[31]

A second point to be underlined with respect to the Guidelines is their definition of "vulnerable witness". In that regard, a preliminary aspect is to be noted. The Guidelines, in fact, apply not only to witnesses in a proper (and narrow) meaning (*i.e.*, independent individuals, not having an interest in the litigation), but also to the parties rendering a deposition in the course of the arbitration. By the specification that they cover "vulnerable witnesses and testifying parties", the Guidelines avoid taking a position as to the assimilation of the role of a party rendering a sworn declaration (and undergoing cross-examination) to that of the "witnesses".[32] As a result, for the purpose of the Guidelines, a reference to a vulnerable witness includes a vulnerable testifying party. The protected category is then widely defined: a witness or testifying party should be considered as vulnerable in the meaning of the Guidelines when testifying may risk (re)traumatising the witness, present a threat to the personal safety of the witness (and possibly others), or create a significant risk to their reputation or of retribution. Minors and witnesses with a mental disability will also generally qualify as vulnerable witnesses.

A third point concerns the measures that can be adopted. They include general protections with regard to the general public, for instance, in order to ensure the anonymity of the witness in any external communication regarding the arbitration, or within the arbitration. Then, they consist in measures that can be adopted prior to the hearing, during the examination at the hearing, or after it.

With respect to the general measures, it is to be noted that CAS proceedings are confidential and held in private, unless otherwise agreed or determined (Articles R57 and R43 of the CAS Code), and that the awards rendered in ordinary cases are not public, unless the parties otherwise agree (Article R43). In appeal cases, on the other hand, the award is, in

[31] It must, in fact, be stressed that, as already noted above, only the violation of the principle of equal treatment of the parties or of the right of the parties to be heard constitutes a ground for the setting aside of the award by the SFT pursuant to Article 190(2)(d) of the PILA. Focus should therefore be put by the panel on the respect of those fundamental rights: the Guidelines apply only in their light and in a way consistent with them.

[32] The practice of the CAS tends to follow the principles expressed by Article 4(2) of the IBA Rules on the Taking of Evidence in International Arbitration, according to which "any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative".

principle, made public by CAS (Article R59, last paragraph of the CAS Code). However, the Guidelines confirm that, in cases involving protected witnesses, once the proceedings are complete, the CAS Court Office may prevent the disclosure in public records of sensitive information, such as the identity of the vulnerable witnesses, and that, if the award is published, the CAS Court Office has the authority to redact sensitive portions of the award, at its discretion, prior to publication of the award. In any event, prior to any publication of the award, a party may request, whether on its own initiative or following a request from a vulnerable witness, that the CAS Court Office anonymize the identity of such witness in the award. In the event that the other party or parties object to the anonymization request, the CAS Court Office has the authority to decide. A measure of caution is however recommended. The CAS Court Office may inform, through parties' counsel or directly, vulnerable witnesses prior to testifying that their identity might be disclosed (directly or indirectly) to the public, including in the final award.

With regard to the specific measures of protection that are suggested for adoption and implementation prior to the hearing of vulnerable witnesses, the Guidelines invite the CAS panels, when appropriate, to proactively notify parties and witnesses of the procedural accommodations available during the proceedings to safeguard a vulnerable witness, so that the parties may seek appropriate protections for them. Procedural accommodations may either be requested by a party on behalf of their witness(es), in the written submissions or at any reasonable time prior to the hearing, or adopted by a CAS panel in its discretion. In both cases, the other party or parties should have the opportunity to respond within the time period set by the CAS panel: the right to be heard and contradict is also to be guaranteed at the stage of the adoption of the procedural measures of protection. At this stage, however, not only the concrete measures available have to be discussed, but also the existence of the preconditions for their adoption, such as the issue of whether the witness qualifies as vulnerable, eligible for protection.

As indicated, in fact, CAS panels also have discretion to adopt necessary measures on their own initiative, in the event that a party is not fully aware of the right to make the request, and/or certain procedural accommodations would be appropriate, but were either not requested by a party or different from those that were so requested. In all such cases, the CAS panel shall discuss these measures and their implementation in advance with the parties and possibly during a case management conference. Likewise, CAS should provide the other party or parties with information about available safeguards to protect the parties' right to a fair trial.

The measures of protection that can be adopted regard mainly the hearing of the vulnerable witnesses. Such measures correspond to those

already adopted in the CAS practice and include, as appropriate under the circumstances of the case, decisions to:

i. permit remote or other means of providing testimony such that the witness may avoid direct contact with the adverse party;

ii. permit a witness to testify anonymously;

iii. require advance review and approval by the CAS panel of questions for cross-examination (to prevent identification of witnesses and/or to avoid (re)traumatizing them);

iv. exercise a degree of control over the manner of questioning to avoid (re)traumatizing alleged victims of abuse, particularly with respect to highly sensitive and traumatic questions during cross-examination; and

v. permit CAS panels, rather than the adverse party, to ask certain questions to the witness, to accommodate the witness' vulnerability.

More specifically, the Guidelines confirm in the list of measures which can be adopted that CAS panels may allow anonymous witness testimony involving vulnerable witnesses, where appropriate. When determining whether anonymous testimony is appropriate in a particular instance, CAS panels are recommended to balance the need to protect vulnerable witnesses with the rights of the parties, including the right to a fair trial. In particular, such witnesses should justify their request for anonymity as to the adverse party, by sufficient proof that disclosure of the witness' identity would create a serious potential threat to the personal safety of the witness (or their relative(s)). If a CAS panel approves the use of anonymous witness testimony, the CAS Court Office has the responsibility to arrange that the identity of such witness can be officially verified; such witness is located in a safe place together with CAS counsel, away from the CAS hearing room and from CAS arbitrators and parties; and such witness' voice and face cannot be recognised (including by utilising encrypted communication, voice distortion, face mask, etc.). Furthermore, the CAS panel may request the advance review and approval of the questions for cross-examination to ensure that no questions would, directly or indirectly, identify such witness. The transportation of such a witness to the hearing location should also guarantee anonymity.

The list of measures mentioned in the Guidelines (remote witness testimony, advance approval of questions, controlling manner of questioning, panel to ask questions, deposition from secret location, audio-visual protection) are not exclusive. For instance, the assistance of a psychologist during the hearing may be envisaged. In any case, the Guidelines, because of their peculiar flexibility, give each panel ample flexibility to identify and adopt the measures proper to the case.

6. THE FIFA RULES ON THE PROTECTION OF VULNERABLE WITNESSES

The (non binding) rules adopted by CAS find a binding equivalent in the provision in force in the FIFA system. Reference in that respect is specifically made to Articles 43 and 44 of the FIFA Disciplinary Code (2025 Edition: the FDC),[33] which deal exactly with the topics covered by the Guidelines and considered in the CAS practice. The mentioned articles of the FDC so provide:

43. Anonymous participants in proceedings
1. When a person's testimony in proceedings conducted in accordance with this Code could lead to threats to them or put them or any person particularly close to them in physical danger, the chairperson of the competent judicial body or the deputy chairperson may order, inter alia, that:
a) the person not be identified in the presence of the parties;
b) the person not appear at the hearing;
c) the person's voice be distorted;
d) the person be questioned outside the hearing room;
e) the person be questioned in writing;
f) all or some of the information that could be used to identify the person be included only in a separate, confidential case file.
2. If no other evidence is available to corroborate the testimony provided by the person concerned, such testimony may only be used in the context of imposing sanctions under this Code if:
a) the parties and their legal representatives had the opportunity to pose questions to the person concerned in writing; and
b) the members of the judicial body had the opportunity to interview the person concerned directly and in full awareness of their identity and to assess their identity and record in full.
3. Disciplinary measures shall be imposed on anyone who reveals the identity of any person granted anonymity under this provision or any information that could be used to identify such person.
44. Identification of anonymous participants in proceedings
1. To ensure their safety, persons granted anonymity shall be identified behind closed doors in the absence of the parties. This identification shall be conducted by the chairperson of the competent judicial body alone, the deputy chairperson and/or the members of the competent judicial body present and shall be recorded in minutes containing the relevant person's personal details.
2. These minutes shall not be communicated to the parties.
3. The parties shall receive a brief notice which:
a) confirms that the person concerned has been formally identified; and
b) contains no details that could be used to identify such person.

[33] Relevant to this topic are also Articles 46 and 47 of the FIFA Code of Ethics (the FCE), which contain rules identical to those set by the FDC.

Such provisions reproduce in the FIFA disciplinary system the measures applicable before CAS and appear to follow the indications of the SFT with regard to Swiss law[34] in all material respects: indeed, the protection measures are the same; and so are the precautions to be adopted before the hearing, in order to accurately identify the testifying protected individual. A couple of additional points can, however, be underlined as peculiarly valuable for the protection of the witnesses. The FIFA rules (wisely) give express relevance not only to direct threats against the testifying person, but also to those "particularly close to them"; and they provide for the imposition of disciplinary measures on anyone revealing the identity of the anonymous witness. In other words, the FIFA system is designed to offer, to the maximum possible extent for a "private" organisation, measures of protection which are comprehensive and effective.

7. PRACTICAL ISSUES AND CONCLUDING REMARKS

The provisions so adopted, as applicable before CAS (or in the internal FIFA disciplinary proceedings), while setting important guiding principles for the hearing of witnesses in a protected environment, face some practical issues.

The difficulties to be overcome do not concern so much the finding of the practical arrangements for a "remote" and "anonymized" deposition of the protected witness: modern technologies are easily available and no issue should arise with respect to the organisation and conduct of the examination of the witness in a safe environment.

The main difficulties are linked to other aspects.

A first point concerns the implementation within the internal disciplinary system (at FIFA level) of the rules applicable according to the FDC. The enforcing internal authority should in fact bear in mind that an appeal to CAS would be in principle open against any final disciplinary decision rendered. As a result, it is important, in granting the protection according to the FDC, to meet the standards required by the CAS panel for such purposes.

The second difficulty comes from the unavoidable need to explain the procedure envisaged, and the risks involved, to the relevant witness/victim.

[34] FIFA is a Swiss law entity and is committed to respecting all internationally recognised human rights and shall strive to promote the protection of these rights (Article 3 of the FIFA Statutes). As a result, it is bound to observe human rights (such as those expressed by the ECHR) not only as a result of being subject to Swiss law, but also because of its self-commitment expressed in the Statutes.

Without "instructing" the witnesses about their statements (which should be rendered freely and in full knowledge and conscience), the testifying parties should be made aware of the responsibility undertaken by their deposition, as well as of the possible pitfalls they might encounter while being examined, including the possibility that the identity could, in the end, be exposed. Such a *caveat* appears in any case necessary (not only to test the determination of the witness, but also) to avoid responsibilities. Any explanation should, however, be offered without dramatization, with the assistance, if such is the case, of a psychologist, and together with an accurate description of all the measures of protection implemented.

On a substantive level, another difficulty to be faced consists in the determination of the eligibility for the status of anonymous/protected witness in proceedings before CAS (to be replicated at the internal level in order to avoid the granted status then being revoked on appeal), and more exactly of the evidence necessary to grant it. Many questions arise in that regard: is the allegation of having received threats in person but without any supported evidence sufficient? Is it sufficient that the prospective witness lives in a non-democratic country or under a conflict to make it vulnerable? Can this status be granted because the witness/victim has only agreed to speak out if they remain anonymous, or because they requested it for fear of public stigma, shame or retaliation (e.g., by a coach, or club manager), but with no supporting evidence?

No absolute answer can be given to those questions. Indeed, a minimum due diligence has to be observed by the relevant judicial body before granting anonymity. Overall, however, any decision should be based on a case-by-case analysis, examining the reasons offered by the individual seeking the protection, any evidence advanced in support, as well as any other objective elements that might justify the granting of the protection.

Then, there is a final, and fundamental issue: what is the evidentiary impact of the deposition rendered by the "anonymous" witness? It must in fact be underlined[35] that the SFT and the ECHR came to the conclusion (at least with respect to criminal investigations) that anonymous witness statements do not breach the right to be heard, when they support the other evidence provided to the court, that a conviction cannot be based solely or to a decisive extent on anonymous statements, and the evidence derived therefrom should be treated with extreme care. Bearing this in mind, any evaluation by the deciding body should be based on an overall evaluation of all the evidence available. Even a single deposition (*e.g.*, by the victim of a sexual assault) may be sufficient to ground a comfortable satisfaction (if this

35 See paragraph 4 above.

is the applicable standard: Article 39(3) FDC) of the hearing body if genuine, open, internally consistent and objectively predictable. In any case, the evaluation of the evidence is left to the prudent appreciation of the panel.

The mentioned problems, however, are inherent to any judicial determination on the rights of the parties and do not prevent a positive overall evaluation from being made with respect to the treatment of vulnerable witnesses before the CAS.

As said, two competing rights have to be reconciled.

In one direction, the right of the witness has to be taken into account, and in that sense the procedural measures that can be adopted to secure the deposition without exposing the testifying party to any danger or threat. In the other direction, the rights of the accused have to be guaranteed. The accused is to be given a concrete chance to contradict the evidence brought against them and to test the credibility of the witness offering the said evidence.

Overall, however, the principles emerging from the CAS practice and summarised in the Guidelines seem to be able to strike a fair balance between these competing rights, in a way consistent with the basic requirements of Swiss law.

In any case, caution and wisdom are the key elements, keeping in mind that adjudicators do not provide their services only in the interest of the parties, or even of the sporting system to which they below. Their task is indeed to do justice, and justice is best served by a careful approach, which balances the rights of all entities involved.

THE RELATIONSHIP BETWEEN ASSOCIATION TRIBUNALS AND THE COURT OF ARBITRATION FOR SPORT

Prof. Ulrich Haas

University of Zurich, Switzerland

ABSTRACT

This article examines the complex relationship between association tribunals and the Court of Arbitration for Sport (CAS) within the multi-stage framework of dispute resolution in organized sports. It explores key legal issues, including the classification of association tribunals versus arbitral tribunals, the legal consequences of procedural deadlines, the mandate scope of the CAS in appeal proceedings, and the legal obligation to exhaust internal remedies before appealing. The article analyses the appealability of decisions and the binding effects of rulings by association tribunals, especially in light of Swiss jurisprudence. Special attention is given to conflicts regarding jurisdiction, admissibility, and the enforceability of internal sports tribunal decisions under the Swiss Private International Law Act (PILA). The paper argues for a nuanced approach that balances procedural efficiency with athletes' access to justice and the autonomy of sports federations.

KEYWORDS

CAS, association tribunals, jurisdiction, admissibility, appeals, Swiss law, procedural mandate, sports law

THE RELATIONSHIP BETWEEN ASSOCIATION TRIBUNALS AND THE COURT OF ARBITRATION FOR SPORT

Ulrich Haas
University of Zurich, Switzerland

Summary: 1. Introduction. 2. Deadline to appeal. 3. The mandate of the first instance. Notes. Bibliography.

1. INTRODUCTION

A two-stage procedure is typical for dispute resolution in organised sport. In the first instance, a dispute is heard by an association tribunal and in the second instance by an arbitral tribunal, usually the Court of Arbitration for Sport ("CAS"). It is not always easy to determine whether the first instance is an association tribunal. This applies in particular to the distinction between an association tribunal and an arbitral tribunal. The name of the tribunal, or the name of the decision issued by it, is at best an indication of the tasks that the parties have chosen to entrust to it.[1] Ultimately, it is not the name

[1] SFT 148 III 427, consid. 5.9.3.

that is decisive, but the specific powers conferred on the third party.[2] Only if the body is to decide the dispute instead of the state courts is it an arbitral tribunal.[3] Even if the parties have entrusted the third party with the task of a (genuine) arbitral tribunal, Swiss law will only uphold such an arbitration agreement if the arbitral tribunal as such is sufficiently independent of the parties.

The multi-stage nature of the procedure raises a number of questions, some of which will be examined in more detail here.

2. DEADLINE TO APPEAL

According to Article R49 of the Code, the CAS may only decide on a dispute at the second instance if the appellant has lodged an appeal within the time limit set for that purpose. Article R49 of the Code provides that "[i]*f no time limit is set in the statutes or regulations of the federation, association or sports-related body concerned or in any prior agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against*".

It is debatable whether the time limit for appeal is a question of jurisdiction, admissibility or the merits of the case. The provision merely states that "[w]*hen a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after considering any submission made by the other parties*". In the commentary by Rigozzi/Hasler on Article R49(1) of the CAS Code, the following is stated in this regard:[4]

> *"An important issue that, so far, has been dealt with in an inconsistent manner in the case law is the nature of the decision rendered by the CAS when it finds that an appeal has been filed out of time. In some cases, the panel ruled that it had 'no jurisdiction to decide' the dispute at hand, while in others the (statement of) appeal was deemed 'inadmissible'. It is submitted that the correct consequence of a failure to meet the time limit for appeal is that the appeal is dismissed on the merits. As mentioned above, we consider that the time limit set in Article R49 is to be treated as a preclusive time limit".* (emphasis added)

---

2 SFT 142 III 296, consid. 2.4.1.1.

3 SFT 148 III 427, consid. 5.2.2: «*The arbitral award ... is a decision rendered, on the basis of an arbitration agreement, by a non-state tribunal to which the parties have entrusted the task of deciding a case ...* »; cf. also SFT 4A_374/2014, consid. 4.3.2.1.

4 Rigozzi/Hasler, in Arroyo (Ed.) Arbitration in Switzerland, 2nd ed. 2018, Article R49 CAS Code N. 25.

The CAS panels predominantly classify compliance with the time limit for appeal as an admissibility issue.[5] This is also the view of the Swiss Federal Tribunal. In its decision 4A_626/2020, the latter stated the following in this regard:[6]

> *"In a recent decision, the Federal Court, referring in particular to two doctrinal contributions (Stefanie Pfisterer ... Antonio Rigozzi, ...), considered that the observance of the time limit for appealing to the CAS is a condition for the admissibility of the appeal, which does not relate to the jurisdiction of the arbitral tribunal (Judgement 4A_413/20199 of October 28, 2019, at 3.3.2). Failure to comply with the time limit within which an appeal must be filed with the CAS does not in fact mean the arbitral tribunal lacks jurisdiction, it only impacts the (in)admissibility of the appeal. Consequently, the complaint based on the failure to comply with the time limit for filing an appeal to the CAS does not fall within the scope of Art. 190(2) lit. b PILA."* (emphasis added)

A similar statement can be found in another decision of the Swiss Federal Tribunal:[7]

> *"The appellant's argument that the CAS should not have considered the respondent's appeal due to a failure to comply with the time limit for filing an appeal is unfounded. Adherence to the time limit for appeal is a requirement for the admissibility of the appeal to the CAS, which does not concern the jurisdiction of the arbitral tribunal. Therefore, the objection that the time limit for appeal before the CAS was not adhered to does not fall under the objection of lack of jurisdiction under Art. 190 para. 2 lit. b PILA"* (emphasis added)

Therefore, if a CAS panel fails to recognise that an appeal is out of time, or if a CAS panel erroneously dismisses an appeal as out of time, the erroneous arbitral award cannot be challenged before the Swiss Federal Tribunal under Article 190(2) lit. b PILA, except in the exceptional case of public policy.

3. THE MANDATE OF THE FIRST INSTANCE

Pursuant to Article 57(1) of the CAS Code, the arbitral tribunal in appeals arbitration procedures has "*full power*" to review the application of the law and the findings of fact made by the first instance adjudicatory body. In other words, the CAS panel is not bound by the findings of fact or the legal opinion of the first instance. However, the CAS panel must observe the limits of its cognition arising from the subject matter of the dispute before the first

5 Cf. CAS 2023/A/9404, para. 91; CAS 2023/A/9923, para. 77 et seq.; CAS 2021/A/7775, para. 88 et seq. ; CAS 2023/A/9636, para. 118 seq. ; CAS 2024/A/10310, para. 62 seq.

6 Cf. consid. 3.2.

7 SFT 4A_2/2023, consid. 3.3.

instance. In particular, it cannot decide on claims that fall outside the subject matter of the dispute in the first instance. Furthermore, it should be noted that the CAS panel derives its mandate in appeals arbitration proceedings from the rules and regulations of the sports federation that issued the first-instance decision. Thus, if the association tribunal at first instance has no mandate to decide on the dispute or parts of it, the mandate of the CAS panel in an appeals arbitration procedure is correspondingly limited. This is in line with the established jurisprudence of the CAS. For example, a CAS decision states the following:[8]

> *"Pursuant to Articles 60 and 61 of the FIFA Statutes, therefore, CAS jurisdiction derives from the issuance by FIFA of a decision and is consequently limited to the scope of such decision and to the parties concerned by the same."*

Similarly, another CAS panel found as follows:[9]

> *"... the Panel in appeals arbitration proceedings is only mandated to decide the dispute within the limits of the previous instance."*

A restriction of the mandate of the first instance may arise from the fact that the first-instance association tribunal had no jurisdiction over the case. In these circumstances, the mandate of the CAS is indisputably limited, because it derives its decision-making authority from the first instance. However, it is disputed in CAS case law whether, in the absence of jurisdiction of the first instance, the CAS has jurisdiction to hear the appeal or whether the question of the jurisdiction of the first instance is one of the merits of the appeal. In CAS 2014/A/3838, the sole arbitrator found that the lack of first-instance jurisdiction also rendered the jurisdiction of the CAS void. Para. 5.14 of the awards reads as follows:

> *"Since it neither is, nor should be possible to circumvent a first-instance judicial body's undisputed lack of jurisdiction to hear and decide on a substantive issue by merely attempting to refer such a decision to the appeals body (in this case the CAS) through a more or less fictitious appeal, the Sole Arbitrator is of the opinion that at the CAS, in its capacity of an appeals body, has no jurisdiction to hear the appeal."*

The vast majority of CAS panels examine the question – in my opinion correctly – in the context of the merits of the case; after all, the CAS is responsible as the second instance for reviewing a first-instance decision, regardless of whether the first-instance decision is right or wrong.[10] If the first instance had no jurisdiction to decide the dispute, the CAS remains responsible as the appeal instance. However, in such a case, the mandate of

8 CAS 2006/A/1206, para. 25.
9 CAS 2021/A/7775, para. 145.
10 Cf. CAS 2021/A/7775, para. 128 ; CAS 2023/A/9923, para. 87 et seq.

the CAS does not extend beyond the question of whether the first instance had jurisdiction. In no case can the CAS – if the first instance adjudicatory body had no jurisdiction – decide on the claim underlying the dispute; this is because the mandate of the CAS does not extend beyond the boundaries of the first instance.

Sometimes, the question of whether the association tribunal had jurisdiction to hear the case as a whole or in part causes significant difficulties. For example, a CAS panel had to decide whether, in proceedings before the FIFA Players 'Status Committee ("FIFA PSC"), the defendant could set off the plaintiff's claim against a claim in tort.[11] The procedural rules applicable before the association tribunal did not address the issue. The CAS decision reads in its pertinent parts as follows:

> *"138. The ... [maxime of 'le juge de l'action est le juge de l'exception'] describes a legal principle whereby the judge that is competent for the main action is also competent to decide on objections thereto, irrespective of whether the issue raised as an objection falls within the competence of another judge. The aforementioned principle applies in court proceedings before Swiss state courts (cf BGE 63 II 133 E. 3c; 124 III 207 E. 3b/bb; BGer 4A_482/2010 E. 4.3.1). As a consequence, a claim can be raised by set-off as a defence against a main action filed in court even if another court would be competent to decide on that claim if the latter was filed separately. The question is whether this principle applicable before state courts also applies to proceedings before the FIFA adjudicatory bodies. ...*
> *154. The FIFA PSC is a (very) specialised dispute resolution body. This follows when looking at the jurisdiction ratione materiae (subject-matter jurisdiction) of the FIFA PSC. ...*
> *157. This restricted subject-matter competence of the FIFA adjudicatory bodies is further supported when looking at the purpose of FIFA's dispute resolution mechanism. The latter does not simply serve the interests of parties to get their disputes resolved. Instead, the dispute resolution mechanism provided by FIFA also serves FIFA's own interests. Through its adjudicatory bodies FIFA seeks to enforce its standards in the international football industry. Such interests of FIFA, however, are obviously limited to disputes that have a close connection to the football industry and that are decided in application of its rules and regulations.*
> *158. In view of the above, it does not appear procedurally efficient to entrust the FIFA PSC with the adjudication of a complex tort claim that is governed by domestic law only. The FIFA PSC is not the proper forum for such disputes, since as a free-standing claim CCFC's tort claim would fall outside FIFA's subject-matter (ratione materiae) jurisdiction. If CCFC had filed its tort claim separately and not in the context of a set-off defence, the FIFA PSC would have correctly declined its competence to adjudicate the matter. The tort claim would have no connection whatsoever to the areas regulated in the FIFA RSTP. CCFC's claim is based on the application of domestic tort law in which FIFA's specialised adjudicatory bodies have insufficient expertise and in which there is no interest of FIFA in its governing and regulatory capacity.*

[11] CAS 2019/A/6594, para. 138 ff.

159. The Panel also finds that the procedural rules applicable before the FIFA PSC are not designed to adjudicate CCFC's tort claim. The applicable procedural rules before FIFA seek to resolve the football-related dispute quickly and inexpensively. This purpose would be undermined if the FIFA PSC were competent to adjudicate such a set-off claim. Furthermore, the Panel observes that the costs of the proceedings before the FIFA PSC are capped at CHF 25,000 (Article 18(1) FIFA Procedural Rules); and that the advance of costs to be paid is capped at CHF 5,000 (Article 17(4) FIFA Procedural Rules). Such relatively low amounts correspond to a speedy and not overly complex dispute resolution mechanism and are entirely inadequate to cover the costs of adjudication of a full-fledged cross-border tort claim involving a significant number of legal and aviation experts, not to mention large multi-firm legal teams on each side.

160. Likewise, pursuant to Article 16(10) and (11) of the FIFA Procedural Rules, the time limits for filing an answer and a potential second round of written submissions are 20 days. These deadlines may be extended once only for another 10 days. These procedural rules are wholly inadequate to address a complex set-off defence such as filed by CCFC in these proceedings. This is demonstrated by the numerous requests for significant extensions of the respective filing deadlines before CAS in these proceedings, which in part were necessary to collect relevant expert evidence.

161. Furthermore, while oral hearings are possible before the FIFA PSC (Article 11 FIFA Procedural Rules), the general rule is that proceedings are conducted on written submissions only (Article 8 FIFA Procedural Rules). Such procedure is inadequate to deal with the type of dispute in question here. CCFC acknowledged this and submitted that if its tort claim were filed in the English courts several days, if not weeks, would be set aside to hear that claim.

162. <u>All of the above confirms that the applicable procedural regulations before the FIFA PSC are not designed to deal with CCFC's complex cross-border tort claim. Consequently, it would neither be procedurally efficient nor in the interests of justice to entrust the FIFA PSC with the adjudication of CCFC's tort claim.</u> ...

167. The Panel thus concludes that ... the FIFA PSC is not competent to adjudicate CCFC's alleged set-off claim. By taking recourse to FIFA's specialised association tribunals the Parties have waived the possibility to introduce by way of set-off claims that would otherwise fall outside FIFA's jurisdiction." (emphasis added)

The question is whether a CAS award can be challenged under Article 190(2) lit. b of the PILA, if the CAS panel fails to recognise that the first instance adjudicatory body lacked jurisdiction. Under Article 190(2) lit. b PILA, an award may be challenged before the Swiss Federal Tribunal "*where the arbitral tribunal wrongly accepted or declined jurisdiction*". This provision not only covers the case where the arbitral tribunal misconstrues the existence or non-existence of an arbitration agreement, but also the case where the arbitral tribunal errs as to the scope of an arbitration agreement and thus as to the scope of its authority.[12] This is illustrated by a case decided by the Swiss Federal Tribunal, which was based on the following facts:[13]

[12] SFT 4A_2/2023, para. 3.1.
[13] SFT 4A_2/2023.

The parties (a club and a coach) had provided in the employment contract for the jurisdiction of the labour courts in the event of an employment-related dispute. After the dispute arose, the coach – contrary to the contractual agreement – brought an action for payment before the Players' Status Committee of the FIFA Football Tribunal. The latter wrongly affirmed its jurisdiction and ordered the club to pay the coach's salary. The club appealed against this decision to the CAS and sought the annulment of the initial decision on the grounds that it was not the FIFA Players' Status Committee but the national labour court that had jurisdiction for resolving the dispute. The CAS upheld the appeal, thus affirming its jurisdiction to review the initial decision, but annulling the decision of the Players' Status Committee due to the latter's lack of jurisdiction. The coach then lodged an appeal against the CAS award with the Swiss Federal Tribunal, invoking, among other things, Article 190(2) lit. b PILA on the grounds that the Players' Status Committee was indeed competent to resolve the dispute and that the CAS panel had misjudged the scope of its decision-making authority.

The Swiss Federal Tribunal ruled on the above facts as follows:[14]

> *"The ... [Coach] alleges that the arbitral tribunal wrongly denied the jurisdiction of the ... FIFA Players' Status Committee and thus also its own jurisdiction to rule on the dispute (Art. 190(2) lit. b IPRG). ...*
> *The CAS correctly pointed out that in the present case, in which it had to decide as a court of appeal, its own jurisdiction could not extend further than that of the association's internal decision-making body. The jurisdiction of the CAS to rule on the claims asserted therefore presupposes that the FIFA Players' Status Committee was itself competent to decide on the dispute (see judgement 4A_420/2022 of 30 March 2023, E. 5.5.5). In order to examine the jurisdiction of the FIFA committee and thus indirectly also of the CAS itself, the arbitral tribunal interpreted not only clause XI.4 of the employment contract ... but also the applicable association rules ...*
> *The CAS understandably considered that clause XI.4 of the employment contract should be interpreted in good faith to mean that the parties, with the express reference to labour disputes, which were to be submitted to the competent state court ... for adjudication, did not waive state jurisdiction for any disputes arising from their employment contract .... The appellant has not demonstrated how the CAS may have violated recognised principles of interpretation. On the contrary, the arbitral tribunal correctly took into account that, according to the case law of the Swiss Federal Tribunal, such a waiver cannot be assumed lightly and, in case of doubt, it is right to give preference to a restrictive interpretation." (emphasis added)*

At first glance, the above decision conflicts with another decision of the Swiss Federal Tribunal.[15] The latter was based on the following facts:

14 SFT 4A_2/2023, consid. 3 et seq.
15 SFT 148 III 427.

An international association had initially provided for its own association tribunal for doping disputes, but later transferred its jurisdiction in doping matters to the Anti-Doping Division of the CAS ("CAD TAS"). The association's rules provided that first-instance decisions (of the former association tribunal or the CAD TAS) could be appealed to the appeals arbitration division of the CAS ("CAA TAS"). In this specific case, the athlete had been accused and convicted of a doping offence before the CAD TAS. He appealed to the CAA TAS and was unsuccessful. The athlete then lodged an appeal against this final arbitral award with the Federal Supreme Court, arguing, among other things, that the former association tribunal, and not the CAD TAS, had been responsible for adjudicating the matter.

The Swiss Federal Tribunal found as follows:

> *"5.2.4. In a ruling handed down on 13 January 2022, the Federal Court held that the plea of lack of jurisdiction referred to in art. 190 para. 2 lit. b PILA can only be used to argue that the arbitral tribunal hearing an action for annulment of a decision handed down by a judicial body of a sports federation (in this case the Players' Status Committee of the Fédération Internationale de Football Association), i.e., a non-arbitral authority, wrongly declared itself competent or incompetent to hear such an action. On the other hand, the plea alleging breach of art. 190 para. 2 let. b of the PILA does not allow the jurisdiction of the court of first instance examined and accepted by the CAA TAS to be called into question (judgement 4A_344/2021 cited above, para. 5). At most, this question can be examined from the angle of conflict with public policy within the meaning of art. 190 para. 2 let. e of the PILA. ...*
> *5.9.4. In view of the foregoing, the plea alleging infringement of art. 190 para. 2 let. b PILA is inadmissible, insofar as the appellant is seeking an indirect review of the jurisdiction of the CAD TAS, which in the present case did not act as a genuine arbitral tribunal, but as a disciplinary court of first instance delegated by the respondent. Insofar as the appellant's entire argument seeking to establish that the CAA TAS lacked jurisdiction is based on the unproven premise that the authority of first instance, i.e., the CAD TAS, had wrongly declared itself competent in the present case, a question that the Federal Court cannot review under art. 190 para. 2 let. b of the PILA, but solely with regard to the infringement of public policy within the meaning of art. 190 para. 2 let. e of the PILA - a complaint that the appellant does not raise -, it logically follows that the appellant's argument is doomed to failure."*
> (emphasis added)

While the Federal Supreme Court examined the jurisdiction of the association tribunal as the first instance under Article 190(2) lit. b PILA in the first case, it refused to do so in the second decision. However, the two rulings only appear to be irreconcilable. On closer inspection, it becomes apparent that in the first case, decided by the Swiss Federal Tribunal, the lack of jurisdiction not only affected the first instance, but also the jurisdiction of the CAS. If it is not the FIFA association tribunal but the national labour court that has jurisdiction, the CAS cannot decide on the claim in the matter even if the association tribunal erroneously affirms its jurisdiction.

In this case, the Swiss Federal Tribunal not only indirectly reviewed the jurisdiction of the association tribunal in light of Article 190(2) lit. b PILA, but also directly the jurisdiction of the CAS. If, on the other hand, it is unclear which of several association tribunals is responsible for settling a dispute within the association, but – as in the second case – the association's rules and regulations provide in any case for the final adjudication of the CAS, a possible lack of jurisdiction at the first instance level does not affect the jurisdiction of the CAS – apart from the public policy reservation. There is therefore no room for the application of Article 190(2) lit. b PILA here.

4. EXHAUSTION OF LEGAL REMEDIES

Article R47(1) of the CAS Code provides that an appeal may only be brought before the CAS in appeals arbitration proceedings if the appellant has first exhausted *"all available legal remedies"*. However, it is questionable what is meant by "legal remedies" in the aforementioned sense. The literature rightly points out that the obligation to exhaust other legal remedies only applies if the legal remedies in question are mandatory, i.e., binding on the parties. In this respect, the commentary by *Rigozzi/Hasler* on Article R47 of the CAS Code rightly states the following:[16]

> *"The requirement of the exhaustion of internal remedies only applies to remedies that are mandatory under the applicable regulations: discretionary, optional or extraordinary remedies, such as, for instance, application for early reinstatement in case of exceptional circumstances, need not be exhausted for the purposes of Art. R47(1)."*

A distinction is also sometimes made in the legal literature between ordinary and extraordinary legal remedies.[17] For example, the commentary by *Mavromati/Reeb* states the following:

> *"The obligation to exhaust internal remedies according to Article R47 only concerns the prior judicial instances foreseen by the applicable regulations. Therefore, it is not necessary to exhaust all legal remedies but only the legal remedies available to the appellant under the regulations prior to the CAS appeal. The wording of Article R47 of the Code has been interpreted as encompassing ordinary remedies only and not extraordinary remedies. The SFT has confirmed the view that the obligation to exhaust internal legal remedies applies only to ordinary - and not to extraordinary or incomplete legal remedies (e.g., the request for revision)."* (emphasis added)

16 *Rigozzi/Hasler*, in Arroyo (ed.) Arbitration in Switzerland, 2nd ed. 2018, Art. R47 CAS Code no. 32.

17 *Mavromati/Reeb*, The Code of the Court of Arbitration for Sport, 2015, Article R47 no. 33.

However, this differentiation between "ordinary" and "extraordinary" legal remedies conceals nothing other than the distinction between binding and non-binding preliminary proceedings. This becomes clear when reading the decision of the Swiss Federal Tribunal referred to in the above commentary. The decision states the following:[18]

> *"The obligation to exhaust prior instances, set out in art. R47 para. 1 of the Code, applies only to the internal body whose implementation the sports federation concerned prescribes before any referral to CAS, to the exclusion of the body to which the appellant has the choice of referring or not the decision that does not satisfy him (Antonio Rigozzi, L'arbitrage international en matière de sport, 2005, no. 1024, p. 526). Moreover, as the respondent rightly points out (reply, n. 34 et seq.), it is hardly conceivable that such an obligation could also apply to an extraordinary and incomplete legal remedy, such as revision."* (emphasis added)

The "legal remedies available" within the meaning of Article R47(1) CAS Code, therefore, only include the binding, i.e., the mandatory, preliminary proceedings, but not those legal remedies to which a party is optionally entitled or in which the entire subject matter of the dispute is not at issue in legal or factual terms.

The CAS case law also provides for exceptions to the obligation to first exhaust the mandatory legal remedies. Accordingly, a premature appeal to the CAS does not constitute a breach of duty if the mandatory legal remedies are "ineffective"[19] or do not serve a "useful purpose"[20]. For example, a CAS decision has stated the following:[21]

> *"For, only if the association's internal instances are willing and in a position to grant effective legal protection do the Appellants have to accept a restriction in their right to have recourse to the courts (or arbitral tribunals)."*

Similarly, another CAS award stated:[22]

> *"In this vein, indeed, the CAS precedents that have dealt with the issue of the exhaustion of legal remedies have indicated that "the internal remedy must be readily and effectively available to the aggrieved party and it must give access to a definite procedure" (CAS 2007/A/1373, § 9.3, and CAS 2003/O/466, § 6.12, in International Sports Law Review, 2004, p. SLR-48; see also the awards in CAS 2008/A/1468; CAS 2008/A/1494; CAS 2008/A/1495; CAS 2008/A/1699; and the order in CAS 2007/A/1347)."*

18 SFT 4A_682/2012, consid. 4.4.3.2.
19 CAS 2010/A/2243, 2358, 2385 & 2411, no. 15.
20 CAS 2016/A/4812, no. 137.
21 CAS 2008/A/1583 & 1584, no.5.3.2.4.
22 CAS 2010/A/2243, 2358, 2385 & 2411, no. 14.

The literature predominantly follows the above case law and does not sanction a premature filing with the arbitral tribunal if the legal remedies at first instance *"do not exist or are illusory … only if the association's internal instances are willing and able to grant effective legal protection does the respondent have the right to impose the exhaustion of internal remedies prior to the appeal to the CAS"*[23] or if *"… for instance, the internal hearing body deliberately delays the proceedings or refuses to deal with the case, or has made comments about the matter which make it clear that it will not be able to act with the necessary impartiality"*[24]. This threshold, however, is rather high.

It is debatable whether the obligation to exhaust internal legal remedies is a question of the jurisdiction of the CAS or an admissibility requirement. If the CAS panel is approached prematurely, must it dismiss the premature arbitration for lack of jurisdiction or must the claim be declared inadmissible? A CAS award states the following in this regard:[25]

> *"77 It is debated in legal doctrine whether exhausting internal legal remedies is an admissibility requirement (pro: RIGOZZI/HASLER, Article R47 CAS Code, in: Arroyo (Ed.), Arbitration in Switzerland, Vol. II, 2018, p. 1583) or a matter of jurisdiction (pro: MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, 2015, p. 391). …*
> *78 The Panel favours considering the issue as an admissibility requirement. First, this is in line with the Parties' written and oral submissions that considered it to be an issue of admissibility. Second, because the requirement does not serve to distinguish the Panel's mandate from the Parties' access to justice before state courts. …"* (emphasis added)

This again raises the question of whether the Swiss Federal Tribunal can set aside a CAS award under Article 190(2) lit. b PILA if a CAS panel wrongly disregards mandatory proceedings before the association tribunal. The Swiss Federal Tribunal has not yet commented on this. However, it has dealt with a comparable case in which the parties had mandatorily provided a med-arb clause. The Swiss Federal Tribunal has ruled as follows in this respect:[26]

> *"The Swiss Federal Supreme Court has considered, in the light of art. 190 para. 2 lit. b of the PILA (RS 291) on the jurisdiction of the arbitral tribunal, the complaint that a contractual mechanism constituting a mandatory prerequisite to arbitration (attempted conciliation, appointment of an expert, mediation, etc.) has been*

---

23 *Mavromati/Reeb*, The Code of the Court of Arbitration for Sport, 2015, Article R47 no. 35; cf. also *Beloff/Netzle/Haas*, in Lewis/Taylor (eds) Sport: Law and practice, 4th ed. 2021, D.2.97.

24 *Rigozzi/Hasler*, in Arroyo (ed.) Arbitration in Switzerland, 2nd ed. 2018, Art. R47 CAS Code no. 34.

25 CAS 2019/A/6298, para. 77 seq.

26 SFT 142 III 296, consid. 2.2

breached. It does so by default, as it is unable to link such a grievance to another ground for appeal within the meaning of this provision, thus implicitly admitting that such a violation is certainly not sufficiently serious to fall within the scope of the procedural public policy referred to in art. 190 para. 2 lit. e PILA ..., but that it must nevertheless be sanctioned in one way or another. This does not mean, in his mind, that such a connection would necessarily dictate the solution to be adopted to sanction the fact of filing a request for arbitration without having taken the compulsory prior step agreed by the parties (judgement 4A_124/2014 of 7 July 2014 recital 3.2 and the precedents cited).

When a claim of lack of jurisdiction is brought before it, the Federal Supreme Court freely examines the legal issues that determine the jurisdiction or lack of jurisdiction of the arbitral tribunal. If necessary, it will also review the application of the relevant foreign law; it will also do so with full cognisance, but will follow the majority opinion expressed on the point in question, or even, in the event of controversy between the doctrine and the law, the majority opinion." (emphasis added)

In the above case, the Swiss Federal Tribunal assessed the "premature referral" of the case to the arbitral tribunal from the perspective of Article 190(2) lit. b PILA. If the arbitral tribunal disregards a binding or mandatory pre-arbitration procedure provided for by the parties, the arbitral award may be challenged. Ultimately, it cannot make any difference whether the binding pre-arbitration procedure agreed by the parties is a mediation or a procedure before an association tribunal. If a CAS panel decides on a dispute, even though the binding internal remedies have not been exhausted, such an arbitral award is in principle subject to appeal before the Swiss Federal Tribunal in accordance with Article 190(2) lit. b PILA.

5. APPEALABLE DECISIONS

Pursuant to Article R47(1) of the CAS, an appeal may be lodged against a *"decision of a federation, association or sports-related body"* in appeals arbitration proceedings. The law does not define the term "decision". The CAS case law points out that the *"the form of the communication has no relevance to determine whether there exists a decision or not. In particular, the fact that the communication is made in the form of a letter does not rule out the possibility that it constitutes a decision subject to appeal."*[27] Rather, it is the content of the declaration of intent that is decisive. *"In principle, for a communication to be a decision, this communication must contain a ruling, whereby the body issuing the decision intends to affect the legal situation*

[27] CAS 2024/A/10588, para. 100; 2010/A/2188, para. 21; CAS 2005/A/899 para. 63; CAS 2007/A/1251 para. 30; CAS 2004/A/748 para. 90; CAS 2008/A/1633 para. 31.

of the addressee of the decision or other parties".[28] The latter is particularly lacking if the declaration of intent is merely informative.[29]

An association tribunal can make a variety of "decisions" as part of its dispute resolution. These may be procedural orders, provisional, interim, partial or final decisions. All these expressions of the association tribunal's will fulfil the above-mentioned requirements of a "decision" within the meaning of Article R47(1) of the CAS Code, because they all affect the procedural and/or substantive legal position of the parties to the proceedings. However, the question of whether a "decision" within the meaning of Article R47(1) of the CAS Code exists must be distinguished from the further question of whether it is an "independently appealable" decision.

The applicable rules and regulations primarily determine which decisions of an association tribunal are subject to appeal. It is – in principle – within the autonomy of the respective sports federation to determine which decision can be referred to CAS. Of course, the autonomy of sports federations is not unlimited. In any case, the decision with which the proceedings before the first instance are concluded must be subject to appeal. The rules of the sports federations cannot completely exclude access to justice. However, the question arises as to what applies to other decisions of the association tribunal that precede its final decision. A CAS panel dealt with this question in a case[30] based on the following facts:

In March 2019, UEFA (Investigatory Chamber) opened disciplinary proceedings against an English club. After completing its investigation, the Investigatory Chamber concluded that the club had committed a disciplinary offence and referred the case to the UEFA Adjudicatory Chamber for adjudication in May 2019. The English club appealed to the CAS against this decision to refer the case to the Adjudicatory Chamber ("Referral Decision") and requested – among other things – that the referral decision be set aside because "*the referral decision is based on a flawed investigation, which was not conducted with procedural fairness or due process*".

The competent CAS panel commented on the appealability of the Referral Decision as follows:

> *"79. The starting point to determine whether or not a decision is appealable is the applicable internal regulations.*
> *80. It is not in dispute that the various regulations of UEFA are primarily applicable to the dispute, in particular the UEFA CL&FFPR and the CFCB Procedural Rules. ...*

---

28 CAS 2024/A/10588, para. 101 ; CAS 2010/A/2188, para. 21; CAS 2005/A/899 para. 63; CAS 2007/A/1251 para. 30; CAS 2004/A/748 para. 90; CAS 2008/A/1633 para. 31.

29 CAS 2024/A/10588, para. 104 seq.

30 CAS 2019/A/6298.

82. Article 34 CFCB Procedural Rules provides as follows:
"1. A party directly affected has the right to appeal a final decision of the CFCB.
2. Final decisions of the CFCB may only be appealed before the Court of Arbitration for Sport (CAS) in accordance with the relevant provisions of the UEFA Statutes."
83. The Panel derives from Article 34 CFCB Procedural Rules that not all decisions issued by the UEFA CFCB shall be appealed to CAS. Rather, only 'final decisions' that directly affect a party can be appealed before CAS. This does not mean that there is no legal remedy against all other decisions. It simply means that the legal remedy against such other decisions is only available in the context of an appeal against the 'final decision'. ...
88. Article 27 CFCB Procedural Rules (headed 'Final decision' – incorporated in the chapter governing the functioning of the Adjudicatory Chamber) provides as follows:
'The adjudicatory chamber may take the following final decisions:
a) To dismiss the case; or
b) to accept or reject the club's admission to the UEFA club competition in question; or
c) to impose disciplinary measures in accordance with the present rules; or
d) to uphold, reject, or modify a decision of the CFCB chief investigator.'
89. The Panel finds that, as emphasised by the heading of the provision, there can be no doubt that the types of decisions listed in Article 27 CFCB Procedural Rules are 'final decisions' within the above meaning and can be appealed to CAS. This makes perfect sense, since nobody within the UEFA administration can review these types of decisions, which legitimises an external appeal to CAS, because all internal legal remedies are exhausted.
90. As a corollary, a decision rendered by the Investigatory Chamber to refer a case to the Adjudicatory Chamber is not final and can therefore in principle not be appealed to CAS directly, because the Adjudicatory Chamber is competent to take any of the decisions listed in Article 27 CFCB Procedural Rules, that are described as being final. It follows from the above that a referral decision issued by the Investigatory Chamber, in principle, does not qualify as a final decision that can be appealed to CAS and that only once the Adjudicatory Chamber renders one of the decisions listed in Article 27 CFCB Procedural Rules has a final decision been rendered that can be appealed to CAS. ...
95. The bottom line as to the Referral Decision is that a decision of the Investigatory Chamber to refer a case to the Adjudicatory Chamber does not bring an end to the matter in dispute wholly or partially. Instead the matter in dispute before the Adjudicatory Chamber remains identical to the one before the Investigatory Chamber that was referred to the Adjudicatory Chamber. Thus, the Adjudicatory Chamber may still decide to dismiss the entire case against MCFC, in which case MCFC would be exonerated. Therefore, until the Adjudicatory Chamber issues its final decision, the legal remedies of MCFC are not exhausted and an appeal to CAS is, in principle, premature. ...
107. The Panel agrees that there can be exceptions to the general rule that internal legal remedies must be exhausted. An exception would be warranted in case irreparable harm would be incurred prior to the issuance of the final decision and in case the proceedings would be wholly unbearable or if the outcome would be clear from the very outset. In such cases procedural efficiency would dictate that an appeal can be filed with CAS directly." (emphasis added)

Whether individual decisions of a first-instance association tribunal that precede the final adjudication of the case can be challenged according

to Article R47(1) CAS Code is – insofar as the issue is not regulated in the applicable rules and regulations – a matter of weighing up the principle of procedural economy against the principle of effective legal protection of the party concerned.

A comparable consideration is made, for example, by the Swiss Federal Tribunal when classifying CAS awards under Article 190 PILA. The provision distinguishes between "arbitral awards" and "preliminary awards" with regard to the standard of review to be applied. The latter are only subject to limited appeal under Article 190(3) PILA, namely only under paragraph 2 lit. a and b PILA. The case law generally distinguishes between preliminary awards (which are subject to limited appeal) and other arbitral awards (which are subject to unlimited appeal) as follows:[31]

> *"The act that may be challenged may be a final award, which brings the arbitration proceedings to an end for a substantive or procedural reason, a partial award, which relates to a quantitatively limited part of a disputed claim or to one of the various claims at issue, or which brings the proceedings to an end with regard to some of the parties … , or even a preliminary or incidental award, which settles one or more preliminary questions of substance or procedure … In deciding whether an appeal is admissible, what is decisive is not the name of the decision appealed against, but its content."*

In sports arbitration, however, the Swiss Federal Tribunal draws a different distinction with a view to the multi-level nature of the dispute resolution mechanism. This applies in particular to cases in which the CAS does not decide the dispute on the merits, but refers it back to the first instance adjudicatory body in accordance with Article R57(1) of the CAS Code. Strictly speaking, such a CAS award is not a preliminary award according to the above criteria, but a final award. However, classifying such an award as a final award would not be particularly efficient in terms of procedural economy, since the proceedings could be brought before the CAS and, thus, also before the Swiss Federal Tribunal a second time after referral back to the association tribunal. The Swiss Federal Tribunal, therefore, states the following:[32]

> *"In defining the various types of award that can be challenged, the Swiss Federal Supreme Court had in mind international disputes arising from commercial relations between parties to a contractual relationship. It fits in well with the nature of such disputes, which are between two or more parties who instruct the arbitral tribunal appointed by them to settle their dispute as a single instance, subject to possible recourse to a state court. In this context, the final award effectively closes the 'arbitration proceedings'.*

31 SFT 140 III 520, consid. 2.1.1.
32 SFT 140 III 520, consid. 2.2.1.

On the other hand, this same definition does not appear to be sufficiently adapted to the specific features inherent in sports arbitration ..., particularly when the CAS is involved in an appeal against a decision taken by a sports federation. Indeed, ruling as an appeal court, the CAS Panel will certainly render a final award within the meaning of the definition mentioned above, i.e., an award that will put an end to the arbitration proceedings pending before it. However, the proceedings on the merits between the parties will not necessarily be terminated by this award. It will continue in the event that the Panel annuls the contested decision and refers the case back to the sports federation concerned, inviting it to resume the investigation of the case and issue a new decision. Seen in this light, the proceedings initiated before the sports federation, then continued on appeal before the CAS, are akin to ordinary state proceedings, subject to the requirement of dual jurisdiction. ..."

In order to avoid multiple appeals to the Swiss Federal Tribunal on the same subject matter, the Swiss Federal Tribunal, for reasons of procedural economy, classifies remissions by the CAS to the lower instance within the meaning of Article R57(1) of the CAS Code as (limitedly appealable) preliminary awards in the sense of Article 190(3) of the PILA. This does not mean that the arbitral award is withdrawn from review by the Swiss Federal Tribunal. Rather, the Swiss Federal Tribunal will only review the application of Article 190(2) lit. c-e PILA at the very end of the proceedings, when the CAS issues its final decision on the dispute.[33]

It is debatable whether the qualification as an appealable decision within the meaning of Article R47(1) of the CAS Code is a question of the jurisdiction or of the admissibility of the appeal. There are good reasons to classify the question as one of admissibility.[34] In a recent CAS decision, this is justified as follows:

"96. The distinction between jurisdiction and admissibility is complex and differs from jurisdiction to jurisdiction (Girsberger/Voser, International Arbitration, 5th ed. 2024, no. 1358; cf. also Stacher, Jurisdiction and Admissibility under Swiss Arbitration Law – the Relevance of the Distinction and a New Hope, Bull-ASA 2020, 55 ff.). In particular, the CAS jurisprudence in relation to the above issue is not unanimous. In CAS 2008/A/1633 and CAS 2022/A/8865-8868 the panels treated the question whether the appeal was directed against a 'decision' as an admissibility issue. In CAS 2007/A/1633 or CAS 2015/A/4174, on the contrary, the respective panels analysed the identical issue as a jurisdictional matter. ...

97. As a rule of thumb, the question whether CAS has competence to decide the dispute in a binding manner in lieu of a state court, and whether the matter before CAS is within the scope of the arbitration agreement, are issues of jurisdiction, whereas all procedural issues that are non-jurisdictional issues and that may cause the end of the arbitration for procedural reasons are admissibility issues (Girsberger/Voser, International Arbitration, 5th ed. 2024, no. 1358). If one applies this rule of thumb

33 SFT 140 III 520, consid. 2.2.2; SFT 4A_140/2022, consid. 3.2.3.

34 Cf also CAS 2019/A/6298, para. 78.

in the case at hand, the question whether the IOC-Decision qualifies as a decision within the meaning of Article R47 of the CAS Code is an admissibility issue. It is not disputed that the competence to decide a dispute in a binding way was transferred from state courts to arbitration in the case at hand. Neither the Appellant nor the IOC object to being bound to Rule 61(2) of the Olympic Charter, which provides for such a transfer of competence to the CAS.
98. Furthermore, the Sole Arbitrator after carefully reviewing the CAS precedents finds that there are further arguments speaking in favour of qualifying the above issue as an admissibility matter (cf. also CAS 2021/A/8034, no. 74). The CAS Code provides different types of proceedings depending on the matter in dispute, i.e., whether the requests filed by an appellant relate to the setting aside of a 'decision' of a sports organisation. If the latter is the case, then the dispute will be adjudicated according to the provisions applicable to the Appeals Arbitration Procedure. In case the matter in dispute does not concern an appeal against a decision, the respective provisions of the Ordinary Appeals Procedure apply. The question of what procedural rules apply is, however, completely independent from the question whether CAS – based on an arbitration agreement – has jurisdiction. As such, the Sole Arbitrator will proceed to address the legal status of the IOC-Decision in the section on admissibility." (emphasis added)

6. THE BINDING EFFECT OF DECISIONS OF AN ASSOCIATION TRIBUNAL

If no appeal is filed against a decision of an association tribunal within the prescribed time limit, it can no longer be challenged in appeal proceedings before the CAS. The question of whether the decision of the association tribunal can be challenged in new proceedings must be distinguished from the question of whether the appeal process has been exhausted. In the case of decisions by state courts or arbitral awards, the purpose of preventing new proceedings concerning the same matter is served by the concept of *res judicata*. This is a procedural concept that derives from state law. However, the decisions of an association tribunal are not among those to which *res judicata* is conferred by state law. This has been repeatedly affirmed by the Swiss Federal Tribunal. For example, in SFT 4A_486/2022, consid. 6.4, it states:

"At the outset, the question arises as to whether the CAS can really be criticised for having breached the ne bis in idem principle - which is described in case law as the corollary or negative aspect of res judicata - on the grounds that it did not take into account the decision previously handed down by the yyy Federal Court of Appeal. It should be remembered that decisions handed down by the judicial bodies of an association, such as yyy, are not judicial decisions or arbitration awards and therefore do not have the force of res judicata (BGE 119 II 271, para. 3b; judgement 4A_476/2020, cited above, para. 3.2 and the references cited)."

The binding nature of decisions of an association tribunal does not derive from procedural law, but from the applicable substantive law. A CAS panel has explained this as follows:[35]

> *"80. Proceedings before association tribunals are a means of alternative dispute resolution. Differently from arbitration, Swiss law does not provide for a legislative framework for these kinds of proceedings. However, it is undisputed in Swiss law that adjudication by association tribunals – as long as they are agreed upon by the parties – are an admissible and legitimate means of (alternative) dispute resolution. It is further accepted in Swiss law that in case a party to this dispute resolution mechanism has not exhausted the internal instances of recourse within the prescribed deadlines or in case a party has failed to lodge a timely appeal against the last instance decision of an association tribunal, the decision becomes 'binding', i.e., it can no longer be appealed to state courts or arbitral tribunals (BGE 85 II 525, 535 seq.; BK-ZGB/Riemer, 1990, Art. 72 N. 83). ...*
> *81. Such binding character attributed to decisions of association tribunals cannot be circumvented by the party who missed the deadline for lodging the appeal according to Art. 75 CC by now dressing his or her claim differently, for example as a claim for damages (within the meaning of Article 28 CC or Articles 41 et seq of the Swiss Code of Obligations – 'CO'). This clearly follows from the jurisprudence of the SFT. ...*
> *82. The FIFA Procedural Rules Governing the Football Tribunal ("PRGFT") (ed. 2022) follow this approach. Article 15(5) (7) and Article 20(4) of the PRGFT provides as follows:*
> *Article 15(5) PRGFT*
> *Where no procedural costs are ordered, a party has ten calendar days from notification of the operative part of the decision to request the grounds of the decision. Failure to comply with the time limit shall result in the decision becoming final and binding and the party will be deemed to have waived its right to file an appeal. The time limit to lodge an appeal begins upon notification of the grounds of the decision.*
> *Article 15(7) PRGFT*
> *Failure to comply with the time limit referred to in paragraph 6 of this article shall result in the request for the grounds being deemed to have been withdrawn. As a result, the decision will become final and binding and the party will be deemed to have waived its right to file an appeal. ...*
> *Article 20(4) PRGFT*
> *Where a proposal is accepted, a confirmation letter will be issued by the FIFA general secretariat. The confirmation letter shall be considered a final and binding decision pursuant to the relevant FIFA regulations". (emphasis added)*

Even though the binding effect of an association tribunal decision is of a substantive (and not procedural) nature, CAS determines the scope of the binding effect of a decision of an association tribunal by applying the principles of *res judicata* by analogy. The CAS panel in the proceedings 2023/A/9404 justified this as follows:

35 CAS 2023/A/9404.

"102. The Panel notes that association tribunals and arbitral tribunals perform similar functions. Both seek to resolve a dispute between the parties in a court-like procedure. Because of these similar functions it appears obvious to determine the extent of the binding effect of both dispute resolution mechanisms in a similar way. This is all the truer, considering that res judicata not only serves a public interest. Instead, the concept also intends to protect the private interests of the parties involved in the litigation. Without the "finality" of a dispute resolution mechanism, a dispute would never end. It is, however, the common intention of the parties when submitting to a dispute resolution mechanism, to have their contentious relationship finally and bindingly resolved by the adjudicator. The private interests involved do not differ in proceedings before an association tribunal from other forms of dispute resolution such as arbitration. Consequently, when looking at the similar functions and the similar interests involved, the better arguments speak in favour of determining the scope of the binding effects of the respective decisions in an identical manner, i.e., to determine the extent of the finality of a decision of an association tribunal by applying the concept of res judicata by analogy.
103. This finding is not contradicted by the fact that – as previously stated – the statutory provisions and principles related to res judicata are mandatory and cannot be altered through an agreement of the parties (see supra no. 82). Unlike the statutory concept of res judicata, the extent of the binding effect of decisions of an association tribunal is within the autonomy of the parties or the autonomy of the federation concerned. Thus, it is for the FIFA rules and regulations to determine the extent of the binding effects of the decisions of the FIFA adjudicatory bodies. It is perfectly legitimate for the parties to agree among themselves that they want a decision of an association tribunal to be treated akin to a state court decision or an arbitral award. Of course, such an agreement only binds the parties involved and not third parties or state authorities. ...
108. The above finding of the Panel is also supported by jurisprudence of the SFT. The latter has applied in the past procedural concepts before state court proceedings to proceedings before association tribunals, because of their similar adjudicatory functions. Thus, the SFT – e.g. – has applied the concept of joint defendants (according to Article 71 of the Swiss Code of Civil Procedure) to proceedings before association tribunals (e.g. SFT 140 III 520). ..." (emphasis added)

7. SUMMARY

(1) The deadline to appeal in Article R49 of the CAS Code is an issue of admissibility and not of jurisdiction. If a CAS panel fails to recognise that an appeal is out of time, or if a CAS panel erroneously dismisses an appeal as out of time, such award cannot be challenged before the Swiss Federal Tribunal under Article 190(2) lit. b PILA, except in the exceptional case of public policy.

(2) The mandate of a CAS panel in appeals arbitration proceedings is limited by the subject matter of the dispute before the first instance. Restrictions of the panel's mandate may also arise if the first instance

had no jurisdiction to decide the dispute in the first place. In such case, the CAS panel must dismiss the Appellant's requests on the merits, since a possible lack of jurisdiction of the first instance level does not – in principle – affect the jurisdiction of the CAS. In case the panel mistakenly assumes that the first instance is competent, such award cannot be appealed according Article 190(2) PILA (subject for a violation of public policy).

(3) Article R47 of the CAS Code requires that an appellant exhaust the internal means of recourse before filing its claim with the CAS. The obligation to exhaust all available internal remedies applies only to mandatory legal remedies. Thus, Article R49 of the CAS Code does not cover legal remedies to which a party is optionally entitled or in which the entire subject matter of the dispute is not at issue in legal or factual terms. If, however, a CAS panel decides on a dispute even though the binding internal remedies have not been exhausted, such arbitral award is in principle subject to appeal before the Swiss Federal Tribunal in accordance with Article 190(2) lit. b PILA.

(4) The appeals arbitration procedure is only available against "decisions" of a sports organization or a sports body. In order for a measure to qualify as a decision, its content (rather than its form) is decisive. The question of whether a "decision" within the meaning of Article R47(1) of the CAS Code exists must be distinguished from the further question of whether it is "independently appealable". Whether decisions of a first-instance association tribunal that precede the final adjudication of the case can be separately challenged according to Article R47(1) of the CAS Code is – absent any determination in the rules and regulations of the sports organization concerned – a matter of weighing up the principle of procedural economy against the principle of effective legal protection of the party concerned.

(5) It is debatable whether the qualification as an "appealable decision" within the meaning of Article R47(1) of the CAS Code is a question of jurisdiction or of admissibility. The better arguments speak in favour of qualifying the issue as a procedural matter.

(6) Decisions of an association tribunal do not enjoy res judicata effects. They do not bind the parties procedurally, but they do bind the parties according to the substantive law of the place, where the sports organisation is seated. However, since proceedings before an association tribunal – just like arbitration proceeding – are a means of authoritative dispute resolution, the scope of the binding effects of such decisions must be determined according to the principles applicable to res judicata.

THE DILIGENCE OF CREDITORS IN FIFA AND CAS JURISPRUDENCE: A DOCTRINAL AND COMPARATIVE ANALYSIS

Carlos Schneider Salvadores

Attorney at Law

Doctor in Law from University of Salamanca, Spain

ABSTRACT:

This article explores the notion of creditor diligence within the context of FIFA and Court of Arbitration for Sport (CAS) proceedings, especially in cases involving insolvency and sporting succession. Drawing upon leading CAS awards and the amendments decided by the FIFA Council on 9 May 2025, the article systematically addresses the legal obligations of creditors, the procedural alternatives provided by FIFA, and the impact of domestic insolvency proceedings on creditors' rights. It concludes by offering critical reflections on the balance between procedural diligence and equitable treatment of creditors in the football regulatory framework.

KEYWORDS:

Creditor diligence; insolvency; FIFA Disciplinary Code; CAS jurisprudence; sporting succession; procedural equity; enforcement mechanisms

THE DILIGENCE OF CREDITORS IN FIFA AND CAS JURISPRUDENCE: A DOCTRINAL AND COMPARATIVE ANALYSIS

Carlos Schneider Salvadores
Attorney at Law
Doctor in Law from University of Salamanca, Spain

1. INTRODUCTION

The regulation of creditor claims within the international football ecosystem has become increasingly complex, particularly in light of evolving financial practices, legal restructurings, and the transnational nature of the sport. As football has globalized, with players, agents, member

associations and clubs operating across multiple jurisdictions, the task of ensuring compliance with financial obligations—such as unpaid wages, transfer fees, or agency commissions—has exposed significant legal and procedural challenges. These challenges are most acute in situations involving insolvent clubs or those that attempt to evade liabilities through successor entities or artificial corporate transformations.

FIFA, through its Disciplinary Committee, has sought to establish a coherent legal framework that can effectively regulate the obligations of clubs toward their creditors. Central to this framework is the current Article 21 of the FIFA Disciplinary Code, which empowers FIFA to impose sanctions—including transfer bans, points deductions, and expulsion from competitions—against clubs that fail to comply with final and binding financial decisions. These sanctions serve as critical enforcement tools in the absence of a centralized, cross-border judicial mechanism that can compel payment or enforce awards across national boundaries.

However, a pivotal issue that continues to generate substantial legal debate is the standard of diligence expected from creditors in pursuing their claims. FIFA's system, while robust, is not designed to substitute for national insolvency procedures. Consequently, questions arise as to when a creditor may legitimately turn to FIFA for relief, and whether they must first exhaust domestic remedies such as registering a claim in insolvency proceedings. The balance between procedural obligation and equitable access is delicate, particularly when creditors are situated in different legal, economic, and linguistic contexts.

This article dissects the evolving concept and legal consequences of creditor diligence by examining a selection of landmark awards issued by the Court of Arbitration for Sport (CAS) and the amendments approved by FIFA at its Council meeting of 9 May 2025. These include not only foundational cases such as CAS 2011/A/2646 and CAS 2019/A/6461 but also more recent developments reflected in CAS 2020/A/6884 and CAS 2022/A/9345, which have further refined the application of the diligence standard. The analysis highlights how CAS panels assess whether creditors acted with sufficient promptness, persistence, and reasonableness in preserving their financial rights, particularly in light of structural inequalities between actors in the football ecosystem.

2. SWISS LAW APPROACH

Article 21 of the FIFA Disciplinary Code provides the regulatory foundation that links the international football governance framework with principles

deeply rooted in Swiss law, particularly in relation to creditor diligence and insolvency proceedings. Given FIFA's incorporation under Swiss law and its consistent reliance on Swiss legal principles, interpretation and application of FIFA regulations inherently reflect Swiss legal traditions.

The rigorous Swiss approach to creditor diligence in insolvency and bankruptcy proceedings, codified primarily under the Swiss Federal Act on Debt Enforcement and Bankruptcy (DEBA) and the Swiss Code of Obligations[1] (CO), aligns closely with the evolving procedural expectations under FIFA's regulatory framework. While FIFA's regulations historically emphasized case-by-case judicial interpretations through its own bodies and the Court of Arbitration for Sport (CAS), recent amendments, notably the introduction of Article 21 of the FIFA Disciplinary Code, reflect a convergence towards the structured, legally mandated diligence prescribed by Swiss insolvency laws. Swiss law explicitly mandates timely action, participatory governance, and proactive oversight by creditors—principles increasingly echoed in FIFA's disciplinary procedures to ensure fairness, efficiency, and predictability in the adjudication of football-related financial disputes, particularly those involving insolvent or bankrupt entities.

Under Swiss law, creditor diligence in insolvency and bankruptcy proceedings is not merely encouraged but legally mandated through a well-defined framework governed by the Swiss Federal Act on Debt Enforcement and Bankruptcy (DEBA[2]) and the Swiss Code of Obligations (CO[3]). Creditors are expected to actively assert and protect their rights by adhering to strict procedural requirements, the failure of which may result in the loss of recovery opportunities and standing in subsequent enforcement processes, including those before FIFA or CAS.

---

1 The DEBA mandates creditor participation in insolvency proceedings, including timely claim registration (Art. 232(2)), attendance at creditors' meetings (Arts. 235–236), and oversight of estate administration (Art. 241(2)). Failure to adhere to these provisions can result in exclusion from asset distribution (Art. 251). These requirements underscore the legal obligation for creditors to act diligently to protect their interests.

2 See Grevesmühl, Götz. *Die Gläubigeranfechtung nach klassischem römischen Recht*. Wallstein-Verlag, Göttingen, 2003. The DEBA mandates creditor participation in insolvency proceedings, including timely claim registration (Art. 232(2)), attendance at creditors' meetings (Arts. 235–236), and oversight of estate administration (Art. 241(2)). Failure to adhere to these provisions can result in exclusion from asset distribution (Art. 251). These requirements underscore the legal obligation for creditors to act diligently to protect their interests.

3 The CO outlines directors' duties in financial distress situations. For instance, if a company is over-indebted, directors must notify the court without delay unless certain conditions are met (Art. 725(2)). This framework ensures that creditors are kept informed and can take appropriate actions.

Central to these obligations is the timely registration of claims following a public call by the bankruptcy office (Art. 232(2) DEBA), generally within a 30-day deadline. Failure to file within this period—unless justified—leads to exclusion from the asset distribution (Art. 251 DEBA). Registration is not simply a formality but a key indicator of diligence, establishing that the creditor has taken steps to participate in collective enforcement. This principle is reinforced through the requirement that creditors participate in creditors' meetings (Art. 235–236 DEBA), where vital decisions regarding estate administration and asset realization are taken. Lack of participation may compromise the creditor's ability to influence or contest those decisions.

Swiss law also entrusts creditors with an oversight function in monitoring the estate administration (Art. 241(2) DEBA), including the right to challenge mismanagement before supervisory authorities (Art. 17–18 DEBA). This procedural involvement is both a right and a duty, aligning with broader legal expectations of diligence and accountability. Moreover, in composition proceedings (Nachlassverfahren), creditors must evaluate and vote on restructuring proposals with care (Art. 302 DEBA[4]), as their decisions shape the legal and financial landscape of the proceedings. Careless abstention or refusal to assess such agreements may later be construed as negligent conduct, particularly if the creditor seeks to invoke alternative enforcement through FIFA mechanisms. Additionally, Swiss law empowers creditors to initiate fraudulent transfer challenges via the Actio Pauliana[5] (Art. 285–292 DEBA), allowing them to reverse transactions that disadvantage the collective creditor pool. These remedies must be exercised swiftly, as limitation periods are short and courts expect creditors to act promptly and with evidentiary support.

---

4 See Hunziker, Marc & Pellascio, Michel. *Schuldbetreibungs- und Konkursrecht*. Orell Füssli, Zürich, 2008; Meier, Niklaus & Rodriguez, Rodrigo. "Recast of the Swiss International Insolvency Law." In *Yearbook of Private International Law*, Vol. XVII, 2015/2016, pp. 355–370; Hari, Olivier. "A Comprehensive Guide to Swiss Composition Agreements." *International Financial Law Review*, September 22, 2020; In composition proceedings, creditors have the right and duty to evaluate and vote on restructuring proposals (Art. 302 DEBA). Their decisions directly influence the outcome of the proceedings, emphasizing the importance of active and informed participation.

5 Hunziker, Marc & Pellascio, Michel. *Schuldbetreibungs- und Konkursrecht*. Orell Füssli, Zürich, 2008; Kaser, Max & Knütel, Rolf. *Römisches Privatrecht*. 19th ed., C.H. Beck Verlag, München, 2008; Grevesmühl, Götz. *Die Gläubigeranfechtung nach klassischem römischen Recht*. Wallstein-Verlag, Göttingen, 2003. This legal remedy allows creditors to challenge and reverse transactions that unfairly disadvantage the creditor pool. Timely action is crucial, as limitation periods are short, and courts expect prompt and substantiated claims.

Swiss cross-border insolvency provisions (Art. 166–175 DEBA[6]) impose heightened due diligence on foreign creditors, requiring them to seek formal recognition and comply with Swiss procedural rules when attempting to engage in local enforcement or protect their interests in Swiss-based estates. These rules are strictly applied and demand that international creditors adapt to Swiss procedural norms rather than bypass them due to jurisdictional unfamiliarity.

In sum, Swiss insolvency law imposes a multi-layered system of creditor duties that encompass claim registration, participatory governance, supervisory engagement, critical assessment of restructuring plans, and proactive legal remedy when abuse is suspected. These obligations are rooted in principles of fairness, procedural economy, and creditor equality. The Swiss legal framework thus presents a rigorous yet balanced approach to creditor diligence—combining legal certainty with equitable enforcement—to uphold the integrity of insolvency proceedings both domestically and in the transnational sports law context. Consequently, Article 21 of the FIFA Disciplinary Code reflects and reinforces these foundational Swiss legal principles, presenting a rigorous yet balanced approach to creditor diligence—combining legal certainty with equitable enforcement—to uphold the integrity of insolvency proceedings both domestically and within the international sports law context regulated by FIFA.

3. JURISPRUDENTIAL OVERVIEW AND TRENDS

A comprehensive review of the CAS awards indicates a trend towards contextual, equity-based assessments of creditor diligence. Panels consider not only formalistic compliance but also the creditor's capacity, the debtor's conduct, and the integrity of the proceedings.

These trends affirm the dual-track approach: FIFA offers a unique enforcement framework that operates in parallel to, and occasionally in substitution for, national legal systems. CAS jurisprudence seeks to maintain coherence between these systems, ensuring that international creditors

6 See UNCITRAL. *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation*, 2013; Fletcher, Ian F. *Insolvency in Private International Law: National and International Approaches*. Oxford University Press; van Zwieten, Kristin. *Goode on Principles of Corporate Insolvency Law*. 5th ed., Sweet & Maxwell, 2018. Foreign creditors must seek formal recognition and comply with Swiss procedural rules when engaging in local enforcement or protecting their interests in Swiss-based estates. These provisions ensure that international creditors adhere to the same standards of diligence as domestic creditors.

are neither prejudiced by domestic formalism nor enabled to exploit FIFA's regulatory mechanisms without due care.

Ultimately, creditor diligence is shaped by the intersection of legal opportunity and practical capacity. Panels are increasingly inclined to assess diligence through a contextual lens, balancing procedural obligations with real-world accessibility and fairness. A comprehensive review of the CAS awards indicates a trend towards contextual, equity-based assessments of creditor diligence. Panels consider not only formalistic compliance but also the creditor's capacity and the debtor's conduct.

4. THE NOTION OF DILIGENCE OF CREDITORS: PRINCIPLE AND CONCEPT

Diligence, as construed in CAS jurisprudence, is the standard of care expected from a creditor in asserting and preserving a claim[7]. It requires the creditor to take timely and reasonable action to recover outstanding debts, including participation in domestic insolvency proceedings and FIFA's internal mechanisms[8]. CAS 2011/A/2646 crystallized this principle by denying the imposition of sporting sanctions due to the creditor's failure to register the claim in the debtor's bankruptcy proceedings despite a theoretical possibility of recovery[9].

From a comparative insolvency law perspective, this expectation of creditor diligence mirrors the general legal principle known as the "duty to mitigate" or "procedural diligence" in creditor-debtor relations. In many jurisdictions, creditors are expected to engage with insolvency proceedings through registration of claims with the insolvency practitioner or court. Failure to do so can lead to the forfeiture of rights in distribution, regardless of the underlying merit of the claim. The CAS adopts a similar approach, requiring evidence that the creditor made an effort to engage with the debtor's legal or administrative process.

---

7 Carlos Schneider and Molly Strachan, The Court of Arbitration for Sport's approach to the complexities of art. 15 of the FIFA Disciplinary Code; CAS Bulletin 2022 at page 64

8 See amongst others CAS 2011/A/2646 at para 31; CAS 2019/A/6461 at para 59; CAS 2020/A/6745 at para 89

9 See Derungs, Vitus. *Insolvency of Football Clubs and Sporting Succession: Financial Claim Proceedings before FIFA and the Court of Arbitration for Sport*. Stämpfli Verlag, 2022 at page 103 et seq; Ozkurt, Emin. "Liability Arising From Sporting Succession – Review in accordance with FIFA Regulations and CAS Decisions." *Football Legal*, 2024

However, the application of diligence by CAS panels has not been uniform. In CAS 2019/A/6461, the panel took a pragmatic approach, noting that the creditor club could not have reasonably registered its claim during the liquidation period, as the decision confirming the debt came after liquidation had already commenced. Similarly, CAS 2020/A/6884 reflects a contextual analysis where the player's inability to intervene in insolvency proceedings abroad was not held against him, but still requiring a certain degree to explore this option.

CAS jurisprudence thus balances legal formalism with equitable considerations. While diligence includes an expectation of procedural initiative—such as timely filings, responses, and appeals—it is also interpreted with an eye toward fairness, particularly where legal, geographical, or financial constraints are involved.

The notion incorporates both subjective and objective elements. Objectively, creditors must adhere to established timelines and utilize available procedures. Subjectively, however, panels consider the creditor's circumstances—such as financial capacity, legal literacy, and access to representation—when assessing whether the level of diligence exercised was sufficient.

This dual-layered interpretation aligns FIFA enforcement mechanisms with broader insolvency principles, while also safeguarding less-resourced stakeholders in global football. It underscores the evolving nature of "diligence" as more than mere procedural compliance—it is a benchmark of reasonable conduct evaluated against the backdrop of an increasingly complex transnational legal environment.

5. FIFA PROCEDURE AS AN ALTERNATIVE TO NATIONAL FORUMS

FIFA's legal system is designed to provide a coherent and uniform mechanism for resolving football-related disputes across jurisdictions[10]. FIFA's Dispute Resolution Chamber (DRC) and Disciplinary Committee (DC) constitute essential components of this system. Particularly in international transfers and labor relations, FIFA's jurisdiction acts as a transnational safety net that often complements, and sometimes supersedes, national legal recourse.

In CAS 2019/A/6461, despite the debtor club being liquidated under Estonian law, FIFA continued proceedings based on the principle that

[10] Carlos Schneider and Molly Strachan, The Court of Arbitration for Sport's approach to the complexities of art. 15 of the FIFA Disciplinary Code; CAS Bulletin 2022 at page 50

FIFA bodies do not enforce decisions through national means but impose disciplinary sanctions for non-compliance. This case underscores the role of FIFA's disciplinary apparatus as an alternative enforcement mechanism, not tied to the debtor's existence as a corporate entity, but rather to the continuation of its sporting identity[11].

The procedural interaction between FIFA and national courts has prompted debate on jurisdictional primacy. While FIFA cannot override domestic insolvency laws, it maintains its regulatory autonomy by sanctioning clubs at the sporting level[12]. This creates a bifurcated system: national forums handle asset distribution and liquidation, whereas FIFA enforces sporting consequences like transfer bans or relegation for not respecting a FIFA or a CAS Decision in accordance with Article 21 FDC. CAS 2011/A/2646[13] and CAS 2020/A/7423[14] both demonstrate this dual-

11 See CAS 2019/A/6461 at para 58 by means of which CAS states that "*At any rate, it was within the purview of the FIFA Disciplinary Committee to consider whether the Appellant bears responsibility for the debts incurred by the Debtor club. Indeed, having identified a clear case of succession between the two clubs, the FIFA Disciplinary Committee legitimately concluded that the successor club, in this case, the Appellant, is liable for the debts incurred by its predecessor, the original Debtor. This is well in line with the legal principle confirmed by CAS Panels, that the successor club is bound by the debts of its predecessor and should bear the consequences for its failure to pay {CAS 201 I/A/2646 §20). Consequently, the FIFA Disciplinary Committee had a duty to address the issue and to examine the liability of the Appellant and, thus, applied correctly Article 64 of the FDC*". Also CAS 2020/A/7423 affirms that "229. Regarding the rest of the credit claimed by the Creditor, as it has already been abovementioned, the mechanism stated in the FIFA Regulations shall be considered as an "alternative" procedure oflast resort when the creditor has exhausted the basic legal remedies in the bankruptcy proceedings and not remained passive in the collection of his debt. The Panel considers that the Creditor, taking into account the particularities of the present case, shall be entitled to benefit from this alternative procedure to try and recover the rest of its debt that was not recognized in the bankruptcy proceedings".

12 Carlos Schneider and Molly Strachan, The Court of Arbitration for Sport's approach to the complexities of art. 15 of the FIFA Disciplinary Code; CAS Bulletin 2022 at page 57

13 At CAS 2011/A/2646 para 19 analyses the particularities of FIFA procedure encompassed by the implementation of bankruptcy proceedings and bankruptcy legal systems worldwide, prevailing the so called "lex sportiva" to balance the different situations. In this regard CAS states that "The Panel is aware that in most bankruptcy legal systems worldwide (including the Chilean "Ley de Quiebras"), a bankrupt entity, while the bankruptcy proceedings are still going on, cannot freely pay the debts accrued before the declaration of bankruptcy, this mainly as regards the general principle of par conditio creditorum. In fact, in the last times it is not unusual to see in the market of football that clubs which are declared bankrupt become, in accordance with the national laws ruling the bankruptcy proceedings, prevented from paying their debts in an immediate and entire manner. This situation is logically provoking

track enforcement, showing how FIFA procedures persist despite formal insolvency barriers in national systems.

Furthermore, CAS panels have acknowledged the preferential utility of FIFA procedures in cross-border disputes. In many cases, especially those involving small or foreign creditors, national forums are practically inaccessible due to linguistic, legal, or procedural obstacles. FIFA provides a unified regulatory space where such claims can be pursued efficiently. This was highlighted in CAS 2020/A/6884, where the creditor—a football player—relied on FIFA processes after facing insurmountable procedural difficulties in the national system[15].

Nonetheless, FIFA's system is not a full substitute. While it allows for enforcement through transfer bans and other sanctions, it lacks the coercive powers typical of national courts—such as asset seizure or liquidation control. Consequently, FIFA proceedings are most effective when used in tandem with national procedures, especially where a claim's enforceability depends on financial recovery, not just sporting pressure[16].

In conclusion, FIFA's procedural framework functions as a vital alternative, particularly in international contexts where national remedies are limited or ineffective. However, its effectiveness depends on its integration within the

undesired inequities in the referred market at international level, where clubs in bankruptcy enjoy the privileges of the bankruptcy proceedings while the other clubs are forced to honour their commitments in full and timely manner, all of them playing in the same competitions. Such inequity of treatment and opportunities is clearly against the essential principles of the so-called "lex sportiva".

14 In CAS 2020/A/7423 at oara 231 the main issue revolved around the recognition by a domestic court of the financial obligation, the debt, imposed by FIFA to the debtor. In particular CAS argued that "by adopting this decision, the Panel has no intention whatsoever in interfering in the bankruptcy proceedings opened by the Sofia City Court regarding the entity that ruled the Old CSK.A, nor intends to affect in any manner the decision adopted regarding such entity in the referred proceeding. The Panel exclusively applies the FIFA regulations invoked by the Respondent and adopted in the Appealed Decision, and taking into account that, following the FIFA regulation applicable to the case at stake, the New CSK.A shall be considered as the sporting successor of the Old CSK.A, in light of what is established by the above-mentioned referred FIFA and CAS jurisprudence, the Appellant shall be considered liable for the non-compliance of the abovementioned CAS decision 2014/A/3740..

15 See also Derungs, Vitus. *Insolvency of Football Clubs and Sporting Succession: Financial Claim Proceedings before FIFA and the Court of Arbitration for Sport*. Stämpfli Verlag, 2022 at pages 110 to 113; Cambreleng Contreras, Jaime, et al. *Sporting Succession in Football*. Sports Law & Policy Centre, 2022.

16 See Derungs, Vitus. *Insolvency of Football Clubs and Sporting Succession: Financial Claim Proceedings before FIFA and the Court of Arbitration for Sport*. Stämpfli Verlag, 2022 at pages 103 to 117; Ozkurt, Emin. "Liability Arising from Sporting Succession – Review in accordance with FIFA Regulations and CAS Decisions." *Football Legal*, 2024

broader legal ecosystem, highlighting the need for coordination rather than conflict between FIFA's disciplinary machinery and national insolvency regimes. FIFA's legal system is designed to provide a coherent and uniform mechanism for resolving football-related disputes across jurisdictions. FIFA's Dispute Resolution Chamber (DRC) and Disciplinary Committee (DC) constitute essential components of this system. Particularly in international transfers and labor relations, FIFA's jurisdiction acts as a transnational safety net.

6. DILIGENCE AND THE ABILITY TO REGISTER A CLAIM

The creditor's diligence is intrinsically tied to the ability to register claims, especially in bankruptcy or liquidation proceedings. CAS 2011/A/2646[17] underscores that failure to register a claim—even when informed of the bankruptcy—may undermine subsequent reliance on FIFA mechanisms. The assumption is that registration, even if unsuccessful, manifests a baseline diligence.

This procedural requirement involves engaging with formal mechanisms under domestic insolvency law. Creditors are generally expected to submit a proof of debt within a legally defined window, often shortly after the declaration of bankruptcy. Failure to adhere to these timelines can result in the exclusion of the claim from any distribution of assets. FIFA and CAS, while acknowledging these constraints, examine whether creditors made reasonable efforts within the procedural timeframe available[18].

Yet, the jurisprudence also recognizes that timelines often make registration impracticable. In CAS 2019/A/6461[19], the creditor was effectively

---

[17] CAS 2011/A/2646 raises concerns about the diligence of creditors who have not made enough efforts to recall the debt owed, e.g. registering their claims in the insolvency or bankruptcy proceedings. In this regard CAS stated that "*It may be thus discussible that a club which in accordance with its national laws, is not allowed to make payments due to its situation of bankruptcy, can be sanctioned as regards a failure to pay something which it is not allowed to pay, but this is not the case hereto, as no restriction to the capacity to pay could take place in August 2011, as the bankruptcy proceedings had finalized well before (it shall be recalled that the sale of assets was formalised in public deed on 25 November 2010). In other words, it was on the Appellant's hands to pay and avoid the sanction, not being limited by any legal prohibition or restriction*".

[18] See also Derungs, Vitus. *Insolvency of Football Clubs and Sporting Succession: Financial Claim Proceedings before FIFA and the Court of Arbitration for Sport*. Stämpfli Verlag, 2022 at pages 103 to 105

[19] Indeed, CAS at para 60 and 61 focuses again on the responsibility of the creditors to assist debtors in the recovery process of their claim. Here, CAS stated that "*yet, in*

unable to register the claim because the liquidation occurred before the FIFA decision became final. The CAS panel accordingly held that the creditor's conduct was not negligent, and FIFA was entitled to continue disciplinary proceedings against the successor entity.

Importantly, the duty to register is not absolute. Panels have introduced a reasonableness test, considering whether a creditor could, realistically and timely, act given procedural constraints and international barriers[20].

This comparative overview reveals that panels place significant weight on factual context, nature of the claim, and procedural feasibility when assessing creditor diligence. While registration is generally advisable, its absence is not automatically fatal to a claim, particularly where procedural obstacles are well-documented or where the creditor acted with reasonable speed and intent.

Thus, while the ability to register a claim is a foundational element in assessing diligence, it is ultimately evaluated within a broader context of access to justice, equity, and procedural integrity. The creditor's diligence is intrinsically tied to the ability to register claims, especially in bankruptcy or liquidation proceedings.

7. EXPECTATION TO RECOVER AND THEORETICAL POSSIBILITY

Another recurrent theme in CAS jurisprudence is the differentiation between practical recovery and theoretical recovery. The principle of

view of the circumstances of this case, there is nothing to suggest that the Creditor club remained passive, or, uninterested in pursuing its claims. It is important to note that the liquidation procedure against the Debtor club commenced on 14 March 2014, while the decision of the FIFA DRC was notified to the parties on 1 December 2015. In this timeline, the Panel finds that the Creditor club could not have done much differently during this period. It is evident that whilst the DRC proceedings were pending, the Creditor club had no opportunity to timely register its claim in the liquidation proceedings. Besides, the Appellant did not submit any information in relation to the value of the liquidated assets of the Debtor club. To the understanding of the Panel the Appellant did not even suggest, let alone prove, that the liquidated assets resulted in sufficient surplus in a way that the recovery of the debt would have been feasible via this procedure. In addition, the Panel finds important that in the case at hand there is no indication that the Appellant had made any prior payments to its predecessor, z. e. the original Debtor, in order to acquire the use of its facilities and logo. This raises valid concerns as to what the liquidated assets actually involved".

20 Carlos Schneider and Molly Strachan, The Court of Arbitration for Sport's approach to the complexities of art. 15 of the FIFA Disciplinary Code; CAS Bulletin 2022 at page 64

'theoretical possibility' appears in several awards, suggesting that where there exists a legal route for claim satisfaction, a creditor may be expected to pursue it.

In CAS 2011/A/2646[21], the panel held that the creditor's failure to file in bankruptcy proceedings constituted a lack of diligence, given the theoretical availability of legal recourse. The tribunal emphasized that even a low chance of success does not relieve a creditor from the duty to engage with available legal procedures.

However, this strict interpretation has evolved. In CAS 2019/A/6461[22], the panel considered the timeline of proceedings and noted that the creditor had no realistic opportunity to intervene in the liquidation, as the FIFA decision confirming the debt came after the national process had closed. Thus, the expectation to pursue the claim was considered unreasonable in that context[23].

Similarly, CAS 2020/A/6884[24] demonstrated how practical obstacles—such as foreign jurisdiction complexity, linguistic and procedural barriers—can render the theoretical recovery argument moot.

Another relevant case is CAS 2020/A/7423[25], where the creditor registered the claim during insolvency, but no actual recovery was possible.

---

21 See CAS 2011/A/2646 at para 19

22 See CAS 2020/A/6461 at para 60 and 61

23 Carlos Schneider and Molly Strachan, The Court of Arbitration for Sport's approach to the complexities of art. 15 of the FIFA Disciplinary Code; CAS Bulletin 2022 at page 65

24 Here CAS 2020/A/6884 addresses to different circumstances that may have an impact on the probabilities to recover the amounts and establishes a distinction with previous awards. Specifically, CAS at para 166 addresses to the important notion of "feasible theoretical possibility" insofar as "the Sole Arbitrator cannot ascertain whether or not the Appellant would have received the sum of her credit, also in light of her position of not holding a preferential credit in this specific case, in case she had duly claimed for it in the bankruptcy proceedings in Bulgaria, but it was at least, a feasible theoretical possibility that could have provoked that the order of payment issued by the Single Judge of the FIFA Players' Status Committee rendered on 28 August 2013 has been complied with and thus, that the sanction imposed in the Appealed Decision became groundless. At any event, it is also taken into consideration by the Sole Arbitrator that it would have required little from the Appellant to register her claim in the bankruptcy proceedings in Bulgaria"

25 Summarily CAS at para 228 stated that "*The majority of the Panel considers that the Creditor could not have done more to try and recover its debt in the bankruptcy proceedings and therefore its position shall be protected, at least regarding the amount that was not recognized in the bankruptcy proceedings. The Panel notes that the amount of EUR 24,999 as outstanding remuneration claimed by the Creditor, was indeed recognized by the bankruptcy trustee and included as a privilege credit in said proceeding. In this regard, it shall be noted that the Creditor, by facilitating*

The CAS recognized the effort as sufficient to demonstrate diligence, even though it yielded no financial result. Conversely, in CAS 2020/A/7481, a lack of timely engagement with either FIFA or national procedures was fatal to the claim.

From these comparisons, it is clear that CAS panels weigh the following factors heavily when evaluating the 'theoretical possibility':

- Timing of the national insolvency in relation to FIFA decisions;
- Accessibility and transparency of domestic proceedings;
- Nature of the claim (labor vs. commercial);
- Resources and legal sophistication of the creditor;
- Evidence of creditor intent and attempts to recover.

Thus, while theoretical recovery remains a relevant benchmark, CAS jurisprudence increasingly emphasizes feasibility and reasonableness, aligning the legal expectation with the practical realities facing international creditors in the global football economy[26].

The line of jurisprudence reflects a realistic understanding that theoretical legal remedies are not always accessible or feasible for international creditors. Accordingly, the expectation to recover must be evaluated in practical terms, considering language, costs, representation, and the openness of insolvency proceedings.

8. SEPARATION BETWEEN FRAUDULENT ACTS AND LACK OF DILIGENCE

A critical legal and ethical dimension in the analysis of creditor diligence under FIFA and CAS jurisprudence is the imperative to distinguish between a creditor's procedural inaction and the debtor club's fraudulent conduct. This distinction is central to ensure that the regulatory and disciplinary mechanisms of international football are not manipulated by clubs seeking

the bank account to the bankruptcy trustee could have recovered at least this part of its existing debt and voluntarily decided not do so. The Panel considers that by remaining passive and not granting its relevant bank account, the Creditor did not adopt a sufficiently active and cautious manner to defend and safeguard this part of his credit and therefore the Appellant shall not be liable for not complying with the amount claimed regarding the amount owed for outstanding remuneration".

26 Carlos Schneider and Molly Strachan, The Court of Arbitration for Sport's approach to the complexities of art. 15 of the FIFA Disciplinary Code; CAS Bulletin 2022 at pages 64 and 65

to evade obligations through strategic restructuring, artificial liquidation, or rebranding[27].

Several cases —most notably CAS 2020/A/6884[28] and CAS 2019/A/6461[29]—demonstrate this principle. In both instances, the clubs involved underwent transformations in their legal identity while maintaining operational continuity. These cases involved tactics such as the dissolution of a financially distressed entity, followed by the registration of a new club under a different legal name but with the same assets, management, staff, and sporting license. The panels emphasized that such actions, even if lawful under domestic corporate law, did not immunize the successor entity from liability under FIFA regulations, particularly if there was evidence of continuity and intention to avoid financial obligations[30].

CAS jurisprudence has developed a robust analytical framework for assessing such situations. It considers elements like continuity in management, legal and operational succession, use of the same stadium and infrastructure, and inheritance of players and technical staff. If a sufficient nexus is found, the successor club may be held liable under the doctrine of sporting succession, even if the original legal entity is no longer in existence. This framework was effectively applied in CAS 2019/A/6461[31], where the successor entity was sanctioned under Article 21 FDC for failing to honor a debt inherited through its sporting lineage.

Importantly, these decisions underscore that a creditor's failure to fully exhaust domestic legal remedies does not absolve a successor club from responsibility when the club has engaged in behavior deemed to be abusive or evasive. The creditor's procedural shortcomings—such as not registering a claim in time or failing to engage a local lawyer—may inform the diligence analysis but do not automatically shield the club from sanctions if fraud or abuse of process is evident.

This distinction is not merely doctrinal or technical. It goes to the heart of the principles of equity, fairness, and sporting integrity that underpin

27 Carlos Schneider and Molly Strachan, The Court of Arbitration for Sport's approach to the complexities of art. 15 of the FIFA Disciplinary Code; CAS Bulletin 2022 at page 59

28 See CAS 2020/A/6884 at para 149

29 See CAS 2019/A/6461 at para 58

30 See here Derungs, Vitus. *Insolvency of Football Clubs and Sporting Succession: Financial Claim Proceedings before FIFA and the Court of Arbitration for Sport*. Stämpfli Verlag, 2022 at page 103 and page; Cambreleng Contreras, Jaime, et al. *Sporting Succession in Football*. Sports Law & Policy Centre, 2022.110; Ozkurt, Emin. "Liability Arising from Sporting Succession – Review in accordance with FIFA Regulations and CAS Decisions." *Football Legal*, 2024

31 CAS at para 56

FIFA's regulatory architecture. If clubs could freely manipulate their legal identity to escape liabilities, it would erode the rule of law in international sport and undermine trust in the regulatory system. Therefore, CAS panels consistently affirm that while creditor diligence is important, it cannot be wielded as a defense against fraudulent conduct by clubs.

The result is a layered accountability system: creditors must demonstrate reasonable efforts to pursue their claims, but clubs that engage in fraudulent succession or restructuring schemes will not be insulated from liability, regardless of creditor conduct. This approach ensures that the system remains just and dissuades bad-faith actors from exploiting procedural weaknesses to avoid compliance with binding decisions.

In conclusion, the separation between creditor inaction and club malfeasance serves as a cornerstone of the integrity-focused framework upheld by FIFA and CAS. It ensures that procedural imperfections by creditors do not enable systemic abuses by clubs, preserving both creditor rights and the ethical foundations of global football governance.

9. DILIGENCE IN INSOLVENCY *VERSUS* BANKRUPTCY PROCEEDINGS

The nature of domestic legal proceedings matters. Bankruptcy typically entails total liquidation, while insolvency might permit rehabilitation or restructuring. CAS jurisprudence acknowledges these differences, particularly in assessing what creditors can reasonably do.

In CAS 2011/A/2646, the club was declared bankrupt under Chilean law, and the player failed to register the claim. The CAS panel deemed the claim inadmissible, noting that the Chilean bankruptcy regime provided an accessible route for creditor engagement. The panel found that the creditor's failure to participate in the local proceedings demonstrated insufficient diligence, even though no actual recovery was guaranteed.

Conversely, in CAS 2019/A/6461, involving Estonian insolvency law, the timing of the FIFA decision and the closure of the liquidation proceedings meant the creditor club had no reasonable opportunity to file its claim. The panel recognized the procedural rigidity of Estonia's bankruptcy process, where late claims could not be registered, and held that this justified the creditor's recourse to FIFA's disciplinary procedures instead[32].

[32] CAS 2019/A/6461 at paras 59 to 63

A further nuance arises in jurisdictions like Bulgaria, addressed in CAS 2020/A/6884. Bulgarian insolvency law distinguishes between creditors in different procedural categories and imposes formalistic burdens that can hinder foreign claimants[33].

These examples illustrate how national bankruptcy regimes differ not only in substance but also in accessibility and transparency. CAS panels have increasingly emphasized the need to assess creditor diligence in light of such legal particularities. A system that excludes foreign or labor-related claims through excessive formality or linguistic hurdles may render a creditor's failure to register legally excusable[34].

The normative tension lies in harmonizing the par *conditio creditorum* (equal treatment of creditors) principle with FIFA's independent disciplinary jurisdiction. On one hand, domestic systems emphasize procedural equality and discourage external enforcement. On the other hand, FIFA aims to ensure accountability and fairness, particularly in safeguarding the rights of players and smaller clubs within the global football economy.

CAS jurisprudence thus plays a bridging role, interpreting diligence with sensitivity to the constraints of national systems. This ensures that the creditor's conduct is not evaluated in a vacuum, but in a comparative legal context that recognizes the variability—and at times, the inaccessibility—of domestic insolvency remedies.

10. DEBT ORIGIN AND CHARACTERIZATION IN CAS JURISPRUDENCE: A COMPARATIVE

The classification of financial claims within insolvency proceedings is central to evaluating creditor diligence in the context of sporting disputes governed by FIFA's regulatory framework. Two CAS awards—CAS 2022/A/9345 (Pavlovic v. FC Astra Giurgiu & FIFA) and CAS 2020/A/7543 (FC Rapid 1923 SA v. Julio Cesar da Silva & FIFA)—offer valuable comparative insights into how arbitral panels distinguish between different categories of debts and the implications of such characterizations for procedural obligations under insolvency law.

In CAS 2022/A/9345, Pavlovic case, the amount at issue originated from a 2015 decision of the FIFA Dispute Resolution Chamber (DRC), which

33 CAS 2020/A/6884 at paras 157 to 171. See also Derungs, Vitus. *Insolvency of Football Clubs and Sporting Succession: Financial Claim Proceedings before FIFA and the Court of Arbitration for Sport*. Stämpfli Verlag, 2022 at pages 110 to 113

34 CAS 2020/A/6884 at para 161 confirms the too formalistic approach

awarded the player contractual damages for breach of contract following his termination in 2014. At the time the claim was filed, the club, FC Astra Giurgiu, was already subject to insolvency proceedings. Importantly, the claim did not concern unpaid salaries accrued during the employment relationship but rather compensation for early termination—a debt that was both post-insolvency in timing and compensatory in nature[35].

By contrast, CAS 2020/A/7543, Julio Cesar case, dealt with a 2012 DRC decision awarding EUR 400,000 in unpaid salaries to the player Julio Cesar. The contract had been signed in 2008, and the salary claim was initiated that same year—well before the insolvency of the original club, SC FC Rapid SA. The Panel unequivocally characterized the amount as employment-related remuneration, derived from a concluded labor relationship and clearly predating the commencement of the insolvency proceedings[36].

Regarding the legal characterization and procedural consequences, the Panel in Pavlovic emphasized that the post-insolvency nature of the claim—as contractual compensation—imposed an obligation on the creditor to actively register the claim within the national insolvency proceedings. The player's failure to do so constituted a lack of diligence, thereby excluding the possibility of enforcement through FIFA's disciplinary mechanisms under Article 21 of the Disciplinary Code[37].

In contrast, the Sole Arbitrator in Julio Cesar accepted the argument that the wage-based nature of the claim triggered an automatic registration mechanism under Romanian insolvency law. In this framework, the responsibility to include the debt in the insolvency estate fell on the insolvency administrator, not the creditor. The Panel found no evidence of procedural negligence and underlined that salary claims benefit from preferential treatment in insolvency contexts. Accordingly, the claim remained enforceable[38] .

Both panels applied Swiss law subsidiarily. However, in assessing procedural obligations tied to insolvency, they applied Romanian law as the lex concursus. In CAS 2022/A/9345, Romanian legislation required creditors to register post-insolvency claims manually. By contrast, in CAS 2020/A/7543, Romanian Law No. 85/2006 provided for the automatic registration of salary claims based on the debtor's financial records[39].

35 See CAS 2022/A/9345 paras. 100–108
36 CAS 2020/A/7543 see paras. 6–9, 52–53
37 CAS 2022/A/9345 see paras. 106–109 and 112–115
38 CAS 2020/A/7543 see paras. 52–53, 134–137
39 See CAS 2022/A/9345 paras. 107–110; CAS 2020/A/7543 paras. 134–136

This divergence in domestic legal treatment significantly shaped the outcome of each case: in Pavlovic, the omission to register the debt was decisive; in Julio Cesar, the lack of a registration obligation preserved the validity of the claim.

The diligence standard under Article 21 of the FIFA Disciplinary Code is thus closely linked to the substantive nature of the debt. For contractual damages (CAS 2022/A/9345), creditors are expected to take affirmative procedural steps to assert their rights within the national bankruptcy framework. For salary arrears (CAS 2020/A/7543), procedural inaction may be excused due to the operation of protective domestic rules and the presumption of registration.

These decisions highlight the importance of aligning FIFA's enforcement mechanisms with the operative principles of national insolvency regimes, particularly in transnational disputes. They confirm that creditor diligence must not be assessed in the abstract, but rather in light of the legal nature of the claim and the procedural obligations imposed by the relevant domestic legal order.

11. SPECIFIC CIRCUMSTANCES OF CREDITORS

CAS panels recognize that not all creditors operate from a level playing field. This is particularly true for individual players, smaller clubs, or agents from developing football regions who may lack the legal infrastructure or financial capability to navigate complex cross-border enforcement procedures. Their ability to act with procedural diligence is often constrained by a combination of structural, economic, and jurisdictional barriers.

A recurring theme in CAS jurisprudence is that access to justice is not uniform, and the assessment of diligence must account for asymmetries in resources and legal sophistication. Players often rely on agents or small legal firms with limited international reach. Smaller clubs might not have in-house legal teams or multilingual staff to interpret insolvency notices or understand registration procedures in a foreign jurisdiction. Procedural rules requiring formal notifications or deadlines may therefore disadvantage these creditors even when they act in good faith.

In CAS 2020/A/7423[40], the creditor's act of registering the claim in insolvency, even though no recovery followed, was recognized as a significant demonstration of effort. The CAS acknowledged that the action

40 See CAS 2020/A/7423at paras 211 to 230

met the diligence standard, emphasizing the value of procedural intent over result. This contrasts with larger institutions, which might have greater ability to act swiftly and efficiently through retained counsel.

In CAS 2019/A/6461 recognized the geographical and practical limitations involved, particularly the fact that the decision confirming the debt came after the liquidation[41]. The Panel took into account the creditor's lack of opportunity to register the claim and declined to penalize it for not engaging with the local insolvency framework[42].

Furthermore, in CAS 2022/A/9345, although the player (a Serbian national) failed to register part of his claim in Romanian insolvency proceedings, the decision reflects an important distinction: the creditor had previous successful registration of unpaid wages but failed to register additional amounts awarded through a FIFA decision. The CAS underscored that diligence is measured not only by isolated efforts but by the creditor's overall conduct in the lifecycle of the debt recovery process[43]. In this case, the Panel held that awareness and capacity were present, making the failure to register the second component of the claim inexcusable. This judgment illustrates that once a creditor has shown procedural awareness, subsequent lapses will be viewed more critically.

Importantly, this approach has parallels in broader legal systems, where courts apply proportionality or reasonableness tests when evaluating a party's procedural conduct. FIFA's approach, as reflected in CAS

41 See also Carlos Schneider and Molly Strachan, The Court of Arbitration for Sport's approach to the complexities of art. 15 of the FIFA Disciplinary Code; CAS Bulletin 2022 at page 64

42 See CAS 2019/A/6461 at para 60 where it states that Yet, in view of the circumstances of this case, there is nothing to suggest that the Creditor club remained passive, or, uninterested in pursuing its claims. It is important to note that the liquidation procedure against the Debtor club commenced on 14 March 2014, while the decision of the FIFA DRC was notified to the parties on 1 December 2015. In this timeline, the Panel finds that the Creditor club could not have done much differently during this period. It is evident that whilst the DRC proceedings were pending, the Creditor club had no opportunity to timely register its claim in the liquidation proceedings. CAS also follows by asserting that the creditor conduct did not contribute to the debtor's failure to comply with the FIFA DRC decision.

43 Indeed, CAS weighed up between the degrees of negligence of the Appellant and liquidator leading to the Appellant's unawareness to register its claim, speaking in favor of the Appellant. CAS at para 163 considered that "*Comparing the degrees of negligence of the Appellant and of the liquidator which led to the unfortunate outcome that the Appellant remained unaware of the opportunity and obligation to register his credit and of the legal remedy available to him after the first deadline expired, the Panel comes to the conclusion that the liquidator's negligence weighs substantially higher than the Appellant's failure to immediately seek qualified legal advice*"

jurisprudence, appears to embrace a similar philosophy. Equity is upheld not by requiring uniform compliance, but by tailoring expectations to the creditor's specific situation, including their legal sophistication, language access, and familiarity with international procedural standards.

12. THE NEW ARTICLE 21 (5) OF THE FIFA DISCIPLINARY CODE: A LEGAL AND REGULATORY ANALYSIS

12.1. INTRODUCTION

The international football ecosystem operates within a legally pluralistic and economically unequal environment, in which financial disputes between clubs, players, agents, and intermediaries often intersect with broader issues of insolvency, jurisdiction, and regulatory enforcement. While FIFA and the Court of Arbitration for Sport (CAS) have progressively developed jurisprudence to address creditor claims, the treatment of creditor diligence—particularly in cases involving bankrupt or restructured clubs—has been marked by interpretative uncertainty.

The introduction of the new Article 21(5) into the FIFA Disciplinary Code (FDC) represents a decisive step in codifying creditor obligations and standardizing the conditions under which financial decisions issued by FIFA bodies or CAS may trigger enforcement measures. Specifically, the provision aims to articulate a clearer framework for evaluating when a creditor has—or has not—acted with sufficient diligence in light of domestic insolvency or bankruptcy procedures.

The changes respond directly to a recurring issue in FIFA and CAS practice: the procedural conduct of creditors in the face of debtor insolvency. While FIFA's enforcement mechanisms—namely Article 64 of the (former) Disciplinary Code—provide for sporting sanctions against non-compliant debtors, the application of these measures is increasingly complicated by the proliferation of insolvent clubs that undergo restructuring, liquidation, or successor transformations.

In several cases, such as CAS 2011/A/2646, CAS 2019/A/6461, and CAS 2022/A/9345, the decisive issue was not the existence of a valid debt, but whether the creditor had acted diligently—particularly by registering their claim in domestic insolvency proceedings or taking reasonable steps to engage with the process. These cases reveal a tension between creditor protection and procedural fairness for clubs that are genuinely undergoing insolvency in compliance with national law.

To date, these questions have largely been answered through case-by-case adjudication. The proposed Article 21(5) introduces long-needed codification, providing all stakeholders with greater predictability and reinforcing the procedural integrity of FIFA's disciplinary jurisdiction.

a. Structure and Legal Significance of the Proposed Provision

At its meeting held on 9 May 2025, the FIFA Council approved a series of amendments to the FIFA Disciplinary Code, most notably to Article 21, in order to address long-standing legal and procedural uncertainties concerning the conduct expected of creditors in financial disputes involving insolvent or bankrupt clubs[44]. These amendments, which were formally communicated to stakeholders through a Circular letter[45], introduce specific conditions and requirements that creditors must meet to demonstrate diligence in the enforcement of decisions issued by FIFA or the Court of Arbitration for Sport (CAS). By adopting this reform, FIFA has moved decisively to enhance clarity, consistency, and fairness in its regulatory framework, particularly in cases where domestic insolvency proceedings intersect with the international enforcement of football-related financial obligations.

The new paragraph 5 of Article 21 of the FIFA Disciplinary Code introduces a long-overdue and structurally significant normative and procedural framework for evaluating the diligence of creditors in the context of financial disputes involving clubs undergoing insolvency or bankruptcy proceedings. In doing so, it marks a transformative shift in FIFA's approach to the enforcement of financial decisions—one that moves away from discretionary, jurisprudential interpretation toward a codified, rule-based system. This shift is not merely technical; it is a critical development that brings greater predictability, transparency, and fairness to the global football regulatory landscape, particularly where financial distress intersects with the enforcement of obligations imposed by FIFA bodies or the Court of Arbitration for Sport (CAS).

Historically, the standard of diligence required of creditors has been developed incrementally through case law, with key precedents—such as *CAS 2011/A/2646*, *CAS 2019/A/6461*, and *CAS 2022/A/9345*—offering fragmented guidance on what constitutes sufficient effort to preserve a claim in the face of debtor insolvency. While this jurisprudence has been valuable, it has left important questions unresolved: What constitutes "reasonable effort"? When does creditor inaction cross the line into negligence? And how should the timing of domestic proceedings relative to FIFA or CAS decisions be taken into account?

The new paragraph 5 directly addresses these gaps, articulating a threefold structure that clearly delineates the responsibilities of both

debtors and creditors in the context of domestic insolvency proceedings and international enforcement. These three components are:

(a) A debtor notification obligation: This imposes a proactive duty on debtor clubs to inform creditors about the initiation of insolvency or bankruptcy proceedings within a strict 15-day timeframe. This obligation serves multiple functions. First, it eliminates the informational asymmetry that has historically disadvantaged creditors—particularly foreign players, small clubs, or agents. Second, it ensures that the foundation for assessing creditor diligence is built on the creditor's opportunity to act. Without timely notice, it is inherently unfair to penalize a creditor for procedural inaction. This part of the provision aligns FIFA's internal disciplinary expectations with core values of good faith, procedural transparency, and creditor equality, as found in Swiss law (see Articles 232(2), 244 DEBA) and broader comparative insolvency norms.

(b) A presumption of creditor negligence: This clause operationalizes FIFA's expectations of creditor engagement by introducing a rebuttable presumption of negligence when creditors fail to register their claims after receiving valid notice of domestic proceedings. It shifts the burden of proof onto the creditor to demonstrate a valid justification for inaction, such as legal, logistical, or financial barriers. This presumption provides disciplinary bodies with a clear and administrable standard for evaluating cases, while also deterring tactical behavior from creditors who might otherwise bypass domestic remedies in favor of the perceived expediency of FIFA enforcement.

(c) An exception for procedural impossibility: Perhaps the most equitable component of the provision is the express recognition that creditors cannot be expected to perform the impossible. If a FIFA or CAS decision confirming the creditor's right is issued after the expiration of the domestic registration window—and if that window cannot legally be reopened—the creditor will not be considered negligent. This clause codifies a principle already acknowledged in CAS jurisprudence (*CAS 2019/A/6461*) and introduces an essential safeguard against procedural injustice. It protects creditors from being excluded from enforcement mechanisms simply because the timing of decisions fell outside of their control, and it prevents debtor clubs from strategically timing insolvency declarations to frustrate enforcement.

Taken together, these components represent a regulatory innovation within the FIFA legal system. They establish a framework that is not only coherent and principled, but also practical and enforceable. It allows FIFA's Disciplinary Committee to apply uniform standards when dealing with cases that involve domestic insolvency proceedings, reducing reliance on case-by-case discretion and promoting consistency across decisions. Moreover, by grounding these obligations in a logic that mirrors domestic insolvency law—particularly the Swiss model, which underpins many of FIFA's legal assumptions—the provision ensures that FIFA's disciplinary mechanisms remain legally intelligible within the broader architecture of international legal norms.

This development also has wider implications for the global football governance ecosystem. It enhances legal certainty for all parties involved

in financial disputes and reinforces FIFA's position as a sophisticated regulatory body capable of integrating transnational legal principles into its internal processes. By codifying standards of diligence, establishing concrete timelines, and embedding exceptions to preserve fairness, FIFA sets a new benchmark for how international sports governing bodies can balance disciplinary authority with procedural justice in an increasingly complex global environment.

13. CONCLUSION

The concept of diligence stands as a foundational pillar in the enforcement of financial claims within FIFA's regulatory and disciplinary architecture. It operates as both a procedural requirement and a normative standard, guiding the behavior of creditors and informing the adjudicative practices of FIFA bodies and the Court of Arbitration for Sport (CAS). In a system where formal enforcement mechanisms are limited by jurisdictional fragmentation and divergent national laws, diligence serves as a common thread that ties together the expectations of fairness, efficiency, and accountability in global football governance.

While creditors are expected to act with responsibility—by taking timely legal steps, engaging with insolvency proceedings when possible, and pursuing their claims through appropriate channels—CAS jurisprudence has repeatedly affirmed that diligence is not to be interpreted as a rigid or punitive standard. Instead, it is a context-sensitive principle, applied with regard to each creditor's access to legal resources, knowledge of procedural options, and realistic opportunity to act within complex cross-border insolvency frameworks. This means that systemic or procedural limitations, such as lack of notice, linguistic and geographic barriers, and the opacity of foreign legal systems, do not automatically disqualify a diligent creditor from accessing FIFA's enforcement tools.

The recent evolution of CAS decisions, including CAS 2019/A/6461, CAS 2020/A/6884, and CAS 2022/A/9345, illustrates a jurisprudence that seeks to balance legal certainty with equitable outcomes. These decisions reinforce that FIFA's disciplinary framework does not operate in a vacuum; it must reflect the structural realities of international football, where asymmetries of power and information are widespread. By adapting the diligence requirement to different creditor profiles—whether they are individual players, agents, or small clubs—CAS has ensured that the principle is applied not only with consistency, but also with fairness and proportionality.

Moreover, the evolving standards of diligence have a broader regulatory function. They promote financial discipline by signaling to clubs that non-compliance with financial obligations—especially through artificial liquidations or successor schemes—will not be tolerated, regardless of procedural gaps in creditor conduct. At the same time, they encourage creditors to remain vigilant, proactive, and engaged with all available remedies, reinforcing the principle that rights must be asserted responsibly to merit protection.

This dual responsibility—on clubs to respect their financial obligations and creditors to pursue their rights with reasonable effort—preserves the integrity of football competitions and supports the sustainability of the sport's financial ecosystem. It reflects a regulatory vision that prioritizes not only enforcement, but also ethical governance and procedural justice.

In conclusion, diligence is not merely a technical threshold; it is a dynamic and evolving legal standard that encapsulates the core values of FIFA's dispute resolution system. It represents a commitment to procedural fairness, institutional accountability, and the equitable resolution of disputes in a highly globalized and commercially driven sporting environment. As CAS jurisprudence continues to develop, the standard of diligence will remain central to ensuring that international football remains not only competitive and financially viable, but also just and inclusive for all participants.

The new Article 21(5) of the FIFA Disciplinary Code marks a significant evolution in the regulation of creditor conduct in football-related financial enforcement. By introducing clear obligations for both debtors and creditors, and by defining negligence and its exceptions, the provision brings transparency, legal certainty, and procedural equity to a domain historically governed by fragmented practice.

It reflects a mature regulatory response to the challenges posed by cross-border insolvency, club restructuring, and procedural abuse, while still maintaining flexibility for vulnerable or disadvantaged creditors. Ultimately, Article 21(5) will serve to strengthen the integrity of FIFA's disciplinary jurisdiction, promote responsible creditor engagement, and ensure that insolvency is not exploited as a shield against just financial obligations.

COMMENTS

legaljournal.fifa.com

CAS 2024/A/10414 A. v. FIFA

Jan Kleiner
FIFA Director of Football Regulatory

ABSTRACT:

A football agent filed an Appeal to CAS to challenge FIFA's refusal to grant him a licence under the so-called "legacy path" provided under the FIFA Football Agent Regulations (FFAR). The agent invoked alleged technical issues with FIFA's Agent Platform as the main cause for him to miss the deadline established under the FFAR to enter the "legacy path". FIFA, on the other hand, argued that the Appellant was merely challenging an informative communication of FIFA, in which it reiterated a position that it had long taken in the past already, and that therefore there was no appealable decision. CAS declared the agent's appeal inadmissible.

KEYWORDS:

CAS, appeal, admissibility, appealable decision, football agents, licence, legacy path, FFAR.

CAS 2024/A/10414 A. v. FIFA

Jan Kleiner
FIFA Director of Football Regulatory

Summary: 1. Factual Background. 1.1. Licensing System under the FFAR. 1.2. The FIFA Agent Platform. 1.3. The Appellant's Attempts to Register on the Agent Platform. 1.4. The Appellant's Licence Applications. 2. The Appellant's Appeal to CAS. 3. Considerations of the CAS Concerning Admissibility. 4. Conclusion

1. FACTUAL BACKGROUND

On 16 December 2022, FIFA adopted its FIFA Football Agent Regulations ("FFAR"). The FFAR were published on 6 January 2023. The FFAR, among other items, re-introduces a licensing system according to which only persons who hold a valid licence issued by FIFA are authorised to provide *"Football Agent Services"*, as defined in the FFAR.

A. (the Appellant) is a football agent based in Madrid, Spain. He is a FIFA pre-2015 licensed sport agent, also registered as a football agent with the Italian and Spanish Football Federations. A. wished to become licensed under the FFAR.

1.1. LICENSING SYSTEM UNDER THE FFAR

The FFAR establish several possibilities for an individual to obtain a licence to act as a football agent: (i) the so-called *"exam path",* granting a licence to every person who passes an exam and pays the applicable licence fee; (ii) the so-called *"legacy path",* converting old registrations under the registration regime that had been in place under the former 2015 FIFA Regulations on Working with Intermediaries towards a licence under the FFAR (without having to pass an exam), with a deadline of 30 September 2023 to apply for this legacy path; and (iii) the so-called *"national law*

path", converting a national licence from a country recognised by FIFA as having a national licensing regime, which is equivalent to the FFAR licensing requirements, into a FIFA license.

Article 23 of the FFAR defines the legacy path in greater detail and provides the requirements to obtain a FIFA licence through this path, as follows:

> *1. A person formerly licensed as an agent pursuant to the FIFA Players' Agent Regulations (1991, 1995, 2001 or 2008 editions) is exempt from the requirement to pass the exam established by these Regulations, provided that:*
> *a) they submit an application for a licence pursuant to these Regulations up to and including 30 September 2023;*
> *b) they provide proof that they were licensed as an agent pursuant to the FIFA Players' Agent Regulations (1991, 1995, 2001 or 2008 editions);*
> *c) upon application, they comply with the eligibility requirements under article 5 of these Regulations;*
> *d) as part of their application, they provide proof that they were registered as an intermediary, or were the owner, director, or employee of a legal person registered as an intermediary at a member association between 1 April 2015 and the date of the approval of these Regulations, pursuant to the RWWI or equivalent national regulations; and*
> *e) after being confirmed as exempt from the exam by the FIFA general secretariat, they comply with article 7 of these Regulations.*
> *2. If a former licensed agent meets the relevant conditions, they shall be issued a licence in accordance with article 8 of these Regulations. (...)*

1.2. THE FIFA AGENT PLATFORM

Licence applications must be submitted to FIFA via the FIFA Agent Platform (https://agents.fifa.com/home). The Agent Platform is a digital platform managing all licence applications. All licence applicants must register and create a profile on this platform, so that they can then submit a licence application.

1.3. THE APPELLANT'S ATTEMPTS TO REGISTER ON THE AGENT PLATFORM

On 6 February 2023, the Appellant registered himself as an agent in Italy, registering both before the Italian Football Federation ("FIGC") and before the Italian National Olympic Committee ("CONI") based on his FIFA pre-2015 licence. The Appellant successfully renewed his registration before both FIGC and CONI in November and December 2023.

On 27 March 2023, he attempted to register on the FIFA Agent Platform and to create his digital profile. However, because of an illegible identification document, the registration could not be completed. He received an

automated message, inviting him to submit a different document. On 2 October 2023, the Appellant again tried to create an account on the Agent Platform, this time with success.

1.4. THE APPELLANT'S LICENCE APPLICATIONS

On 18 October 2023, the Appellant attempted to apply for a FIFA licence using the national law path under Article 24 FFAR. As this path is not available for holders of Spanish or Italian licences (it is available for FFF licence holders only), the Appellant selected the relevant field (holder of an FFF licence), but attached his Spanish licence.

On 1 November 2023, FIFA sent an email rejecting his application for the national law path, referring to the fact that the Appellant did not hold an FFF licence:

> *Dear Sir or Madam*
> *Thank you for your application.*
> *It seems that you have not submitted documentation which is relevant and/or sufficient for your licence application.*
> *The reason for rejection of your application for the National Law Path with the French Football Federation is the following:*
> *'Ne détient pas de licence d'agent sportif F.F.F. conformément à l'article L222-7 du code du sport.' In case of questions, please reach out to the French Football Federation directly.*
> *We thank you for your attention to the above.*
> *(...)*

On 20 November 2023, the Appellant's legal representative contacted FIFA, re-submitted the Appellant's passport and invoked technical issues, which the Appellant had allegedly faced during the (initial) registration on the Agent Platform.

> *I write on behalf of* [A.], *FIFA pre 2015 licensed Agent (see RFEF licence attached hereto), who has incurred in technical problems while accessing the FIFA Agent Platform to apply to his FIFA licence. In particular, the video did not recognize* [A.'s] *passport during the application procedure. In this regard, I am attaching together with the pre 2015 FIFA Licences, the passport of* [A.] *to confirm his eligibility and complete his FIFA Agent's licence application.*

After internal verification with its IT services, FIFA confirmed to the Appellant that the system had not recorded multiple registration attempts. FIFA confirmed that other agents successfully used the Agent Platform without issues. On 17 January 2024, therefore, FIFA communicated the following:

> *Dear Sir,*
> *Thank you for your e-mail, we acknowledge receipt of your query.*

Firstly, we would like to inform you that the IT team has confirmed that the only time Mr. [A.] *appears in ID recognition system, is on 2023-10-02 19:25:06. There are no other registration attempts.*
Furthermore, we would like to remind you that the legacy application window closed last 30 September 2023 (and it was opened 9 January 2023), as indicated in our enclosure 2, in this regard we would like to stress that candidates, in general, are responsible for their application to become a FIFA football agent.
In light of the above mentioned, you would apply for 3rd FIFA Football Agent Exam, please be kindly informed that the Exam licensing path application window for the 3rd FIFA Football Agent Exam is open (see below). You will find relevant information in our dedicated website here (for example, how to become a football agent and in our FAQ).

3rd FIFA Football Agent Exam (22 May 2024)	
Application window opens	*9 January 2024 (afternoon CET/Zurich)*
Application window closes	*31 March 2024 (23:59 CET/Zurich)*

Moreover, please be kindly aware that the full implementation of the new FIFA football agent regulations was last 1 October 2023, therefore, any intermediary providing football agent services around the world have to become a FIFA football agent from that date onwards. In addition, please find relevant information here link and in the online conference 'Understanding the new FIFA Football Agent Regulations' in which the Agents Department explains in detail the main principles of the new framework. We advise you to regularly follow the relevant updates on www.fifa.com.
We thank you for taking note of the above.

On 31 January 2024, the Appellant's legal representative contacted FIFA by phone, followed by a detailed email on 5 February 2024, reiterating the (alleged) technical problems with the Agent Platform and urging FIFA to consider the Appellant's eligibility based on his previous attempts.

Dear Victor,
Many thanks for reaching out. I follow up my previous correspondence, attached hereto for your convenience.
In a nutshell, I am writing on behalf of FIFA pre 2015 Agent Mr [A.]. *Mr* [A.] *is a very renowned and esteemed agent, albeit not very familiar with digital procedures as he is class of 1959.* [A.] *attempted to register himself uploading his Passport during spring 2023 through his collaborators and the undersigned through the FIFA Agent Platform, specifically between April and May, with the last recorded attempt through our law firm on June 10th, 2023.*
In your reply (see attached) you kindly informed that "the IT team has confirmed that the only time Mr. [A.] *appears in ID recognition system, is on 2023-10-02 19:25:06. There are no other registration attempts".*
However, I shall stress that this is not true, as I have been trying many times to upload Mr [A.'s] *Passport and there has also been an exchange of correspondence at the end of March 2023 from notifications@agents.fifa.org (also attached). In the latter, FIFA stated that the Passport was not enlightened enough and thus decided to reject the application and reset and delete the entire file.*

Therefore, the FIFA Agent Platform did not recognize Mr [A.'s] *Passport during all and numerous attempts we made. To this extent, we tried to contact the Agent Department but at the time it was impossible to get in contact with the FIFA Agent Platform, nor was there in place any possibility to submit claims.*
In light of all the above, it shall be taken into account that Mr . [A.] *attempted many times and in good faith to complete the application within the prescribed terms, holding all the requirements to be awarded with the FIFA Agent Licence.*
Therefore, a technical issue of the FIFA Agent Platform cannot jeopardize Mr. [A.'s] *career requiring him to undergo the FIFA Agent Exam as a non-previous FIFA Agent. I therefore respectfully request you take into consideration the above and confirm Mr.* [A.'s] *eligibility and allow him to complete his FIFA Agent's licence application. I look forward to hearing from you.*
Many thanks in advance.
(...)

Following a further investigation, the FIFA IT services re-confirmed that there was no record of multiple registration attempts. On 20 February 2024, FIFA reiterated that the legacy path application window had in the meantime closed and therefore advised the Appellant to apply for the next FIFA agent exam:

Dear Sir,
Thank you for your e-mail, we acknowledge receipt of your query.
We would like to stress again that the legacy path window was closed 30 September 2023. In this regard, we would like to highlight once more that the legacy path opened 9th January 2023 and closed 30 September 2023 (cf. Enclosure 2, Timeline). Moreover, after thoroughly reviewing your application, including the information that you provided, we confirmed that on October 2023, Mr [A.] *completed the registration process through the FIFA Agent Platform and applied for the National law path: Fédération Française de Football, however his application was rejected because he had not submitted documentation which was relevant and/or sufficient for his licence application (i.e.'Ne détient pas de licence d'agent sportif F.F.F. conformément à l'article L 222-7 du code du sport.'). In this regard, considering the documents and information currently at our disposal, your licence application has therefore been rejected in the Platform.*
Furthermore, we would like to point out that when applicants attempt several times to complete the ID verification and this generates an error message.
Applicants should contact the Support Team and they would have been able to inform them accordingly. Indeed, during the last registration period, users were able to contact via support@agents.fifa.org, and, for example, if the verification process fails, the user should try again or try using an alternative document to complete the process.
Lastly, we would like to remind you that the Exam licensing path application window for the 3rd FIFA Football Agent Exam is currently open.
Please be aware that to obtain a licence to act as a Football Agent, you must apply via the FIFA Agent Platform.
We thank you for taking note of the above.
(...)

2. THE APPELLANT'S APPEAL TO CAS

The Appellant filed an Appeal to CAS against this last communication of FIFA of 20 February 2024. From the outset, FIFA challenged the admissibility of this Appeal, taking the position that this communication of 20 February 2024 did not qualify as an appealable decision.

FIFA put forward, in particular, the following arguments:

- The communication of 20 February 2024 was not a decision, but merely a communication reiterating points which had all been notified, decided and communicated previously by FIFA to the Appellant.
- The information that the legacy path window had closed on 30 September 2023 had already been provided to the Appellant by FIFA on 17 January 2024. To the extent that FIFA's 17 January 2024 communication might have qualified as a decision, it was not legally challenged and thus became final and binding.
- The information that the national law path application had been rejected had been notified to the Appellant already on 1 November 2023. To the extent that the notification in FIFA's 1 November 2023 communication might have qualified as a decision, it was not legally challenged and thus became final and binding.
- The 20 February 2024 communication did not have any *animus decidendi*. It also did not affect the legal position of the Appellant.
- The Appellant should not be allowed to reiterate earlier arguments, only to seek the issuance of a new decision and to thus artificially extend the deadline to Appeal to CAS.

In response, the Appellant put forward the following:

- In the Appellant's view, FIFA's 20 February 2024 communication constituted a decision issued by FIFA and the Appellant had exhausted the legal remedies available to him prior to filing the Appeal, in accordance with the Statutes and regulations of FIFA.
- FIFA's 20 February 2024 communication unduly jeopardized the Appellant's right to have his pre-2015 FIFA agents' licence recognized by FIFA, stating that the Appellant should take the exam path, regardless of him already holding the requirements in light of his former licence and his several substantiated attempts to register and apply for licence conversion on the FIFA Agent Platform.
- The 20 February 2024 communication met all the criteria to qualify as a decision as established in CAS jurisprudence, while neither the 1 November 2023 nor the 17 January 2024 Letters contained any ruling or *animus decidendi*.

3. CONSIDERATIONS OF THE CAS CONCERNING ADMISSIBILITY

Before addressing the admissibility of the Appellant's Appeal, CAS recalled the content of Art. R49 of the CAS-Code:

> *In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after considering any submission made by the other parties. (...)*

Further, CAS recalled that pursuant to Art. 57 of the FIFA Statutes, an appeal to CAS must be lodged within 21 days of receipt of the decision in question.

CAS then set out the key question, i.e., how the various communications or letters of FIFA (notably the ones of 1 November 2023, 17 January 2024, and 20 February 2024) qualified from a legal perspective. In this respect, CAS summarized the crucial issue in this case as follows:

> *"Stated differently, if all matters legally affecting the Appellant have already been decided and communicated by FIFA to the Appellant in FIFA's 1 November 2023 Letter and FIFA's 17 January 2024 Letter, then the appeal is untimely as it was filed well beyond the 21-day deadline per Article 57 of the FIFA Statutes from the respective dates of these letters which preceded FIFA's 20 February 2024 Letter. If, on the other hand, FIFA's 20 February 2024 Letter decides and communicates for the first time all or some of the matters legally affecting the Appellant, and if all other needed elements rendering such communication a decision do exist, then the appeal filed on 12 March 2024 within 21 days of FIFA's 20 February 2024 Letter is admissible."*

CAS then recalled its ample jurisprudence defining when, and under which circumstances, communications qualify as decisions in a legal sense, notably as follows:

- The form of a communication has no relevance for the determination as to whether there exists an appealable decision.[1]
- Whether or not a letter qualifies as a decision depends on its contents, not on its form.[2]

---

1 CAS 2015/A/4162, at para. 49.

2 CAS 2015/A/4162, at para. 50, with reference to CAS 2015/A/4162, para. 63; CAS 2008/A/1633, para. 31; CAS 2007/A/1251, para. 4; CAS 2005/A/899, para. 14; CAS 2004/A/748, para. 90.

- The term decision must be interpreted in a broad manner.[3]
- The decisive criterion is whether or not the act in question impacts upon the legal situation of the Appellant. If that is the case (independent of what the intentions of the relevant sports organisation were), there must be access to justice for the person concerned.[4]
- A decision is a communication of a federation, association or sports-related body that is not just of a mere informative nature but also contains, in substance, an actual ruling or resolution which affects in a binding manner the legal situation of the addressee. In other words, it is a communication that contains an animus decidendi, i.e., by its objective content (and irrespective of its form) it conveys to the addressee(s) the will of the sports body to decide on a matter.[5]

Against the above background, and in light of the parties' submissions, CAS went on to determine whether FIFA's communication of 20 February 2024 qualified as a 'decision' or whether it was merely a confirmation of decisions taken and communicated earlier, notably in FIFA's communications of 1 November 2023 and 17 January 2024.

In this respect, CAS concluded that on 1 November 2023, FIFA clearly communicated to the Appellant that the national law path application was rejected. Similarly, CAS held that on 17 January 2024, FIFA clearly communicated to the Appellant that the legacy application window had closed on 30 September 2023 and that therefore any application beyond that timeframe was untimely.

CAS considered that the 20 February 2024 communication did not make any other ruling, and did not provide any clearer, more specific or more detailed determination or explanation. It merely repeated what had been stated and communicated before.

CAS also reiterated its earlier jurisprudence, according to which it was not appropriate to artificially extend a deadline to appeal by repeating questions to FIFA, asking for more information or requesting reconsideration of FIFA's position, and to then seek to challenge one of FIFA's confirmations of its original statements or decisions.[6] CAS was clear that such requests cannot be used to *"restart the clock"*.

3 CAS 2020/A/7590 & 7591, at para. 71; CAS 2005/A/899, at paras. 12 and 14; CAS 2004/A/748, at paras. 13 to 18.
4 CAS 2015/A/4162, at para. 52.
5 CAS 2014/A/3744 & 3766, at para. 191.
6 CAS 2021/A/8322, at para. 91.

4. CONCLUSION

On the basis of the above considerations, CAS concluded that the Appellant's appeal was inadmissible:

> *"Since FIFA's 20 February 2024 Letter is not a "decision" as its operative parts relating to the rejection of both the "national law path" and the "legacy path" merely repeat such decisions or information provided earlier, since the Appellant failed to appeal the original notifications in regard to such matters and since this appeal was filed well beyond the expiration of the respective 21-day deadlines in regard to FIFA's 1 November 2023 Letter and FIFA's 17 January 2024 Letter, this appeal is inadmissible."*

This conclusion is in line with earlier jurisprudence and does not suggest any departure from established principles. It reiterates the well-known criteria to assess whether a communication or notification legally qualifies as a "decision" subject to appeal.[7] It also re-confirms the important principle that it is neither possible nor appropriate for parties to artificially extend a deadline to appeal by seeking the re-issuance of a decision and to thereby obtain a new possibility for an appeal.

[7] *See,* notably, CAS 2020/A/7590 & 7591; CAS 2015/A/4162; CAS 2008/A/1633; CAS 2005/A/899; CAS 2004/A/748; each with further references.

CAS 2023/A/9972 FEDERACIÓN MEXICANA DE FÚTBOL v. FIFA. DISCRIMINATORY BEHAVIOUR

Francisco A. Larios

FIFA Senior Legal Counsel

ABSTRACT:

The following is an analysis of the legal proceedings involving the *Federación Mexicana de Fútbol* (FMF) and FIFA, concerning the discriminatory behaviour of FMF's supporters at two matches played in the context of the FIFA World Cup Qatar 2022. The FIFA Disciplinary Committee found the FMF in breach of the anti-discrimination rule of the FIFA Disciplinary Code (FDC). The matter ultimately reached the Court of Arbitration for Sport (CAS), where the FMF's appeal centred on the limits of the strict liability principle and on the proportionality of the sanction. The CAS confirmed the applicability of strict liability to member associations for the discriminatory conduct of their supporters. However, it slightly reduced the sanction imposed by FIFA, citing the "passive attitude" of FIFA's officials in responding to the incidents as a mitigating factor. The award reaffirmed that discriminatory chants have no place in football and suggested that, in future, FIFA may need to impose harsher sanctions on associations to eradicate this misbehaviour.

KEYWORDS:

CAS, disciplinary proceedings, appeal, discrimination, supporter misconduct, strict liability, proportionality, mitigating circumstances.

CAS 2023/A/9972 FEDERACIÓN MEXICANA DE FÚTBOL v. FIFA. DISCRIMINATORY BEHAVIOUR

Francisco A. Larios
FIFA Senior Legal Counsel

Summary: 1. Factual background. 1.1. The discriminatory incidents. 1.2. The disciplinary proceedings against the FMF. 2. CAS Appeal. 2.1. Arguments of the Parties. 2.2. The Panel's decision. 3. Conclusions

1. FACTUAL BACKGROUND

1.1. THE DISCRIMINATORY INCIDENTS

On 22 November 2022, the representative teams of Mexico and Poland faced off in the FIFA World Cup Qatar 2022. Before entering the stadium, a small group of 5-10 Mexican supporters chanted "*Poropopo poropo el que no salte es un polaco maricon*" (which translates in English to "*Poropopo poropo he who doesn't jump is a Polish faggot*"). During the match, two further discriminatory incidents took place. At minute 18:55, about 200 Mexican supporters engaged in the same chant for around 10 seconds. The chant was again repeated in minute 85:40 of the match, this time by the majority of the Mexican fans in the stadium. In response to this second chant, a stadium announcement was made reminding the supporters to refrain from discriminatory chants, to uphold the principles of fair play, and to take part in football in the spirit of respect and equality.

On 30 November 2022, the Mexican team played Saudi Arabia in the same competition. At minutes 94 and 96, the Mexican supporters throughout the stadium in the 11 sections shouted "*Eeeeeh puto*" at the Saudi Arabian goalkeeper as he was taking the goal kick.

1.2. THE DISCIPLINARY PROCEEDINGS AGAINST THE FMF

In view of these discriminatory incidents, disciplinary proceedings were opened against the FMF for a potential breach of Article 13 FDC (2019 ed.) on discrimination. The case was heard first by the Disciplinary Committee and then on appeal by the Appeal Committee, before ultimately reaching the CAS. The main points of the decisions of the FIFA judicial bodies are summarised below.

1.2.1. The Decision of the Disciplinary Committee

On 13 January 2023, the FIFA Disciplinary Committee rendered its decision on the matter, finding the FMF in breach of Article 13 FDC[1] and ordering the FMF to pay a fine to the amount of CHF 100,000 and to play its next (A level) FIFA competition match without spectators, with such sanction being suspended for a probationary period of two years.

In reaching its conclusion, the Committee, noting that the FMF had not challenged the occurrence of the incidents or that they were discriminatory in nature, found the FMF strictly liable for the offence committed by its supporters. The Committee recalled that through the application of strict

[1] "*1. Any person who offends the dignity or integrity of a country, a person or group of people through contemptuous, discriminatory or derogatory words or actions (by any means whatsoever) on account of race, skin colour, ethnic, national or social origin, gender, disability, sexual orientation, language, religion, political opinion, wealth, birth or any other status or any other reason, shall be sanctioned with a suspension lasting at least ten matches or a specific period, or any other appropriate disciplinary measure.*
2. If one or more of an association´s or club's supporters engage in the behaviour described in paragraph 1, the association or club responsible will be subject to the following disciplinary measures:
a) For a first offence, playing a match with a limited number of spectators and a fine of at least CHF 20,000 shall be imposed on the association or club concerned;
b) For reoffenders or if the circumstances of the case require it, disciplinary measures such as the implementation of a prevention plan, a fine, a points deduction, playing one or more matches without spectators, a ban on playing in a particular stadium, the forfeiting of a match, expulsion from a competition or relegation to a lower division may be imposed on the association or club concerned.
(...)"

liability, an association is responsible for the discriminatory acts of its supporters, even if it is not at fault, and that FIFA is empowered to sanction not only the supporter, but also the association in order to implement FIFA's zero-tolerance policy on discrimination. The Committee underlined that this principle served as one of the few legal tools available to FIFA to prevent misconduct by supporters from occurring and going unpunished.

While the Committee commended the FMF for the various anti-discrimination efforts and initiatives it implemented prior to the FIFA World Cup Qatar 2022 and acknowledged that the FMF lacked authority over security logistics and organisation of the competition, it underlined that this did not excuse or absolve the FMF of its strict liability for the misconduct of its supporters.

In determining the appropriate sanction, the Committee took into account: (i) FIFA's zero tolerance policy towards discrimination; (ii) that discrimination should be met with a sanction that reflects the seriousness of the offense; (iii) that the incidents occurred during two matches of the FIFA World Cup 2022 – the most prestigious and widely-viewed sporting event in the world; (iv) the efforts of the FMF in combatting discrimination through various measures and initiatives; and (v) the fact that the FMF was a recidivist.

The FMF appealed this decision of the Disciplinary Committee.

1.2.2. The Decision of the Appeal Committee

On 1 June 2023, the FIFA Appeal Committee rendered its decision on the matter (the "Appealed Decision").

In application of the *lex mitior* principle enshrined in the FDC, the Committee decided to apply Article 15 of the 2023 FDC, instead of Article 13 of the 2019 FDC, which had been used by the first instance. In this respect, the Committee noted that the two provisions were nearly identical except for one substantive change that benefitted the FMF, specifically, the addition of paragraph 3[2], which gave the FIFA judicial bodies the right to deviate from

[2] "*The competent judicial body may deviate from the above minimum sanctions if the association and/or club concerned commits to developing, in conjunction with FIFA, a comprehensive plan to ensure action against discrimination and to prevent repeated incidents. The plan shall be approved by FIFA and shall include, at least, the following three focus areas:*
a) educational activities (including a communication campaign aimed at supporters and the general public). The effectiveness of the campaign will be reviewed regularly.
b) Stadium security and dialogue measures (including a policy on how offenders will be identified and dealt with through football sanctions, a policy on escalation to

the above minimum sanctions if an association, in conjunction with FIFA, implemented or further developed an anti-discrimination plan.

On the substance, the Committee first held that the Appellant could not be exonerated from its strict liability for the misconduct of its supporters. In this respect, the Committee relied on well-established CAS jurisprudence, which held that the purpose of applying strict liability was "*not simply to sanction the association as such, but above all to ensure that the association assumes liability for the offence committed by its fans. Accordingly, the provision is of a highly preventive and dissuasive nature... [T]he punitive aspect of the sanction is therefore of secondary importance or the preventative and dissuasive role that sanctions must perform in the interest of internal order in football*" (citing CAS 2022/A/8751).

The Committee found irrelevant – in determining liability – that the FMF had taken preventative measures against discrimination and that it was not in charge of the organisation of the matches. The Committee underlined that the principle of strict liability was independent from the behaviour of the FMF and/or from any external organisation aspect. The Committee considered that these elements could only constitute potential mitigating circumstances, but they did not affect the strict liability of the FMF.

Having found the FMF liable, the Committee then assessed the proportionality of the sanction. The Committee considered that, as a matter of principle, the fine imposed by the first instance was entirely appropriate and proportionate to the offence committed. In this respect, the Committee found that, contrary to the FMF's position, the FMF had been correctly qualified as a recidivist and the association's efforts to combat discrimination were duly acknowledged and taken into account by the first instance. The Committee noted that the first instance had correctly departed from the "standard" sanctions usually imposed on recidivists of discriminatory offences. Instead of ordering the FMF to play a match without spectators – which is the default sanction for such recidivism – the first instance body suspended that sanction, subject to a probationary period.

Nonetheless, in application of Article 15.3 FDC and in view of the various measures against discrimination taken by the FMF, as well as the FMF's pledge to continue working towards the eradication of discriminatory chants and implementing awareness-raising measures and actions to combat such behaviour, the Committee found it appropriate to partially amend the

state (criminal) legal authorities, and a dialogue with supporters and influencers on how to create change).

c) Partnerships (including working with supporters, NGOs, experts and stakeholders to advise on and support the action plan and ensure effective and ongoing implementation)".

sanction imposed by the first instance, by reducing the stadium closure to 20 percent and modifying the fine as follows: CHF 50,000 to be invested in implementing or developing an anti-discrimination plan in line with Article 15.3 FDC and CHF 50,000 suspended for a period of 6 months, with all CHF 100,000 becoming due only if the FMF failed to implement/develop the anti-discrimination plan as required.

2. CAS APPEAL

On 8 September 2023, the FMF filed an appeal against the Appealed Decision.

2.1. ARGUMENTS OF THE PARTIES

In the appeal, the Parties disputed: (a) the application of the principle of strict liability; (b) the existence and effects of concurrent contribution by FIFA as organiser of the matches; and (c) the proportionality of the sanction imposed by FIFA. The main points of contention between the FMF and FIFA are summarised below.

2.1.1. Strict liability for misconduct of supporters

2.1.1.1. The FMF's position

The FMF submitted that the principle of strict liability cannot extend to a competition in which the member association does not have any possibility to direct, affect or control the discriminatory behaviour of its fans, nor to intervene in the execution of the Three-Step Protocol designed to deal with such incidents at a match.

The FMF set out the cumulative conditions which must be met under Swiss law for no-fault strict liability to apply –wrongful conduct, damage and a causal link between the two. Furthermore, the FMF argued that, pursuant to Swiss law, for a member association to be strictly liable for the actions of a third party, it must have direction and/or control over said party. As there was no causal link between the Mexican supporters and the FMF, the principle of strict liability could not be applied.

The FMF pointed out that FIFA was the exclusive organiser of the final stage of the FIFA World Cup Qatar 2022. As a result, FIFA had control of security and access to the stadiums and of the public address system. The FMF posited that this absence of control and direction over the organisation of the matches and, in turn, of the fans, led to the non-imputability of the FMF.

2.1.1.2. FIFA's position

FIFA posited that the FMF's reliance on Swiss law was misplaced, as the applicable laws were the FIFA regulations (in particular the FDC) and that there was no need to apply Swiss law subsidiarily. On this point, FIFA advanced that Article 15 FDC did not contain a *lacuna* or require an interpretation so as to necessitate the application of Swiss law on a subsidiarity basis. In FIFA's view, as confirmed by CAS jurisprudence, the principle of strict liability established in articles 8.1[3] and 17[4] FDC was valid and compatible with Swiss law, the broad regulatory autonomy it enjoys as an association, and public order. Furthermore, FIFA emphasised that the strict liability principle applicable to Article 15 FDC served a justified and valuable purpose in meeting the association's objective of eradicating violence, discrimination and homophobia in football.

FIFA also argued that the FMF could not be exempted from its strict liability based on the measures it had taken to combat discrimination or the fact that FIFA was the organiser of the matches.

2.1.2. FIFA's concurrent contribution to the infringement

2.1.2.1. The FMF's position

The FMF contended that FIFA contributed to the infringement by ignoring the FMF's invitation to collaborate in discrimination prevention campaigns, allowing access in the second match to the supporters who engaged in the discriminatory chants in the first match, not making a stadium announcement after the first incident that occurred in each match, not implementing the Three-Step Protocol pursuant to FIFA Circular 1682, and not identifying the perpetrators with the aim of expelling them from the stadium or preventing them from attending future matches of the competition. In the FMF's opinion, the above circumstances warranted the exoneration of liability of the FMF, or at least, the mitigation of sanctions. Furthermore, the FMF

---

3 "*Unless otherwise specified in this Code, infringements are punishable regardless of whether they have been committed deliberately or negligently. In particular, associations and clubs may be responsible for the behaviour of their members, players, officials or supporters or any other person carrying out a function on their behalf even if the association or club concerned can prove the absence of any fault or negligence*".

4 "*All associations and clubs are liable for inappropriate behaviour on the part of one or more of their supporters as stated below and may be subject to disciplinary measures and directives even if they can prove the absence of any negligence in relation to the organisation of the match…*".

advanced that the existence of strict liability did not imply that sanctions had to be imposed. In a justified and appropriate circumstance, a sanction could be reduced or eliminated despite the application of strict liability.

2.1.2.2. FIFA's position

FIFA rejected the idea that it contributed to the misconduct of the Mexican supporters. FIFA did not ignore the FMF's invitation to collaborate on an anti-discriminatory campaign but rather communicated that it was working on its own initiatives. Regarding the FMF's allegation that FIFA did not make stadium announcements, FIFA submitted that, in the first match, the FIFA officials did not make such an announcement after the first incident because it was not very audible or of great intensity (as compared to the chant in the 85th minute which was followed by an announcement). Furthermore, FIFA submitted that it did not make an announcement in the second match because the incidents occurred in the 94th and 96th minutes. With the match ending in the 97th minute, this resulted in limited time to implement the protocol. Lastly, FIFA recalled that the referee had the exclusive power to activate the Three-Step Protocol under FIFA Circular 1682.

2.1.3. Proportionality of the sanction

2.1.3.1. The FMF's position

The FMF maintained that Article 15.3 FDC (ed. 2023) allowed FIFA to diverge from the minimum sanctions set out in Article 15 FDC or to even eliminate the sanction altogether based on the particular circumstances of the case.

The FMF considered that the circumstances of the present case warranted the reduction or elimination of the sanction. In its view, the sanction imposed was disproportionate considering FIFA's praise of the FMF in the fight against discrimination, the preventive and reactive actions taken by the FMF to combat discrimination, the fact that the FMF's measures against discrimination have proven to be effective, and the minor nature of the incidents that occurred.

2.1.3.2. FIFA's position

FIFA posited that the Appealed Decision had taken into consideration all mitigating factors. FIFA considered the sanction imposed on the FMF to be proportionate to the offense committed in view of the fact that: (i) FIFA has zero tolerance policy regarding discriminatory behaviour; (ii) the chants were

highly homophobic and insulting; (iii) the chants occurred in two different matches; (iv) the chants were shouted by a majority of the spectators; (v) the chants occurred during the FIFA World Cup; (vi) the FMF was a recidivist; (vii) the Appealed Decision took into account the measures taken by the FMF to combat discrimination; and (viii) the sanction was very low by FIFA standards in cases of recidivism.

2.2. THE PANEL'S DECISION

2.2.1. Strict liability for misconduct of supporters

The Panel rejected the FMF's proposition that the strict liability of third parties is incompatible with Swiss law, given the doctrinal recognition of the autonomy FIFA enjoys to regulate, at the global level, matters concerning the disciplinary liability of its members. This includes the ability to define, within the FDC, the categories and forms of strict liability, as well as the conditions for applying the principle in specific disciplinary cases.[5]

The Panel concluded that, since there was no *lacuna* in this regard, there was no need to apply Swiss law on a subsidiary basis.[6] In this respect, it should be noted that, indeed, the CAS has previously confirmed the wording of art. 15 FDC to be clear, unequivocal and leaving no room for ambiguity.[7]

The Panel reinforced that, according to well-established CAS jurisprudence, the principle of strict liability is fundamental to FIFA's efforts to combat hooliganism and discriminatory behaviour by fans and represents one of the few legal mechanisms available to effectively enforce its disciplinary rules. In this context, the Panel explained that the *ratio legis* behind FIFA's strict liability regime is that FIFA relies on its member associations to implement and uphold its statutory objectives, particularly in cases involving discriminatory conduct by supporters.

The Panel does not cite the CAS jurisprudence on which it relies. However, this author notes that the application of strict liability against a member association for the misconduct of its fans is not a novel concept, and one that has been repeatedly accepted by the CAS, for example, in TAS 2022/A/8751 *FENAFUTH v. FIFA*, which eloquently held:

5 On the broad regulatory autonomy of FIFA as an association under Swiss law see e.g., CAS 2022/A/8708, CAS 2020/A/7090, CAS 2018/A/5622, among others.

6 The Panel's finding is supported by consistent CAS jurisprudence establishing that Swiss law is only applicable in the event of a *lacuna* or if there is a need to interpret the FIFA regulations. See e.g., CAS 2019/A/6241, CAS 2016/A/4471 and CAS 2020/A/7180.

7 CAS 2022/A/8751, at paras. 101 and 115.

"116. The liability contemplated here is direct - since liability is imputed to the association as a legal person regardless of the fact that it did not perform directly or through its organs the acts in question - and strict - since liability is attributable beyond the diligence or care provided by the subject in question-.
117. Case law has uniformly commended this system of liability, as it is on the basis of this principle that FIFA has the possibility to deal with cases of spectator misconduct and to impose indirect sanctions on spectators through their association (ex multis: CAS 2009/A/1944, para. 78). The intention of this provision is not only to sanction the association as such, but above all to ensure that the association assumes responsibility for offenses committed by its fans; as such, the provision has an eminently preventive and dissuasive character. The punitive element of the sanction, it has been held, thus assumes a secondary importance behind the preventive and dissuasive function that sanctions must play in the interest of the internal order of football (vide e.g., CAS 2022/A/423, cited expressly and with approval in CAS 2013/A/3094).
118. Therefore, there is no doubt here for the Sole Arbitrator: not only that this liability is applicable to the particular case, but also that it is highly valuable from an axiological point of view, as it embodies one of the most effective tools that the world of football has to eradicate general violence - and discrimination in particular - from its fields".[8]

Moreover, it should be noted that the CAS has accepted the principle of strict liability as applicable not only within the regulatory framework of FIFA, but also in relation to other federations and confederations.[9]

The Panel further reasoned that if the FMF could avoid liability by claiming it had taken all reasonable measures to prevent the misconduct, then supporters could continue to engage in discriminatory behaviour without consequence, as there would be no effective means of holding anyone accountable. The Panel considered that allowing liability to be avoided in such cases would reduce binding obligations to mere recommendations, thereby undermining the preventive and deterrent purpose of the strict liability regime. It emphasised that the aim of applying strict liability in discrimination cases is not to punish the member association for its own fault – which may be absent – but rather to assign responsibility in a way

8 Translated from the Spanish original; see also CAS 2013/A/3094, CAS 2009/A/1944 and CAS 2002/A/423.

9 See CAS 2015/A/3874 *Football Association of Albania v. UEFA and Football Association of Serbia*, which held that "*the principle [of] strict liability for the behaviour of supporters is a fundamental element of the current football regulatory framework*" and "*one of the few legal tools available to football authorities to deter hooliganism and other improper conduct on the part of supporters*". The Panel further noted that "*strict liability is widely used in many legal systems to deter activity that is seen as being particularly harmful to social values and interests in circumstances in which it would be very difficult to prove the negligence of the responsible party*"; see also CAS 2013/A/3047 at para. 98, and CAS 2018/A/6040.

that ensures discriminatory conduct is addressed through responses that are both effective and dissuasive.

The Panel considered it irrelevant – in determining the application of strict liability – whether the FMF had any direction or control over its supporters. This is consistent with past CAS jurisprudence, holding that even where a club or member association is the away team, it must be held responsible for the conduct of its fans.[10]

In any event, in the Panel's view, the FMF could not claim that it was completely uninvolved or absolved of responsibility simply because FIFA was the organiser. The Panel noted that the FMF still had a duty to cooperate and take part in the organisation. For example, that FMF officials actively participated in the pre-match coordination meetings and were involved in organisational and control measures. In addition, the FMF received extensive information from FIFA on the measures to be taken in cooperation with FIFA's fight against discrimination during the competition. As part of the cooperation, FIFA called for the FMF to designate a representative to be responsible during the competition for the coordination of activities related to anti-discrimination and, in particular, to act as a constant point of contact with fans, act as a proactive mediator, and use and distribute the latest version of the FARE Global Guide to Discriminatory Practices in Football.

The Panel concluded that the FMF – in accordance with the principle of strict liability established in the FDC and grounded in FIFA's regulatory autonomy – bore liability for the discriminatory conduct of its supporters. This liability would – in line with past CAS jurisprudence – apply even if the FMF had not been involved in organising the matches and even if only a single supporter had engaged in the discriminatory conduct. The Panel added that, in any event, because the FMF did participate in the organisation and oversight of security and crowd control measures, its claim of non-imputability had to be rejected.

2.2.2. Mitigating circumstances

Notwithstanding the strict liability of the FMF, the Panel found that FIFA officials did not take adequate action in response to certain incidents, demonstrating what it described as a "passive attitude".

With regard to the first match, the Panel found that if the supporters who chanted homophobic slurs had been identified and expelled prior to kick-off, such action could reasonably have had a deterrent effect on the misconduct that followed during the match. Moreover, the Panel found that there was

10 See e.g., CAS 2009/A/1944, CAS 2014/A/3944 and CAS 2020/A/6920.

sufficient time to identify and even expel from the stadium those offenders who could have been identified during the incidents at minutes 18 and 85 of the match. The Panel also considered that the stadium announcement in the first match was delayed, having been made in the 90th minute. Lastly, the Panel noted that the referee is a FIFA official and that he did not activate the Three-Step Protocol.

As to the second match, the Panel agreed with FIFA that it may have been impracticable and useless to activate the Three-Step Protocol considering that the incidents occurred in minutes 94 and 96 of the match.

The Panel concluded that the "passive attitude" of the FIFA officials in the first match – while it did not excuse or absolve the FMF of its strict liability – constituted a mitigating circumstance and one that had not been considered in the Appealed Decision.

2.2.3. Proportionality of the sanction

Despite the aforementioned mitigating circumstance, the Panel only slightly reduced the sanction imposed on the FMF in the Appealed Decision.

In assessing the proportionality of the sanction, the Panel first observed that the sanction imposed in the Appealed Decision was significantly lower than those established by the FDC for discrimination. The Panel noted that the Appealed Decision imposed a first fine of CHF 50,000 and a second suspended fine of CHF 50,000, which would only become due if the FMF failed to invest the first fine towards the implementation and/or further development of an anti-discrimination plan in accordance with Article 15.3 FDC. In addition, the FMF was sanctioned with only a 20% stadium closure in its next (A level) FIFA competition match, this sanction being suspended for a probationary period of two years.

The Panel found that the new mitigating circumstance, i.e., the FIFA officials' "passive attitude", required only a slight modification of the sanction by reducing the probationary period of the stadium closure from two years to one year.

In this respect, it should be noted that pursuant to an established line of CAS jurisprudence, a sanction imposed by FIFA can only be amended by the CAS if the sanction concerned is "*evidently and grossly disproportionate*" to the offence committed.[11] While not explicitly stated, the Panel did not modify the sanction imposed by FIFA on this basis. On the contrary, the Panel accepts that the sanction imposed by FIFA was proportionate to the offence

[11] *Ex multis*: CAS 2018/A/5863, CAS 2018/A/6239, CAS 2017/A/5401, CAS 2016/A/2762, CAS 2014/A/3562 and CAS 2009/A/1817; CAS 2012/A/2762,

and even appears to suggest that the sanction may have been too lenient, since it was "*significantly lower than those established by the regulations for cases of discriminatory acts*".[12] Instead, the Panel's reduction of the sanction is grounded on the fact that there was this new mitigation circumstance that had not been taken into consideration by the FIFA judicial bodies.[13] Even so, it should be noted that the Panel, in respect of past decisions requiring the CAS to show "*reservation and restraint*" when "re-assessing" a sanction,[14] lowered FIFA's sanction only slightly.

The Panel concluded by acknowledging the FMF's concern that, despite its efforts to combat discrimination, the unacceptable conduct of its supporters had not been eradicated. Nonetheless, the Panel importantly affirmed that discriminatory chants seriously undermine both the reputation of the FMF and FIFA, and, ultimately, the integrity of the sport itself. The Panel stressed that such chants have no place in football and must be eradicated. While the Panel recognised that Article 15 FDC allows for FIFA to reduce sanctions from the minimum – as occurred here – it remarked that such behaviour may be "*dealt with more harshly, energetically and vigorously in accordance with the [FDC], which allow, among others, for the exclusion of the member associations from competitions organised by FIFA*".

3. CONCLUSIONS

This Panel's decision reinforces the notion, well-established and accepted by the CAS, that under the FDC a member association bears strict liability for the discriminatory conduct of its supporters, regardless of fault or control and, in particular, of whether it was the organiser of the match.

The decision further cements – as per long-standing CAS jurisprudence – that this form of liability is not intended to punish associations for their own misconduct, but to ensure that discriminatory behaviour in football is addressed through responses that are both effective and dissuasive. As emphasised by the Panel, strict liability remains one of FIFA's most important regulatory tools for achieving its statutory objectives, particularly

12 See para. 98 of the decision.

13 In this respect, it should be noted that the CAS has previously re-assessed a sanction due to the fact that it found fewer infractions committed than the FIFA judicial bodies (see e.g., CAS 2019/A/6301 and CAS 2016/A/4785). Doing so is not a determination that the sanction was "evidently and grossly disproportionate", but rather that it needed adjustment based on a new factual element.

14 *Ex multis*: CAS 2012/A/2824; CAS 2012/A/2702; CAS 2012/A/2762; CAS 2009/A/1817 & 1844; and CAS 2007/A/1217.

in addressing misconduct such as homophobic and discriminatory chants, which undermine the values of fairness and inclusivity in the sport.

The decision raises a new element to consider when determining the proportionality of a sanction and that is the match organiser's conduct. Indeed, the Panel deemed relevant FIFA's own conduct as match organiser, acknowledging that inaction or passivity by the organiser may constitute a mitigating element. Notwithstanding, it firmly held that such inaction or passivity does not absolve a member association of liability for its supporters' conduct – even where the association lacks direct control over the organisation of the competition. The Panel – in keeping with CAS jurisprudence concerning the review of a sanction's proportionality and, in particular, that it must show a high degree of reservation and restraint when reassessing a sports governing body's sanction – concluded that the fact the member association was not the organiser of the match justified only a limited reduction in the sanction imposed.

Finally, it is important to note the Panel's observation that the sanction imposed on the FMF was at the lower end of the spectrum and its reminder that FIFA retains the authority under the FDC to impose significantly harsher penalties – including exclusion from competitions – in cases of discriminatory conduct. The decision suggests – quite directly – that stricter and more forceful disciplinary measures may be necessary to safeguard the integrity of the sport should these discriminatory chants persist. This leaves us to question whether FIFA's current approach is too lenient and whether sanctions such as full stadium closures are necessary to truly educate supporters and eradicate discrimination from the sport.

CAS 2023/A/9867 ESTEBAN BECKER CHURUKIAN v. FEDERACIÓN ECUATOGUINEANA DE FÚTBOL & FIFA. COMPENSATION FOR BREACH OF CONTRACT

Miguel Liétard

FIFA Director of Litigation

ABSTRACT:

The following is an analysis of the legal proceedings involving a Coach and a national association (FEGUIFUT) stemming from the unilateral termination of the employment contract by the latter. After said termination, the Coach filed a claim with FIFA, and was found to be entitled to compensation from FEGUIFUT. Subsequent non-compliance by FEGUIFUT led to multiple disciplinary decisions and an eventual appeal to the Court of Arbitration for Sport (CAS). The appeal, focused on FIFA's decision to lift sanctions against FEGUIFUT, was ultimately dismissed, with the CAS finding the case moot following the settlement of the financial obligations by FEGUIFUT and the consequent lack of standing to sue/appeal by the Coach.

KEYWORDS:

CAS, disciplinary proceedings, appeal, claim for damages, admissibility, jurisdiction, standing to sue.

CAS 2023/A/9867 ESTEBAN BECKER CHURUKIAN v. FEDERACIÓN ECUATOGUINEANA DE FÚTBOL & FIFA. COMPENSATION FOR BREACH OF CONTRACT

Miguel Liétard
FIFA Director of Litigation

Summary: 1. Factual background. 1.1. The Coach's employment dispute with FEGUIFUT. 1.2. The disciplinary proceedings against FEGUIFUT. 2. CAS Appeal. 2.1. Arguments of the Parties. 2.2. The Panel's decision. 3. Conclusions

1. FACTUAL BACKGROUND

1.1. THE COACH'S EMPLOYMENT DISPUTE WITH FEGUIFUT

On 2 January 2015, Mr. Esteban Becker Churukian (hereinafter also referred to as the "Coach" or the "Appellant") signed an employment contract with the Federación Ecuatoguineana de Fútbol[1] ("FEGUIFUT") by means of which the

[1] FEGUIFUT is the governing body of football in Equatorial Guinea. It is a member of the African Football Confederation ("CAF") and of the *Fédération Internationale de Football Association* ("FIFA").

former was hired as the head coach of FEGUIFUT's men's national A team. Before this, Mr Becker Churukian had been employed by FEGUIFUT as the coach of its women's national A team between 2012 and 2015 (the "Contract").

On 12 June 2017, following a defeat of the national team in the qualifying tournament for the CAF African Nations' Cup 2019, FEGUIFUT unilaterally terminated the Coach's employment (the "Termination"). As a result, on 2 August 2017 the Coach filed a claim with the FIFA Players' Status Committee ("PSC"), arguing that the Termination had been unilateral and without just cause and requesting that FEGUIFUT be ordered to pay him compensation for breach of contract.

On 31 January 2019, the PSC issued a decision in connection with the Coach's claim, by means of which FEGUIFUT was ordered to pay Mr. Becker Churukian the amount of EUR 1,045,000 plus interests as from 2 August 2017 as compensation for having breached the Contract (the "PSC Decision").

FEGUIFUT subsequently filed an appeal to the Court of Arbitration for Sport ("CAS"), which was eventually dismissed on 24 November 2020 (TAS 2019/A/6428 – the "CAS Award").

1.2. THE DISCIPLINARY PROCEEDINGS AGAINST FEGUIFUT

As the CAS Award resulted in the PSC Decision becoming final and binding, and FEGUIFUT had not complied with its obligations arising therefrom, the Coach turned to the FIFA Disciplinary Committee (the "Disciplinary Committee") and sought to apply the mechanisms available to him under the FIFA Disciplinary Code ("FDC") by denouncing FEGUIFUT's failure to comply with the CAS Award (and indirectly with the PSC Decision).

This, in turn, led to several decisions by the Disciplinary Committee over the course of several years.

1.2.1. First Disciplinary Decision

On 18 December 2020, the Appellant filed his first complaint to the Disciplinary Committee in connection with FEGUIFUT's failure to comply with the CAS Award.

Following the relevant process, the Disciplinary Committee issued its decision FDD-7637 on 11 March 2021, which, in short, (i) found FEGUIFUT guilty of failing to comply with the CAS Award, (ii) ordered FEGUIFUT to pay the outstanding amounts to the Coach and to FIFA (procedural costs in the latter case), (iii) imposed a CHF 30,000 fine on FEGUIFUT and (iv) warned FEGUIFUT that in case of further non-compliance within 30 days, the case would be submitted to the Disciplinary Committee for further and more severe sanctions.

No appeal was ever filed against decision FDD-7637 (also referred to as the "First Disciplinary Decision").

1.2.2. Second Disciplinary Decision

On 22 April 2021, the Coach informed the Disciplinary Committee that FEGUIFUT had failed to comply with the First Disciplinary Decision and asked that more severe sanctions be imposed on that association.

As a result, on 20 May 2021, a second decision in proceedings FDD-7637 (the "Second Disciplinary Decision") was issued, whereby, in addition to the finding of guilt and the order to comply with its outstanding financial obligations arising from the PSC Decision, the CAS Award and the First Disciplinary Decision within a final grace period of 60 days, FEGUIFUT was imposed a CHF 50,000 fine.

Here too, the decision became final and binding in the absence of an appeal to CAS.

1.2.3. Third Disciplinary Decision

On 27 July 2021, the Coach informed the Disciplinary Committee of FEGUIFUT's continued failure to fulfill its obligations towards him, and he therefore asked that the latter be imposed sanctions that would effectively dissuade it from persisting in such default.

On 11 October 2021, a third decision was taken by the Disciplinary Committee (the "Third Disciplinary Decision"), in which FEGUIFUT was granted a final 30-day deadline to pay its outstanding debt, failing which it would automatically be expulsed from the FIFA World Cup Qatar 2022TM.

On 19 October 2021, following the notification of the Third Disciplinary Decision on 18 October 2021, the Coach asked the Disciplinary Committee to review the Third Disciplinary Decision. However, the request was rejected by the Disciplinary Committee on 8 November 2021 because the Coach did not have standing to sue in those proceedings that would allow him to request the revision of the decision.

The Coach did not appeal this Third Disciplinary Decision, which also became final and binding.

1.2.4. Fourth Disciplinary Decision

On 21 November 2021, the Coach again informed FIFA that FEGUIFUT had yet to comply with the CAS Award and asked that more severe and effective sanctions be imposed on the association.

On 11 February 2022, FEGUIFUT was informed that because it had already been eliminated from the FIFA World Cup Qatar 2022 TM on sporting grounds, the Chairman of the Disciplinary Committee had decided to apply the sanction to the Preliminary Competition of the FIFA World Cup 2026TM (the "Preliminary Competition"). As a result, FEGUIFUT was not allowed to participate in the draw of that competition (the "Fourth Disciplinary Decision" or the "Sanction"). However, the Disciplinary Committee further clarified that, should the amounts due to the Coach be paid prior to the draw of the Preliminary Competition, FEGUIFUT may be reinstated in said competition.

1.2.5. Appealed Decision and subsequent actions by the parties

On 11 July 2023, FEGUIFUT contacted FIFA and attached a letter from the Equatoguinean Vice-Minister of Youth and Sport, in which the latter stated that, following meetings between the parties (the Coach and FEGUIFUT), the Equatoguinean Government would make a one-time payment to the Coach and his assistant of USD 1,000,000, and that the rest would be covered by FEGUIFUT's funds in FIFA.

On 12 July 2023, on behalf of the Chairman of the Disciplinary Committee, FIFA informed the Coach and FEGUIFUT that the Fourth Disciplinary Decision had provisionally been lifted (the "Appealed Decision").

On that same day, the Appellant addressed an e-mail to the Disciplinary Committee, denying that any written or verbal agreement with FEGUIFUT existed, highlighting that no amount had yet been received by the Coach and requesting the reinstatement of the sanction under the Fourth Disciplinary Decision.

On 22 July 2023, the Coach and his assistant were jointly paid EUR 1,000,000 by the Equatoguinean Government.

2. CAS APPEAL

On 2 August 2023, the Coach filed an appeal against the Appealed Decision and a request for provisional measures before CAS (procedure referenced as TAS 2023/A/9867), the latter of which was rejected by the Panel on 19 October 2023.

On 13 November 2023, while the CAS Appeal was ongoing, the Coach confirmed to FIFA that the outstanding amount in connection to the compliance with the Third Disciplinary Decision and the CAS Award was EUR 747,832 and CHF 11,000, at the same time authorising that the payment be made to his legal counsel's bank account.

On 23 November 2023, FIFA made two transfers to the Appellant's counsel, with the Coach and his assistant as ultimate beneficiaries, in the respective amounts of EUR 1,208,358 and CHF 22,000. These transfers covered the totality of the debt that was owed to the Coach and his assistant.[2]

2.1. ARGUMENTS OF THE PARTIES

The main focus of the Coach's argumentation was aimed at portraying that, as a result of the Appealed Decision, the Coach would have suffered moral damage which required reparation.

On its side, FIFA argued that the Coach lacked standing to sue, as his appeal had become moot after the full compliance by FEGUIFUT with the CAS Award. FIFA also submitted arguments in connection with the mandatory passive joinder of CAF ("*consorité passive nécessaire*"), as organiser of the Preliminary Competition which would be directly affected by the Appellant's requests for relief, as well as in relation to the Appellant's claim for damages.

FEGUIFUT did not file an answer in the CAS appeal proceedings.

The main points of contention between the Coach and FIFA are summarised below.

2.1.1. The Appellant's standing to sue

2.1.1.1. The Appellant's position

In response to FIFA's argument that he lacks standing to sue[3], the Appellant argued that his standing in this matter arises from his right to rely on the Disciplinary Committee's intervention to ensure compliance with the CAS Award, as well as to appeal when the Appealed Decision violates that right.

As per the Coach, the creditor plays an essential role within the proceedings to confirm compliance or not with the payment of the amounts owed to him, to give impulse to the proceedings and to make his position known to the debtor and FIFA. This is therefore no ordinary disciplinary proceeding, as it is aimed at ensuring compliance with a CAS award.

Furthermore, the Coach sustained that the Appellant's interest existed at the time the appeal was filed, and it will remain until an award is rendered,

---

2 The Appellant's assistant had parallel proceedings ongoing at every level, which for the most part mirrored those of the Coach. At CAS level, the proceedings involving the assistant were referenced TAS 2023/A/9868.

3 Section 2.1.1.2 *infra*.

since the object of the appeal is not to claim the payment of the amounts owed by FEGUIFUT in accordance with the CAS Award. The object is the illegality of the Disciplinary Committee's actions and the moral damage caused by such actions. Additionally, the illegality and abuse caused by the Appealed Decision requires the declaration of its nullity. The Coach therefore had an interest in its annulment and in his claim for damages being decided upon, even if the amounts owed to him by FEGUIFUT are paid.

2.1.1.2. FIFA's position

In its answer to the appeal (the "Answer"), FIFA firstly raised the Appellant's lack of standing to challenge the Appealed Decision which, pursuant to Swiss law, is an issue pertaining to the merits of the dispute and which entails the rejection of the appeal.

Following the principles established in Swiss law, as well as in CAS jurisprudence, there are three requirements to assess the standing to appeal: (i) the party must be sufficiently affected by the challenged decision, (ii) the existence of a direct and legitimate interest worthy of protection in the annulment of the decision, and (iii) that such interest is present at the time the appeal is filed and at the time a decision putting an end to the appeal is issued. In FIFA's view, none of these requirements were met by the Appellant.

In this respect, FIFA recalled that the Coach was not a party to the disciplinary proceedings which led to the Appealed Decision, nor was the latter addressed to him. According to CAS jurisprudence, the standing to appeal of a third party that was not the addressee of a decision is only granted under exceptional circumstances, with a theoretical or indirect interest being insufficient to grant such standing. Furthermore, the Appealed Decision in this case did not affect the Appellant, as he received the full payment of the amounts due to him, which had justified the lifting of the Sanction through the Appealed Decision.

Additionally, FIFA also emphasised that CAS jurisprudence has also acknowledged that a club or player does not have standing to request the imposition of sporting sanctions. In this sense, the Appellant would not gain anything from the reinstatement of the Sanction against FEGUIFUT, nor would he obtain any benefit from the imposition of additional measures. For this reason, the Appellant lacks a legitimate and direct interest in the annulment of the Appealed Decision.

Finally, FIFA highlighted that the direct and legitimate interest for the annulment of the Appealed Decision must be of a sporting or financial nature, and it must remain valid at the time that CAS issues its award on appeal. In this respect, the Coach never had a sporting interest in FEGUIFUT

not participating in the Preliminary Competition, and the financial interest that had disappeared once FEGUIFUT made the full payment of its debt pursuant to the CAS Award prior to the Panel issuing its decision in the appeal.

2.1.2. CAF as a mandatory respondent

2.1.2.1. The Appellant's position

Concerning the CAF's mandatory standing to be sued alleged by FIFA[4], the Appellant stated his disagreement and argued that CAF did not have standing to be sued, and much less a mandatory standing. CAF was not the addressee of the Third Disciplinary Decision, the Fourth Disciplinary Decision or the Appealed Decision, which were only communicated to it for information purposes.

Moreover, CAF is not the organiser of the Preliminary Competition; FIFA is. CAF only assists and collaborates with FIFA at the territorial level in this context.

2.1.2.2. FIFA's position

In its Answer, FIFA pointed to the absence of CAF as a respondent, as it would be directly affected by the relief sought by the Appellant (in particular, the annulment of the draw of the Preliminary Competition and the elimination of FEGUIFUT from the tournament).

Indeed, CAF was a co-organiser of the Preliminary Competition, and the Coach's request would directly affect the integrity of the tournament. CAF would be directly affected by FEGUIFUT's exclusion in several aspects, such as: competition format, income, ticketing, calendars, etc. In fact, should the Appellant's relief be granted, CAF would likely be more affected than FIFA.

The Appellant was fully aware that CAF would be directly affected by his appeal, yet he chose not to direct it against CAF. The latter's absence in these proceedings meant that its right to be heard was not respected in connection with certain aspects that could have an influence on the outcome of the arbitration.

For this reason too, FIFA argued that the appeal should be rejected, in line with CAS jurisprudence in similar matters.

4 Section 2.1.2.2, *infra*.

2.1.3. The validity or not of the Appealed Decision

2.1.3.1. The Appellant's position

The Appellant's main point of contention was that the provisional lifting of the Sanction set out in the Appealed Decision went against the Coach's own denial of an agreement between himself and FEGUIFUT or of the payment of the amounts owed. The Appealed Decision would therefore be illegal and an abuse of power by FIFA, who took an unjust decision fully knowing that it was such.

The Appealed Decision, as well as the lack of response to the Coach's requests to reinstate the Sanction, were in breach of the FDC, the FIFA Statutes and the FIFA Code of Ethics. Although Article 21 FDC allows the provisional lifting of disciplinary measures when irrefutable evidence of compliance with a decision is submitted, in this case no payment has been proven, aside from a letter which mentioned an existing agreement.

The illegality of the Appealed Decision affected the proper administration of justice that FIFA has bestowed upon itself, as the enforcement of a CAS award is part of the fundamental right to due process.

For the above reasons, the Appealed Decision must be declared null, with the consequent *ex tunc* effect, which requires backdating the effects of the Appealed Decision to the moment in which it was issued, with all subsequent acts being declared null (including FEGUIFUT's inclusion in the draw for the Preliminary Competition and the closing of the disciplinary proceedings).

2.1.3.2. FIFA's position

In FIFA's view, the Appealed Decision was taken in accordance with the powers granted under Article 21(3) FDC, which had been amended to ensure a faster, more agile and efficient way to provisionally lift disciplinary measures, in order to avoid serious and irreparable repercussions. This power can be exercised when the debtor submits reliable evidence that the amounts due will be paid.

In this case, the letter filed by FEGUIFUT proved that the payment was guaranteed by the Equatoguinean Government and by FIFA itself. There were no reasons to doubt the veracity of the information contained therein, as FIFA could easily verify the truth behind the eventual payment through FEGUIFUT's FIFA funds, and the Government's commitment to pay could not be influenced in any way by FEGUIFUT. Proof of the reliability of the letter's content is that the mentioned payments were finally made (in particular, the Equatoguinean Government paid the promised amount on 22 July 2023, less than ten days after its letter, and long before the Coach filed his appeal to CAS).

FIFA never violated the Coach's right to due process. FIFA is not an enforcement authority; as such power is exclusively reserved for the State. FIFA exercises the disciplinary power of a private association under Swiss law, to ensure that its members comply with its regulations. Furthermore, the decisions issued by the Disciplinary Committee throughout the process were taken within the average timeframe as in other cases, therefore without any unreasonable delay, and FIFA had therefore never violated the Appellant's due process rights.

According to Article 21(3) FDC, the reinstatement of the sanctions that had been provisionally suspended is not mandatory. The use of the term "may" portrays the reinstatement as a mere possibility, allowing FIFA to exercise its functions as it deems reasonable. However, under the circumstances of the case, the reinstatement of the sanction would have been unreasonable and excessive, and even prejudicial for all affected parties, i.e., the Coach, FEGUIFUT, FIFA and CAF.

FIFA therefore never breached the Appellant's fundamental rights, as the right to the enforcement of an arbitral award is not guaranteed by FIFA, as FIFA is not an enforcement authority. In addition, the ability to amend or suspend disciplinary measures is conferred to the Disciplinary Committee by the FDC, so such action cannot constitute a breach of the Appellant's fundamental rights.

Finally, on the merits, should the Appealed Decision be declared null, such declaration shall only have *ex nunc* effects, i.e., from the date its nullity is declared. The Appellant has not adduced a legal basis in support of his request to apply *ex tunc* effects to the alleged nullity of the Appealed Decision, aside from referring to an obsolete and non-binding CAS award.

2.1.4. The Appellant's claim for damages

2.1.4.1. The Appellant's position

According to the Appellant, the Appealed Decision has caused him moral damages that must be repaired by FIFA, jointly with FEGUIFUT, in accordance with tort liability under Swiss law. As per the Coach, in the case at hand, the requirements for the reparation of his damage were met, namely by:

a) The violation of the victim's personality rights, based on (i) the illegal actions of the Disciplinary Committee, which breached his due process rights, (ii) the damage to his mental and psychological integrity due to the denial of the enforcement of a payment that he had been awaiting for six years, (iii) the damage to his reputation due to the defamatory public statements by FEGUIFUT and the Equatoguinean Government during the proceedings.

b) A proven illegal action, which was FIFA's refusal to reinstate the Sanction and its unjustified decision to close the proceedings, in a clear abuse of rights and power.

c) The existence of moral damage, which was proven by the report of Dr. Luis Javier Irastorza Egusquiza (the "Expert", whose report shall be referred to as the "Expert Report"). The Appellant suffered stress arising from the denial of his right to an effective judicial remedy, and to being subjected to unjustified delays.

d) The existence of a causal link, which is also established through the Expert Report.

e) The damage has not been otherwise remedied by the perpetrator (FIFA).

According to the Appellant, because all of the above requirements were met, he was entitled to be compensated in an amount of no less than the minimum amounts foreseen in the Expert Report, which could not be reduced in accordance with Article 44 of the Swiss Code of Obligations ("SCO"). In addition, another form of reparation is required under Article 49(2) SCO, consisting in a public written apology by FIFA and FEGUIFUT.

2.1.4.2. FIFA's position

On this point, FIFA preliminarily contested CAS' jurisdiction to award moral damages on appeal, when such claim was not the object of the proceedings before the Disciplinary Committee and in the absence of a specific agreement to arbitrate this issue.

Subsidiarily, FIFA recalled that, pursuant to CAS jurisprudence, when evaluating the evidence and deciding on a claim for moral damages, a modest and restrictive approach must be followed.

FIFA then turned to Swiss law to evoke the requirements which must be met in this context, such as: (i) the general requirements for moral damages to be found (i.e., violation of the victim's personality rights, unlawfulness of the violation and a causal link between the act and the violation); (ii) that the damage caused be serious (i.e., surpassing a certain threshold); and (iii) that the damage has not been otherwise remedied by the perpetrator.

According to FIFA, none of these requirements were met in the Coach's case, for the following reasons:

a) The Appellant was very unspecific as to what triggered the alleged violation of his personality rights and what exactly caused him moral damage.

b) The Appellant has not established that the right to due process, to moral and psychological integrity, or to his reputation would be personality rights under Swiss law.

c) There is no causal link between the moral damage claimed and the Appealed Decision. The moral damage adduced by the Appellant is practically linked in full to the prior actions undertaken in order to obtain a favourable decision against FEGUIFUT, as well as to the alleged defamatory public statements made by that federation's authorities. The Appellant relies on the Expert Report, yet the aspects referred to in that report are not related to the Appealed Decision in itself.

d) FIFA did not incur in any unlawful behaviour, as Article 21(3) FDC allowed it to issue the Appealed Decision. Even if the latter were to be deemed illegal, it was justified by the preponderant interest of all affected parties: the Appealed Decision put FEGUIFUT in a position to obtain funds from its participation in the Preliminary Competition; it allowed FIFA to ensure respect with the CAS Award; it ensured the proper running of the Preliminary Competition by CAF; and, most importantly, it allowed the Appellant to obtain payment of the amounts owed pursuant to the CAS Award.

e) No serious moral damage had been established. The Expert Report was unreliable, as it was based on a legal evaluation under Spanish law carried out by an individual with no expertise in Law in general. In any event, the Expert qualified the alleged damage which he had found as "light", and such damage was not even current. The Appellant misrepresented his Expert's own conclusions.

2.2. THE PANEL'S DECISION

2.2.1. CAS Jurisdiction

As is generally the case in CAS appeal proceedings, the Panel first analysed whether or not CAS had jurisdiction to entertain the Coach's appeal.

In particular, the Panel observed that, although the Parties did not contest CAS' jurisdiction to decide on the challenge against the Appealed Decision, FIFA did put into question the Court's competence in connection with the Appellant's claim for moral damages.

The Panel also noted the Appellant's arguments in favour of CAS jurisdiction to hear his claim for damages, which he found could not be dissociated from the legal action to annul the Appealed Decision and he was forbidden by the FIFA Statutes from turning to the ordinary courts of law.

When analysing the arguments submitted by the Parties, the Panel considered that FIFA was not challenging CAS' jurisdiction *per se* (i.e., under Article 57 FIFA Statutes and Article R47 CAS Code), but FIFA's objection was rather focused on the extent and limit of the Panel's *de novo* power of review when deciding on the appeal, as per Article R57 CAS Code.

Therefore, the Panel found that whether or not one of the Appellant's requests for relief is covered by the Panel's scope of review under Article R57 CAS Code is an issue of admissibility rather than jurisdiction. The Panel therefore found that CAS did have jurisdiction to deal with the Coach's appeal, without prejudice to its findings on the admissibility of the claim for moral damages.[5]

2.2.2. Admissibility of the Appeal and Claim for Damages

Turning to the question of the admissibility of the appeal, the Panel observed that FIFA had challenged the admissibility of the appeal "*due to the* [Coach's] *lack of standing to sue/appeal*", whilst admitting that both standing to sue and standing to be sued are questions on the merits, whose absence would lead to the dismissal of the appeal and not to its inadmissibility.

As a result, and bearing in mind that, according to Swiss law and as confirmed by CAS jurisprudence, the issues of standing pertain to the merits, the Panel rejected FIFA's objection to the admissibility of the appeal on this ground, reserving its assessment on standing for its analysis of the merits of the appeal.

The Panel then turned to analysing the specific question of whether or not the Coach's claim for damages was admissible in the context of its *de novo* power of review conferred by Article R57 CAS Code.

On this point, the Panel recalled that the object of the appeal was to challenge a disciplinary decision taken by FIFA, in which CAS acts as a second-instance tribunal with the *de novo* power to review the Appealed Decision (i.e., the provisional lifting of the Sanction). However, in the Panel's view, such power does not allow it to decide on an independent claim from those that were assessed by the first-instance body. In this sense, the object of an appeal is the same as the one before the first instance, with CAS issuing a new judgment on the requests made by the parties in the previous instance.

The Panel thus found that there was no room for the Appellant to file requests which, although they may be a consequence of the decision to

5 Section 2.2.2 *infra*.

provisionally lift the Sanction, were not the object of the Appealed Decision in itself.

The above reasoning falls in line with consistent CAS jurisprudence on the issue, as expressly quoted by the Panel:

– CAS 2017/A/5195:

"79. However, the modification of the relief sought should be confined within certain boundaries. As held in CAS 2014/A/3523 (with reference to other cases), "[w]hile the de novo nature of the CAS Appeal Procedure allows a CAS Panel to take new facts into account, it does not free the Panel from the inherent constraint of any appeal procedure, which must remain within the scope of the first instance decision (cf., e.g., CAS 2007/A/1433, para. 36; CAS 2006/A/1206, para. 25). By deciding upon a decision which was not the subject matter of the first instance, the CAS Panel itself might be deemed to effectively decide as a first instance, thus exceeding its mandate.
80. As a general rule, the CAS traditionally considers that its power of review is limited by the object of the dispute such as delimited in the previous instance. Similarly, the Panel in CAS 2007/A/1426 stated as follows: "Although, pursuant to art. R57 of the CAS Code, a CAS panel has full power to review the facts and the law and to issue a decision de novo, when acting following an appeal against a decision of a federation, association or sports-related body, the power of review of such panel is also determined by the relevant statutory legal basis and, therefore, is limited with regard to the appeal against and the review of the appealed decision, both from an objective and a subjective point of view. Therefore, if a motion was neither object of the proceedings before the previous authorities, nor in any way dealt with in the appealed decision, the panel does not have the power to decide on it and the motion must be rejected." (emphasis added).

– CAS 2020/A/7468:

"*102.* [...] *the scope of this appeal cannot exceed the limits of the scope of the Appealed Decision, and the fact that the Appellant made contractual arguments cannot cause standing to appeal when there is none*" (emphasis added).

– CAS 2014/A/3776:

"*343. With regard to damages, the Appellant requests the Panel to issue an order reserving judgment in respect of the loss and damage GFA has sustained by reason of FIFA's wrongful failure to admit it to membership. The Panel observes, however, that this is a CAS appeal procedure seeking the reversal of a decision of FIFA, and that the Panel may rule only on the dispute as defined by the Appealed Decision and as limited by its objective and subjective scope (see CAS 2005/A/835 & 942, CAS 2006/A/1206, CAS 2013/A/3314). If GFA wishes to seek damages against FIFA, it will have to start a new and different legal action. Accordingly, the Panel dismisses the Appellant's motion for relief under para. 280.7 of the Appeal Brief (see supra at para. 188).*" (emphasis added).

Addressing the Appellant's arguments on this issue, the Panel found that although the Coach argued that the claim for damages could not be

separated from the action to declare the Appealed Decision null, according to the applicable regulations and CAS jurisprudence, this is not a criterion that would justify that the specific claim would be included within the Panel's powers.

The Panel additionally noted that the claim for damages was not limited to those caused by the alleged unlawfulness of the Appealed Decision, as it referred to alleged moral damages that would have arisen from an unlawful action of FIFA or FEGUIFUT from the moment of the Termination of the Coach's employment in 2017 until the Appealed Decision was rendered. In the Panel's view, the foregoing showed that the claim for damages before it went beyond the scope of the appeal against the provisional lifting of the Sanction through the Appealed Decision, as it was not only directed against FIFA but also against FEGUIFUT.

As a result, the Panel concluded that, while the appeal was filed on time and was therefore admissible, the claim for damages was inadmissible.

The Panel's analysis on how the new claim for damages was to be assessed in the context of both an objection to the jurisdiction of the court and the admissibility of the claim itself is of particular interest, especially when considering that issues of jurisdiction and admissibility are at times closely linked. As found by another CAS panel in the past, such *"discussion is mostly of academic nature, because regardless of the categorization applied, the material outcome* [...] *would be the same, i.e. the substance of the appeal would be entertained or not*."[6]

In the case at hand, the only practical difference from the Panel's conclusion that the claim for damages was inadmissible is that the scope of review of Swiss Federal Tribunal ("SFT") is more restricted when it concerns an issue of admissibility; whereas the SFT would have full power to review an appeal against a denial of CAS' jurisdiction pursuant to Article 190(2)(b) of the Swiss Private International Law Act.[7]

2.2.3. Merits of the Appeal

As advanced, because the Appellant's standing to appeal is a matter pertaining to the merits of the case, the Panel decided to preliminarily address this issue, as its findings would determine whether or not the remaining substantive questions (CAF's mandatory standing to be sued, the Disciplinary Committee's power to provisionally lift the Sanction and any eventual legal consequence of the Appellant's claims) should be dealt with.

6 CAS 2019/A/6677 Markus Kattner v. FIFA, para. 48.
7 *Ibid., paras*. 48-49.

In its analysis on standing to appeal, the Panel first referred to the jurisprudence of the SFT[8] and recalled that a party will have standing to sue if it has an interest worthy of protection, be it financial or sporting, consisting in the practical usefulness that the annulment of the appealed decision will have for the appellant. The appellant's interest in such case must be current, that is, it must exist not only at the time the appeal is lodged, but also when the decision is issued on appeal.

The Panel noted that the Parties were in agreement that the Coach had been paid all of the amounts owed to him, including interests, without any financial claim remaining from the CAS Award whose compliance had been requested through the disciplinary proceedings in FIFA. Because of this, the Panel agreed with FIFA's position that the Appealed Decision had ceased to have any effect in light of the full payment of the debt. This conclusion applied not only to the Appealed Decision, but also, in fact, to the disciplinary process as a whole, which had become moot. Indeed, the latter's goal was the imposition of disciplinary measures due to the failure to comply with the CAS Award and the consequent breach of FIFA's regulations. Once the CAS Award is complied with, no object remains.

The Panel highlighted that the Appellant has never claimed to have a financial or sporting interest in the exclusion of FEGUIFUT from the Preliminary Competition beyond obtaining the payment of the amounts which were finally paid to him. Therefore, since the factual circumstances have changed since the Appellant filed his appeal, no longer being a creditor of FEGUIFUT, it was clear to the Panel that the Coach no longer had a direct interest in the annulment of a moot disciplinary decision.

In this sense, even the Sanction itself informed FEGUIFUT that "*should the amounts due to the Creditor be paid prior to the preliminary draw to the FIFA World Cup 2026TM, the Equatorial Guinean Football Association may be reinstated in said competition*." In the Panel's view, the foregoing established that the object of the imposition of disciplinary measures exists only when the non-compliance remains.

---

8 SFT 4A_426/2017, para. 3.1.: "*According to art. 76 para. 1 let. b LSFT, the Appellant must, inter alia, have an interest worthy of protection in the annulment of the contested decision. The interest worthy of protection consists in the practical utility that the admission of the appeal would bring to the Appellant* [...]. ***The interest must be current, i.e., it must exist not only at the time the appeal is lodged but also at the time the judgment is handed down.*** *The* [*SFT*] *declares the appeal inadmissible if the interest worthy of protection is lacking at the time the appeal is lodged. On the other hand,* ***if the interest disappears in the course of the proceedings, the appeal becomes devoid of purpose. (ATF 137 I 23, paragraph 1.3.1, p. 24 ff. and cited decisions).***" (emphasis added)

Turning to the Appellant's argument that the object of the appeal would have been to have the Appealed Decision declared illegal, which would then allow him to claim moral damages, the Panel observed that the annulment of the Appealed Decision no longer had a practical usefulness for the Coach, due to the Sanction having become moot. Should the Panel have decided to annul the Appealed Decision, it could either replace it with a new one, which would have no usefulness because the ultimate objective pursued was compliance with the CAS Award, or it could send the case back to the Disciplinary Committee, so that the latter could impose new sanctions or reinstate the Sanction, which would also be impossible because the basis for the disciplinary proceedings had disappeared.

More importantly, the Panel considered that the Appellant could not rely solely on having an interest in the declaration of the illegality of the Appealed Decision. For the Panel, the object of the arbitration was the alleged nullity of the Appealed Decision and the reinstatement of the Sanction. Pursuant to Article R57 CAS Code, the Panel "*may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance.*" Therefore, it was not possible for the Panel to issue an award limited to declaratory effects, since they were not properly part of the CAS proceedings.

The consequence of the foregoing was that the Appellant's interest in the appeal could not be limited to the declaration of illegality, but also to its practical effect, i.e., the financial and sporting interest in the Sanction being reinstated. Should the Appellant's current interest have been the declaration of illegality of FIFA's actions when taking the Appealed Decision, he should turn to the relevant legal recourse to that effect.

As a final consideration on standing to appeal, the Panel observed that the moral damages claimed by the Coach did not arise from the Appealed Decision in itself. The Coach had argued that the moral damages were caused by FIFA's actions and omissions during the disciplinary proceedings. However, according to the Expert, the moral damage claimed would have been caused by the situation following the Coach's dismissal by FEGUIFUT, which should have been claimed in the first arbitration proceedings with FEGUIFUT (i.e., those which led to the CAS Award).

As a result, the Panel did not find that the Appellant's claim for moral damages would result in the existence of a direct and current interest in the annulment of the Appealed Decision and the reinstatement of the Sanction. In fact, FIFA's alleged liability for damages could have been claimed by the Coach in the relevant forum, without the need for the Panel to annul the Appealed Decision and reinstate the Sanction.

This author notes that the above is in line with the case law of the SFT according to which the intention of filing a potential claim for damages at a later stage is not sufficient to grant standing to appeal.[9]

In the absence of any practical usefulness in the Appealed Decision being set aside, the Panel decided that the Appellant lacked standing to appeal, and the appeal was therefore rejected. As a result, the Panel did not need to entertain the remaining issues of merit raised by the Parties.

For the sake of completeness, we note that the Panel's conclusion in this matter is in contrast with the findings of other CAS panels who found claims for damages filed for the first time at the CAS appellate stage to be admissible (without prejudice to their actual merits).[10] Nevertheless, this author shares the view of the Panel in this case, as such claim for damages which were not filed before the previous instance evidently fall outside of CAS' scope of review in the context of an appeals arbitration, which shall be limited to the scope of the appealed decision and the proceedings which led to it.

3. CONCLUSIONS

The award summarised above provides an interesting perspective on a number of issues which, although not frequently dealt with in CAS proceedings, may require a thorough assessment from the relevant panels.

The Panel's assessment on whether a claim for moral damages that had not been part of the previous instance proceedings would fall within its *de novo* power of review is of particular interest, as it establishes not only that such claims are inadmissible at the CAS level (if beyond the object of the appealed decision), even if CAS would, in principle, have jurisdiction to hear them. This distinction between jurisdiction and admissibility would also be relevant in the context of a potential challenge against such determination to the SFT, as the inadmissibility of a claim does not constitute a reason for challenging an award under the provisions of the Swiss Private International Law Act.

Additionally, particular importance must be given to the Panel's analysis on the issue of standing to appeal, which was thoroughly carried out by reference to both Swiss jurisprudence and CAS' own case law. Especially

9 See SFT decisions 4A_134/2012, para. 2.2; 4A_620/2015, para. 1.2; 4A_56/2018, para. 4.4 and cited case law.

10 For instance, CAS 2013/A/3260 Grêmio Foot-ball Porto Alegrense v. Maximiliano Gastón López; CAS 2014/A/3703 Legia Warszawa SA v. UEFA; CAS 2015/A/4266 Iván Bolado Palacios v. FIFA.

in line with the former, the Panel rightfully concluded that once an appeal (i.e., the annulment of the appealed decision) has become moot during the arbitral proceedings, the appellant's mere (residual) interest in the appealed decision being declared illegal or in claiming moral damages is not sufficient to (continue to) grant him standing to appeal. This because, once the object of the appeal has disappeared, the appeal itself loses all practical usefulness for the appellant as far as the appealed decision is concerned, and any other alleged interest can by no means be considered direct.

CONTAMINATED MEAT AND NO FAULT SANCTIONS: HOW RECENT CONMEBOL DECISIONS EXEMPLIFY THE PROPER ADJUDICATION OF MEAT CONTAMINATION CASES

Carlos López

FIFA Senior Anti-Doping Manager

ABSTRACT:

This article examines recent CONMEBOL Disciplinary Committee decisions addressing the issue of inadvertent meat contamination resulting in Adverse Analytical Findings (AAFs) for Boldenone. It explores how these cases illustrate the correct application of the No Fault or Negligence mechanism under the strict liability regime of the World Anti-Doping Code (WADC). Through a detailed analysis of evidentiary standards, the article demonstrates how the athletes successfully established that the ingestion of the prohibited substance was unintentional and occurred without fault, leading to findings of no ineligibility. The author argues that these decisions exemplify fair, context-sensitive, and scientifically grounded adjudication in anti-doping cases from high-risk regions, ensuring both the integrity of competition and the protection of athletes' rights.

KEYWORDS:

CAS, anti-doping, strict liability, no fault, meat contamination, Boldenone, proportionality, CONMEBOL, WADA Code.

CONTAMINATED MEAT AND NO FAULT SANCTIONS: HOW RECENT CONMEBOL DECISIONS EXEMPLIFY THE PROPER ADJUDICATION OF MEAT CONTAMINATION CASES

Carlos López
FIFA Senior Anti-Doping Manager

1. INTRODUCTION

On 3 February 2024, in the context of the 2024 CONMEBOL Pre-Olympic Tournament, various out-of-competition (OOC) doping controls were conducted on members of a U-23 national team in northern South America. Subsequent analysis of the samples conducted by the WADA accredited laboratory in Cologne, Germany returned 8 Adverse Analytical Findings (AAFs) for the presence of Boldenone, a category S1.1 non-*Specified* anabolic androgenic steroid prohibited *at all times* under the WADA Prohibited List.

The Athletes affected advanced the argument that the presence of Boldenone found in their Samples was due to the unintentional ingestion of contaminated beef during a team dinner at a hotel the day before, on 2 February 2024. In the end, the CONMEBOL Disciplinary Committee **(Disciplinary Committee)** handed down a No Fault finding to all 8 affected Athletes. Most importantly to the Athletes involved, a No Fault finding means that the athletes were able to establish that they did not know or suspect, and could not have reasonably known or suspected, even with the exercise of utmost caution, that they had ingested a Prohibited Substance[1]. To someone who does not have experience with anti-doping results management, the concept that an Athlete could return a positive test for an anabolic steroid after consuming contaminated meat might be a surprise. Even more so, it may sound surprising to hear that an Athlete can be found to have tested positive for a steroid and yet not be suspended. However, for anti-doping practitioners, this is an ever-developing area of highly technical and difficult cases[2] where close attention to detail is required to achieve the most just result for both the Athlete and the integrity of competition.

This article will briefly discuss the legal context under which meat contamination cases are adjudicated in sport, and how the above cases (herein after referred to as the "CONMEBOL decisions") exemplify strong and effective meat contamination results management.

---

1 Capitalized terms not otherwise defined in this text have the meaning ascribed to them in the WADA Code or International Standards.

2 Meat contamination defences brought by athletes are difficulty to adjudicate and generally present varying levels of success for the athlete, for example in (i) CAS 2011/A/2384 UCI v Contador, the CAS rejected the athlete's claim that contaminated meat was the most likely source of the banned substance and imposed a two year ban, and in (ii) CAS 2019/A/6443 CCES v Jamnicky, the CAS Panel accepted that the source of the banned substance was most likely contaminated cattle and the athlete could not be blamed in any way, imposing No Fault.

2. THE INTERSECTION OF STRICT LIABILITY AND INADVERTENT MEAT CONTAMINATION

The World Anti-Doping Code **(WADC)** is founded on the legal principle of strict liability, a principle which holds athletes accountable for any Prohibited Substances found in their bodies, regardless of their specific intent to ingest those substances.[3] This principle is a critical component of the global anti-doping regime. It is in place to enforce clean sport and protect the integrity of competition. It similarly acts as a deterrent in anti-doping that places significant responsibility, rightfully so, on the individual Athlete to ensure that they are not only complying with their anti-doping obligations but also behaving with utmost caution to avoid a potential anti-doping rule violation.

However, the application of strict liability sometimes leads to harsh decisions and can, and does, inevitably result in well-meaning Athletes facing periods of Ineligibility for unintentional Adverse Analytical Findings **(AAFs)**. As it relates to its application in cases of unintentional ingestion due to contaminated meat, the No Fault mechanism has revealed tensions between procedural consistency and substantive justice.

In recent years, athletes have returned AAFs for substances like Clenbuterol, and relevantly, Boldenone, after consuming meat in countries where these substances are still used in livestock. Clenbuterol has since been recognized by WADA as a substance which carries an especially high risk of meat contamination, particularly in Mexico, Guatemala and China.[4] Cases of very low Clenbuterol concentration in urine samples are generally treated as Atypical Findings and athletes are given an opportunity to point their exposure to potentially contaminated meats before entering formal results management for an AAF.

---

[3] See for example how the CAS explains strict liability in CAS 2004/A/690 Hipperdinger v ATP: *"...The principle of strict liability means that an athlete is responsible for whatever substance is in his body, without having regard to the reasons for such presence and the degree of any respective fault of the athlete. While there are exceptions to this principle under the antidoping regulations inspired and influenced by the WADC, every athlete must be considered to be aware of the fact that he is responsible for any substance found in his body. This also means that every athlete must be concerned about substances he or she is ingesting, in particular if this is done for a medicinal purpose."*, at para 21

[4] In 2021 WADA issued a "Stakeholder Notice regarding potential meat contamination cases" involving Clenbuterol, among other banned substances. The notice clarifies that the WADA Contaminants Working Group has determined that Clenbuterol is used in China, Mexico and Guatemala, and that this could result in low urinary concentrations in the sample of athletes who consume those meats. As such, Clenbuterol findings at concentrations of (>) 5 ng/mL are now reported as Atypical Findings, prompting an investigation into a possible meat contamination.

Boldenone presents an increasingly recognized problem very similar to that of Clenbuterol. Colombia has emerged as a focal point for Boldenone-related AAFs[5], however, the widespread use of Boldenone in cattle in other countries of Latin-America, and the close interaction between Colombia and its bordering neighbors such as Venezuela necessitate that Anti-Doping Organizations approach Boldenone related meat contamination cases from this region with caution. To date, WADA does not treat low concentration Boldenone cases in the same way as Clenbuterol does. This difference in treatment means that Athletes contaminated with Boldenone in high-risk countries won't benefit from safeguards similar to those established by WADA for Clenbuterol.

3. STRICT LIABILITY IN ANTI-DOPING

As a signatory to WADA, FIFA employs the same strict liability obligations on its athletes as does WADA through the FIFA Anti-Doping Regulations (FADR).

Strict Liability imposes responsibility on Athletes for any Prohibited Substances detected in their samples, regardless of how they entered their body. This mechanism supports efficiency in enforcement and removes the burden (in most circumstances) on anti-doping authorities to demonstrate that there was intent to prove a doping violation has occurred. More importantly however, this means that an Athlete does not get a "free pass" simply for demonstrating that they did not intend to violate the anti-doping rules. An AAF is sufficient to establish a violation in and of itself and any reduction in sanctions that may follow must be justified by the Athlete through strict evidentiary requirements.

---

5 There is a growing list of *lex sportive* decisions recognizing the widespread use of Boldenone in Colombia and its likelihood to contaminate athletes. See for example a recent decision from the ITIA in the case of Nicolas Zanellato where No Fault was established the athlete demonstrated he consumed contaminated meat shortly before a doping control: "*Given all of the circumstances of this case, and considering cases involving comparable facts (i.e., the detection of boldenone only, in a low concentration that can plausibly be explained by the ingestion of contaminated beef, and in circumstances where the athlete has established that he ingested one or multiple portions of Colombian beef shortly before sample collection), the ITIA accepts the Player has established that it is more likely than not that the boldenone found in his urine sample 1427480 was due to the presence of boldenone residues in the beef that he consumed in the days and/or hours prior to collection of the Sample.*" at para 25. Similar decisions include ITF v Farah and ITA v Mosquera.

4. THE NO FAULT MECHANISM

There exist mechanisms in the global anti-doping regime whereby Athletes who have committed an anti-doping rule violation can have their suspensions eliminated or reduced, these are known as No Fault or Negligence and No Significant Fault or Negligence. Alternatively, the FIFA Anti-Doping Regulations (FADR), much like the WADA Code, also acknowledges exceptional situations through Articles 22 and 10.5 respectively which provide that an Athlete shall not be declared Ineligible (i.e. no suspension shall be imposed on them) if they can establish No Fault or Negligence. This provision requires Athletes to demonstrate, on a balance of probabilities, that they did not know or suspect, and could not reasonably have known or suspected, that they had ingested a prohibited substance.

The analysis in these circumstances revolves around the Athlete's level of Fault even in cases where they accidentally ingested prohibited substances. FADR defines Fault as:

...[A]ny breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing a Player's or other Person's degree of Fault include, for example, the Player's or other Person's experience, whether the Player or other Person is a Protected Person, special considerations such as impairment, the degree of risk that should have been perceived by the Player and the level of care and investigation exercised by the Player in relation to what should have been the perceived level of risk. In assessing the Player's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Player's or other Person's departure from the expected standard of behaviour. Thus, for example, the fact that a Player would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Player only has a short time left in his career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under art. 23 par. 1 or 2 (Reduction of the period of Ineligibility based on No Significant Fault or Negligence).

The rationale behind the No Fault exception lies in proportionality.[6] While deterrence is critical, anti-doping decisions must also be contextually fair.

[6] The WADA Code has been drafted giving consideration to the principles of proportionality and human rights, WADA Code, page 10, this has been similarly discussed in literature such as Adam Lewis KC & Jonathan Taylor KC (eds), *Sport: Law and Practice*, 4th edn (Bloomsbury Professional, 2021): "*The [WADA Code] respects the legal principle that there should be no punishment without fault (nulla poena sine culpa). This include in relation to a... 'strict liability' violation, which is presumed to be*

Strict Liability cannot deprive Athletes of a legal "escape hatch" by which varying extenuating circumstances may justify or differentiate the Fault behind one strict liability offence from another. Athletes who exercise due diligence and nonetheless fall victim to exposure of a prohibited substance deserve recourse under the No Fault standard.

Meat contamination cases provide for a perfect example in which exceptional circumstances create room for Anti-Doping Organizations (ADOs) to apply a case-by-case approach with the goal of appropriately attaining proportionality in sanctioning. In the case of meat contamination, considering the appropriateness of No Fault decisions should be an indispensable requirement of proper adjudication and results management. This is especially important in regions which are specifically recognized as having a higher risk of meat contamination.

5. STRONG EVIDENTIARY BASIS IS NECESSARY FOR A FINDING OF NO FAULT

It's important to emphasize that being sensible to the risks of meat contamination in some regions does not mean that any Athlete returning an AAF for a prohibited substance, even in high-risk countries, should automatically receive reduced sanctions in any form.[7] However, when substantiated with credible evidence, a thorough investigation and analysis of the circumstances is essential for maintaining the legitimacy and fairness of the global anti-doping regime. In these cases, the Athletes who successfully demonstrate that they were contaminated by affected meat should, as in the CONMEBOL decisions, be given a No Fault Finding.

In order to meet this burden, the onus lies with the Athlete to demonstrate two critical points. First, they must prove to the relevant judicial body how

*the fault of the athlete, unless the contrary is proven…if the violation was not intentional the athlete is also given the opportunity to establish that the [applicable ban] should be eliminated entirely…or that it should be materially reduced…"*at page 909.

7 CAS jurisprudence requires strong, persuasive evidence before it can accept a lack of intent, in any circumstance, see for example the reasoning in CAS 2022/A/8970 WADA v SLOADO & Dejan Mlakar: "*Protestations of innocence, as has been noted by many a CAS panel, are the common currency of the guilty and innocent, not just in anti-doping cases but also in other areas of society where wrongdoing is alleged against an individual.*" at para 66 and CAS 2020/A/6987 Iannone v FIM: "*… Even in such cases, it is clear that the athlete cannot rely on simple protestations of innocence or mere speculation as to what must have happened but must instead adduce concrete and persuasive evidence establishing, on a balance of probabilities, a lack of intent.*" at para 137.

the substance entered their system[8] (in these cases, via the inadvertent ingestion of contaminated meat), and second, they must demonstrate that they acted with utmost caution to keep their system clear of the Prohibited Substance.[9]

In the CONMEBOL decisions, the Athletes brought forward a variety of critical, necessary and convincing evidence. Key points of their evidence included that the eight Athletes had tested positive together (suggesting a group contamination rather than single isolated use), that Boldenone is a commonly used anabolic substance to promote muscle growth in Venezuelan livestock, that the detected concentration in their samples was very low (in some athletes as low as 4.8 ng/mL), that some of the Athletes had been subject to subsequent doping controls shortly after and returned negative results, and also expert evidence substantiating technical aspects of their defense. Of course, the Athletes also categorically denied any wrongdoing and similarly denied ever having taken Boldenone intentionally.

The Athletes defenceteam did not only advance a theory of Boldenone exposure from local injected livestock but similarly introduced expert evidence. The expert evidence was provided by a toxicologist and pharmacy professor as well as a veterinarian. The veterinarian concluded that Boldenone is widely used in Venezuelan livestock, that regulatory oversight in the use of Boldenone in Venezuelan agriculture is weak, in that farmers can obtain Boldenone easily and apply it without any regulated withdrawal periods, and that cooking does not remove Boldenone from livestock meat, including even high-quality cuts.

The toxicologist, on the other hand, provided expert evidence which concluded that meat contamination is frequent, and sometimes even more so in higher grade cuts of meat, and that there was a significant likelihood that the players would have consumed contaminated meat at the hotel in question.

The Athletes also provided evidence that they acted diligently to avoid a potential ingestion of Prohibited Substances. The meals they ate were controlled and dictated by their nutritionists and team staff, they followed

8 CAS 2018/A/5619 WADA v UWW & Boltukaev: "*there is one crucial point: it concerns the determination of the origin of the prohibited substance found in the Athlete's body. In fact, only in the event the Athlete proves 'how the Prohibited Substance entered his ... system' can a fault-related reduction (or elimination) of the sanction be granted.*" at para 73

9 CAS 2005/C/976 & 986 FIFA & WADA: "The WADC imposes on the athlete a duty of utmost caution to avoid that a prohibited substance enters his or her body. ... It is this standard of utmost care against which the behaviour of an athlete is measured if an anti-doping rule violation has been identified.' at paras 73 and 74

the team's dietary protocols, and they clearly investigated the potential source of their contamination as quickly as possible. The Panel concluded that the Athletes did not deviate from the type of utmost caution that is expected of them. This is especially true considering that they followed the instruction of their team staff and ate from the menus provided to them, indicating no deviation from standard protocol.

6. THE CONMEBOL DISCIPLINARY COMMITTEE'S DECISIONS: NO FAULT, NO INELIGIBILITY

In the end, the CONMEBOL Disciplinary Committee decided the players had committed an anti-doping rule violation due to the presence of Boldenone in their sample, as established under the CONMEBOL Anti-Doping Regulations. This is in line with the strict liability principle that the presence of the substance alone is sufficient to establish a violation.

However, after an exhaustive analysis of the evidence, the Committee concluded that the players had demonstrated the presence of the Boldenone in their Samples was most likely the result of accidental ingestion through contaminated meat consumed during their team dinner while on team duties. This conclusion was supported by the extensive evidence which had been provided by their defence team.

Considering this, and applying Article 22 of their Anti-Doping Regulations, the CONMEBOL Disciplinary Committee found that the athletes had established No Fault or Negligence. As a result, no period of ineligibility or sanction was imposed, and the case was closed without disciplinary measures.

7. CONCLUSION: THE CONMEBOL DECISIONS EXEMPLIFY STRONG AND EFFECTIVE RESULTS MANAGEMENT

The CONMEBOL Decisions serve as a timely and important benchmark for how No Fault findings in cases of high-risk regions for meat contaminants should be adjudicated under the global anti-doping framework. Anti-doping adjudication is fraught with scientific complexity, jurisdictional nuance, and evolving jurisprudence. In a field of law already replete with complexity, meat contamination in high risk regions further complicates the results management exercise and presents a difficult challenge to anti-doping organizations adjudicating these matters. The CONMEBOL Disciplinary

Committee's methodical evaluation of the evidence in these cases highlights the importance of a case-specific approach grounded in fairness and rigor.

By recognizing the unique realities of particular regions, the scientific and contextual realities that accompany these cases, and the need for strong evidentiary standards, CONMEBOL not only ensured that the mechanisms to preserve the integrity of the sport are respected, but it also safeguarded the rights of athletes who were not at Fault. This approach aligns with the spirit and letter of the WADA Code, reinforcing the importance of proportionality in sanctioning.

FIFA®

legaljournal.fifa.com