An Overview of Recent CAS Awards Related to the Arab World

by Antonio Rigozzi*

The Switzerland based Court of Arbitration for Sport (CAS) is the main arbitral institution active in sports internationally. Statistics show that the number of awards rendered increases every year. In particular, CAS is the exclusive forum in which (i) decisions on doping concerning international level athletes and (ii) FIFA decisions regarding the status and international transfer of players, can be challenged. It has been noted that an increasingly significant number of important cases originate from the Arab World and that they would deserve special attention. The recent launch of CAS alternative hearing centers in Abu Dhabi and Cairo reinforces the idea that it is perfect timing to look more closely at cases emanating from the region.

For this first edition, we will first briefly introduce the main features of CAS (I) and then present five cases, which we consider representative of CAS jurisprudence and illustrative of some of the main recurrent procedural and substantive issues (II).

I. CAS and the legal framework in which it operates:

CAS is headquartered in Lausanne (Switzerland) but also has two "decentralised offices" in Sydney and New York and a number of alternative hearing centres in Kuala Lumpur, Shanghai, Abu Dhabi and Cairo as a result of a number of individual partnership arrangement deals struck by CAS. The CAS provides four separate and distinct dispute

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resolution services: Ordinary Arbitration, Appeals Arbitration, *Ad Hoc* expedited Arbitration at major sporting events and Mediation. The Ordinary and Appeals Arbitration divisions are each headed by a president, who can take charge of the initial steps in an arbitration before the arbitral tribunal is constituted.

The CAS Ordinary Division is a classic arbitration service, resolving mainly commercial disputes, and its general structure and workings will be familiar to any practitioner with experience of the ICC, AAA or other commercial arbitration institutions. Arbitrations which take place under the CAS's Ordinary Arbitration Rules are those that have been referred to the CAS as a first instance arbitral body, usually pursuant to an arbitration agreement contained in a settlement agreement or a commercial contract, such as sponsorship or licensing agreements.

Appeals arbitration, while very commonplace in the sporting world, is usually somewhat of a novelty for other arbitration practitioners. Appeals arbitration consists of appeals filed against decisions issued by other arbitral or disciplinary tribunals, typically either national sports arbitration bodies or the internal disciplinary or judicial bodies of international sports federations. The cases brought before the CAS Appeals Arbitration Division account for the vast majority of the CAS's caseload.

The CAS also has a Mediation service which it promotes as an alternative to CAS arbitration. In addition, as previously mentioned, the CAS establishes an expedited arbitration service during major sporting events, which is referred to as the CAS *Ad Hoc* Division.

Pursuant to article R28 of the CAS Code, "[t]he seat of the CAS and of each Arbitration Panel ('Panel') is in Lausanne, Switzerland". The same provision applies to the arbitral tribunals of the CAS *Ad Hoc* Divisions sitting, for example, at the Olympic Games. The location of the hearing has no consequence on the legal seat of the arbitration, which remains in Lausanne. As each CAS panel constitutes an international arbitral tribunal seated in Switzerland, all CAS proceedings are subject to the provisions of Switzerland's Private International Law Act (PILA), which ensures that there is procedural consistency between CAS cases. Chapter 12 of the PILA, dealing with international arbitration, is widely regarded as being "arbitration friendly".

Pursuant to article 190 of the PILA, CAS awards are final upon communication to the parties and can only be challenged on very limited grounds before the Swiss Supreme Court. In addition, the Swiss Supreme Court has held that advance waivers of any right to challenge the award pursuant to Article 192(1) of the PILA are in principle unenforceable in sports arbitrations, given that the athletes' purported consent to such exclusion agreements "obviously [does] not rest on a free will" and is therefore "tainted ab ovo".

The procedure before the Appeals Arbitration Division is governed by the General Provisions of the CAS Code, (Articles R27 to R37), and by the Special Provisions Applicable to the Appeals Arbitration Proceedings (Articles R47 to R59 of the CAS Code).

II. Emblematic CAS cases in the Arab World:

TAS 2015/A/3920 Fédération Royale Marocaine de Football (FRMF) c. Confédération Africaine de Football (CAF), award of 17 November 2015 (operative part notified on 2 April 2015):

Summary of the facts:

This case concerned an Appeal that was brought by the Fédération Royale Marocaine de Football ("FRMF"; the Appellant) against the decision of the Confédération Africaine de Football ("CAF"; the Respondent) of 6 February 2015, by which the CAF Executive Committee (the "Executive Committee") imposed sporting sanctions upon the FRMF after Morocco had renounced to organize the 2015 Orange Africa Cup of Nations (hereinafter, the "CAN") in light of the Ebola outburst.

The FRMF is the national football federation in the Kingdom of Morocco. It is a member of the Confédération Africaine de Football ("CAF"; the Respondent) and of the Fédération Internationale de Football Association ("FIFA").[1] The CAF is one of the five FIFA confederations,[2] which supervises the organization of football on the African continent. The CAF is in charge of organizing continental competitions, in particular the CAN and has the authority to impose disciplinary sanctions on its members pursuant to its Statutes and Regulations.

Specifically, the FRMF's appeal was against the decision of the CAF Executive Committee (the "Executive Committee") of 6 February 2015 to suspend the FRMF national team from participating in the next two editions of the CAN (2017 and 2019) and to impose a fine of USD 1,000,000 (hereinafter, the "First Decision").[3] The FRMF also appealed against the Executive Committee's decision of the same date imposing additional "financial sanctions" for the same reasons (hereinafter, the "Second Decision").[4]

1. TAS 2015/A/3920 *Fédération Royale Marocaine de Football* (*FRMF*) *c. Confédération Africaine de Football* (*CAS*), award of 17 November 2015, para. 1.1.
2. *Id.*, para. 1.2.
3. *Id.*, para. 2.1.
4. *Id.*, para. 2.2.

The dispute originated as follows:

In 2010, the FRMF bid with the CAF to organize and host the 2015 edition of the CAN.[5]

On 29 January 2011, the CAF chose the FRMF to organize the 2015 CAN in Morocco.[6]

In March 2014, in view of the spread of the Ebola virus in West Africa, Morocco put in place a national action plan to counter this fatal disease in accordance with the recommendations of the World Health Organization ("WHO").[7]

On 8 August 2014, the WHO characterized the Ebola outbreak in West Africa as an "extraordinary event" constituting a "public health risk to other States".[8]

In August 2014, in order to assess the public health risk, the Moroccan Ministry of Health and the FRMF prepared a health plan for the 2015 CAN ("*plan de couverture sanitaire*"), including specific measures against the Ebola risk.[9]

On 8 October 2014, the Moroccan Ministry of Health sought advice from the WHO Director for the Eastern Mediterranean Region. In his response of 10 October 2014, the latter indicated that it was for Morocco to decide whether the date of the 2015 CAN should be confirmed or postponed based on a thorough risk assessment taking into account the recent epidemiological reports on the Ebola disease.[10]

On 10 October 2014, the Moroccan Ministry of Health took position and requested the competent state authorities to postpone the organization of mass gatherings in which people from countries affected by the Ebola virus would participate; including international sports, events such as the 2015 CAN to be held between January and February 2015.[11]

In a press release of 11 October 2014, the government of Morocco publicly announced that it wished to postpone the 2015 CAN.[12]

The CAF informed the Ministry of Youth and Sports of Morocco that it could not accept its request to postpone the competition and, consequently, that the 2015 CAN was maintained.

5. *Id.*, para. 3.3.
6. *Id.*, para. 3.5.
7. *Id.*, para. 3.12.
8. *Id.*, para. 3.13.
9. *Id.*, para. 3.14.
10. *Id.*, paras. 3.22-3.23.
11. *Id.*, paras. 3.24-3.25.
12. *Id.*, para. 3.26.

The President of CAF took note of Morocco's decision to maintain its request to postpone the competition for one year for purported "highly dangerous health [risks]", and of its refusal to organize the competition between 17 January and 8 February 2015 on the ground of force majeure. The CAF concluded that the FRMF had renounced to organize the competition during the agreed dates, which amounted to a withdrawal. Consequently, the CAF Executive Committee confirmed that the 2015 CAN would not take place in Morocco and that the national team of Morocco was disqualified and would not be allowed to participate in the competition.[13]

On 14 November 2014, the CAF entrusted the organization of the 2015 CAN to Equatorial Guinea.[14]

On 6 February 2015, the Executive Committee met in Malabo to examine Morocco's decision not to organize the 2015 CAN. During this meeting, the Executive Committee took two decisions, one imposing "sportive sanctions" (the First Decision) and the other one imposing "financial sanctions" (the Second Decision):[15]

With respect to the "sportive sanctions": The Executive Committee held that, contrary to what the FRMF contended, there was no case of force majeure. Therefore, in accordance with Articles 7.1a, 23.11 and 62 of the CAF Statutes, Article 41 of the Regulations governing the application of CAF Statutes, Article 92.4 of the competition regulations and the terms of the "A.A.O." signed for the organization of the 2015 Orange CAN, the Executive Committee decided to suspend the representative national team of the FRMF from any participation in the two next editions of the CAN, i.e. the 2017 and 2019 editions. It also imposed a regulatory fine of USD 1 million. The First Decision was notified on the same day to the FRMF, with a summary of the grounds.

With respect to the "financial sanctions": Based on Article 92.4 of the CAN Regulations, the Executive Committee decided to subject the FRMF to "financial sanctions" of EUR 8,050,000, to compensate for the losses incurred by the CAF and other parties involved after the withdrawal. This Second Decision was also notified to the FRMF on the day of the meeting, 6 February 2015. It indicated that the details of the incurred losses would be communicated as soon as possible, together with the supporting documents.

On 16 February 2015, the FRMF appealed against both the First and the Second Decision in the CAS.[16]

13. *Id.*, para. 3.41.
14. *Id.*, para. 3.42.
15. *Id.*, para. 3.55.
16. *Id.*, para. 3.56.

Decision:

CAS jurisdiction and nature of the decisions under appeal:

The CAF acknowledged the jurisdiction of the CAS with respect to the appeal lodged against the First Decision. However, it challenged CAS jurisdiction with respect to the Second Decision, on the ground that it was not an appealable decision *stricto sensu*, but rather a (non-appealable) letter. Hence, in this letter, the Executive Committee merely informed the FRMF that the CAF had decided to claim compensation for the losses incurred in an amount of EUR 8,050,000, while indicating that the CAF would subsequently provide the FRMF with the details of the losses and the supporting documents.

The Panel dismissed the CAF's jurisdictional objection. Based on CAS jurisprudence,[17] it held that whether or not a letter or other communication qualifies as a "decision" depends on its contents. The form of the communication has no relevance for determining whether it constitutes a decision or not. The relevant criterion is whether the communication contains the required *animus decidendi*. A decision must be distinguished from mere information. A letter by which a financial sanction is imposed upon a member by the executive committee of a federation (as in the present case) constitutes an appealable decision before CAS.

Formal validity of the appealed decisions:

The Appellant contested the formal validity of the Decisions under appeal, in particular on the ground of lack of reasoning. It further invoked a breach of the adversarial principle and of its defense rights.

The Panel referred to the CAS case law according to which, as a general rule, formal or procedural irregularities before the lower instances may be cured through the appeal to CAS, as CAS panels have full power of review of the facts and the law (Article R57(1) of the CAS Code).[18] That said, serious procedural defects might not be cured through a *de novo* hearing before CAS, such as a serious violation of the right to be heard in certain instances[19] or the fact that the decision under appeal was issued by a body that lacked jurisdiction to render it.[20]

In the case at hand, the Panel held that the lack of reasoning of a decision issued by a sports governing body could be cured before CAS since the CAS panels fully review the

17. CAS 2010/A/2315.
18. TAS 2004/A/549 para. 31 ; CAS 2003/O/486, para. 50 ; CAS 2006/A/1153, para. 53 ; CAS 2008/A/1594, para. 109 ; TAS 2008/A/1582, para. 54 ; TAS 2009/A/1879, para. 71.
19. CAS 2010/A/2275.
20. CAS 2009/A/1903, paras. 194 et seq.

case with respect to the fact and the law (Article R47 of the CAS Code).[21] Therefore, the Panel dismissed the Appellant's submission that the Decisions under appeal were not valid on this ground.

Finally, the CAS Panel dismissed the Appellant's submissions based on an alleged breach of the adversarial principle and of its defense rights on the ground that the Appellant had the opportunity to fully present its case several times before the sanction was imposed.

"Error of fact":

The Appellant further challenged the CAF's determination that its conduct amounted to a withdrawal from the organization of the 2015 CAN, arguing that it had only submitted a request to postpone the competition. On this view, the characterization of the Appellant's statements as a "withdrawal" under Article 90 of the CAN Organizational Regulation (2011 edition) would constitute an "error of fact" ("*erreur de fait*") affecting the legality of the Decision under appeal.

The Panel held that the FRMF's (reiterated) requests to postpone the competition despite the CAF's refusal to postpone it amounted to a refusal to organize that event as planned initially. In other words, the FRMF had requested to organize the event under very different terms than those initially agreed between the parties, i.e. an altogether different competition. Therefore, the Panel held that the request to postpone the competition for one year amounted to a refusal to organize, or a withdrawal from the organization of the competition.

Force majeure:

The Appellant further submitted that its request to postpone the organization of the 2015 CAN was based on a case of "force majeure". The main ground for its request was the significant and worrying spread of the Ebola virus outbreak. The Appellant maintained that it had complied with the WHO and Health Ministry's recommendations.

The Panel held that the Appellant had not established a case of force majeure. There is no statutory definition of force majeure under Swiss law. Under Swiss case law, the force majeure defence is subject to very strict requirements. It requires an impossibility to perform the contract. Mere difficulties do not suffice. In this case, the FRMF had not established that it was not in a position to perform its own obligation to

21. TAS 2014/A/3475, paras. 52 et seq. ; CAS 2006/A/1175, para. 8.

organize the competition because of a health risk: another federation had been able to organize the same event during the initial agreed dates by taking the appropriate health measures. According to the Panel, this showed that another solution could have been envisaged.

As a result, the Panel held that the FRMF's withdrawal from the organization of the competition absent a case of force majeure constituted a breach of the FRMF's obligations vis-à-vis the CAF and, thus, a violation of the applicable regulations.

Proportionality of the sanction imposed:

The Panel then referred to the CAS jurisprudence according to which the sanction imposed must be proportional to the degree of fault. The extent or "weight" of the sanction ("*quotité de la sanction*") imposed by a disciplinary body exercising its discretionary power based on the applicable regulations can only be reviewed when the sanction is manifestly and significantly disproportionate.[22]

In the case at hand, the Panel held that, although there was no case of force majeure, the degree of culpability was minor ("*léger*") in view of the exceptional circumstances of the case, in particular the significant health risks. This is in particular the case when a sports federation renounces to organize a competition based on the principle of precaution in order to preserve human life in an international context of great fear about the epidemiologic situation. Although manageable, the situation was preoccupying for the whole world.

Against this background, the Panel held that the suspension of the national team from the two next editions of the continental competition was a disproportionate "sporting" sanction, in particular in view of the fact that the national team had been already disqualified from the former edition.

In addition to the purely disciplinary sanction described above, the CAF also imposed a regulatory fine of USD 1 million upon the FRMF pursuant to the Organizational Regulation of CAN. The Panel held that this fine had to be reduced to be brought in line with the Regulation in force at the relevant time (the 2011 edition).

Finally, the Panel held that a "financial" sanction whose amount was not justified should be annulled.

22. CAS 2012/A/2762, para. 122.

Based on the above, the Panel upheld the FRMF's appeal against the "financial" sanctions (which it struck down) and partially upheld the appeal against the "sporting" sanctions, as just seen.

Comments:

As the authors of this article represented one of the parties to the arbitration, we will not comment on the merits of this award.

It may be noted however that the award is interesting in that it deals with recurring issues in CAS arbitration such as the requirements for a decision to be appealable, the curing effect of appeal proceedings before CAS, and the *lex specialis derogat legi generali* principle. It is also one of the few cases where the CAS had to examine whether there was a case of force majeure, i.e. whether it became impossible for the FRMF to organize the 2015 CAN in Morocco in view of the Ebola virus outbreak in West Africa. The award further contains interesting developments on the principle of proportionality in relation to disciplinary sanctions.

CAS 2015/A/4241 *Kuwait Sporting Club et al. v. FIFA & KFA*, award of 9 December 2016 (operative part notified on 13 June 2016):

Summary of the facts:

The Appellants were five professional football clubs from Kuwait, namely Al-Arabi Sporting Club, Al-Fahaheel Sporting Club, Kazma Sporting Club, Kuwait Sporting Club and Salmiya Sport Club (the "Clubs"). The Clubs are members of the Kuwait Football Association ("KFA") and participate in the Premier League of Kuwait.[23]

The Second Respondent was the KFA. The KFA is the national football association of Kuwait and is a member of FIFA. It is based in Kuwait City, Kuwait.[24]

The Clubs appealed against a decision issued by FIFA on 16 October 2015, which had suspended the KFA with immediate effect as a result of the enactment of Kuwait national sports legislation infringing the FIFA Statutes (the "Decision"). The Decision stated that the suspension would be lifted only when the KFA and its members (the clubs) would be able to carry out their activities and obligations independently. It further stated that the suspension of the KFA meant that no team from Kuwait of any sort (including clubs) could have any international sporting contacts.[25]

23. CAS 2015/A/4241 Kuwait Sporting Club et al. v. FIFA & KFA, award of 9 December 2016, para. 1.1.
24. *Id.*, para. 1.3.
25. *Id.*, para. 2.1.

The Decision was based inter alia on Article 13(1)(i) and Article 17(1) of the 2015 FIFA Statutes, which read as follows in their relevant parts:[26]

Article 13(1)(i) of the 2015 FIFA Statutes:
"*Members have the following obligations*:
to manage their affairs independently and ensure that their own affairs are not influenced by any third parties"

Article 17(1) of the 2015 FIFA Statutes:
"*Each Member shall manage its affairs independently and with no influence from third parties.*"

The Clubs also appealed, alternatively, against an earlier letter, which FIFA sent to the KFA on 25 September 2015. This letter communicated a FIFA Executive Committee's decision fixing a deadline until 15 October 2015 for the KFA to confirm positive developments with regard to the national legislation on sports, failing which it would be suspended (the "Alternative Decision").[27]

The dispute arose as follows:

The laws of Kuwait contain specific legislation governing sport, which was first enacted in 1978 as Law 42/1978.

Since the enactment of Law 42/1978, Kuwait and its national sporting federations have been previously suspended by the international sports governing bodies on the ground that the rules governing sports in Kuwait allowed for the possible interference of third parties, such as the Kuwaiti government, in the governance of sports.[28]

Following a suspension in January 2010 of both the Kuwait Olympic Committee ("KOC") by the International Olympic Committee ("IOC") and the KFA by FIFA, Kuwait's sports law was amended in 2012 by Law 26/2012. Since it guaranteed the independence of Kuwait's sporting federations, the new law was approved by the IOC and FIFA. As a consequence, the KOC and KFA's respective suspensions were lifted.[29]

Kuwaiti sports law was then again amended, first by Law 117/2014 which came into force on 23 October 2014, and then by Law 25/2015, which became effective on 24 May

26. *Id.*, para. 3.6.
27. *Id.*, para. 2.2.
28. *Id.*, para. 3.1.
29. *Id.*, para. 3.2.

2016. These amendments included provisions which gave the Kuwaiti Public Authority for Youth and Sport ("PAYS") several powers regarding the organization of sporting federations in Kuwait and established a specific judicial procedure for sports-related disputes.[30]

In an opinion letter dated 19 June 2015, the IOC issued a detailed analysis of Laws 117/2014 and 25/2015, identifying several articles in those laws which violated the principle of autonomy and independence of sporting organizations. This was communicated by the IOC to H.E. Sheikh Salman Sabah Al-Salem Al-Homud Al-Sabah, the Minister in charge of PAYS, on 13 October 2015, with a deadline until 27 October 2015 to amend the sports legislation.[31]

Meanwhile, on 14 August 2015, the Asian Football Confederation ("AFC") informed the KFA that the new Kuwaiti laws negatively affected the autonomy and independence of national sports bodies. On 14 and 15 August 2015, the KFA requested FIFA's official opinion on possible solutions to address any concerns under the FIFA Statutes.[32]

On 4 September 2015, FIFA informed the KFA that it supported the IOC's interpretation of 19 June 2015 and it reiterated that the KFA had to comply with its obligations under Articles 13(1)(i) and 17 of the FIFA Statutes.[33]

On 15 September 2015, the KFA informed FIFA that the new Kuwaiti laws contained provisions to the following effect:[34]

PAYS was empowered to define the conditions under which sports bodies in Kuwait could be established;

All sports bodies in Kuwait had to amend their Statutes by recognizing the powers of PAYS in accordance with the new legislation;

PAYS could convene Extraordinary General Assemblies for all Kuwaiti sports bodies;

If Kuwaiti sports bodies did not comply with these requirements set by PAYS, they would be dissolved by force of law;

CAS would no longer be recognized and no appeal could be made to it. CAS would be replaced by a special department within ordinary state courts to deal with sports-related disputes.

30. *Id.*, para. 3.3.
31. *Id.*, paras. 3.7, 3.9.
32. *Id.*, para. 3.5.
33. *Id.*, para. 3.7.
34. *Id.*

On 25 September 2015, FIFA informed the KFA that Kuwait's new legislation contained "*unacceptable interference*" in breach of Articles 13(1) and 17 of the FIFA Statutes. FIFA set a deadline until 15 October 2015 for the KFA to confirm "*positive developments*" regarding the new laws. Should the KFA fail to do so, it would be suspended with immediate effect.[35]

On 16 October 2015, FIFA informed the KFA that, in view of the lack of positive developments, it was suspended with immediate effect. The suspension would only be lifted when the KFA and its members would be able to "*carry out their activities and obligations independently, meaning that the sports law must be amended as per the recommendations of the International Olympic Committee* [in its Opinion]".[36]

At the FIFA Extraordinary Congress of 26 February 2016, an 87% majority approved the proposal to confirm the suspension of the KFA until the next FIFA Ordinary Congress, where the suspension would be definitively confirmed.[37]

During the FIFA Ordinary Congress of 13 May 2016, the congress confirmed the suspension of the KFA by a 93% majority.[38]

On 6 November 2015, several Kuwaiti sporting clubs (the Appellants) appealed the decision of suspension of 16 October 2015. By contrast, the KFA did not appeal against its suspension. Both the KFA and FIFA participated in the proceedings as Respondents.

Decision:

CAS jurisdiction and admissibility of the appeal:

The Respondents raised a jurisdictional challenge on the ground that the decision under appeal had a *res judicata* effect for the KFA, as well as (directly or indirectly) for all its members, including the Appellants. In addition, the Respondents argued that third parties (in this case, the Appellants) may appeal an association's decision only if they are directly affected by it, that is, if their rights, in addition to those of the addressee of the decision, are affected.

The Panel held that this was not an issue of jurisdiction but rather of standing or admissibility of the appeal. It held that the decision under appeal affected the Appellants

35. *Id.*, para. 3.8.
36. *Id.*, para. 3.10.
37. *Id.*, para. 3.11.
38. *Id.*, para. 3.12.

directly because it limited their ability to undertake economic activities as professional football clubs. The fact that KFA did not appeal against the decision could not have an (adverse) effect on the Appellants' own right to appeal it.[39]

However, the Panel held that it was questionable whether the Appellants could avail themselves of the CAS and Federal Tribunal's jurisprudence whereby an indirect member of an association can appeal against a decision of the association. The dispute was indeed not a case where a person is individually sanctioned by the association to which he or she is affiliated as an indirect member. In this case, the Appellants were affected by the decision, but to the same extent as any other member of the KFA. The decision under appeal did not target them directly.[40]

FIFA Extraordinary Congress of 26 February 2016:

The Appellants argued that during the FIFA Extraordinary Congress of 26 February 2016, the suspension of the KFA was not confirmed so that the suspension should be automatically lifted pursuant to Article 14(2) of the FIFA Statutes.[41]

The Panel dismissed this argument on the ground that the Extraordinary Congress had voted and approved by an 87% majority the proposal to confirm the suspension of the KFA until the next FIFA Ordinary Congress where the suspension would be definitely confirmed. As a result, the suspension was not automatically lifted as per Article 14(2).[42]

FIFA Ordinary Congress of 13 May 2016:

The Respondents submitted that following the confirmation of the KFA's suspension at the Ordinary Congress of 13 May 2016, the decision under appeal (i.e. the suspension of 16 October 2015) had been superseded and rendered moot. As a result, the appeal was inadmissible or should be summarily dismissed.

The Appellants argued that the confirmation of the decision by the FIFA Ordinary Congress did not constitute a new decision against the KFA, but rather a confirmation of the sanctions imposed. The Appellants also submitted a separate Statement of Appeal

39. *Id.*, paras. 5.9, 5.10.

40. *Id.*, para. 5.12.

41. Article 14(2) of the FIFA Statutes (2015 version) reads as follows : "*A suspension shall be confirmed at the next Congress by a three-quarter majority of the Members present and eligible to vote. If it is not confirmed, the suspension is automatically lifted.*"

42. CAS 2015/A/4241 Kuwait Sporting Club et al. v. FIFA & KFA, award of 9 December 2016, para. 8.4.

against the confirmation of the decision by the FIFA Ordinary Congress and requested the consolidation of the new appeal with the pending proceedings.

The panel left the question open on the ground that the appeal should be dismissed on the merits. As a result, it did not examine the question of the status or validity of the decision taken by the FIFA Ordinary Congress of 13 May 2016, nor the Appellant's request for consolidation.[43]

Principle of independence and autonomy:

The Panel then examined whether the new Kuwaiti sports laws violated the principles of independence and autonomy embodied in Articles 13(1)(i) and 17 of the FIFA Statutes.

It held that FIFA, as an association under Swiss law, enjoys substantial autonomy under Article 63(1) of the Swiss Civil Code ("SCC"). It is empowered to require its members to manage their affairs independently and without third party interference, and to impose appropriate sanctions on non-compliant members. Those principles are limited only by the protection of personality rights and competition law.[44]

As a result of such broad discretion and autonomy, FIFA can require its members to abide by its Statutes. A failure to do so may result in sanction. Such autonomy also includes the ability of FIFA to take into account the specific circumstances of its members' actions.[45]

In this case, the Panel noted that Kuwait was in the midst of political strife with regard to the sports movement, and the Kuwaiti government had on several previous occasions engaged in undue interference with Kuwaiti sports bodies. The Panel thus decided, in accordance with Article R57 of the CAS Code, to take into account the full background leading to the adoption of the contentious Kuwaiti sports laws and their possible infringement of Articles 13(1)(i) and 17 of the FIFA Statutes.[46]

The contentious legal provisions of the new Kuwaiti sports laws:

The Panel then examined each of the contentious legal provisions of the new Kuwaiti sports laws,[47] in particular Article 5 of Law 117/2014 and Article 28 of Law 25/2015.

43. *Id.*, para. 8.8.
44. *Id.*, para. 8.13.
45. *Id.*, para. 8.14.
46. *Id.*
47. *Id.*, para. 8.15 et seq.

Article 5 of Law 117/2014 provided inter alia that the Kuwaiti PAYS could form a neutral committee to attend the meetings of the KFA's general assembly to investigate the validity of its meeting and voting measures.[48] The Panel held that a committee formed by PAYS attending and investigating the meetings held by the KFA would breach Article 17 of the FIFA Statutes.[49]

Article 28 of Law 25/2015 created a Kuwaiti State court dispute resolution mechanism for sports-related disputes, with the possibility to appeal to a special department of the Court of appeal. The Panel held that the KFA's authority to resolve disputes involving its members through arbitration had thus been encroached upon by government bodies.[50]

Based on a thorough review of each provision, the Panel held that several (but not all) of the statutory provisions at issue were in breach of the FIFA Statutes. Specifically, it found that the KFA, which was obliged to implement the laws of Kuwait, was itself in breach of its obligations as a member of FIFA.[51]

Even though not all of the new legal provisions were found to breach the FIFA Statutes, the Panel held that the legal provisions which were found to be against the principles of independence and autonomy, particularly Article 5 of Law 117/2014 and Article 28 of Law 25/2015, were sufficient to justify the suspension of the KFA.[52]

Violation of the principle of equal treatment:

The Appellants contended that the Kuwaiti sports laws were in all respects similar or identical to those of other countries which had not been sanctioned by FIFA so that the decision under appeal violated the principle of equal treatment.

The Panel held that equal treatment is a fundamental legal principle which aims to ensure equality and just results. This principle requires that administrative and adjudicatory bodies treat similar situations in a similar manner. It further noted that "*the crucial caveat results on the objective similarity between situations*".[53] "*As the international governing body for football, FIFA is under a duty in its decision making process to treat its members similarly under similar circumstances, but there are*

48. *Id.*, para. 8.16 et seq.
49. *Id.*, para. 8.18.
50. *Id.*, para. 8.19 et seq.
51. *Id.*
52. *Id.*, para. 8.50.
53. *Id.*, para. 8.56.

circumstances where it may be justified to grant a different treatment to a party in a different situation."[54]

The Panel held that, in this case, the treatment of the KFA by FIFA was seemingly justified on the basis that, already on multiple occasions in the past, FIFA had encountered significant difficulties in Kuwait on the same issues. Additionally, FIFA had on previous occasions imposed similar sanctions on other federations. The Panel stressed the importance of the circumstances of the case, in particular the background and context in which the disputed legal provisions had been adopted.[55]

Violation of the principle of proportionality:

The Panel dismissed the Appellants' contention that the sanction was disproportionate on the following grounds:[56]

It first held that the undue interference by governments into the governance of national federations is a serious concern which contravenes a fundamental FIFA principle. The independence and autonomy of sport is a cornerstone of FIFA's Statutes and of its values as an organization which aims to promote football without political interference.

Considering the litigious provisions, FIFA has very limited tools with which to enforce its Statutes. FIFA cannot take direct measures against the State of Kuwait and, as a result, it is only left with the option of imposing sanctions on its own members.

Article 13 of the FIFA Statutes provides that in the case of third party influence, a sanction may be imposed on the relevant member association regardless of fault. This is due to the lack of viable enforcement measures which FIFA could take against a third party.

Fourth, the decision only provided for a suspension, which could be lifted immediately once the undue interference would cease. It did not envisage the expulsion of the KFA from FIFA.

Fifth, the decision was imposed on the KFA due to, in part, the lack of "positive development" in Kuwait with regard to the status of the litigious statutory provisions since the situation had come to FIFA's attention. Had improvements been achieved or even a public willingness been displayed by the Kuwaiti government to start the

54. *Id.*, para. 8.57.
55. *Id.*, para. 8.58.
56. *Id.*, paras. 8.59 ss.

process of addressing the issues, then the sanction may have been substantially mitigated.

Nevertheless, the Panel stressed that, in principle, FIFA's decision to suspend the KFA with immediate effect, without fixing a time limit for the latter to address FIFA's concerns, could be a violation of the principle of proportionality. That said, the sanction had not been taken in a "*contextual vacuum*". FIFA had to intervene on numerous occasions in Kuwait over the past several years, each of which related to interference by the Kuwaiti government into the affairs of sports organizations. The Panel held that regular and repeated attempts by a national government to unduly interfere with the independence of FIFA's members justified the manner in which the decision had been imposed.[57]

Violation of the Appellants' personality rights:

The Appellants further claimed that the decision under appeal violated their personality rights under Article 28 SCC.

The Panel noted that the protection of personality rights may limit, under specific circumstances, the autonomy of the association to exclude a member. If the association is active in the public sphere and deals directly with state authorities as the organizations at the pinnacle of a profession or trade, as is the case with FIFA, a balancing of the interests at stake must be exercised when assessing the validity of the exclusion of an association member. Such exclusion is only permissible if the association's interest prevails over the relevant member's interest, in the presence of a just cause for exclusion.[58]

The Panel held that the decision under appeal did not impose a permanent exclusion of the KFA, but rather a temporary suspension which could be lifted immediately. Since the sanction was not permanent in nature and could be removed entirely within a very short period of time, the Panel found that it would be "disproportionate" to consider that it violated "Swiss social, moral and economic values". Finally, it noted that the KFA, as a FIFA member and addressee of the decision, had accepted to be bound by the FIFA Statutes, which expressly provide for the possibility of such sanctions.[59]

The Panel further found that, in any event, FIFA had an overriding interest under Article 28(2) SCC to suspend the KFA since the autonomy and independence of sports governing bodies is a fundamental principle under which FIFA and its members must operate (Articles 13(1)(i) and 17 of the FIFA Statutes). The Appellants could not use their

57. *Id.*, para. 8.65.
58. *Id.*, para. 8.68, referring to the Swiss Federal Supreme Court's decision, ATF 123 III 193, 198 para. 2c/bb.
59. *Id.*, para. 8.69.

personality rights under Article 28 SCC in order to alter the legitimate interests embodied in the FIFA Statutes' provisions dealing with membership criteria.[60]

Violation of Swiss competition law:

The Appellants contended that the decision under appeal violated Swiss competition law, more specifically Article 5 of the Swiss Cartel Act (LCart) (prohibiting "concerted practice") and Article 7 LCart (prohibiting the abuse of a dominant position).

The Panel left opened the question whether the decision under appeal, by which FIFA suspended the KFA and its members, potentially affected the Swiss market (and, as a result, was subject to the LCart).

Based on the well-established principles of EU competition law (i.e. the *Meca Medina* ruling),[61] to which the Swiss authorities readily refer, the Panel held that restrictions that are proportionate to achieve a legitimate objective do not violate competition law.

Since the KFA's suspension achieved a legitimate objective and was proportionate (see above), the Panel held that the suspension did not violate competition law.

Comments:

As the authors of this article represented one of the parties to the arbitration, we will not comment on the merits of this award.

It may be noted however that this award is very interesting.

Here, the CAS examined in depth the validity of a suspension of an association's member. This type of sanction has been imposed in several instances where the autonomy and independence of the relevant member could not be ensured, in particular because of governmental interference.

This decision further contains interesting developments on the main legal issues that may arise in these types of disputes. It defines in particular the concept of the autonomy of associations under Swiss law, which is limited only by the protection of personality rights and competition law. It further contains interesting developments on the principles of equal treatment and proportionality. The main takeaway from this decision is that CAS panels

60. *Id.* , para. 8.70.
61. *Id.*, para. 8.74, referring to case C-519/04P, *Meca Medina v. Commission*, ECLI:EU:C:2006:492.

will examine the validity of the suspension at stake taking into account the particular circumstances of the case.

CAS 2016/A/4459 *HRH Prince Ali Al Hussein v. FIFA*, order of 26 May 2016 (operative part notified on 24 February 2016):

Summary of the facts:

The Appellant was a sitting candidate for election as the President of the *Federation Internationale de Football* Association (FIFA). The Respondent, FIFA, is the international governing body of football and is based in Zurich, Switzerland.[62]

The Order dealt with an application (the "Application") for a request for provisional and conservatory measures seeking *inter alia* the enforcement of effective measures, including the use of transparent voting booths, to enforce the ban on the use of cameras in the voting booths during the election for President of FIFA at the Extraordinary FIFA Congress (the "Election") in an effort to prevent vote rigging. Alternatively, the Appellant sought a postponement of the Election until such time as his main requests for relief were considered.[63]

On 11 February 2016, the Appellant wrote to the Chairman of the FIFA *Ad-hoc* Electoral Committee and the FIFA Secretary General, expressing his concern over the integrity of the voting process during the Election. More specifically, the Appellant requested that the voting booths be constructed in a way that would make it impossible for a delegate to photograph his ballot paper without being detected. The Appellant requested that the following measures be implemented:[64]

A ban on the use of mobile phones or other camera equipment in the voting booths; and,

The use of transparent voting booths to ensure the ban is seen to be respected.

On 15 February 2016, the Chairman of the FIFA *Ad-hoc* Electoral Committee responded to the Appellant's request and informed him that all delegates at the Election would be reminded that their votes must be conducted by secret ballot and that the use of any cameras or recording devices are strictly forbidden.[65]

62. CAS 2016/A/4459 *HRH Prince Ali Al Hussein v. FIFA*, order of 26 May 2016, paras. 1.1 - 1.2.
63. *Id.*, para. 2.1.
64. *Id.*, para. 2.2.
65. *Id.*, para. 2.3.

On 20 February 2016, the Appellant responded expressing his displeasure that no proposal was made by FIFA to police compliance with the ban on the use of recording devices in the absence of transparent voting booths and moreover, that no sanctions in the case of noncompliance have been identified. The Appellant proceeded to seek confirmation from FIFA that the proposed transparent voting booths would be used at the Election. Failing receipt of such confirmation, the Appellant informed the Chairman of the Committee that he would proceed to file an appeal at the Court of Arbitration for Sport (the "CAS").[66]

On 22 February 2016, the Appellant filed his statement of appeal against FIFA with respect to the decision rendered by the FIFA *Ad-Hoc* Electoral Committee on 15 February 2016 and requested that his appeal be handled by a Sole Arbitrator on an expedited basis. FIFA did not agree to expedite the procedure or the appointment of Sole Arbitrator and the proceedings were not expedited.[67]

On 23 February 2016, the Appellant filed a request for provisional measures and sought the following reliefs:[68]

To formally and publically announce, both ahead of the Congress and at the start of the voting process at the Congress itself, that the vote must be conducted in secret and that the use of mobile phones, cameras or other electronic equipment capable of recording the voting process will not be permitted in the voting booths.

To put in place, and publicize in advance, the measures it will take to police that ban, including use of the transparent voting booths arranged by the Appellant.

To employ independent scrutineers to perform all those tasks assigned to scrutineers in Art. 3 of the Standing Orders of the Congress; to specifically instruct those scrutineers to observe carefully for signs of non-compliance with the ban on cameras, etc.; to position the scrutineers on the different sides of the booth (i.e. not just in front of the voting delegate but also beside and behind him or her, far enough away from the booth to protect the secrecy of the ballot, but close enough to allow the scrutineer to check that mobile phones, etc. are not being used by the voters; and to position cameras so that they capture any inappropriate behaviour in the voting booths.

To fully brief and empower the scrutinisers to stop voting delegates taking photographs or otherwise frustrating the integrity of the vote, including putting in place a

66. *Id.*, para. 2.4.
67. *Id.*, paras. 3.1 - 3.4.
68. *Id.*, para. 3.5.

clear process for the scrutineers to raise any concerns, particularly about photographs being taken, and also a clear process for how FIFA will respond and what sanctions would be imposed.

To announce in advance the sanction that will apply in the event anyone breaches the ban (e.g. voiding the vote in question).

To postpone the Election until such time as it is possible to consider and determine that request for relief.

The Appellant's arguments were summarized in the Order as follows:[69]

FIFA accepts that there is a risk of third-party undue interference corrupting the election, and that a ban on the use of cameras in the voting booth is required to preserve the secrecy of the ballot. If such risk is not properly addressed, there is a real chance that the Appellant will lose votes (as will other candidates), and such candidates would all face enormous difficulties after the election in proving the extent of the harm done to their election. If such interference was ultimately proved, FIFA would be required to re-run the election and in doing so, FIFA would further sustain greater damage to its image and reputation. In this regard, any chances of effective cure *ex post facto* are minimal and therefore, such damage is irreparable.

The Appellant has a strong likelihood of success on the merits of his appeal as to meet this burden at this stage, he must establish only that his appeal is "arguable, and cannot definitely be discounted." FIFA accepts that there is a risk of corruption/vote-rigging which is why it has agreed to ban the use of cameras in the voting booths. However, the Appellant strongly disputes that this will be effective. So where there is an admitted risk of serious corruption and where steps could be made to remove that risk, it is irrational for FIFA to refuse to take those steps.

Granting such request would cause absolutely no harm or prejudice to FIFA (or any other candidate), or any other material cost or inconvenience, especially considering the Appellant has agreed to pay for the construction, delivery, and installation of the transparent voting booths.

FIFA's arguments were summarized in the Order as follows:[70]

While Article 8.2 of the FIFA *Ad-hoc* Electoral Regulations provides that the decisions of the FIFA *Ad-hoc* Committee are subject to appeal at the CAS, the CAS does not have

69. *Id.*, para. 3.6.
70. *Id.*, para. 3.7.

jurisdiction over this procedure as the Decision is not an appealable decision under Swiss law. Nevertheless, even if it were an appealable decision, CAS would have no jurisdiction to postpone the election.

The appeal is inadmissible as the other candidates were not named as parties to the arbitration and moreover, that this request for provisional relief merely tries to seek anticipatory enforcement of a future award.

The Appellant's appeal is late given that he was aware of the organizational measures which would be in place at the upcoming election. Therefore, the appeal is merely an abuse of the electoral process.

The substantive conditions of Article R37 of the CAS Code had not been met. The Appellant only speaks of speculative risks predicated on suspicions that he may be harmed by losing votes at the election. The Appellant has failed to establish that he has a likelihood of success on the merits of his case noting that, as a general rule, the greater the risk of irreparable harm, the lower the burden to establish the chances of success. The request is more far reaching that installing the voting booths and there are other candidates involved in the voting process that have not been made part of this process.

Decision:

CAS jurisdiction of the appeal:

The Appellant grounded jurisdiction on Article 67.1 of the FIFA Statutes which provides that "Appeals against final decisions passed by FIFA 's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question" noting Article 8.2 of the FIFA *Ad-hoc* Electoral Regulations provides that "[t]he decisions of the *Ad-hoc* Electoral Committee may be appealed against directly with the Court of Arbitration for Sport."[71]

FIFA challenged the jurisdiction of CAS on the ground that the letter of 15 February 2016 was not an appealable decision under Swiss law from which an appeal can be filed with the CAS and moreover, even if it were a decision, the CAS would not have jurisdiction to grant the Appellant's request that the election be postponed.[72]

71. *Id.*, para. 4.4.
72. *Id.*, para. 4.5.

However, the President of the Appeals Arbitration Division confirmed that he was satisfied that the CAS had *prima facie* jurisdiction to hear this appeal, without prejudice to any other decision the Panel would have taken in this respect if constituted.[73]

Irreparable Harm:

After noting that it is necessary to consider (i) whether the measure is necessary to protect the Appellant from irreparable harm, (ii) the Appellant's likelihood of succeeding in the substantive appeal, and (iii) whether the interests of the Appellant outweigh those of the Respondent[74] and that these criteria were cumulative,[75] the President of the Appeals Arbitration Division first examined whether irreparable harm had been demonstrated.

The President of the Appeals Arbitration Division noted that, in accordance with CAS jurisprudence, when deciding whether to grant provisional measures, the CAS considers whether such measures are necessary to protect the applicant from substantial damage that would be difficult to remedy at a later stage.[76]

He did not find that the Appellant would suffer any damage, yet alone substantial damage, that would be impossible to remedy at a later stage.[77] He was of the view that the harm alleged by the Appellant is not irreparable as no evidence had been put forward suggesting that the vote was in imminent danger of being manipulated. He considered that the alleged damage was sceptical, hypothetical, and dependent on a series of well-orchestrated actions taking place in face of security measures designed to prevent such actions from occurring.[78]

He held that while the use of transparent boxes may provide additional transparency, the voting boxes would not cure every effort to prevent someone from trying to clandestinely take a picture of their ballot with some hidden device.[79]

He noted that the Appellant would be able to challenge the results of the Election and agreed with FIFA that the Appellant could not rely on potential *ex post* evidentiary difficulties as a basis to assert irreparable harm.

73. *Id.*, para. 4.6.
74. *Id.*, para. 6.1.
75. *Id.*, para. 6.2.
76. *Id.*, para. 6.4.
77. *Id.*, para. 6.4.
78. *Id.*, para. 6.4.
79. *Id.*, para. 6.4.

Consequently, he denied the Appellant's request as he would not suffer irreparable damage if his request for provisional measures was not granted.[80]

Comments:

As the authors of this article represented one of the parties to the proceedings, we will not comment on this order.

It may be noted however that this order is in keeping with the practice of CAS not to address the likelihood of success on the merits and the balance of interests where the first criteria of irreparable harm is not met. The order also demonstrates the speed within which requests for provisional measures can be dealt with as the request was filed on 23 February 2016 and, after giving FIFA a short deadline to file its response the operative part of the order was issued on 24 February 2016.

CAS 2013/A/3207 Tout Puissant Mazembe v. Alain Kaluyituka Dioko & Al Ahli SC, award of 31 March 2014:

Summary of the facts:

The Appellant is a professional Congolese football club (also referred to as "TP Mazembe"). The First Respondent is a professional Congolese football player (also referred to as "Mr. Dioko"). The Second Respondent (also referred to as "Al Ahli SC") is a Qatari multi-sport club which includes a professional football section.[81]

On 1 July 2011, Mr. Dioko and Al Ahli SC entered into a three year employment contract.[82]

On 27 July 2011, on Al Ahli SC's instructions, the Qatar Football Association ("QFA") requested the International Transfer Certificate ("ITC") of Mr. Dioko through the FIFA Transfer Matching System ("TMS") in order to register him as a player with Al Ahli SC.[83]

On 4 August 2011, the *Fédération Congolaise de Football* Association ("FECOFA") rejected the request for Mr. Dioko's ITC, indicating that he was still under contract with TP Mazembe.[84]

80. *Id.*, para. 7.1.
81. CAS 2013/A/3207 *Tout Puissant Mazembe v. Alain Kaluyituka Dioko & Al Ahli SC*, award of 31 March 2014, paras. 1-3.
82. *Id.*, para. 5.
83. *Id.*
84. *Id.*

On 18 August 2011, the QFA requested a provisional registration of Mr. Dioko with Al Ahli SC from FIFA and requested the Single Judge of the Players' Status Committee to:[85]

Establish that the employment contract between Al Ahli SC and Mr. Dioko was valid and enforceable; and Authorize QFA to provisionally register Mr Dioko for Al Ahli SC with immediate effect.

On 23 August 2011, FIFA requested FECOFA to confirm whether it insisted on the rejection of the ITC for Mr. Dioko and FECOFA informed FIFA, on 26 August 2011, that TP Mazembe and Mr. Dioko had signed an employment contract on 2 February 2009 which was valid until February 2014.[86]

On 6 September 2011, the Single Judge issued a decision where he concluded "that the Congolese club does not seem to be genuinely and truly interested in maintaining the services of the player concerned, but that it rather appears to be looking for financial compensation" and authorized the QFA to provisionally register Mr. Dioko for Al Ahli SC.[87]

On 28 September 2011, TP Mazembe lodged a complaint with the FIFA Dispute Resolution Chamber ("DRC") against Mr. Dioko and Al Ahli SC for breach of contract without just cause, in particular for concluding a new employment contract without notifying TP Mazembe of the termination of Mr. Dioko's contract with TP Mazembe and without concluding a transfer contract between the two clubs.[88] TP Mazembe claimed compensation of EUR 5,000,000 (based on an alleged transfer offer from the Royal Sporting Club Anderlecht SA in Belgium to TP Mazembe for Mr. Dioko) and requested the suspension of Mr. Dioko for at least four months, and a ban from registering any new players for two consecutive registration periods on Al Ahli SC.[89]

On 23 May 2013, the DRC notified its decision (the "Decision") wherein it considered that it was for TP Mazembe to evidence the existence of a written employment contract based on which compensation for breach of contract could be claimed. Mr. Dioko argued that he had never signed a written employment contract with TP Mazembe and that the signature on the copy of the contract that TP Mazembe had submitted, was forged. TP Mazembe was unable to provide the DRC with the original employment contract and the DRC concluded that the fact that TP Mazembe had only submitted a copy of the disputed contract was insufficient to establish the existence of the alleged contractual relationship.[90]

85. *Id.*, para. 6.
86. *Id.*
87. *Id.*, para. 8.
88. *Id.*, para. 10.
89. *Id.*, para. 11.
90. *Id.*, para. 12.

The DRC considered that it could not "assume that an employment contract had been concluded by and between the parties simply based on circumstances which, in general, may be likely but do not imply with certainty the signing of a contract", such as the existence of payment slips from TP Mazembe signed by Mr. Dioko. According to the DRC, Mr. Dioko had not admitted at any point that he was under contract with TP Mazembe.[91]

The DRC rejected TP Mazembe's claim in its entirety.[92]

On 12 June 2013, TP Mazembe lodged its appeal with the CAS against Mr. Dioko and Al Ahli SC with respect to the Decision.

Decision:

Parties submissions:

In its submissions to CAS, TP Mazembe contended that:[93]

Mr. Dioko signed a valid employment contract which Mr. Dioko breached without just cause by signing a second employment contract with Al Ahli SC.

The parties to the first contract had always respected the provision of this contract up until Mr. Dioko signed the new contract with Al Ahli SC.

Mr. Dioko only questioned the authenticity of the employment contract with TP Mazembe after almost a year had passed since the present dispute arose.

It is for Mr. Dioko to evidence that the signature on the contract is not his.

Compensation of EUR 5,000,000 should be awarded to it from the Respondents jointly, based on an alleged transfer offer from RSC Anderlecht for Mr. Dioko.

Disciplinary sanctions should be imposed on both Respondents.

In his submissions to CAS, Mr. Dioko submitted that:[94]

TP Mazembe has that the burden of proof of showing that there was a written employment contract between him and TP Mazembe.

91. *Id.*, para. 13.
92. *Id.*, para. 14.
93. *Id.*, para. 31.
94. *Id.*, para. 31.

A "written contract" requires the original signature of the parties that are bound by the contract, and that this has not been filed.

His signature on the copy of the contract supplied by TP Mazembe is not authentic.

The claimed compensation is not in line with the relevant FIFA regulations and the jurisprudence of the FIFA DRC and the CAS.

There is no room for any disciplinary sanctions given that TP Mazembe did not direct its appeal against FIFA, which is the appropriate body to impose any such sanctions.

In its submissions to CAS, Al Ahli SC submitted that:[95]

It was for TP Mazembe to evidence that there existed a valid employment contract between it and Mr. Dioko.

Mr. Dioko explicitly denied the existence of any such contract, but, even if an employment contract existed, Al Ahli SC claims that the contract is null and void for a variety of reasons, including that TP Mazembe's Sports Director did not have the authority to represent the club and sign the contract, and that it does not meet the FIFA minimum requirements for professional football players' contracts.

It did not induce Mr. Dioko to leave TP Mazembe, and that Mr. Dioko had confirmed that he was free to sign a contract with Al Ahli SC.

The claimed damage is not sufficiently substantiated, and that the request for disciplinary sanctions is inadmissible because FIFA is not a party to the present proceedings.

Applicable Law:

The Panel noted the application of Article R58 of the CAS Code and Article 66(2) of the FIFA Statutes and that whilst TP Mazembe did not explicitly invoke any applicable law in its Appeal, in a second submission, it held that only Congolese courts could determine the validity of the relevant employment contract, and submitted a legal opinion regarding certain aspects of Congolese law.[96]

95. *Id.*, para. 31.
96. *Id.*, paras. 36-38.

However, TP Mazembe, explicitly admitted during the hearing that FIFA regulations are applicable, and additionally Swiss and Congolese law.[97]

Mr. Dioko argued that Congolese law should not be applied to the dispute. Al Ahli SC claimed that Congolese labour Law could be used as a supplementary legal regime to the relevant FIFA regulations and Swiss law in interpreting the employment contract.[98]

Ultimately the Panel concluded that the relevant FIFA regulations to be applied were the FIFA Regulations on the Status and Transfer of Players (FIFA RSTP). The Panel indicated that Swiss law applied to matters not covered by relevant FIFA regulations and that the alleged employment contract is *prima facie* governed by Congolese law, which may therefore also be relevant.[99]

Burden of Proof:

The parties disagreed as to who bears the burden of proof regarding the existence of an employment contract between TP Mazembe and Mr. Dioko. Whilst TP Mazembe claimed that it has produced a valid employment contract, and that the burden of proof is on Mr. Dioko to evidence that the signature on the contract is not his, the Respondents claimed that the burden of proof was on TP Mazembe to demonstrate that the contract is valid, in particular because TP Mazembe was not able to produce an original copy.[100]

The Panel referenced Article 12(3) of FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber and Article 8 of the Swiss Civil Code and observed that, according to the general rules and principles of law and settled CAS case-law, facts pleaded have to be proven by those who plead them, which means that when a party invokes a right, that very same party is required to prove such facts.[101]

The Panel went on to note that the concept of the "burden of proof" consists of the "burden of persuasion" and the "burden of production of the proof". The Panel suggested that in order to fulfil the burden of proof, the relevant party must provide all relevant evidence that it holds and convince the Panel that the facts that it pleads are true, accurate and produce the consequences envisaged by that party. The panel stated that only when

97. *Id.*, para. 39.
98. *Id.*, para. 40.
99. *Id.*, para. 41.
100. *Id.*, para. 44.
101. *Id.*, para. 48.

these requirements are complied with has the party fulfilled its burden and has the burden of proof been transferred to the other party.[102]

Therefore Panel indicated that given that TP Mazembe claims that it has a right to compensation on the basis of an employment contract it is for TP Mazembe to evidence the existence of a valid employment contract between it and Mr. Dioko.[103]

The Existence of an Employment Contract:

TP Mazembe claimed that it signed a five year employment contract with Mr. Dioko on 2 February 2009 and in order to evidence the existence of a valid employment contract, submitted:[104]

A copy of the alleged employment contract between TP Mazembe and Mr. Dioko, and copies of other employment contracts in order to demonstrate that all employment contracts look similar;

Pay slips for January, February and April 2011 (USD 15,000) as well as a pay slip for a "supplementary salary" in November 2010 (USD 6,000);

A letter dated 10 August 2011 from Mr. Dioko to FIFA explaining that he had signed a contract for three years with Al Ahli SC on condition that the club "would come to an agreement with my original club TP Mazembe";

An email from Mr. Dioko to the President of FECOFA dated 8 August 2011 in which he indicated that he wanted Al Ahli SC to negotiate with TP Mazembe;

A transcript of a TV interview with Mr. Dioko in which he allegedly confirmed having a contract with TP Mazembe;

A judgment of the Commercial Court of Lubumbashi dated 12 June 2013 declaring that Mr. Dioko's signature is authentic;

A statement from FECOFA of 10 October 2013 declaring that it received the alleged employment contract between TP Mazembe and Mr. Dioko on 3 February 2009; and

A letter from TP Mazembe to the FECOFA requesting a copy of the employment contract, including an allegedly certified copy of the employment contract.

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102. *Id.*, para. 51 citing CAS 2007/A/1380, at para. 28 and CAS 2009/A/1909, at para. 23.
103. *Id.*, para. 52.
104. *Id.*, paras. 53-54.

Both the Respondents claimed that Mr. Dioko did not sign any employment contract, and that he only provided services to TP Mazembe on a voluntary basis.[105] Al Ahli SC submitted that it did not induce Mr. Dioko to breach an employment contract, if any. In support of his claims, Mr. Dioko submitted:[106]

A letter of Mr. Dioko dated 21 January 2012 explaining that he never signed an employment contract with TP Mazembe;

A declaration of Mr. Dioko that he was an amateur player at TP Mazembe and was not contractually bound to it; and

A letter of Mr. Dioko dated 26 August 2011 expressing his wish to move to Al Ahli SC.

The Panel referred to Article 2(2) RSTP which provided that a professional player "is a player who has a written contract with a club and is paid more for his footballing activity than the expenses he effectively incurs" and that "all other players are considered to be amateurs", The Panel then considered that the definition of a "professional player", including the requirement of a "written contract", should be interpreted strictly.[107] The Panel stresses the importance of this provision for global contractual stability and legal certainty in employment relationships in professional football.[108]

The Panel went on to note that even though the RSTP did not define the meaning of "in writing", in accordance with Swiss law and CAS jurisprudence (e.g., case CAS/A/1521, at para. 19) a contract is deemed to be made "in writing" when it is signed with the original signature of the relevant parties to the contract.[109]

The Panel considered that TP Mazembe had not satisfied its burden of proof that a valid written employment contract signed by Mr. Dioko existed, attached particular importance to the fact that it was not able to submit the original employment contract while Mr. Dioko disputed that the signature on the contract was his.[110]

The Panel considered that (i) the pay slips do not correspond to the amount agreed upon in the alleged employment contract, (ii) there was no evidence that the payments were actually made each month (iii) neither in his letter, email nor in the TV

105. *Id.*, para. 56.
106. *Id.*
107. *Id.*, paras. 59-60 citing TAS 2009/A/1895, at 33-34 and the case-law cited there.
108. *Id.*, para. 60.
109. *Id.*, para. 61.
110. *Id.*, para. 63.

interview did Mr. Dioko explicitly confirm having signed an employment contract with TP Mazembe (iv) the judgment of the Commercial Court of Lubumbashi issued without Mr. Dioko ever being heard or being informed of the proceedings and (v) the allegedly certified copy of the employment contract from FECOFA was only filed in a second round of submissions and should be disregarded on the basis of Article R57 of the Code.[111]

The Panel concluded that TP Mazembe had not fulfilled its burden of proof, and that the Panel could thus not determine with the required degree of certainty that Mr. Dioko and TP Mazembe actually entered into an employment contract.[112]

As a result, the Panel did not need to consider the remaining arguments and evidence submitted by the Parties and rejected all the claims in their entirety and confirmed the DRC decision issued on 18 December 2012.[113]

Comments:

This is an interesting award in that it clearly lays out that to fulfil the burden of proof, the relevant party must provide the deciding body with all relevant evidence that it holds and convince the deciding body that the facts that it pleads are true, accurate and produce the consequences envisaged by that party. Only when these requirements are complied with has the party fulfilled its burden and has the burden of proof been transferred to the other party.

The award also makes clear that it is compulsory to lay down a written contract between the club and a player in order to be compliant with Article 2(2) of the RSTP and that a contract is deemed to be "in writing" when it is signed with the original signature of the relevant parties to the contract.

The award is also notable for the exclusion of evidence under Article R57 of the CAS Code in circumstances where the Panel has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered.

111. *Id.*, para. 64.
112. *Id.*, para. 65.
113. *Id.*

CAS 2015/A/4292 Wesley Lopes da Silva v. Al Hilal Al Saudi Football Club; CAS 2015/A/4231 Soçiedad Azul y Blanco SA - Millonarios FC v. Al Hilal Al Saudi Football Club & Wesley Lopes da Silva, award of 21 October 2016:

Summary of the facts:

The appeal was brought by the Brazilian player Wesley Lopes da Silva (the "Player") and the Colombian football club Soçiedad Azul y Blanco SA - Millonarios FC ("Millonarios") against the decision of the FIFA Dispute Resolution Chamber ("DRC") of 2 November 2015 (the "Appealed Decision") according to which the Player was found to have breached without just cause his contract with the Saudi club Al Hilal Al Saudi Football Club ("Al Hilal"). The Decision under Appeal also made the Player and Millonarios jointly and severally liable for compensation in the amount EUR 1,400,000 due to Al Hilal.[114]

The dispute originated as follows:

On 25 July 2012, the Player was transferred from Romanian side Vaslui FC to Al Hilal with the payment of a transfer fee in the amount of EUR 2 million.[115]

On 25 July 2012, the Player and Al Hilal concluded a two year employment contract valid from 25 July 2012 until 24 July 2014 (the "Contract"). In addition to monthly salary of EUR 70,000 the Contract provided that the player be provided with "suitable housing", "suitable transportation", an advance payment of EUR 360,000 upon signing the contract and a further payment of EUR 360,000 on 24 July 2013.[116]

At the end of his first season the agent of the Player approached the club to discuss the Player's future. A meeting was arranged but was not attended by the Player's agent. The Player then returned to Brazil.[117]

The Player was not provided with the details of the preseason training camp of Al Hilal in Austria but arrived on his own initiative.[118] When the Player arrived, Al Hilal sought to engage in discussion with the Player on a possible transfer to Al Ittihad, another club in Saudi Arabia.[119] The Player announced that he was only interested in fulfilling his contract and that, if Al Hilal no longer wanted him that they should pay out the balance of the

114. CAS 2015/A/4292 *Wesley Lopes da Silva v. Al Hilal Al Saudi Football Club*; CAS 2015/A/4231 *Soçiedad Azul y Blanco SA - Millonarios FC v. Al Hilal Al Saudi Football Club & Wesley Lopes da Silva*, award of 21 October 2016, paras. 1, 3 & 8.
115. *Id.*, para. 7.
116. *Id.*, para. 8.
117. *Id.*, paras. 11-14.
118. *Id.*, paras. 17-18.
119. *Id.*, paras. 19 et seq.

Contract.[120] The Player's father died around the same time requiring the player to return to Brazil.[121] When the Player returned to Saudi Arabia he claimed that he had not been paid his wages for April, May and June 2013, that he was not being provided with accommodation and that he had not been provided with a car. The Player also complained that Al Hilal now had 5 international players (including him) and that it was possible for Al Hilal to register only four of them.[122]

The Player was also not brought on Al Hilal's preseason tournament and instead was told to stay in Riyadh and train with the B team.[123]

This in fact prompted the Player to complain formally to Al Hilal that his May and June salaries had not been paid, that he was not being provided with accommodation, that he had not been provided with a car, that he had been excluded from the A Team, and that the amount of EUR 360,000 was 5 days overdue.

On 2 August 2013, Al Hilal responded that his May salary was paid in May and was never overdue, that his June salary was paid on 30 July, that the EUR 360,000 amount would be paid "very soon", and that his training was a decision on the coach. The Club also noted that the Player had been offered a 5 star villa but had refused to move to it, that he had been gifted a car worth EUR 150,000 and was told that there will not be a problem with his registration.[124]

On the evening of Friday 2 August the Player demanded to be reinstated to the A team to be paid the outstanding amount of EUR 360,000 by Tuesday 6 August. If not, he indicated that he would consider that Al Hilal had "heavily breached" the Contract.[125]

On 7 August 2013, the Player trained with the A team but shortly thereafter communicated his termination of the Contract through an email from his lawyer. The email cited the outstanding debt of EUR 360,000 as well as the situation with his accommodation, transport, training and registration.[126]

On 27 January 2014, the Player signed a contract with Millonarios until 30 June 2014.[127]

120. *Id.*, para. 22.
121. *Id.*, para. 24.
122. *Id.*, para. 27.
123. *Id.*, para. 29.
124. *Id.*, para. 31.
125. *Id.*, para. 32.
126. *Id.*, para. 33.
127. *Id.*, para. 34.

The matter was then dealt with by the DRC which communicated the Decision under Appeal on 2 November 2015.[128]

On 18 and 20 November 2015, the Player and Millonarios filed their respective appeals with the Court of Arbitration for Sport (the "CAS").[129]

Decision:

The Player's position in the proceedings was that:

There were lengthy delays in the payment of his salaries between April and July 2013 with insufficient excuses which meant that he could no longer expect that he would be paid his July 2013 salary.[130]

The most important contractual breach was the non-payment of the amount of EUR 360,000 which fell due on 24 July 2013.[131]

When the Player returned to Saudi Arabia Al Hilal temporarily offered him a hotel room and this was not "suitable housing".[132]

The car offered to the Player under the Contract was of an inferior quality to the one he had the previous season and this was not suitable.[133]

He had been punished and humiliated by being made to train with the B team when the first team went to a preseason tournament.[134]

He was anxious about registration problems that would arise due to Al Hilal having contracted with four other foreign players for the 2013-2014 season.[135]

He was entitled to be paid the amounts that were due at the time of termination of the Contract as well as EUR 420,000 as compensation.[136]

128. *Id.*, para. 40.
129. *Id.*, paras. 41 and 42.
130. *Id.*, paras. 59-61.
131. *Id.*, paras. 62-69.
132. *Id.*, paras. 71-72.
133. *Id.*, paras. 73-74. However, the Player acknowleged that he had also received a gift of a second car during the previous season outside of the contractual obligations.
134. *Id.*, paras. 75-77.
135. *Id.*, paras. 78-79.
136. *Id.*, paras. 81-83.

Al Hilal's position in the arbitration was that:

The only monthly salary that was late was the June salary but that this was paid on 30 July 2013. Al Hilal attached contemporaneous evidence of the timely payment of the April and May 2013 salaries.[137]

There was a slight delay with the payment of the EUR 360,000 due to the Player but that it had provided assurances with respect to its prompt payment and that two weeks was not sufficient to enable the Player to terminate the Contract with just cause.[138]

Suitable transportation and accommodation was provided to the Player.[139]

The Player was not demoted to the B Team and simply was not called up to the preseason tournament as he had not trained with the team following the death of his father.[140]

At the time of his termination the Player was fully registered with the Saudi league and had received assurances that there would not be a problem with his registration.[141]

The amount of compensation of EUR 1,400,000 due to it in the Decision under Appeal should not be reduced.[142]

Millonarios is jointly severally liable under Article 17.2 of the FIFA Regulations on the Status and Transfer of Players (FIFA RSTP).[143]

Millonarios submitted that:
It considered that the Player had just cause to terminate the Contract.[144]
It was in good faith when it signed the Player.[145]

Due to the International Convention on non-discrimination to workers it could not discriminate against the Player for having a dispute pending.[146]

137. *Id.*, paras. 86-88.
138. *Id.*, paras. 89-90 and 96-97.
139. *Id.*, paras. 98-104.
140. *Id.*, paras. 105-107.
141. *Id.*, paras. 108-111.
142. *Id.*, paras. 112-113.
143. *Id.*, paras. 114-118.
144. *Id.*, para. 119.
145. *Id.*, para. 120.
146. *Id.*, para. 122.

It could not afford the payment of compensation due to its financial difficulties.[147]

The CAS Panel considered the arguments and confirmed that it was the Player who terminated the Contract (which was not disputed) and went on to consider the issues of whether this was with or without just cause (A), the financial consequences of the termination (B) and the position of Millonarios (C).

Was it with or without just cause?

The Panel noted that there is no definition in the FIFA RSTP of what constitutes "just cause", and that it is necessary to refer to Swiss law and in particular Article 337 of the Swiss Code of Obligations (the "CO") which provides that either the employer or the employee may immediately terminate the contract at any stage for just cause and a valid reason is considered to be any existing circumstance under which the terminating party cannot in good faith be expected to continue with the employment relationship.[148] The Panel emphasized that the breach of contract must have a certain degree of seriousness to constitute just cause.[149]

The Panel considered whether, in general, if a large sum of money which was equivalent to over three monthly salaries overdue, would be seen as a ground for "just cause" enabling a player to terminate a contract.[150] Ultimately, the Panel did not reach a clear conclusion on this aspect but expressed concerns that, in the instant case, the Player terminated too soon especially given the assurances from Al Hilal that the amount of EUR 360,000 would be paid "very soon".[151]

The Panel noted that the warning given by the Player on Friday 2 August 2013 was problematic in that it did not provide Al Hilal with much time to make the payment and he did not expressly set out that he would terminate the Contract if the amount was not paid by 6 August 2013.[152] The Panel considered that it was a mistake of the Player to quickly terminate without waiting to see if the amount would be paid very soon.[153]

The Panel considered that this was a "borderline" case and that it needed to determine whether the Player was "pushed" or whether he "jumped".[154]

147. *Id.*, para. 123.
148. *Id.*, para. 137.
149. *Id.*, para. 138.
150. *Id.*, para. 142.
151. *Id.*, paras. 142-146.
152. *Id.*, para. 146.
153. *Id.*, para. 147.
154. *Id.*, para. 151 & 159.

It also held that Al Hilal was not in breach of its obligation to provide suitable housing at the time of termination.[155]

On the Player's registration, the Panel considered that he should have waited longer to see what Al Hilal ultimately did with respect to the registration issues that he identified[156] and regarding his reintegration into the A team.[157]

Ultimately, the Panel held that just cause did not exist for termination at the time when the Player terminated his contract and that "he would have been better advised to wait a little longer to see if the promises and reassurances made by the club materialized or not". The Panel was not convinced that the Player could not "in good faith be expected to continue with the employment relationship" at that moment in time.[158]

Financial consequences of termination:

First, the Panel confirmed that the July salary of EUR 70,000 and the amount of EUR 360,000 that was due to the Player at the date of termination of the Contract remained due and awarded that amount (with interest) to the Player.[159]

Then the Panel calculated the amount of compensation due to Al Hilal for the Player's breach of Contract. As there was no liquidated damages/penalty clause in the Contract, the Panel, as a starting point, took note of the evidence of an offer for the Player of EUR 1,000,000.[160] The Panel then took into account the actions of Al Hilal, noting that the FIFA RSTP is silent on the effect of contributory acts by the party that suffers the termination.[161] The Panel considered that Article 44 CO could fill this lacuna and entitle the panel to reduce the compensation due.[162] The Panel considered that there were also breaches of the Contract by the Club with respect to delayed salary payment, a delay in a paying the EUR 360,000, a failure of Al Hilal to notify the Player about pre-season training, questionable treatment of the Player when he returned to Saudi Arabia in July 2013, including the Panel's impression that his non participation in the preseason tournament was designed to ostracize him and encourage him to leave.[163]

155. *Id.*, para. 148.
156. *Id.*, para. 152.
157. *Id.,* paras. 152-158.
158. *Id.*, para. 159.
159. *Id.,* paras. 161-162.
160. *Id.,* para. 166.
161. *Id.,* para. 168.
162. *Id.*
163. *Id.,* paras. 169-176.

The Panel was of the opinion that Al Hilal's actions were that of a club that no longer wanted a player and was willing to make his life more difficult with a view to forcing him out of the club whilst stopping short of crossing the line to give the Player legal grounds to terminate.[164]

Consequently, the Panel held that the compensation of EUR 1,000,000 ought to be reduced by 60% for the contributory acts of Al Hilal and awarded the club EUR 400,000 in compensation.[165]

Liability of Millonarios:

The Panel noted that the rule on joint and several liability in Article 17.2 of the FIFA RSTP was a "hard" rule and that Millonarios' claimed good faith in signing the Player was not relevant.[166]

Accordingly, it dismissed the appeal of Millonarios which was held jointly and severally liable for the amount of EUR 400,000 due to Al Hilal for the Player's termination without just cause.[167]

Comments:

As the authors of this article represented one of the parties to the arbitration, we will not comment at length on this award.

It may be noted however that this award highlights that it is imperative for a player to take necessary care to ensure that he does not terminate his contract prematurely. It underscores that it is much more prudent to first wait until it becomes clear that a moment has been reached where the player could not in good faith be expected to continue with the employment relationship. The award also sets out that, with the application of Article 44 CO, an amount of compensation can and should be reduced where the evidence suggests that there were acts performed by the club suggesting that it sought to force the player out of the club.

164. *Id.*, para. 178.
165. *Id.*, para. 181.
166. *Id.*, para. 184.
167. *Id.*, para. 185.

III. Conclusion:

The five cases pertaining to the Arab world discussed in this chronicle highlight some important aspects of sports arbitation generally and CAS arbitration in particular.

The case of *FRMF v.CAF* demonstrates how that fallout from high profile international non-sporting happenings such as the 2014 Ebola outbreak can have a significant impact on mega sports events culminating in an arbitation proceeding.

The case of *Kuwait Sporting Club et al. v. FIFA & KFA* also shows the potential for conflict (and ultimately arbitration) when the rules of an international sports governing body places requirements on (national) members which are incompatible with laws introduced in that specifc country.

The cases also provide a compelling example of some of sports arbitation's best competences, i.e. speed and efficiency. The *HRH Prince Hussein v. FIFA* case, even though dealing with an entirely unique fact pattern, showcases how quickly an order on interim measures can be made.

However, it is also important to emphasis that sports arbitation generally and CAS arbitration in particular requires special expertise. Not only do these cases require knowledge of sporting organisation rules and the CAS code, there may also be cases which would require the parties' legal teams to be well versed at times even with Swiss Law. This is extremely relevant in the context of sports arbitration given the unique timeframe within which cases are filed, pleaded and decided.

In CAS arbitrations originating from disputes in the Arab world, one can expect to see all manner of issues being argued and dealt with. Even in the limited context of the five cases discussed above, we have seen political disputes, player employment issues, disciplinary actions against clubs or national sporting organisations, as well as the standard contract termination disputes.

These cases are significant not just for the parties involved, but also for the legal community in that they discuss, develop and uphold crucial legal principles of resolving disputes in sports. It will not be a surprise to envisage seminal decisions being rendered at the new hearing centres in Abu Dhabi or Cairo in the near future.