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A background image showing soccer players on a field. In the center, a player in a black Mexico jersey with number 13 is looking down with his hand on his forehead. To his right, a player in a green Mexico jersey with number 30 is looking forward. Further right, another player in a green Mexico jersey with number 17 is visible. In the background, a player in a red and white Peru jersey with number 18 is visible. A crowd of spectators is in the stands behind them.



FIFA FOOTBALL LAW ANNUAL REVIEW 2023

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Standing to appeal and standing to be sued: current trends in CAS jurisprudence

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Outline

- Some fundamentals
 - CAS case law confirms the relevance of Swiss law
 - CAS case law is not entirely consistent
- Differentiate depending on the kind of decision under appeal
 - Decisions of the Congress – (Bureau of the) Council - Committees
 - Decisions of the Judicial Bodies (vertical disputes)
 - Decisions of the Football Tribunal (horizontal disputes)
- Take home messages



Fundamentals



The relevance of Swiss law

- FIFA regulations are silent on standing
- Swiss law is used by CAS to fill this lacuna ([CAS 2020/A/6694](#))
 - FIFA as an association governed by Swiss law
 - FIFA Statutes and RSTP provide for subsidiary application of Swiss law
 - CAS Code provides for subsidiary application of Swiss law
- Remarkably, Swiss law is used also in cases governed by other laws ([CAS 2020/A/6907](#); [TAS 2020/A/7096](#))



Main principles of Swiss law

- Standing is a substantive issue
 - lack of standing means that the action should be dismissed on the merits
 - res judicata
- **Article 75 of the Swiss Civil Code (CC)** is the starting point of the analysis
 - applies directly only to decisions of the Congress
 - must be adjusted in other situations
 - Swiss associations can adopt rules to regulate standing in situations not directly governed by Article 75 CC



Prof. Haas' summary (CAS 2020/A/6694)

“It is equally uncontested that Article 75 SCC also applies mutatis mutandis to decisions of other organs of an association. However, if an organ other than the general assembly has issued a decision, CAS jurisprudence requires to take a nuanced approach in order to determine what party has standing to be sued. The question must be resolved on the basis of a weighting of the interests of the persons affected by said decision. The question, thus, is who is best suitable to represent and defend the will expressed by the organ of the association. Which entity is best suited to defend the will expressed by the organ of the association will depend on the role assumed by the latter. If the latter acted in an adjudicatory capacity, i.e. by resolving a dispute between other parties (so-called horizontal disputes), standing to be sued will rest with the party that avails itself of the binding effect of the decision. If, on the contrary, the organ of the association assumed an administrative or disciplinary role instead (so-called vertical disputes) and its interests are at stake, then the party having standing to be sued is the association.”



Some procedural issues

- Standing is an issue that the CAS Panel address *ex officio* ([CAS 2017/O/5264, 5265 & 5266](#))
- It is the party claiming that it has a sufficient legal interest in the matter being appealed that has the burden of establishing the existence of such interest
- “*the interest must be present, that is it must exist not only at the time the appeal is made but also when the decision is issued*” ([CAS 2021/A/8329](#))



Decisions of the FIFA Congress, FIFA Council, FIFA Committees and FIFA Administration



Decisions of the FIFA Congress

- Direct and mandatory application of Article 75 CC

“Any member who has not consented to a resolution which infringes the law or the articles of association is entitled by law to challenge such resolution in court within one month of learning thereof”
- **Standing to appeal**
 - Only the Member Association that voted against the decision
- **Standing to be sued**
 - FIFA



Decisions of the FIFA Council

- Analogical application of Article 75 CC ([CAS 2020/A/7356](#))
- **Standing to appeal**
 - The addressee of the decision
 - Any other entities or persons that are affected in their membership rights
- **Standing to be sued**
 - FIFA



Appointment of a normalization committee

- **Standing to appeal:**
 - The relevant member association ([CAS 2018/A/5560&5650](#))
 - but: who will exercise the right to sue of the “normalized member association”?
 - The affected persons and entities within the member association ([TAS 2021/A/7637](#) & [TAS 2021/A/7656](#))
- **Standing to be sued:**
 - FIFA



Decisions regarding change of nationality

- **Standing to appeal:**
 - The Player and the new association if the change is denied
 - The previous association if the change is allowed
- **Standing to be sued:**
 - Both FIFA and the previous association if the change is allowed ([TAS 2020/A/7444](#))
 - Both FIFA and the new association if the change is denied



Decisions of the Judicial Bodies

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FIFA Appeal Committee



Disciplinary decisions – in general

- **Standing to appeal:**

- CAS case law considers that in the absence of a specific rule, [Article 62.1 FDC](#) shall be applied by analogy to determine the standing to appeal to CAS ([CAS 2008/A/1658](#)):

“Anyone who has been a party to the proceedings before the Disciplinary Committee may lodge an appeal with the Appeal Committee, provided this party has a legally protected interest in filing the appeal.”

- In practice CAS extends also to non-parties provided they have a particular interest in having the decision set aside – flexibility and lack of consistency

- **Standing to be sued:**

- Always FIFA (and not the body that took the decision - [CAS 2020/A/6907](#))
- Also the addressee of the decision in case of appeal by a non-party



Special regime for clubs and national associations

- **Article 62.2 FDC:** “Associations and clubs may appeal against decisions sanctioning their players, officials or members”
- **TAS 2021/A/7650:** standing to appeal extended by the regulations (“*legitimación activa estatutaria*”)
 - No issue when the sanctioned Player would have a legitimate interest to appeal
 - When the Player has served the ban, the Club might still have a “reputational interest” in having the Player’s sanction set aside



Article 15 FDC Decisions

- Decisions against debtors that failed to respect FIFA/CAS pecuniary decisions
 - Disciplinary in nature but aimed at enforcing a decision in an “horizontal dispute”
- The Player who instigated the FIFA disciplinary proceedings has **standing to appeal** even if he or she was not a party ([CAS 2020/A/6713](#))
- Corollary **concerning standing to be sued**: the Player must direct the appeal against both FIFA and the non-compliant Club ([CAS 2020/ A/6922](#))
 - In case of sporting succession the “previous club” does not have standing to be sued ([CAS 2020/A/7537](#))



Whistleblower – ‘dénonciateur’

- [Article 55\(2\) FDC](#): “Any person or body may report any conduct that is considered incompatible with FIFA regulations to the FIFA judicial bodies”.
- As a matter of principle no **standing to appeal** as the unhappy reporting person is not a party ([CAS 2018/A/5746](#))
- However, CAS is prepared to accept standing provided that the whistleblower prove “*how the potential sanctions required against the [addressee of the decision] could have, in any way, altered their sphere of rights and interests*” ([CAS 2020/A/6921&7297](#))
 - Confirmed by the Swiss Federal Supreme Court ([4A_564/2021](#))



Standing of the Victim

- CAS/2015/A/3874: *“Without such a right, the mere fact that an individual is a victim does not as such establish a standing to appeal a sanction imposed on the offender. Such an interpretation would have far-reaching consequences and could lead to the possibility of appeals from a potentially very large group of persons. Under such an interpretation, for instance, any player - who is injured by a dangerous tackle or is bitten by another player - would be able to appeal if he were unhappy with the sanction imposed on the offender”*
- As they are affected by the conduct and not the decisions, victims have **standing to appeal** only if so provided by the applicable rules



Victim of “Discrimination”

- An example of situation where the applicable regulations extend the standing to appeal to the victim (even if only indirectly affected)

- **Article 15.4 FDC**

“Persons who are bound by this Code and have been the victim of potential discriminatory behaviour [...] will have the right to request the motivated decision in proceedings before the judicial bodies, as well as to lodge an appeal [...]”

- Possibly a new “trend” – in cases of sexual harassment



FIFA Anti-Doping Decisions

- **Standing to appeal** set out by the applicable regulations ([Article 77 of the FIFA Anti-Doping Regulations](#)):
 - The player
 - The NADO of the player's residence/nationality/affiliation
 - WADA
 - The “competitors” (for instance the rival clubs) do not have standing to appeal
- **Standing to be sued** ([CAS 2018/A/5546](#))
 - FIFA, if the appeal is brought by the player
 - FIFA and the player if the appeal is brought by WADA and/or the Player's NADO



Decisions of the Football Tribunal



The so-called “horizontal disputes”

- FIFA is not a party to the first-instance proceeding and solely acted in its role as the competent deciding body
 - Example – [Article 17\(1\) RSTP](#) disputes – compensation in case of breach of contract
- **Standing to appeal:**
 - Only the parties to the FIFA proceedings (here the club cannot act for the player)
- **Standing to be sued:**
 - The other party(ies) in the FIFA proceedings
 - Can be cured if the other party accepts to participate in the arbitration ([CAS 2019/A/6524](#))
 - FIFA does not have standing to be sued ([CAS 2018/A/6044](#))
 - FIFA can ask to participate if the case concerns issues of principle



Jurisdictional issues in “horizontal disputes”

- No need to name FIFA as a respondent either [CAS 2015/A/3896](#)
- [CAS 2020/A/7144](#): “*such a situation does not differ from the situation in which a civil court, under the national laws and potentially international laws and directives such as the Lugano Convention and Brussels I Regulation, assesses its own jurisdiction.*”
- [CAS 2020/A/6748](#): FIFA can always intervene if it believes that there is a jurisdictional issue of principle
- [CAS 2019/A/6452](#): The Appellant “*had of course the right to include FIFA, the body that issued the Appealed Decision, in the list of Respondents*”



“Horizontal disputes” with “vertical” aspects

- RSTP cases concerning compensation and sporting sanctions
 - The player if termination during the protected period ([Article 17\(3\) RSTP](#))
 - The new club in case of inducement to breach ([Article 17\(4\) RSTP](#))
 - The club or the player if they do not pay within the set time limit ([Article 24 RSTP](#))
- **Standing to appeal** the sanctions:
 - The sanctioned player or club
 - Not the old club ([CAS 2019/A/6539](#)) – same rationale as “victim”
- **Standing to be sued** with respect to the sporting sanctions:
 - FIFA ([CAS 2020/A/6694](#) concerning Article 24 RSTP)
 - If FIFA is not named as a respondent, the sanction stands
 - Unless the basis for the sanction falls apart ([CAS 2019/A/6646](#) – here: the club did pay)



Issuance of the ITC

- Disputes concerning the issuance of the International Transfer Certificate (ITC) are between national associations but administrative in nature
- **Standing to appeal:** the aggrieved national association
 - The old club does not have standing to appeal the decision to issue the ITC ([CAS 2020/A/7468](#))
 - Similarly, the new club does not have standing to appeal the decision not to issue the ITC
- **Standing to be sued:** FIFA and the other national association



Final Remarks



Take home message for FIFA

- Swiss law allows associations to regulate standing to appeal against their decisions
 - FIFA Anti-Doping Regulations
 - Victims of discriminatory conduct
- Could be used more comprehensively
 - In particular for the kind of decisions where FIFA does not wish to have standing to be sued
 - Would avoid ancillary disputes and ensure consistency



Take home message for the appellants

- Be prepared to prove the legitimate interest in appealing, in particular if not a party in the FIFA proceedings
- Make sure to name all the potentially affected third parties even if they were not a party in the FIFA proceedings
- Always name FIFA as a respondent to be on the safe side



thank you

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