

Principal FIFA DRC & CAS rulings 2012–2013

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Georgi Gradev
Sport Counsel
GRADEV SPORTS LTD.

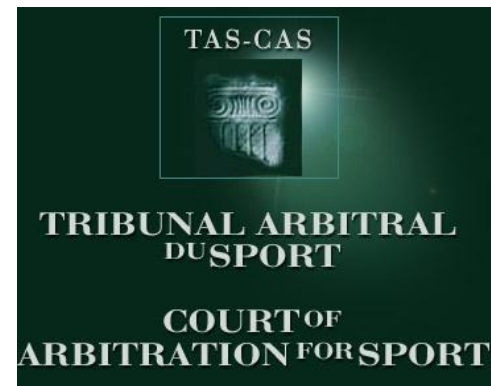
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STRUCTURE OF THE PRESENTATION

I. FIFA Dispute Resolution Chamber jurisprudence



II. Court of Arbitration for Sport (CAS) jurisprudence



I. FIFA DRC decisions

FIFA is competent to hear the following disputes (cf. Article 24 par. 1 in conjunction with Article 22 lit. a), b), d) and e) FIFA RSTP):

- Labour Disputes
- Training Compensation
- Solidarity Contribution

DRC No. 8122047 of 17.08.2012

- ▶ 27.09.2009 – Player and Club sign a contract
- ▶ 16.10.2009 – Player fined about half a salary for late return after international duty (not contested by Player)
- ▶ 21.12.2009 & 11.01.2010 – Player puts Club on notice for 3 salaries, setting a final deadline until 18.01.2010
- ▶ 18.01.2010 – Club unilaterally terminates contract & fines Player for his absence between 26.12.2009 & 07.01.2010
- ▶ 25.01.2010 – Player turns to FIFA
- ▶ Club admits debt only partially & claims a set-off of its debt against the two fines imposed on Player

DRC No. 8122047 of 17.08.2012

- ▶ **FIFA:** *“if there are more lenient measures which can be taken in order for an employer to assure the employee’s fulfilment of his contractual duties, such measures must be taken before terminating an employment contract. A premature termination of an employment contract can always only be an ultima ratio”*

DRC No. 8122047 of 17.08.2012

- ▶ A fine equalling almost 2 monthly salaries for a few days absence from work is disproportionate and shall be disregarded by FIFA
- ▶ **Notwithstanding the above, “*the Chamber wished to point out that the imposition of a fine, or any other available financial sanction in general, shall not be used by clubs as a means to set off outstanding financial obligations towards players*”**
- ▶ Moreover, Club was already in breach of contract at the time Player was absent from Club
- ▶ Club had no just cause to unilaterally terminate the contract on 18.01.2010

DRC No. 8122047 of 17.08.2012

- ▶ **As the first fine entailed on Player was undisputed and proportionate, it shall be deducted from the outstanding salaries** (cf. CAS 2010/O/2132: A set-off by the Club of a **part** of the salary with the Club's claim against the Player because of the breach of a contractual clause is **valid**, unless it violates the limits permitted by Swiss law, in particular those set out in Article 323b para. 2 of the Swiss CO)
- ▶ Compensation => Player's obligation to mitigate the damages: Player's early termination of his new contract by mutual consent cannot be held against Club => the entire value of the new contract shall count
- ▶ Claim for moral damages denied for lack of legal basis

Nicky Hofs & Vitesse–Arnhem v AEL Limassol

DRC No. 3121241 of 17.08.2012

- ▶ 17.06.2010 – Player and Club sign a contract and an appendix to it, both valid until 31.05.2012
- ▶ Both the Contract and the Appendix entitled Club to unilaterally terminate Player if the latter does not perform his duties, subject to a prior written notice
- ▶ 20.04.2011 – Club terminates contract with immediate effect after allegedly sending a final warning & fining Player for the 3rd time with €3,000
- ▶ 05.05.2011 – Player claims to FIFA that the termination is unjustified & asks for outstanding payments and compensation for breach of contract by Club
- ▶ In particular, Player submits that “*he was never warned, suspended or fined*”

Nicky Hofs & Vitesse–Arnhem v AEL Limassol

DRC No. 3121241 of 17.08.2012

- ▶ Club contests FIFA jurisdiction based on *lis pendens*, because Club had allegedly filed a lawsuit against Player to a civil court, on 15.06.2011
- ▶ Club refers to **FIFA Manual Players' Status and Disciplinary Matters**, which apparently indicates: *"Basically, every player and club can lodge a claim before an ordinary court in disputes relating to employment rights. If a party lodges a claim before an ordinary court, FIFA's legal bodies will cease to deal with the case"*
- ▶ Player replies he is unaware of any court proceedings & both the Contract & the Appendix stipulate that the FIFA DRC is competent

Nicky Hofs & Vitesse–Arnhem v AEL Limassol
DRC No. 3121241 of 17.08.2012

- ▶ **FIFA:** *“Recourse to arbitration is considered a basic principle despite the exception contained in art. 22 of the Regulations, which allows players and clubs to seek redress before a civil court”*

Nicky Hofs & Vitesse–Arnhem v AEL Limassol

DRC No. 3121241 of 17.08.2012

- ▶ Club failed to prove that Player was duly informed of any pending proceedings in front of a civil court
- ▶ The alleged court proceedings were instigated after the commencement of the proceedings at FIFA
- ▶ The litigious labour contract contained a clear choice of jurisdiction in favour of FIFA
- ▶ The DRC and its role should be considered within the entire system, which includes the CAS as a body of appeal, which is an arbitration tribunal
- ▶ FIFA Manuals do not constitute Regulations
- ▶ FIFA is competent to hear the dispute

Nicky Hofs & Vitesse–Arnhem v AEL Limassol

DRC No. 3121241 of 17.08.2012

- ▶ Club did not prove compliance with the prerequisites for a premature contractual termination, as agreed upon in the Contract; in particular, Club failed to prove sending of any warning to Player before termination
- ▶ *“A premature termination of an employment contract can always only be used as ultima ratio”*
- ▶ Club breached the Contract without just cause
- ▶ Player was awarded all outstanding amounts & compensation for breach of contract, in accordance with Article 17 par. 1 FIFA RSTP

Solidarity Contribution

Some Basic Principles

1. The solidarity mechanism established in the FIFA RSTP cannot be derogated by a contract. A net of solidarity payment clause is not accepted by FIFA (cf. DRC No. 3112691 of 11.03.2011)
2. With respect to national transfers, there is no obligation to pay solidarity contribution to non-members of an association based on the FIFA RSTP or the National FA RSTP (cf. DRC No. 2121218 of 01.02.2012 & No. 4121300 of 26.04.2012)
3. In case of players' exchange, where no transfer fee is stipulated, solidarity contribution is payable and due (cf. DRC No. 812019 of 17.08.2012)

Training Compensation

Early Completion of a Player's Training Period

- ▶ Indications for early completion of a player's training period:
 - Number of matches played domestically
 - European cups appearances (starter or substitute)
 - Status of the training club (big or modest)
 - National team appearances (incl. youth teams)
 - Existence of a professional contract with the training club & salary level
 - Any transfer/loan fee paid for the player
 - Other particularities (e.g., team captain, position on the field, number of scored goals, player's importance for the team, etc.)

CAS 2012/A/2847 Hammarby Fotboll AB v. Besiktas
Futbol Yatirimlari Sanayi ve Ticaret A.S,
award of 22.03.2013

- ▶ 18.06.2009 – Hammarby and Besiktas sign a Transfer Agreement for the Player, Erkan Zergin, for the transfer fee of €300,000, payable on 2 instalments of €150,000 each by 30.06.2009 and 12.10.2009
- ▶ Penalty clause: *“If the second instalment of EUR 150,000 has not been paid on 12 October 2009 at the latest, Besiktas shall be subject to pay a penalty fee of EUR 100,000”*
- ▶ The 1st instalment paid on time, the 2nd – not

CAS 2012/A/2847

- ▶ Hammarby turns to FIFA
- ▶ As a result, Besiktas pays the 2nd instalment, deducting the due solidarity contribution
- ▶ Nevertheless, Hammarby insists on the penalty
- ▶ **FIFA:** *“the penalty clause was clearly disproportional [...], as an alternative and in accordance with the longlasting practice of the Players’ Status Committee, [Besiktas] has to pay 5% default interest over the amount paid late”*

CAS 2012/A/2847

- ▶ **CAS:** Article 160 *et seq.* Swiss CO apply
- ▶ “*Since the possibility of a reduction affects the contractual freedom of the parties, it may only be applied with reservation*” (*pacta sunt servanda*)
- ▶ The Panel considered the following criteria:
 1. The main criterion: the creditor’s interest
 2. The severity of the breach
 3. Besiktas' fault and the intentional failure to execute the main obligation
 4. The business experience of the Parties
 5. Besiktas' financial situation
- ▶ CAS decided that “*the apparent disproportion in value of a penalty is not of itself sufficient to trigger the application of the reduction of the Penalty Fee according to Article 163(3) CO*” and, consequently, Besiktas must pay the agreed upon penalty to Hammarby, increased with interest of 5% per year as from 18.04.2010

CAS 2012/A/2754 UC Sampdoria v. Club San Lorenzo de Almagro & FIFA, award of 25.07.2012

- ▶ 19.07.2002 – the Argentinian court approves a reorganisation plan for San Lorenzo, which is under administration ever since
- ▶ 11.08.2009 – Parties sign a Transfer Agreement for the Player, Jonathan Pablo Bottinelli, who moves from Sampdoria to San Lorenzo
- ▶ Transfer fee of €1.4m, payable on 5 instalments
- ▶ Penalty clause: *“The failure to execute timely on any of the above obligations will entitle Sampdoria to claim a penalty of EUR 600,000 to be paid within 20 days of the due date”*

CAS 2012/A/2754

- ▶ 19.07.2010 – having received only the first instalment, Sampdoria turns to FIFA with a claim for all instalments plus liquidated damages
- ▶ 01.03.2012 – **FIFA** replies that San Lorenzo is under administration and hence, FIFA is not competent, closing the proceedings. The FIFA's letter is issued by the FIFA general secretariat & is signed by the Director of Legal Affairs & by the Head of Players' Status & Governance
- ▶ 16.03.2012 – Sampdoria appeals against FIFA's letter to CAS

CAS 2012/A/2754

- ▶ **CAS:** FIFA's letter is an appealable decision, as FIFA closed the case and refused to render a decision, affecting thus Sampdoria's legal situation
- ▶ Because of "*the need for an efficient administration of justice*", CAS has jurisdiction to decide on the merits and shall not refer the case back to FIFA
- ▶ FIFA has to distinguish between the question of the recognition of the existence of a debt & the question of the enforcement of a payment obligation based on a debt
- ▶ Such distinction is consistent with the FIFA RSTP and the FIFA Procedural Rules, in which there is no clause such as Article 107 FDC

CAS 2012/A/2754

- ▶ CAS specified that the question of possible interferences of FIFA's decision(s) with the sorting out of local procedure(s), and notably a possible continuation plan of the club's activity, will only be at stake when it comes to execute the decision taken at the level of PSC/DRC
- ▶ In other words, according to CAS, the fact that a club is going through insolvency/bankruptcy proceedings should not prevent PSC or DRC to pass a decision as to the merits of a claim lodged against that club
- ▶ Panel determined that the penalty of €600,000 is compatible with the freedom of contract and complies with Article 160 *et seq.* Swiss CO
- ▶ CAS decided that San Lorenzo must pay the outstanding instalments as well as the agreed upon penalty to Sampdoria, increased with interest of 5% per year

Thank you!

Спасибо!

Contact:

Georgi Gradev

GRADEV SPORTS EOOD

M: +359 888 40 70 34

Email: agency@gradev.com

www.gradev.com