Fairness and Football: is CAS actually ready for its new challenges?

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The overshooting FIFA's regulatory passion and the new scenario for its application

The major role FIFA plays in football is due to the pyramid structure of football and as for that structure, sports associations usually have practical monopolies in a given sport and may thus normally be considered in a dominant position in the market of the organization of sports events under Article 102 TFEU.

Thereby, as a result of the autonomy of sports organizations and the "*specificity*" of sports, sports organizations have a certain margin to make up rules and regulations.

But the objectives of FIFA, established in Article 2 of its Statues (to improve the game of football and to organize its own international competitions), have become greatly exceeded by the content of its Regulations.

In fact, in the last decade FIFA has been going beyond the scope of its real objectives, and has been increasing the number of regulations where topics very far from football or the competition itself are being included under FIFA's control and its punitive system.

This overwhelming regulatory tendency clearly assigns to FIFA (and UEFA) an increasing political role, impacting on topics which are not directly linked with the game but only have a minor or indirect connection with football, removing them from the autonomy of the civil society or the individual freedom.

With a deeper invasion of civil or commercial matters, the number of problems and frictions arising with national legal systems and European Law increases.

In this sense, by way of example, we can mention the Third Party Ownership (TPO) ban, the minors' regulations, the UEFA Financial Fair Play (FFP) Regulations, the new FIFA regulations for intermediaries and the "*homegrown*" players rule. Let's take a quick look at these matters, as it would help us to contextualize the new challenges for fairness in football.

TPO

In December 2014, FIFA decided to ban TPO use in football as of 1 May 2015 (Article 18ter of the Regulations on the Status and Transfer of Players - RSTP). It is obvious that this ban seriously threatens club's entrepreneurial freedom.

The Spanish and Portuguese Leagues swiftly lodged a complaint with the European Commission, arguing that this ban infringes EU competition rules and regulations on free movement of labour and capital.

The legal battle surrounding TPO will be focused on whether or not it can be proved that:

1. The ban is in pursuit of a legitimate objective to protect the interests of not just the players and clubs, but also the sport in general; and
2. The ban unfairly restricts trade between football clubs (and mainly the less wealthy ones) in the Member States, by preventing them from entering into negotiations for players they could not have afforded without the assistance of TPO, as they could share the cost with an investor.

Therefore the argument is that this ban will harm the clubs who have become reliant on TPO and distort competition between clubs therefore infringing Article 101 TFEU.

There is also an argument that the ban infringes Article 102 TFEU, which is intended to prevent a dominant position in the market being abused. The ruling in the *Piau* case determined that FIFA holds a collective dominant position in the market. The European Commission will have to determine whether the ban amounts to an abuse of this position. The ban has the potential to put smaller clubs at a competitive disadvantage to those larger clubs, which it could be argued, amounts to such an abuse.

Going into the issue in depth entails analysis of whether proper regulation of the TPO practice would be preferable to a complete ban. Measures suggested to tackle the possible risks associated with TPO include imposing a requirement for complete transparency (both about the investors involved and the TPO arrangements), a cap on the amount invested or on the remuneration for the investor; and prohibiting clauses jeopardising clubs' independence and autonomy in decision-making.

Protection of minors

Article 19 RSTP provides that international transfers of players are only permitted if the player is over the age of 18.

Three exceptions to this rule apply. First, if the player's parents move to the country in which the new club is located for reasons not linked to football. Second, the transfer takes place within the territory of the EU or EEA and the player is aged between 16 and 18, subject to the new club fulfilling a number of minimum obligations including the provision of education, training and accommodation. Third, the player lives no further than 50 km from a national border and the club for which the player wishes to be registered in the neighbouring Association is also within 50 km of that border. The maximum distance between the player's domicile and the club's quarters shall be 100 km.

The conditions of Article 19 RSTP also apply to any player who has never previously been registered with a club and is not a national of the country in which he wishes to be registered for the first time. In a 2009 amendment to the regulations, a subcommittee appointed by the Players' Status Committee is in charge of the examination and the approval of every international transfer of a minor player, and every first registration of a minor player who is not a national of the country in which he wishes to be registered for the first time.

However, the Convention on the Rights of the Child[1], states in Article 18.1 that: "*States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.*"

Further, Article 31 establishes that "*States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural,*

[1] Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with Article 49

artistic, recreational and leisure activity."

On the other hand, Article 19.1 put the limits to the parents responsibility: "*States Parties shall take oll appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*"

Nevertheless, FIFA assumed this role, invading the parents' responsibility, deleting their right of choice regarding their children's education and integral development, even if there is no trace of abuse or exploitation.

It also introduced a discriminatory system where foreigner minors whose family has a valid residence permit shall comply with requirements and are subject to limits inexistent for national minors.

New intermediaries' regulation

On 1 April 2015, the new FIFA Regulations on Working with Intermediaries came into force. These Regulations introduced a number of changes as regards the division of competences between FIFA and its members, the national associations.

In this case, FIFA chose the easy way out and placed all agents outside the sphere of FIFA's responsibility, provoking, as an immediate effect, the lack of a forum for deciding on international disputes.
Nevertheless, the new system has increased the frictions with EU Law because FIFA allows national associations to create rules that go beyond their own regulations[2], but imposing to all of them a registration system.

According to the new FIFA Regulations, "*Intermediaries must be registered in the relevant registration system every time they are individually involved in a specific transaction.*" Therefore, in principle, intermediaries have to be registered with the association where they carry out their activities from time to time, irrespective of the fact that they have already been registered in the association of their own country or in any other association.

This new system clearly infringes the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, especially when establishing in Article 16.2, b) that "*member States may not restrict the freedom to provide services in the case of a provider established in another Member State by imposing*", inter alia, "*an obligotion on the provider to obtain an authorisation from their competent authorities including entry in a register or registration with a professional body or association in their territory, except where provided for in this Directive or other instruments of Community law.*"

The current situation is a severe blow for the free movement of services (perhaps the most cross-border) in the EU and it throws back European integration for more than half a century.

Additionally, a particularly interesting issue from an EU competition law perspective is the amended Article 7 of the Regulations. Under paragraph 3, which regulates the rules on payments to intermediaries, it is recommended that the total amount of remuneration per transaction due to intermediaries either being engaged to act on a player's or club's behalf should not exceed 3% of the player's basic gross income for the entire duration of the relevant employment contract. In the case of transactions due to intermediaries who have been engaged to act on a club's behalf in order to conclude a transfer agreement, the total amount of remuneration is recommended to not exceed 3% of the eventual transfer fee paid in relation to the relevant transfer of the player.

Article 101(1) (a) TFEU lists "*directly or indirectly fix purchase or selling prices*" as an object by an agreement that constitutes a restriction on

[2] As a consequence, the requirements for registration differ per country. In Italy foreign intermediaries cannot be registered with the FIGC, since one of the pre-requisites for such a registration is to be legally resident. Add to this aspect the fact that every country charges a sum for registration between EUR 450 and EUR 1000 and the pressure of the transfer window, which only allows actual "*business*" to take place in pre-determined periods of time.
There is a large inconsistency in the recommendation for the remuneration. France maximizes the fee that agents are allowed to charge on the basis of the gross annual salary of the worker on 10%, The Netherlands and Germany do not include any recommendation, England uses the 3% FIFA basis, Portugal 5%, etc.
Every national member state has its own system of sanctioning agents. Sanctions are based on different regulatory frameworks, so no uniform system exists. FIFA must be informed about a sanction on an agent and FIFA may then decide to apply this sanction on a worldwide level.
Some countries (England, Netherlands, Portugal, Italy, to name some) allow agents to register only once per year, instead of registering for every individual transaction.

competition. Further, the Commission has continuously interpreted recommended pricing as falling under the category of price fixing in the sense of Article 101 TFEU.[3]

Financial Fair Play

Financial fair play (FFP) was approved in 2010 and the first assessments kicked off in 2011. Since then clubs that have qualified for UEFA competitions have to prove they do not have overdue payables towards other clubs, their players and social/tax authorities throughout the season. In other words, they have to prove they have paid their bills.

Since 2013, clubs have also been assessed against break-even requirements, which require clubs to balance their spending with their revenues and restricts clubs from accumulating debt.

In May 2013, *Daniel STRIANI*, a Belgian football agent licensed by the Royal Belgian Football Association, lodged a complaint with the European Commission against UEFA. He requested the Commission to launch an investigation into the break-even requirement contained in Articles 58 to 63 of the FFP. According to Mr *STRIANI*, the break-even requirement infringes the European antitrust rules (Article 101 and 102 TFEU) and the free movement rules.

Following refusal from the European Commission, Mr *STRIANI* filed a suit before Belgian courts.[4]

Daniel STRIANI essentially argues that the FFP break-even rule, by reducing the number of transfers, the level of the transfer fees and the players' salaries, has a deflationary effect on the revenue of players' agents. Since agents are thus only indirectly affected, substantial changes were made to the original claim to buttress the legitimate interest of the original claimant.

Albeit having established that only the Swiss courts are competent as to the substance of the dispute, the Brussels Court decided to grant Mr *STRIANI* the requested provisional measure, namely blocking UEFA from implementing the next phase of the FFP implementation (*i.e.* the reduction of the so-called "*acceptable deviation*" from EUR 45 million to 30 million).

However, UEFA decided to appeal the judgment, both the provisional measure and the preliminary reference are suspended. Hence, UEFA can proceed with the next phase of implementation of the FFP as planned.

"Homegrown players rule"

In 2005, UEFA agreed on the introduction of a so-called homegrown-rule. This rule states that squad lists for UEFA club competitions will continue to be limited to 25 players for the main "A" list. From season 2006/2007, the final four places were reserved exclusively for "*locally trained players*". A locally trained player is either a "*club trained player*" or an "*association trained player*". In the following two seasons, one additional place for a club trained player and one additional place for an association trained player was reserved on the "A" list with the final number of four club trained and four association trained players in place for the 2009/2010 season.

UEFA's homegrown player rule stipulates that in matches organized by UEFA, football clubs must have at least eight 'locally trained players' in their squad lists. In order to qualify as a "*locally trained player*" in a certain country, the player must have played three entire seasons or 36 months in that country while he is between the age of 15 and 21.

The question is whether UEFA's homegrown player rule is fully in conformity with European Union Law.

All these controversial points in FIFA and UEFA Regulations leads us to question whether the Court of Arbitration for Sport (CAS) is in the best position to analyze and decide the validity of these regulations when applying its mots debatable provisions.

[3] Belgian Architects' Association [2005] OJ L4/10 par. 3 and 4; Case COMP/37.975 PO/Yamaha [2003] par. 141

[4] A number of other claimants later joined the same proceeding. The Brussels Court admitted the voluntary intervention of: (1) Dejan Mitrovic, a players' agent domiciled in Belgium but licensed by the Serbian Football Association; (2) RFC Sérésien, a Belgian second division football club (now competing as Seraing United); and (3) a total of 53 football fans (*i.e.* supporters of Paris Saint-Germain and Manchester City) domiciled in France and the United Kingdom.

The fairness and its procedural requirements: significant wake-up call up from the PECHSTEIN *case*

In public international law, two essential aspects of fairness are emphasized: the substantive aspect of distributive justice and the procedural aspect of right process.

Concerning procedural fairness, a CAS award[5] made it clear that *"the principle of procedural fairness is surely among the unwritten principles of sports law to be complied with by international federations."*

As a matter of due process or natural justice, we can identify two basic rules: the rule against bias and the right to a fair hearing. In turn, the right to a fair hearing can be seen to involve seven requirements: prior to the notice of a decision, consultation and written representation, adequate notice of applicable sanctions, an oral hearing, a right to call and cross-examine witnesses, an opportunity for legal representation and a reasoned decision.

Currently, no one can doubt about the benefits of arbitration (as opposed to the Court system) in resolving sporting disputes. The specialized expertise of sports arbitrators, the speed, confidentiality and relative cost efficiency with which arbitral panels can deliver decisions are all attractive in an industry that requires disputes to be decided quickly and at short notice.

Thus, CAS gained the confidence of most sports bodies as a consistent forum for the resolution of disputes. Unsurprisingly, most sports have now adopted the CAS as the final appellate forum.

Nevertheless, it has always been paradoxical that CAS never applied to itself the test of independency for arbitral bodies which repeatedly has demanded from other bodies.

For instance, in CAS 2012/A/2983[6], the Panel noted that *"the principle of equal representation of players and clubs is a fundamental principle of Article 22 of the FIFA RSTP and also according to FIFA Circular Letter 1010 communicated to all national federations. This principle implies, among other effects, that the parties to a case must have equal influence over the appointment of arbitrators."*

But does CAS observe this principle in its own composition?

The *PECHSTEIN* case has definitively opened a gap for discussion and concern about the independency of CAS.

As it is well known, dissatisfied with the CAS and Swiss Federal Tribunal's decisions, Ms. *PECHSTEIN* issued a damages claim for EUR 4 million in her local German Regional Court in Munich (*Landesgericht*), alongside a complaint to the European Court of Human Rights.

Subsequently Ms. *PECHSTEIN* appealed to the Higher Regional Court of Munich (*Oberlandesgericht*). On 15 January 2015, overturning the decision of the *Landesgericht*, it held that:

(i) The arbitration agreement between Ms. *PECHSTEIN* and the International Skating Union (ISU) was invalid as it was contrary to mandatory German anti-trust law. Namely, the ISU's insistence upon the agreement to arbitrate as a precondition of competing constituted an abuse of a dominant position. In fact, it acknowledges that an arbitration clause imposed by a sports governing body does not constitute *per se* an antitrust violation. To the contrary, the Court clearly states that there are good reasons (for example the uniform application of anti-doping regulations) to subject the resolution of sporting disputes between athletes and sports governing bodies to a unique world court for sport. In the eyes of the German Court, the problem lies with CAS and its institutional set-up. This was on the basis that the constitution of the International Council for Arbitration in Sport (ICAS) that selected the closed list of arbitrators and also appointed the President of the Appeals Arbitration Division, who in turn was responsible for appointing the chair for each CAS panel, was contrary to German anti-trust law.

[5] AEK Athens & SK Slavia Prague v. Union of European Football Associations (UEFA), CAS 98/200, at 158

[6] ARIS Football Club v. Márcio Amoroso dos Santos & Fédération Internationale de Football Association (FIFA)

ICAS comprises 20 members, of which 12 were nominated by the International Olympic Committee, and only 1/5 were nominated with the athletes' interests in mind;

(ii) Accordingly, the CAS decision (which was mandated by the invalid arbitration agreement) was unlawful; and

(iii) The *Oberlandesgericht* considered that the breach of anti-trust law was contrary to public policy, and pursuant to the exclusion contained within Article V(2)(b) of the New York Convention, the CAS decision was not binding.

This decision might also be constructed as an abuse of a dominant position in the sense of Article 102 TFEU and could gain validity in the European Union as a whole.[7]

ISU announced on 9 July 2015 that it had filed an appeal against the *Oberlandesgericht*'s decision to the German Federal Court of Justice (*Bundesgerichtshof*). On 14 July 2015, FIFPro, the football players' federation, announced that it will financially support Ms. *PECHSTEIN* in the defence of the ISU's appeal, which is now pending. Germany's highest civil court has postponed a verdict until 7 June 2016.

"Every athlete as a citizen ond worker has the right to a fair process and to be judged in an independent and impartial court. The decisions of the regional courts in Germany in Claudia PECHSTEIN*'s case have confirmed that this right wos nat duly granted by CAS at the time of her anti-doping cose. FIFPro is firmly of the view that also today CAS does not provide footballers and other athletes with a structure and process thot is fair to the athletes. Even after CAS' structural reform, the composition of ICAS, the appointment of arbitrators and chairmen do not provide athletes with equal representotion of orbitrotors and independence of the tribunal."*

This idea should be easily applicable to professional football clubs when questioning the validity of certain provisions of FIFA or UEFA regulations.

>> The true issues to be addresses in relation to independence arise from the composition of the ICAS, the identity and role of the President of the CAS Appeals Division and the closed list of arbitrators

In response to the *PECHSTEIN* ruling, the CAS issued a press release [8] claiming *"that the findings of the Munich Appeals Court are based on the CAS rules and organization in force in 2009, when* Claudia PECHSTEIN *appealed before CAS, and do not take into account the changes leading to the current organization, with amended procedural rules regarding the nomination of arbitrators, development of the legal aid program and the oppointment of new ICAS Members not active in or connected to sports-bodies."*

Thus, CAS suggests that the decision would have been different if they had taken into account the current rules. However, the Munich Appeals Court reasoning as to the CAS's lack of independence was based on various features of CAS procedure that are still in place today.

The true issues to be addressed in relation to independence arise from the composition of the ICAS, the identity and role of the President of the CAS Appeals Division and the closed list of arbitrators.[9]

The composition of ICAS

The ICAS is the body in charge of taking the most significant institutional decisions in the life of the CAS. It decides, in particular, who gets to be a CAS arbitrator, who gets to be the president of the CAS appeal division, and who gets to be the secretary general of the CAS. It also rules on challenges to the independence of arbitrators. Thus, the ICAS decides all the main institutional matters which have a decisive influence on the

[7] *"The* PECHSTEIN *ruling of the Oberlondesgericht München - Time for a new reform of CAS?" Antoine* DUVAL, Asser International Sports Law Blog. 19 January 201

[8] Lausanne, 27 March 2015

[9] *"The Court of Arbitration for Sport after* PECHSTEIN*: Reform or Revolution?" Antoine* DUVAL, Asser International Sports Law Blog

broader legal orientations of the CAS and its jurisprudence.

According to Article S4 CAS Code: "*ICAS is composed of twenty members, experienced jurists appointed in the following manner:*

1. Four members are appointed by the International Federations (IFs), viz. three by the Association of Summer Olympic IFs (ASOIF) ond one by the Association of the Winter Olympic IFs (AIOWF), chosen from within or outside their membership;
2. Four members are oppointed by the Association of the Nationol Olympic Committees (ANOC), chosen from within or outside its membership;
3. Four members are appointed by the Internotional Olympic Committee (IOC), chosen from within or outside its membership;
4. Four members are appointed by the twelve members of ICAS listed above, after appropriate consultotion with a view to safeguarding the interests of the athletes;
5. Four members are appointed by the sixteen members of ICAS listed above, chosen from among personalities independent of the bodies designating the other members of the ICAS."

As a consequence, three fifths of its current members are selected by the sport governing bodies, and that group, in turn, selects the remaining two fifths of the members.

It is expected that the sport governing bodies would pick members who share their views on the application of their rules and, more broadly, their mindset in relation to the management of sports. Thus, many ICAS members have had (or still have) a career inside national and international sport governing body, and several among them have acted as legal advisors to them.

Independence of the President of the Appeals Division

In *PECHSTEIN*, the Munich Appeals Court was particularly concerned about the way in which the president of each appeal panel is selected.

According to Article R54 of the CAS Code, the president of the Appeals Division decides who is to be the president of a specific appeal panel. He or she will consult the arbitrators nominated by the parties, but their suggestions are not binding. In fact, especially when they disagree, the Division President is the one that decides who is to chair the panel, and, thus, who is most likely to tilt the balance in one direction or another. Consequently, the President of the Appeals Division occupies probably the most important and powerful position at the CAS.

Independence of individual arbitrators

The Munich Appeals Court remarked that it is not against a closed list of CAS arbitrators. However, the fact that under the current procedures the arbitrators are selected by a structurally biased ICAS was seen as highly problematic.

Is CAS ready in terms of fairness to face the new challenge?

Under the circumstances described above, the question arises as to whether CAS would be able to address the doubts related the possible contradiction of FIFA and UEFA regulations with International Conventions, European Law or national legal systems, and the consequent invalidity of the provisions affected, in a truly independent way.

In our opinion, there are holes in the system that can have to be discussed in order to improve CAS.

The weak points highlighted by *PECHSTEIN* case show that CAS is vitiated by a genetic lack of critic profile when approaching the International Federations' (IF) regulations.

In fact, the experience proves that, when addressing delicate points of the regulations considered important by IF, the attitude of CAS usually show a "*creationist*" reaction, trying to save any provision at any cost, even if this entails disregard national laws or international treaties or resorting to "*imaginative*" arguments.

For instance, in CAS 2013/A/3140[10], related to the authorization of a minor transfer, the set of facts spoke for itself:

[10] A. v. Club Atlético de Madrid SAD & Real Federación Española de Fútbol (RFEF) & Fédération Internationale de Football Association (FIFA)

"it was only six weeks after the arrival of the family in Spain that the Player took a physical test with the club... the Player took part in matches with the Chicago Magic. *Finally, in June and July 2012, the Player competed in the "*USL Super Y-League*" with the* Chicago Magic *Soccer Club, which is a club which has a partnership with* Atlético de Madrid. *Furthermare, the declaration of the Player, reported on the official website of his school, cannot be ignored either. The Player expressly stated that the reason of his move to Spain was the possibility that he has been given to play with the Club* Atlético de Madrid."

However, the Panel took into consideration the following curious counterarguments:

"The family is wealthy and has the privilege to have the choice to settle between several countries. The basic maintenance of the family is not dependent of a working activity of the porents. One can also, in light of the sums involved when selling the company of the father of the Player, as well as the weolth situation resulting therefrom, exclude that the family's maintenance depends on the professional evolution of the Player."

As a conclusion, and although the facts proved the clearest link of the movement of the family with football, the Panel found that:

"the registration of the Appellant must be accepted, because the criteria for the exception to the prohibition of international transfers of minors, pursuant to Article 19 par. 2 (a) of the RSTP have been met in the present case."

Obviously, the Panel took the precaution of adding that:

"the set of facts of this case is truly exceptianal, and reiterates that the Appealed Decision derives from the facts of this particular case."

But, in fact, the CAS decision excessively forced the exception a) of Article 19.2 when the situation taken into consideration was that, although the family moved to Madrid only for football reasons, there was no risk of abuse or exploitation of the minor.

In other words, the Convention on the Rights of the Child and his fundamental right to move with his family and practice the sport they choose, within his integral development and education, should prevail over a simple provision of an IF.

But, although Switzerland signed and is party to such Convention, this would be too much for CAS, because it would make way for other Appeals, and this is far from FIFA's desire.

However, this critical approach would be always much more valid than the "*wealthy family theory*". We do not dare to imagine that the CAS reasoning actually means that middle-class or grass-roots families do not deserve to choose the country where they try to make a living or do not have the right to choose the education and leisure of their children.

In other situations, CAS showed an undisguised disdain for national law, even in disciplinary proceedings when this law should be relevant in assessing the conduct of the subjects under investigation.

Thus, for instance, in CAS 2014/A/3793[11], the Panel stated regarding one of the infringements taken into account by FIFA to determine the sanction in the disciplinary proceeding:

"9.27 For the purpose of this dispute, the Panel has to address one issue only: since FCB *cannot register player 1-31 with the RFEF (because they participate only in regional competitions), can it still be liable for breaching Art. 5 RSTP? The Panel believe that this should not be the case. Indeed,* FCB *had no discretion, since, applying the statutes adopted by the RFEF, the institutional" interlocutor of the FIFA, but to register players 1-31 with the FCF. It bears repetition that the question of the consistency of the Spanish regime in this respect with the relevant FIFA Statutes is not part of the scope of this Panel.*

... Furthermore, we are not suggesting here that FCB *acted in accordance with 5 RSTP. We are suggesting that it was prevented to act in accordance with Art. 5 RSTP because of elements idiosyncratic to Spanish law regarding the registration process, that is, the quintessential field of competence of "associations."*

Anyone reading these statements would bet that CAS decision finally mitigated, at

[11] CAS 2014/A/3793 Fútbol Club Barcelona v. FIFA

least partially, the sanction imposed by FIFA. Wrong bet indeed...

On the contrary, the Panel totally confirmed the sanction and fully dismissed the appeal.

How can this result be explained, in terms of fairness? Simply, it cannot. It is a mere matter of objectivity which we are playing with here, taking into account both CAS awards and their very own wording.

Maybe the Panel was paying more attention to follow FIFA's decision and empathized with its will of sending *"a strong signal not only to* FCB *but to other potential violators of this provision, that it will be taking protection of minors seriously, as it should"* (par. 9.34).

This mental alignment was even more dramatic in CAS 2013/A/3067 [12], regarding a disciplinary proceeding connected with the UEFA Club License and Financial Fair Play Regulations (CL&FFPR) and its application to a national tax obligation. Obviously, UEFA disregard the national tax law because it appeared as a disgusting obstacle for the neat and tidy uniform enforcement of its CL&FFPR.

The CL&FFPR, while defining the concept of *"overdue payables"*, refers only to *"not paid in the agreed terms"*. In case of tax obligations, it entails an obvious reference to the relevant national tax law.

Such reference appears unlimited and provided neither with exceptions nor other restrictive criteria.

At the end of the day, in the mentioned case CAS created *ex post* an exception based in the most pure subjective desire of UEFA: that the *"recourse to national laws does not undermine the very purpose of the CL&FFPR"*. This imaginary exception only sought to obviate a part of the Spanish Law and its effects, clearly confirmed by the Spanish Tax Authority: *"The said debts were not in enforcement period for payment on 30 September 2012, as a consequence of the processing status of the applications for postponement concerned, according to the Spanish Tax Law"* (letter dated 23 May 2013, admitted by CAS).

These new criteria destroyed the most elemental concept of legality and *lex previa et certa*, common to any civilized legal system.

In fact, the Panel left unanswered the reasons grounding the fact that the tax liability in question had to be considered as overdue, blatantly contradicting what was stipulated by the only provisions that shall be deemed as applicable regarding the legal issue of the conditions verifying that the debt was due, *i.e.* the 5panish Law.

The only applicable regulations related to the *"due date"* of any tax debt particularly when it comes overdue, is the corresponding national law. It is not a sort of legal prevalence or criteria stipulating its subsidiary application, but is rather based on the fact that the UEFA CL&FFPR do not provide anything at all in that respect, and therefore its reference to the national tax law is unlimited and unconditioned.

However, the award inexplicably states that Spanish Law was only pertinent with regard to the existence of the tax debt, but not regarding its due date. The aforesaid clearly contravenes the allegations of UEFA's legal representatives themselves, who expressly admitted that not only the existence and calculation but also the date when a tax liability was considered to be due were clearly defined by the corresponding national regulations.

This came to an obvious CAS arbitrariness and injustice, because it is expelling part of the applicable rules through an *ex post* and unjustified interpretation of the only law governing the tax obligations at stake, in whose entire application the taxpayer should legitimately rely on.

In line with UEFA's purposes and not acting as an impartial court which is deciding about a disciplinary sanction, the idea that inspired CAS was to establish the need of a uniform definition of overdue payables in respect tax obligations, which indeed is a mere desideratum of UEFA. To this effect, the Panel argues that *"if the term 'overdue' were not defined in the CL&FFPR, it would be difficult to know what consequences the term 'overdue' used in the CL&FFPR refers"* (par. 9.5), and states that *"the idea to define in a uniform manner - and independently of where a club is domiciled - the term* 'overdue'

[12] CAS 2013/A/3067 Málaga CF SAD v. UEFA

*is, thus, not arbitrary, but instead perfectly in line with the principle af freedom af associatio*n" (par. 9.4).

Consequently in order to attain the said *"uniformity"* and despite recognizing that *"it is true that, in principle, the law governing the existence of an obligation also governs the due date of the latter"* (par. 9.4 of the CAS award), the Panel further establishes *"it is not o mandatory requirement that bath questions (existence of an obligation and due date) be governed by the same law. In light of the freedom of association, the latter may provide in its rules and regulations that a different set of rules apply to both questions."*

It thus seemed to attribute to the CL&FFPR the power to determine that different bodies of rules apply to the questions of the existence and the date of maturity of a tax debt. However, even admitting such possibility, the question was: does CL&FFPR provide such difference? The response was clearly no.

When CAS stated that *"it is not a mandatory requirement that both questions (existence of an obligation and due date) be governed by the same law"* it is expressing some sort of a line of argumentation which itself contradicts at a later stage, because the operation which UEFA and CAS implement is not a choice of different bodies of rules for governing different questions, but a discrimination without any normative and previous criteria and within the same question (due date or term for maturity) the specific articles of the Spanish Law which are supposed to be not in line with UEFA's interests for attaining a uniform concept of *"overdue payobles"*.

This is not the application of previous rules; this is simply to execute the desires of UEFA expressed *ex post facto.*

Such operation, true *ex post* alteration of a rule, entailed purely and simply satisfying wishes of UEFA without legal support, introducing *ad libitum* selection criteria in the referral to the applicable regulation for defining what should be considered an overdue and enforceable debt in each case.

Accordingly, by means of paragraph 9.7, the CAS rules as follows:

"The Panel finds that recourse to a national law in the context of the CL&FFPR is legitimate only (i) if necessary for the application of the CL&FFPR and (ii) where recourse to national laws does not undermine the very purpose of the CL&FFPR. Neither prerequisite is fulfilled in the case at hand and, thus, only the CL&FFPR are applicable to the question whether or not the outstanding payables were overdue."

CAS's argumentation, as expressed above, implicitly indicates that the provisions contained in the Spanish Law establishing when a tax liability has to be paid are applicable as *"necessary far the application of the CL&FFPR"*, particularly when considering that the latter regulations do not contain a similar provision. However, the articles contained in the Spanish Law establishing that once the deferral of the payment is filed, the tax liability is not payable and due are regrettably excluded from the general reference to the *"agreed terms"* on the only basis that they are supposed to undermine the *"very purpose of CL&FFPR"*.

In other words, CAS accepts UEFA's theory that, although the CL&FFPR makes a general reference to the *"agreed terms"*, a subsequent discrimination should be made within the regulatory body applicable under such reference based exclusively on the highly subjective assessment that a part of that body of law undermines the purpose of UEFA Regulation. Fairness?

Putting aside the point that such subjective assessment is arguably by itself, the CAS argument assumed that in a disciplinary procedure rules apply and cease to apply on the basis of subjective criteria established after the facts.

Such technique could only be considered as completely arbitrary, contrary to the most basic principles of legal certainty, legality and its derivatives of *lex certa* and predictability of behavior required by the disciplinary rule.

Again, this is an objective point of view deriving from the CAS award and the very principles of the Law, as our main intention is to try to help CAS to avoid those certainly deviations from what a Tribunal should be.

Conclusion

According to the examples given above, it seems that CAS suffers from a somehow inability to face in the most controversial issues of FIFA and UEFA regulations within a clearly independent and critical profile.

As a consequence, for us it is obvious that CAS only could address the hot questions raised in section 1 if it does carry out the reform of its own structure in order to cope with the weak points stressed in *PECHSTEIN* case, regardless of the final outcome of the proceeding in Germany.

Any professional football Club would not hesitate that questioning the validity of a FIFA or UEFA regulation before CAS means venture into the lion's den. However, there are in our view several proposals which could be considered.

For instance, a change should be made to the CAS statutes, imposing that only 4 of the ICAS members shall be selected by the sport governing bodies, the next 4 shall be selected by representatives of the athletes (at a specific conference or assembly including, for example, FIFPro, UNI World Athletes, EU Athletes, and the IOC Athletes' Commission), the next 4 shall be appointed by representatives of professional clubs (at a specific conference or assembly including, for example, ECA, the South American League of Clubs, etc.), and the final 8 members shall be picked by the first 12.

Furthermore, the nomination by the President of a Panel should be left to either the other two nominated arbitrators and not to the CAS itself, or if there is no agreement, by picking one out of three decided by the chosen arbitrators.

There are more, of course, but let's start with something, not a perfect world, but surely a more independent CAS which is what the stakeholders, or the "*clients*" as we lawyers are known, are pleading for. In order to make our own clients decide that CAS is the needed body in Sport, we must be convinced ourselves that its legal approaches are not always mere followers of the creed of the "*Big football bodies*"...

We are strong defenders of the Court of Arbitration for Sport, as such a body is much needed in our market, in order to avoid multiple and different civil, commercial or labour courts' decisions that would surely impede football (and sport in general) to have a common legal path. But this wish and support cannot be a never-ending *carte blanche* to CAS, which needs to rebuilt itself, not just now due to *PECHSTEIN* or other issues, but to improve and reborn into a the truly independent and modern sporting tribunal without any reproach. •