

Practical analysis of Article 64 of the FIFA Disciplinary Code

The effective execution of an arbitral award issued by the Court of Arbitration for Sport ('CAS') is an essential aspect of the football justice system. However, in 2011 FIFA introduced an amendment to Article 64 of the Disciplinary Code that restricted the enforcement of CAS decisions through the FIFA disciplinary system exclusively to those issued in an appeal proceeding. Lucas Ferrer, Partner at Pintó Ruiz & Del Valle, and Ornella Desirée Bellia, Legal Affairs Manager at the European Professional Football Leagues, review this amendment and propose an alternative, which would see arbitral awards from ordinary proceedings enforced by national associations.

Introduction

The execution of awards passed by CAS within the so-called ordinary proceeding¹ constitutes a problematic issue to be dealt with, especially after the amendment of Article 64 of the FIFA Disciplinary Code ('FDC') made by means of FIFA Circular n. 1270 of 21 July 2011. It is well-known that Art. 64 of the FDC allows the opening of a disciplinary proceeding against those members of the football family who fail to comply with a financial or non-financial decision passed by a body of FIFA or CAS.

The aforementioned provision has proven to be a strong tool through which it is possible to quickly obtain the fulfilment of a decision or award rendered by FIFA or CAS. Indeed, a disciplinary proceeding and the risk of a severe consequence affecting the sporting activity constitute a strong deterrent from not complying with decisions issued by those bodies.

With the implementation of Circular n. 1270, FIFA has limited the range of application of Art. 64 of the FDC to those CAS cases that had previously been dealt with by a body or a committee of FIFA. Therefore, as from 1 August 2011 it is no longer possible to initiate a disciplinary proceeding before FIFA to ensure the respect of the CAS awards rendered within the ordinary proceeding. The awards following an ordinary proceeding before the CAS, as from that moment, in principle, may only be enforced by means of the New York Convention² ('NYC').

As lawyers operating in the sports industry, we have witnessed the practical consequences of such an amendment, being involved in cases where despite being successful in the ordinary proceeding we have struggled to find a way to get the other party to comply with the CAS award.

Indeed, several issues may arise

from enforcement through the NYC. For instance, national courts may somehow interfere with the decisions taken by CAS rejecting the recognition and execution of the awards due to a conflict with national law or procedural issues³. Furthermore, practical disadvantages may arise as well. For example, in the case of a plurality of debtors with different domiciles or with assets in different countries the procedure should be carried out over different jurisdictions with an evident increase in costs and a more complex procedure.

It is therefore difficult to find the reason why FIFA decided to change the private system of enforcement they had in place previously that was working well. The new approach discriminates between cases that have access to an efficient and fast system of execution and cases that simply do not. Indeed, only if the parties to a contract agree on the jurisdiction of FIFA, can they eventually rely on the efficient disciplinary system provided by Art. 64 of the FDC. On the contrary, those members of the football family who had agreed in their contract to submit future disputes to CAS will not be able to rely on such a private system of enforcement. Thus, the scenario results in a kind of immunity from sporting sanctions in the case of non-compliance with decisions taken by a body, whose authority is fully recognised by FIFA and all its members⁴.

Certainly, enforcement still remains possible through the NYC, conducting the proper procedure in the country where the creditor is domiciled or where the principal assets are located. However, it cannot be denied that, as already outlined, this procedure presents all the problems associated with international recognition and enforcement of court judgments

and usually takes much longer than the private system of enforcement put in place by FIFA.

As we have already experienced some of these issues, finding ourselves in the position of being unable to assert our clients' rights in a proper and fast way, in this article we will present a possible alternative solution that may also fit with the FIFA Statutes.

The risk of execution through the NYC

In general, national courts adopt a respectful attitude towards arbitral awards as they only review the due process components and enter into substantial matters exclusively in cases where the award is inconsistent with public policy, i.e. when fundamental and generally accepted principles of law are breached giving rise to an intolerable conflict with the notion of justice in a way that the decision would appear contrary to the accepted values existing in that State. However, the risk of potential conflicts with national laws and public policy cannot be disregarded.

According to Article V paragraph 2 a) of the NYC the recognition and enforcement of an arbitral award may also be refused if 'the subject matter of the difference is not capable of settlement by arbitration under the law of the country.'

Taking into consideration that in several countries employment-related disputes are not subject to arbitration⁵, national courts may be reluctant to recognise and enforce CAS awards whenever the dispute concerns an employment matter. Thus, while according to the Swiss Private International Law Act ('PILA') and FIFA rules employment matters may be referred to arbitration, CAS awards may encounter difficulties in being enforced in all of those countries

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where such disputes are considered legally subject to arbitration.

Alternative solutions for the enforcement of CAS awards passed in ordinary proceedings

Even though Art. 64 of the FDC does not provide a private system of enforcement for these awards, a consistent interpretation of FIFA Statutes may allow an alternative, more effective and faster solution to the NYC.

Indeed, a combined interpretation of some provisions laid down in the FIFA Statutes may provide the legal basis for allowing a private enforcement mechanism to those CAS awards rendered within the ordinary proceeding.

First and foremost, it has to be noted that FIFA Statutes oblige national associations with the responsibility to ensure that their members comply with CAS decisions. According to Art. 68 paragraph 1 of the FIFA Statutes: 'national associations shall agree to recognise CAS as an independent judicial authority and to ensure that their members, affiliated, players and officials comply with the decisions passed by the CAS.'

Furthermore, Art. 13 paragraph 1 a) foresees the members' obligation to fully comply with the FIFA Statutes, while Art. 146.2 FDC states that: 'the associations shall, without exception, incorporate art. 64 of the FDC into their own Regulations.'

The combined interpretation of these articles leads to the conclusion that national associations are obliged to ensure decisions rendered by CAS against their affiliates (without any distinction between ordinary or appeal proceedings) are respected and if they do not do so, disciplinary proceedings may be initiated accordingly. Indeed, not only does each association have to

recognise the authority of CAS, but each association also has to ensure that its members comply with decisions of CAS.

Moreover, the failure of member associations to do so, *de facto* disregarding a duty foreseen by the FIFA Statutes, would see them subject to a disciplinary proceeding by FIFA.

Indeed, as provided by the new wording of Art. 64 of the FDC and duly explained in Circular n. 1270, even associations are to be considered 'offenders.' Accordingly, disciplinary sanctions may be imposed on them for not respecting the FIFA Statutes, i.e. for not making sure that their members, affiliates, players and officials comply with an award issued by CAS.

In other words and to recapitulate, while FIFA is no longer competent to deal with decisions taken by CAS in first instance proceedings, the competence to do so now seems to be attributed to national associations. Accordingly, the prevailing party in an ordinary proceeding before the CAS, in case of unfulfillment of the award by the other party, should now be addressed to the national association with which that party is registered, requesting the initiation of disciplinary proceedings against those who have not complied with the CAS decision.

It should be noted that in a few cases FIFA has confirmed such a construction. Indeed, FIFA has sent letters to a few national federations⁶ threatening them with a disciplinary proceeding for not having executed decisions rendered by CAS against their affiliates, notwithstanding the pertinent requests made by the injured parties. Thus, it seems that FIFA has indirectly recognised that national associations would be the competent entities to enforce the

above-mentioned CAS decisions. However, this position of FIFA has not been constant over the last few years.

For the sake of completeness, it is worthwhile to note that the Asian Football Confederation has proved to be in line with such a construction. Article 62.1 of the AFC Statutes rewrites the wording of Art. 68.1 of the FIFA Statutes and similarly dictates that 'The Member Associations shall agree to recognise CAS as an independent judicial authority and to ensure that their members, affiliated leagues, clubs, players and officials comply with the decisions passed by CAS [...]' Based on such a provision, Asian national associations have been requested by the AFC to make sure that their members' comply with CAS awards passed in ordinary proceedings. The AFC has made clear that failing to do so, would result in the matter being referred to the AFC disciplinary committee.

Conclusions

There is no doubt that the threat to impose disciplinary measures has proven to be an effective way to ensure the respect of financial obligations within the football world.

However, the current wording of Art. 64 of the FDC, by excluding from its scope of application CAS awards passed in so-called ordinary proceedings, has created a sort of immunity from sporting sanctions in cases of non-compliance with these decisions. Furthermore, as analysed in this article, those CAS awards are not always easy to enforce by means of the NYC and problems in the execution may arise, causing a big delay - or even the impossibility - to obtain what is granted in the award.

In order to overcome this situation, the recourse to a private system of enforcement through



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member associations is presented as a possible solution⁷. Having said that, an amendment of Art. 64 of the FDC would be desirable in order to bring more consistency and certainty to the entire system and to guarantee equal protection to all members of the football family in the event of non-compliance with obligations agreed within the football market.

This solution would not only be consistent with the FIFA Statutes, but it would also be beneficial for the entire system of sports justice as the number of cases dealt with by CAS is increasing year by year. It is undisputed that the Court of Arbitration for Sport nowadays has a huge importance in the football market and represents the highest decision-making body that offers celerity, high standards of expertise and independency.

To conclude this short essay, we do believe that the failure to comply with CAS ordinary decisions could be and should still be considered a disciplinary offence.

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1. The Ordinary Proceeding is the arbitration procedure derived from the agreement by two or more parties to submit any disputes arising from a contract to the Court of Arbitration for Sport. In this short essay, we will use the expression 'CAS ordinary decisions' to indicate the awards issued following ordinary proceedings.

2. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 21 U.S.T. 2517 ('NYC'). The NYC permits mutual recognition and enforcement of awards in the courts of those nations that have accessed the Convention as long as arbitration awards meet minimum standards. The recognition and enforcement of foreign awards may be refused only under some circumstances.

3. Article V of the NYC.

4. Article 68 of the FIFA Statutes.

5. To name some examples, the prohibition to settle employment-related disputes via arbitration is provided in Spain, Brazil, many other South American countries, Qatar and so on.

6. Some of these letters were sent in 2013 in a case regarding the execution of an ordinary CAS award requested by a football club against another club.

7. However, in order for this alternative solution to work the association's regulations must contain a provision dictating the obligation to ensure the execution of FIFA and CAS decisions, as required by Art. 146.2 of the FDC. It is worth noting that some national associations already have such a provision. In Brazil, for instance, Art. 75 of the Parágrafo Único of the Estatuto Confederação Brasileira de Futebol establishes that this confederation guarantees the respect and enforcement of FIFA and CAS decisions. A similar provision is contained in Art. 14.1 (e) of the Statutes of German Association and in some other countries.