

# Chapter 11

## Match Fixing

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## **11.1 CAS 2008/A/1583 and 1584 Sport Lisboa e Benfica Futebol SAD, Vitoria Sport Clube de Guimaraes v. UEFA and FC Porto Futebol SAD**

As recent scandals have shown, match-fixing is also an unfortunate reality in football. This was the motivation for the Sport Lisboa e Benfica Futebol SAD, Vitoria Sport Clube de Guimaraes v/UEFA and FC Porto Futebol SAD case being brought before the CAS. Against the background of the criminal procedure (the ‘Apito Dourado’) involving referee bribery a few years before, the UEFA Disciplinary Body cast doubt on FC Porto’s admission to the UEFA Champions League 2008/09 season. The UEFA Appeals Body initially referred the case back, not denying admission to the UEFA Champions League 2008/2009. FC Porto’s rivals SL Benfica and Vitória SC took the issue to the CAS. In the end the CAS confirmed FC Porto’s admission. The author considers the right to appeal a UEFA decision, exceptions to the obligation to exhaust legal remedies prior to the appeal, the non-retroactive nature, and the independence of the federation from possible decisions of civil courts or national associations.

### ***11.1.1 Introduction***

This CAS award, issued in September 2008, deals with a number of interesting legal issues, both procedural and in relation to the merits of the case.

As far as the facts are concerned, it is clear that reference should be made to the full award. However, it is worth recalling here that the whole procedure conducted by the UEFA disciplinary bodies was concerned with whether or not FC Porto should be admitted to the UEFA Champions League for the 2008/09 season, bearing in mind the scandal and the criminal procedure known as “Apito Dourado”, in which FC Porto and its president were accused of involvement in referee corruption in 2004, i.e. several years previously. In the disputed decision, the UEFA Appeals Body had decided that it did not possess all the necessary evidence and referred the case back to the UEFA Control and Disciplinary Body (first instance). The clubs SL Benfica and Vitória SC challenged this decision before the CAS, requesting that FC Porto not be admitted to the UEFA Champions League 2008/09. Their interests clearly lay in the fact that Vitória SC had finished third in the Portuguese championship, while SL Benfica had finished fourth. If FC Porto were refused admission to the Champions League, Vitória SC would have qualified for the competition without having to play in the preliminary round, while SL Benfica would have gained a place in the Champions League preliminary round rather than in the UEFA Cup. The present article looks specifically at the question of the standing to appeal the UEFA decision. To conclude, a number of other issues dealt with in the arbitral award will be briefly mentioned.

### ***11.1.2 Standing to Appeal the UEFA Decision***

Insofar as the procedure concerned the admission of FC Porto to the UEFA Champions League, it was unclear whether the other two Portuguese clubs, which appealed to the CAS, were entitled to contest the UEFA Appeals Body's decision. More generally speaking, in a procedure involving a club, do other clubs have the standing, as parties, to dispute the decision before the CAS?

Under Article 62(2) of the UEFA Statutes, "only parties directly affected by a decision may appeal to the CAS". Firstly, the Panel considered that the terms "directly affected", as mentioned in the UEFA Statutes, and "directly concerned", which appear in Article 28 of the UEFA Disciplinary Regulations, should mean exactly the same thing. In other words, the CAS held that the standing of a party is the same before the UEFA disciplinary bodies as before the CAS.

The Panel then examined the nature of the provision contained in Article 62(2) of the UEFA Statutes.

The Panel began by noting that the provision was not designed to limit the scope of the arbitration agreement by restricting the arbitrators' mandate. The Panel particularly referred to the judgement of the Swiss Federal Tribunal (BG Urteil 4P.105/2006 of 4.8.2006, No. 6.2). It then considered whether the provision of Article 62(2) of the UEFA Statutes was a condition for the admissibility of an appeal or, on the contrary, a question of justifying the request for arbitration. This is an important distinction. If the first solution is adopted, it means that the standing of the party is a condition for the admissibility of the appeal, so this must be decided first, whereas under the second interpretation, linked to the underlying right upon which standing is based, the arbitrators must consider this question at the same time as the merits of the appeal. After making various remarks on both possible solutions, the Panel left this question open as it would not have a decisive impact on the outcome of the present case.

The Panel then looked at the crucial issue of the standing of a party, i.e. how the terms "directly affected", "directly concerned" and "on whom the disciplinary measures have direct consequences" should be interpreted. None of these terms are clearly defined, since the meaning of the word "direct" is not explained. The Panel considered that the actual text of the provision did not provide an answer to this question. It therefore deemed it necessary to look at several sources to interpret the provision. As the first criterion for its interpretation, the Panel examined how it was applied in practice by the association's organs. It noted that, in the procedure in question, the UEFA disciplinary bodies (or, more specifically, the second instance body) had considered the appellants (SL Benfica and Vitória SC) as parties. This was considered that this could play a role in the Panel's interpretation of the provision. In the author's opinion, although the way in which an association's organs apply a procedural provision in practice may be useful or indeed necessary for interpreting that provision, the Panel's considerations appear unsatisfactory. Indeed, in order to analyse the practice of an association's organs, it is necessary to consider more than one case, particularly if that case is the disputed

procedure itself. For in this particular procedure, the standing of a party was contested. This disputed case cannot therefore be used as a basis for deciding that the practice of an association's organs corresponds to a particular solution. It would have been necessary to examine several cases and several procedures in order to ensure that this was genuinely a practice rather than an isolated case. Unless other cases are also considered, it cannot be concluded that this is the association's practice.

This seems particularly true in the light of the practice of the UEFA disciplinary bodies, since both prior to and since the *FC Porto case*, the notion of "party" has been applied in a much more limited, restrictive manner. It should therefore be concluded that the interpretation of the notion of "party" in the *FC Porto case* is a one-off, which should not be taken as a guide in the future.

As the second criterion, the Panel examined the historical origin of Article 62 of the UEFA Statutes. The minutes of the UEFA Congress at which the provision was adopted explained very clearly that only the banned or disqualified club in question may submit an appeal to the CAS. According to the UEFA Congress minutes, other clubs had no right of appeal against a UEFA decision concerning disqualification, exclusion or the sporting consequences of disqualification. This historical interpretation of Article 62(2) clearly appears very restrictive, since only the party (the club) to which the measure is addressed has a right to appeal.

The Panel considered that the different sources for interpretation pointed in different directions. Faced with these opposing interpretations, the Panel thought that particular importance should be attached to the wording of the provision. This is clearly correct, for the application of a provision should be based primarily on the actual text of the provision. Only if the text of the provision is insufficiently clear and precise should it be interpreted with reference to sources for interpretation. Now, by definition, these sources for interpretation cannot include the text itself since, as we have seen, it is the text that is insufficiently clear and precise. Moreover, the Panel considered that "legislative materials", i.e. the historical interpretation, were less important than the wording of the provision. In the present case, the CAS's reasoning is debatable because the wording used in the provision was not inconsistent with the historical interpretation intended by the UEFA Congress. The Panel held that an association's rules and regulations should, first and foremost, be interpreted according to their objective meaning and not according to the subjective will of the association's organs responsible for adopting them. This prioritising of an objective interpretation appears questionable because Swiss association law, which applies here, gives associations a certain autonomy to organise themselves and adopt the rules they deem necessary. Depending on how the association is organised, certain organs have the power to adopt regulations. It is the meaning given to regulations by those who adopt them that appears decisive, rather than how people outside the relevant organ interpret them. Furthermore, it is hard to understand how, in relation to an imprecise provision containing indeterminate notions that require interpretation, it is possible to talk about an objective meaning, as opposed to a subjective one. If an

interpretation is necessary through recourse to different sources for interpretation, it is because the provision has no identifiable, clear objective meaning.

In support of its opinion, the Panel also referred to Swiss association law (Article 75 et seq. of the Swiss Civil Code) to state that limiting the right of appeal would contravene the public policy rule under which an individual can challenge certain measures taken by an association before an outside body. In its reference to Swiss association law, the Panel did not take into account Article 72 of the Civil Code, which states that an association's statutes can sanction the expulsion of a member without disclosing the grounds for the expulsion.<sup>1</sup> Paragraph 2 stipulates that "in such cases, no right of action arises in regard to the grounds for the expulsion". If, under Swiss law, statutes can therefore make provision for the "extreme" measure of expulsion without disclosure of the grounds, and therefore without the possibility of challenging those grounds before a court, could the statutes not also limit the conditions under which an appeal lodged by a third party would be admissible?<sup>2</sup>

The Panel then had to examine the distinction between parties directly affected by the decision and parties affected indirectly. In other words, the CAS held that the distinction between "directly" and "indirectly" should be analysed in accordance with the facts of the individual case. The Panel referred to CAS case-law (CAS 2002/O/373; CAS 2006/A/1082; CAS 2007/A/1278 and 1279), in which it identified a common thread: when a third party is affected because it is a competitor of the addressee of the association's decision, it has no right of appeal, unless otherwise provided by the association's rules and regulations. In other words, unless the rules provide otherwise, effects that unfold only within the context of the competition itself are indirect consequences of the association's decision. However, if the association, in its decision, rules not only on the rights of the addressee, but also on those of a third party, the latter is directly affected, with the consequence that the third party must have a right of appeal. If the Panel's line of thinking is followed, particularly the fact that the effects of the association's decision should be considered as indirect consequences of the decision, when effects ensue only from competition, certain reservations need to be expressed with regard to the application of this principle in the present case. In the *FC Porto* case, the Panel considered that the appellants (SL Benfica and Vitória SC) were directly affected. It held that, if UEFA granted a club a place in a championship with a limited number of participants, that decision at the same time represented a negative decision about including other candidates for the available places. In the Panel's view, allocating or denying a place in the Champions League did not represent a vague hope for the club concerned. It was a decision on a right of the clubs concerned, particularly specified in the Regulations of the UEFA Champions

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<sup>1</sup> For more detailed discussion of the scope of Article 72 of the Swiss Civil Code, and the limitations of this provision, which is particularly based on the protection of personality, see Perrin 2004, p. 149 et seq., Baddeley 1994, p. 98.

<sup>2</sup> The CAS has previously referred to Article 72 of the Swiss Civil Code (CAS 2002/A/423, p. 12).

League. The Panel therefore considered that, under the UEFA rules, UEFA was obliged to treat all clubs equally in terms of their participation in the competition. It particularly mentioned the provision of the Regulations of the UEFA Champions League stipulating that, if a club is not admitted, its place should be allocated to the next best placed club in the domestic league.<sup>3</sup> That club therefore had a right against UEFA to be admitted if it met all the requirements. In the case at hand concerning the three Portuguese clubs, the argument set out in the arbitral award raises a number of significant questions and problems.

Firstly, the principle that a decision to admit a club also represents a decision not to admit other clubs creates a situation fraught with uncertainty. This would mean that, in relation to a club's admission to a European competition, all the other clubs from the same national championship would be entitled to appeal since, by admitting one club, the others would implicitly be excluded. Clearly, such a consequence is totally excessive. The reference to the Regulations of the UEFA Champions League, particularly para 1.07, is also debatable. If this provision gives a right to the club placed directly below the club that is not admitted in the national championship, the same right should be granted to the other clubs who finish behind the second club, then the third, and so on through the whole domestic championship. In the case at hand, the club that finished directly below FC Porto was Sporting Clube de Portugal, who had finished second in the championship. Therefore, neither of the appellants, Vitória SC or SL Benfica, had finished directly below the club concerned, FC Porto. In other words, if these two clubs were considered to be directly affected, the clubs below them would also be directly affected in terms of their possible participation in the UEFA Cup. If they are recognised as parties and, in particular, granted the right to appeal to the CAS against UEFA's decision, they must also be considered as parties before the UEFA disciplinary bodies. This would mean that, in any procedure relating to the admission of a club, all the clubs below it in the championship table should also be invited to participate as parties in the procedure. Since the refusal to admit a club would, according to the competition regulations, have effects on the other clubs, this would therefore mean that these clubs were directly affected. Clearly, the CAS's reasoning here is flawed.

Otherwise, it would be necessary, before any European competition, to offer all the clubs in the national championship the chance to express their views in a procedure relating to the admission of a club from the same country. Such a consequence would be derived from the right to a fair hearing, which would need to be respected if these other clubs were considered to be directly affected parties.

It is even open to question whether the other clubs participating in the same competition should also have the right to express their views, since the admission

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<sup>3</sup> The provision mentioned is para 1.07 of the Regulations of the UEFA Champions League 2008/09, which states: "A club which is not admitted to the competition shall be replaced by the next best placed club in the top domestic league championship of the same national association, provided it fulfills the admission criteria. In this case, the access list for the UEFA Club Competitions (Annex 1a) will be adjusted accordingly".

or non-admission of a club from a particular country can affect the designation of seeds in the competition itself. A club from one country may, for example, be directly affected if a club from another country does not participate in the European competition. Insofar as seeds are selected in accordance with UEFA rules (Article 8 of the Regulations of the UEFA Champions League 2008/09), and if the CAS's reasoning is followed, these other clubs would have to be considered as directly affected and therefore have the standing of parties. The CAS's definition of the notion of a directly affected third party in this award is clearly much too broad. Paragraph 1.07, to which the award refers, does not grant a right to the "next best placed club", but determines, by referring back to the domestic championship, the indirect consequences of a club's non-admission. The other clubs should therefore simply be considered as indirectly affected by the consequences of the decision. If they are indirectly affected, they are not considered as parties and have no standing to appeal to the CAS.

The CAS is therefore wrong to consider the appellants as directly affected parties in both the procedure before the CAS and UEFA's internal procedures.

### ***11.1.3 Other Issues Addressed by This Award***

#### **11.1.3.1 Exception to the Obligation to Exhaust the Legal Remedies Available Prior to the Appeal (Article R47 of the Code of Sports-Related Arbitration)**

In this award, the CAS also had to examine the requirement set out in Article R47 of the Code of Sports-Related Arbitration, under which the appellant must have exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the sports-related body concerned.

Now, in the case at hand, UEFA's final instance body (Appeals Body) had lifted the first instance decision and referred the case back to the first instance body.

It could therefore be considered that the appellants, SL Benfica and Vitória SC, had not exhausted the association's internal legal remedies prior to the appeal, since further decisions were still pending.

However, the CAS considered that the requirement that all legal remedies be exhausted could not be admitted in this case, insofar as it did not appear possible, in view of the urgency of the situation and the limited time available before the start of the competition concerned, that decisions could be issued by UEFA's first, and then by its second instance body before the CAS could give its verdict in such a way as to respect the appellants' possible rights.

In other words, it can be inferred from this award that an exception to the principle that legal remedies must be exhausted prior to an appeal may be granted if acceptance of the CAS's jurisdiction is the only way of protecting the appellant's rights, bearing in mind the available procedures and, where relevant, the urgency of the situation.

### **11.1.3.2 Principle of Non-Retroactivity and Conditions of Admission to a Competition**

During the arbitral procedure, FC Porto disputed that the specific regulations adopted by UEFA in relation to admission to the UEFA Champions League 2008/09 could take into consideration the facts of the “Apito Dourado” scandal, since these facts, which were contested anyway, were alleged to have taken place in 2004, i.e. before the regulations were adopted.

FC Porto argued that the application of subsequently adopted rules to past events represented a violation of the principle of non-retroactivity that should be applied in disciplinary, as well as criminal cases.

After referring to CAS case-law relating to the application of certain principles of criminal law and their limitations, as well as the specific nature of the relationship between federations and their athletes, the Panel clearly concluded that the principle of non-retroactivity did not apply to the rules on admission to a future competition.

To be more precise, a federation is quite clearly entitled to amend the admission criteria for any future competition without the candidates being able to rely on any previously acquired right. Candidates are obviously entitled to demand that the federation applies the rules adopted in its regulations and that it applies them in the same way to all candidates, in accordance with the principle of equality.

In addition, each candidate clearly enjoys what are called the “droits de protection” (protective rights), which particularly include the principles of equal treatment and proportionality.

### **11.1.3.3 Independence of the Federation From Possible Decisions of Civil Courts or National Associations**

Another point examined by the arbitral award concerns the possible dependence of a federation’s disciplinary bodies on procedures conducted by a country’s state courts or a national association.

The Panel held very clearly that, in this case, UEFA was not bound by any decision taken by a national association against a club for match-fixing.

At the very least, the UEFA regulations gave UEFA a degree of discretion. Furthermore, UEFA should take its own decision autonomously on the basis of all the facts and circumstances available to it. To this extent, the existence of a decision taken by a national association forms only one of the elements that may be taken into consideration.

This award is interesting insofar as it confirms the autonomy of the disciplinary bodies of a federation which must simply issue a decision autonomously and independently on the basis of the elements in its possession, without automatically being bound by a procedure or decision issued at national level by an association or state court.

### ***11.1.4 Conclusions***

This Court of Arbitration for Sport award contains numerous interesting points and references to CAS case-law, even though in some respects, it is impossible to agree with the reasoning followed or the outcome of that reasoning.

Finally, it should be noted that UEFA has since amended its regulations on admission to European competitions, and in doing so has addressed many of the points raised in this award.

## **11.2 CAS 2009/A/1920 FK Pobeda et al. v. UEFA**

In the FK Pobeda Award, for the first time the CAS imposed sanctions against a club and the club's president within the context of match-fixing. The author analyses both the merits and the procedural questions. This Award can be also called a landmark decision through its procedural matters. The main issues are the one of protecting witnesses through anonymity, the belated request of the examination of an additional witness and the alleged procedural errors on the part of the UEFA Disciplinary Body.

### ***11.2.1 Introduction***

The arbitral award issued by the Court of Arbitration for Sport on 15 April 2010 in the case FK Pobeda—Prilep, Aleksandar Zabrcanec, Nikolce Zdraveski v/UEFA (hereinafter “the award” or “the award against Pobeda”) is a first in several respects, not only for UEFA but also for the CAS.

With regard to the substance first of all, it is one of the very first procedures that has led to sanctions being imposed against a club and individuals in relation to the fixing of football matches. The subject of match-fixing has attracted a great deal of media attention since the revelations made by the Bochum public prosecutor's office. However, the Pobeda case is totally unconnected to those revelations. It is the result of numerous investigative measures taken by the UEFA disciplinary bodies without the help, it should be stressed, of any state investigative or judicial authority.

This arbitral award is also a first from a procedural point of view, since the most important among numerous procedural questions that the arbitrators had to consider concerned whether or not they should accept UEFA's request that the identity of certain witnesses should be withheld and that they should therefore be examined by the CAS without their identity being made known to the appellants.

Finally, this award represents a first in terms of its outcome, since it is the first time a club and its president have been sanctioned for match-fixing in a European competition.

### ***11.2.2 Summary of the Facts***

Insofar as the present publication contains the full text of the arbitral award, there is no need to describe the facts of the case in detail, but readers are invited to examine the facts as they appear in the award.

Readers are therefore merely reminded that UEFA had opened a disciplinary investigation against FK Pobeda, a club from the Macedonian city of Prilep, on the basis of information suggesting that the home and away matches between FK Pobeda and FC Pyunik, an Armenian club, in the 2004/05 UEFA Champions League had been fixed. The UEFA Control and Disciplinary Body (first instance body), on the basis of the findings of the investigation, sanctioned FK Pobeda, its president and the team captain at the time.

Following an appeal lodged by the three parties (club, president and captain, hereinafter “the appellants”), the UEFA Appeals Body (second instance body) confirmed the first instance decision. The three appellants lodged an appeal against this UEFA Appeals Body decision with the CAS.

### ***11.2.3 In Substance***

For various reasons, particularly certain procedural reasons which are discussed later, the Panel carried out a full review of the case. The CAS confirmed the decision of the UEFA Appeals Body in relation to the sanctions imposed against the club and its president, but set aside the sanction imposed against the captain.

In the examination on the merits, the arbitral award contains some extremely important recitals.

#### **11.2.3.1 Fundamental Principles for Sport**

Firstly, while noting that the regulations applicable in 2004 did not contain any specific provisions on the sanctioning of match-fixing activities, the award states that match-fixing “touches at the very essence of the principle of loyalty, integrity and sportsmanship”.

The CAS therefore considered that match-fixing and sports betting activities violated the general clause of Article 5 of the UEFA Disciplinary Regulations, which states that “member associations, clubs, as well as their players, officials and members, shall conduct themselves according to the principles of loyalty, integrity and sportsmanship.” Similarly, the CAS pointed out the high social significance of football in Europe. It is therefore fundamental that the public is sure that all players (in the broad sense) act with the sole objective of beating their opponent and that all decisions are based on that objective (award, p. 14, rec. 76–78; see also CAS 98/2000/AEK Athens & SK Slavia Prague v/UEFA).

It is therefore clear that the rule prohibiting match-fixing activities is based on conduct rather than on the outcome of such activities. In other words, it is not necessary for the match to have actually been fixed. The result is not indispensable. As soon as club officials or players behave in a way which violates the principles of loyalty, integrity and sportsmanship, they may be sanctioned. This also means that any attempt and any action in breach of these principles, even if it does not result in a match being fixed, should be punished. Conduct that infringes the aforementioned principles cannot be allowed to go unpunished simply because the intended outcome did not materialise.

### 11.2.3.2 Reasoning of the CAS

#### Fixed Matches

When examining the merits, in particular the appellants' culpability, the CAS considered, firstly, whether the matches between Pobeda and Pyunik had been fixed.<sup>4</sup> The Panel explained very clearly its opinion that they had indeed been fixed. It mentioned various reasons for this conclusion, particularly the report of the sports betting expert, who had stated that the variations in betting patterns and odds for the first leg had clearly been extraordinary and abnormal, which proved that the match had been fixed. The appellants made no attempt to refute this.

The Panel also based its view on the testimony of the various witnesses, who reported not only that the Pobeda club was in financial difficulty, but also that the club president had mentioned his intention to fix the match against Pyunik. The witness statements on which the Panel's conclusion was based were not made by anyone who had seen money being exchanged between an intermediary and a club representative. It must therefore be concluded that, in order to establish that a match was fixed, it is not necessary to have direct proof (documentary evidence or witness statements) of every stage of the fixing of a match, particularly real evidence that money was given to a player or club representative. The witness statements contained elements confirming, sometimes indirectly, that the match had been fixed. For example, one witness stated that Pobeda players had bet on their own team losing. Reference should also be made to the recitals of the award. It is important to note that the convergence of a range of clues and evidence, even indirect, can be sufficient to justify the decision of disciplinary bodies required to rule on possible match-fixing. Finally, the Panel stated that the degree of proof required should be the same as in doping cases, i.e. "to the comfortable satisfaction of the Court having in mind the seriousness of allegation which is made" (award, rec. 85, p. 17, and CAS 2005/A/908).

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<sup>4</sup> It should be noted that a fixed match does not necessarily have to be fixed by both teams. In the present case, there was no evidence that the Pyunik club was involved. Generally, only the team that is meant to lose or concede a certain number of goals fixes the match, while the other team, which is not involved, plays its best in order to achieve the best possible result.

It can also therefore be noted that, in order to establish that a match was fixed, technical data linked to sports betting and unusual variations in odds and/or betting patterns represent significant evidence.<sup>5</sup>

### Involvement of the Appellants

Having concluded that the match had been fixed, the CAS considered the extent to which the appellants had been involved in the match-fixing plot. On the basis of the witness statements, the CAS decided that the president, Zabrcanec, had been actively involved in attempts to ensure that his team would lose the matches against Pyunik.

As mentioned above, the Panel considered that the witness statements were not sufficient to establish that the captain had been involved.

One interesting aspect concerns the club's involvement. The CAS firstly confirmed the application of Article 11 of the UEFA Disciplinary Regulations, which provides for the possibility to sanction member associations or clubs, particularly if "a team, player, official or member is in breach of Article 5". In other words, the club may be sanctioned for acts committed by its officials. Since the Panel was "comfortably satisfied" that the president was guilty of influencing players and the coach in order to fix the match, the club could be sanctioned on the basis of Article 11.

The award also states that, in the Panel's view, it was important to underline that there was no evidence that the president manipulated the games for personal gain.

This comment in the award raises a question. If the president had said that the match-fixing and his conduct had been exclusively dictated by a strictly personal interest and not by the interests of the club, could the club have been sanctioned in the same way? The award does not answer this question directly.

In the author's view, the answer must be yes. It is unacceptable that a club should be able to escape any sanction simply by arguing that one of its officials acted in his own personal interest and that the club should not, therefore, suffer the consequences of his actions. Such a scenario would provide too easy a way out for club officials found guilty of breaking the rules. Furthermore, by enabling the club to escape any sanction, it would go against the very objective laid down by the CAS in the same *Pobeda* award (see award, rec. 116, p. 25). According to the award, strong sanctions against clubs are likely to provoke reactions within the clubs when attempts are made to manipulate matches. As was pointed out in the *Pobeda* case, the president clearly could not have manipulated matches without the assistance of players on the pitch. This shows that it was possible, within a club, to fix a match without provoking adequate reactions. By imposing strong sanctions against the club, it is possible not only to prevent individuals from manipulating

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<sup>5</sup> The media have recently reported on the control and monitoring measures that have been implemented, in particular by UEFA, and then by FIFA, in this area.

matches, but also to encourage other club officials, players or members to take action when they become aware of an attempt to manipulate a match. In other words, it is important that clubs or associations should be punishable when officials or players are involved in match-fixing activities. The prospect of a sanction against the club is likely to encourage the club's directors and other officials to keep a close eye on the proper running of the club and to fight against any attempt to fix matches, and even to encourage the players to refuse to participate in such activities.

Finally, it does not appear necessary to decide who will benefit from the crime. Even if the only beneficiary were a friend or acquaintance of the club president who fixed a match result with the help of certain players, it seems logical and well-founded to punish the club itself.

## Sanctions

Finally, still concerning the merits, it should be noted that the CAS thought that the sanctions imposed against the club and the president were appropriate. The club was banned from all European competitions for eight years, while the president was given a life ban from all football-related activities. The fact that this sanction was considered appropriate demonstrates the gravity of the actions committed, which violated the very essence of sport and the fundamental principles of loyalty, integrity and sportsmanship.

### *11.2.4 Various Procedural Questions*

During the appeal procedure instigated by Pobeda, the Court of Arbitration for Sport had to consider various procedural questions, some of which are examined in this chapter.

Firstly, for example, we will study UEFA's request that certain witnesses be given anonymity. Unless the author is mistaken, this is the first time the Court of Arbitration for Sport has examined witnesses whose identity has been withheld from one of the parties.

A second question concerned Article R56 of the Code of Sports-related Arbitration, in particular UEFA's request, submitted after it had lodged its response, that an additional witness be heard.

The Court of Arbitration for Sport also had to consider complaints made by the appellants concerning the procedure followed by the UEFA disciplinary bodies. On this occasion, the CAS confirmed its case-law relating to Article R57 of the Code. It should be noted that one of the questions relating to this provision was not dealt with in the award.

Finally, we will not go back over a point previously discussed: the degree of proof required by the CAS, i.e. “to the comfortable satisfaction” of the arbitrators. Reference is made to what has already been said on this subject.

#### **11.2.4.1 Protection of Witnesses by Means of Anonymity**

UEFA asked the CAS if it could examine witnesses without their identity being revealed to the appellants.

During the procedure before the UEFA disciplinary bodies, some witnesses had been heard without their identity being revealed. UEFA wanted to protect their anonymity mainly because of the risk to the lives and safety of the witnesses and their families. UEFA pointed out that, between the decisions of UEFA’s first and second instance bodies, the identity of certain witnesses testifying against the club had been disclosed on the Pobeda club website, which had announced that it intended to publish photos of these witnesses. As a result, some witnesses had expressly asked for protection.

In support of its request, UEFA mentioned the practice of the Swiss state courts and the case-law of the Swiss Federal Court and the European Court of Human Rights.

The CAS decided to follow strictly the case-law of the Swiss Federal Court with regard to the protection of witnesses. It should be noted that the Swiss Federal Court itself applies the case-law of the European Court of Human Rights (Article 6 ECHR and Article 29 para 2 of the Swiss Constitution; ATF 133 I 33).

Bearing in mind all the circumstances, the Panel considered that the fears expressed by some of the witnesses could not be ignored. It therefore maintained a balance between the rights of the appellant, particularly the right to examine the witnesses, and the need to protect the witnesses.

The CAS therefore applied the case-law of the European Court of Human Rights and the Swiss Federal Tribunal. However, it should be noted that this case-law applies to criminal procedures. A disciplinary procedure within a sports organisation cannot automatically be put in the same category as a criminal procedure. It is therefore questionable whether it is really necessary to demand that all the requirements of a criminal procedure are met.

In practical terms, the appellants received copies of the minutes of the interrogations of the protected witnesses, with all clues to the witnesses’ identity deleted.

In addition, the witnesses were examined by telephone. Their voices were disguised. A CAS representative was with the witnesses during this process, in order to ensure that they were answering the questions alone and, of course, to check their identity, which was known to the Panel. In this way, the appellants, who did not know the identity of certain witnesses, were able to interrogate them remotely. This procedure therefore protected the interests of the appellants as well as those of the witnesses to have their identity protected.

It is possible that, in the future, the CAS will need to use the same procedure again for hearing witnesses who need protection. Since the CAS tries to apply Article R57 of the Code in a broad way, giving the Panel full power to examine the facts and the law, it is indispensable that the examination of protected witnesses should be possible before the CAS. It should therefore be possible, where necessary, to apply practical procedures in accordance with the case-law of the Swiss Federal Tribunal and the European Court of Human Rights.<sup>6</sup>

#### 11.2.4.2 Examination of an Additional Witness (Article R56)

After submitting its response, UEFA requested that an additional witness (anonymous witness Z) be examined. UEFA asked for permission to call this witness on the basis of Article R56 of the Code, particularly mentioning the existence of exceptional circumstances.

UEFA explained that it had not become aware of the testimony of witness Z until after it had filed its response. It also produced minutes of an interrogation carried out after its response had been submitted. The CAS refused to allow witness Z to be examined on the grounds that the existence of exceptional circumstances had not been established.

On reading the award, it is impossible not to imagine that the Panel refused to allow witness Z to be examined because it wanted to avoid another procedural problem. Should the fact that a party did not become aware of an additional piece of evidence until after it had submitted its written pleadings not be treated as an exceptional circumstance under Article R56? The discovery, after the submission of written pleadings, that an additional witness could provide important evidence should constitute an exceptional circumstance under Article R56.

When it filed its response, the respondent did not know what this witness might subsequently say. It therefore had no reason, at that time, to request that he be examined by the CAS.

It is logical that the CAS should have accepted that this was an exceptional circumstance in the sense of Article R56 of the Code.

When a party does not become aware of the existence of an additional piece of evidence until after the deadline fixed for the submission of its written pleadings, it should be allowed to submit that evidence to the CAS.

With regard to witness Z in the present case, the Panel probably felt uncomfortable about the issue of the minutes of the interrogation of witness Z.

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<sup>6</sup> Incidentally, one of the witnesses who was meant to remain anonymous declared at the hearing that he was prepared to reveal his identity and be examined in the presence of the parties and the arbitrators. He was therefore taken to the hearing chamber and examined as an ordinary witness. This witness was a former coach of the Pobeda club, who was coaching another Macedonian team when the hearing took place. A few days after the hearing, he was sacked by his Macedonian club, particularly on the grounds that he had tarnished the image of Macedonian football. In principle, the club who sacked this coach has no links with the Pobeda club.

For UEFA requested that these minutes should not be transmitted to the appellants because their content would enable them to identify the witness. We cannot dismiss the idea that the Panel faced a two-fold problem: on the one hand, it was asked not to transmit the minutes because the safety of the witness might have been endangered, while on the other, it feared it might infringe the appellants' rights by allowing the minutes to be submitted without allowing the appellants to see them.

In the author's opinion, this problem could have been resolved either by refusing to accept the minutes of the interrogation or by asking UEFA to submit excerpts from the minutes which would not lead to the identification of the witness.

In any case, it would have been possible to examine witness Z without agreeing to the submission of the written minutes.

While it may be admitted that the aim of Article R56 of the Code is to define the parameters of the subject of arbitration and to avoid the submission of multiple written pleadings and evidence, it should not be applied in such a restrictive way that new evidence or evidence which a party did not discover until after it submitted its written pleadings is rejected.<sup>7</sup>

#### **11.2.4.3 Procedural Error by the UEFA Disciplinary Bodies (Article R57)**

The appellants complained, initially to the UEFA disciplinary bodies and then in their appeal pleadings to the CAS, that their procedural rights were breached by the UEFA disciplinary bodies. It may be even be suggested that the main grounds of the appeal concerned the alleged procedural errors and the violation of the appellants' rights by the UEFA disciplinary bodies.

The award does not examine these procedural complaints in detail, nor answer them. Indeed, it dismisses them with reference to the rule laid down in Article R57 of the Code, under which the Panel can hear the case de novo. Article R57 states that "The Panel shall have full power to review the facts and the law".

According to CAS case-law, any procedural errors committed by a lower instance body are cured by the fact that the Panel carried out a full review. The award also points out that CAS case-law is in line with the decisions of the ECHR. The award mentions various examples of relevant case-law (award, p. 17, rec. 87).

This CAS case-law is helpful insofar as it avoids debate surrounding possible procedural errors allegedly committed by lower instance bodies. However, it does create a number of perverse effects. For example, since it does not re-examine in detail the procedure followed by the lower instance bodies, the CAS does not decide whether a particular form of procedure is acceptable or not. In other words,

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<sup>7</sup> The CAS applied the version of Article R56 that was in force before 1 January 2010. The amendment of this provision does not concern an element that was crucial to the question being dealt with here.

the lower instance bodies and the federations do not obtain a decision confirming that their procedure was correct or indicating what aspects of their procedure were incorrect. This creates the risk that procedural errors are perpetuated in different procedures before the federations, since the CAS does not comment on such errors.

Furthermore, the notion of hearing a case *de novo*, i.e. carrying out a free examination with full power to review the facts and the law, raises a problem in terms of appeal procedures against UEFA decisions.

For although the first sentence of Article 57 para 1 clearly states that “The Panel shall have full power to review the facts and the law”, this provision is not in line with the UEFA Statutes.

Article 62 para 6 of the UEFA Statutes stipulates that “The CAS shall not take into account facts or evidence which the appellant could have submitted to an internal UEFA body by acting with the diligence required under the circumstances, but failed or chose not to do so”.

Article 62 of the UEFA Statutes concerns the jurisdiction of the CAS as an appeals arbitration body. It is this same provision (Article 62 para 1) that recognises the jurisdiction of the CAS to hear appeals against decisions taken by a UEFA organ.

In other words, the rules laid down in Article 62 of the UEFA Statutes form part of the arbitration clause that binds the parties (UEFA and the other parties). However, as an arbitration clause, it must also bind the CAS.

The CAS and some legal writers are very restrictive and doubtful as to the possibility of limiting the powers of the CAS to review cases in an arbitration clause (see Antonio Rigozzi, “L’arbitrage international en matière de sport”, p 557 ff and references to case-law). As far as we are concerned, it is hard to see why the restriction created by the UEFA Statutes should not validly limit the jurisdiction of the CAS.

Moreover, in a recent award in the “Valverde” case (CAS 2009/A/1879, p. 19), the CAS accepted the need to base its jurisdiction on the rules of the federation concerned. It wrote: “The jurisdiction of the CAS to rule *de novo* must be based on the rules of the federation concerned, which the CAS follows. As a private arbitration body, the jurisdiction of the CAS is limited by the jurisdiction of the arbitral procedure on which the appeal is based”.<sup>8</sup>

The restriction imposed by Article 62 para 6 of the UEFA Statutes is extremely precise and limited. It only concerns facts or evidence which the party could have submitted to an internal UEFA body, but did not.

In other words, if a procedural error was committed by a UEFA body and resulted in the violation of a party’s right to a fair hearing, such as the right to examine or submit evidence, the limitation of Article 62 para 6 would not apply in any case. For in such circumstances, the CAS would be able to conclude that the

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<sup>8</sup> Unofficial translation of the following : “*La compétence du TAS à juger de novo doit être fondée sur les règlements de la fédération intéressée, limite à laquelle souscrit ce Tribunal. En tant qu’instance arbitrale privée, la compétence du TAS se trouve limitée par la compétence de la procédure arbitrale sur laquelle est fondé l’appel*”.

party did not have the opportunity, even with the diligence required, to submit the facts or evidence concerned.

Furthermore, the examination of an alleged procedural error could lead the CAS to set aside the decision and refer the case back to the UEFA bodies.

This limitation of Article R56 of the Code by Article 62 para 6 of the UEFA Statutes did not raise any particular problem in the Pobeda procedure. However, this question could one day become a serious issue.

It is not out of the question that the failure to respect the limitation set out in Article 62 para 6 of the UEFA Statutes might be considered as a valid reason to appeal to the Swiss Federal Tribunal against the CAS award, in accordance with Article 190 para 2 of the LDIP (Swiss Federal Code on Private International Law).

In other words, such a complaint could be one of the few grounds on which an appeal to the Swiss Federal Tribunal against a CAS award is allowed under Swiss law.

Perhaps this question will be answered in the future.

### ***11.2.5 Conclusions***

As mentioned above, the CAS award in the case *UEFA v/Pobeda* is a first in several respects.

Quite clearly, it is extremely important because of the fact that it is the first decision connected with the fixing of football matches at European level. Unfortunately, it is unlikely to be the last.

This award also appears very significant insofar as it is sure to remain a reference point for some time as regards the evidence that is necessary and sufficient to establish the involvement of certain individuals or sports organisations and, therefore, to sanction them.

This award is also extremely important because it is the first time that CAS arbitrators have had to examine protected witnesses, i.e. witnesses whose identity was withheld from one of the parties.

Finally, as is often the case where CAS case-law is concerned, the award as a whole raises for discussion a number of interesting items related to the arbitration procedure.

## **References**

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