

Chapter 13

Players Release

Pere Lluís Mellado and Michael Gerlinger

Contents

13.1	CAS 2008/A/1622-1623-1624, FC Schalke 04, SV Werder Bremen, FC Barcelona v. FIFA.....	233
13.2	Introduction.....	234
13.3	Discussions Between the Clubs and Federations.....	235
13.4	Decision of the FIFA Emergency Committee.....	236
13.5	The CAS Procedure.....	236
13.6	The CAS Decision.....	237
13.7	Conclusion.....	240

13.1 CAS 2008/A/1622-1623-1624, FC Schalke 04, SV Werder Bremen, FC Barcelona v. FIFA

Several clubs had to release players chosen for their national teams for the Summer Olympics held in Beijing in 2008. Because the 2008 Olympic Games were not included in the international calendar, FIFA issued a Circular Letter (No.1153) 15 days ahead of the tournament. According to this letter, the clubs were obliged to release the relevant players,

Pere Lluís Mellado—Attorney-at-law, MC advocats—sport division.
Dr. Michael Gerlinger, M.A.,—Direktion Recht, Rechtsanwalt, Direktor Recht, Prokurist,
FC Bayern München AG.

P. L. Mellado (✉)
Barcelona, Spain
e-mail: pere@mcadvocats.es

M. Gerlinger
Munich, Germany
e-mail: michael.gerlinger@fcb.de

based on customary law. FC Bayern Munich, FC Barcelona, FC Schalke 04 and SV Werder Bremen refused to release their players. Ultimately the CAS ruled in favour of the clubs. Among the conclusions reached by the authors is that fast and effective proceedings, and specific knowledge of the Panel's role in sports, can resolve such issues fairly.

13.2 Introduction

The "Olympic Cases" (CAS 2008/A/1622-1623-1624) concerned a rather simple question, i.e. whether professional football clubs had a statutory obligation to release their players for the 2008 Olympic Games in Beijing or not. Nevertheless, the issue was highly disputed between clubs, federations and in the media.

In particular the fact that only shortly prior to the opening ceremony of the Olympic Games in Beijing the legal proceedings started, led to an intensive and controversial public debate on the release of players. The first match of the Olympic Men's football tournament was supposed to take place on 7 August 2008, but only on 23 July 2008, 15 days in advance, FIFA issued a Circular Letter (No. 1153) with respect to the legal basis of an obligation to release. In fact, in such Circular Letter FIFA referred to customary law as legal basis, while the respective FIFA Regulation on the Status and Transfer of Players (hereinafter "Transfer Regulations") did not provide for such obligation.

Already in January 2008, it was common understanding between many club lawyers that the Transfer Regulations explicitly declare the release for the Olympic Games as "not mandatory". Article 1 para 2 and 3 of Annex 1 to these Regulations stipulate that clubs are not obliged to release their players for matches scheduled on dates not listed in the coordinated international match calendar, with the exception of a duty to release on basis of a special decision by the FIFA Executive Committee. Since, at that time, there was clearly no special decision of the FIFA Executive Committee, neither were the Games included in the international calendar, club officials did not visualize any problems with having to release players in August.

Real problems started, when the federations that were taking part in the Olympic Men's football tournament, called their players for the Games. In the case of FC Barcelona, the Argentinian federation AFA informed the club with letter of 27 June 2008 that it requests the player Lionel Messi for the Games, while the club, having finished the league season 2007/2008 only in third place, needed to play the extremely important Champions League qualification during the Games in Beijing.

And this was precisely the heart of the problem: Since the 2008 Olympic Games were not included in the international calendar, two different competitions took place at the same time, and while AFA needed the player Lionel Messi for winning the Olympic Men's football tournament, FC Barcelona, which was obliged to continue paying the player's salary, needed to win the Champions League qualification and, of course, wanted to keep the star of the team for those matches.

13.3 Discussions Between the Clubs and Federations

Most of the federations started to call their players at the end of June/beginning of July 2008. Since the clubs were convinced that there was no legal obligation to release their players, they mostly only released players that were not part of the club's line-up and informed the federations accordingly that they would not release line-up-players.

Some federations replied immediately referring to an alleged obligation to release all players requested. Discussions started quite quickly, FIFA and the European Club Association (ECA) called on all parties to find solutions and many compromises were reached within the next weeks.

However, there were still cases that could not be solved between the clubs and the federations individually. In case of FC Barcelona and Lionel Messi, the issue was very difficult: As mentioned earlier, the team was supposed to play in the qualifying round of the UEFA Champions League for the 2008/2009 season in August (on 12/13 and 26/27 August) at the same time as the Beijing Olympics of 2008. At the time, it was essential for the club to be able to play those games with all of its players (and especially such an important one as Lionel Messi) for any setback could leave the team out of the forthcoming edition of Europe's premier club competition.

Trying to defend its interests without provoking a conflict, the first thing the club did was go to the Spanish Football Federation RFEF for advice on the issue. RFEF, in turn, approached FIFA, who, on 27 May 2008 responded in writing to RFEF to expressly state that the Beijing Olympics were not part of the international match calendar; and that the release of players aged over 23 years was not an obligation and the release of those under 23 had always been an obligation on the basis of "*customary law*". In other words, the Olympics were not expressly included in the international calendar, but in accordance with the custom up until that point, the release of players of under 23 years was considered an obligation.

Convinced that the club was right, FC Barcelona sent AFA a letter on 11 June 2008, in which, along with the response from FIFA, it informed them that it was reserving the right not to release the player on the basis of current Transfer Regulations. AFA did not reply. Instead, on 27 June 2008, AFA sent an official call-up to the player requesting that he joins his national team on 7 July 2008.

In order to prevent any consideration that the player was refusing to join his national team, FC Barcelona wrote to AFA on 2 July 2008 saying that it was not releasing the player, duly justifying the decision on the basis of the Transfer Regulations and also basing the decision on the club's own sporting needs. At the same time, contact was initiated with AFA in order for both institutions to reach an agreement, with such proposed solutions as, for example, Lionel Messi playing the first game of the qualifying round of the UEFA Champions League and joining the Argentina team on a later date. All of these proposals were rejected by AFA.

Foreseeing that there would be no agreement, the club decided to move a step further (the Olympic Games were only a month away) and wrote to the Secretary

General of FIFA to explain the situation and requesting a clarification on the club's right not to release the player. FIFA, at first, reiterated its position of 27 May 2008 without additional arguments, which is why the club asked for a detailed position on the legal situation.

On 15 July 2008, Lionel Messi reported back to FC Barcelona after his holidays and started preseason training with the rest of the squad. A few days later, on 23 July 2008 (15 days before the start of the Olympics), FIFA issued the above mentioned Circular Letter N° 1153, in which FIFA recognised the uncertainty regarding the obligation to release players, and by means of a chronological review of the regulations and principles that FIFA had issued since 1988, indicating that the tournament was deliberately not included in the international match calendar, reiterating that the release of players was an obligation “*on the basis of customary law*”.

The next day, while the player was taking part in a preseason match for FC Barcelona and the deadline was reached for him to report to the Argentinian national team, FIFA announced that it would be submitting the issue to the Single Judge of the Players' Status Committee in order to jointly resolve the requests from SV Werder Bremen, FC Schalke 04 and FC Barcelona.

In late July the events happened fast. On 28 July 2008, FC Barcelona sent its final report of arguments to the Single Judge. The decision was expected shortly after.

13.4 Decision of the FIFA Emergency Committee

A very specific element of the procedures was that during above discussions and prior to the CAS procedure, FIFA actually issued a decision on the release of players. On 29 July 2008, the FIFA Emergency Committee, which-according to Article 33 of the FIFA Statutes-is competent to decide matters requiring immediate settlement between two meetings of the FIFA Executive Committee, “confirmed” the application of customary law.

The Committee referred to a longstanding and undisputed practice and “concluded” that an obligation to release existed.

It pointed out that it was contacted to “deliberate” about such obligation, and indeed, the Single Judge deciding upon above requests of FC Barcelona, FC Schalke 04 and SV Werder Bremen explicitly referred to the conclusions of the Emergency Committee.

13.5 The CAS Procedure

The decision of the Single Judge of the FIFA Players' Status Committee, confirming an “obligation to release on basis of customary law”, was then issued on 30 July 2008 and submitted to FC Barcelona, FC Schalke 04 and SV Werder

Bremen the same day. All players involved, Messi, Rafinha and Diego, were supposed to play on 7 August 2008, Rafinha and Diego with Brazil against Belgium and Messi with Argentina against Ivory Coast. This meant that only one week was left for the proceedings.

For this reason and very quickly, all parties cooperated and agreed with CAS on a schedule for an expedite procedure, a practice which CAS uses quite often for such urgent “admission cases”. According to such schedule, the Appellants’ submissions were submitted on Thursday 31 July 2008, FIFA’s response on Monday, 4 August 2008. The hearing took place on Tuesday, 5 August 2008 and the decision was finally issued on 6 August 2008, the day before the matches.

The proceedings are a perfect example, how fast and tailored to the specific event CAS can act. The fast proceedings allowed a decision within only 6 days. Since the players, however, were already in China, the clubs needed to decide what to do with the decision they achieved. Asking the players to return would have meant additional travelling back to Europe, not knowing whether the players would be able to play for the clubs at top level after the tiring journeys.

FC Barcelona decided to find a solution, which would allow the player to stay with the Argentinian team while protecting the club’s interests, in particular securing a proper insurance. For this reason, the club contacted AFA and agreed on those appropriate measures in the night of 6–7 August 2008. Messi stayed, played, scored and won the tournament with Argentina. FC Barcelona, without Messi, qualified for the Champions League, won the title as well as all other titles it could achieve in season 2008/2009. A perfect story.

But let’s turn to the CAS decision itself:

13.6 The CAS Decision

In its decision, the Panel first defines the question to be answered explicitly as:

Do/Did the Appellants 1–3 have a legal obligation to release their players Rafinha, Diego and Messi to participate in the Olympic Games 2008 with their national teams?

It then turns to the above mentioned provision in the Transfer Regulations, stipulating the two possibilities of making the release mandatory, i.e.

- The coordinated international match calendar and
- A special decision by the FIFA Executive Committee.

The coordinated international match calendar was created by FIFA in 2000 and applied as from 1 January 2002, in order to harmonize the different matches and tournaments and to prevent situations as in this case. The idea was to create a clear calendar of official matches, when no other official matches could take place. If there are dates blocked in the calendar for international matches and tournaments, no national or international club competitions can be played at the same time, so there would be no collision of matches. This principle helped a lot to avoid

conflicts between club matches and national team matches and is highly appreciated in particular by the clubs.

However, the second option for a mandatory release, a special decision of the FIFA Executive Committee, would not be able to avoid such conflicts, since even if the Executive Committee decides to make the release mandatory, club competitions could take place. This is why clubs recommend elaborating the calendar further instead of taking special decisions. On the other hand, an overloaded calendar would make it impossible to play club competitions. If the period of the Olympic Games, for example, would have been included in the calendar, UEFA would have had no time to play Champions League Qualification.

The same problem of conflicts would apply, if there was a mandatory release based on customary law. Also in this case, club competitions could take place at the same time, resulting in a conflict between the national team matches and the club matches.

The Panel shortly referred to the fact that the Men Football Tournament of the Olympic Games 2008 in Beijing had not been included in the calendar. It then turned to the above decision of the FIFA Emergency Committee dated 29 July 2008. The Panel denied the existence of a special decision, since there was no urgency within the meaning of Article 33 of the FIFA Statutes, which is why the Emergency Committee would not have been competent to take such a special decision anyway.

Before assessing the application of customary law, the Panel confirms that no other written legal regulation would support an obligation to release the players, since the Transfer Regulations are exhaustive in this respect. It also clarifies that the unique character of the Olympic Games might have an impact on the application of customary law, but could not itself be a legal basis for the release of players.

The essential part of the CAS decision is the assessment and exhaustive clarification on the application of customary law in sports. There is no doubt that the general principle of customary law can also apply to the regulations of sports federations (e.g. CAS 2004/A/589 *SK Rapid Wien v FC Crvena Zvezda & FIFA*). However, there are three basic requirements that have to met for such application, i.e.

- a loophole in the law, which may be supplemented by customary law
- a constant and consistent practice (*inveterata consuetudo*) and
- a conviction of the members that the practice is binding (*opinio necessitatis*).

Without a loophole, customary law cannot apply. The Panel makes quite clear that customary law may only complement or help to interpret sports regulations. It cannot apply *contra legem*. If there is a specific rule on the legal question to be answered, customary law cannot derogate such rule. The Panel did not further investigate the existence of a loophole at this stage, since the other requirements for customary law did not apply. If it had investigated further, it would have probably come to the conclusion that already this requirement was missing. As outlined earlier, Article 1 para. 2 and 3 of Annex 1 to the Transfer Regulations clearly state that clubs are not obliged to release their players for matches

scheduled on dates not listed in the coordinated international match calendar, with the exception of a duty to release on basis of a special decision by the FIFA Executive Committee. A loophole would have only existed, if the regulations did not foresee any legal consequence for matches not listed in the calendar or not subject to a special decision. Then, maybe customary law could explain the legal consequence of such fact. However, the regulations clearly say, what the legal consequence is, i.e. that “it is not compulsory to release players” for such matches. Any application of customary law, leading to a compulsory release, would be *contra legem*.

With respect to the constant and consistent practice, the Panel analyzed the Parties submissions on past Olympic Games. If there had been a consistent practice to release players, even without the clubs’ will to do so and even if there was no integration in the calendar or a special decision, there could have been such practice. But the Appellants outlined that

- at least at the Olympic Games in Athens 2004, FIFA included the Olympic Football Tournament in the calendar and
- on many occasions, the Technical Reports of FIFA on the Games reported problems with clubs that didn’t release their players, without FIFA sanctioning them.

The fact that many clubs released their players voluntarily to the Games could, on the other hand, only show a constant practice of *voluntary* release, while it was quite clear that a *compulsory* release was not applied, neither by the clubs, nor by FIFA. On this basis, the Panel concluded that there was no constant and consistent practice.

And also the third requirement, a conviction of the members that the practice is binding, could not be established by the Panel. A consistent practice could only lead to the existence of customary law, if the members of the respective sports organization consider such practice as mandatory. Since a FIFA regulation was concerned, the Panel examined, as far as submitted by the Parties, the conviction of FIFA’s members, i.e. the national associations’ and their members’, the clubs’. Besides the above mentioned fact that many clubs refused to release players in the past, the Panel explicitly refers to a letter by the German Football Federation DFB of 17 July 2008, which it sent to the Brazilian Federation CBF. In such letter, DFB states that it did not see any legal basis for a mandatory release, which is why even amongst FIFA’s direct members, the issue was not clear at all, which even the FIFA Emergency Committee concluded.

For this reason, the Panel also denied the existence of “*opinio necessitatis*”. In fact, none of the requirements for the application of customary law was met.

13.7 Conclusion

The case is an important part of CAS jurisprudence in two aspects: It did not only clearly and exhaustively explain the application of customary law on sports regulations. It also serves as a proof for the necessity and advantage of specialized sports arbitration: The fast and effective proceedings as well as the specific knowledge of the Panel in sports helped to solve the case only shortly before the Olympic Games started. In addition, the Panel, in its “Epilogue” also tried to find a balance between the importance of the Olympic Games and the rights of the clubs and recognized the importance and spirit of the Games. In such light, it asked for cooperation between all Parties. If, for example, Messi would wish to play for Argentina, the Parties should try to find a solution. They did. They won.