

Chapter 14

Stay of Execution

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14.1 CAS 2009/A/1880 and 1881 FC Sion & Essam El-Hadary v. FIFA & Al-Ahly Sporting Club CAS 2009/A/1976 and 1977 Chelsea Football Club & Gaël Kakuta v. SASP Racing Club de Lens & Association Racing Club De Lens & FIFA

Controversies between players and clubs often lead to decisions of the FIFA Dispute Resolution Chamber which include financial remedy. This can entail serious consequences both players and clubs. Banning a player or a club from participating in official

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matches/tournaments, imposing a life ban (as in the case of Ukrainian referee Oleg Oriekhov) or ordering that compensation be paid are just a few examples. The author describes how an appellant can ensure that the financial order is not enforced and the disciplinary sanction is not served pending the outcome of the appeal. With reference to the latest CAS jurisprudence—*FC Sion & Essam El Hadary v FIFA & Al-Ahly Sporting Club* (CAS 2009/A/1880 & 1881) and *Chelsea Football Club & Gaël Kakuta v SASP Racing Club de Lens & Association Racing Club De Lens & FIFA* (CAS 2009/A/1976 & 1977)—Stephen Sampson introduces significant principles to serve as guidelines for a stay of execution.

14.2 Introduction

In disputes between players and clubs decisions of the FIFA Dispute Resolution Chamber may contain a financial remedy, such as an order to pay compensation, and/or a disciplinary sanction, such as a ban on a player from participation in official matches or a ban on a club registering new players for two transfer windows. Having taken a decision to challenge the order of the FIFA DRC, it is likely to be of financial and practical importance to an appellant to ensure that the financial order is not enforced and the disciplinary sanction is not served pending the outcome of the appeal. Despite the importance of securing any necessary stay of execution, the procedure and decisions on such matters are not necessarily well known and matters are still contested that might otherwise be dealt with by consent.

The purpose of this commentary is to set out some of the relevant principles and jurisprudence, by reference to two decisions from the FIFA DRC of summer 2009 that were the subject of appeals to the CAS and resolved in 2010, *FC Sion & Essam El-Hadary v FIFA & Al-Ahly Sporting Club*¹ and *Chelsea Football Club & Gaël Kakuta v SASP Racing Club de Lens & Association Racing Club De Lens & FIFA*.² In both cases, in order to protect their positions the appellant clubs and players secured the necessary stays of execution of the sporting sanctions pending the outcome of the appeals.

14.3 FC Sion

In the FC Sion case it was alleged that the Swiss club FC Sion/Olympique de Alpes SA entered into an employment contract with the very successful Egyptian goalkeeper Essam El-Hadary contrary to an employment contract between the player and Al-Ahly Sporting Club from Egypt. The FIFA DRC rendered its

¹ CAS 2009/A/1880 and 1881.

² CAS 2009/A/1976 and 1977.

decision³ that the player was in breach of contract without just cause during the protected period and that the new club had induced the breach of contract. Consequently, compensation of €900,000 was ordered to be paid by the new club and player jointly and severally, the player was sanctioned with a restriction of four months on participating in official matches,⁴ and the new club was sanctioned with a restriction on registering any new players for the next two entire registration periods.⁵ On 18 June 2009 both the player and the club filed their Statements of Appeal with the CAS and requested an interim stay of the FIFA DRC Decision. On 7 July 2009, before the CAS arbitration panel was constituted, the Deputy President of the Appeals Arbitration Division of the CAS granted both applications for stays of the FIFA DRC. Finally, by decision of 1 June 2010, the CAS determined that the appeal filed purportedly on behalf of FC Sion was inadmissible and the player's appeal as to liability failed, thus the stays on the imposition of the disciplinary sanctions were lifted.

14.4 RC Lens

In the RC Lens case it was alleged that Chelsea entered into an employment contract with the French player Gaël Kakuta while he was under contract with RC Lens. The FIFA DRC rendered its decision⁶ that the player was in breach of contract without just cause during the protected period and that the new club had induced the breach of contract. Consequently compensation was ordered to be paid by the new club and the player jointly and severally, the player was sanctioned with a restriction of four months on participating in official matches, and the new club was sanctioned with a restriction on registering any new players for the next two entire registration periods. On 16 October 2009 both the club and the player filed their Statements of Appeal with the CAS and requested an interim stay of the disciplinary sanctions imposed by the FIFA DRC. By order of 5 November 2009 the President of the Appeals Division of the CAS granted both applications for stays of the FIFA DRC Decision. Finally by Award by Consent of 4 February 2010 the sanctions were overturned following the acknowledgment by RC Lens that the alleged contract between the player and the club was not valid, thus there had been not contract to breach and no liability for inducing a breach.

³ Decision of 16 April 2009.

⁴ In accordance with Article 17.3 of the FIFA Regulations on the Status and Transfer of Players (the "FIFA Regulations").

⁵ In accordance with Article 17.4 of the FIFA Regulations.

⁶ Decision of 27 August 2009.

14.5 Relevant CAS Procedural Rules

The rules relevant to an application for a stay of execution are those set out in R48 and R37 of the CAS Code of Sports Related Arbitration (the “CAS Code”).⁷

R48 of the CAS Code sets out the requirements for the content of the appellant’s Statement of Appeal. It provides that, among other things, the statement should include “if applicable, an application to stay the execution of the decision appealed against, together with reasons”.

The CAS jurisprudence provides that such an application for a stay is treated as a request for provisional and conservatory measures, pursuant to R37 of the CAS Code. R37 provides, in part

The President of the relevant Division, prior to the transfer of the file to the Panel, or thereafter the Panel may, upon application by one of the parties, make an order for provisional or conservatory measures. In agreeing to submit to these Procedural Rules any dispute subject to appeal arbitration proceedings, the parties expressly waive their rights to request such measures from state authorities. If an application for provisional measures is filed, the President of the relevant Division or the Panel invites the opponent to express his position within ten days or within a shorter time limit if circumstances so require. The President of the relevant Division or the Panel shall issue an order within a short time. In case of utmost urgency, the President of the relevant Division, prior to the transfer of the file to the Panel, or thereafter the President of the Panel, may issue an order upon mere presentation of the application provided that the opponent is heard subsequently.

Several points arise by way of further comment: Firstly, whether the terms of R48 to file the application for a stay in the Statement of Appeal is a mandatory requirement or whether an appellant who fails to do so may nevertheless secure an order for provisional measures at some other time can be the subject of dispute. R37 does not contain any requirement specifying the time at which an application is to be filed; consequently the authorities support the view that to fail to apply for a stay in the Statement of Appeal is not fatal to a later application. In *Ortega v Fenerbahçe & FIFA* the Panel commented “[i]t appears to the Panel that an appellate body which was denied the ability in appropriate circumstances to make an interim order would run the risk of its final decision being in vain. Such conclusion ought not readily to be reached.”⁸

Secondly, in all but the most urgent cases, the application for a stay will be dealt with *inter partes* rather than *ex parte*. Given that transfer windows are fixed and cover only a limited period of each year and the practice of the FIFA DRC to provide for bans on registrations to cover the two next entire windows, it seems

⁷ The Code is accessible at <http://www.tas-cas.org/rules>.

⁸ CAS 2003/O/482, Preliminary Decision issued on 19 August 2003, para 8.4. See also *AS Roma v FIFA*, CAS 2005/A/916, Order of Provisional Measures issued on 23 August 2005, para 11, “*les mesures provisionnelles....doivent pouvoir être déposées en tout temps, au vu de l’urgence et pour prévenir d’un dommage irréparable*”.

unlikely that a club would be faced with the need to apply on *ex parte*. The situation of a player may be more difficult, given that official matches may be played during the majority of a year.

Thirdly, the appellant may consider whether it would prefer the application for a stay to be dealt with by the President of the Division prior to the appointment of the Panel or by the Panel once it is constituted. In that regard, a time consuming challenge to the appointment of an arbitrator that would require a decision from the ICAS, may take such a decision from the hands of the appellant.

Finally it is noteworthy that, contrary to the waiver set out in R37, in the *FC Sion* case the player applied to the District Court of Zurich, contesting the FIFA DRC Decision and requesting its annulment, applying for *ex parte* interim relief, which application was rejected.

Order for the payment of compensation: no need to apply for a stay of execution.

When an appellant receives an order from the FIFA DRC providing for the payment of compensation, it will not want to have to pay the money over pending the outcome of an appeal. The CAS jurisprudence supports the appellant in this position. It provides that, so long as an admissible appeal is filed before the CAS,⁹ it is unnecessary for a party to apply for a stay of execution of the compensation award element of a decision as such award is incapable of enforcement pending the outcome of the appeal.¹⁰

The explanation of this principle is set out in the *Fulham* case, at para 13.

To execute and enforce such a decision [of the FIFA DRC] [the receiving club] would need the assistance of the competent state authorities. However, because of the present pending ordinary arbitration, [the receiving club] is not legally in a position to enforce the Decision. The Panel relies upon and adopts the reasoning of the CAS in its decision dated 16 June 2003 (CAS 2003/O/460, 5.3): ‘The Panel has concluded that it need not make any ruling on this application. The Decision is one made by a Swiss Private association, and as such it cannot be legally enforced, if it is challenged, either before the ordinary courts, pursuant to Article 75 of the Swiss Civil Code, or, as in the present case, before an arbitral tribunal, such as the CAS (see Margareta Baddeley, *L’Association sportive face au droit—Les limites de son autonomie*, Basel 1994, pp. 224–226 and pp. 309–312; Jean-Francois PERRIN, *Droit de l’association* (Article 60–79) CC, Fribourg 1990, pp. 141–142)’

No doubt the need not to pay out money where the liability to do so is contested will be of some relief to the appellant. However, the sporting sanction is likely to be of greater significance to both a player and a club given the impact such a sanction will have on their season and beyond.

⁹ Or some other challenge to the decision is commenced before a court.

¹⁰ See *Fulham FC v Olympique Lyonnais* CAS 2003/O/486 and *Christian Maicon Henning v Prudentipolis Esporte Club & FIFA* CAS 2004/A/780.

14.6 Disciplinary Sanction: Issues to be Assessed in Making an Application

The established case law of the CAS provides that there are three cumulative conditions that must be satisfied for a stay of execution of a disciplinary sanction to be granted¹¹:

- (a) the measure must be useful to protect the application from irreparable harm;
- (b) there must be at least a plausible case that the facts relied upon by the applicant and the rights that it seeks to enforce exist and that the material conditions for the legal cause of action are fulfilled; and
- (c) the interest of the applicant must not be outweighed by those of the other parties.¹²

14.6.1 First Condition: Irreparable Harm

Harm is irreparable if it cannot be compensated for if the appeal is subsequently successful but the sanction is served in full or in part in the intervening period. It seems likely, therefore, that an appellant player or club subject to a significant sporting sanction is able to show irreparable harm.

Where a player is concerned, if he is wrongly banned from playing he is prevented from exercising his profession which prevention cannot be undone. In *FC Sion*, the player was not to be banned until the beginning of the forthcoming season, leaving open the possibility, but not the likelihood, that the case could be resolved within the summer months. Further, while it seems likely that a player would be entitled to the contractual remuneration from his club during the period of any ban, it is conceivable that the club could challenge the entitlement during the period of any ban or that the level of remuneration could be determined according to the player's ability to participate in matches or achieve certain performance targets during matches.

Where a club is concerned, firstly it would lose the playing services of the player which loss could not be undone. Secondly, it would not be possible to undo the loss of the opportunity for registering new players for a transfer window. Thirdly the club would suffer reputational harm. Fourthly, irreparable harm would be caused to innocent third party players who, but for the ban, would have joined the club or who might wish to leave the club (but who would not be capable of being replaced).

¹¹ The author acknowledges the article produced by Tom Hickman and available at http://www.blackstonechambers.com/news/newsletters/sports_law_focus_articles/stays_of_execution.html.

¹² See e.g. Henning para 5.8 and CAS 2006/A/1141 *M.P. v FIFA & PFC Krilja Sovetov* Order of 31 August 2006, para 16.

That harm of this nature was irreparable was recognised by the CAS in *AEK Athens v Slavia Prague & UEFA*¹³ when addressing the question of whether there would be irreparable harm if the club was kept out of a UEFA competition pending the determination of the case. The CAS stated: “the Court is of the opinion that such risk is self evident. In part at least, that harm is difficult to quantify or not quantifiable at all and thus qualifies as irreparable. This is so in any event for the loss or reputation and of opportunity may also partly apply to lost revenue.”¹⁴

Further, if the harm was in fact considered the sort of harm that could be reparable, and compensated by a payment of money, it is unclear who would be liable to make such payment.

Finally, while CAS proceedings will be resolved promptly, there is a real possibility that the case could take longer to resolve than a four month period of a ban, or at least the period covering one transfer window, in which case the appeal would be rendered academic and undermine the right of the parties to appeal to the CAS.

14.6.2 Second Condition: Arguable Case

This condition is self explanatory. The only other relevant comment is that the jurisprudence provides that a party’s chances of success on appeal must be prima facie reasonable and “cannot definitely be discounted”.¹⁵ The reasoning advanced by the appellants will obviously be determined by the facts of the case. Plainly in both the *FC Sion* and *RC Lens* cases, this threshold was satisfied.

14.6.3 Third Condition: Balance of Interests

The question for the CAS to determine is “whether it would do greater harm to grant the preliminary relief than to deny it.”¹⁶

While previously a sports governing body such as FIFA will no doubt have sought to object to the grant of a stay of execution in order to preserve the integrity of its tribunal and their orders, given the recent jurisprudence from the CAS it seems likely that to oppose the grant of a stay would be the exception rather than the rule. It seems to be hard argument for a sport’s governing body to win to say that the sanction must be imposed and served immediately or in accordance with its tribunal’s order rather than following the determination of an admissible appeal, unless perhaps the sanction was imposed at participation in a particular event.

¹³ Procedural Order, 17 July 1998.

¹⁴ *Ibid* para 43.

¹⁵ Henning, para 5.10.

¹⁶ *AEK* para 70, Henning para 12.

The sanction is imposed to act as a deterrent rather than to compensate or otherwise benefit the wronged party and in both *FC Sion* and *RC Lens* it does not appear that the sanction was time specific in any sense. Consequently if it was later found, as in the *FC Sion* case, that the sanction should be imposed, it would lose none of its force; the player was still to be banned from playing for four months and the club would suffer the transfer ban. Conversely if, as in the *RC Lens* case, the CAS agreed that the sanctions should not have been imposed such a decision does not undermine the deterrent effect and to have permitted the sanction to have been served in full or in part in the intervening period would have been unjust.

This position was summarised by the CAS in *Henning*,¹⁷ when it states: “FIFA assumes that the Appellant is in breach and merited the sanction, but that is the very matter that the Panel to be appointed will have to determine. Likewise, the deterrent effect of the sanction will not be undermined if its imposition is merely postponed and not cancelled. The risks incurred by the Appellant in the event of immediate execution of the decision seem thus to outweigh the disadvantages for FIFA in being deprived from such execution.”

14.7 Conclusion

The decision of the FIFA DRC commonly marks only a staging post in a claim for compensation and/or the imposition of disciplinary sanctions. *FC Sion* and *RC Lens* illustrate that the order to pay compensation is unenforceable and an appellant club or player has a good prospect of securing a stay of execution of a disciplinary sanction pending the outcome of the appeal. That must be the right and just position in the majority of cases and respondents may find it appropriate to invest their resources in dealing with other aspects of the appeal rather than the issue of a stay. Thankfully matters before the CAS always proceed promptly and so the period of the postponement of the order to pay compensation or the imposition of the disciplinary sanction will not be excessive; alternatively the orders will be overturned in which case to have served any part of a sanction or paid over money not due and owing would have been unjust.

¹⁷ Para 5.12.