

SPORTS LAW BRIEFING

THE LANDMARK MATUZALEM CASE AND ITS CONSEQUENCES ON THE FIFA REGULATIONS

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Introduction

For the first time in more than 20 years, an international arbitral award has been annulled by the Swiss Federal Supreme Court for breach of substantive public policy. In a landmark decision, the Federal Supreme Court overruled a Court of Arbitration for Sport (CAS) award in which the decision of the FIFA Disciplinary Committee was confirmed. The decision had found the Brazilian football player Francelino da Silva Matuzalem and the Spanish football club Real Saragossa guilty of breaching their obligations towards the Ukrainian football club Shakhtar Donetsk. Among other consequences, Matuzalem would therewith automatically have been banned from any activity in connection with football pursuant to the applicable FIFA regulations. The Federal Supreme Court has now considered such a worldwide ban as a breach of public policy, and in particular as an excessive commitment in the sense of art. 27 para. 2 of the Swiss Civil Code.

How it all Began: The First Decision of the Federal Supreme Court

In 2004 Matuzalem entered into a five year employment contract with Shakhtar Donetsk. After three years Matuzalem terminated his contract and signed a contract

with Real Saragossa, which undertook to hold him harmless from any claims that could arise from the termination of the contract without just cause. Based on article 17 of the Regulations on the Status and Transfer of Players, FIFA ordered Matuzalem and Real Saragossa to pay compensation to Shakhtar Donetsk in the amount of EUR 6'800'000 plus interest at 5% from July 2007. Both parties appealed against the FIFA decision. Thereafter, CAS increased the compensation to be paid to Shakhtar Donetsk to EUR 11'858'934 plus interest at 5% from July 2007.

An appeal against this decision was filed by Matuzalem and Real Saragossa with the Federal Supreme Court. The appeal was rejected on 2 June 2010 (case no. 4A_320/2009). Therewith, the Federal Supreme Court substantially strengthened the position of the football clubs in the world of football. The Federal Supreme Court considered the extremely punitive calculation of the compensation only as a "compensation for damages".



However, CAS had in fact decided that the football player had to pay a compensation comprising of (i) a possible future salary (minus the salary Matuzalem would have earned with Shakhtar Donetsk), plus (ii) a possible future transfer sum defined in the contract but never paid, plus (iii) a sport specific penalty in the amount of six months of salary.

The Decision of the FIFA Disciplinary Committee

Of course Matuzalem was subsequently not able to pay such compensation. Until summer 2009, when his labour contract with Shakhtar Donetsk would have ended, his salary did not exceed EUR 1'000'000 per year. Also at the monetary peak of his career in the season 2009/10, at the age of 31, when he was transferred to Lazio Roma, he only earned EUR 3'220'900. Until the end of his career as a football player, Matuzalem will, therefore, not earn the amount he has to pay to Shakhtar Donetsk for terminating his employment contract two years earlier than agreed.

Unfortunately, also Real Saragossa was – due to its financial difficulties – not able to pay Shakhtar Donetsk the compensation, and could therefore not live up to the hold harmless agreement with Matuzalem. For this reason Shakhtar Donetsk initiated disciplinary proceedings against Matuzalem and Real Saragossa with FIFA. Based on article 64 of the FIFA Disciplinary Code, the FIFA Disciplinary Committee found Matuzalem and Real Saragossa guilty and condemned both to pay a fine of CHF 30'000 within a final deadline. If such payment would not be made within 90 days, Shakhtar Donetsk could demand in writing from FIFA that a ban on taking part in any football related activity be imposed on Matuzalem and/or six points be deducted from the first team of Real Saragossa in the domestic league championship. Such ban and/or such a deduction of points would be imposed without further formal decisions of the FIFA Disciplinary Committee until the total outstanding amount has been fully paid.

The appeal filed by Matuzalem and Real Saragossa against the decision of the FIFA Disciplinary Committee



was turned down by CAS on 29 June 2011. Thereafter, only Matuzalem appealed against the CAS decision.

The Second Decision of the Federal Supreme Court

In its decision dated 27 March 2012 (case no. 4A_558/2011), the Federal Supreme Court first reaffirmed that the free development of an individual must not only be respected by the state but also by monopolistic private individuals, such as sport federations. The Federal Supreme Court held that any decision of such a sport federation must be consistent with the fundamental values in Switzerland. These fundamental values of public policy are not exhaustively defined in Swiss jurisprudence. One of these fundamental values is the provision in article 27 para. 2 Swiss Civil Code – the so called excessive commitment – which is considered by the Federal Supreme Court as a substantial part of any moral and legal system. Thus, the violation of this principle leads to a violation of substantive public policy if the personality rights are obviously and seriously violated.

Taking into consideration article 27 para. 2 Swiss Civil Code, the Federal Supreme Court found that the worldwide ban of a professional football player for an unlimited time because of his incapacity to pay a certain amount

of money to his former club is a breach of substantive public policy. Instead of promoting compliance with the decision, the “punishment” renders the payment completely impossible, because the player would never be able to earn enough to pay his obligations. Such a punishment was furthermore considered as unnecessary, as under the New York Convention it would be quite easy to enforce the decision. Therefore, the Federal Supreme Court annulled the CAS award with its decision dated 27 March 2012.

Consequences for FIFA’s Disciplinary System

As the CAS decision has been set aside, CAS is now in a position to render a new decision without applying in particular article 64 para. 4 of the FIFA Disciplinary Code. The worldwide ban on a football player is definitively against public policy. Whether the fine of CHF 30’000 is also against public policy or whether it is at least against mandatory Swiss law still needs to be decided. Based on the decision of the Federal Supreme Court, there are at least serious reasons that such regulations are – if they are not against public policy – at least illegal, as they are not really suitable to enforce a fine of several million EUR.

As Real Saragossa has not appealed the decision regarding the deduction of points in the national championship, it was not decided whether article 64 of the FIFA Disciplinary Code is generally against public policy or not. It could have been argued that also the deduction of points for Real Saragossa would not be necessary to enforce FIFA and CAS decisions in the football world. The binding of the football club could therefore also be considered as excessive according to article 27 para. 2 Swiss Civil Code. These considerations could in particular be applied to the case of the FC Sion. As is widely known, FC Sion was punished by the FIFA Disciplinary Commission for letting six (unregistered) football players play in the Europa League and in the Swiss Football League based on a decision of a lower court which was later lifted by an upper court.

In any case, based on the decision of the Federal Supreme Court, the entire sanctioning system of FIFA needs to be reviewed to determine whether it is suitable and necessary to reach the envisaged goals or whether the personality rights of the persons involved prevail. With its decision, the Federal Supreme Court has shown that it is not willing always to give more weight to the interests of the sport federations than to the interests of the athletes.

Consequences for FIFA’s Regulations on the Status and Transfer of Players

The salary of Matuzalem and his inability to pay the compensation have clearly shown that the compensation as calculated by CAS, which the Federal Supreme Court considered in its first decision as “a compensation for damages only”, did in fact not have anything to do with the value of the player, and the effective damage which Shakhtar Donetsk suffered.

Given the second decision of the Federal Supreme Court (and the fact that the Federal Supreme Court consequently talks only about damages in its second decision), it might well be the case that the Federal Supreme Court will in the future have a closer look also at the compensation which has to be paid in case of an early termination of an employment contract pursuant to the FIFA Regulations on the Status and Transfer of Players. Even though there is of course the principle of *pacta sunt servanda*, there is no (sporting) reason why a football player should become factually a slave of his former football club for the rest of his life if the football player decides to terminate his contract earlier than agreed. There is no prevailing interest of the football world which could justify such a lifelong limitation of personal and economic freedom.

Against this background, the compensation payments according to article 17 of the FIFA Regulations on the Status and Transfer of Players will need to be reviewed again under the perspective of the excessive commitment according to art. 27 para. 2 Swiss Civil Code.

Sports Law Department

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The members of our sports law team provide the full range of services, both contentious and non-contentious: including drafting of employment, service, sponsoring and image agreements, transfers of athletes, contract negotiation and litigation as well as the handling of doping cases. The team also takes care of athletes' personal needs and requirements in all areas,

including contract negotiations, asset planning and wealth management, commercialising of their image, personal sponsoring contracts and residence and work permits.

Our sports law team has a lot of experience in sports related dispute resolution proceedings before the Court of Arbitration for Sport in Lausanne and other special judiciary bodies (e.g., the FIFA Dispute Resolution Chamber).

Many of the partners in the sports team are also active as officials in sports bodies.

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The Firm

Founded in Zurich in 1966, Froriep Renggli is one of the leading law firms in Switzerland, with around 90 lawyers and offices in Zurich, Geneva, Lausanne and Zug as well as an office in both London and Madrid serving clients seeking Swiss law advice.

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