



Court of Arbitration for Sport - UEFA - FC Sion - Case commentary

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The 'Sion affair' has finally come to an end, with the publication, at the end of January 2012, of the Court of Arbitration for Sport (CAS) Award.

The complexity of the affair surrounds issues concerning the prevalence of sports federations' judgments and those of state courts, as well as issues regarding rights of access to competitions. The legal importance of this case revolves principally around the intervention of state courts in the purely sporting domain of sport federations and competitions. FC Sion has opened the debate as to the possibility of contesting sporting sanctions before state courts.

The facts

The Affair began in 2009 with F.C. Sion convinced of inducing goalkeeper, Essam Al-Hadary, to breach his contract with his former club in Egypt. The consequence of this act resulted in a ban for F.C. Sion by the FIFA Dispute Resolution Chamber from registering any new players for two registration periods. No transfers were made in the summer of 2010 and an appeal by FC Sion to the CAS (which was eventually unsuccessful) was in progress.

In the registration period before the 2011/2012 season, FC Sion applied to register several new players – the Swiss Football League (SFL) and FIFA refused. The players had already played in qualification matches for UEFA Europa League and, having been informed that they had fielded unregistered players; were consequently excluded from the competition by UEFA. A civil court had overturned UEFA's exclusion, but UEFA ignored the court twice, claiming the second time that they awaited a decision by the Court of Arbitration for Sport. The civil court's decision was later overturned by a Swiss Appellate Court.

Many affairs were brought before the various jurisdictions; internal instances of FIFA and UEFA, the CAS as well as Swiss civil courts.

The affair, containing a number of legal procedures, considering FC Sion's determination to be reintegrated into the UEFA Europa League, therefore employing every possible civil court procedures, begs the following questions: Is it possible to circumvent football's governing bodies' internal instances by going in front of the state courts? Which would have priority – in theory and in reality?

The main issues, however, concerned the registration in the summer of 2011 of six FC Sion players as well as the exclusion of FC Sion from the 2011/2012 edition of the UEFA Europa League for having fielded these players in two matches against Glasgow Celtic football club from Scotland. The third issue concerned the abuse of dominant position and therefore disrespect of competition law by UEFA.

The issues raised in the affair surrounding these two decisions concerned the jurisdiction of UEFA and FIFA in relation to state courts and residually the independence of the Court of Arbitration for Sport (CAS).

The first complaint in this long affair took place in 2009, when the Egyptian club, Al-Ahly, requested compensation in FIFA's Dispute Resolution Chamber from FC Sion and the player; Mr. Al-Hadar, for breach of contract.

FC Sion filed an appeal with the CAS against the verdict in June 2009, two months after a favourable decision was rendered for the Egyptian club. Furthermore, FC Sion had received a two year suspension from FIFA, in June 2009, from registering any new players for two consecutive registration periods. The CAS Appeals Arbitration Division granted an interim stay on the suspension handed to FC Sion by FIFA. Therefore, the club was free to register players in 2009.

In June 2010, the CAS confirmed the FIFA suspension. Unsuccessful in front of the CAS, due to the initial case being filed against the club's association, Olympique des Alpes SA, and therefore lacking legal interest, the club persisted in appealing to national civil courts for a stay of execution on its sanctions in July 2010.

While the Swiss Federal Tribunal refused the club on two occasions a stay on the execution of its suspension, the Swiss Football League's disciplinary instance gave reason to FC Sion to allow the club to register players in the summer period of 2010, as FIFA's suspension had only arrived after the start of the registration period. No players were registered, however.

In 2011, the affair resurfaced as FIFA reiterated the ban on the registration by the club of new players in the summer 2011 registration period. Subsequently, the club's request for the registration of new players was rejected by the Swiss Football League (SFL) in July 2011 and later confirmed by its Appeals Tribunal.

In August 2011, the club submitted its Player List A for the UEL 2011/2012, which was accepted and approved by the Swiss Football Association and UEFA Administration.

However, at the protest of FC Sion's first opponents in the UEFA Europa League, Glasgow Celtic FC, concerning the eligibility of certain players, FIFA informed UEFA in early September of the non-eligibility of certain FC Sion players due to irregularities of compliance with FIFA Player Status and Transfer Regulations, stating that the players' eligibility was 'only' based on the decision by a state court. The UEFA Control and Disciplinary Body (confirmed by the Appeals Body) later handed FC Sion a two match forfeit for having fielded the litigious players in two Europa League matches and later excluded FC Sion entirely from the UEFA Europa League 2011/2012.

The complication arose when the club's request against UEFA's abuse of dominant position was successful in front of the State Court of the Canton of Vaud on the 13th of September 2011. UEFA was instructed to reintegrate FC Sion and its litigious players into the Europa League.

UEFA then filed an appeal with the CAS, refusing to enforce the Swiss state court's order until a decision by the CAS had been rendered. FC Sion refused to recognize the CAS jurisdiction

considering that it was not impartial.

Before the CAS decision, a Swiss Appellate Court overturned the civil court's order to reintegrate the club into the Europa League. In its decision, the CAS reiterated the independence of the CAS and upheld the ban on registration of players by FC Sion as well as its exclusion from the 2011/2012 edition of the UEFA Europa League. The CAS also commented on the question of a breach of competition law stating that the actions taken by UEFA were necessary for maintaining integrity in the sport and were; in addition, proportionate.

I. On the question of the battle between Sports regulatory Instances and state courts – Jurisdiction of the CAS

Independence of Court of Arbitration for Sport

The Swiss club questioned the independence of the CAS. While it can be argued that FIFA may have a strong influence, the CAS has been judged on various occasions by the Swiss Federal Tribunal, since the first affair of 1993, (Gundel – 15 March 1993), to be independent. The creation of ICAS (International Council for Arbitration of Sport) was later created as a further development in the independence of the CAS from the International Olympic Committee.

In addition, in October 2011, FC Sion had refused to acknowledge the jurisdiction of the CAS, claiming that it is not independent. However, the president of the club did sign the entry form for the UEL 2011/2012, in which he agreed to adhere to UEL Regulation, which states the recognition of the CAS in Article 2.07.

While the CAS has been judged as independent and this status was confirmed in the current affair, it is true that there list of arbitrators is a closed, selective list. The International Bar Association (IBA) Guidelines (point 3.1.2) provide an exception: “for certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialized pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, no disclosure of this fact is required where all parties in the arbitration should be familiar with such custom and practice”. The CAS has decided that sports law falls into this description.

CAS Jurisdiction

UEFA submits that “it is indeed undeniable that in accordance with the Statutes of UEFA as well as with the UEFA Regulations of the Europa League 2011/2012, CAS has exclusive jurisdiction to deal with any dispute between UEFA and a club (see Article 59 and Article 61 seq. UEFA Statutes and Article 2.07 and 32.01 of the UEFA Regulations of the Europa League 2011/2012)”.

Arbitration has, therefore, been foreseen in FIFA regulations (article 62-64 of FIFA Statutes) as well as the regulations of many other federations and sporting entities.

II. The eligibility of players

The second principle issue surrounded the eligibility of the players.

UEFA did not restrict FC Sion access to the Europa League. The exclusion was a sanction imposed for having breached a previous FIFA sanction – the suspension on the registration of new players. This suspension was a purely sporting sanction.

At national level, the Swiss Football League was later bound by the decision of the civil court to

allow the registration of the litigious players, following an appeal by FC Sion. However, UEFA did not feel itself bound by the civil court's judgment and also felt within its rights to review the eligibility of players and to sanction breaches of this eligibility rule. Therefore, under article 18.01 of UEL Regulations, a non-registered player is not eligible to participate in the Europa League. The responsibility of facing the legal consequences of fielding an illegal player rests on the club.

This resulted in the annulment of results in which FC Sion qualified for the next round of the Europa League. The club strongly contested in front of two civil courts, however,

The interesting issue here is how far FC Sion managed to thread into the legal system by clearly violating rules set out by an international sports federation. FIFA has long been known to have a certain level of authority; however this influence has been put into clear conflict with national (in this case, Swiss) Law. Its response to refuse to adhere to national law begs the question of hierarchy of norms. Even an international sports federation as powerful as FIFA is, is not above the law. Its headquarters being in Switzerland, this association is subjected to Swiss Law.

III. On the question of Abuse of dominant position in an economic sector

FC Sion accused UEFA of abusing its dominant position in the market for the organization of official European club competitions. In this complaint, the Swiss club claimed that UEFA's disciplinary instances, in sentencing and confirming two forfeits for the club and excluding the club from the 2011/2012 Europa League, violated the rules of Swiss Competition law.

The CAS reminded the parties that under competition law, should there be a violation of competition rules, this could be accepted as long as the conditions were fulfilled: necessity, proportionality and the pursuit of a legitimate goal.

FC Sion even stated that UEFA had agreed to the list of players and was then irate because the players went to the Civil Courts. UEFA certainly did not appreciate that the civil courts were being implicated in an affair that appeared, to the European footballing body as well as to FIFA, to be an internal dispute based on the breach of sporting rules. However, the administrative acceptance of the list does not mean that UEFA accepted the eligibility of players.

Conclusion

While the final decision in this affair adhered to the status quo, F.C. Sion did succeed in going quite far in the state courts. The fact that some instances of the canton courts did give reason to FC Sion leaves food for thought. Sport – and football- has never been above the law, but sporting federal rules have been – and continue for now to be- within the sole jurisdiction of disciplinary instances within the federations concerned.

While sporting specificity is important (and one of the main reasons for the creation of the CAS), these federations are associations, subjected to the laws of the country in which they are based. A balance may need to be made, however, between purely sporting rules and rules that affect rights such as the right to access to physical activities.

Are we heading towards a new direction, where a sports entity can contest a purely sporting decision that had been made following purely sporting rules, in front of a state court? In this case, the exclusion of a football club due to its disrespect of sporting rules concerning player eligibility (rules that were judged by all courts in this affair to be within the confines of Competition law), is based purely on sporting rules. The sanction that set the whole process rolling was, in itself, a standard sanction by FIFA for a club that did not respect player transfer regulations. The subsequent disrespect of the sanction resulted in FC Sion's exclusion. Purely sport- related, yet all

the same successful in two state courts in Switzerland.

Another point that we feel is important to raise in conclusion is UEFA's refusal to follow a state court order. The battle of powers between arguably the most powerful international sport federation and state courts has become explicit – no more implicit references. While the CAS has been internationally recognized – and officially recognized by the Swiss federal tribunal, whose authority is valid due to the location of the CAS which is an entity of private law, it is only a court of arbitration and not above state law. However, both, UEFA and FIFA criticized FC Sion for having approached a civil court to solve, what they felt, was a purely sporting issue.

The merits and disadvantages of the ability of a club member of a sports federation to attack sanctions based on legitimate sporting rules in front of a state court will no doubt be the subject of long discussions. More specifically, the risk is very real that the authority of FIFA's disciplinary bodies faces considerable challenge to remain as powerful as it currently stands, should every decision made be attacked by unhappy clubs. What would happen when a non-Swiss club challenges the decision? In this affair, the courts admitted the affair as a case of national law and therefore the issue was not breached.

Let the debating commence.

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Summary of affair:

Claims filed by UEFA: Seven

Successful: Two - Following the complaint of FC Celtic Glasgow, UEFA investigated the claims concerning the qualification of certain players in the F.C. Sion squad. Decision to exclude players and the club from this year's competition was upheld by the CAS.

No abuse of dominant market position by its decision to disqualify F.C. Sion from the Europa League 2011/2012 under the Swiss Cartel Act.