Football Legal

The international journal dedicated to football law

8 – December 2017

Brief overview of the recent CAS and SFT jurisprudence on res judicata

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➔ ***Swiss Federal Tribunal - Swiss Law – Res judicata principle – Court of Arbitration for Sport (CAS) – FIFA Dispute Resolution Chamber (DRC)***

Swiss Federal Tribunal, Decision 4A_490/2009, 13 April 2010;
Swiss Federal Tribunal, Decision 4A_374/2014, 26 February 2015;
Swiss Federal Tribunal, Decision 4A 633/2014, 29 May 2014;
Swiss Federal Tribunal, Decision 4A_6/2014, 28 August 2014;
CAS 2009/A/1880 FC Sion v. FIFA & Al-Ahly Sporting Club,
CAS 2009/A/1881 E. v. FIFA & Al-Ahly Sporting Club;
CAS 2010/A/2091 Dennis Lachter v. Derek Boateng Owusu;
CAS 2012/A/2912 Koji Murofushi & Japanese Olympic Committee v. International Olympic Committee;
CAS 2013/A/3061 Sergei Kuznetsov v. FC Karpaty Lviv; CAS 2015/A/3959 CD Universidad Catolica & Cruzados SADP v. Genoa Cricket and Football Club;
CAS 2015/A/4195 FK Senica v. PFC Ludogorets 1945 & FIFA;
CAS 2015/A/4352 Former Clubtletico Velez Sarsfield v. S.S. Lazio S.p.A.; CAS 2015/A/4353 Mauro Matias Zarate v. S.S. Lazio S.p.A.;
CAS 2015/A/4350 Mersudin Akhmetovic v. FC Volga Nizhniy Novgrod & RFU;
CAS 2016/A/4501 Joseph S. Blatter v. FIFA

After the increasing recourse from members of the football community to the State courts and national arbitral tribunals or dispute resolution chambers, the Court of Arbitration for Sport (CAS), in its recent jurisprudence, was faced with the issue of res judicata *in numerous cases. When appearing as an arbitral tribunal in a dispute, where a final decision of a national arbitral tribunal or a State court exists, the CAS is obliged to examine,* ex officio*, the existence of* res judicata *- a general principle, which precludes adjudicating disputes that have already been decided.*

The definition of res judicata *and its effects*

The definition of *res judicata* is not codified in Swiss Law.

However, the principle of *res judicata* is recognized in Swiss Federal Tribunal (SFT) and CAS jurisprudence as "*a fundamental principle of Swiss procedural public policy whose violation would yield the nullity of the award.*"[1]

The term *res judicata* refers to the general doctrine that an earlier and final adjudication by a court or arbitration tribunal is conclusive in subsequent proceedings involving the same subject matter or relief, the same legal grounds and the same parties (the so-called "*triple-identity*" criteria).[2]

1 SFT, decision 4A_490/2009, par. 2.1; CAS 2010/A/2091, par. 18.

2 CAS 2010/A/2091, par. 16: *"The Panel thus finds that the so-called "*triple identity*" test – used basically in all jurisdictions to verify whether one is truly confronted with a res judicata question (cf. ILA, International Commercial Arbitration Committee, Berlin Conference [2004], Interim Report: "*Res Judicata*" and Arbitration, p. 2, in www.ila-hq.org/en/committees/index.cfm/cid/19) – is indisputably met"*. See also CAS 2015/A/3959; CAS 2016/A/4501; CAS 2006/A/3061; CAS 2010/A/2058. However, in legal doctrine, it is noted that cumulative fulfillment of only two conditions – i.e. identity of claims and identity of persons - is sufficient, in this respect see *"Res judicata in sports disputes and decisions rendered by sports federations in Switzerland", D. MAVROMATI*, CAS Bulletin 2015/1, p. 41.

If these prerequisites are successfully met, the arbitral tribunal is bound by the award issued in the previous proceedings and cannot issue a new award on the merits in the same matter. In view of the principle of public interest, *res judicata* intends to safeguard the certainty of rights which have already been adjudicated upon and defined by a judgment.[3]

Res judicata is said to have a positive and a negative effect. The positive effect of *res judicata* is the termination of a dispute in a final and binding manner between the parties. The negative effect prevents the re-litigation of the subject matter of the judgment or award, also referred to as *ne bis in idem*.[4]

Further, the SFT explained in its judgment 4A_633/2014 at c. 3.2.2 that:

"*Res judicata applies both domestically and internationally and applies in particular to the relationship between an arbitral tribunal sitting in Switzerland and a foreign court or arbitral tribunal (judgment 4A_374/2014 of February 26,2015, at 4.2.1; see also BGE 140 III 278 at 3.1, p. 279; 127 III 279 at 2).*

Therefore, should a party raise a claim in an arbitral tribunal sitting in Switzerland which is identical to a foreign judgment or arbitral award in force as to the claim adjudicated there, the arbitral tribunal may not address the matter insofar as the foreign judgment can be recognized in Switzerland according to Art. 25 or Art. 194 PILA (judgment 4A_374/2014 of February 26, 2015, at 4.2.1; see also BGE 140 III 278 at 3.1, p. 279; judgment 4A_508/2010 of February 14, 2011, at 3.1)."

It is generally accepted in Swiss jurisprudence that the arbitral tribunal violates procedural public policy when it leaves unheeded in its award the material legal force of an earlier judgment or when it deviates in the final award from the opinion expressed in a preliminary award as to a material preliminary issue.[5]

3 CAS 2006/A/1029, par. 14.
4 CAS 2015/A/3959, par. 109.
5 SFT, decision 4A_490/2009 at c. 2.1 with further references.

Res judicata *effects to FIFA decisions*

The SFT and CAS jurisprudence used to be reluctant to accord *res judicata* effects to decisions made by judicial organs of associations, such as the FIFA Dispute Resolution Chamber (DRC). In particular, CAS used to say that the FIFA proceedings are neither court proceedings nor arbitral proceedings, but rather defined such as "*intra-association proceedings*", leaving the question as to whether the *res judicata* effects can be applied to FIFA decisions open and noting that the application of the principles of arbitrational proceedings to the ones at FIFA "*must be demonstrated in each specific case by the party invoking them.*"[6]

For example, in the case CAS 2012/A/2912 at par. 105, the Panel considered as follows:

"*Res judicata - at least under Swiss law - is a procedural concept that is known only in relation to court judgments and decisions of arbitral tribunals. The concept applies in a case in which there has been a final judgment that is no longer subject to appeal. The consequence thereof is that the matter cannot be raised again in the same or in another court. Thus, no court may reconsider the matter that has been finally disposed of in the previous court judgment. In particular Swiss law does not attribute res judicata effects to administrative decisions by organs of sports associations which necessarily lack the adversarial nature of a legal procedure and decision by a judicial body.*"

It appears that the SFT does not share this view anymore. In a judgment of 2014, it explicitly acknowledged *res judicata* effects to a decision of the DRC.[7] The main relevant facts of the case were as follows.

The case concerned the unilateral termination of the employment contract by the Player. As a result, the Former Club initiated proceedings before the DRC against the Player and the New Club. In this proceeding, the Former Club claimed damages from the Player for the early termination of the employment contract. Furthermore, the Former Club also claimed damages for said breach from the Player's new employer, *i.e.* the New Club. The DRC ruled that the Player and the New Club were severally and jointly liable to the Former Club in the amount of GBP 400,000 (approx. EUR 450,000). The Player and the New Club appealed against the DRC decision to CAS. Since the Player did not pay the advance of costs, CAS terminated his appeal and issued a termination order. In the (remaining) procedure opposing the Former Club and the New Club, CAS decided to squash FIFA's decision in total and to refer the matter back to the DRC. The Former Club appealed the CAS award to SFT, and submitted that CAS was not entitled to also annul the DRC decision in relation to the Player, whose appeal before CAS had been terminated.

> ***In a judgment of 2014, SFT explicitly acknowledged* res judicata *effects to a decision of the DRC***

In its decision, SFT upheld the appeal against the CAS award for lack of jurisdiction and stated as follows:

"*However, the CAS made the same mistake by annulling §2 of the operative part of the DRC award, which exclusively concerned the dispute between the Appellant and the Player. In so doing, it overlooked that the withdrawal of the Player's appeal, followed by the appeal proceedings CAS 2012/A/2916 being struck out, put an end to this appeal procedure so that the decision of first instance was henceforth res judicata as to the Player and the Appellant. In other words, the CAS arrogated to itself a jurisdiction ratione personae that it no longer had as a consequence of the withdrawal of the appeal when it*

6 CAS 2009/A/1880, 1881, par. 50.
7 SFT, decision 4A_6/2014.

annulled a decision already enforceable as to one of the joint Defendants and henceforth untouchable, irrespective of the fate of the appeal of the other joint Defendant and of the risk of contradictory awards. It actually acted as though it were still seized of the appeal made and then withdrawn by the Player. The Appellant is therefore right to challenge its jurisdiction in this respect."[8]

It follows from the above decision that, according to SFT, a CAS Panel acts outside its competence, if it ignores the binding character of the first instance decision. In the afore-cited case, the first instance decision of FIFA opposing the Player and the Former Club had become final and binding with the withdrawal of the appeal.

> ***CAS, in its recent jurisprudence, has also confirmed the res judicata effects to final decisions rendered by FIFA deciding bodies or judicial organs of national associations***

CAS, in its recent jurisprudence, has also confirmed the *res judicata* effects to final decisions rendered by FIFA deciding bodies or judicial organs of national associations. For example, in the case CAS 2013/A/3061 at par. 184, CAS vested *res judicata* effect with a decision of a judicial body of the Football Federation of Ukraine. In the case CAS 2015/A/4195 at par. 45, the Sole Arbitrator considered the relevant FIFA decision to be *res judicata*. In the case CAS 2015/A/4350 at par. 71, CAS considered that the decision passed by the Football Union of Russia's organ had *res judicata* effect. In the latter case, the Sole Arbitrator stressed that, "*[c]onsidering the employment-related issues between the Player and the Club have already been validly dealt with by another judicial authority, it is very doubtful, in the Sole Arbitrator's view, that the Player's claim related to the payment of his Moving Expenses can be heard unless it does not arise from the employment relationship with the club. It would otherwise be barred by the res judicata effect of the decision already issued in 2013.*"

Therefore, taking into account the existing approach in SFT and CAS jurisprudence on *res judicata* effects to arbitral awards and court decisions, they can only have a preclusive nature if they satisfy the "*triple identity*" test and are enforceable under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (the New York Convention). At the same time, there is still no unanimous opinion on whether the decisions of the FIFA judicial bodies and the deciding organs of the national associations should also be vested with *res judicata* effects. On the one hand, it is undisputed that the FIFA decisions are not arbitral awards, which could be enforced under the New York Convention, but, from the other hand, the final and binding effects of the FIFA decisions to the subjects of the football community, who were parties to such proceedings at FIFA and did not appeal the decisions to CAS, justify the *res judicata* consequences of such rulings.

Res judicata *effects to CAS termination orders*

In the case CAS 2015/A/3959 *CD Universidad Catolica & Cruzados SADP* v. *Genoa Cricket and FC*, the Panel dealt with the joint appeal of the football club, *CD Universidad Catolica*, and the company, *Cruzados SADP*, against a FIFA decision. The club lodged its first claim with FIFA in October 2012. In May 2013, FIFA informed the club that it is not in a position to intervene in a dispute based on a contract concluded between a football club and a company. The club and the company appealed the FIFA decision at CAS, but ultimately withdrew their appeal.

Consequently, in June 2013, CAS issued a termination order, without exploring the questions relating to jurisdiction, admissibility, the merits or any other legal issue.

Also in June 2013, the club once again lodged its original claim with FIFA, partially amending its initial request. In September 2014, FIFA issued a decision, declaring the claim of the club admissible, but rejecting it on the merits. Upon receipt of the grounds of the new FIFA decision, both the club and the company filed an appeal before CAS.

Therefore, the Panel had to consider which effects were stemming from the CAS termination order of June 2013. In doing so, the Panel relied on the following fragment from the SFT judgment 4A_374/2014 at c. 4.3.2.2:

"*In principle, only a judgment on the merits has res judicata authority whilst an unenforceable procedural judgment may at best have it in connection with the issue of admissibility that the arbitral tribunal upheld or rejected (…). However, the Swiss Code of Civil Procedure sees certain unilateral acts of the parties as akin to a judgment (…). This applies to the discontinuance of the action (Art. 241(2) CPC; …) as opposed to the discontinuance of the proceedings, the conditions of which are set at Art. 65 CPC. Although the code draws no terminological distinction in this respect, both institutions must not be confused (…). The discontinuation of the action strictly speaking, which is one form of acknowledgement of the other party's position, is the deed by which the claimant abandons his submissions in the case; it concerns the action and enjoys res judicata. The discontinuance of the proceedings or withdrawal of the claim, however, which does not have that authority, is an act terminating the proceedings only and does not constitute an obstacle to reintroducing the claim under certain conditions (…).*"

In the aforementioned CAS case, the Panel considered that whether there is a waiver or a simple withdrawal does not depend upon how the decision in question is named (award, termination order, etc.). Instead, the effects depend on the applicable arbitration rules. If the latter provide that no unilateral withdrawal is possible without renouncing to the matter in dispute altogether, the decision that puts an end to the proceeding also finally disposes of the claim and, thus, has *res judicata* effect. A CAS termination order is not a final and binding decision having *res judicata* effects, if the appellant withdraws its appeal before the arbitral tribunal was constituted and before the appeal brief was filed. In such a case, the CAS termination order only acknowledges that an appeal with CAS had been lodged, that this appeal has then been withdrawn without a panel having been constituted, thus, leading to the (purely procedural) termination of the proceedings (without *res judicata* effects).

In another case, CAS 2015/A/4195 *FK Senica* v. *PFC Ludogorets 1945 & FIFA*, the Sole Arbitrator was faced with a case in which the Slovak club filed with FIFA a claim against the Bulgarian club for training compensation for a player. In August and October 2012, FIFA wrote to *Senica*, *inter alia*, that "*we regret having to inform you that we do not appear to be in a position to intervene on your behalf in the matter of reference*", because, "*according to the information contained in the Transfer Matching System (TMS) at the time the player were registered with FC Ludogorets Razgrad, the said club belonged to the category IV in the sense of art. 4 par. 2 of the Annexe 4 of the Regulations on the Status and Transfer of Players*."

In November 2012, *Senica* appealed against the FIFA decision in the form of a letter of October 2012 to CAS.

In December 2012, *Senica* withdrew its appeal and CAS issued a termination order.

In August 2015, *Senica* filed a new appeal with CAS against the FIFA's alleged denial of justice (*i.e.* the lack of a motivated decision). *Senica* submitted that the fact that an appeal has been lodged with CAS and then withdrawn does not exclude the possibly to re-submit the appeal, if it happens within the prescribed time limit. *Ludogorets* asserted that the CAS termination order of December 2012 was "*binding the same way as an award, and the withdrawal of an appeal, on the other hand, has the effect of rejection (and res judicata respectively)*". FIFA argued that, "*bearing in mind the fact that the Appellant withdrew its first appeal against FIFA's letter of 26 October 2012, we consider that CAS is not in a position to deal with the new appeal at stake as the current situation qualifies as a res judicata situation.*"

The Sole Arbitrator found that *Senica*'s shift of position in the second appeal, in which it claimed denial of justice, whilst in the first appeal it claimed the FIFA letter of October 2012 to be a final decision, was a violation of the principle of *venire contra factum proprium*. He considered that "*FIFA was legitimately under the impression that the matter was definitely settled by the Termination Order issued by CAS on 31 December 2012.*" Also, the Sole Arbitrator considered that, in any case, the object of the first CAS proceedings would have been to determine whether there had been a decision of FIFA in October 2012 and to possibly rule on the merits of *Senica*'s claim or to request FIFA to render a formal decision on *Senica*'s claim in case it was found that there had been a denial of justice by FIFA. Therefore, the second appeal would indeed, as argued by the respondents, be qualified as a *res judicata* situation.

Limit on the application of res judicata

The *res judicata* effect only applies insofar as the specific claim was decided. To what extent this is the case is determined by the interpretation of the judgment on the basis of its entire contents. While the *res judicata* effect is limited to the dispositive part of the award, its scope frequently results from the reasons of the decision, particularly when a claim is rejected. The meaning of the specific operative part of the award is, therefore, to be assessed in each case on the basis of the entire reasons of the decision.[9]

In the language of SFT, "*[r]es judicata only relates to the dispositif of the decision or the award. It does not cover the reasoning. However, one sometimes needs to look at the reasoning of the decision to know the exact meaning and extent of the dispositive.*"[10]

Conclusions

Notwithstanding that definition of *res judicata* is not codified in Swiss Law, it constitutes a part of the Swiss procedural public policy, whose violation would yield the nullity of an award.

As it was stated in the final report on the topic of *res judicata* and arbitration by the International Law Association's International Commercial Arbitration Committee, for an arbitral award to have conclusive and preclusive effects it must comply with the traditional "*triple identity*" test (identity of the claims, of the causes of action and of the parties), and if there are different parties in the further arbitration proceedings, the prior award will not have conclusive and preclusive effects on a different party.[11]

8 *Ibid.* at c. 3.2.2..

9 SFT, decision 4A_633/2014 at c. 3.2.6 with further references; CAS 2015/A/4352, 4353 at par. 135-137; CAS 2015/A/3959 at par. 116.

10 ATF 128 III 191; *F. Hohl*, Procédure civile (Bern, 2001), Tome I, Introduction et théorie générale, at 246
In the arbitral practice of International Chamber of Commerce (ICC), ICC Case No. 3267 (1984), a tribunal chaired by Prof. *Reymond*, applying Swiss Law, when asked to consider the *res judicata* effect of its earlier partial award, held that *"the binding effect of its first award is not limited to the content of the order thereof adjudicating or dismissing certain claims, but that it extends to the legal reasons that were necessary for such order, i.e. to the ratio decidendi of such award."*

11 CAS 2016/A/4501 at par. 104 with further references to De Ly/Sheppard, ILA Final Report on *Res Judicata* and Arbitration, Arbitration International, vol. 25, no. 1, 2009, p. 76.

There are, however, several published awards in which arbitral tribunals have given some effects to a prior decision, even though it did not qualify as *res judicata*. This was typically done in situations where the prior decision involved a case that was not identical but was closely connected to the case before the arbitral tribunal. The effects given to such prior decisions varied among arbitral tribunals. While some tribunals considered themselves bound by a prior decision that was not *res judicata*, others were more cautious holding that they would take the prior decision into consideration.[12]

> ***The* res judicata *effect is limited to the operative part of the award, but it also extends to the legal reasons that were necessary for the award***

In any event, following the more liberal approach demonstrated by SFT and CAS in their recent rulings, a decision passed by a judicial organ of FIFA or a national association, which was not appealed against, becomes binding to the relevant parties and is thus granted a preclusive nature, or, at the least, is "*taken into consideration*" by the Panel adjudicating a dispute at a later stage.

The *res judicata* effect is limited to the operative part of the award, but it also extends to the legal reasons that were necessary for the award, *i.e.* to the *ratio decidendi* of such award.

12 CAS 2016/A/4501 at par. 105 with further references to SCHAFFSTEIN, *Res Judicata* in International Commercial Arbitration – A Problem, in: International Commercial Arbitration, 2016, par. 4.173.

Harold MAY-NICHOLLS*'s Quest for Justice*

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→ ***FIFA – Governance – Corruption – FIFA World Cup – FIFA Ethics Committee – FIFA Appeal Committee – Court of Arbitration for Sport (CAS)***

Adjudicatory Chamber of the FIFA Ethics Committee, 6 July 2015 (grounds date: 14 January 2016), no. 140 662 CHI ZH;
FIFA Appeals Committee, 22 April 2016 (grounds date: 8 February 2017), no. 140 662 CHI ZH;
CAS 2017/A/5006 Harold Mayne-Nicholls v. FIFA

As the FIFA World Cup in Russia approaches, scrutiny of the combined bid processes for the 2018 and 2022 tournaments has revealed a dark side that the football world can no longer afford to ignore. It was widely reported that members of the FIFA Executive Committee shamelessly sold their influence behind closed doors in exchange for personal benefits. Some have even alleged that the selection of Russia and Qatar as hosts suggest that the football world is being used for ulterior and greater geopolitical motives. The culmination of various investigations resulted not only in the expulsion of football officials from the football world but to the arrests and criminal trials of some of the biggest names in sports administration. Buried within these tales is the protracted story of Harold MAYNE-NICHOLLS*, the president of the 2018 and 2022 FIFA World Cup bid selection committee, who was originally banned by the FIFA Ethics Committee from all football related activity for seven years. The sanction was ultimately reduced to two years by the Court of Arbitration for Sport (CAS) which found that he did not receive a benefit as prohibited by the FIFA Code of Ethics (FCE).*[1] *In any event* MAYNE-NICHOLLS *ended up serving a ban longer than what was imposed by the CAS.*

The case is particularly egregious considering that (a) FIFA used the incorrect version of the FIFA Code of Ethics as it applied the 2012 version to events that occurred in 2010; (b) *MAYNE-NICHOLLS* served a sanction longer than what ultimately handed down because of the delay of the FIFA Ethics Committee and Appeal Committee in issuing the grounds of the two decisions; and (c) FIFA refused to provide the Report on the Inquiry into the 2018/2022 FIFA World Cup Bidding Process, otherwise known as the "*GARCIA Report*", that contained evidence relevant to the case.

FIFA World Cup 2018 and 2022 Bid Evaluation Committee

Harold MAYNE-NICHOLLS, a Chilean national and journalist by trade, has worked in football administration for over 20 years as the president of the Chilean Football Federation and the Chilean National Professional Football Association. Having served as a FIFA official, *Harold MAYNE-NICHOLLS* was the chairman of the 2018 and 2022 FIFA World Cup Bid Evaluation Committee (the "*Bid Evaluation Committee*") which is the working group established to visit each country submitting bids to host the World Cup. Generally speaking, the Bid Evaluation Committee is responsible for the review of each bid and produces a report provided to the (then) FIFA Executive Committee. This report merely identifies the benefits and risks of each bid and does not recommend which country should be selected. To be clear, the Bid Evaluation Committee does not actually select which country will host the World Cup. Its function focuses on determining whether the various bids are in fact as represented by the bidding countries. Ultimately the choice as to where the World Cup is to be held was a decision of the FIFA Executive Committee body.

The Bid Evaluation Committee visited Qatar in September of 2010 for the purposes of reviewing Qatar's bid for the 2022 World Cup. The Bid Evaluation Committee visited the *Aspire Academy for Sports Excellence* ("*Aspire*") in Doha. There the members of the Bid Evaluation Committee met *Aspire*'s Executive Director for International Football affairs Mr *Andreas BLEICHER*.

1 CAS 2017/A/5996 *Harold Mayne-Nicholls* v. *FIFA* (award dated 14 July 2017).