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EDITORIAL

Times are changing for Broadcasting and Media Rights. With new technologies and updated regulations, market operators must improve their business models. These markets are constantly evolving at both national and international levels.

In this context, Football Legal devotes its *Special Report* to a comparative approach of Broadcasting and Media Rights in the major football leagues.

The challenges, considerations and debates on the issue reveal that modern football has rivaling conceptions of governance, economic development and solidarity among football stakeholders.

Regarding the future of Broadcasting and Media Rights in football, a key issue is how football stakeholders will adapt to the emergence of the digital world and new regulations.

On 26 October 2016, the *SPORTEL Law Conference* in Monaco will dedicate its first edition to this matter, with expert panels addressing the sporting, economic and legal aspects of the question.

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The tempus regit actum principle in CAS jurisprudence, protecting players' agents after quitting the "football family"

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→ Court of Arbitration for Sport (CAS) – FIFA Regulations – Intermediary – Football Union of Russia (FUR) – Football dispute – Retroactivity

CAS 2016/A/4372 Alexander Lopyrev v. FUR & FC Krylya Sovetov
CAS 2015/A/4368 Mikhail Danilyuk v. FUR & FC "Shinnik"

It has already been over a year since FIFA excluded players' agents from the football family. Starting from 1 April 2015, agents were left out of the dispute resolution system of international football governor FIFA, and from most national football federations, including the Football Union of Russia (FUR). Right after cancellation of Players Agents Regulations, i.e. 1 April 2015, the FUR refused for its jurisdictional bodies to be competent for any claim submitted by players' agents. However, some of such claims were pending at the FUR, some of which were submitted in order to oblige the clubs and players to fulfill the decisions on merit. All of sudden, FUR's internal bodies rejected most of the claims based on the fact that players' agents were no longer subjects of football at the time of hearing for cases that took place after 1 April 2015. The question was therefore to know who was responsible for the execution of FUR decisions on agents' cases.

Two specific CAS cases on players' agents, who were denied jurisdiction by the FUR after 1 April 2015, will be observed in the following article. Both of them were mainly dealing with a crucial procedural principle of no retroactivity (for the sake of clearness of author's discourse, no Lex Mitior existed in both cases).

Tempus regit actum - The Principle of No Retroactivity

Already in its advisory opinion of 26 April 2005, the CAS made it clear that there is a problem in identifying the relevant substantive legal rule because the anti-doping rules were amended in relatively quick succession.⁶ This advisory opinion of a CAS Panel confirmed the application of the *tempus regit actum* principle and pointed out that "any disciplinary action shall take into account the substantive norms and rules applicable at the time of the alleged violation."⁷

In practice, the *tempus regit actum* mostly appears in doping disputes at the confluence of the application of a new edition of the WADA Code and its previous one. In such cases, the Panel has to, first of all, determine the applicable edition of the WADA Code, and here the CAS applied the edition in force at the time of the alleged

violation matters. For example, in landmark case CAS 2000/A/274 S v. FINA, award dated 19 October 2000, it is stated as follows:

"[U]nder Swiss law the prohibition against the retroactive application of Swiss law is well established. In general, it is necessary to apply those laws, regulations or rules that were in force at the time that the facts at issue occurred ..."⁸ (same mentions in CAS 2009/A/2019 Jakub Wawrzyniak v. HFF, par.15).

Prior to football practices, the application of the principle of no retroactivity was described in a CAS award dated 27 January 2005⁹, in order to determine the applicable FIFA Regulations conflicting to one another, the Panel concluded as follows:

"Nonetheless, the Panel deems that a plausible construal which would avoid any regulatory inconsistency could be the following: any substantive aspects of contracts entered into before 1 September

2001 are governed by the 1997 Regulations, whereas any procedural aspects (such as the settlement of disputes) are governed by the 2001 Regulations. This reading of the above FIFA provisions would be in full compliance with the tempus regit actum principle (cf. supra at 8), according to which – as a general rule – the substantive aspects of a contract keep being governed by the law in force at the time when the contract was signed, while any claim should be brought and any dispute should be settled in accordance with the rules in force at the time of the claim" [emphasis added].¹⁰

The above was confirmed in CAS 2011/A/2653 of 27 April 2012¹¹, when the Panel determined the application of a national federation's regulations to the governance of a player's contract in such regulations edition to the date of registration of the player with the club.

The Panel's conclusion in CAS 2004/A/635 also mentions in CAS 2008/A/1545 Andrea

⁶ Prof. Dr J. ADOLPHSEN, Challenges for CAS decisions following the adoption of new WADA Code 2009, CAS Bulletin 1/2010, p. 5

⁷ CAS 2005/C/841 CONI, par. 66, p. 22

⁸ CAS 2000/A/274 S v. FINA, Digest of CAS Awards II (1998-2000), p. 389 at 405

⁹ CAS 2004/A/635 RCD Espanyol de Barcelona SAD v. Club Atlético Velez Sarsfield

¹⁰ CAS 2004/A/635 RCD Espanyol de Barcelona SAD v. Club Atlético Velez Sarsfield, par. 11, p. 10

¹¹ CAS 2011/A/2653 FC Shakhtar Donetsk v. CPF Karpaty, par. 66



Anderson et al. v. IOC, where the Panel determined that Olympic Charter in its edition at the time of the event shall apply to all events and circumstances which took place during the particular Olympic Games.¹²

Hence, in CAS jurisprudence it is established that, whether it is for a doping offence or for the registration with a football club, the time of the event shall be taken into account when determining the applicable laws and regulations. Notwithstanding that at the time of the proceeding the regulations may have changed, such new edition shall not affect the merits of the case. It should not go unmentioned that the rule of no retroactivity does not apply when it collides with *Lex Mitior* at the same time. However, this situation appears mainly in doping cases and is not an issue for the following article.

CAS 2016/A/4372¹³

The case of Russian players' agent was already decided on merits by the FUR Dispute Resolution Chamber (NDRC) on 14 July 2015; the club was obliged to pay remuneration under the agency contract to the agent. The decision was not appealed and became *res judicata*.

But the NDRC decision was left ignored by the club. On 19 October 2015, the agent brought the claim on execution of the decision to the NDRC. The NDRC dismissed the claim without prejudice to the agent's application and terminated the procedure on payment of debt under the agency contract. The NDRC grounded its decision on that the agent was not the subject of the "football family" at the time of filling a claim on execution to the NDRC, and advised the agent to turn to the state court in order to protect his legal interests. The FUR Players Status Committee (internal body for appealing NDRC decisions - NPSC) stated that the consideration of disputes where one party is a licensed agent of the football players is beyond the competence of the NDRC, and the NPSC consequently did not take jurisdiction over the appeal. The agent brought the appeal to CAS.

The Sole Arbitrator in this case took due note that the appeal arises out of the same dispute (whole procedure in FUR internal

bodies - the merits and execution - were run under same case number).

When determining the applicable law, based on Article R58 of the CAS Code, he stressed that *"the regulations of the FUR, which were applicable at the time the initial claim of the Appellant"*¹⁴ [the Agent], shall apply. Considering that the claim on merits in this dispute was brought on 31 March 2015, rules in force to that date were applicable.

When analyzing the merits, the Sole Arbitrator came to a conclusion that applicable provisions and regulations of the FUR, at the time when the agent lodged his original claim against the club, i.e. on 31 March 2015, allowed him to institute execution proceedings before the FUR's judicial bodies, and confirmed that no retroactivity shall take place, even if regulations have been changed during the proceedings:

"In the light of these circumstances, the Sole Arbitrator finds that both the FUR DRC and the FUR PSC, when hearing and deciding the dispute, should rightly have applied the provision and regulations in force on 31 March 2015 prior to the issuing of the Second 060-15 Decision [NDRC decision on execution] and the Decision [NPSC decision on execution], respectively. This conforms to the general principle of "tempus regit actum", according to which – as a general rule – the substantive aspects of a contract keep being governed by the law in force at the time when the contract was signed, while any claim should be brought and any dispute should be settled in accordance with the procedural rules in force at the time of the claim (see CAS 2004/A/635 RCD Espanyol de Barcelona SAS v. Club Atletico Velez Sarsfield)" [emphasis added].

In the following case, the CAS cancelled the national federation decision, rendered with violation of the fundamental procedural principle *"tempus regit actum"*, prescribing application of a law (procedural), in force to the date of a claim submission. Notwithstanding, that the agent was no more subject to dispute resolution system of football to the date of bringing an application on execution, the procedural rules at the time when the original claim was submitted, allowed him to continue with the execution and enforce the national football body decision through the dispute resolution system of the very federation.¹⁵

CAS 2015/A/4368¹⁶

This case was also decided by the Sole Arbitrator in CAS, mainly focusing on the possibility of retroactivity appearing in front of the FUR jurisdictional bodies after 1 April 2015, when considering the dispute between the agent and the club.

Before moving to the findings of the CAS, it must be emphasized that the factual background mainly corresponds to a previously described case, however, no decision on merits was made before the agent submitted an appeal to CAS. The central issue was whether the change of FUR Regulations on 1 April 2015 caused the jurisdiction of the NDRC to lapse, i.e. whether a process validly started before the changes occurred became invalid at midnight on 31 March/1 April 2015.

The *tempus regit actum* principle was considered by the Arbitrator in this procedure as follows:

*"The maxim or principle tempus regit actum may apply with greatest rigour in the field of criminal law, so that no one may be held criminally liable for an action which is not prohibited by law when committed. It may also apply in relation to substantive rights such as contractual rights. It is not a maxim or principle which (whether in public courts or before private tribunals such as the DRC) necessarily prevents changes in procedural rules during the course of existing proceedings being validly applied to those proceedings from that point onwards."*¹⁷

In the following case two issues were to be determined in order to establish the jurisdiction of the NDRC to proceed with the claim of Mr DANILYUK after quitting the "football family":

"However, the issue in this appeal concerns jurisdiction and not just changes of procedure. There is the very least a strong presumption that where under the applicable laws and regulations at the time

- *a claim is validly filed before a judicial body by a person who is then entitled to bring that claim; and*
- *that judicial body has jurisdiction over the claim at the time it is filed"*¹⁸ [emphasis added].

¹² CAS 2008/A/1545 Andrea Anderson et al. v. IOC, par. 15

¹³ CAS 2016/A/4372 Alexander Lopyrev v. FUR & FC Krylya Sovetov

¹⁴ *Ibid.*, par. 6.3, p.11

¹⁵ *Ibid.*, pars. 8.17 and 8.18, p.16-18

¹⁶ CAS 2015/A/4368 Mikhail Danilyuk v. Football Union of Russia and Football club "Shinnik"

¹⁷ *Ibid.*, par. 52, p. 18

¹⁸ *Ibid.*, par. 53, p. 18



It is interesting to note that the CAS, in the following decision, accepted the right of the national federation, being a private organization to change its regulations with a direct effect, however noted, the wording shall be clear and the lawfulness of such changes shall be a subject to test:

*"the proceedings cannot be invalidated and the jurisdiction cannot be removed unless by the clearest exercise of powers by whichever public or private authority decides the laws and regulations governing that body and its jurisdiction [emphasis added]. Moreover, any purported exercise of powers to that effect would always be liable to testing and scrutiny to ensure that such a drastic effect on existing proceedings under an existing jurisdiction was lawful and valid."*¹⁹

Finally, the Sole Arbitrator came to the conclusion that there was nothing provided in the new regulations of the national federation that allowed the FUR to lawfully reject a pending procedure without reaching a decision on merits, and stated that the FUR internal bodies shall follow fundamental procedural principles: *"the general rule cited in par. 51 above [tempus regit actum in proceedings CAS 2011/A/2653 FC Shakhtar Donetsk v. CPF Karpaty and CAS 2004/A/635 RCD Espanyol de Barcelona SAD v. Club Atletico Velez Sarsfield mentioned] applies and the DRC's jurisdiction over Mr. DANILYUK's case No. 034-15 remained entirely unaffected by the changes of FUR regulations which took effect on 1 April 2015."*²⁰

In both players' agents cases it is of a core importance that CAS confirmed the breach of general procedural issue of no retroactivity by the internal jurisdictional bodies of national federation. Both cases established a strict approach of application of laws at the time of the claim, thus, saving the rights of not just two agents, but all the other suffered from the massive denials of the FUR jurisdiction due to changes in FUR Regulations, which took place after 1 April 2015.

FIFA's approach

It goes without saying that the removal of agents as subjects of the "football family" throughout national football federations was brought by FIFA. As it was mentioned, the FIFA Players Agents Regulations are not applicable starting from 1 April 2015.

FIFA's approach in respect of cases pending to the date of FIFA Players Agents Regulations cancellation is clear. FIFA's jurisdictional cases continue to deliver decisions either on merits and its executional parts, no matter that agents are already out of the system for more than a year.

The case of Bulgarian agent Mr ZABERSKI illustrates a position of FIFA in respect of proceedings where the agent is a party. Already, several months after agents were out of FIFA, on 11 August 2015, the FIFA Players Committee issued an award²¹ establishing the debt of the club in front of the agent and obliging the debtor to pay the relevant amount under sporting sanctions.

On 20 April 2016, the FIFA Disciplinary Committee issued a decision on sanctioning the club for non-fulfilment of the FIFA PSC Decision on the agent's case.²²

Hence, this case, pending at FIFA to the date of cancellation of the FIFA Players Agents Regulations shows that FIFA, like the CAS in the abovementioned cases, is following the *tempus regit actum* principle, delivering decisions, and not withdrawing the agent's proceedings before it is fulfilled.

Conclusion

Having faced a non-compliance of football clubs with the contractual obligations and non-respect of NDRC decisions, the agents were massively denied the jurisdiction of national federations in resolving disputes, where the agent is a party. Thus, being left between the Agents Regulations providing for the status of the agent and arbitrability of disputes; and its cancellation as from 1 April 2015, the agents in Russia stayed without the legal protection of FUR.

Further, by upholding two appeals submitted by the Russian agents in this respect to CAS, the CAS in both cases confirmed the jurisdiction of the FUR and the unlawfulness of denials made.

Thus, the CAS, by its awards on cases CAS 2015/A/4368 and CAS 2016/A/4372, established that the actions of the Russian national federation were inconsistent with the legal principle of *tempus regit actum*; and confirmed that NDRC decisions are

mandatory, even after agents losing their status as subjects of football governance.

Both agents' cases successfully appealed to CAS have changed the practice of national jurisdictional bodies in Russia.

The CAS annulled the election of the Russian DRC's Deputy Chairman

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→ Court of Arbitration for Sport (CAS) – National Regulations – Football Union of Russia (FUR) – Independence/Impartiality

CAS 2015/A/4172 Association of Unions of Football Players and Coaches v. Football Union of Russia



By the Arbitral Award dated 17 August 2016 the Court of Arbitration for Sport recognized that both – the Chairman and Deputy Chairman of the Russian Football Union's Dispute Resolution Chamber were not independent and impartial, and annulled the election of the Deputy Chairman. The election of the Chairman was confirmed as the appeal was time-barred.

Brief facts

On 2 December 2013, the Executive Committee of the Football Union of Russia (FUR) adopted the current version of the FUR Dispute Resolution Regulations (DRR).

According to Article 7.4 of the DRR, members of the DRC may not "occupy the position of Executives of the Leagues and/or associations."

Pursuant to Article 8.2 of the DRR, "In the event where a football club is a party to the dispute, as an Arbitrator – a representative of the professional football clubs may not

¹⁹ Ibid., section two of par. 53, p. 18

²⁰ Ibid., par. 53-54, p. 18-19

²¹ FIFA PSC Decision no. 160073, 11 August 2015

²² FIFA DC Decision no. 160073, 20 April 2016