

Sports Arbitration and Due Process: The Sequel

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In a post dated March 2, 2011, I reported about a Swiss Supreme Court decision of February 20, 2009 where the Supreme Court had confirmed a CAS award which deemed an appeal withdrawn after the appellant had failed to pay the advance on costs.

I indicated that I did not know what had happened to the dispute afterwards.

As it turns out, about a month after this post, the saga continued with the Supreme Court rendering another decision related to this matter.

As a reminder, the dispute concerned the payment of an indemnity by a football coach to its former club following a transfer. The identity of the parties being revealed in this new decision, I will refer to the parties by their names. The name of the coach is Luis Fernandez; the name of the former club, Al-Rayyan Sports Club, in Qatar.

Shortly after the first decision of the Supreme Court, Al-Rayyan requested the FIFA to open disciplinary proceedings against Mr Fernandez for failure to pay the indemnity. The FIFA opened disciplinary proceedings and ordered the coach to pay the indemnity within 60 days. Passed this deadline, Mr Fernandez would be automatically suspended of any football-related activity upon request by the club. Mr Fernandez appealed this decision with the CAS, requesting however that the execution of the FIFA decision be suspended and that no decision be rendered before the criminal complaint that he was about to bring be instructed. Mr Fernandez filed shortly thereafter a criminal complaint against the president of the Beitar Jerusalem FC, the club that newly employed him, accusing him of fraud and false pretenses.

The CAS suspended the execution of the FIFA decision. However, it did not take into account Mr Fernandez's request to wait until the outcome of the criminal proceedings and confirmed the FIFA's disciplinary measure. It appears that thereafter, Mr Fernandez having not paid the indemnity, he was suspended from its football activities by the FIFA.

Mr Fernandez appealed the CAS decision before the Swiss Supreme Court. The first question that the Supreme Court had to consider was whether Mr Fernandez still had standing. Indeed, Mr Fernandez had paid the indemnity, albeit late, and as a result the FIFA had terminated his suspension. As a result, the Court had to consider whether Mr Fernandez still had a legally protected interest to see the CAS award overturned. The Supreme Court held that Mr Fernandez had standing, but dismissed the appeal on substantive grounds.

Clearly, the Supreme Court wanted to give Mr Fernandez his day in court, after what had happened in the first proceeding. The reasoning of the Supreme Court to grant standing to Mr Fernandez is however hard to follow. The Supreme Court held that the FIFA should not have rendered its decision before the outcome of the criminal proceedings was known, because the criminal proceedings could have revealed that the Al-Rayyan club had been paid twice, in which case Mr Fernandez could

introduce a liability claim against the FIFA claiming that, had the FIFA not ordered him to pay the indemnity, he would not have unduly paid twice. I believe that the Court made a mistake in referring to the FIFA in this instance: the procedure was in the hands of the CAS, it is the CAS that should have stopped the procedure until the decision of the criminal court. Indeed, the Court then holds that the TAS' errors grant standing to Mr Fernandez. On the whole, however, the reasoning of the Supreme Court is correct, in my opinion: the CAS should have waited until the outcome of the criminal complaint to render its decision. The criminal procedure would have determined whether Mr Fernandez was or not victim of a fraud, and presumably whether he had actually paid the indemnity twice.

I do not know the inside story behind this case, and in particular not what the criminal proceedings will reveal, but I find both cases highly unsatisfactory from a legal efficiency point of view. To the outside (legal) eye, it seems that the system, whether at the hand of the tribunals or of Mr Fernandez's representative, has twice failed him.