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How Far Will CAS Take the Requirement of Due Diligence?

Pratyush Singh · Saturday, May 13th, 2023

Several football teams were adversely affected by the 2008 global financial crisis, and some of them were even liquidated. Over time, some of these clubs re-emerged, including as a result of mergers, acquisitions, the sale and purchase of production units during bankruptcy proceedings, etc. Others, however, were resurrected due to the desire of the supporters and/or local authorities to uphold the spirit of their old, disbanded club by forming new amateur football clubs at the lowest level of organised football, which would later take on, more or less, the characteristics of the old club's identity.

'Sporting succession' as a concept was developed such that new clubs could be held liable for the debts of the old club in exchange for benefitting from the history and associations of the old club. Although now codified under Article 15.4 of the FIFA Disciplinary Code 2019 (FDC), the concept of sporting succession was already well established under *lex sportiva* through various cases. Court of Arbitration for Sport (CAS) jurisprudence has consistently upheld the principle that the sporting successor of a former club can be liable for its financial obligations even without being part of any agreement or understanding, regardless of changes in management, structure, or ownership. In essence, a newly formed 'third-party' club that has effectively assumed the role of the former club can be sued by a creditor (such as a club, coach, player, or intermediary) who holds a final and binding judgement against the former club (being thus considered its sporting successor).

It is in this broad context that the CAS panel in *Ranger de Talca* for the first time in 2012 held that if a creditor has not displayed the required due diligence by pursuing their claims in the national bankruptcy proceedings, then CAS can refuse to sanction the sporting successor for the debts of the old club. In this post, I analyse whether this requirement of due diligence would entail the creditor exhausting all local remedies or merely filing their claims with the judicial administrator.

The Requirement of Due Diligence: The Origin

While due diligence is not a requirement that is explicitly mentioned in a provision of the disciplinary codes, CAS panels in the past have read this requirement with Articles 2 and 3 of the Swiss Civil Code which deal with good faith and the principle of *par conditio creditorum* according to which in bankruptcy proceedings, all creditors should be satisfied equally. Through cases, the two requirements that stand out while assessing a player's diligence are *first*, whether there was a theoretical possibility for the player to receive their claim and *second*, whether the player acted passively by not participating in the bankruptcy proceedings.

What Is a Theoretical Possibility?

The 'theoretical possibility' has been interpreted to mean legal theoretical possibility which is looked at in one of two ways. *First*, as observed in *Soukeyna Ba Bengelloun v. FIFA & PFC CSKA-Sofia*, a claim that is accorded a 'privileged status' in the bankruptcy proceedings will always be deemed to have a theoretical possibility. And *second*, the panel in *Youness Bengelloun v. FIFA & PFC CSKA-Sofia* noted that since there were restrictions under Bulgarian law that prevented the claim from being filed in the first place, the panel remarked that there existed no theoretical possibility of receiving any part of the claim. In this case, the restriction existed as claims arising from breach of employment contract was not recognized under the Bulgarian bankruptcy law. The requirement of theoretical possibility also does not depend on whether the creditor would actually end up receiving any part of their claims. In *Viktor Viktorov Genev v. FC Petrolul Ploiesti (ACS Petrolul 52 Ploiesti) & FIFA*, the panel stated that the appellant's argument that 'no player ended up receiving any claim and hence there was no theoretical possibility' does not hold water as the player could not have known this before filing their claims.

Hence, as long as a creditor's claim is recognized under the bankruptcy law and is granted a privileged status, it will always be assumed that they have a theoretical possibility of receiving their claims. Since the theoretical possibility will remain consistent for all stages of a case, it does not help us answer whether the requirement of due diligence entails the exhaustion of all local remedies. Thus, we move on to the second prong of the due diligence analysis, i.e., the passiveness displayed by the player.

Filing a Claim or Exhausting All Remedies?

In *Rangers de Talca* and many other CAS cases that followed, the panels remarked that the creditor should 'explore' the possibility of communicating their credits in the bankruptcy proceedings. This might give us a sense that the requirement only entails the creditor following their claims until the first instance hearing and it does not matter whether they stick around until the appeal. However, all these cases must be viewed in a certain context. In almost all of the cases pertaining to due diligence, the creditor (mostly the player) did not file their claims under the national bankruptcy proceedings at all. Hence, the question of whether it would entail an exhaustion of all local remedies was never dealt with by these panels.

A pertinent case to consider in this regard is *PFC CSKA-Sofia v. Sergio Filipe Dias Ribeiro & FIFA*. In this case, the player's claim was rejected by the bankruptcy trustee. The player appealed this decision which was also ultimately rejected by the Sofia Court. The panel in this case, after making a note of the player's behaviour, stated that they had acted diligently. The panel further remarked that "*the FIFA Regulations shall be considered as an "alternative" procedure of last resort when the creditor has exhausted the basic legal remedies in the bankruptcy proceeding and not remained passive in the collection of his debt.*" What the panel intended with the phrase 'exhaustion of basic legal remedies' can be clarified by referring to the latter half of the verdict. It was stated that the protection offered by FIFA is subsidiary in nature and cannot be used an excuse by the player to not seek their claim at the national level.

Even in *Viktor Viktorov Genev*, the panel stated that merely because the claims of the player were

rejected by the judicial body is not a good argument for letting go of the national proceedings. It was observed that the player should have exercised their right to appeal the said decision. Similar observations were also made in *Ivan Bolado Palacios v. CSKA Sofia & FIFA* and *Joaquin Bdrcena Uriarte v. CSKA Sofia & FIFA*. Even the FIFA Dispute Resolution Chamber (DRC) in *Stanley Elbers* criticized the player for simultaneously filing a claim before FIFA and the civil court of Romania. The DRC stated that such an approach can be termed as forum shopping and if a party opts for a certain course of legal remedy, then they should stick to it as otherwise the credibility of the sporting dispute resolution system would be jeopardised. All of these judgments hint at the fact that the national proceedings should still be the first forum that a creditor approaches and it is only after they fail to offer any protection that the creditor may approach FIFA. This invariably makes the requirement of due diligence coterminous with exhaustion of local remedies.

Although this is how the jurisprudence has developed through the CSKA Sofia line of cases, this was not the intent behind the requirement of due diligence. In *FC Rapid 1923 SA v. FIFA & Daniel Barioni*, the panel observed that registering one's claim in the national bankruptcy proceedings is not a requirement under Article 15.4 of the FDC. The requirement of due diligence is just a manifestation of the principle that a creditor should not benefit from their own negligence. To that end, if the creditor is reckless in collecting their credit, then FIFA should not offer them any form of protection. The panel in this case went further ahead to hold that it is not even necessary for the creditor to file their claim in the bankruptcy proceedings as long as they can demonstrate that they acted diligently by seeking their claims through other means. Lastly, it must also be kept in mind that there exists a requirement for exhaustion of internal remedies of FIFA under R37 of the CAS Code. However, no such explicit provision exists for the exhaustion of local remedies and in its absence, only general legal principles of good faith should be imposed on a party.

Conclusion

While there still remains ambiguity around the requirements of due diligence, there is a case to be made that it should not be equated to the requirement of exhaustion of local remedies. On a concluding note, it must also be noted that the existing jurisprudence offers no clear answer as to how it does not interfere with the national bankruptcy proceedings. Regardless of which stage of bankruptcy proceedings the creditor is in, as long as they get some portion of it (presumably after a haircut), they can always seek the remaining amount through FIFA. Hence, we would run into a situation whereby a creditor has a chance to recover 100% of their claims which violates the principle of *par conditio creditorum*. Thus, CAS and FIFA have a lot to consider before concretising any such requirements.

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