

## Chapter 13

# CAS 2014/A/3474, *Clube de Regatas do Flamengo v. Confederação Brasileira de Futebol (CBF) & Superior Tribunal de Justiça Desportiva (STJD)*, Award of 5 October 2015

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**Abstract** The jurisdiction of the Court of Arbitration for Sport is established in Article R47 of the CAS Code. The early jurisprudence established that Article R47 required that federative statutes explicitly recognize CAS jurisdiction to retain competence as an appeal court over their decisions. Here the CAS has consistently applied the doctrine of direct jurisdiction. Since the development of that jurisprudence, the doctrine of indirect jurisdiction has developed, namely in the *Pizarro* and *Flamengo* cases. Indirect jurisdiction is established in the CAS where national federation rules refer to or incorporate applicable international federation rules that explicitly recognize the jurisdiction of the CAS where the subsidiary regulations do not. The doctrine of indirect jurisdiction, however, does have some outer limits where it has not been recognized as applicable to appeals of the decisions regarding Financial Fair Play licensing decisions nor to decisions of the Fédération Internationale de l'Automobile. This article seeks to review the jurisprudence of the CAS with respect to its jurisdiction, demonstrate that the traditionally rigid interpretation of its jurisdiction has evolved in order to recognize the principle of indirect jurisdiction, and that in some cases CAS jurisdiction is recognized where a complex set of regulations requires a sophisticated analysis such as in the *Flamengo* case.

**Keywords** Jurisdiction • CAS • Direct jurisdiction • Indirect jurisdiction • *Pizarro* and *flamengo* cases • Financial fair play • Fédération internationale de l'automobile • Sports arbitration

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## 13.1 Introduction

Traditionally the CAS has held that a jurisdictional clause delineating its authority to resolve a legal dispute requires its explicit recognition. Ideally, jurisdictional clauses would clearly set out in unambiguous terms which arbitral panel has authority to resolve a particular dispute.

Unfortunately, there are countless examples within the international sports law context where jurisdictional clauses do not clearly identify the competent arbitral panel. The clause may be worded unclearly or in an unintelligible manner. It is also possible that national and international federation rules may contradict each other, making it difficult to understand which judicial body has jurisdiction. In some cases, the complex and fractioned world of the international sports pyramid contributes to the confusion.

The result is that the legal basis conferring jurisdiction on the CAS may not always be so direct. It may be necessary to review and apply several federation statutes to determine the appropriate jurisdiction. In this sense, the doctrine of indirect jurisdiction generally refers to those cases where there is no explicit jurisdictional clause in the relevant statute but where jurisdiction of the CAS is recognized by reference to another statute. It is this reference to another external statute that ultimately recognizes the indirect jurisdiction of the arbitration panel.



Most recently the CAS had the opportunity to consider this issue of indirect jurisdiction in CAS 2014/A/3474, *Clube de Regatas do Flamengo v. Confederação Brasileira de Futebol ('CBF') & Superior Tribunal de Justiça Desportiva ('STJD')*.

In this case, the player Andre Clarindo Dos Santos received a one match suspension for his behaviour in the final of the 2013 Copa do Brasil. Santos subsequently played in the next match and the Brazilian authorities sanctioned his club, Flamengo, for fielding an ineligible player. Flamengo appealed the national decision to the CAS, despite the incidence that the CBF statutes do not explicitly confer appeal jurisdiction to the Lausanne-based arbitration body. In rendering the decision, the CAS Panel decided that appellate jurisdiction can be conferred on the CAS in cases where the national statutes do not directly refer to CAS appeal process, but where national statutes indirectly incorporate international federation statutes that refer to the appeal powers of the CAS.

The result is that in this case Flamengo successfully argued that the doctrine of indirect jurisdiction is indeed a legitimate method in recognizing an appeal route to the CAS. This doctrine, however, is not universally applicable and depends on the precise wording of both the national and international federation rules.

Therefore the purpose of this work is to analyze various jurisdictional clauses and the CAS jurisprudence regarding jurisdiction. The authors will discuss the concept of direct and indirect jurisdiction within the context of several federative rules with concrete examples. In addition, the authors will discuss these principles within UEFA's Licensing and Financial Fair Play Regulations as well as the jurisdiction of the CAS to hear appeals concerning decisions of the Fédération Internationale de l'Automobile ('FIA').

The conclusions reached by the authors are that the doctrine of indirect jurisdiction will only confer appellate jurisdiction of the CAS in sporting disputes where national federation rules refer to or incorporate applicable international federation rules that explicitly recognize the jurisdiction of the CAS where there is no other appeal route. This is an evolution from the original jurisdictional awards issued by the CAS that have required that the federative statutes explicitly, in no uncertain terms, recognize the jurisdiction of the CAS. This evolution is clearly a response to the increasing complexity of international sports law where the regulation of sporting activities is regulated by many complicated and sometimes contradictory statutes.

Finally, we note that many of the issues that arise in connection with jurisdictional clauses contained in statutes and regulations may also arise when analyzing arbitration clauses inserted in private contracts. Although the issues may be analogous, for the sake of parsimony, this paper will exclusively deal with jurisdictional clauses contained in statutes and regulations; it will not consider contractual arbitration clauses unless otherwise stated.

## 13.2 The Starting Point: Article R47 of the CAS Code

Article R47 of the CAS Code sets out the CAS' jurisdiction to hear appeals<sup>1</sup>

### "R47 Appeal

An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body.

An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned."

Clearly, the CAS Code contemplates the jurisdiction of CAS to hear appeals against the decisions of federations ("(a)n appeal against the decision of a federation, association or sports-related body may be filed with CAS"). The issue that arises is how specific the wording of the federation's statutes must be in order to confer jurisdiction on the CAS. The wording that "the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement" leaves room for interpretation. If the jurisdictional clause in the statutes of federation refers to the CAS for a particular type of dispute, that will be end of the inquiry. This is direct jurisdiction.

As demonstrated in the jurisprudence, however, the question as to what includes the "statutes or regulations of said body" is hardly determinative as federation statutes can incorporate the rules of other federations or associations, and sometimes those regulations can be contradictory. This is the source of the tension between direct and indirect jurisdiction as described below.

## 13.3 Direct Jurisdictional Clauses in Theory

Ideally a jurisdictional clause will leave little to interpretation and be particularly specific to remove all ambiguity. Theoretically speaking, a perfectly direct jurisdictional clause of a federation will contain three elements to ensure that the appeal route over a sports-related dispute is clear: the designated arbitral body, the scope of the dispute submitted to arbitration and (as the case may be) the determination of the parties who have standing (to sue or be sued).

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<sup>1</sup>Article R47, CAS Code.



### 13.3.1 Identify the Arbitral Body

Most importantly an effective jurisdictional clause will unambiguously designate a specific arbitral or judicial body with jurisdiction over the dispute. The clause must be clear and specific in the sense that it will identify one specific body, and, where relevant, it will state whether the designated body is to act as the first instance or appellate body.

An example of an ambiguous jurisdictional clause is one that conjunctively identifies two potential judicial bodies to hear a dispute simultaneously without explaining, which retains jurisdiction over the first instance hearing. Such a clause can be cured by ensuring that the wording specifically identifies which arbitral panel is the first instance decision-maker and which performs the appeal function. Precision in the drafting of jurisdictional clauses is essential to ensure that the appeal route is clear. Federations or associations should only refer to the exclusive power of one judicial body to hear appeals.

An example of a jurisdictional clause that clearly identifies which arbitral tribunal retains jurisdiction is Rule 61 of the Olympic Charter<sup>2</sup>

“61 Dispute resolution

1. The decisions of the IOC are final. Any dispute relating to their application or interpretation may be resolved solely by the IOC Executive Board and, in certain cases, by arbitration before the Court of Arbitration for Sport (CAS).
2. Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration.”

This clause provides that the IOC Executive Board has the initial jurisdiction to entertain disputes relating to the application and interpretation of the Olympic statutes and that the CAS has exclusive jurisdiction to hear appeals against those decisions. Although the language of paragraph 1 of Rule 61 may appear to limit the ability to appeal a decision of the IOC Executive Board, in previous cases the IOC has not challenged the authority of the CAS. The CAS itself has previously held that it does have jurisdiction to hear appeals under Rule 61 of the Charter, as reasoned by the Panel in CAS 2012/A/2913, *Mu-yen Chu & Chinese Taipei Olympic Committee v. International Olympic Committee*:<sup>3</sup>

In particular, the Appellants refer, for the purposes of Article R47 of the Code, to Rule 61 of the Olympic Charter, whose para. 2 provides that “any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport (CAS), in accordance with the Code of Sports-Related Arbitration”, and to the email sent by the IOC on 30 August 2012 (§ 24 above). The Respondent, while submitting that the present dispute is not covered by any arbitration clause, expressly declared that it “accepts arbitration and does not oppose CAS jurisdiction”. The jurisdiction of CAS was further confirmed by the parties’ signing the Order of Procedure.

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<sup>2</sup>Rule 61, Olympic Charter.

<sup>3</sup>CAS 2012/A/2913, *Mu-yen Chu & Chinese Taipei Olympic Committee v. IOC*, Award of 15 March 2013.

In turn, Article R47 of the CAS Code applies and the jurisdiction of the CAS as the arbiter of disputes regarding the Olympic Charter is established.

It must be noted, however, that in practice the IOC, technically speaking, does not oppose the jurisdiction of the CAS as the review panel of a decision of the IOC Executive Board. It appears that this “non-opposition” has been interpreted by the CAS as the IOC not refusing jurisdiction where this approach has shaped the jurisprudence. An example is where the decision of CAS 2012/A/2913 grants jurisdiction of the CAS over IOC Executive Board decisions, not as a matter of an automatic right in applying the jurisdictional clause following an analysis of the jurisdictional clause, but merely because the IOC has not opposed its jurisdiction.

The authors are of the opinion that the Olympic Charter grants the CAS the jurisdiction to review decisions of the IOC Executive Board concerning “any dispute arising on the occasion of, or in connection with, the Olympic Games” whether or not the IOC technically submits as the wording of Rule 61 is clear.

### *13.3.2 Scope of the Dispute*

Second, a well-drafted jurisdictional clause will clearly identify the scope of the dispute to be arbitrated. Due to the general nature of Article R47 of the CAS Code, this limitation must be found in the relevant federation or association rules.

Rule 61(2) of the Olympic Charter attempts to identify the scope or type of disputes that are subject to CAS jurisdiction in that the issue must arise “on the occasion of, or in connection with, the Olympic Games.”<sup>4</sup> The wording is quite broad and may present some difficulties with respect to defining what is “in connection with the Olympic Games”.

A good example of a jurisdictional clause with a well-defined scope is the one that clearly identifies the types of disputes subject to arbitration. Although, in general, the FIFA Statutes are not drafted in very clear terms. Articles 22, 23 and 24 of the FIFA RSTP clearly identify which disputes are to proceed to the Players’ Status Committee and which are to be heard by the Dispute Resolution Chamber, by specifically distinguishing between disputes that relate to the solidarity mechanism, training compensation and other employment disputes of an international dimension.

As the jurisdiction of the CAS regarding the decisions of FIFA judicial bodies is clear, the appeal routes in these cases are equally clear. Although this is an obvious and well-settled example, the jurisdictional clauses of FIFA do provide a clear model for other federations and associations to follow.

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<sup>4</sup>Rule 61, Olympic Charter.



### 13.3.3 *Standing to Appeal*

Finally, a well-drafted jurisdictional clause will clearly identify not only the appropriate arbitral panel and the scope of the dispute, but also the type of dispute and who retains standing to appeal the decision.

The Fédération Internationale de Natation ('FINA') provides an example of a particularly well-drafted jurisdiction clause. The FINA Constitution outlines which internal panel hears which type of dispute. General governance disciplinary decisions are taken by the FINA Executive and are appealed to the FINA Bureau<sup>5</sup> whereas specific disciplinary infractions are handled by the FINA Disciplinary Panel.<sup>6</sup> The FINA Doping Panel<sup>7</sup> and the FINA Ethics Panel<sup>8</sup> make decisions regarding the FINA Doping Control (DC) Rules and the FINA Ethics Code, respectively.

The FINA Constitution then goes on to unambiguously specify the appeal route for each type of hearing and issue. Decisions of the Doping Panel, the Disciplinary Panel or the Ethics Panel are appealed "directly to CAS."<sup>9</sup> For greater specificity, the FINA Constitution in order to avoid confusion regarding the appeal of a decision of the FINA Bureau, which is an additional appeal step for disciplinary proceedings, determines the following:<sup>10</sup>

An appeal against a decision by the Bureau, the FINA Doping Panel, the Disciplinary Panel or the Ethics Panel shall be referred to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland, within the same term as in C 12.11.3. The only appeal from a decision of the Doping Panel, the Disciplinary Panel or the Ethics Panel shall be to the CAS. The CAS shall also have exclusive jurisdiction over interlocutory orders and no other court or tribunal shall have authority to issue interlocutory orders relating to matters before the CAS. Decisions by the CAS shall be final and binding, subject only to the provisions of the Swiss Private International Law Act, section 190.

Finally, with respect to the parties to the dispute, the FINA Constitution grants "Member, member of a Member or individuals" standing before the CAS to sue such decisions. A member is defined as a "Member Federation—(which) means the national federations affiliated to FINA in a country or Sport Country recognized by FINA."<sup>11</sup> This definition confers the ability of not only member national federations but also national sub-associations, clubs who are members of Members according to national federation rules and athletes the standing to appeal. Ultimately there is little ambiguity in the FINA jurisdictional clause to the

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<sup>5</sup>Article C12.3, FINA Constitution.

<sup>6</sup>Arts C12.11.1 and C12.6, FINA Constitution.

<sup>7</sup>Article C12.5, FINA Constitution.

<sup>8</sup>Article C12.7, FINA Constitution.

<sup>9</sup>Article C12.11.2, FINA Constitution.

<sup>10</sup>Article C12.11.4, FINA Constitution.

<sup>11</sup>Article C3.14, FINA Constitution.

CAS as it defines the appropriate arbitral panel, the scope and type of dispute and who has standing to appeal the decision.

The ability to limit what person or organization can appeal a decision to the CAS, however, is complicated by national and international federation rules granting the standing to appeal to 'affected parties'.

The Canadian system provides a relevant example. The Sport Dispute Resolution Centre of Canada ('SDRCC') hears the appeals against decisions of Canadian national sporting federations and decisions of the SDRCC involving sanctions for doping can be appealed to the CAS.<sup>12</sup> The Canadian Sport Dispute Resolution Code ('SDRCC Code') grants 'affected parties' the right to be notified of disputes heard by the SDRCC and the subsequent ability to participate in proceedings.<sup>13</sup> The SDRCC Code identifies an 'affected party' as "a Person who may be adversely affected by a decision of the [SDRCC], such as losing a previously granted status or privilege."<sup>14</sup> Therefore, an athlete who may lose his or her position on a Canadian national team due to the successful appeal of a doping sanction by another athlete indeed retains standing to appeal the decision before the SDRCC and eventually to the CAS.

Ultimately, effective jurisdiction clauses must identify who has standing to sue in an appeal before the CAS. The unambiguous identification of the relevant parties to the dispute, including the definition of 'affected parties' can only serve to ameliorate the predictable jurisdiction of the CAS, otherwise identified as 'direct jurisdiction'.

### 13.4 Established CAS Jurisprudence

As mentioned above, Article R47 of the CAS Code determines that "an appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide." Historically the CAS jurisprudence has determined that despite the clarity of the FIFA statutes described above, national federations must clearly adopt the CAS' jurisdiction in their regulations to be subject to its competence.

As the recent *Flamengo* case has revisited this issue of jurisdiction and applied the principle of indirect jurisdiction, it is worth identifying how the CAS has interpreted and applied the concept of its jurisdiction in football cases.

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<sup>12</sup>Article 6.21(h), SDRCC Code.

<sup>13</sup>Article 6.12, SDRCC Code.

<sup>14</sup>Article 1.1(a), SDRCC Code.



### 13.4.1 Direct Jurisdiction: Expressly Recognized

Historically, the CAS has consistently affirmed that in order for it to have jurisdiction to hear an appeal of the decision of an international or national federation or association it must be expressly recognized in the statutes or regulations of the sports federation or association.

One of the earlier CAS decisions affirming the concept of direct jurisdiction was the 2002 decision in *Besiktas v. FIFA & SC Freiburg*.<sup>15</sup> Besiktas filed an appeal with the CAS against a decision rendered by the FIFA Special Committee before FIFA had stated in the Circular 827 that the CAS would hear appeals against its decisions. The articles of the FIFA Statutes had not yet been amended to expressly recognize jurisdiction of the CAS. Instead, the FIFA Statutes only recognized the Arbitration Tribunal for Football (TAF). The 2002 Panel was clear in their ruling that, as the jurisdiction of the CAS was not established that it had no power to hear the appeal.

The CAS had a further opportunity to consider its jurisdiction with respect to the FIFA regulations and the rights of appeal to the CAS that were introduced in 2004. In *Ismailia Sporting Club v. Confédération Africaine de Football*, the Panel noted that the existence of the FIFA regulations (containing the arbitration clause) in and of itself was not sufficient and that the jurisdiction of the CAS had to be explicitly recognized by the football federation's regulations<sup>16</sup>

It is only with the implementation by the individual confederations of the new FIFA statutes into their individual statutes, that the CAS can be held to have jurisdiction. The FIFA rules that came into force on 1 January 2004 do not constitute per se a basis for arbitration. Instead, they constitute an instruction to introduce a regulation providing for CAS arbitration. This was implemented by the coming into force of the new C.A.F. regulations on 1 September 2004. It follows that the Court of Arbitration for Sport has no jurisdiction with regard to the decision of the C.A.F. Appeal Committee and that therefore, it cannot proceed with the present arbitration.

In 2004, the CAS reasoned that the FIFA rules recognizing CAS jurisdiction must be specifically incorporated in the relevant federation's rules in order for the CAS to have jurisdiction to hear appeals against that federation's decisions. The famous Ashley Cole case of 2005 applied the exact same reasoning. The Panel declared in no uncertain terms that "in order for the CAS to have jurisdiction to hear an appeal, the statutes or regulations of the sports-related body from whose decision the appeal is being made, must expressly recognize the CAS as an arbitral body of appeal."<sup>17</sup> The Panel ruled that as rule 63 of the regulations of the Football

<sup>15</sup>TAS 2002/O/422, *Besiktas v. FIFA & SC Freiburg*, Award of 10 March 2003.

<sup>16</sup>CAS 2004/A/676, *Ismailia Sporting Club v. Confédération Africaine de Football (CAF)*, Award of 15 December 2004, paras 2.6 and 2.7.

<sup>17</sup>CAS 2005/A/952, *Ashley Cole v. Football Association Premier League*, Award of 24 January 2006, para 7.

Association Premier League ('FAPL') stated that the decisions of the appeal board were final, the CAS had no jurisdiction to hear an appeal.

The Cole Panel also determined that the reference to the FIFA Statutes at the time did not recognize the jurisdiction of the CAS as "the FIFA Statutes do not contain any mandatory provision that obliges the Respondent to allow" where "the CAS jurisprudence suggests that if the FIFA Statutes did compel the Respondent to provide for a right of appeal from its decisions, no right of appeal to the CAS would exist until the Respondent had made provision for this right in its statutes or regulations."<sup>18</sup> The Panel specifically stated that the regulations must make "direct reference" to the jurisdiction of the CAS.<sup>19</sup>

The CAS continued to apply this concept of direct jurisdiction whereby mere membership in FIFA was only an invitation to accept CAS jurisdiction (*point de départ à une procédure d'arbitrage*) and not explicit acceptance. In the award of *A. v. Caykur Rizespor Kulübü Derneği & Turkish Football Federation (TFF)*, the CAS ruled that as the issue at appeal was a domestic Turkish contractual matter and not a disciplinary matter involving FIFA, and as the regulations of the TFF did not recognize the jurisdiction of the CAS in domestic Turkish contractual matters, the CAS had no jurisdiction to hear the appeal of a decision of the TFF.<sup>20</sup> The award in *Telecom Egypt Club v. Egyptian Football Association* did the same where it reasoned that mere general 'recognition' was not sufficient to establish jurisdiction.<sup>21</sup>

Ultimately the concept of the necessity of a direct jurisdictional clause to establish CAS competence is a well-entrenched principle in the interpretation of Article R47 of the CAS Code. The early cases from 2002 to 2008 clearly apply this principle, and the CAS has also more recently applied this principle in 2010.<sup>22</sup> Despite this overwhelming jurisprudence, the CAS has held that in certain cases it can have, what the authors term—indirect jurisdiction.

### 13.4.2 The Pizarro Decision: Indirect Jurisdiction

This doctrine of indirect jurisdiction of the CAS was previously applied in the case of *Claudio Pizarro v. Federación Peruana de Fútbol*.<sup>23</sup> The *Pizarro* case involved the appeal rights of the player Pizarro against the decision of the Peruvian Football

<sup>18</sup>Ibid., para 10.

<sup>19</sup>Ibid., para 14.

<sup>20</sup>CAS 2008/A/1602, *A. v. Caykur Rizesport Kulübü Derneği & Turkish Football Federation (TFF)*, Award of 20 February 2009.

<sup>21</sup>CAS 2009/A/1910, *Telecom Egypt Club v. Egyptian Football Association (EFA)*, Award of 9 September 2010, para 31.

<sup>22</sup>CAS 2010/A/2170, *Iraklis Thessaloniki FC v. Hellenic Football Federation* and CAS 2010/A/2171, *OF IFC v. Hellenic Football Federation*, Awards of 23 February 2011.

<sup>23</sup>CAS 2008/A/1617, *Claudio Pizarro v. Federación Peruana de Fútbol*, Award of 15 April 2009.



Federation (“PFF”) to suspend him for 18 months for unruly behaviour after the night of a national team match.<sup>24</sup> In essence, the rules of the PFF did not explicitly provide for the appeal jurisdiction of the CAS to review such disciplinary decisions, but the disciplinary regulations of the PFF did refer to and incorporate the FIFA Statutes. The player sought to have the PFF decision overturned before the CAS.

In its decision, the CAS ruled that as the PFF strictly complies with FIFA provisions on the transfer of players, the regulations regarding the participation of players in the selection of international events for the national team and countless other obligations, the PFF must also have observed FIFA regulations incorporating into its rules the right to appeal to the CAS.<sup>25</sup> The CAS explained that as the PFF reference to the FIFA Statutes was exhaustive the right to appeal to the CAS, which forms part of those statutes, was not excluded.<sup>26</sup>

The Panel concluded that the FIFA Statutes were applicable to the PFF which enabled the appeal to the CAS.<sup>27</sup>

### 13.4.3 *Indirect Jurisdiction Explained*

As a result, CAS jurisprudence recognized that the incorporation or reference to an international federation’s regulations that clearly provide for an appeal to the CAS by a national federation is sufficient to satisfy the requirement of Article R47 of the CAS Code to the effect that “an appeal against the decision of a federation, association or sports-related body may be filed with CAS *if the statutes or regulations of the said body so provide*” (emphasis added).

This is precisely what is meant by indirect jurisdiction. Jurisdiction to be heard before the CAS on appeal can be established, under specific circumstances, in cases where a federation did not directly recognize the CAS but referred to other statutes which did. This principle has been most recently applied in the CAS award of *Flamengo v. CBF & STJD*.

## 13.5 *Flamengo v. CBF & STJD: The Award*

Santos, the former Brazilian international who plays predominantly as a left-back, has been no stranger to controversy. In July 2014, after Clube de Regatas do Flamengo accumulated a mere 7 points in 11 games, Santos was attacked by a

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<sup>24</sup>Ibid.

<sup>25</sup>Ibid., para 109.

<sup>26</sup>Ibid., para 113.

<sup>27</sup>Ibid., para 116.

Flamengo fan following his performance in Flamengo's 4-0 loss against Porto Alegre's Sport Club Internacional, and ended up in hospital.<sup>28</sup>

Santos, however, has also been the subject of controversy in the legal field, in relation to the doctrine of CAS indirect jurisdiction, as set out in the *Flamengo v. CBF & STJD* award.

This case is the appeal of a decision taken by the STJD of Brazil filed by Flamengo further to Article R47 of the CAS Code. The decision of the three-member CAS Panel is relatively recent as it was heard in Lausanne in June 2014 and released in October 2015.<sup>29</sup>

### 13.5.1 *The Facts of the Case*

Despite winning the 2013 Copa do Brasil for Flamengo played against Club Atletico Paranaense ('Paranaense') at the Maracana Stadium, Santos was sent off the pitch by the referee during the closing minutes of the second leg of the final. Santos did not compete in Flamengo's subsequent match, the 37th round of the Brazilian National Championship (the 'Brasileirao') played on 1 December 2013. It is worthy to note that the Brasileirao is not the same competition as the Copa do Brasil (in which Santos had been sent off, as just mentioned).

After Flamengo's 37th Brasileirao match on 2 December 2013, the prosecutor of the STJD condemned Santos' actions in the Copa do Brasil final, and several days later the Disciplinary Commission of the STJD suspended Santos for one match for his unsporting behaviour. Santos played in Flamengo's next match after the suspension was levied against FC Cruzeiro on 7 of December 2013. That match was Flamengo's final Brasileirao match and obviously not a match involving the Copa do Brasil competition.

After the Prosecutor of the STJD denounced Flamengo for fielding an ineligible player, Santos, in the match against FC Cruzeiro, the Disciplinary Commission of the STJD decided that Flamengo has violated Article 214 of the Brazilian Code of Sport Justice ('CBJD'). As a result the STJD imposed the following sanctions on Flamengo: (a) the deduction of 3 points applied to its standing in the Brasileirao; (b) elimination of the point obtained in the match against FC Cruzeiro; a fine of 1000 reais. The loss of 4 points resulted in Flamengo losing five places in the final standings of the Brasileirao, which made it fall to 16th place, barely avoiding the relegation zone.

Flamengo appealed the decision of the STJD to the CAS requesting that (a) the CAS recognize its jurisdiction in the matter; (b) an order for provisional measures

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<sup>28</sup>Coombs D, Former Arsenal signing Andre Santos attacked by fan in Brazil, 20 July 2014. <http://www.hitc.com/en-gb/2014/07/20/former-arsenal-signing-andre-santos-attacked-by-fan-in-brazil/page/1/>. Accessed 17 November, 2015.

<sup>29</sup>CAS 2014/A/3474, *Clube de Regatas do Flamengo v. Confederação Brasileira de Futebol (CBF) & Superior Tribunal de Justiça Desportiva (STJD)*, Award of 5 October 2015.



be issued, staying the STJD decision; (c) the STJD decision be eventually set aside; and (d) Flamengo be absolved of any violation of Article 214 of the CBJD. The STJD and CBF naturally opposed this appeal.

In issuing its award the CAS ruled that

- the CBF may be sued in this appeal while the STJD cannot;
- Santos was not suspended for the Brasileirao (37th round) match held after the final of the Copa do Brasil;
- Santos was ineligible to play in the final match of the Brasileirao; and
- Flamengo is to be sanctioned for fielding an ineligible player.

This CAS decision addresses several important and interesting issues that provide practitioners with some guidance. The significance of the decision is that the jurisdiction of the CAS can be established by incorporation of, or reference to other statutes, and not necessarily only by explicit wording in the statute itself.

### 13.5.2 *Indirect Jurisdiction of the CAS in Flamengo*

As a preliminary matter, the CAS Panel considered whether the jurisdiction issue was a procedural or substantive matter. The CAS jurisprudence on this very issue is inconsistent where some CAS cases have treated it as a procedural matter<sup>30</sup> and others have decided that jurisdiction is a substantive issue to be decided within the context of the merits of the appeal.<sup>31</sup> The Panel in the *Flamengo* award noted that most recently the CAS has applied the reasoning of the Swiss Federal Tribunal and that jurisdiction is a substantive issue to be addressed within the merits of the decision.<sup>32</sup>

With respect to the merits of the jurisdictional question, the appellant Flamengo argued that the CAS retains jurisdiction to hear the appeal of decisions of the STJD and the CBF. It noted that Article 1(2) of the CBF statutes stipulates that “all members, organs and parties of the CBF, as well as clubs... must observe and comply, in Brazil, all statutes, regulations, directives, decisions and the Code of Ethics of the Federation Internationale de Football Association—FIFA.”

In addition, Flamengo noted that as there is no national arbitral tribunal in Brazil, Article 68(3) of the FIFA Statutes is triggered: “instead of recourse to ordinary courts of law, provisions shall be made for arbitration. Such disputes shall be taken to an independent and duly constituted arbitration tribunal recognized under the rules of the Association or Confederation or to CAS.” Therefore, Flamengo

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<sup>30</sup>CAS 2008/A/1639, *RCD Mallorca v. The Football Association (FA) & Newcastle United*, Award of 24 April 2009; CAS 2007/A/1329, *Chiapas FC v. Cricuma Esporte Clube* and CAS 2007/A/1330, *Chiapas FC v. R.*, Awards of 5 December 2007.

<sup>31</sup>CAS 2008/A/1517, *Ionikos FC v. C.*, Award of 23 February 2009.

<sup>32</sup>CAS 2009/A/1869 (parties and date unknown).

argued that by reference Article 67(1) and 67(2) of the FIFA Statutes indeed to confer indirect jurisdiction on the CAS to hear appeals against decisions of the STJD and the CBF.

The CBF took the opposite position rejecting the doctrine of indirect jurisdiction, arguing that the CAS has no jurisdiction to hear this dispute as the relevant Brazilian sporting statutes do not provide for an express appeal route against decisions taken by the STJD to the CAS.

In rendering its decision, the “Panel observed that it is consistent CAS jurisprudence that Article 67(1) of the FIFA Statutes does not by itself grant jurisdiction to CAS as a final instance in national matters.”<sup>33</sup> In this sense the Panel explicitly noted the *ratio* in CAS 2011/A/2483 that proclaims that “the regulations of FIFA ... need to be adopted in the federation’s rules either word by word or by reference to apply to domestic matters.”

On this issue, the CAS Panel did in fact recognize that the CAS has indirect jurisdiction to hear appeals of the CBF. The Panel accepted the argument put forth by the Appellant that Article 1(2) of the CBF statutes does indeed include a reference to the FIFA Statutes where “all members, organs and parties of the CBF, as well as clubs ... must observe and comply with FIFA Statutes.” The Panel also went as far to say that “the implementation of article 1(2) of the CBF Statutes went further than to merely recognizing CAS in accordance with article 68(1) of the FIFA Statutes, but required all members of the CBF to comply with the statutes and regulations of FIFA.”<sup>34</sup> Therefore, as the FIFA Statutes include the arbitration and appeal clauses in Article 67, those appeal rights secured in the FIFA Statutes form part of the legal appeal route for decisions taken by the CBF.

The Panel also found that Flamengo had exhausted all available national remedies, in compliance with Article R47 of the CAS Code, and that the CAS had jurisdiction to deal with the question as to whether Santos was ineligible to compete when he was fielded by Flamengo in the final match of the Brasileirao.

### 13.5.3 *Merits of the Flamengo Decision*

In addition to the jurisdictional issue, the *Flamengo v. CBF & STJD* Panel decided several other issues worth mentioning.

Relying on a domestic Brazilian sporting statute, the respondents argued that the issue before the Panel is “inarbitrable” because it is in “consideration of matters related to the sports discipline and competition.” Here the Panel did not apply the traditional jurisprudence of the CAS regarding ‘field of play’ issues and characterized this dispute as a disciplinary case. In this sense, it noted that the

<sup>33</sup>CAS 2014/A/3474, *Flamengo v. CBF & STJD*, Award of 5 October 2015, para 88.

<sup>34</sup>*Ibid.*, para 92.



regulation that the respondents were relying on did not specifically exclude the arbitration of disciplinary cases and that the issue before the Panel was 'arbitrable'.<sup>35</sup>

Both the CBF and the STJD took the position that neither of them had standing to be sued. The Panel followed CAS established jurisprudence that determines that the STJD is an arbitral tribunal that "forms an integral part of the CBF and that the STJD has therefore no standing in and of itself."<sup>36</sup> On the other hand, the *Flamengo* Panel held that the CBF did have standing to be sued.

With respect to the actual merits of the decision regarding Santos' suspension, the Panel was required to consider whether Santos was automatically suspended for the next (37th) round of the Brasileirao following the sending off in the final Cup match; if Santos was ineligible to compete in the final round of the Brasileirao; and whether Flamengo was guilty of fielding an ineligible player in the final match of the season.

With respect to the automatic suspension issue, the Panel found that the general rule is that a player is automatically suspended in the subsequent match in the same competition from which he was sent off. In this case, Santos could not serve the suspension in the same competition (Copa do Brasil) and as clearly set out in the relevant Brazilian statutes an automatic suspension cannot be served in another competition.<sup>37</sup> This implies that the application of a suspension to another competition requires an express decision by the relevant body. As no such decision had been issued before the penultimate (37th round) match of the Brasileirao, Santos was not suspended at that point. The Panel concluded that the suspension operated with immediate effect the day after it was rendered by the STJD and that Santos was ineligible to compete in the last match of the Brasileirao.

Article 214 of the CBJD applies a sanction to Brazilian clubs who use ineligible players in a match. Flamengo argued that by not fielding Santos in the penultimate match and consulting the online registry prior to the last match, it was diligent and that the Panel ought to mitigate the penalty in the circumstances. The Panel ruled that there was no doubt that Article 214 was violated and that mitigating or aggravating circumstances were not present.<sup>38</sup>

### 13.5.4 Conclusions Regarding Flamengo

The significance of the *Flamengo* award lies in the subsequent recognition of the doctrine of indirect jurisdiction, which was previously set out in the *Pizarro* case. As we can see, the doctrine of indirect jurisdiction is applicable where there is no

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<sup>35</sup>Ibid., para 125.

<sup>36</sup>Ibid., para 143.

<sup>37</sup>Ibid., paras 162–165.

<sup>38</sup>Ibid., paras 216–220.

direct recognition of the jurisdiction of the CAS, but where such jurisdiction recognized by a national association's rules indirectly refer to or incorporate an international federation's jurisdictional clause providing for CAS arbitration.

The general principle that we can draw from the jurisprudence is that the relevant rules must refer to or incorporate the specific jurisdictional clause providing for arbitration in order to find that the CAS has indirect jurisdiction to hear the appeal of a federation's decision. In this sense, the incorporated statutes cannot distinguish between doping issues and other issues, identifying the CAS as the competent appeal panel for one, but not the other types of issues.

In order to further illustrate this jurisprudence and the application of the doctrine, the authors will now consider other areas where these issues arise, including appeals against Financial Fair Play licensing decisions (6.) and against decisions of the Federation Internationale de l'Automobile (7.).

### **13.6 Indirect Jurisdiction of the CAS in UEFA FFP Matters**

The introduction of UEFA's FFP Regulations ('FFP Regulations') has triggered the development of a new area of jurisprudence in the world of football law. Several appellants have attempted to use the doctrine of indirect jurisdiction to appeal against a decision of a national association to deny the issuance of a UEFA license, without success.

As a result, it is worthy to note the application of this doctrine within the context of UEFA licensing decisions. The lesson to be learned within this context is that licensing decisions made specifically by UEFA can be appealed to the CAS because the relevant UEFA statutes explicitly provide for this appeal route. On the other hand, the decisions taken by national football associations may not be appealed unless the national football federation statutes explicitly provides for CAS jurisdiction or if the UEFA licensing statutes are referred to and incorporated into the national football association regulations.

Here we see the limits of the applicability of the doctrine of indirect jurisdiction as it is applied in practice to the ability of European clubs to appeal licensing decisions.

#### ***13.6.1 Context: The Delegation of Licensing Decisions to National Associations***

Clubs in UEFA member associations that wish to compete in either the Champions or the Europa League must fulfil the substantive requirements of the FFP Regulations. Article 4.01(c) of both the UEFA Champions League Regulations



(‘CLR’)<sup>39</sup> and the UEFA Europa League Regulations (‘ELR’)<sup>40</sup> specifically requires that prospective clubs have obtained a license issued by the competent NFA in accordance with the UEFA FFP Regulations. The language of these provisions is clear in that the UEFA CLR and UEFA ELR specifically delegate the initial licensing functions to “the competent national body in accordance with the UEFA Club Licensing and Financial Fair Play Regulations.”

The UEFA FFP Regulations require that, within each member association, there are two decision-making bodies in charge of determining whether a club has satisfied the licensing requirement, a First Instance Body and an Appeals Body.<sup>41</sup> The First Instance Body makes its decision based on the documents submitted to it by the predetermined deadline.<sup>42</sup> The Appeals Body serves as a review court, which can consider the evidence submitted to the First Instance Body as well as submissions made once the appeal has been lodged.<sup>43</sup>

Once these remedies have been exhausted within the national UEFA member association, however, it is unclear whether the CAS has jurisdiction to hear an appeal against the final decision. The general thrust of the jurisprudence is that it depends on the specific language of the national association’s jurisdictional clause. As we see below, some associations have directly recognized the appellate jurisdiction of the CAS for FFP licensing decisions, while others have not. In this sense, these jurisdictional decisions of the CAS with regard to national licensing decisions have demonstrated the outer limits of the application of the doctrine of indirect jurisdiction.

### 13.6.2 *Context: Powers and Decisions of UEFA*

In addition to the licensing process delegated to national football associations, UEFA retains general powers of enforcement both inside and outside the licensing process. In cases where “there is any doubt as to whether a club fulfils the admission criteria defined” by the FFP Regulations the UEFA General Secretary can refer the case to the UEFA Club Financial Control Board (‘CFCB’).<sup>44</sup> These investigations can be carried out at any time, even after the end of the competition. Therefore, the UEFA CFCB can exercise its power both within and outside the licensing process.

These decisions are enforced by two UEFA bodies where the UEFA CFCB is split into two units, the Investigatory Chamber, which is responsible for

<sup>39</sup>Article 4.01(c), UEFA CLR.

<sup>40</sup>Article 4.01(c), UEFA ELR.

<sup>41</sup>Article 7(1), FFP Regulations.

<sup>42</sup>Article 7(2), FFP Regulations.

<sup>43</sup>Article 7(5), FFP Regulations.

<sup>44</sup>Article 4.01(c), UEFA CLR; Article 4.01(c), UEFA ELR.

monitoring and investigations, and the Adjudicatory Chamber, which is tasked with reviewing the positions of the parties and passing judgement in individual cases. Once the Investigatory Chamber has concluded its investigation, it has the following options: a) dismiss the case; b) conclude with a settlement agreement; c) apply disciplinary measures limited to a warning, a reprimand or a fine; d) refer the case to the Adjudicatory Chamber.<sup>45</sup>

The Adjudicatory Chamber operates much like an arbitration or judicial body where a binding decision is issued. Here the parties can submit written representations,<sup>46</sup> a hearing may be convened in order to present evidence,<sup>47</sup> interested parties may be given intervener status,<sup>48</sup> and the Adjudicatory Chamber shall deliberate and issue a judgment<sup>49</sup> where it can either dismiss the case, accept or reject the club's admission to a UEFA club competition, impose disciplinary measures or uphold, reject, or modify a decision of the CFCB Investigatory Chamber.<sup>50</sup>

As clearly indicated in the arbitration clause of the FFP Procedural Rules, decisions of the UEFA CFCB Adjudicatory Chamber can be appealed to the CAS as Article 34(4) of the FFP Procedural Rules directly confers unequivocal and exclusive jurisdiction by providing that "Final decisions of the CFCB may only be appealed before the Court of Arbitration for Sport (CAS) in accordance with the relevant provisions of the UEFA Statutes."<sup>51</sup>

This direct jurisdiction has been recognized in the jurisprudence relating to FFP licensing cases, i.e. inter alia, *FC Petrolul Ploiesti v. UEFA*,<sup>52</sup> *Beşiktaş JK v. UEFA*,<sup>53</sup> *Bursaspor Kulübü Derneği v. UEFA*,<sup>54</sup> *Györi ETO v. UEFA*<sup>55</sup> and *Málaga CF SAD v. UEFA*.<sup>56</sup>

### ***13.6.3 No Indirect Jurisdiction: Rayo Vallecano and Parma FC***

Decisions applying FFP Regulations made by the Appeals Body of national federations may not necessarily be appealed where such decisions could be final. The

<sup>45</sup>Article 13(2), FFP Procedural Rules.

<sup>46</sup>Article 20, FFP Procedural Rules.

<sup>47</sup>Arts 21 and 23, FFP Procedural Rules.

<sup>48</sup>Article 22, FFP Procedural Rules.

<sup>49</sup>Arts 24 and 25, FFP Procedural Rules.

<sup>50</sup>Article 27, FFP Procedural Rules.

<sup>51</sup>Article 34(2), FFP Procedural Rules.

<sup>52</sup>CAS 2013/A/3453, *FC Petrolul Ploiesti v. UEFA*, Award of 20 February 2014.

<sup>53</sup>CAS 2012/A/2824, *Beşiktaş JK v. UEFA*, Award of 31 October 2012.

<sup>54</sup>CAS 2012/A/2821, *Bursaspor Kulübü Derneği v. UEFA*, Award of 10 July 2012.

<sup>55</sup>CAS 2012/A/2702, *Györi ETO v. UEFA*, Award of 8 May 2012.

<sup>56</sup>CAS 2013/A/3067, *Málaga CF SAD v. UEFA*, Award of 8 October 2013.



ability to appeal depends on the specific wording of the national federations' arbitration clauses.

Rayo Vallecano finished in 8th place in the 2012/2013 edition of *La Liga* and had qualified to compete in the UEFA Europa League, as Málaga Club de Fútbol which finished seventh, was refused a UEFA License due to FFP irregularities. Coincidentally, Rayo Vallecano suffered overdue payables and was also refused a UEFA license by both the First and Second Instance Licensing Committees of the Real Federación Española de Fútbol ('RFEF') under the RFEF Club Licensing Regulations.

The club appealed this decision to the CAS.<sup>57</sup> The initial application to provisionally suspend the sanction pending but the final result of the case was rejected on the basis that CAS jurisprudence indicates that economical or financial damage per se cannot constitute irreparable harm.

As the arbitration clause of the RFEF Statutes stipulates that "the RFEF recognizes the jurisdiction of the Court of Arbitration for Sport (CAS) exclusively in those disputes which may arise *between the RFEF, FIFA, and/or UEFA*" there is no direct arbitration clause referring disputes between clubs and the RFEF to the CAS. The Panel considered the CAS Code and determined that neither the arbitration clause in the RFEF statutes nor the UEFA clause generally recognizing CAS jurisdiction was sufficient to refer the dispute to Lausanne.<sup>58</sup>

Unsurprisingly, the Panel also noted that if UEFA wishes to have FFP licensing decisions made by national Football Associations reviewed by the CAS it is up to UEFA to ensure that the member's arbitration clause explicitly confers jurisdiction.

A similar decision was reached in *Parma FC v. FIGC & Torino FC*.<sup>59</sup> The Federazione Italiana Giuoco Calcio ('FIGC') refused Parma FC a UEFA license, prohibiting it from competing in the Europa League for overdue payables because Parma FC had not paid personal income tax deductions on payments from October and November 2013 to ten of its players. The club appealed the second instance decision of the Alta Corte di Giustizia Sportiva which confirmed the first instance decision. The CAS held that there was no jurisdictional clause in its favour and that the decision of the Alta Corte di Giustizia Sportiva was final for three reasons.

First, Articles 4.21 and 6.9 of the Italian UEFA Club Licensing Manual<sup>60</sup> explicitly grant the Alta Corte di Giustizia Sportiva the exclusive jurisdiction to hear Italian licensing appeals. Second, the general clause recognizing the jurisdiction of the CAS contained in the Manual is not sufficient to trump the appeal route provided for a specific category of disputes (relating to the refusal or withdrawal of licenses), whereby jurisdiction is exclusively devolved to another body, i.e. the

<sup>57</sup>CAS 2013/A/3199, *Rayo Vallecano de Madrid SAD v. RFEF*, Award of 22 October 2013.

<sup>58</sup>*Ibid.*, paras 5.5–5.7.

<sup>59</sup>CAS 2014/A/3629, *Parma FC v. FIGC & Torino FC*, Award of 31 October 2014.

<sup>60</sup>FIGC Manuale delle Licenze UEFA.

Alta Corte.<sup>61</sup> Third, the same reasoning applies to Article 59 of the UEFA Statutes. Following established CAS jurisprudence, the reference to the general jurisdiction of the CAS in this provision is not sufficient to confer jurisdiction because it only constitutes an instruction for the national associations to introduce a regulation providing for CAS arbitration, but is not in itself part of the national (in this case, FIGC) regulations. The Panel explained that if FIGC rules do not comply with UEFA Statutes it is for UEFA and the FIGC to ensure such compliance.

#### **13.6.4 Direct Jurisdiction: The Romanian Football Federation**

On the other hand, some national federation licensing regulations do grant direct jurisdiction to the CAS in the review of a national licensing decision. The CAS heard appeals and issued awards concerning the decision of the Romanian Football Federation in *S.C. F.C. Universitatea Cluj S.A. v. Romanian Football Federation (RFF) & Romanian Professional Football League (RPFL)*.<sup>62</sup>

In this case, it was clearly established that the relevant Romanian federation rules recognize the jurisdiction of the CAS to hear such appeals. This is not an indirect use of jurisdiction rather a direct application where the RFF and the RPFL have, on the contrary, explicitly provided for the jurisdiction of the CAS.<sup>63</sup>

Therefore, the precedent has been set; clubs do not have the ability to challenge domestic licensing committee decisions implementing UEFA FFP standards unless the domestic football association explicitly agrees to allow the review. The incorporation of FFP principles to domestic licensing procedures is not sufficient in the eyes of the CAS and the particular jurisdictional appeal clause to the CAS must be directly adopted or incorporated. The applicability of the indirect jurisdiction of the CAS has been limited in this context as some European national football associations do not explicitly recognize the jurisdiction of the CAS either by incorporation or reference.

### **13.7 Indirect Jurisdiction of the CAS in Decisions of the FIA**

Similar arguments have been made to apply the doctrine of indirect jurisdiction in favour of the CAS in order to review decisions of the Fédération Internationale de l'Automobile ('FIA'). The legal landscape of professional motor racing subject

<sup>61</sup>FIGC Manuale delle Licenze UEFA, Article 7.10 and Annex L.01 A.

<sup>62</sup>CAS 2013/A/3194, *SC FC Universitatea Cluj SA v. RFF & RPFL*, Award of 18 November 2013.

<sup>63</sup>*Ibid.*, para 37.



to the jurisdiction of the FIA presents particular issues that are not present in the world of football, mainly because the FIA does not operate on the same federative basis as other associations, and as the seat of the FIA is located in Paris, France.

### **13.7.1 FIA: The Legal Landscape**

The final judicial chamber within the FIA is the International Court of Appeal ('ICA'), meaning that the issuance of an ICA decision amounts to the exhaustion of internal remedies within the meaning of Article R47 of the CAS Code. The jurisdictional clause for appeals against decisions of the FIA is found in Article 15 of its Judicial and Disciplinary Rules

For the avoidance of doubt, nothing in these rules shall prevent any party from pursuing any right of action which it may have before any court or tribunal, subject at all times to such party having first exhausted all mechanisms of dispute resolution set out in the Statutes and regulations of the FIA.

This jurisdictional clause is particularly broad as it confers the ability to lodge an appeal before "any court or tribunal" so long as all internal dispute resolution mechanisms have been exhausted. There is, however, no direct or explicit reference to have a decision of the FIA ICA heard on appeal before the CAS.

On the other hand, the FIA is part of and has accepted the general pyramid structure of the international sports landscape for two reasons. First, the FIA is a member of the IOC, the Association of IOC Recognized International Sports Federations ('ARISF') and is recognized by SportAccord. As mentioned above, Rule 61 of the Olympic Charter recognizes the jurisdiction of the CAS. In addition, Article 7A.4.4 of SportAccord Statutes determines that member associations' regulations "must also contain a specific provision recognizing the exclusive jurisdiction of the Court of Arbitration for Sport, in Lausanne, Switzerland". This provides certain context that the FIA does operate in the international sports pyramid world.

Second, the FIA does indeed have an office in Geneva, Switzerland. The CAS, by virtue of its location in Switzerland, could be an appropriate venue to resolve an appeal against ICA decisions as Article 26 of the FIA Statutes explicitly determines that the ICA is subject to the jurisdiction of Swiss Law

The International Court of Appeal shall be entrusted with judging definitively any dispute or conflict resulting from the application of the present Statutes, of the Statutes of the body governed by Swiss law, of the International Sporting Code, and more generally of the rules and regulations decreed by the FIA, with settling any dispute relating to FIA activities, and with hearing any litigation which may be submitted to it by the President of the FIA.

Ultimately, there are some arguments to suggest that the FIA must be subject to the indirect appeal jurisdiction of the CAS by virtue of incorporation and reference to other statutes.

### ***13.7.2 No Indirect Jurisdiction of the CAS for Decisions of the FIA***

The CAS Panel in CAS 2015/A/3872, *Sheikh Khalid Al Qassimi & Abu Dhabi Racing Team v. FIA, Qatar Motor and Motorcycle Federation, & Nasser Al-Attiyah* did not agree with these arguments and refused to hear an appeal against a decision of the FIA ICA.

Here Al Qassimi and Al-Attiyah were competing in the 2014 Dubai International Rally as part of the 2014 FIA Middle East Rally Championship. Al-Attiyah complained to the race stewards that Al Qassimi violated certain racing regulations. The stewards did not agree and Al-Attiyah appealed to the FIA ICA, which did find that Al Qassimi violated racing regulations and granted certain sporting results to Al-Attiyah. Al Qassimi appealed this decision of the ICA to the CAS.

The Panel observed that “CAS decisions have consistently affirmed that in order for the CAS to have jurisdiction to hear an appeal, there must exist a specific arbitration agreement between the parties, or else the jurisdiction of the CAS must be expressly recognized in the statutes or regulations of the sports-related body.”<sup>64</sup> The CAS Panel ruled that the general recognition of the IOC and SportAccord did not suffice and that it is necessary for a jurisdictional clause to confer appeal jurisdiction to the CAS. As Article 15 of the FIA Judicial and Disciplinary Rules does not do so, nor do the aforementioned rules incorporate a CAS arbitration clause contained in another statute, the CAS does not have jurisdiction to hear appeals against the FIA ICA’s decisions. The general effect of the award is that belonging to the Olympic Movement, ARISF and SportAccord is not sufficient to confer jurisdiction upon the CAS. In relation to the incidence of the fact that the FIA has a seat in Geneva, the Panel concluded that Swiss Law, although favourable towards sport arbitration, cannot create a right to arbitration on its own without a clear arbitration provision.

## **13.8 Conclusion**

As seen above, the early CAS jurisprudence clearly established that Article R47 of the CAS Code required that the statutes of a sports-governing body explicitly recognize CAS jurisdiction in order for the latter to be competent to hear appeals against the sports-governing body’s decisions. In this sense, the CAS has consistently applied the doctrine of direct jurisdiction.

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<sup>64</sup>CAS 2015/A/3872, *Sheikh Khalid Al Qassimi & Abu Dhabi Racing Team v. FIA, Qatar Motor and Motorcycle Federation & Nasser Al-Attiyah*, para 31.



More recently, the so-called doctrine of indirect jurisdiction has developed, namely in the *Pizarro* and *Flamengo* cases, where jurisdiction will be conferred on the CAS by national federation rules that refer to or incorporate the applicable international federation rules which explicitly recognize the jurisdiction of the CAS.

This jurisprudence goes further than the earlier awards, which required that a federation's statutes explicitly, in no uncertain terms, recognize the jurisdiction of the CAS. This evolution is clearly a response to the increasing complexity of international sports law, which entails that sporting activities are now regulated by numerous complex and sometimes contradictory statutes and other rules.

Nevertheless, the doctrine of indirect jurisdiction does have some limitations as we have seen within the context of the application of the UEFA FFP Regulations and the regulations of the FIA. In this sense, we can observe that although indirect jurisdiction is an argument available to establish CAS jurisprudence, the relevant statute must wholly and fully incorporate the entirety of the other federation's regulations, or specifically incorporate the appeal regulation recognizing the CAS.

In any event, it is interesting to note that the jurisdiction of the CAS in the world of sports law has not yet been entirely consolidated. There are still issues that are not subject to CAS jurisdiction and disputes that will never be heard by a truly international arbitral panel. If the CAS is to further establish its jurisdiction over the entire world of sports law, its recognition must be expanded.