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WILL COVID-19 EXCUSE CONTRACTUAL PERFORMANCE IN INTERNATIONAL FOOTBALL CONTRACTS?

An overview of court arbitration for sport jurisprudence on force majeure

COVID-19 has caused financial difficulties for many in sport during the past few weeks, and especially football clubs given the current postponement of the season. It will, therefore, be no surprise if some parties will attempt to use COVID-19 in order to avoid contractual liabilities in the coming months.

The principle of pacta sunt servanda, simply meaning that agreements which are legally binding must be performed, is a fundamental feature of legal systems around the world and is enshrined in Court of Arbitration for Sport ("CAS") jurisprudence. In accordance with that principle, it is, therefore, well established that lack of financial means to satisfy a contractual obligation of payment does not excuse the failure to make the required payment (see P.24 *CAS 2005/A/957 Clube Atlético Mineiro v. FIFA*). However, in certain limited circumstances, a party could be excused for a breach of contractual obligation under the legal concept of force majeure.

The concept of force majeure varies significantly across jurisdictions. For example, some jurisdictions have specific definitions of force majeure within legislation which apply even if a contract does not contain a force majeure clause or imply force majeure terms into contracts. Under English law, however, force majeure is not defined in legislation and parties can only rely on the doctrine if it is expressly provided for in the contract.

Ultimately, specific national laws and/or the relevant contractual provisions (including sporting rules) will determine whether force majeure can be relied upon to avoid a contractual obligation. FIFA's Statutes recognise CAS as the relevant arbitral body to resolve disputes relating to international football disputes between FIFA, its member associations, confederations, leagues, clubs, players, officials, intermediaries and licensed match agents[1] and requires CAS to apply the various FIFA regulations and, additionally Swiss law[2]. As such, a consistent body of CAS jurisprudence on force majeure, reflecting FIFA's regulations and Swiss law, has developed. This is very relevant in the COVID-19 era and provides an insight as to how CAS will determine future football disputes where a party relies on force majeure (arising from the challenges COVID-19 is presenting) as an excuse for failing to comply with contractual obligations.

This article explores the CAS jurisprudence on force majeure in football disputes, which, although CAS doesn't operate a rule of binding precedence, will helpfully determine the likelihood of parties successfully invoking this argument as a result of COVID-19 in future cases.

1 Article 57(1)

2 Article 57(2)

CAS 2006/A/1110 PAOK FC v. UEFA

In *CAS 2002/A/388, Ülker Sport/Euroleague*, involving a Turkish basketball team refusing to travel to Israel due to security concerns, the CAS panel stressed how force majeure was *"concerned with impossibility of performance"*[3], but in perhaps the leading CAS case on force majeure, the sole arbitrator in *CAS 2006/A/1110 PAOK FC v. UEFA* went further in order to define the concept.

The case concerned the application by the Greek football club PAOK FC for a licence to participate in UEFA competitions in the 2006/2007 season. After being first refused a licence by the Hellenic Football Federation ("HFF"), PAOK successfully appealed that decision to the Appeals Committee of the HFF, but UEFA refused to recognise that decision as it was handed down after the deadline set by UEFA for the admission of clubs to the UEFA 2006/2007 competitions.

PAOK appealed UEFA's decision to CAS and argued that the delay in the HFF issuing the licence to them was caused by delays in banks providing necessary letters of guarantee and that this delay constituted a force majeure event.

The sole arbitrator defined the concept of force majeure as follows:

"Force majeure, indeed, implies an objective, rather than a personal, impediment, beyond the control of the "obliged party", that is unforeseeable, that cannot be resisted, and that renders the performance of the obligation impossible (see CAS 2002/A/388, published in Digest of CAS Awards III 2001-2003, pp. 516 ff.) In addition, the conditions for the occurrence of force majeure are to be narrowly interpreted, since force majeure introduces an exception to the binding force of an obligation."[4]

Given that narrow interpretation, it was no surprise that PAOK's appeal failed because the failure of PAOK to timely satisfy the criteria to obtain the UEFA licence i.e. obtaining the letters of guarantee from the banks *"was caused by reasons falling within PAOK's sphere of responsibility"*[5].

CAS 2010/A/2144 Real Betis Balompié SAD v. PSV Eindhoven

In *CAS 2010/A/2144 Real Betis Balompié SAD v. PSV Eindhoven*, a dispute arose over whether Real Betis had validly exercised an option to buy Brazilian player Robert de Pinho de Souza, who was on loan to the Spanish club at the time.

As with PAOK, Real Betis pleaded force majeure by stating that its failure

3 Paragraph 5.

4 Paragraph 17.

5 Paragraph 19.

to secure a bank guarantee meant that it was impossible for it to fulfil its contractual obligation to pay a transfer fee to PSV.

The CAS panel explained that:

"force majeure is an event which leads to the non-performance of a part of a contract due to causes which are outside the control of the parties and which could not be avoided by exercise of due care. The unforeseen event must also have been unavoidable in the sense that the party seeking to be excused from performing could not have prevented it."[6]

Crucially the CAS Panel confirmed that:

"force majeure is not intended to excuse any possible negligence or lack of diligence from a party, and is not applicable in cases where a party does not take reasonable steps or specific precautions to prevent or limit the effects of the external interference."[7]

In light of the above, Real Betis' argument failed because it did not provide any evidence to prove that it could not obtain the bank guarantee and even if it did, it failed to prove that this was due to an unforeseen event beyond its control which took place after the date when the option was exercised.

CAS 2014/A/3533 Football Club Metallurg v. UEFA

In *CAS 2014/A/3533 Football Club Metallurg v. UEFA* the adjudicatory chamber of the UEFA Club Financial Control Body found that Football Club Metallurg from the Ukraine had breached UEFA's Club Licensing & Financial Fair Play Regulations because it had overdue payables towards other football clubs. FC Metalurg were, therefore, fined and excluded from participating in UEFA competitions for three seasons unless it was able to prove by a set date that it had paid the overdue payables in the sum of €890,000. The club subsequently agreed instalment arrangements with the clubs which it owed monies to, but UEFA concluded that the overdue amounts had only been deferred and therefore not paid by the due date. FC Metalurg's exclusion from UEFA competitions was, therefore, effective immediately.

On appeal to CAS, one of FC Metalurg's arguments was that it was impossible to pay the overdue payables to the various clubs (who were all based outside of Ukraine) by the set deadline because of financial problems and the problematical social and political environment in Ukraine. This apparently included difficulties in making overseas payments. The sole arbitrator noted that in accordance with Swiss law and CAS jurisprudence, such as *CAS 2005/A/957 Clube Atlético Mineiro v. FIFA*, financial problems or the lack of financial means cannot be invoked as a justification for the non-compliance with an obligation. It also applied the definition of force majeure given by the sole arbitrator in *CAS 2006/A/1110 PAOK FC v. UEFA*.

In light of that definition, the sole arbitrator did not find that the situation invoked by Metallurg was a case of force majeure since there was no evidence to prove that the situation in the Ukraine did not prevent Metallurg from paying its creditors, especially as the club made some payments under the instalment arrangements agreed with other clubs[8]. In this respect, the sole arbitrator was comforted by the CAS award in *CAS 2008/A/1621 Iraqi Football Association vs. FIFA & Qatar Football Association* where it was held that *"it shall be stated that the mere reference to a general situation of troubles in a concrete place is not enough to justify a breach on the basis of exceptional circumstances as the force majeure. The party asking for its application shall duly identify and accredit which specific and precise fact prevented it to perform a certain activity"*.[9]

CAS 2015/A/3909 Club Atlético Mineiro v. FC Dynamo Kyiv

The case of *CAS 2015/A/3909 Club Atlético Mineiro v. FC Dynamo Kyiv* concerned a non-payment of a transfer fee by Atlético Mineiro.

Atlético Mineiro accepted that it did not pay the transfer fee but explained that it encountered enormous financial difficulties due to very old tax debts caused by its previous management and as a result they were unable to pay the amounts owed to Dynamo Kiev as its difficulties led to a sudden block of its credits and funds by the Brazilian Treasury Department. Atletico Mineiro argued that this constituted force majeure as the debts and the risk of the block on its funds *"were not well known by its actual executive boards of the Appellant at the time of signing the Transfer Agreement with the Respondent"*[10] and so it was impossible to foresee that it would be suffering serious financial difficulties on the date the transfer fee was due. The CAS panel dismissed Atletico Mineiro's arguments for several reasons.

The CAS panel took into account the previous CAS jurisprudence and noted:

"that the legal concept of force majeure is widely and internationally accepted and… As a general rule it could be said that, under some extraordinary and limited circumstances, a party who does not fulfil a contractual obligation could be excused for his breach in case he proves that such breach is due to the concurrence of an event or an impediment that is not only beyond his control (and that he cannot avoid to overcome) but also that could not have been reasonably expected or taken into account when he assumed the relevant obligation that has been breached."[11]

As the applicable law to the dispute was Swiss law, the CAS panel stressed how the concept of force majeure is also valid and applicable under Swiss law. According to the jurisprudence of the Swiss Federal Tribunal (2C_579/2011), *"Force majeure takes place in the presence of extraordinary and unforeseeable events that occur beyond the sphere of activity of the person concerned and that impose themselves on him/her in an irresistible manner"*.[12]

The admission from Atlético Mineiro that it had *"very old tax debts"* meant that the blocking of its accounts by the Brazilian Treasury Department was its responsibility even if this might have been caused by previous management. In light of this, the CAS panel found that the financial difficulties of Atlético Mineiro were caused by its own conduct and voluntary behaviour which could not justify the breach of Atlético Mineiro's obligations.

CAS 2016/A/4402 Panthrakikos FC v. FIFA

The case of *CAS 2016/A/4402 Panthrakikos FC v. FIFA* concerned the non-payment of training compensation which led to disciplinary proceedings and a fine being imposed by the FIFA Disciplinary Committee and potential sporting sanctions if the debt remained unpaid.

On appeal to CAS, Panthrakikos FC accepted the debt owed but explained that this was due to a significant amount of cash being stolen from

6 Paragraph 40.

7 Paragraph 41.

8 Paragraph 61

9 Paragraph 62.

10 Paragraph 47.

11 Paragraph 72.

12 Paragraph 73.

its offices which was unexpected and unforeseen. Also, following this incident, it intended to pay the outstanding amounts however the Greek Government introduced urgent legislation imposing strict restrictions on the international transfers of capital through Greek banks. Within this legislation, the international transfer of capital through Greek banks was only possible with approval from a specialist committee and so it asked the FIFA Disciplinary Committee to suspend the disciplinary proceedings as it was unable to make the payments until it obtained approval. In those circumstances, Panthrakikos FC argued that disciplinary proceedings should not have commenced and that the sanctions imposed were disproportionate.

The burglary at the club's offices was not supported by any shred of evidence and even if it was, the CAS panel held that it would not have excused the club's failure to comply given the well-known principle that financial difficulties to satisfy an obligation of payment does not excuse the failure to make the required payment.

In terms of whether the restrictions on the transfer of capital via Greek banks constituted an event of force majeure that could be legitimately invoked as an adequate and sufficient ground for not imposing sanctions on Panthrakikos FC, the CAS panel noted that the operation of the Greek banking sector was indeed placed under strict regulatory restrictions, however it concluded that these restrictions did not result in an outright ban on all international transfers of capital. In particular, international payments and transfers of capital abroad were made possible in certain instances and for specific purposes upon authorisation and approval by the specialist committee, which the club was aware of. Therefore, the club did not prove that the Greek legislation was an absolute obstacle to the transfer of capital which prevented it from settling its outstanding debt. It could not, therefore, invoke a situation of force majeure.

CAS 2017/A/5496 FK Olimpik Sarajevo v. FIFA, Football Association of Bosnia and Herzegovina, NK Sesvete and Croatian Football Federation

The case of *CAS 2017/A/5496 FK Olimpik Sarajevo v. FIFA, Football Association of Bosnia and Herzegovina, NK Sesvete and Croatian Football Federation* concerned the non-payment by FK Olimpik Sarajevo of training compensation to Croatian club, Sesvete. Initially FIFA's dispute resolution chamber issued a decision ordering Olimpik to pay the Croatian club, EUR 60,000.The failure by Olimpik to comply with that order led to further disciplinary proceedings being commenced and a fine being imposed by the FIFA disciplinary committee as well as possible sporting sanctions in the event that the debt remained unpaid.

Olimpik did not contest its failure to comply with the order but appealed to CAS, pointing out that its financial situation drastically got worse as it was relegated to a lower division resulting in the loss of many sponsors and other economic benefits. As a result, it claimed that it was unable to comply with the decision due to force majeure.

The sole arbitrator was not convinced by the arguments put forward by Olimpik. First of all, it failed to provide any tangible evidence to prove that it was prevented from complying with the decision passed by the FIFA DRC for reasons beyond the sphere of its responsibility. In addition, after applying the previous CAS jurisprudence, in particular the well-established principle that a lack of financial means to satisfy a contractual obligation of payment does not excuse the failure to make the required payment, the sole arbitrator concluded that the alleged financial difficulties of Olimpik following its relegation cannot be considered force majeure.

This decision followed the earlier *CAS case of CAS 2016/A/4692 Kardemir Karabükspor Kulübü Dernegi v. UEFA* in which the sole arbitrator also found that relegation does not constitute force majeure, a possible excuse or a mitigating circumstance which might justify breach of a contractual obligation.

CAS 2018/A/5537 Zamalek Sporting Club v. FIFA

Zamalek Sporting Club was previously ordered by *CAS in 2013/A/3426 Zamalek SC v. Manuel Agogo* to pay its former player Manuel Agogo the sum of EUR 720,736 plus interest as compensation for breach of contract. The club appealed the CAS award to the Swiss Federal Tribunal, which dismissed the appeal in its entirety. As Zamalek did not pay the full sum owed to the player, disciplinary proceedings were commenced against Zamalek and a fine was imposed by the FIFA disciplinary committee as well as possible sporting sanctions in the event that the debt remained unpaid.

Zamalek appealed the disciplinary decision to *CAS* and accepted the debt was owed, but claimed it was impossible to comply with its obligation to pay because following the economic crisis in Egypt at the end of 2016, the Central Bank of Egypt required exceptional approvals in relation to international payments and, therefore, the transfer of money could not be completed due to force majeure. Such restrictions were limited to a yearly amount of USD 100,000 and a cap on depositing foreign currencies was established in the maximum amount of USD 10,000 per day or USD 50,000 per month. Zamalek argued that this was out of its control and not due to its fault or negligence.

After summarising the above CAS jurisprudence on force majeure, the CAS panel concluded that whilst Egypt did suffer an economic crisis which led to banking restrictions at that time, those restrictions did not result in an outright ban on all international bank transfers as international payments and transfers abroad were still possible for specific purposes with exceptional approval from the Egyptian authorities and/or the Central Bank of Egypt. The club failed to submit any relevant documentation evidencing its request for exceptional approvals to make international transfers and in addition the CAS panel was aware that the club was able to make several international payments in foreign currencies to the player during the relevant period. The panel further observed that according to a FIFA TMS report, Zamalek signed a number of transfer agreements in order to sign players during the period of time when it was allegedly prevented from making international payments to the player. Zamalek tried to adduce evidence to show that the transfer fees in question were not paid, but the panel rejected this request and deemed it irrelevant because it had concluded a transfer agreement for an amount it allegedly was not able to pay.

Consequently, the panel found that Zamalek had *"failed to discharge its burden of proof, as it did not sufficiently establish that the restrictions by the Central Bank of Egypt and the Egyptian authorities in force since January 2014, as well as the seizure of its bank accounts, constituted an absolute obstacle to the transfer of capital that prevented it from settling its outstanding debt to the Player under the CAS Award"*[13]. Also, it was important that the events relied upon by Zamalek to plead force majeure took place after Zamalek had already defaulted on its financial obligations under the CAS Award. As a result, it could not benefit from a situation that occurred after its default and use it as a ground for defence.

The same force majeure argument by Zamalek failed for exactly the same reasons in the very similar case of *CAS 2018/A/5779 Zamalek Sporting Club v. FIFA*.

13 Paragraph 81.

So will Covid-19 Excuse Contractual Performance of Obligations?

COVID 19 is without doubt an unprecedented situation for everyone involved in football with almost every football competition globally being suspended and FIFA has already declared in its recently released COVID-19 Football Regulatory Issues document that the COVID-19 situation is, per se, a case of force majeure for FIFA and football. However, in that document, whilst FIFA acknowledges that is fully aware of the financial difficulties now suffered by clubs and thus the potential difficulty in complying with contractual obligations, it has made clear that it will not grant exceptions to complying with decisions rendered by the FIFA DRC, the PSC or the Disciplinary Committee and decisions passed by those judicial bodies must still be respected.[14]

Therefore, for now, cases will still need to be determined on a case by case basis and CAS will no doubt need to decide on a number of these in the coming months, not only from decisions rendered by FIFA judicial bodies but also from parties directly such as clubs, players and agents. Every case will turn on its facts, but what the previous CAS jurisprudence tells us is that whilst CAS panels are prepared to apply the concept majeure notwithstanding any express clause in the contract, the concept will only be applied in exceptional and limited circumstances. This is verified by the fact that none of the parties arguing force majeure in the cases referred to above were successful.

One case which parties may seek to rely upon is CAS 2014/A/3463 & 3464 Alexandria Union Club v. Sánchez & Cazorla where the sole arbitrator held the Egyptian civil war was an event of force majeure. The case involved a dispute between Alexandria Union Club and two of its coaches. As a result of the Egyptian civil war, the 2012/2013 football season was cancelled and the coaches unilaterally terminated their contracts. The sole arbitrator held that:

"the Egyptian civil war is an event of force majeure, which is beyond the Parties' control, which the Parties could not have reasonably provided against before entering into the contract, which could not reasonably have been avoided or overcome, and which is not attributable to any of the Parties. Under these circumstances, the Sole Arbitrator finds that the events which put an end to the 2012/2013 season, and which admittedly occurred on 1 April 2013, prevented the Appellant from performing all or part of its contractual obligations. As a result, and as of 1 April 2013, the Appellant must be released from further performance of the obligations concerned."[15]

Applying the widely accepted definition in *2006/A/1110 PAOK FC v. UEFA*, I think it can be safely said that the COVID 19 outbreak has been beyond the control of everyone involved in football. However, whilst that may be the case, any football party wishing to rely upon a force majeure defence at CAS will also need to prove other factors including:

a) Was the outbreak of COVID 19 and the significant impact it has had on football unforeseeable?

The answer to this is most likely no but it will depend on when the contract in question was concluded. It cannot be said that parties to a contract concluded in September 2019 would or should have foreseen the current events, but that is likely to be different if the contract was concluded in April.

The answer to this question could be harder to determine though in less clear-cut examples such as contracts concluded during the transfer window in January. At that time, the outbreak was largely restricted to China but there was concern about the spread of the virus so was a global pandemic at that point foreseeable?

14 Page 11.

15 Paragraph 80.

b) Was the specific impediment caused by COVID 19 unavoidable and not caused in any way by the party's conduct?

The cases of *CAS 2010/A/2144 Real Betis Balompié SAD v. PSV Eindhoven and CAS 2015/A/3909 Club Atlético Mineiro v. FC Dynamo Kyiv* confirm that COVID 19 must be the true cause of what led to performance becoming impossible and that force majeure will not be invoked if the party is in any way at fault.

Therefore, a football club which has suffered significant financial hardship as a result of the outbreak but who was already suffering financial difficulty prior to say the postponement of matches and at the time the contract was concluded, is likely to be unsuccessful in relying upon a force majeure defence. On the flip side, a club which was financially strong prior to the outbreak but since suffered a restriction of funds from its bank may have better prospects.

c) Was performance of the contractual obligation impossible due to COVID-19?

This is likely to be the hardest hurdle for any party seeking to rely on force majeure to overcome because whilst the outbreak of the virus has led to significant disruption and financial hardship in some cases, the cases of *CAS 2016/A/4402 Panthrakikos FC v. FIFA and CAS 2018/A/5537 Zamalek Sporting Club v. FIFA* show that this does not necessarily mean that performance of a contractual obligation is impossible. So, for example, clubs seeking to rely upon force majeure to excuse performance of a contractual obligation but which at the same time enter into transfer agreements to sign new players are unlikely to receive much sympathy from a CAS panel.

During the coming months, parties will no doubt be trying to use COVID-19 as an excuse to avoid contractual liabilities but it remains the case that lack of financial means to satisfy a contractual obligation of payment does not excuse the failure to make the required payment and it is clear from CAS jurisprudence that the doctrine of force majeure will only be applied in exceptional circumstances.

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