

THE LEGAL ASPECTS OF COVID-19 AS A FORCE MAJEURE EVENT IN SPORTS ESPECIALLY IN FOOTBALL LAW

General Overview

As we all know the outbreak of COVID-19 began in Wuhan, China in December 2019 and has now spread all over the world. Due to the ongoing situation regarding COVID-19, every aspect of the daily life of ours has started to feel the tension, and this situation led to cancellation of many events — for the sake of public health, so in that sense, sports competitions are one of these events facing this crisis. Considering the features of the tournaments, competitions or matches, especially being played out on a wide-open area heaving with the audiences, the cancelation/postponement of the leagues is very required. So, at this point, several issues are arising about what will happen when a sports event gets cancelled. Mostly about the financial matters for sure, whether the contracts between the club and football players or coaches are still valid even though the matches are no longer played, whether the parties still have the obligations/liabilities or not etc. All these uncertainties are related to one legal issue: force majeure.

Force majeure is basically a common clause in legal contracts regarding a major event that parties could not see coming while signing the agreement. This unforeseeable and extraordinary event prevents the performance of obligation and liabilities of the parties. Force majeure is mostly called as “act of god” that an event cannot be avoided with due diligence means that it is beyond the parties’ control, such as earthquakes, tsunamis or war.

Zamalek Sporting Club v. FIFA

According to CAS 2018/A/5779¹, The Court of Arbitration for Sports (CAS) states that the “legal concept of force majeure is widely and internationally accepted and is valid and applicable under Swiss law. As a general rule, under some extraordinary and limited circumstances, a party that does not fulfil a contractual obligation could be excused for its breach if it can prove that the breach is due to the occurrence of an event or an impediment that is not only beyond its control (and that it cannot avoid to get over) but also that it could not have been reasonably expected to have taken into account when it assumed the relevant obligation that was breached. Force majeure 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.”

Although Swiss law does not include a provision about force majeure defence, the notion is interiorized by the Swiss courts. Article 119 of the Swiss Code of Obligations states that "An obligation is deemed extinguished where its performance is made impossible by circumstances not attributable to the obligor."

In addition to these statements, CAS propounds that the conditions for the occurrence of force majeure should be narrowly interpreted, since force majeure introduces an exception to the binding force of an obligation.² At this point, there is a significant

¹ Arbitration CAS 2018/A/5779 Zamalek Sporting Club v. Fédération Internationale de Football Association (FIFA), award of 31 October 2018

² Arbitration CAS 2018/A/5779 Zamalek Sporting Club v. Fédération Internationale de Football Association (FIFA), award of 31 October 2018

subject of dispute regarding whether viruses are act of god under the force majeure clause or not.

Royale Marocaine de Football v. Confédération Africaine de Football

Related to the above mentioned issue, for example, in CAS 2015/A/392 CAS found that the Royal Moroccan Federation of Football was not authorized to postpone the African Cup of Nations tournament in 2015 regarding to concerns about the Ebola virus. The CAS found that Ebola was not a force majeure event because the virus had not made hosting the event impossible, it just made more difficult.³

FIFA Guidelines on 7 March 2020

While the discussions are going on, The Bureau of the FIFA Council clarified that the breakdown of football caused by COVID-19 is a case of force majeure and because of the Article 27 of FIFA Regulations on the Status and Transfer of Players (RSTP), this decision is final and binding. So, in respect of this final decision, the situation of the employees and clubs, will be reviewed hereinafter.

RSTP defines season as “the period starting with the first official match of the relevant national league championship and ending with the last official match of the relevant national league championship.” It is indisputable that because of the postponements and suspensions caused by COVID-19 virus, league competitions will take place after

³ Fédération Royale Marocaine de Football v. Confédération Africaine de Football, Award of 17 November 2015 and see Bône N. (2017) CAS 2015/A/3920 Fédération Royale Marocaine de Football v. Confédération Africaine de Football, Award of 17 November 2015. In: Duval A., Rigozzi A. (eds) Yearbook of International Sports Arbitration 2016. Yearbook of International Sports Arbitration. T.M.C. Asser Press, The Hague

the actual end date of the current season. Due to this situation, the beginning of the new seasons will also have been postponed naturally. So, we can easily assert that because of the COVID-19, the period of the season will be extended automatically. Considering Article 18 para. 2 of RSTP providing that minimum length of a contract shall be from its effective date until the end of the season, we can say that the duration of contract between the clubs and players will be extended as well.

As we mentioned above related to force majeure event, COVID-19 led to unperformed contracts by the parties originally anticipated. Players and coaches are unable to work, and clubs cannot provide safety for public health during the matches or even training. In that case, parties can terminate the contract before the end of the season but none of these parties could gain advantage from this, neither players/coaches nor clubs. So, FIFA recommended some fair solutions ensuring employees protecting their job while clubs being prevented from financial collapse.

First of all, the club and employees (players and coaches) should try to interoperate and compose a new agreement that regulates the conditions of employment. This -club based or league based- reformed agreement should reorganize the essential provisions such as contract extension, remuneration, salary deferrals and protection mechanisms etc. Collective bargaining agreements (CBA) are also free to used by the parties if relevant social partners exist.

In occurrence of unilateral decision, it will only be accepted if it is in accordance with national law or CBA structures finds it feasible. In the event of clubs and employees cannot agree on new terms or national law does not address the situation or collective agreements are not possible or not applicable; those unilateral decisions will only be acknowledged via FIFA's Dispute Resolution Chamber (DRC) or Players' Status

Committee (PSC). Deciding the unilateral provisions are acceptable or not, the DRC or PSC should consider the economic situation of the club, the net income of the employee before and after the amendment, whether these decisions are for the whole team or just for a specific employee and the club's intention basically.⁴

An alternatively, if the club provides its employees an insurance coverage and also the alternative sufficient income support, the agreements between the club and employees could be suspended during the suspension of competitions.

To sum up, even though a force majeure event creates a situation of just cause derives from the impossibility of performance, terminating the employment contract unilaterally and prematurely brings no advantage to either parties. Therefore, FIFA brought some essential solutions that preserve both clubs and employees' mutual interests. In that sense, parties should try to come to an agreement about the new terms in the first place. If this agreement cannot be reached, unilateral decisions should be considered as long as it protects both parties' benefits. Alternatively, parties could consider suspending the employment agreements as long as the club accepts to provide employees an insurance coverage and also an income support during this time.

⁴ FIFA V1.0 COVID-19 Football Regulatory Issues