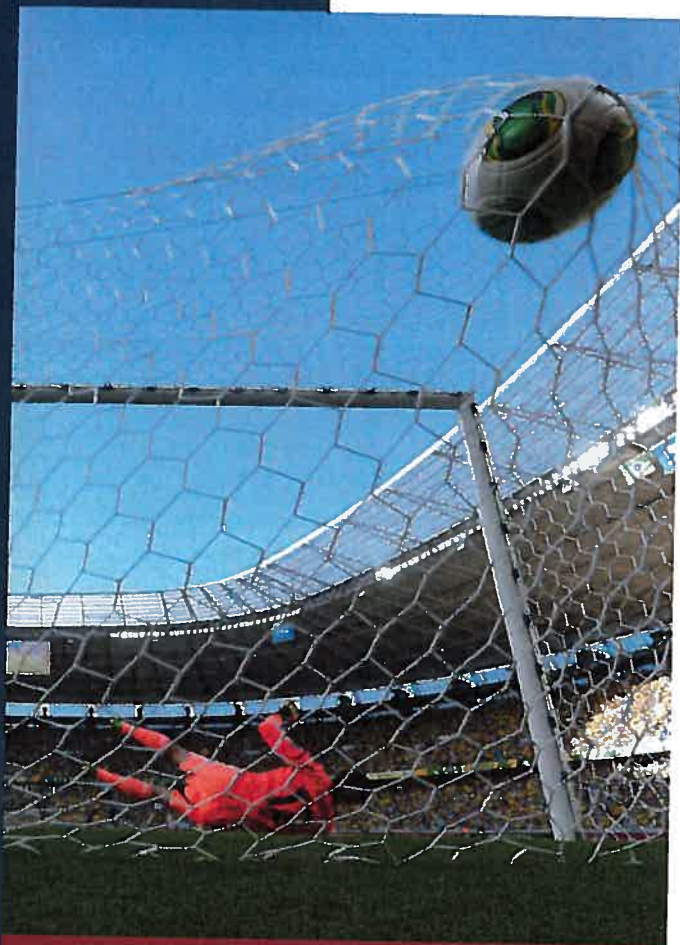




Football Legal

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EDITORIAL

In many football aspects, rules have been enforced and issues are increasingly taken to "courts"...

In this context, *Football Legal* aims to provide a clear and detailed picture of what the key legal issues are in Football around the world. It is intended to be a tool for lawyers and all Football stakeholders.

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The AIAF Congress 2016 in Abu Dhabi is dedicated to the Future of Justice in Football. A perfect opportunity to discuss and exchange views on this widely debated issue.

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Notifications through Associations (Article 102 of FIFA Disciplinary Code) The Fernando SANTOS case

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→ FIFA Regulations – FIFA Dispute Resolution Chamber (DRC) –
Player contract – Breach of contract – Contractual stability

FIFA Disciplinary Committee, 11 July 2014, no 140373
GRE RIO, Fernando Santos
FIFA Appeal Committee, 19 September 2014, no 140373
APC GRE ZH, Fernando Santos
CAS 2014/A/3762 Fernando Santos v FIFA

Introduction

The subject of the present article has its origin in events regarding a case that occurred during the final phase of the last FIFA World Cup in 2014.

A case where the importance of the first notification of a disciplinary proceeding is well seen, as it defined the base on which the whole case was analyzed and decided. The case in question was *FIFA v. Mr Fernando SANTOS* that ended with a decision of the Court of Arbitration for Sport, dated of 23 March 2015.

Mr *Fernando SANTOS*, former head coach of the Greek National Team, was sent off during the Round of 16 match against Costa Rica, on 29 June 2014.

After that match the contract between Mr *Fernando SANTOS* and the Greek National Team came to an end (the concrete termination date was 30 June 2014).

On 2 July 2014, disciplinary proceedings were opened by FIFA's Disciplinary Committee against Mr *Fernando SANTOS*.

On 3 July 2014, FIFA Disciplinary Committee sent to the Hellenic Football Federation (HFF) a Confirmation Letter where, besides summarizing the facts attributed to Mr *Fernando SANTOS*, the Federation and Mr *Fernando SANTOS* were given the opportunity, until 9 July 2014, to submit any comments or evidence in connection with the facts in dispute.

This Confirmation Letter was sent exclusively to the HFF and was sent on a date when Mr *Fernando SANTOS* had no more links to that Association.

Taking these facts into consideration, the question the present article intends to answer is the following: should a notification made in these circumstances be enough to grant the defendant his right to be heard?

FIFA Disciplinary Code and other rules regarding notifications

Article 102, no. 1 and 2, of the FIFA Disciplinary Code states that: "1 - All of the parties are notified of the decisions. 2. Decisions and other documents intended for players, clubs and officials are addressed to the association concerned on condition that it forwards the documents to the parties concerned. In the event that the documents were not also or solely sent to the party concerned, these documents are considered to have been communicated properly to the ultimate addressee four days after communication of the documents to the association (cf. art. 90)."

Besides that, FIFA issued Circular no. 21, of 28 January 2014, sent to the Associations that had qualified to the final competition of the 2014 FIFA World Cup, which, in its point V., established that the secretariat of the FIFA Disciplinary

Committee was going to notify the head of the delegation concerned of all sanctions in writing.

These two rules present us with a global scenario where Associations have a key role. They are responsible for receiving a notification, either directly addressed to the Association, or addressed to a player, a club or an official, and, in this last situation, for forwarding such notification to them.

Regarding the concrete case in which this article is based, the first question these two rules raise is the following: when the official working as a head coach of a National Team is a foreigner, to which Association should FIFA send the notification to? To the Association of the National Team he is/was the head coach of or to the Association he is a national of?

Article 102 of the FIFA Disciplinary Code seems to treat players, clubs and officials in the same manner. If that is the case, an official should, at least, also be notified through the Association he is a national of (despite working, at that same time, for another Association). With effect, only this interpretation is able to apprehend, in the same way, players, clubs and officials. A club is always notified through its Association, even if it is disputing a competition that is not taking place in the territory of its Association. This means that players and officials should benefit from the same treatment.



We understand the difficulty that this solution may cause, especially during a competition such as the World Cup. We also understand that, because of that, FIFA decided to create special rules for notifications. However, we believe such rules have to be interpreted in a way that guarantees to all defendants, at all times, an effective right to be heard.

>> An official was considered notified to present his defense through an Association with which he no longer had any relationship

When a disciplinary matter is in cause, it is necessary to assure, by all means available, the right of defense.

The present case was of the utmost injustice. An official was considered notified to present his defense through an Association with which he no longer had any relationship. An Association that, at the time it received the notification, could not be, in any way, harmed by the effects of such notification to the official.

The legal system created by FIFA is based in two presuppositions: the first is that the harm done to a player, a club or an official will also harm the Association in cause, what would lead the Association to guarantee that the notification will arrive to its addressee; the second one is that the Association has a legal obligation of forwarding the notification to the addressee.

Neither the first, nor the second, are sufficient to solve a case such as *Mr Fernando SANTOS*. On one hand, *Mr Fernando SANTOS* was no more an official of the HFF and, therefore, any consequence of the disciplinary proceeding to him would not hurt, in anyway, such Association. On the other hand, there is no legal consequence to an Association that does not forward a notification to the addressee.

In this context, as already said, FIFA sent the notification only to the HFF. The Hellenic Football Federation never sent said notification to *Mr Fernando SANTOS*, nor did FIFA. *Mr Fernando SANTOS* was not able to present his position.

In fact, *Mr Fernando SANTOS* left the Greek "A" Representative team on 30 June 2014, before the notification was sent, since the contract entered with the HFF to perform the duties of Head Coach of the Greek team terminated on that date. This fact was reported by the general media and also by FIFA and UEFA, thus it was publicly known, in particular by FIFA. This means that, in the date FIFA sent the Confirmation Letter to the HFF, *Mr Fernando SANTOS* had no contractual relation with the HFF, a fact that FIFA was aware of.

In a context like this it is inadmissible to consider that such notification fulfilled its purposes of guaranteeing an effective exercise of the right of defense, a key principle for any sanction procedures.

Despite having argued that all rules were respected regarding such notification and, therefore, the defendant had no reason on this matter, the truth is that the operative part of the decision of the FIFA Disciplinary Committee of 11 July 2014 was notified by FIFA not only to the HFF, but also to the Portuguese Football Federation (the Federation where *Fernando SANTOS* is registered as a coach). That fact clearly demonstrates that FIFA was aware that the defendant should not have been initially notified of the disciplinary proceedings opened against him through the Hellenic Football Federation.

This example gives us a clear vision of the risks Article 102 of the FIFA Disciplinary Code represents when interpreted in such a way that only demands a notification to be sent to the Association where a player or an official is working and not also to the Association they are a national of.

Therefore, the solution herein presented - that the notifications should be sent to both Associations - is the only one that, guarantying the respect of the right to present a defense, also guarantees that the procedure is not affected by eventual difficulties resulting from the necessity to notify the individuals directly.

The real consequences of a first decision taken when the defendant was not able to present his defense

Because *Mr Fernando SANTOS* did not present any response to said first notification, FIFA sustained, in its first decision, that he had demonstrated lack of interest for the proceeding. That fact was also taken in consideration when FIFA had to define the concrete applicable sanction.

FIFA decided to suspend *Mr Fernando SANTOS* for 8 matches and also to sanction him with a fine of the amount of CHF 20,000 (approx. EUR 18,000). It was this decision that was notified not only to the HFF, but also to the Portuguese Football Federation. In other words, only after this decision, was *Mr Fernando SANTOS* aware that a proceeding was taking place against him.

He had, finally, the opportunity to present his arguments. However, he was already condemned by then. When he first presented his defense, he was no longer presenting his position before a decision was issued; he was already acting against a sanction. He already lost one round and was appealing for a new body, the FIFA Appeal Committee.

Both FIFA Appeal Committee and Court of Arbitration for Sport decided that, as *Mr Fernando SANTOS* now had the opportunity to present, before them, all the arguments he wanted, any possible violation of his right to be heard occurred before the FIFA Disciplinary Committee was healed. We believe that this conclusion is too simplistic.

It is true that, pursuant Article 124, no. 1, of the FIFA Disciplinary Code: "*An appeal results in the case being reviewed by the Appeal Committee.*" Also, Article R57 of the Court of Arbitration for Sport Code (version of 2013, applicable to *Mr Fernando Santos'* case) establishes that: "*The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. The President of the Panel may request communication of the file of the federation, association or sports-related body, whose decision is the subject of the appeal. Upon transfer of the CAS file to the Panel, the President of the Panel shall issue directions in connection with the hearing for the examination of the parties, the witnesses and the experts, as well as for the oral arguments.*"

Therefore, taking these legal rules into consideration, there is no doubt that said entities were free to apprehend and decide on every arguments the defendant presents before them.



At a first glance, it seems, in fact, that a violation of the right to be heard can be healed during the subsequent phase of a proceeding.

However, a deeper look is essential to fully comprehend the consequence of said violation before a first decision is taken. With effect, when presenting his defense before the body that will, for the first time, decide on a possible disciplinary sanction, the defendant is, in fact, trying to influence the result of the proceeding and he is doing it in a time where no one has already pronounced his guilt or the seriousness of his acts. It is the right moment to present defense arguments. It is, despite all, the unique moment where the defendant does not have a sanction pending on him.

After this moment passes, and imagining that the defendant is sanctioned by the Disciplinary Committee, every defense he will present is a defense that is already conditioned by a decision that, if not appealed, will be binding. The position of the defendant has already changed. The way he presents himself before the body that, for the first time, will hear his arguments, is different to when he would have had the opportunity to defend himself before a first decision was taken.

This difference is massive not only for the defendant but also for the body that will analyze the appeal. In fact, even though it has all the power to take a decision on the facts and the law, being free to analyze all the arguments brought before it, the truth is that such body is already conditioned by the decision subject to appeal.

It is not the same - it will never be - to decide a case for the first time and to decide a case on an appeal basis. It is of the utmost difficulty to take prejudice away and take a decision that is not significantly influenced by the decision that is under appeal.

For instance, if said decision has sanctioned the defendant with a severe sanction and if, in case, the discussion is not about the guilty of defendant, but the severity of the offense, the truth is that the sanction already imposed constitutes the base from where the analysis of the new sanction will start. The influence of the first decision is indisputable.

In this case, if the first sanction was decided while taking into consideration the fact that the defendant demonstrated a lack of interest for the proceeding, as he did not respond to the first notification that was sent, we can find the injustice that situation represents to him.

A real first notification can, therefore, be decisive for the development of a proceeding. We cannot expect that a defendant that was not given the right, the opportunity, to present his arguments before a decision against him is taken will, afterwards, recover its initial position as it has the right to appeal against said decision. It is essential to separate the appeal phase from the initial one and, therefore, FIFA should always do its best efforts to guarantee that said first notification will, in fact, arrive to its addressee.

The solution presented before - to send the notification to both Associations (the one the official is representing and the one he is a national of) - is a solution that with harming the urgency of a proceeding guarantees that, nevermore, an official can be sanctioned before having the opportunity to present his defense.

Conclusion

The Article 102, no. 1 and 2 of the FIFA Disciplinary Code - stating that decisions and other documents intended for players, clubs and officials are addressed to the Association concerned on condition that it forwards the documents to the parties concerned does not guarantee, in any cases, the elementary right of defense for those that could be affected by a proceeding or a FIFA decision.

>> No official should ever be sanctioned without the opportunity to present his defense

Simultaneously, FIFA Circular no. 21 of 28 January 2014 - stating, in addition, that all sanctions related to 2014 FIFA World Cup should be notified to the head of the delegation of the Association qualified to the final completion - was based on the idea that all the parties besides the Association (specially any officials) preserve the link with the Association after the event and the concrete episode that generate the FIFA proceeding or the decision.

In neither case (FIFA Disciplinary Code and Circular no. 21) was a very common scenario foreseen: what happens when an

official is involved in a proceeding or affected by a decision and is no longer linked to the Association that receives the notifications?

The relevance of the question is even more critic in cases - also very common - of opposite or, at least, different interests between the Association and the agent.

In fact, when the agent is not registered in the notified Association or a citizen of the country where the Association is based, and does not have any contract with that Association (whether the contract term is litigious or not), the right of defense is very fragile.

In the *Fernando SANTOS* case those risks were real and had consequences - he could not present his defense during the proceeding and faced an unfavourable decision especially aggravated because of his *lack of interest*.

The proposed solution, although it constrains the urgent nature of a proceeding, should guarantee that no official can ever be sanctioned without the opportunity to present his defense. It is a balanced and proportionate solution. And, curiously, it was practiced by FIFA, albeit in a late stage, when it notified the Hellenic Football Federation as well as the Portuguese Football Federation (the Federation where the defendant is registered as a coach).

Therefore, the solution herein presented - that the notifications should be sent to both Associations - is the only one that respects the right of defense while also guaranteeing that the procedure is not affected by eventual difficulties resulting from the necessity to notify the individuals directly.