Swiss Federal Tribunal overrules CAS award in a landmark decision: FIFA vs Matuzalem

By **Roy Levy***

1. INTRODUCTION

This case is a landmark decision of the Swiss Federal Tribunal[1]. For the first time in history, an award of the Court of Arbitration for Sport ("CAS") was annulled by the Swiss Federal Tribunal because it violated 'fundamental principles of law', the so called 'substantive public policy' (Article 190 (2) (e) Private International Law Act ("PILA")). This marks the first time that a CAS award has been overruled based on substantive law and not procedural law.

2. FACTS

The case concerns the Brazilian footballer Francelino Matuzalem da Silva ("Matuzalem"), who (at the time of writing) plays for S.S. Lazio s.p.a., Rome ("Lazio"). In June 2004 he entered into an employment agreement with the Ukrainian football club FC Shakhtar Donetsk ("Shakhtar"). It was a fixed-term agreement for five years, effective 1 July 2004 until 1 July 2009. On 2 July 2007 (i.e. one day after the protected period ended), Matuzalem terminated his contract with immediate effect to play for the Spanish club Real Zaragoza SAD ("Zaragoza"). It is undisputed that he unilaterally and prematurely terminated the contract without just cause.

Shakhtar initiated proceedings with the FIFA Dispute Resolution Chamber ("FIFA DRC") which concluded that Shakhtar was entitled to the payment of EUR 6.8 M[2]. This decision was appealed before the CAS by both parties. On 19 May 2009, CAS issued its decision whereby Matuzalem was ordered to pay to Shakhtar the amount of EUR 11,858,934, plus interest of 5% p.a. accruing from 5 July 2007[3]. Matuzalem and Real Zaragoza were held jointly and severally liable for the amount. This CAS award became known as the 'Matuzalem case' and many commentaries were written about it due to the fact that it was the first time that CAS, when calculating the claim for damages, took into consideration not only the residual value of a player, i.e. the total amount of wages outstanding under the fixed term contract (as had been applied in the *Webster* case[4]), but also the lost service of the value of Matuzalem, i.e. possible future income of the club with the player such as transfer opportunities. Many commentaries claimed that CAS used Matuzalem to make an example to the football world that contracts must be honored. The CAS panel argued that the purpose of Article 17 of the FIFA Regulations on the Status and Transfer of Players (which deals with the consequences of terminating a contract without just cause) is

> *'[...] basically nothing else than to reinforce contractual stability, i.e. to strengthen the principle of pacta sunt servanda in the world of international football, by acting as a deterrent against unilateral contractual breaches and terminations, be it breaches by a club or by a player[...]'*[5]

The panel further stated that

> *'The deterrent effect of Article 17* FIFA Regulations shall be achieved through the impending risk for a party to incur disciplinary sanctions, if some conditions are met, and, in any event, the risk to have to pay a compensation for the damage caused by the breach or the unjustified termination. In other words, both players and club are warned: if one does breach or terminate a contract without just cause, a financial compensation is due, and such compensation is to be calculated in accordance with all those elements of Art. *17* FIFA Regulations that are applicable in the matter at stake, including all the non-exclusive criteria listed in para. *1* of said article that, based on the circumstances of the single case, the panel will consider appropriate to apply.'[6]

The Swiss Federal Tribunal upheld this decision in 2010[7].

As neither Real Zaragoza nor Matuzalem were able to pay the amount of almost EUR 12 M., FIFA's Disciplinary Committee informed them on 14 July 2010 that (i) disciplinary proceedings would be initiated against them and that (ii) corresponding sanctions would be applied in accordance with Article 64 of the FIFA Disciplinary Code. On 31 August 2010 the FIFA Disciplinary Committee decided that:

> *'[...]*
>
> *3. The player Matuzalem Francelino da Silva and the club Real Zaragoza SAD are granted a final period of grace of 90 days as from notification of this decision in which to settle their debt to the creditor.*
>
> *4. If payment is not made by this deadline, the creditor may demand in writing from FIFA that a ban on taking part in any football related activity be imposed on the player Matuzalem Francelino da Silva and/or six (6) points be deducted from the first team of the club Real Zaragoza SAD in the domestic league championship. Once the creditor has filed this/these requests, the ban on taking part in any football-related activity will be imposed on the player Matuzalem Francelino da Silva and/or the points will be deducted automatically from the first team of the club Real Zaragoza SAD without further formal decision having to be taken by the FIFA Disciplinary Committee. [...] Such ban will apply until the total outstanding amount has been fully paid. [...]'*

On 1 September 2010, Zaragoza transferred EUR 500,000 to Shakhtar. No further payment has been made by either Matuzalem or by Zaragoza.

Both Zaragoza and Matuzalem appealed to CAS. On 29 June 2011, CAS informed the parties that it dismissed both appeals and confirmed the decision of the FIFA Disciplinary Committee[8]. Matuzalem appealed against the CAS award to the Swiss Federal Tribunal.

In the mentioned landmark decision held on 27 March 2012, the Swiss Federal Tribunal annulled the CAS award, ruling that it violates fundamental principles of law (public policy). This is the first time that the Swiss Federal Tribunal has overruled a CAS award based on substantive public policy and not just procedural mistakes. Reason enough to have a better look at the decision and its implications.

3. WHY IS FIFA ALLOWED TO IMPOSE SANCTIONS ON PLAYERS?

The question of whether FIFA has the ability to impose disciplinary sanctions upon football clubs and players for failure to comply with CAS awards has been answered by the Swiss Federal Tribunal in the decision 4P.240/2006/len of 5 January 2007[9]. The Federal Tribunal affirmed FIFA's power to regulate its sport through suitable rules and decision-making processes. Sanctions issued by associations such as FIFA in conformity with its statutes and regulations are not in conflict with

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1 Judgment of the Swiss Federal Tribunal 4A_558/2011 of 27 March 2012.
2 DRC Decision of 2 November 2007.
3 CAS 2008/A/1519-1520.
4 CAS 2007/A/1298; 2007/A/1300.
5 CAS 2008/A/1519-1520, item 80.
6 CAS 2008/A/1519-1520, item 82.
7 Judgment of the Swiss Federal Tribunal 4A_320/2009 of 2 June 2010.
8 CAS 2010/A/2261 Real Zaragoza SAD v/ FIFA and CAS 2010/A/2263 Matuzalem Francelino da Silva v/ FIFA.
9 Appeal against the award CAS 2006/A/1008, Rayo Vallecano de Madrid SAD v/ FIFA.

the state monopoly to enforce monetary judgments. The Federal Tribunal has explicitly upheld such private enforcement systems by deciding that the imposition by FIFA of a sanction against one of its direct (national associations) and/or indirect members (such as football associations and players) for failure to comply with a CAS award or with a decision by one of the FIFA judicial bodies, was not inconsistent with public policy.

The Federal Tribunal confirmed that private associations (such as FIFA) may impose sanctions on their members in cases of violation of their membership obligations[10]. For this purpose, an association may set up rules and regulations which its members agree upon, in order to ensure the enforcement of its members' obligations. The consent given by the members is considered given voluntarily even if the dominant position of FIFA makes it impossible for a member to resign if it wants to participate at international matches. The Swiss Federal Tribunal argued that just as liquidated damages mutually agreed by two parties in a contract are valid, the same should apply to sanctions imposed by FIFA on its members.

4. THE DECISION OF THE SWISS FEDERAL TRIBUNAL

4.1 WHY DID THE SWISS FEDERAL TRIBUNAL ANNUL THE CAS AWARD?

The possibilities of annulling CAS awards are very limited. CAS awards may only be overruled by the Swiss Federal Tribunal if one of the following reasons can be maintained (Article 190 (2) PILA):

1. if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted;
2. if the arbitral tribunal wrongly accepted or declined jurisdiction;
3. if the arbitral tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claim;
4. if the principle of equal treatment of the parties or the right of the parties to be heard was violated;
5. if the award is incompatible with public policy.

As one can see, reasons a) - d) relate exclusively to procedural mistakes and only e) allows the higher instance - to some extent - to verify the substance of the appealed decision. This is why appeals against CAS awards are rarely successful (prior to the Matuzalem ruling, only 6 appeals had been successful).

Public policy has both substantive and procedural contents[11]. According to the Federal Tribunal the substantive adjudication of a dispute violates public policy only when it disregards some fundamental legal principles and consequently becomes completely inconsistent with the important, generally recognized values, which according to dominant opinions in Switzerland should be the basis of any legal order. Among such principles are the rule of *pacta sunt servanda* (agreements must be kept), the prohibition of abuse of rights, the requirement to act in good faith, the prohibition of expropriation without compensation, the prohibition of discrimination and the protection of incapables[12]. However this enumeration is not exhaustive[13]. A breach of public policy could therefore also be in case of a violation of Article 27 Swiss Civil Code[14] which prohibits contracts which are excessively restrictive on one party[15].

Another essential point which is often forgotten, is that the arbitral award under appeal is annulled only when its result, and not merely its reasons, contradicts public policy[16]. The Federal Tribunal has made it clear that even if an award is arbitrary or if it is evidently illicit or obviously based on wrong merits, it does not necessarily violate the principle of public policy unless fundamental legal principles are disrespected[17].

Up to the Matuzalem case, the Swiss Federal Tribunal has uniformly rejected challenges to the merits of a CAS panel's decision. Although a CAS award may be challenged on the ground that it is incompatible with Swiss substantive public policy, no party has successfully asserted this argument in an appeal before the Federal Tribunal[18]. It declared that this defense *'[m]ust be understood as a universal rather than national concept, intended to penalize incompatibility with the fundamental legal or moral principles acknowledged in all civilized states.'*[19] It has ruled that *'[e]ven the manifestly wrong application of a rule of law or the obviously incorrect finding of a point of fact is still not sufficient to justify revocation for breach of public policy of an award made in international arbitration proceedings.'* In the case of *Gundel*, the Swiss Federal Tribunal stated that this standard is *'[m]ore restrictive and narrower than the argument of arbitrariness.'*[20] It held that doping rules prohibiting the use of substances that allegedly are not likely to affect a horse's racing performance do not violate public policy simply because *'[t]he norms prescribed by the regulations [...] might be incompatible with certain statutory or legal provisions.'*[21]

As a side note, procedural public policy applies to all fundamental procedural mistakes which do not fall under any of the categories a) - d)[22]. It was not argued that the case at hand would be in violation of procedural public policy.

4.2 WHAT WERE THE ARGUMENTS OF THE SWISS FEDERAL TRIBUNAL?

First, the Swiss Federal Tribunal stated that the personality of the human being requires as a fundamental legal value, the protection of the legal order. In Switzerland it is protected by the constitution through the guarantee of the right to personal freedom (Article 10 (2) Swiss Federal Constitution), which protects the elementary manifestations of the expression of personality[23]. The free expression of personality is also guaranteed among other by the constitutional right to economic freedom, which contains, in particular, the right to choose a profession freely and to access and exercise an occupational activity freely (Article 27 (2) Swiss Federal Constitution)[24]. The free expression of personality is not only protected against infringement by the state but also by private persons. Despite the freedom of contract, Article 27 of the Swiss Civil Code (private law) stipulates that a person may not enter into a contract which is excessively binding or which otherwise limits the person's freedom in an excessive manner. The principle contained in Article 27 (2) of the Swiss Civil Code belongs to the important generally recognized order of values which, according to dominant opinion in Switzerland, should be the basis of any legal order.

A contractual restriction of economic freedom is considered excessive within the meaning of Art. 27 (2) Swiss Civil Code when a person is subjected to another person's arbitrariness, gives up his economic freedom or limits it to such an extent that the foundations of his economic existence are jeopardized[25]. However, public policy is not to be con-

10 Michael Riemer, Sportrechts-Weltmacht Schweiz, *Causa Sport*, 2004, p. 106.
11 Judgment of the Swiss Federal Tribunal 132 III 389 at 2.2.1 p. 392; 128 III 191 at 4a p. 194; 126 III 249 at 3b p. 253 with references.
12 Judgment of the Swiss Federal Tribunal 132 III 389 at 2.2.1; 128 III 191 at 6b p. 198 with references.
13 Judgment of the Swiss Federal Tribunal 4A_458/2009 of June 10, 2010 at 4.1.
14 Art. 27 (2) Swiss Civil Code: *'No person may surrender his or her freedom or restrict the use of it to a degree which violates the law or public morals.'*
15 Judgment of the Swiss Federal Tribunal 4A_458/2009 of June 10, 2010 at 4.4.3.2; 4A_320/2009 of June 2nd, 2010 at 4.4; 4P.12/2000 of June 14, 2000 E. 5b/aa with references.
16 Judgment of the Swiss Federal Tribunal 120 II 155 at 6a p. 167.
17 Judgment of the Swiss Federal Tribunal 121 III 333 at 3a; 116 II 634.
18 Matthew J. Mitten, Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations; *Pepperdine Dispute Resolution Law Journal*, Vol. 10: 1, 2009.
19 Judgment of the Swiss Federal Tribunal 5P.83/1999.
20 Judgment of the Swiss Federal Tribunal 119 II 271.
21 Judgment of the Swiss Federal Tribunal 4A_506/ 2007 (2008).
22 Judgment of the Swiss Federal Tribunal 4A_490/2009 Atletico de Madrid vs. Sport Lisboa E Benfica - Futebol SAD.
23 Judgment of the Swiss Federal Tribunal 134 I 209 at 2.3.1 p. 211; 133 I 110 at 5.2 119; all with references.
24 Judgment of the Swiss Federal Tribunal 136 I 1 at 5.1 p. 12; 128 I 19 at 4c/aa p. 29.
25 Judgment of the Swiss Federal Tribunal 123 III 337 at 5 p. 345 f. with references; see also judgement 4P.167/1997 of November 25, 1997 at 2a.

fused with mere illegality and whether there is a violation of public policy is assessed more restrictively than a breach of the prohibition of arbitrariness. A contractual commitment may be excessive to such an extent that it becomes contrary to public policy when it constitutes an obvious and grave violation of privacy[26].

The limits to legal commitments due to the protection of privacy do not apply only to contractual agreements but also to the statutes and decisions of legal persons, e.g. associations[27]. Sanctions imposed by a federation, which do not merely ensure the correct course of game (so called technical rules) are subject to judicial control according to case law[28]. This particularly applies when sanctions imposed by a federation severely impact the personal right to economic development. In such a case, the Federal Tribunal has held that the right of an association to exclude its members is limited by their privacy rights[29]. This corresponds to the view that was adopted in particular for sport federations[30]. In such cases the right of the association to exclude a member is not only reviewed from the point of view of an abuse of rights but also by balancing the interests involved with a view to the infringement of privacy[31]. These principles also apply to associations governed by Swiss law and headquarted in Switzerland which - like FIFA - regulate international sport. The measures taken by such sport federations which gravely harm the development of individuals who practice the sport as a profession are only valid when the interests of the federation outweigh the infringement of privacy of the individual.

The Federal Tribunal stated that

> *'The sanction under dispute [...] contained in Article 64 of the FIFA Disciplinary Code, is in service of private enforcement of the decision granting damages if the claim remains unpaid. Upon a simple request by the creditor, Matuzalem would be subject to a ban from all professional activities in connection with football until a claim in excess of €11 million with interest at 5% from the middle of 2007 (i.e. €550'000 yearly) is paid. This is supposed to uphold the interest of a member of FIFA to the payment of damages by the employee in breach and indirectly the interest of the sport federation to contractual compliance by football players. The infringement of Matuzalem's economic freedom would (in theory) be an appropriate threat to pay and to find the funds for the amount due. However, if Matuzalem rightly says that he cannot pay the whole amount anyway, it is questionable if the sanction is appropriate to achieve its direct purpose - namely the payment of the damages. Indeed the prohibition from continuing his previous economic and other activities will deprive Matuzalem from the possibility of achieving an income which would enable him to pay his debt. Yet the sanction of the Federation is not even necessary to enforce the damages awarded: Shakhtar can enforce the award by means of the New York Convention on the Recognition and Enforcement of Arbitral Awards of June 10, 1958 ("New York Convention"), as most states are parties to that treaty and in particular Italy, which is Matuzalem's present domicile. The sanction issued by the federation is also illegitimate to the extent that the interests which FIFA seeks to enforce in this way do not justify the severe infringement of Matuzalem's privacy. The abstract goal of enforcing compliance by football players with their duties to their employers is clearly of less weight than the occupational ban against the player, unlimited in time and worldwide for any activities in connection with football.'* [32]

The Federal Tribunal sums up its reasoning as follows:

> *'The threat of an unlimited occupational ban based on Article 64 (4) of the FIFA Disciplinary Code constitutes an obvious and severe restriction in the player's privacy rights and disregards the fundamental limits of legal commitments as contained in Article 27 (2) CC. Should payment fail to take place, the award under appeal would lead not only to the player being subjected to his previous employer's arbitrariness but also to a restriction in his economic freedom of such severity that the foundations of his economic existence are jeopardized without any possible justification by some prevailing interest of FIFA or its members. In view of the penalty it entails, the CAS arbitral award of June 29, 2011 contains an obvious and grave violation of privacy and is contrary to public policy.'* [33]

To summarize, the arguments of the Federal Tribunal why the CAS award was in violation of public policy, are the following:

- The sanction was subjected to Shakhtar's starting legal proceedings and therefore Matuzalem was dependent on Shakhtar's arbitrariness (see item 4 of the decision by FIFA DRC);
- The threat of a lifelong ban is in violation of Article 27 (2) CC;
- The sanction jeopardizes Matuzalem's economic freedom;
- There is no prevailing interest of FIFA or its members;
- The sanction is not necessary because the New York Convention allows enforcement of arbitral awards.

5. WHAT COULD BE THE IMPLICATIONS OF THIS DECISION?

5.1 IMPLICATION ON THE CASE AT HAND

The question is what is now going to happen to Matuzalem. The Swiss Federal Tribunal did not impose a different sanction or impose on CAS or FIFA what to do. It simply annulled the CAS decision with regard to Matuzalem's sanction. Does this mean that Matuzalem does not have to pay the damage compensation and will not be sanctioned at all?

What is undisputed is that Matuzalem still owes Shakhtar EUR 11,858,934, plus interest of 5% p.a. from the first proceedings. The question is, assuming that Matuzalem will not pay the outstanding amount, if FIFA may on its own impose another, less severe sanction on Matuzalem, or if Shakhtar has to initiate a new proceedings against Matuzalem [34]. In the author's opinion, these proceedings were started by Shakhtar and have now been ended by a final decision of the Federal Tribunal. Therefore, these proceedings are closed and Shakhtar would have to lodge a new complaint with FIFA DRC.

It is questionable if having FIFA impose another (less severe) sanction on Matuzalem will bring the result Shakhtar is aiming at - the payment of the damages. Alternatively, Shakhtar could try to enforce the first CAS decision, which ordered Matuzalem to pay the above mentioned amount, by means of the New York Convention. The New York Convention applies to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought[35]. Each contracting state shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon[36]. The New York Convention has been ratified by 146 states, including Switzerland (seat of CAS), Italy (domicile of Matuzalem) and Spain (seat of Real Zaragoza). Thus, it should be possible for Shakhtar to start debt collection proceedings in order to enforce the CAS award in Italy and Spain[37] and to at least partially recover the debt.

26 Judgment of the Swiss Federal Tribunal 132 III 389 at 2.2.2 p. 393; 4A_458/2009 of June 10, 2010 at 4.4.3.2; 4A_320/2009 of June 2, 2010 at. 4.4; 4P.12/2000 of June 14, 2000 at 5b/aa with references.

27 Eugen Bucher, Berner Kommentar, 3rd ed., 1993, item 18 to Article 27 CC, 104 II 6 at 2 p. 8 f.

28 Judgment of the Swiss Federal Tribunal 120 II 369 at 2 p. 370; 119 II 271 at 3c; 118 II 12 at 2 p. 15 ff.

29 Judgment of the Swiss Federal Tribunal 123 III 193 at 2c/bb und cc p. 197.

30 Judgment of the Swiss Federal Tribunal 123 III 193 E. 2c/bb p. 198 with references; see also 134 III 193 at 4.5 p. 200.

31 Judgment of the Swiss Federal Tribunal 123 III 193 at 2c/cc p. 198; see also 134 III 193 at. 4.4.

32 Judgment of the Swiss Federal Tribunal 4A_558/2011 at 4.3.4.

33 Judgment of the Swiss Federal Tribunal 4A_558/2011 at 4.3.5.

34 At the end of May 2012, when this article was handed in, FIFA had not yet taken a decision in this matter.

35 Article I(1) New York Convention.

36 Article III New York Convention.

37 After having filed for bankruptcy in June 2011, Zaragoza announced on 10 May 2012 that it has emerged from bankruptcy and is no longer under court protection. It is possible that Zaragoza reached a deal with Shakhtar in the bankruptcy proceedings.

5.2 IMPLICATION ON OTHER CASES

A similar case to the one of Matuzalem is the *Mutu* case. Following his proven cocaine abuse, Chelsea Football Club terminated its contract with its Romanian player Adrian Mutu with immediate effect and claimed damages in the form of monetary compensation. Mutu was ordered by FIFA DRC to pay to Chelsea the amount of EUR 17,173,990 plus interest of 5% p.a. Both CAS and subsequently the Swiss Federal Tribunal upheld this decision[38]. Assuming that Mutu is not going to pay this amount, and further to the recent Matuzalem decision, FIFA will probably not impose a ban on Mutu from any football-related activity until the amount is paid, given that it is very likely that the Matuzalem case will act as a precedent in cases of this nature. Considering the enormous amount to be paid by Mutu, an amount he will probably not be able to pay, it is again questionable if any ban on Mutu will force him to pay the damages. Nevertheless, FIFA will insist on imposing some kind of sanction on him (upon Chelsea's request) in order not to jeopardize the credibility of its sanctioning system.

Based on Article 64 of the FIFA Disciplinary Code and on the legal principle of *a maiore ad minus* (from larger to smaller), it should be possible for FIFA to impose a ban on a player which is limited in time or in territory. It could thus be possible to limit the ban to two years or to a defined territory, e.g. Europe[39]. Probably FIFA will decide to apply the practice which is common in doping cases; to limit the ban in time. The question is whether the FIFA Disciplinary Code would also allow for a ban limited in the subject matter, e.g. to ban a player from playing professional football (but not to work as a football coach, as a president of a football club or from any other football related activity). In the author's opinion, based on the above mentioned principle of *a maiore ad minus* and based on the wording of the English, the German and the Spanish version of the FIFA Disciplinary Code, such a ban limited in the subject matter should be possible[40]. Only the wording of the French version seems that the ban shall encompass *all* football related activities[41]. However, Article 143 (2) of the FIFA Disciplinary Code rules that in the event of any discrepancy between the four texts, the English version is authoritative. The question then is if Article 64 (4) may be read in relation with Article 22 of the FIFA Disciplinary Code. Article 22 which deals with ordinary sanctions (i.e. not sanctions due to a default in payment of a sanction) stipulates that *'A person may be banned from taking part in any kind of football-related activity (administrative, sports or any other)'.* It is thus evident that Article 22 allows for a ban limited in the subject matter. However, one may argue that the purpose of Article 64 (4) is to force the player to pay the outstanding amount and not to (simply) punish him. A ban which is limited by any sort, would contravene its own purpose. In the author's opinion, Article 64 (4) must be read in conjunction with Article 22 and, thus, a ban may be limited in time, territory or even subject matter.

Another question one may ask is if the Matuzalem decision means that all lifelong bans in sports are in violation of the public order as they infringe the personality rights of the player/athlete. In the author's opinion, the answer is clearly no. Lifelong bans to engage in any sports related activity have been imposed on persons found guilty of match fixing[42] or sometimes doping (2ND offense[43]). The Swiss Federal Tribunal made it very clear that one of the reasons why the CAS award in the Matuzalem case was in violation of public order was because there was no prevailing interest of FIFA or its members for the sanction. In other words, the Swiss Federal Tribunal compared the interests at stake. Doping and match fixing are typical examples where the proper functioning of a sport is at stake. While doping abuses the principle of 'May the best man win!', match fixing attacks the impartiality of a referee or the attitude which any sportsperson should have: the ambition to win and thus, the unpredictability of the outcome of a sports event. If these fundamental sporting principles are in danger, lifelong bans should - in severe cases - be possible sanctions to protect the integrity of the sport. On the other hand, in the Matuzalem case the sanction was imposed to enforce damages awarded as compensation, i.e. money, and was therefore in violation of public policy.

6. CONCLUSION / LESSONS TO BE LEARNED?

The Matuzalem case showed that the enormous compensation which the CAS may order footballers to pay to their former club for terminating their contract without just cause, are difficult to enforce by applying FIFA's sanctioning system[44]. Thus, the purpose of the CAS, to ensure compliance with the principle of *pacta sunt servanda* by using these high compensation payments as deterrents for players to terminate their contract without just cause, is now jeopardized. Sanctions which cannot be enforced are no deterrents.

It is therefore time to reconsider (i) the joint and several liability of the player and the new club for the total compensation, and (ii) the sanctioning system in case of default.

Why should a player who is in negotiations with a new club for a transfer, whereby the new club cannot find an agreement with the former club, be liable for the loss of the transfer money, a compensation which was supposed to be paid by the new club? Would it not make more sense to allocate each compensation category to either the player or the new club, depending on who it has the stronger relation to. Only compensation categories which cannot be allocated to the player or the new club, shall be in the joint and several liability of both of them. This would result in the following liability allocations:

Remuneration due under the player's new contract:	Player
Lost transfer opportunity:	New club
Replacement costs:	Player
Non-amortized investment costs:	Player
Specificity of sports:	Player
Supplementary damages:	Player or new club

In the case of Matuzalem, according to this calculation, he would have to pay about EUR 2.5 M and Zaragoza would have to pay EUR 9.3 M.

The Matuzalem case also showed that the current sanctioning system for defaulting players under Article 64 of the FIFA Disciplinary Code is not always enforceable. Article 32 would allow FIFA to combine sanctions provided in Chapter I (General Part) and Chapter II (Special Part). This would allow FIFA to impose sanctions such as warnings, reprimands, fines, return of awards, cautions, expulsions, match suspensions, bans from dressing rooms and/or substitute bench, ban from entering a stadium and ban on taking part in any football-related activity (limited in territory, time and/or subject matter). Such a sanctioning system with much more levels of sanctions would be better tailored to the situation at hand.

38 CAS 2008/A/1644 Adrian Mutu v/ Chelsea Football Club Limited as of 31 July 2009; Decision of Swiss Federal Tribunal 4A_458/2009.

39 Article 64(4) FIFA Disciplinary Code (English edition): "A ban on any football-related activity may also be imposed against natural persons."

40 Article 64(4) FIFA Disciplinary Code (German edition): "Gegen natürliche Personen kann zudem ein Verbot jeglicher in Zusammenhang mit dem Fussball stehenden Tätigkeit ausgesprochen werden." Article 64(4) FIFA Disciplinary Code (Spanish edition): „En el caso de personas físicas se puede aplicar además la prohibición de ejercer cualquier actividad relacionada con el fútbol."

41 Article 64(4) FIFA Disciplinary Code (French edition): "Une interdiction d'exercer de toute activité relative au football peut par ailleurs être prononcée contre toute personne physique."

42 Article 69 FIFA Disciplinary Code. CAS 2011/A/2490 Daniel Köllerer vs. ATP et al.; CAS 2009/A/1920 FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski v/ UEFA; CAS 2010/A/2172 Mr Oleg Oriekhov v/ UEFA.

43 See Article 10.7.1 of the World Anti-Doping Code 2009.

44 They may however be enforced by means of the New York Convention and the debt collection proceedings of the state, but in practice, it may be difficult to receive these high amounts from a player, even if he is well paid.