Due diligence and insolvency from a club’s point of view

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Introductory remarks

• Insolvency is not a straightforward matter
  • Distinction between administration / bankruptcy

• Difficult balance between ordinary justice and sports justice, where does one end and where does the other start?

• Position of the Governing Bodies not easy due to legal restraints:
  • FIFA acting through its judicial bodies
  • UEFA as competition organizer
ECA’s Membership Policy

- ECA not a governing body nor a competition organizer (representative)

- ECA Statutes differentiate between Ordinary & Association Members (art. 3 Statutes)
  - Ordinary Members which are prevented from participating to an UEFA competitions as per a decision in force are not eligible for Ordinary membership (art 4.3 Statutes)
  - Associated Members shall have no financial difficulties

- ECA should in theory not have any members with insolvency issues

- ECA together with UEFA has worked hard on FFP regulations
Insolvency?

- Insolvency affects players but it also affects clubs both on:
  - financial level (e.g. transfer fees, training compensation, bonus, etc.)
  - sporting level (e.g. cancellation of match results, competitiveness)

- Interest between clubs and players are not contrary per se
  - Legal and economic framework to be adopted in which rights of the football family are protected – *opposition from outside football*

- Not a new phenomena but due to global crisis:
  - Mismanagement exposed (excessive transfer fees, salaries)
  - Decrease in revenues in certain clubs (sponsors, ticketing, etc. with ongoing contracts)
Due Diligence

• Two different actors to be distinguished when it comes to due diligence
  • Actors such as football clubs and players
  • Actors such as governing bodies or competitions organizers

• With regards to football clubs and players:
  • Due diligence prior to entering into contracts
  • Due diligence when being faced with insolvent clubs:
Due Diligence Club & Players

- **Clubs & Players:**
  - Be critical with regards to financial offers (e.g. transfer fees & salaries)
    - Always the same clubs which have cases at the FIFA DRC & PSC
  - Be aware of the legal framework in which you are operating (*infra*)

- **Clubs:**
  - Secure your financial interests when signing transfer agreements by means of:
    - Bank guarantees
    - Contractual law clauses regarding non-payments
      - “Retention of title” clauses in combination with employment contract
      - “Dissolvent” clause in combination with employment contract
    - Priority rules in case of bankruptcy
Due Diligence - Legal Framework

• Understand the legal framework:
  • Insolvency law at national level – role of Unions and local specialists

• FIFA level
  ➢ FIFA Administration had to adjust its policies due to CAS awards:
    – CAS 2011/A/2343 CD Universidad Catolica v. FIFA
    – CAS 2011/A/2586 Willam de Lanes Lima v. FIFA
    – CAS 2012/A/2750 Shakhtar Donetsk v. FIFA & Real Zaragoza
    – CAS 2012/A/2754 UC Sampdoria v. FIFA & Club San Lorenzo Almagro

• FIFA can no longer hide behind its administration letters & customary law
Remarks on “old approach”
- Lack of clear communication by FIFA
- FIFA Administration letters led to problems:
  - French Cour de Cassation 27 Fevrier 2013 Servette Geneve FC v. RC Lens
- Delays at FIFA level problematic when it comes to clubs in administration
  - Willam Lanes de Lima award
  - Recognition of distinction between “recognition of debt” and “enforcement”

Remarks on “current approach”
- Contracts signed prior to entry into administration and contract signed after entry into administration are different – March 2013 decision
- Article 107 FIFA Disciplinary Code
  - Cases can be closed if (1) parties have reached an agreement (2) bankruptcy (3) claim becomes baseless
Due Diligence - Governing Bodies

- Governing Bodies
  - Objective is to protect the interest of the game and long term viability of the game
    - create a framework in which this objective is achieved
      - UEFA Club Licensing and Financial Fair Play Regulations... BUT

- Licensing and FFP requirements to be enforced at national FA / league level
  - Premier League FFP regulations
  - Serie B FFP regulations

- FIFA could look at transfer bans? - Case of Zaragoza

- Too heavy sanctions might have the opposite effect