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**Dispute Resolution in Football from the Perspective of Player Agents:  
Arbitration, Regulation, and the Applicability of Brazilian Law**

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**Abstract:**

This thesis explores the dispute resolution mechanisms available to football agents, focusing on FIFA's judicial bodies, the Court of Arbitration for Sport (CAS), and the applicability of Brazilian law. The research critically analyzes the interplay between international sports regulations and national legal systems, particularly in Brazil, where civil law principles influence contractual disputes. Key issues include the enforceability of arbitration clauses, the role of sports tribunals, and the challenges of recognizing FIFA-imposed regulations under domestic legal frameworks. The study aims to provide insights into the legal autonomy of player agents and the potential conflicts between private regulatory bodies and public legal institutions.

**Keywords:** Football agents, FIFA regulations, CAS, arbitration, Brazilian law, dispute resolution.



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## Introduction

Football player agents play a crucial role in the transfer market, negotiating contracts and ensuring the best conditions for their clients. However, their legal relationships with clubs, players, and federations face significant challenges, particularly regarding dispute resolution and the applicability of FIFA regulations versus national laws.

FIFA imposes its own regulatory framework on intermediaries, often raising questions about its legitimacy and compatibility with domestic legal systems. In Brazil, civil law principles and contractual autonomy play a fundamental role in defining the legal framework governing contracts and disputes involving agents.

Given this scenario, this thesis examines the dispute resolution mechanisms available to football agents, focusing on FIFA's judicial bodies, the Court of Arbitration for Sport (CAS), and the possibility of resorting to the Brazilian judiciary. The study aims to analyze the implications of these different jurisdictions and the legal feasibility of challenging FIFA's regulatory impositions, especially when they conflict with rights protected under Brazilian law.

Throughout this research, key issues will be addressed, including the validity of arbitration clauses, the role of sports tribunals in regulating the profession, and the enforceability of arbitral decisions in Brazil. The objective is to provide a critical analysis of the current dispute resolution framework in football, highlighting the rights and challenges faced by agents in this system.



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## SPORTS SYSTEM

Before delving into the methods of dispute resolution —whether judicial, arbitral, or administrative — it is essential to understand the structure and functioning of the sports system. The international sports system is predominantly private and organized in a pyramidal manner<sup>1</sup>.

Envision a pyramid, with the International Olympic Committee (IOC) at the apex<sup>2</sup>, followed by International Federations such as FIFA, FIBA, and others. Below these federations are the Confederations, followed by National Federations, and in some jurisdictions, Regional Federations (which may not exist in countries with smaller territories).

The International Olympic Committee was established by Pierre de Coubertin to promote Olympic values and to organize the Olympic Games<sup>3</sup>. While the IOC is responsible for the organization of the Games, there is a collaborative relationship with the International Federations. These federations, despite having their own organizational structures and being responsible for the development and promotion of their respective sports, remain, to some extent, accountable to the IOC.

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<sup>1</sup> “While there is an extremely wide degree of autonomy in the way IFs may draft their rules, there is still some consistency and common obligations throughout the Olympic Movement. As seen above, the Olympic Movement is structured in a pyramidal manner and essentially comprises the IOC, the NOCs and the IFs. The IOC is the core entity of the Olympic Movement and is also structured as an association under Swiss law. IFs can be recognized as “Olympic Federations” and enjoy all the accompanying benefits, including financial aid and the possibility to participate in the Olympic Games if they comply with the basic requirements of Article 25 of the Olympic Charter.”. Despina Mavromati, *Governance of International Sports Federations Through the Lens of Global Administrative Law*, 34 Marq. Sports L. Rev. 85 (2023)

<sup>2</sup> The IOC, which governs the Olympic Games in conjunction with a wide range of partners (mainly organising committees of the olympic Games (OCOGs), National Olympic Committees (NOCs) and International Sports Federations (IFs) (...). Jean-Loup Chappelet, Josephine Clausen, Emmanuel Bayle, *Governance of international sports federations*, in *Routledge Handbook of Sport Governance*, Routledge, 2019.

<sup>3</sup> “Modern Olympism was conceived by Pierre de Coubertin, on whose initiative the International Athletic Congress of Paris was held in June 1894. The International Olympic Committee (IOC) constituted itself on 23 June 1894.”. Olympic Charter.



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There is no transnational legislation or statute that explicitly formalizes this relationship<sup>4</sup>, primarily because International Federations are relatively recent entities. This relationship is inferred from cross-references between the statutes of International Federations (recognized by the IOC) and the Olympic Charter<sup>5</sup>.

As is commonly observed, International Federations are private entities, free from external interference, with their own rules and statutes<sup>6</sup> to which members voluntarily adhere. Membership is discretionary, not mandatory, which is crucial when discussing the competence of entities such as FIFA in regulating third parties who are not directly affiliated with it.

In this context, both an international and a national federation are, in simple terms, private entities whose "owners" are their members, such

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<sup>4</sup> The term IOC is generally taken to describe a club of up to 115 individuals drawn from around the world and an administrative office based at the organisation's headquarters in Lausanne. However, world sport's leading institution is more complex than this because, over the last two decades, it has become a group (known as IOC Group) consisting of a non-profit association at the head of several commercial companies and foundations. On a second level, the IOC owns the Olympic Games, which are staged by Olympic Games organisation committees (OCOGs) under contract to the IOC via Host City Contracts. On a third level, it oversees the Olympic movement with its partners, which Chappelet (1991, 2016) termed the 'Olympic system' due to the interdependencies between the numerous bodies that run institutional sport and deliver the Olympic Games. This system's components are NOCs, international sport federations (IFs), national sport federations (NFs) and their athletes, and OCOGs, together with many other stakeholders. On a fourth level, the IOC, in conjunction with its partners, has taken on the mission of promoting Olympism throughout society.". Emmanuel Bayle (06 Feb 2024): Changes to the IOC's governance during Thomas Bach's presidency: intense institutional work to achieve balance and compromise, *Sport in Society*, DOI: 10.1080/17430437.2024.2310696.

<sup>5</sup> "The IOC is not subject to international law, but its activities are governed by the OC which is described in its Introduction as "a basic instrument of a constitutional nature". The Introduction also states that the OC "sets forth and recalls the Fundamental Principles and essential values of Olympism.". CAS 2023/A/10093 Russian Olympic Committee (ROC) v. International Olympic Committee (IOC).

<sup>6</sup> "Under the Olympic Charter (OC), the IOC undertakes the role of the guarantor of ethics and good governance in sport for all actors of the Olympic Movement.

Notwithstanding the very liberal regime and their extensive autonomy under the Swiss CC, IFs undertake important tasks and responsibilities for all their members (National Federations, NFs) and indirect members (athletes, clubs, supporting personnel, etc.).

As such, they regulate their respective sports at the international level, are responsible for the scheduling and the organization of international competitions and have the power to render decisions regarding a wide variety of issues.". Despina Mavromati, *Governance of International Sports Federations Through the Lens of Global Administrative Law*, 34 Marq. Sports L. Rev. 85 (2023)



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as clubs and regional associations. A national federation, in turn, organizes the sport at the local level and is responsible for national teams in a given discipline.

By their statutory nature, these entities are non-profit organizations, distinguishing them from for-profit entities, whose primary objective is the distribution of profits among members. Non-profit organizations, by contrast, focus on the development and improvement of the sport. However, there is no prohibition against the establishment of a for-profit International Federation.

The stakeholders of a federation (whether international or national) include athletes, coaches, international federations, and others, playing a fundamental role in its development<sup>7</sup>.

Reducing this matter to its essence, organizations lower in the pyramid must always comply with the regulations imposed by those above them, with FIFA being the supreme governing body of football worldwide.

In this regard, FIFA has enacted regulations covering various sectors, including intermediaries, which govern their relationships with clubs, players, and third parties. Due to the pyramidal system, Confederations and National Federations have adopted FIFA's regulatory provisions. However, in several jurisdictions, such provisions have been invalidated<sup>8</sup> due to conflicts with national legislation.

The origin of these federations dates back to the early days of organized sports, which were structured through private initiatives. These initiatives

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<sup>7</sup> "In the last years, it seems that participation of stakeholders and consultation are respected, particularly by large IFs. FIFA is one such example since it has proceeded to extensive stakeholders' participation prior to enacting its various regulations." Despina Mavromati, *Governance of International Sports Federations Through the Lens of Global Administrative Law*, 34 Marq. Sports L. Rev. 85 (2023).

<sup>8</sup> District Court of Dortmund (Landgericht Dortmund) no processo nº 8 O 1/23.



\*Pedro Henrique Gomes Ramiz Wright\* created an autonomous and independent movement for the practice and regulation of sports.

It is noteworthy that although sport emerged from private initiatives, with the evolution of state functions, governmental intervention in citizens' lives intensified. Matters that were initially within the private domain gradually acquired public aspects, leading to increased state intervention in sports.

For instance, 19th and early 20th-century constitutions<sup>9</sup> made no reference to sport as a value warranting state protection. Today, however, many constitutions worldwide contain provisions on sport, and public regulations significantly affect private institutions that historically asserted autonomy from public authorities.

This tension between private autonomy and public oversight is evident in contemporary sports disputes. Private associations assert their independence under the premise of "our game, our rules," while public authorities and even private entities seek to limit the power of sports associations.

In Spain, for example, National Federations have a dual legal nature, functioning within both private and public spheres depending on the activity. Disciplinary matters, for instance, are regarded as public in nature, whereas the organization of competitions and scheduling is considered a private function. This underscores the necessity of a meticulous analysis of federation statutes.

### **FIFA and Swiss Law**

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<sup>9</sup> Brazillian Constitution of 1934 does not talk about sports.



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As previously mentioned, FIFA is an International Federation affiliated with the Olympic Committee and incorporated under Swiss law. The decision to establish FIFA in Switzerland was influenced by multiple factors, including competitive taxation, strategic geographical location, and, most notably, a liberal legal framework favoring non-profit organizations. In Switzerland, the requirements for establishing an association are relatively simple, with minimal mandatory provisions<sup>10</sup>.

The autonomy of a sports federation is largely contingent on the jurisdiction in which it is domiciled. Switzerland provides a more flexible regulatory environment, making it an attractive jurisdiction, whereas countries such as Spain, Portugal, Italy, and Greece impose stricter regulations with state oversight in certain aspects.

In this regard, it is necessary to reference key provisions of Swiss law to gain a fundamental understanding of how Switzerland regulates associations.

With respect to the incorporation and governance of associations, these matters are governed by Article 60 et seq. of the Swiss Civil Code. This legal framework establishes, inter alia, that mandatory and imperative provisions cannot be altered by an association's statutes or regulations.

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<sup>10</sup> "Switzerland –and particularly the Lausanne region— is the hub of most IFs; they are structured in the form of "associations" under Swiss law and are regulated by Articles 60-79 Swiss Civil Code (CC). The legal framework of associations under Swiss law includes only a few mandatory provisions aiming at safeguarding minimum democratic standards in terms of members' rights. Apart from the mandatory provisions expressly stipulated as such in Articles 60-79 CC, there are some principles that also imperatively apply, such as the non-excessive restriction of the right of self-determination of the association, the general assembly as the supreme body of the association and the protection of the purpose of the association. For the rest, each association has extensive rights of self-regulation.". Despina Mavromati, *Governance of International Sports Federations Through the Lens of Global Administrative Law*, 34 Marq. Sports L. Rev. 85 (2023)



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Additionally, Article 75 of the Swiss Civil Code<sup>11</sup> stipulates that any member who has not consented to a decision or regulation that contravenes the law or the statutes of the association has a one-month period from the date of awareness to challenge its validity before Swiss courts.

Consequently, numerous actions are filed in Switzerland, often involving matters related to personality rights, competition law, or the obligation to act in good faith. Legal challenges concerning legality, proportionality, and the hierarchy of norms typically involve alleged breaches of an association's internal regulations.

Beyond shaping the formation of International Federations, Swiss law is also crucial for the interpretation of cases.

FIFA's regulations stipulate that Swiss law applies in conjunction with FIFA's own regulatory framework to resolve ambiguities and ensure jurisprudential uniformity. Swiss law serves as an interpretative standard for FIFA's regulations—where gaps or uncertainties arise, Swiss law is employed to rectify such deficiencies.

The significance of this regulatory synergy is evident in its provision of a solid and predictable foundation for legal determinations.

Regarding the Court of Arbitration for Sport (CAS), this integration between FIFA's regulations and Swiss law is widely recognized in CAS jurisprudence. For example, in CAS (2014/A/3850 Branislav Krunic v. BIHFF<sup>12</sup>), the tribunal affirmed that the applicable regulations of a sports

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<sup>11</sup> "Any member who has not consented to a resolution which infringes the law or the articles of association is entitled by law to challenge such resolution in court within one month of learning thereof". Available on [https://legislationline.org/sites/default/files/documents/e6/SWITZ\\_civil%20code\\_excerpts.pdf](https://legislationline.org/sites/default/files/documents/e6/SWITZ_civil%20code_excerpts.pdf).

<sup>12</sup> 2014/A/3850 Branislav Krunic v. BIHFF.



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federation (in this case, FIFA) hold absolute primacy. It follows from this precedent that CAS cannot disregard or substitute such regulations with rules chosen by the parties.

Where FIFA's regulations contain lacunae, CAS will apply Swiss law (since FIFA is domiciled in Switzerland and its statutes prescribe such application). Only as a last resort—if neither FIFA's regulations nor Swiss law provide an adequate resolution—will the tribunal consider the laws selected by the parties.

On this point, it is pertinent to note that under the CAS Code (Article R58<sup>13</sup>), in FIFA-related disputes, the first applicable framework is FIFA's regulations, followed by the law chosen by the parties. Only in cases where disputes persist does Swiss law apply.

There is thus an apparent contradiction between CAS jurisprudence and its own procedural code. However, in disputes adjudicated before FIFA's bodies, there is no doubt that Swiss law is the primary subsidiary law to be applied.

In conclusion, notwithstanding the provisions of the CAS Code, Swiss law plays a fundamental role in supplementing CAS rulings, as arbitral panels consistently prioritize its application over laws chosen by the parties.

As with any rule, exceptions exist. There have been cases where specific legislation (rather than a legal system) was referenced, and the arbitral panel deemed it applicable in lieu of Swiss law as the subsidiary norm.

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<sup>13</sup> **R58** Law Applicable to the merits

The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision". Available in: <https://www.tas-cas.org/en/arbitration/code-procedural-rules.html>



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Having established this foundational framework, it should be emphasized that different disputes may be adjudicated in forums outside of Switzerland, under distinct legal systems, which will be explored in subsequent chapters.

## **FORMS OF JURISDICTION: ARBITRATION PROCEEDINGS, JUDICIAL PROCEEDINGS, AND ADMINISTRATIVE PROCEDURE**

Once a dispute arises between the parties involved in intermediation or the legal relationship between the agent and the player/club, the following question emerges: where should one seek their rights? This question is frequently asked by agents who struggle to understand how to assert their rights in court.

Although lawyers have expertise in the subject, it is essential to clarify, in simple terms, how an agent can assert their rights and the pros and cons of each jurisdiction involved.

Excluding the possibility of mediation, there are five options for a party seeking to initiate a claim: (a) submitting their dispute to the Ordinary Courts; (b) submitting it to FIFA's tribunals, with a possible appeal to the CAS (Court of Arbitration for Sport); (c) submitting it directly to CAS as an original (not appellate) instance; (d) submitting it to the CNRD (with the possibility of an appeal to the CBMA); or (e) another National or International Arbitration Chamber.

An analysis will now be conducted on the meaning of these jurisdictions. In a subsequent chapter, the nature of each of these mentioned bodies will be examined to understand their effects on the agent's relationship and the judicial, arbitral, or administrative decisions that may be related to them.



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## **ARBITRATION**

As previously mentioned, there is the possibility of submitting the dispute to arbitration. Arbitration is essentially a process where the parties grant jurisdiction to third parties, other than the State, to resolve disputes between them. This occurs through contractual clauses and specific agreements known as arbitration clauses and arbitration agreements, which outline the method for resolving the dispute through arbitration.

In general and abstract terms, arbitration removes the jurisdiction of the Judiciary to decide the conflict and transfers it to arbitrators chosen by the parties. These arbitrators have the role of adjudicating the dispute based on pre-established rules or in accordance with general principles of law, equity, or customs, as agreed upon by the parties.

In Brazil, this choice is supported by the Arbitration Law (Law No. 9,307/1996), which regulates arbitration proceedings and ensures that an arbitral decision, known as an arbitral award, has the same enforceability as a judicial ruling, being final and not subject to appeal, except in exceptional cases outlined in the legislation. Internationally, arbitration is regulated by national laws in each country, and the enforcement of arbitral awards is governed by the 1958 New York Convention.

Arbitration offers advantages<sup>14</sup> such as speed, expertise of the adjudicator, and confidentiality. It is widely used in business disputes, especially those involving complex contracts. However, this alternative requires the mutual consent of the parties, either expressed in the

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<sup>14</sup> “There are a number of reasons why arbitration is the preferred means of resolving international commercial disputes. Put simply, and as explained in greater detail below, businesses perceive international arbitration as providing a neutral, speedy and expert dispute resolution process, largely subject to the parties’ control, in a single, centralized forum, with internationally-enforceable dispute resolution agreements and decisions.”. (Gary B. Born, *International Commercial Arbitration*, 2nd ed., Kluwer Law International, 2014, p. 65).



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contract or later agreed upon in an arbitration agreement, as arbitration cannot be imposed unilaterally.

For arbitration to be instituted, an essential requirement must be met: the parties' consent to submit the dispute to arbitration<sup>15</sup>. Without consent—meaning, without one party agreeing to arbitration—there is no arbitration, only an administrative procedure due to the absence of an indispensable requirement.

In other words, if the parties, upon signing the contract, voluntarily chose (without direct or indirect coercion, such as economic disparity) to submit their dispute to FIFA's Tribunal (or another Arbitral Tribunal), or if they later formalized this choice, the first requirement for initiating the arbitration process is met.

## **JUDICIARY: STATE COURTS**

The Judiciary is one of the fundamental pillars of a Democratic State governed by the rule of law. It is the institution responsible for interpreting and applying the laws of a State impartially, ensuring that the rights and obligations established by the legal system are respected.

The Judiciary acts as a mediator and resolver of conflicts between individuals, legal entities, entities, and even the State itself, always aiming for social pacification and justice.

This is the general rule: filing a lawsuit in the state court system is routine, following the procedural rules established in the Code of Civil Procedure. A separate chapter will later analyze the relationship between the

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<sup>15</sup> "Arbitration is a consensual recourse mechanism or remedy; its legitimacy is based on consent expressed by the parties." (Peter Bekker, *Arbitration of International Disputes in New York, Juris*, 2024, p. 27).



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ordinary courts and football agents. However, a state court judge may be unable to rule on a lawsuit if the parties have agreed to submit their dispute to arbitration, as mentioned earlier.

In such cases, the principle of Kompetenz-Kompetenz applies, which has both negative and positive effects. The negative effect is that a state court judge cannot decide on their own jurisdiction regarding an arbitration dispute<sup>16</sup> (except in exceptional cases requiring coercive measures) before the arbitrators have ruled on their jurisdiction. On the other hand, the positive effect allows the arbitrator to determine their own jurisdiction to hear the dispute instead of the state court<sup>17</sup>.

In other words, if an arbitration clause exists, the arbitral panel itself decides on jurisdiction, following the Kompetenz-Kompetenz principle, which states that "the arbitrator has the power to decide on their own jurisdiction, and any attempt by the parties or the state judge to alter this reality is inadmissible."<sup>18</sup>. Once the arbitration process has begun, a party cannot seek recourse in the state judiciary to initiate a new lawsuit<sup>19</sup>.

Thus, there is a clear prohibition against judicial intervention in arbitration before the arbitrators have ruled on their jurisdiction. If they affirm their jurisdiction, the decision becomes final due to the negative effect of the Kompetenz-Kompetenz principle.

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<sup>16</sup> SILVEIRA, Gustavo Scheffer da. *O papel do juiz no fortalecimento da arbitragem: efeito negativo da competência-competência v. anti-suit injunctions*, em *Revista Brasileira de Arbitragem*, volume XV, issue 60, Kluwer Law International, 2018, p. 52).

<sup>17</sup> (ANCEL, Bertrand. *O controle de validade da convenção de arbitragem: o efeito negativo da "competência-competência"*, em *Revista Brasileira de Arbitragem*, volume II, issue 6, Comitê Brasileiro de Arbitragem, 2005, p. 55, destacou-se)

<sup>18</sup> SEC n. 12.781/EX, relator Ministro João Otávio de Noronha, Corte Especial, julgado em 7/6/2017, DJe de 18/8/2017.

<sup>19</sup> AgInt nos EDcl no AgInt no CC n. 170.233/SP, relator Ministro Moura Ribeiro, Segunda Seção, julgado em 14/10/2020, DJe de 19/10/2020.



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If there is no arbitration clause, the Judiciary itself determines whether it has jurisdiction over the dispute. If an arbitration clause exists and the arbitrator affirms their jurisdiction, the Judiciary may only intervene by annulling the award if the arbitration clause or agreement is clearly illegal.

Therefore, there cannot be both a national arbitration proceeding and a state court lawsuit over the same matter—at least not domestically. Internationally, concurrent proceedings may occur (i.e., an international arbitration and a judicial lawsuit filed in Brazil).

However, it is necessary to assess: (a) whether Brazilian courts have jurisdiction over the matter<sup>20</sup>; and (b) whether a foreign arbitral award has been recognized during the Brazilian lawsuit<sup>21</sup>.

As Rui Barbosa famously stated at the Second Hague Peace Conference: "*Arbitration thrives on trust, while the judiciary thrives on obedience.*"<sup>22</sup>.

## **PRIVATE ADMINISTRATIVE TRIBUNAL**

Although there is no unanimous agreement on terminology, for the purpose of this discussion, a private entity that adjudicates disputes among its members will be referred to as a private administrative tribunal. Its procedure, as the name suggests, is administrative in nature. It is important to note that this type of tribunal differs from those linked to Public Administration.

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<sup>20</sup> MC n. 15.398/RJ, relatora Ministra Nancy Andrighi, Terceira Turma, julgado em 2/4/2009, DJe de 23/4/2009.

<sup>21</sup> AgRg no REsp n. 1.316.522/RJ, relatora Ministra Maria Isabel Gallotti, Quarta Turma, julgado em 19/5/2016, DJe de 30/5/2016

<sup>22</sup><https://cpdoc.fgv.br/sites/default/files/verbetes/primeira-republica/CONFER%C3%84NCIAS%20DA%20PAZ%20DE%20HAIA.pdf>



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This tribunal is a type of forum established by a private entity (such as associations, federations, clubs, companies, or professional organizations) to resolve disputes, impose sanctions, or interpret internal regulations based on the entity's rules or statutes.

Its jurisdiction is limited to its internal scope and applies only to parties subject to its authority—though this is not always the case, as agents are not necessarily required to submit to its jurisdiction to conduct their work and claim agreed-upon fees.

Although the decisions of a private administrative tribunal are binding within its internal framework, they can be challenged in court if they violate legal norms (e.g., the right to due process and defense) or exceed the entity's autonomy.

## **JURISDICTIONAL CONFLICT**

Even when a contract specifies a particular jurisdiction, a jurisdictional conflict may arise. This occurs when two jurisdictions—state or arbitral—are triggered by the parties, or when multiple jurisdictions refuse to hear the case.

In disputes involving jurisdictional conflicts between arbitral and state courts, the Superior Court of Justice (STJ) is responsible for resolving the matter<sup>23</sup>.

Additionally, a contract may designate the ordinary courts as the chosen forum while an administrative football body exercises purely administrative functions. Doctrine acknowledges that this is possible<sup>24</sup>,

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<sup>23</sup> CC n. 184.495/SP, relator Ministro Ricardo Villas Bôas Cueva, Segunda Seção, julgado em 22/6/2022, DJe de 1/7/2022

<sup>24</sup> Fachada, Rafael Terreiro, O exercício da tutela arbitral pela Câmara Nacional de Resolução de Disputas no futebol associado / RafaelTerreiro Fachada. -- São Paulo, pág. 142, 2023



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provided it does not contradict judicial rulings or overstep its administrative authority.

## **SPORTS ARBITRATION AND ADMINISTRATIVE BODIES: FIFA AND CNRD**

As a private system, FIFA has established its own dispute resolution mechanism by creating arbitral chambers to resolve disputes involving clubs, players, and agents.

For a case to fall within the jurisdiction of a FIFA-related body, including its adjudicatory chambers, which may also function as arbitral tribunals, the dispute must have an international dimension. This requirement is set forth in FIFA's regulations, particularly in the regulations governing the transfer of players and intermediaries, and has been extensively analyzed in various CAS rulings<sup>25</sup>.

To provide context, FIFA has established two primary bodies: the first, defined as judicial under its statutes, consists of the following adjudicatory bodies: (a) the Disciplinary Committee; (b) the Ethics Committee; and (c) the Appeal Committee (Article 44 of the FIFA Statutes<sup>26</sup>). These bodies have distinct functions from the arbitral chambers that fall under the "Football Tribunal," as set out in Article 48

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<sup>25</sup> "As a general rule, the international dimension is represented by the fact that the player concerned is not a national of the country of the association with which the relevant club is affiliated. When both parties have the same nationality, however, the dispute must be considered to be of a national or internal nature, with the consequence being that the rules and regulations of the association concerned must be applied to the matter and the deciding bodies in accordance with the relevant provisions are to rule on the issue. If FIFA's deciding body would deal with such an internal matter, the internal competence of a FIFA member association would be violated.

FIFA DRC is entitled, *ex officio*, to decide on its own competence, including the competence to determine whether or not a dispute is of an international dimension in accordance with the FIFA Regulations. In order to decide on the existence of such international dimension, it is first necessary to establish the time that is material to this assessment. The analysis of the player's nationality should be made at the time of the event giving rise to the dispute, and not the time of the signing of the contract". (Arbitration CAS 2016/A/4441 Jhonny van Beukering v. Pelita Bandung Raya & Fédération Internationale de Football Association (FIFA), award of 27 June 2016)

<sup>26</sup> <https://www.football-legal.com/content/fifa-statutes-ed-may-2024>



\*Pedro Henrique Gomes Ramiz Wright\* of the Statutes. This Tribunal encompasses chambers responsible for dispute resolution involving players and agents. For the purposes of this analysis, we shall focus solely on the Football Tribunal, which operates independently of FIFA as an external body.

The primary objectives of this structured dispute resolution system (Football Tribunal) are justice, efficiency, speed, and specialization in handling disputes among its members. However, these mechanisms may still be subject to public law regulations that impose certain limitations.

It is important to reiterate that FIFA's system is intended to resolve international disputes. For domestic disputes, parties may submit their claims to the National Dispute Resolution Chamber (NDRC). In Brazil, this is the CNRD, which will be analyzed in the following section.

Under FIFA statutes, each country may only have one National Dispute Resolution Chamber recognized by FIFA for the submission of disputes. It is always crucial to emphasize that contractual provisions play a fundamental role in determining the competent forum for litigation.

### **The Legal Nature of FIFA's Tribunal**

This raises a fundamental legal question: depending on the nature of the tribunal, the enforcement of its decisions may vary across jurisdictions. What is the legal nature of FIFA's tribunals? How do they compare to national chambers?

According to the Swiss Federal Court, FIFA's Tribunal is merely an administrative tribunal and does not constitute arbitration. As stated by the Court:

*"Applying these principles, the Federal Court held that an arbitral tribunal belonging to an association, which is also a party to the proceedings,*



*\*Pedro Henrique Gomes Ramiz Wright\* does not offer sufficient guarantees of independence. Decisions issued by such bodies are, in reality, merely an expression of the association's will; they constitute managerial acts rather than judicial rulings.” (Unofficial translation)<sup>27</sup>.*

In essence, the Swiss Federal Court found that FIFA's Football Tribunal is not independent, as its adjudicators could potentially rule in favor of FIFA's interests.

However, with due respect, certain considerations must be made regarding this decision. Firstly, it is important to highlight that the Swiss ruling is not binding on other jurisdictions.

This means that, while Switzerland may adopt this interpretation, other countries may take a different stance, recognizing FIFA's Football Tribunal as an arbitral tribunal. This interpretation directly affects the enforcement of its decisions in various jurisdictions.

### **Premise: The Parties Chose FIFA's Tribunal**

Assuming the parties voluntarily selected FIFA's Tribunal as their dispute resolution method, under Brazilian law, it is recognized as an arbitral tribunal. This assertion is supported by the following rationale.

### **Reasons to Consider FIFA's Tribunal as an Arbitral Tribunal: Acceptance of Rules**

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<sup>27</sup> BGE, 119 II 271, E. 3b p. 276.



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By opting for FIFA's Tribunal, which functions as an arbitration center, the parties accept its rules regarding costs, deadlines, arbitration procedures, and final decision review, as is customary in arbitration<sup>28</sup>.

This understanding is widely shared by the international legal community<sup>29</sup>, given that arbitration's primary advantage is its flexibility compared to state courts.

Regarding legal frameworks, the Geneva Convention (1961), applicable to signatory European countries, stipulates in Article 4 that parties are free to submit their disputes *"to a permanent arbitral institution; in this case, the arbitration proceedings shall be held in conformity with the rules of the said institution."*

Similarly, certain national laws, including Brazil's<sup>30</sup>, provide that: *"If the parties refer, in the arbitration clause, to the rules of an arbitral institution or specialized entity, the arbitration shall be conducted in accordance with such rules. The parties may also establish, in the arbitration clause*

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<sup>28</sup> "3. Method of Selection The arbitrator selection procedure can vary, depending upon the parties' agreement, and upon the institutional rules. **If parties do not state in their arbitration clause how they want to select arbitrators, but they choose rules to govern the process, the selection will take place according to the institutional rules.** However, even if parties did not agree on a method of selection in their arbitration clause, if they can agree at the time of the arbitration, they can generally select the arbitrators, depending on institutional rules. If parties cannot reach agreement, however, **the institution will choose the arbitrators.** Some of the differences parties should be aware of, when they have not chosen a selection process, are whether (a) the institutional rules provide parties freedom to choose the arbitrators, or (b) they will be limited to a list of names provided by the arbitral institution, or (c) the institution will choose the arbitrators, or (d) some variation of the above." (Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge [UK]: Cambridge University Press, 2008, p. 121).

<sup>29</sup> "[1] Institutional Arbitration:

(...)

**These (and other) arbitral institutions have promulgated sets of procedural rules that apply where parties have agreed to arbitration pursuant to such rules.** Among other things, institutional rules set out the basic procedural framework and timetable for the arbitral proceedings. **Institutional rules also typically authorize the arbitral institution to select arbitrators in particular disputes and resolve challenges to arbitrators (that is, to serve as 'appointing authority'), to designate the place of arbitration, to fix or influence the fees payable to the arbitrators and (sometimes) to review the arbitrators' awards to reduce the risk of unenforceability on formal grounds.** Each arbitral institution has a staff (with the size varying significantly from one institution to another) and a decision-making body." (Gary B. Born, *International Commercial Arbitration*, 2nd ed., Kluwer Law International, 2014, p. 65).

<sup>30</sup> José Antonio Fichtner, Sergio Nelson Mannheimer e André Luís Monteiro, *Teoria Geral da Arbitragem*, Rio de Janeiro: Forense, 2019, e-book.



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*or in another document, the agreed-upon procedure for instituting the arbitration.*" (Article 5, Brazilian Arbitration Law).

Therefore, FIFA's Tribunal rules must prevail within its own proceedings. The key issue, then, is whether these rules are fair and equitable to all parties.

### **Reasons to Consider FIFA's Tribunal as an Arbitral Tribunal: The New York Convention**

The [New York Convention \(1958\)](#),<sup>31</sup> signed by most countries, ensures the recognition and enforcement of arbitral awards but allows the refusal of enforcement if the parties do not have a fair procedure.

The grounds for this are set out in Article V, paragraph 1(b), which includes (a) if one of the parties lacked legal capacity or the arbitration agreement is invalid under the applicable law; (b) if the party against whom the award is invoked was not duly notified of the arbitration proceedings or was unable to present its case; (c) if the award deals with matters beyond what the parties submitted to arbitration or if the arbitrators exceed the terms of the arbitration agreement; (d) if the arbitration procedure or the Tribunal's composition did not follow the parties' agreement or, failing such agreement, did not comply with the laws of the country where the arbitration took place; (e) if the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country where the award was made; and (f) if the subject matter of the dispute is not capable of settlement by arbitration under the law of the country where enforcement is sought or if the recognition or enforcement of the award would be contrary to the public policy of that country.

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<sup>31</sup> <https://www.newyorkconvention.org/text>



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Thus, in the context of the issue at hand, particularly given the Swiss Court's understanding, the matter boils down to the impartiality of the parties in presenting their arguments and the independence of the arbitrators in adjudicating the dispute as they see fit.

### **Reasons to Consider FIFA's Tribunal as an Arbitral Tribunal: Impartiality and Independence**

The FIFA Tribunal's procedural rules uphold independence and impartiality. This is because its composition, as outlined in the current Article 4 of the [FIFA Procedural Rules](#),<sup>32</sup> provides that representatives of players, clubs, associations, and leagues appoint adjudicators.

Thus, they are not *exclusively* chosen by FIFA. In reality, they represent the various stakeholders in world football, which supports the selection of arbitrators and their theoretical independence from FIFA.

Additionally, the arbitrators' names are periodically rotated, with fixed terms in the chambers to which they are appointed, ensuring there is no long-term stability in appointments. This arrangement prevents any bias towards FIFA's interests over time, undermining the argument that arbitrators might need to decide in favour of FIFA's interests (or any other stakeholder that could exert influence over them).

Regarding the decision favoring FIFA's interests, it is also pertinent to state that, although the arbitrators may receive payment from funds originating from the FIFA Tribunal, this does not imply bias or dependency.

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<sup>32</sup> <https://digitalhub.fifa.com/m/4cb35a2eb32629d4/original/Procedural-Rules-Governing-the-Football-Tribunal-March-2023-edition.pdf>



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This is so because: (a) as previously mentioned, arbitrators hold their positions for a fixed term, and there is no provision within the Procedural Rules allowing for their removal during this term, particularly at FIFA's discretion; and (b) *mutatis mutandis*, just as a judge may be remunerated by the State, there is, at least in Brazil, no barrier to questioning his independence and impartiality in cases involving the State solely for this reason – the presumption is that judges act in good faith and maintain impartiality. Therefore, why should an arbitrator's independence and impartiality be questioned? The *ratio* is the same, even in the disputes that FIFA is defendant/respondent.

Even if one might argue that the arbitrator could be considered an employee of FIFA by virtue of receiving payment, thereby falling within the IBA Guidelines' red list<sup>33</sup>, this interpretation does not reflect reality. In essence, the arbitrator would be, at most, an employee of the arbitration center solely for the purpose of that specific arbitration. There exists no subordinate relationship with FIFA precisely because the arbitrator is not an employee of FIFA but, theoretically, only of the arbitration center. There is nothing saying that the center cannot pay the arbitrators.

Moreover, suppose the parties have chosen, of their own accord, to submit their dispute to the FIFA Tribunal. In that case, there is no reason to doubt the body's impartiality, as both parties, fully empowered, assessed the absence of impartiality and thus selected it.

Even though FIFA formally confirms the arbitrators' appointments, parties choosing to submit their dispute to this body agree to the closed list of arbitrators FIFA imposes at the time of adjudication, much like many international commercial arbitrations. Therefore, the mere existence of a closed list does not, in itself, render FIFA or its adjudicators biased.

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<sup>33</sup> <https://www.ibanet.org/MediaHandler?id=EB37DA96-F98E-4746-A019-61841CE4054C>



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Furthermore, the rules explicitly state that “*A party is entitled to challenge a member of the FT appointed to decide a matter if it believes that there is a legitimate doubt as to their impartiality. Such a challenge shall be filed within five calendar days from the notification of the composition of the relevant chamber for adjudication. The decision on such challenge shall be made by the chairperson of the FT.*” This means that should any doubts arise, parties can challenge an arbitrator’s appointment.

Additionally, the procedural rules affirm the parties’ right to be heard, requiring that the respondent be served with notice of the claim and afforded the opportunity to respond, submit evidence, and file counterclaims. Each party has the right to counter all presented evidence. Indeed, the parties cannot choose the individual arbitrators, as they are appointed by the Tribunal, not only for the closed list but also at the time of adjudication. However, by agreeing to the FIFA Tribunal as their arbitral forum<sup>34</sup>, the parties cannot later claim a flaw in the selection process without evidence of coercion, as such a claim would contravene the principle of *venire contra factum proprium*.

This argument is supported by the fact that the Basketball Arbitral Tribunal (BAT) follows a similar method of appointing arbitrators for a case, namely through internal determination. Nevertheless, the Swiss Supreme Court regards it as arbitration.<sup>35</sup>

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<sup>34</sup> “3. Method of Selection The arbitrator selection procedure can vary, depending upon the parties’ agreement, and upon the institutional rules. **If parties do not state in their arbitration clause how they want to select arbitrators, but they choose rules to govern the process, the selection will take place according to the institutional rules.** However, even if parties did not agree on a method of selection in their arbitration clause, if they can agree at the time of the arbitration, they can generally select the arbitrators, depending on institutional rules. If parties cannot reach agreement, however, **the institution will choose the arbitrators.** Some of the differences parties should be aware of, when they have not chosen a selection process, are whether (a) the institutional rules provide parties freedom to choose the arbitrators, or (b) they will be limited to a list of names provided by the arbitral institution, or (c) the institution will choose the arbitrators, or (d) some variation of the above.” (Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge [UK]: Cambridge University Press, 2008, p. 121).

<sup>35</sup> [SFT 4A 676/2014](#).



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It would indeed be irrational for the parties to subject themselves to the adjudication of a body whose neutrality and equality are questioned due to alleged interference by its administering authority or by the manner of arbitrator appointments,<sup>36</sup> the identities of whom are known beforehand, although not the specific panel.

Furthermore, FIFA [Circular No. 1010](#),<sup>37</sup> issued in 2005, stipulates that bodies will be considered arbitral tribunals if they respect (a) the principle of parity in tribunal composition, (b) the right to an independent and impartial tribunal, (c) the right to a fair hearing; (d) the right to adversarial proceedings; and (e) the principle of equal treatment of the parties.

Thus, in essence, FIFA's rules provide that parties will be heard equally, allow for the challenging of arbitrators, and include responsibility for case administration.

Logically, this arrangement confers the right to equality between the parties and fair adjudication, thereby characterising it as arbitration, given that there are no flaws in the adopted rules and procedures.

Therefore, based on the parties' direct choice and the absence of any factor rendering the arbitration process invalid, the FIFA Tribunal's adjudications qualify as true arbitration proceedings rather than mere administrative procedures.

One should not argue that a party's right of appeal would negate the arbitral nature of proceedings before the FIFA Tribunal, as: (a) the New York Convention does not limit the term "*final*" to only one decision,

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<sup>36</sup> Fachada, Rafael Terreiro, O exercício da tutela arbitral pela Câmara Nacional de Resolução de Disputas no futebol associado / Rafael Terreiro Fachada. -- São Paulo: [s.n.], 2023.

<sup>37</sup> [http://goldengate-law.com/pdf/fifa\\_circular/fifa\\_circular\\_1010.pdf](http://goldengate-law.com/pdf/fifa_circular/fifa_circular_1010.pdf)



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meaning the Convention does not state that only the first decision must be final and definitive; (b) the term “*arbitral awards*” in the Convention stipulates that “*The term ‘arbitral awards’ shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted*”, which implies the possibility of appeals to arbitral bodies of decisions made by appointed arbitrators; (c) the primary provisions underlying the Convention state that “*Each Party may determine the procedural mechanisms that may be followed where the Convention does not prescribe any requirement,*” and, in this case, the Convention does not prohibit appeals, leaving the procedural choice to the parties; (d) the only requirement is that decisions must be binding, without specifying that the binding nature applies only to the initial or second decision; (e) in Brazil, according to the principle of legality, what is not prohibited by law is permitted among private parties, and among states, only what is expressly permitted by law may be done, which implies that, if legislation does not prohibit it, there is no reason not to accept it; and (f) other jurisdictions, such as England,<sup>38</sup> under the [1996 English Arbitration Act](#), section 69, allow for appeals on points of law without compromising the arbitral nature of the dispute. The [1996 New Zealand Arbitration Act](#) similarly allows appeals without altering the dispute’s arbitral character.<sup>39</sup> In order to corroborate the arbitral nature, at least in relation to Brazil, it is noted that the National Dispute Resolution Chambers established by FIFA, whose rules follow the same guidelines as the Tribunal and also provide for the possibility of appealing their decisions, are regarded in other jurisdictions as an arbitral tribunal,<sup>40</sup> should they be chosen by both parties.

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<sup>38</sup> <https://www.macfarlanes.com/what-we-think/2024/when-can-you-appeal-an-arbitration-award-on-a-point-of-law-in-england-and-wales/>

<sup>39</sup> <https://www.acerislaw.com/appealing-international-arbitration-awards/>

<sup>40</sup> Apelação nº 0171567-33.2019.8.19.0001, Des. MARIA HELENA PINTO MACHADO – j. 12/05/2021 - QUARTA CÂMARA CÍVEL, TJRJ; Apelação Cível 1024890-80.2022.8.26.0562, Des. José Augusto Genofre Martins, 31ª Câmara de Direito Privado, j. 29/05/2024, TJSP)



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For relevance, the Swiss Tribunal's understanding that its applicability is confined to its own territory, given the sovereignty of States over their respective territories, should be reiterated. It is entirely feasible to employ this argument in other jurisdictions and for the FIFA Tribunal's decision, whichever it may be, to be recognized as an arbitration.

However, a word of caution is necessary: the right to due process and the impartiality of the arbitrator are fundamental aspects of fair arbitration. Should a party demonstrate the impossibility of challenging the arbitrators or their partiality, and if this fact compromises the right to an impartial arbitrator, a violation of due process may be claimed, and the arbitration could be set aside.

### **The Importance of the Tribunal's Nature**

In Brazil, for the enforcement of an arbitral award, when dealing with foreign arbitration—i.e., when the decision is rendered outside national territory—there is a specific procedure before the Superior Court of Justice (STJ) to recognize and enforce the arbitral decision<sup>41</sup>.

If FIFA's body is considered an arbitral tribunal under Brazilian law, its decisions must be homologated by the Superior Court of Justice, failing which their enforcement would be obstructed. Conversely, if it is deemed a mere administrative procedure, this requirement would not apply. Thus, the discussion surrounding the nature of FIFA's tribunal is crucial for the proper execution of its decisions in Brazil.

Should the argument presented above prevail, and FIFA's tribunal be classified as an arbitral tribunal, its decisions would require recognition by the Superior Court of Justice, rather than a mere notification to the

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<sup>41</sup> AgInt na HDE n. 6.347/EX, relator Ministro Benedito Gonçalves, Corte Especial, julgado em 13/6/2023, DJe de 16/6/2023.)



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Brazilian Football Confederation (CBF), thereby altering the current operational procedure.

This could lead to a conflict between FIFA and Brazilian courts, which would not be advantageous to FIFA. The enforcement of FIFA Tribunal's decisions could be obstructed if the affected party challenges the execution by CBF in domestic courts, on the grounds that the award lacks prior homologation by the Superior Court of Justice.

Such a scenario would pose a substantial obstacle for FIFA, as the lack of recognition and enforcement by national courts would undermine the authority of its tribunal and the effectiveness of its rulings within Brazil. Moreover, this issue could set a precedent for other jurisdictions to question the binding nature of FIFA Tribunal's authority within their own territories.

As a recognized arbitral award, FIFA Tribunal's decisions would be largely immune to appeals, thus ensuring legal certainty in their enforcement without unnecessary proceedings before CAS or potential challenges in national courts.

Additionally, France follows a similar requirement for the enforcement of an international arbitral award before a state court, as do many other countries. While this process may involve additional formalities, it would enhance legal security, benefiting all parties by avoiding unnecessary instances where FIFA's tribunal is regarded merely as an administrative body.

It would therefore be in FIFA's best interest to explicitly recognize the arbitral nature of its tribunals, like the Basketball Arbitral Tribunal (BAT), making it clear that CAS serves as a second-instance appellate body—albeit in an unusual manner compared to commercial arbitration.



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Alternatively, FIFA could follow the FIBA model, which, unlike FIFA, does not impose the content of contracts or the choice of dispute resolution mechanisms.

As demonstrated, there are both legal and logical grounds for FIFA's tribunals to be considered arbitral bodies, particularly in the interest of legal certainty, as a contrary interpretation would impact the enforceability of its decisions and the integrity of FIFA's own Tribunal.

### **Administrative Procedure: The Parties Did Not Choose FIFA's Tribunal**

An administrative procedure can only be considered as such if the contract does not expressly designate FIFA's tribunal as the competent body. The fundamental requirement of arbitration is consent, which, if absent, prevents the process from being classified as arbitral.

In such cases, there would be no obligation for the affected party to appeal to the FIFA-designated appellate tribunal, as jurisdiction would rest with the forum stipulated in the contract. Consequently, FIFA's tribunal would be irrelevant to a party that never agreed to submit disputes to its jurisdiction. Indeed, where no contractual provision exists, the affected party could bypass FIFA's tribunal altogether and seek redress directly in national courts.

In this scenario, FIFA would merely need to notify the Brazilian Football Confederation (CBF) of its decision and request enforcement. However, if the contract designates a different forum, and FIFA executes its decision as an administrative tribunal, the affected party could challenge the decision in domestic courts, with a broad scope of review—whereas



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in arbitration, judicial review is limited to procedural aspects, not the merits of the case.

Moreover, if FIFA's tribunal is deemed merely administrative, can it impose sanctions on third parties, such as agents, who are not directly affiliated with FIFA? The answer is clearly negative.

This distinction benefits football agents, as it enables them to challenge FIFA's jurisdiction, particularly given that their licenses are currently granted through procedures imposed by FIFA.

## **CAS**

FIFA's statutes expressly designate CAS (Court of Arbitration for Sport) as the appellate body for FIFA decisions, irrespective of whether FIFA's decision is considered arbitral or administrative.

In other words, decisions issued by FIFA may be appealed to CAS, which may uphold, amend, or overturn FIFA Tribunal's rulings. Moreover, CAS decisions may, in some instances, be challenged in Swiss courts, depending on the grounds of appeal.

For instance, in the Paolo Guerrero case, the Swiss courts granted a suspensive effect, allowing the player to participate in the 2018 FIFA World Cup<sup>42</sup>.

As a rule, disputes adjudicated before CAS may be challenged in Swiss courts, as the arbitration seat determines the competent jurisdiction for annulment proceedings, in accordance with Swiss arbitration law.

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<sup>42</sup> <https://ge.globo.com/rs/futebol/times/internacional/noticia/tribunal-suico-recusa-pedido-da-fifa-para-fazer-parte-no-processo-de-guerrero.ghtml>



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Article 5 of the New York Convention addresses refusal of recognition or enforcement of an arbitral award. Although it does not explicitly govern annulment, many jurisdictions interpret it as conferring exclusive jurisdiction to the arbitration seat for such challenges.

The Court of Arbitration for Sport was established as a specialized sports jurisdiction, notably for Olympic disputes. In the landmark Gundel case (1993), the Swiss Federal Tribunal recognized CAS as a genuine arbitral tribunal.

Following this ruling, the International Council of Arbitration for Sport (ICAS) was created in 1994, based in Paris, to oversee and finance CAS, ensuring its independence from international federations and the IOC.

The Pechstein precedent (STF 4A\_612-2009) reaffirmed CAS's independence, despite arbitrators being affiliated with sports federations. Notably, CAS operates under a closed-list system, whereas FIFA designates its arbitrators without allowing parties to choose.

Swiss courts have upheld CAS's jurisdiction even in the absence of direct consent, provided it is stipulated in FIFA's statutes. However, Swiss court rulings are not binding in Brazil, given the distinct legal frameworks governing arbitration in both jurisdictions.

There is no doubt regarding CAS's arbitral nature, as it is seated in Switzerland and its awards are rendered in Swiss territory. Therefore, its decisions must be recognized by the Superior Court of Justice in Brazil, failing which their enforceability could be suspended in domestic courts.

Notably, CAS may serve not only as an appellate body for FIFA's tribunal but also as a first-instance jurisdiction where: (a) the parties have expressly designated CAS as their forum in the contract; or (b) a FIFA



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body originally designated to handle the dispute has been suspended or abolished.

CAS has upheld its jurisdiction in such cases, arguing that the parties' intention was to submit their dispute to arbitration<sup>43</sup>. However, in this scenario, one party could still challenge the award in domestic courts, arguing that an appeal to CAS was merely optional, not mandatory.

### **Mandatory Nature Supporting the Arbitral Nature**

When considering whether FIFA's tribunal possesses an arbitral nature when chosen by the parties, it is logically inconsistent to have an administrative decision and then initiate an arbitration as an appeal. The appeal process inherently assumes that the legal nature of the initial decision aligns with that of the appeal mechanism. Otherwise, it would necessitate a different designation or procedure, such as an annulment action or another judicial measure.

Further reinforcing the arbitral nature of FIFA's tribunals, one must ask: if arbitration is only established at the CAS, and FIFA's own statutes require the losing party at FIFA's tribunal to appeal exclusively to the CAS, does this not constitute a mandatory arbitration process? The answer is affirmative. Consequently, Brazilian courts should not validate an arbitration that is imposed on a party, as arbitration fundamentally relies on consent.

Consider a scenario where an administrative proceeding is initiated within FIFA, and the losing party—such as an agent or a third party who never agreed to FIFA's jurisdiction—has only the CAS as an appeal option.

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<sup>43</sup> CAS 2023/O/9401 World Athletics (WA) v. Russian Athletic Federation (RUSAF) & Yelena Korobkina, award of 27 September 2023



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The mandatory use of FIFA-affiliated tribunals (or the CAS) constitutes a form of coercion, particularly since agents have no direct connection to the sport itself and do not voluntarily seek to become FIFA members but are rather compelled to do so.

In such cases, a party could challenge the enforcement of an arbitral award by arguing that the tribunal's composition violated the parties' consent, contravening Article V(1)(d) of the New York Convention.

Under Swiss and Brazilian law, for an arbitral award rendered by the Court of Arbitration for Sport (CAS) to be annulled, it must be demonstrated that a violation of public policy occurred, as set forth in the New York Convention.

A notable precedent is the Matuzalem case in Switzerland, where a CAS decision was successfully challenged, leading to the annulment of the arbitral award. This case exemplifies that CAS rulings may be subject to review in instances where they contravene national public policy principles.

Put simply, the absence of valid consent may result in the annulment of arbitral decisions by domestic courts due to a violation of public policy, particularly because valid consent is a fundamental requirement for arbitration to exist.

Given this framework, it is in the interest of all parties to recognize FIFA's tribunal as an arbitral body, both from a logical standpoint and for the sake of legal certainty.

**CNRD (National Dispute Resolution Chamber)**



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The Brazilian Football Confederation (CBF) has established various bodies to resolve disputes among stakeholders in Brazilian football, mirroring FIFA's approach. Over the years, certain chambers and entities have been dissolved while new ones have been created. As the purpose of this chapter is to present the system as a whole, we will not delve into each specific institution.

The most recent dispute resolution body is the Câmara Nacional de Resolução de Disputas (CNRD), created by the CBF in 2016 to expedite judicial decisions related to football stakeholders.

An important clarification is necessary: the CNRD is not part of the sports justice system, which has jurisdiction over disciplinary matters and competition-related issues under the Pelé Law. For instance, the STJD (Superior Court of Sports Justice) is a part of the sports justice system and addresses issues distinct from those handled by the CNRD.

### **Arbitral or Administrative Nature of CNRD**

The CNRD may function as an arbitral tribunal when both parties freely choose to submit their dispute to this collegiate body. The same reasoning applies to FIFA's tribunal—whether to consider the CNRD an arbitral body or an administrative tribunal depends on party consent.

In simple terms, disputes brought before the CNRD, when agreed upon by both parties, have an arbitral nature, as permitted by Article 90-C of the Pelé Law, which allows arbitration in cases involving disposable property rights, except for matters related to discipline and sports competitions.

Furthermore, under Brazilian law, an agent may be granted powers by an athlete to represent them in contractual negotiations, in accordance



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with Article 710, sole paragraph, of the Civil Code. If the agent, acting with such powers, signs a contract containing an arbitration clause referring disputes to the CNRD, the athlete is bound by arbitration and cannot later challenge it. International cases with similar legal foundations have upheld this principle.

Arbitration is a dispute resolution method in which third parties, appointed by the parties, exercise jurisdiction over a conflict.

Once arbitration is stipulated in a contract, the arbitrator has jurisdiction over all disputes arising from that contract unless nullity is established, particularly in labor-related matters where the vulnerability of one party (economic dependence) may lead labor courts to declare the arbitration clause void.

Conversely, the CNRD may only serve as an administrative body if one party does not consent to its jurisdiction. But why would a party choose the CNRD solely as an administrative body?

### **Enforcement of CNRD Decisions in the Judiciary**

A judicial decision in Brazil can be enforced in three ways: (a) typical execution, where enforcement measures are explicitly provided for by law; (b) atypical execution, where the court orders non-standard enforcement measures; and (c) mixed execution, which combines both approaches.

Atypical enforcement measures are detailed in Article 139, IV, Article 297, and Article 536(1) of the Brazilian Code of Civil Procedure. While these measures can be requested as interim relief, they are most commonly applied during judgment enforcement to compel the debtor to fulfill an obligation—such as the seizure of trophies won by a club.



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CNRD's administrative nature is particularly relevant when it imposes sanctions that regular courts would take years to enforce, such as a transfer ban on a non-compliant club.

Depending on the case, particularly in complex disputes, the CNRD plays a crucial role, as its decisions are theoretically executed more swiftly than judicial rulings. While uncommon, CNRD decisions may be appealed before the Brazilian Center for Mediation and Arbitration (CBMA).

It is important to highlight that, although the CNRD follows an administrative procedure, its decisions can be reviewed or even suspended if challenged in judiciary.

If chosen by both parties, the CNRD operates as an arbitral tribunal, meaning court interference is generally limited, except in cases where arbitration law permits intervention. If one party does not consent, it functions as an administrative body, meaning sanctions imposed may still be subject to judicial review.

For a party to utilize the CNRD in an administrative capacity, it must have standing—i.e., it must be recognized in CNRD's regulations as a party eligible to seek enforcement or be subject to sanctions. Additionally, the subject matter of the dispute must fall within the scope of CNRD's jurisdiction. Failure to comply with these regulatory requirements may result in the claim being dismissed.

Regarding jurisdiction, there is consensus that CNRD decisions apply only to domestic disputes, while international disputes fall under FIFA's jurisdiction. However, for CNRD to hear an international dispute, the relevant contract must contain a clear arbitration clause designating



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CNRD's jurisdiction or be covered by a collective bargaining agreement that mandates its exclusive jurisdiction.

### **Composition and Independence**

CNRD arbitrators must be appointed by entities representing both players and clubs, ensuring equal representation on the tribunal. Furthermore, arbitrators and parties must maintain independence and impartiality, and procedural guarantees—such as the right to a fair hearing and defense—must be observed to prevent subsequent annulment of the award.

The Rio de Janeiro Court of Justice has already affirmed CNRD's nature as an arbitral body in past rulings<sup>44</sup>.

Ultimately, whether operating under an arbitral or administrative framework, CNRD's procedural rules must be strictly followed, as updated annually. In essence, its proceedings resemble a judicial case, requiring the claimant to justify their claim, specify their requests, and formally notify the respondent. Fees are also required at both the initiation and conclusion of proceedings, varying according to the case.

### **PROS AND CONS**

Although FIFA-affiliated tribunals, the CNRD, and the CAS offer certain advantages for specific types of disputes—most notably the speed of adjudication and the ability to impose administrative penalties (albeit not as a general rule)—they also come with a significant financial burden.

The costs involved in these proceedings are considerable, and depending on the scale of the dispute, they may not always be justified,

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<sup>44</sup> Apelação nº 0171567-33.2019.8.19.0001, Des(a). MARIA HELENA PINTO MACHADO - Julgamento: 12/05/2021 - QUARTA CÂMARA CÍVEL



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even if the adjudicating body ultimately orders reimbursement of the upfront legal expenses.

Another crucial aspect to consider is that, similar to the CNRD, FIFA-affiliated bodies have limited means of enforcing their decisions. The execution of substantive rulings, particularly those concerning financial obligations, ultimately falls within the purview of national courts, which have the authority to enforce judgments through asset freezes, bank account seizures, or other enforcement mechanisms.

In this regard, both FIFA-affiliated bodies and the CNRD can impose administrative sanctions—such as prohibiting a club from registering new players—but they lack the ability to enforce payment obligations. Consequently, any arbitral award rendered by these bodies must be executed through the domestic judiciary, as it qualifies as an enforceable judicial title under Article 515 of the Brazilian Code of Civil Procedure.

Conversely, in cases classified as purely administrative proceedings (as opposed to arbitration), there is no judicially enforceable judgment, meaning execution cannot be based on an executive title. As such, seeking FIFA's jurisdiction for procedural matters is not advisable.

### **Selection of Arbitrators and Legal Diversity**

Regardless of whether the proceedings are administrative or arbitral, the case will be adjudicated by the appointed members of the relevant body. Unlike traditional arbitration, parties cannot independently select arbitrators from outside the pre-established panel. This can be problematic, particularly concerning the experience and legal background of the appointed adjudicator.



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Arbitrators from different countries inherently carry their legal convictions and perspectives, shaped by their national legal systems. Some jurisdictions operate under common law, others under civil law, while others—such as China—adhere to legal frameworks that do not conform to either system. These differences can impact case adjudication.

For straightforward cases, such as financial claims, these discrepancies are often negligible. However, in disputes requiring complex evidentiary analysis, the legal background of the adjudicator can become a critical factor.

### **Strategic Considerations for Dispute Resolution Clauses**

From a practical standpoint, consider the following:

1. In contracts between agents and international clubs, if the dispute resolution clause designates the CAS as the competent forum, the agent may have an easier time enforcing a favorable decision, despite potential drawbacks concerning the applicable regulations—particularly FIFA’s rules, which are not always favorable to agents. Therefore, specialized legal advice is crucial when selecting the appropriate dispute resolution forum.
2. In contracts with domestic clubs, direct recourse to national courts is often preferable because:
  - (a) Depending on the case, the judicial process may be more efficient.
  - (b) National courts have coercive powers beyond the sports system, such as asset freezes and enforcement actions.
  - (c) There is greater certainty regarding the applicable law, which will be the domestic legal framework.
3. In cases where a Brazilian agent contracts with a foreign player, inserting a national jurisdiction clause is advisable only if the foreign player has a clear and demonstrable link to Brazil.



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- (a) If the foreign player has no strong ties to Brazil, opting for CAS jurisdiction under FIFA regulations and Swiss law may be more advantageous, as: Enforcement within the sports system is generally more straightforward.
- (b) The agent benefits from greater legal predictability, as they (and likely their legal counsel) may not be fully familiar with the foreign jurisdiction's legal system but are more accustomed to FIFA's regulatory framework.

In summary, for domestic transactions, a state court jurisdiction clause is generally preferable. However, for cross-border agreements, particularly those potentially unfavorable to the agent, opting for CAS jurisdiction as the first-instance forum may provide greater legal certainty—albeit at a higher cost.

#### **LAW APPLICABLE TO THE MERITS: COMMON JUDICIARY**

Before delving into the intricacies concerning the applicability of the CBF and FIFA regulations, it is necessary to establish certain basic premises regarding arbitration and state jurisdiction, so as to ascertain the applicable legal framework. By “applicable legislation” we mean either the statutory laws or state constitutions emanating from governmental authority, or the regulations promulgated by private entities such as FIFA and the CBF.

Obviously, if the contract stipulates the application of Brazilian law and selects national jurisdiction (i.e., the forum of one of the judicial districts in the country), no further legal ramifications warrant detailed analysis. In such cases, the previously examined contractual provisions apply. However, there are instances where contracts remain silent as to the applicable law, and these merit closer scrutiny.



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In the event that the forum selection clause designates the Brazilian judiciary without any reference to the substantive law, the applicable law – as a general rule in the absence of any alternative legal framework – is the national legislation, namely, the Federal Constitution, statutory laws, state laws, etc. In the vast majority of contracts, this is the prevailing rule, the aforementioned exception being one of the very few instances in which foreign substantive law has been reported to be applied in a case before the Brazilian courts.

Where a foreign state forum is chosen (for example, the English judiciary) without any reference to the applicable substantive law, it may be said that, in most cases, the national legislation of that jurisdiction applies. While one does not possess exhaustive knowledge of all the world's legal systems, it is generally assumed that the applicable law is the national law and, as in Brazil, the application of other substantive legal norms may occur in very specific circumstances.

## **LAW APPLICABLE TO THE MERITS: ARBITRATION**

Notwithstanding the foregoing, in arbitration there exists the possibility of selecting the applicable law (in accordance with Article 2, Section II of the Brazilian Arbitration Law). It is the contracting parties who determine the legal framework to be applied, and they may choose among various alternatives, including the adjudicatory body, whose rules are incorporated into and govern the proceedings.

For instance, an individual in Brazil may enter into a contract with a company from another jurisdiction and opt for the law of a third state. It is even conceivable that the chosen framework is not a statutory law at all, but rather a set of non-state norms.



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This is particularly relevant in disputes involving parties that submit to FIFA arbitration. In such cases, the provisions of the FIFA regulations may be applied. The ensuing issue concerns the enforcement of such provisions within the country, namely, Brazil.

In essence, the arbitrators shall decide the substantive aspects of the dispute in accordance with the law chosen by the parties, while procedural matters shall be governed by the rules of the arbitral institution – which functions as a judicial authority in processing the arbitration – with the possibility of the subsidiary application of procedural rules.

It is important to emphasize that, in Brazil—and in other jurisdictions—an international arbitral award may not be ratified (and, consequently, enforced) if it contravenes public policy (Article 39, Section II of the Brazilian Arbitration Law). This concept will be of significance when assessing the applicability of the FIFA regulations.

In Brazil, there is no exhaustive catalogue defining what constitutes a breach of public policy. It is necessary to consult the jurisprudence, particularly that of the Superior Tribunal of Justice (STJ). Some illustrative cases include:

- (a) the cumulation of monetary correction with exchange rate variation, which offends national public policy;
- (b) an arbitral award rendered by an arbitrator who, in relation to the parties or the dispute, maintains relationships that give rise to grounds for disqualification or suspicion; and
- (c) the absence of consent to arbitration.

For example, French courts similarly require that arbitration conform to public policy norms, whose definition is likewise neither clear nor confined



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to a single statute. In effect, this involves an analysis of the corpus of French public policy norms.

According to the “Lautour” precedent (French Court of Cassation, 25 May 1948), international public policy is manifested through adherence to the “principles of universal justice considered by French public opinion to possess absolute international value.”.

### **FIFA REGULATIONS: GROUNDS FOR NON-REGULATION**

This chapter begins with the famous adage Of Apeles: *ne sutor ultra crepidam*—literally, “shoemaker, do not go beyond the shoe.” Disregarding this maxim, in 1994 FIFA issued its first regulation governing football intermediaries, which it designated as “agents.”<sup>45</sup>

It need not be elaborated at length that intermediaries are common figures, yet they are not essential to the conduct of the sport. They do not take the field, are not involved in team selection, nor do they execute transfers. There is no necessity for their professional activity in the realization of the sport. Hence, FIFA would have no logical grounds to regulate third parties who, in truth, are hired by the actual actors in the sport—as noted in the preceding chapter. Allowing such a scenario would compel FIFA to regulate everyone—absolutely everyone: all third parties involved with players, coaches, directors, or presidents of sporting entities.

The true purpose behind FIFA’s regulation of football intermediaries lies in the financial aspects of the business. Consequently, over time it has issued a series of regulations—which have been contested in various

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<sup>45</sup> <https://ibdd.com.br/regulations-governing-player-agents/?v=19d3326f3137>



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jurisdictions—and, to circumvent the obvious, it issues further regulations with minor modifications.

Over time, rules that had been previously set aside—such as the cap on commission fees for intermediaries—resurface. FIFA’s justification is that limiting the amount earned by an intermediary is meant to deter them from incentivizing the movement of players from one location to another. However, it would suffice for the amount corresponding to the intermediary’s services to be passed on to the player, who then disburses that sum to his intermediary as remuneration for services rendered. In truth, this is a futile solution.

Another noteworthy point in the regulations is that FIFA prohibits the multiple engagement of more than one intermediary in the same negotiation, aiming to avoid conflicts of interest. Yet this prohibition is easily circumvented by attributing the allegedly excess amount due from one party to another. Ultimately, the final word belongs to the club—and not to FIFA.

Here, it is strongly argued that there is no necessity to regulate intermediaries, especially since the relationship in question is civil rather than sporting. For this very reason, FIFA lacks the legitimacy to impose rules on intermediaries for performing their work and for having their right to remuneration recognised—except insofar as they are duly registered with it.

Indeed, were there a specific national law—enacted by the State—mandating that intermediaries hold a specific licence to operate, then it would be acceptable to require such a prerequisite in that country, as is the case in France. However, on a worldwide level, FIFA cannot impose any mandatory regulation over civil relations, which are to be governed



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at the national level. It is evident that a private entity cannot demand this without the backing of a law that creates such an obligation.

Furthermore, Article 23 of the Swiss Constitution<sup>46</sup>—the country in which FIFA is headquartered—guarantees freedom of association without obligating one to join or be a member of any association. This leads to an important question: why does FIFA impose regulations on intermediaries worldwide if, as we have seen, they are not compulsory participants in the sport?

From this perspective, the requirement for intermediaries to be regulated and to hold a licence implies an obligation to affiliate with an association in order to carry out their professional activity—a requirement proscribed by Article 23 of the Swiss Constitution, which provides that membership in a federation is not mandatory.

Thus, it is argued that there are no logical (nor legal) grounds for FIFA to issue a regulation governing football intermediaries aimed at regulating the profession, particularly if it conditions the protection of their rights on such regulation.

## **REGULATION: APPLICABILITY ONLY IN ARBITRATION**

Although FIFA has, over the years, issued regulations (including those issued by National Federations which adopt FIFA's regulations as their basis), there is no impediment to their enactment—even if they are unnecessary and there are reasons against them (as reiterated *ad aeternum*)—provided they serve as the normative framework applicable

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<sup>46</sup> “Art. 23 Freedom of association

1 Freedom of association is guaranteed.

2 Every person has the right to form, join or belong to an association and to participate in the activities of an association.

3 No person may be compelled to join or to belong to an association.” Available on [https://www.fedlex.admin.ch/eli/cc/1999/404/en#art\\_23](https://www.fedlex.admin.ch/eli/cc/1999/404/en#art_23).



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to arbitration instituted before its arbitral chambers or before the Court of Arbitration for Sport (CAS), since it has already been demonstrated that the parties may choose the rules applicable to their dispute. Regarding judicial proceedings, it has already been stated that national legislation applies, which is why these regulations are of little consequence.

Even in this scenario—where the regulations are applicable to arbitration—there may be repercussions, as they might not be accepted in the country where execution of the decision is sought for a variety of reasons. Below, the explanation is divided into international arbitration (rendered outside Brazil) and domestic arbitration, where awards are issued locally.

## **RULES OF THE REGULATION: INTERNATIONAL ARBITRATION**

As already noted, in the case of international arbitration there is the possibility of applying FIFA's regulations as the governing framework for the merits of the dispute—provided that the parties stipulate that such regulation shall govern the adjudication of the substantive issues, or if the adjudicatory body is, in some way, affiliated with FIFA.

Although this does not constitute legislation enacted by a State, as noted above, arbitral procedures do not preclude the application of the substantive law governing the contract. It is necessary, however, that in the executed contract—or at a later time—the parties agree to submit their dispute to that body, under those specific rules, even if only indirectly (insert CAS reference indicating that FIFA's regulation is applicable).

It should be reiterated that, for intermediaries, in light of the events of recent years, it is worthwhile to consider whether it is advantageous in the contracts they enter into to adhere to FIFA's substantive law, given that it is restrictive to intermediaries—both in terms of profit and in the free exercise of their profession.



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In the event that an international arbitral award is rendered in a manner contrary to Brazilian law—that is, based on substantive law applicable to the dispute but contrary to the provisions of Brazilian law (as may occur, for example, in cases involving limits on remuneration or a requirement for a binding affiliation with FIFA or the Brazilian Football Confederation (CBF)—there exists the possibility that it will not be ratified (or more precisely, executed on national soil), pursuant to Article 39, Section II of the Arbitration Law (Law No. 9,307/1996), on the grounds of violation of national public policy. This provision is expressly set forth in Article 39, II, of the Arbitration Law (9,307/1996).

According to the precedent of the Special Chamber of the Superior Court of Justice<sup>47</sup>, as reported by Minister Og Fernandes, “notwithstanding that the expression ‘public policy’ is a fluid, open concept, it is possible to infer that it relates to the fundamental principles and precepts of the national legal order, and therefore its transgression has the capacity to obstruct the ratification of a foreign award.”.

In summary, in that opinion he stated that “as observed, the prevailing understanding in this Superior Court to establish the concept of an offense to public policy sufficient to deny ratification of a foreign award is based on the following premises: (a) public policy, in this context, does not equate to international public policy but rather to a concept of domestic public policy; (b) there must exist an absolute incompatibility between the foreign award and the internal norm (whether a norm-principle or norm-rule) applicable to the matter; (c) the internal norm—whether it be a principle or a rule—must be foundational, that is, it must consist of an essential provision to the very internalised concept of law in Brazil.”.

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<sup>47</sup> SEC n. 14.930/EX, relator Ministro Og Fernandes, Corte Especial, julgado em 15/5/2019, DJe de 27/6/2019.



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In practical terms, one may assert that certain provisions in the regulations issued by FIFA, when employed in an arbitral award (and this point is of fundamental importance—not merely that the regulation contains provisions contrary to Brazilian law, but that such provisions are central to the award’s reasoning), are contrary to the foundational norm set forth in the Federal Constitution (e.g. freedom to work, free competition, etc.).

Consequently, in light of the Superior Court of Justice’s concepts, the arbitral award would be contrary to public policy—embodying a contravention of the foundational internal norm—and therefore may be refused ratification in Brazil.

Another important aspect is the standardisation of rules governing the professional conduct of intermediaries. This is because, in administrative proceeding No. 08700.004974/2015-71, processed before CADE<sup>48</sup> (the Administrative Council for Economic Defense), it was determined that “CRECIs and COFECI were attributed with the practice of influencing uniform conduct, arising from the drafting of resolutions and other acts that would impose compliance with price tables prepared by trade unions,” and, consequently, such conduct “constituted an infraction by virtue of having participated in the drafting of a table with mandatory effects,” leading to the condemnation of the entities representing real estate brokerage for uniform commercial conduct.

Simply put, rules that standardise the conduct of intermediaries in football can be considered a violation of free enterprise and the free market,

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<sup>48</sup>[https://sei.cade.gov.br/sei/modulos/pesquisa/md\\_pesq\\_documento\\_consulta\\_externa.php?HJ7F4wnIPj2Y8B7Bj80h1lskjh7ohC8yMfhLoDBLddYolf4Udsr3lt0qNg1xAnlDrGdG0uLnKp\\_3ziEggyNRMpDAMEFZOU0Yaln16jft1Y457wgc4ZcmZCEJmGeRD2c](https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?HJ7F4wnIPj2Y8B7Bj80h1lskjh7ohC8yMfhLoDBLddYolf4Udsr3lt0qNg1xAnlDrGdG0uLnKp_3ziEggyNRMpDAMEFZOU0Yaln16jft1Y457wgc4ZcmZCEJmGeRD2c)



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which also contravenes Article 170, IV, of the Federal Constitution—an internal norm essential to Brazilian law beyond dispute.

These examples serve to illustrate how such regulations may violate Brazilian law, thereby potentially leading to non-ratification of the foreign award in Brazil. Considering that these regulations are issued from time to time, many other examples may serve as a basis for non-ratification of the arbitral decision.

Therefore, if an international arbitration arises from a contract entered into between an intermediary and a sporting entity, or between two intermediaries, and the substantive law applicable is contrary to national public policy—as applied in the arbitral award—it is possible that the award may not be executed on Brazilian soil, but only in the country where it was rendered and in others that have treaties with that country. For intermediaries who are creditors, this scenario is difficult to accept, since even if they have an award in their favour they may not receive what is due to them—and the very same logic applies to debtors.

An important issue arises if the international regulation is applied solely as an administrative matter. Given the pyramidal structure in which the sport is managed, non-compliance with such an administrative decision might result in a club or player being excluded from that system.

This rule does not apply to intermediaries, since they do not exercise any administrative power in the sporting arena—that is, they do not hold federative rights over players (nor economic rights as intermediaries—as opposed to being owners of sporting entities); their registration is not mandatory, and their remuneration is not tied to any account connected to FIFA. In truth, it is merely a civil obligation.



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Regardless of what FIFA's regulations may stipulate, the determining factor for execution on national soil in any matter involving an intermediary and a third party is that the terms of the foreign arbitral award do not conflict with Brazilian law.

Finally, it is worth noting that with respect to FIFA's regulations and their applicability, there is a clear guideline regarding the timing of a claim's submission. In accordance with the principle *tempus regit actum*, any case submitted to FIFA before the new editions of the Regulations on the Status and Transfer of Players (RSTP) come into force shall be evaluated under the previous regulations. This approach is consistently followed by the FIFA Football Tribunal, which applies the rules in force as of the filing date of the claim, as well as by the CAS<sup>49</sup>.

### **CBF REGULATION: IMPOSSIBILITY OF JUDICIAL APPLICATION**

In judicial proceedings, it has been held that the regulation issued by the Brazilian Football Confederation cannot be applied as the substantive law of the case, being merely a regulation enacted by a private entity; rather, only the Civil Code and the laws enacted and ratified by the National Congress may be applied.

In legal parlance, this understanding originates from the so-called "Kelsen Pyramid" theory developed by Hans Kelsen. This theory posits that legal norms have a hierarchical structure—much like the sporting system—with the Constitution being the principal norm governing the entire legal system of a country.

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<sup>49</sup> Arbitration CAS 2020/A/7144 Raja Club Athletic v. Léma Mabidi, award of 4 May 2021.



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Obviously, no private institution may enact norms and impose upon its employees or related persons rules that run contrary not only to the Constitution but also to ordinary laws, such as the Civil Code.

Even if there is a reference in the General Sports Law regarding the necessity for intermediaries to submit to the rules and regulations of sporting administrative entities, under no circumstances can such rules prevail over ordinary legislation—be it the Civil Code, the Economic Freedom Law, or any other applicable law governing the contractual relationship specifically.

In the event of a conflict of laws, the special law must always prevail over the general law, and that with higher hierarchy. This is due to the principle of speciality (*lex specialis derogat legi generali*). In this case, the Civil Code governs the legal relationship between the parties—being therefore the special law—whereas the General Sports Law does not.

Moreover, the Federal Constitution itself, in Article 217, I, provides that confederations or federations have autonomy solely to regulate their own organisation and operation, and not to regulate all activities inherent to the practice of sport.

The General Sports Law (No. 14,597/2023), specifically Article 26, Paragraph 2, states that “High-performance sports are regulated by national and international standards and by the sporting practice rules of each modality, as accepted by the respective national organisations for the administration and regulation of sport.”.

In Article 27 of that legislation it is provided that “Sporting organisations, regardless of their legal nature or structure—even if members of Sinesp—are autonomous in internal regulation for self-regulation, self-government and self-administration, including in matters relating to



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the specific rules governing the practice of sport and competitions in the sporting modalities in which they operate or participate, their internal organisation and the manner of selecting their directors and members, as well as with respect to association with other organisations or institutions.”.

However, this does not mean that the regulations established by private entities have authority superior to the specific legislation governing the relationship between the parties, precisely due to the hierarchy of norms. Indeed, such regulations should serve merely as guidelines for regulating sporting situations and championship rules, and cannot be endowed with legislative effect for other purposes—most notably, for regulating civil rights between the parties.

In some national and foreign cases, it has already been recognised that the regulations of the Brazilian Football Confederation and other federations do not have the power to nullify a valid and unblemished contractual instrument, provided it is in accordance with the law.

Reducing the matter to its essence, in judicial proceedings the regulations issued by the Brazilian Football Confederation may never be regarded as the substantive law applicable to the dispute.

### **CBF REGULATION: GROUNDS FOR REQUESTING ANNULMENT OF THE REGULATION (OR PART THEREOF)**

Although the Brazilian Football Confederation has instituted national regulations to address the role of the intermediary, one such regulation has been the subject of judicial action seeking its annulment.

Many of these regulations contravene the free exercise of the profession and impede economic freedom, making it inconceivable to impose (a)



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limitations on earnings; (b) an absence of legitimacy to perform the work due to an imposed licence requirement, without any prior national legislation; or (c) a requirement to observe the duration of the contractual relationship between the intermediary and the third party.

This is because, if neither the Federal Constitution nor the Civil Code impose any limitation or requirement in this regard, there is no basis for imposing them on legal relations.

Recall that the Federal Constitution enshrines the principle of legality, whereby “no one shall be compelled to do or refrain from doing anything except by virtue of law.” In other words, private entities do not have the authority to establish rules that impose duties, obligations, or sanctions—or to confer benefits—without explicit legal provision, since such matters are reserved for legislation.

If it has already been decided that regulatory agencies cannot exceed their mandate—adhering to the principle of legality by imposing duties not mandated by law, let alone a private entity doing so—and whose requirements hinder the free exercise of the profession, this is the inverse of the maxim “he who can do more, can do less” (*in eo quod plus est semper inest et minus*).

Although it is well established that “everything which is not forbidden is permitted” among private parties, there is an explicit prohibition against creating duties relating to civil matters—a competence reserved to the Union through the National Congress (Article 22, I, of the Federal Constitution)—as well as the constitutional provision that no one is obliged to do anything that is not provided for by law. Moreover, there is no current legislation mandating that intermediaries be registered with the relevant federation or confederation.



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From every angle, the same conclusion is reached: CBF regulations that hinder intermediaries from operating due to excessive rules based on the creation of duties are unlawful and must be repudiated by the Judiciary. Specifically regarding the legitimacy of the intermediary in conducting business, affiliation with a confederation or federation has effects solely between those parties.

It cannot be permitted, for example, that an intermediary who is not registered with one of these bodies has his remuneration from a third party obstructed solely because he is not registered there. There is no provision in any special legislation requiring agency contracts, for example, to be regularised before any private body, nor does the Federal Constitution impose such a requirement.

If an intermediary is not registered with the relevant federation or confederation, yet maintains a legal relationship with the player through a contractual instrument—or even via a verbal agreement—he is entitled to his remuneration, regardless of whether he is duly registered with the Brazilian Football Confederation, after all, “no one shall be compelled to do or refrain from doing anything except by virtue of law.”.

In such a case, this argument would be sufficient to defeat any claim of contractual nullity. Moreover, it can be argued that both the club and the player entered into a contract with the intermediary even in the absence of registration.

Subsequently alleging nullity on the grounds of non-registration undoubtedly constitutes *venire contra factum proprium*, which is proscribed by the legal order, since the party initially consented to incur rights and obligations with the intermediary despite his lack of registration—and later sought to invalidate what was previously agreed solely to escape the obligations incurred.



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Apart from this legal foundation, it should be noted that the absence of the intermediary's registration may lead, for example, to administrative sanctions imposed on him or on third parties.

It also directly affects the publication of contractual instruments, considering that if the intermediary were registered, he could have ensured that the contracts entered into were duly recorded for the information of other intermediaries. However, this does not justify invalidating the contract on that basis.

In the same vein, and by all the reasoning already presented, provisions in the regulations regarding the intermediary's remuneration—as well as those concerning his legitimacy to operate without the requisite licence—should not necessarily be enforced, given the absence of any statutory cap provided by federal law, and because it would result in the standardisation of the profession, thereby impeding free competition. Such norms are contrary to the Federal Constitution.

Notably, the Federal Supreme Court<sup>50</sup>, in a precedent with analogous legal reasoning—even in a different factual context—has already ruled that “(...) the existence of a professional council with powers to select, discipline and supervise the exercise of the profession of musician (Art. 1), to carry out mandatory professional registrations, to issue mandatory professional licences (Arts. 16 and 17) and to exercise police powers by applying penalties for the illegal exercise of the profession (Arts. 18, 19, 54 and 55), affronts the guarantees of freedom of profession and of artistic expression (...).”.

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<sup>50</sup> ADPF 183, Min. Rel. ALEXANDRE DE MORAES, Tribunal Pleno, j. 27-09-2019



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Such decisions not only prioritise the rule of special legislation over general norms—as provided in the General Sports Law—but also promote legal certainty, given that, year after year, there are significant changes in these regulations, which alter the terms of the relationships entered into with players.

Allowing such a scenario would create enormous uncertainty regarding which norm should apply—even if the law in effect at the time the contract was signed were applied—as there would be different bases for analysis (practically on an annual basis) and the risk of divergent decisions with differing reasoning and possibly differing conclusions in identical cases. Moreover, excessive regulation—creating rights and duties by the Brazilian Football Confederation—constitutes an abuse of rights, a situation proscribed by Article 187 of the Civil Code<sup>51</sup>.

It exceeds the social and economic purposes to which it should be confined, not only by creating duties and sanctions not provided for by law but also by regulating the profession of a third party who is not involved in the practice of sport.

Indeed, precisely for this reason, intermediaries are not bound by any arbitration clause for dispute resolution that may be provided in the regulations of FIFA or the Brazilian Football Confederation, and may resort to the Judiciary to request the partial or total inapplicability of such regulation to their profession.

### **CBF REGULATION: ARBITRATION**

If the parties agree that the law applicable to arbitration shall be the regulation issued by the Brazilian Football Confederation—even if such

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<sup>51</sup> Law nº 10.406, January, 10th, 2002.



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regulation conflicts with the Constitution of the Republic—it may be understood that the chosen legal rules contravene public policy and, therefore, could not be the subject matter of arbitration, given that the parties have agreed upon a law that is impossible to contract upon.

It should be stressed, once again, that it is not sufficient for the regulation merely to contain provisions contrary to public policy; it is necessary that the arbitral award employs these provisions in its reasoning.

Herein lies a distinction: the grounds for requesting judicial exclusion of the regulation's application are similar to those underpinning a request for annulment of an arbitral award, yet they constitute two distinct situations.

In the first instance, the request is made in the abstract—as has already been pursued in the judicial process mentioned above—whereas in the second instance it is necessary that the arbitral award rely on a basis contrary to public policy in order for a request for annulment to be made.

In the case of domestic contracts that adopt arbitration as the method for dispute resolution, it would be in the best interests of all parties to expressly state that the applicable law shall be the Civil Code and other applicable legislation, making use—where appropriate—of the CBF and FIFA regulations merely as soft law. After all, the aforementioned regulation would have applicability only on national soil.

Indeed, it would also be advisable for the Brazilian Football Confederation to draft its regulation based on the Civil Code and the Federal Constitution, thereby explaining to FIFA the reasons why its own regulation could not be fully adopted.



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In any event, as this remains a controversial issue—its repercussions regarding any annulment action of an arbitral award issued under these conditions have yet to be reported—this discussion remains purely theoretical.

It is important to note that there is no impediment for the regulation issued by the Brazilian Football Confederation to be applied in arbitration, provided that it does not contravene public norms.

In summary, regardless of the terms of the regulation, which may change over time, in judicial proceedings involving intermediaries and third parties—where the relationship is clearly civil—the regulation should be disregarded. Even in arbitral proceedings, certain provisions may be properly contested.

Let it be recalled that the underlying premise here is that the contractual relationship is governed by Brazilian law—not that of any other country—which must be analysed in light of that legal order.

### **Conclusion:**

The regulation of football agents, particularly regarding dispute resolution mechanisms, reveals a constant tension between FIFA's private rules and the principles established under Brazilian law. While FIFA seeks to impose strict regulations on intermediaries, these rules often clash with fundamental legal rights such as professional freedom and contractual autonomy.

Arbitration mechanisms, particularly FIFA's tribunals and CAS, offer advantages such as speed and specialization but also raise concerns about their impartiality and compliance with national legal systems. The mandatory submission to these bodies can be legally challenged,



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especially in cases where there is a lack of valid consent or a conflict with public order norms.

In this context, football agents operating in Brazil must adopt a strategic approach when drafting contracts to ensure their rights are protected both in sports and legal arenas.

The ability to challenge arbitral decisions before national courts is an essential tool to safeguard their interests when such decisions contradict Brazilian law.

Ultimately, this thesis underscores the need for a balanced approach between sports regulations and the legal certainty required by professionals in the football industry. Recognizing contractual autonomy and national jurisdiction over specific aspects of the agent-club-player relationship is crucial for establishing a fairer and more predictable environment for all stakeholders in the football market.

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