

Will U.S. Soccer be Forced to Adopt Promotion and Relegation?

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Introduction

Among member nations in the Fédération Internationale de Football Associations (FIFA), the United States is an outlier for more than just the fact that it calls the game “soccer,” rather than “football.” In most FIFA member nations, the domestic federation organizes the leagues into divisions, and clubs playing within the country are shuttled from lower divisions to higher divisions—and vice versa—through a system of promotion and relegation based on their records at the conclusion of the season.¹ Supporters claim that this “open” system is superior because it provides all clubs a pathway to the top while ensuring that those already there have to fight to retain their spots.² In many leagues in which the first division league has a lucrative television contract, millions are at stake every year for teams on either side of the promotion/relegation line.³

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¹ James A. R. Nafziger, European and North American Models of Sports Organization in *Handbook on International Sports Law* 88, 91-92 (James A.R. Nafziger & Stephen F. Ross, eds., 2011); EUROPEAN COMMISSION, DIRECTORATE-GENERAL X, THE EUROPEAN MODEL OF SPORT 4 (1999), http://www.bso.or.at/fileadmin/Inhalte/Dokumente/Internationales/EU_European_Model_Sport.pdf.

² Stephen F. Ross and Stefan Szymanski, *Open Competition in League Sports in The Comparative Economics of Sport* 139, 140 (Stefan Szymanski, ed., 2010), https://link.springer.com/chapter/10.1057%2F9780230274273_4.

³ Kevin Baxter, *There are Millions of Reasons to Want a Promotion and Avoid Relegation in the English Premier League*, L. A. TIMES, May 14, 2016, <http://www.latimes.com/sports/soccer/la-sp-soccer-baxter-20160515-story.html>.



In the United States, professional soccer has traditionally operated under a “closed” system.⁴ The United States Soccer Federation (“U.S. Soccer”), FIFA’s governing body for soccer in the United States, sanctions leagues and classifies them into divisions, but it does not require promotion and relegation between those leagues.⁵ Major League Soccer (MLS), the nation’s first division league, consists of a closed group of teams that play against each other every year, regardless of each team’s performance.⁶ Teams have entered or left the league over its 20+ years of existence, but such movement has taken place because of a vote of the investors rather than successes or failures on the field.⁷

Although this same type of closed system is commonly used in all major sports leagues in the United States,⁸ a small but “vocal and passionate” segment of the soccer community, rising to the level of a political movement, has long been stridently opposed to its use in MLS.⁹ They consider the closed system to

⁴ *The Football Pyramid in America: Why is There No Promotion and Relegation in the United States?* ECONOMIST, Nov. 23, 2016, <https://www.economist.com/blogs/gametheory/2016/11/football-pyramid-america>; EUROPEAN COMMISSION, *supra* note xx, at 4. In addition to the United States, Australia is the most prominent example of a closed league system, although there are rumblings of change. Joe Gorman, *Promotion, Relegation, and Expansion: Football Waits for the Big Step-Up*, THE GUARDIAN, May 16, 2017, <https://www.theguardian.com/football/2017/may/17/promotion-relegation-and-expansion-football-waits-for-the-big-step-up>. The Indian Super League is also a closed league, but India has promotion and relegation in lower divisions. See Dileep Premachandran, *All May Be Rosy in the Indian Super League, But It Is Far More Gloomy One Tier Down in the I-League*, THE NATIONAL, Nov. 27, 2016, <https://www.thenational.ae/sport/all-may-be-rosy-in-indian-super-league-but-it-is-far-more-gloomy-one-tier-down-in-the-i-league-1.191602>. There are also some examples of open systems that are structured to inhibit access. See Cesar Hernandez, *An Imperfect Arrangement: The Problems with Promotion and Relegation in Mexico’s Top Flight*, FOURFOUR TWO, Feb. 24, 2017, <https://www.fourfourtwo.com/us/features/how-does-promotion-relegation-work-liga-mx-mexico> (describing Mexico’s system, which is biased against newcomers by using a three-year average in the first division to determine relegation).

⁵ *Promotion and Relegation in the US? Sunil Gulati on Why It’s Not in Place*, SPORTS ILLUSTRATED, Feb. 7, 2017, <https://www.si.com/planet-futbol/2017/02/07/sunil-gulati-us-soccer-promotion-relegation-mls-pro-rel-usa>. U.S. Soccer’s president, Sunil Gulati, has, however, stated that U.S. Soccer would not oppose promotion and relegation if a league or leagues wanted to institute it. Indeed, one amateur league—the United Premier Soccer League—adopted promotion and relegation within its league. Scott French, *Pro-Rel Is Already in the United States, But It Is the Future?* FOURFOUR TWO, June 27, 2017, <https://www.fourfourtwo.com/us/features/promotion-relegation-already-united-states-future-ups-l-nasl-usl-mls>.

⁶ *The Football Pyramid in America*, *supra* note xx, at 1.

⁷ See Ken Belson, *As Appetite for Soccer in U.S. Grows, So Does M.L.S.*, N. Y. TIMES, Aug. 8, 2017, https://www.nytimes.com/2017/08/08/sports/soccer/mls-expansion-nashville-cincinnati.html?smid=tw-nytsports&smtyp=cur&_r=0 (discussing contraction of league from 12 to 10 teams in 2001 and current expansion that will grow it to 28 teams by 2020).

⁸ Nafziger, *supra* note xx, at 95-96.

⁹ French, *supra* note xx. But see David Rudin, *Why the #ProRelForUSA Movement Is So Utterly Ineffective*, PASTE MAG., March 16, 2017, <https://www.pastemagazine.com/articles/2017/03/why-the-prorelforusa-movement-is-so-utterly-ineffe.html> (arguing that it has failed to translate from an Internet hashtag to a true political movement).



be “un-American,”¹⁰ noting the irony in U.S. Soccer’s embrace of a system that seems more like socialism while European football operates under a system that appears to be more like capitalism.¹¹ Such conversations, for years the denizen of obscure corners of the Internet, have started to enter into the mainstream.¹² Some observers remain opposed to bringing promotion and relegation to soccer in the United States,¹³ while others believe the time is right and have turned their attention to how to implement such an idea.¹⁴

¹⁰ Michael W. Austin, *Promotion and Relegation for Soccer in the USA*, PSYCHOLOGY TODAY, May 9, 2017, <https://www.psychologytoday.com/blog/ethics-everyone/201705/promotion-and-relegation-soccer-in-the-usa>.

¹¹ Derek Thompson, *Why American Sports are Socialist and Why European Sports Are Not*, THE ATLANTIC, June 20, 2016, <https://www.theatlantic.com/business/archive/2016/06/why-american-sports-are-socialist/487640/>. One potential objection to such characterizations is that it focuses only at the club level and not on the league as a business. While leagues are closed in the U.S., the closed league system is theoretically open to competitor leagues. See Brian Straus, U.S. Grants Provisional Division Two Sanctioning to Both NASL, USL, SPORTS ILLUSTRATED, Jan. 6, 2017, <https://www.si.com/planet-futbol/2017/01/06/us-soccer-division-two-sanctioning-usl-nasl> (both USL and NASL granted second division status, allowing them to compete); *But see NASL Accuses U.S. Soccer and MLS of Violating Antitrust Laws*, ESPNFC, Sept. 1, 2015, <http://www.espnfc.us/major-league-soccer/story/2592756/nasl-accuses-us-soccer-and-mls-of-violating-antitrust-laws> (NASL concern about being denied first division status). In the European-style open system, by contrast, the national federation prevents rival leagues from challenging the top league by allowing only teams, not leagues, to be promoted or relegated and by maintaining a strict caste system for such leagues. See Matt Scott, *Top European Clubs Threaten to Break Away from FIFA and UEFA*, THE GUARDIAN, July 27, 2011, <https://www.theguardian.com/football/2011/jul/27/european-clubs-breakaway-fifa-uefa> (European teams considered forming a competitor league outside of FIFA/UEFA).

¹² Ives Galarep, *On American Soccer: Promotion/Relegation Becoming a Much Less Taboo Topic in the U.S.*, GOAL., Nov. 25, 2015, <http://www.goal.com/en-us/news/66/unit-ed-states/2015/11/25/17695082/on-american-soccer-promotionrelegation-becoming-a-much-less>.

¹³ Luke Kerr-Dineen, *Instituting Relegation in MLS Would be a Really, Really Terrible Idea*, USA TODAY, Nov. 21, 2016, <http://ftw.usatoday.com/2016/11/mls-promotion-relegation-study-salary-cap>; Jon Marthaler, *Soccer Insider: Promotion and Relegation No Cure-All to American Game’s Ills*, STAR TRIBUNE, Dec. 2, 2016, <http://www.startribune.com/soccer-insider-promotion-and-relegation-no-cure-all-to-american-game-s-ills/404370666/>.

¹⁴ Andy Furillo, *It’s Time for Promotion-Relegation in U.S. Soccer*, SACRAMENTO BEE, May 31, 2015, <http://www.sacbee.com/sports/spt-columns-blogs/andy-furillo/article22764273.html>; Ty Schalter, *Promotion and Relegation the American Way: How MLS Can Implement Promotion and Relegation Right Now*, PASTE MAG., Dec. 9, 2016, <https://www.pastemagazine.com/articles/2016/12/promotion-and-relegation-the-american-way-how-mls.html>.



Recently, supporters went a step further and have argued that promotion and relegation is not merely a good idea, but is mandatory. On August 3, 2017, Miami FC, of the second division North American Soccer League (NASL), and Kingston Stockade FC, an amateur side in the fourth division National Premier Soccer League,¹⁵ filed a claim with the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, in an attempt to force U.S. Soccer to require promotion and relegation.¹⁶ This was the culmination of a flurry of pro-open system activism undertaken by Riccardo Silva, Miami FC's owner. In the fall of 2016, Silva commissioned a study on the subject by Deloitte's Sport Business Group.¹⁷ Deloitte concluded that "the closed league system ... may hinder the longer term growth prospects of club soccer."¹⁸ In July of 2017, Silva, through his global media company, MP & Silva, offered to purchase MLS's worldwide media rights from 2023–32—after the expiration of the current deal—for \$4 billion on the condition that the league put into place a system of promotion and relegation.¹⁹ Soon after MLS rejected this offer,²⁰ which was derided as a publicity stunt by

¹⁵ U.S. Soccer has not officially sanctioned a fourth division below the professional leagues, but the National Premier Soccer League is commonly referred to as occupying the fourth tier. Mike Firpo, *The Unruly Soccer Pyramids of America*, SOCCER NEWSDAY, Feb. 10, 2012, <http://www.soccernewsday.com/usa/a/73/the-unruly-soccer-pyramids-of-america>.

¹⁶ Request for Arbitration in the matter of Miami FC and Kingston Stockade FC v. FIFA concerning breach of Respondent's Statutes and Regulations under Swiss Law, Court of Arbitration for Sport, Aug. 3, 2017, <http://files.constantcontact.com/b0c17dbc501/5ed14321-db4b-4899-baa5-593e3d3c4adf.pdf> ("Request for Arbitration"). Similar requests for arbitrations were filed against U.S. Soccer and the regional confederation of which U.S. Soccer is a member—the Confederation of North, Central American and Caribbean Association Football nations ("CONCACAF")—and the petitioners requested that they be consolidated. Request for Arbitration, *supra*, at 16. Because the arguments in each are the same, citations will be to the request for arbitration against FIFA exclusively.

¹⁷ Bob Williams, *Building the Soccer Pyramid: Deloitte Makes the Case for Promotion and Relegation in USA*, THE TELEGRAPH, Nov. 21, 2016, <http://www.telegraph.co.uk/football/2016/11/21/building-the-soccer-pyramid-deloitte-report-makes-case-for-promo/>.

¹⁸ DELOITTE SPORT BUSINESS GROUP, PROFESSIONAL CLUB SOCCER IN THE USA: AN ANALYSIS OF PROMOTION AND RELEGATION 6 (Nov. 2016), <https://www2.deloitte.com/uk/en/pages/sports-business-group/articles/professional-club-soccer-in-the-usa.html>.

¹⁹ Billy Haisley, *MLS Offered Gigantic Media Rights Bid, But Only if It Adopts Promotion and Relegation*, DEADSPIN, July 24, 2017, <http://deadspin.com/mls-offered-gigantic-media-rights-bid-but-only-if-it-a-1797207836>.

²⁰ Tim Rostan, *MLS Says No to Promotion-and-Relegation Regime – and \$4 billion, to Boot*, MARKETWATCH, July 25, 2017, <http://www.marketwatch.com/story/mls-says-no-to-promotion-and-relegation-regime-and-4-billion-to-boot-2017-07-24/print>; John Ourand, *MLS Rebuffs Rich Offer Tied to Relegation*, SPORTS BUS. J., July 24, 2017, <http://www.sportsbusinessdaily.com/Journal/Issues/2017/07/24/Leagues-and-Governing-Bodies/MLS.aspx>.



some,²¹ Silva and Kingston Stockade's owner, Dennis Crowley, opted to proceed to the CAS.²²

The CAS was formed in 1983 by the International Olympic Committee (IOC) to provide an impartial tribunal outside of national courts that could adjudicate disputes arising in international sports in a speedy, uniform manner.²³ Referred to as “a supreme court of world sport” by then-IOC president Juan Antonio Samaranch, it is not a court,²⁴ but rather a forum in which parties can submit cases for binding arbitration.²⁵ It generally does not handle field-of-play disputes or disputes relating to the rules of the games, but it can handle private matters relating to sport such as contract and licensing disputes if the parties agree to submit to CAS's jurisdiction. Some international sport organizations, such as the IOC, the World Anti-Doping Agency, and, most notably for these purposes, FIFA and its member football associations such as U.S. Soccer, recognize the decisions of CAS or even require that their members agree to have all disputes submitted to CAS on issues such as eligibility, discipline, and nationality through either CAS's Ordinary Arbitration Division or its Appeals Arbitration Division.²⁶

Miami FC and Kingston Stockade FC (the “Claimants”) seek to have CAS declare that (1) the “principle of promotion and relegation” is mandatory under Article 9 of FIFA's Regulations and (2) non-enforcement of this principle violates Swiss law on associations and Swiss competition law.²⁷ It also requests that

²¹ Haisley, *supra* note xx (“The deal on offer is best seen as something of a stunt bid.”).

²² See Dennis Crowley, *On Enabling Change in the U.S. Soccer Pyramid—Bottom-Up and Top-Down*, MEDIUM, Aug. 3, 2017, <https://medium.com/@dens/on-enabling-change-in-the-us-soccer-pyramid-bottom-up-and-top-down-f14059f80f0> (statement from Crowley explaining his participation in the request for arbitration with CAS).

²³ The information in this paragraph comes from Richard H. McLaren, *The Court of Arbitration for Sport*, in HANDBOOK ON INTERNATIONAL SPORTS LAW 32 (James A.R. Nafziger & Stephen F. Ross, eds., 2011).

²⁴ *Id.* at 32.

²⁵ Ironically, given the nature of the claim in this case, one of the distinguishing, and in some eyes controversial, aspects of CAS is that it has a closed, rather than open, list of arbitrators. See Sergei Gorbylev, *A Short Story of an Athlete: Does He Question Independence and Impartiality of the Court of Arbitration for Sport?* 13 INT'L SPORTS L. J. 294 (2013), <https://link.springer.com/article/10.1007/s40318-013-0029-x> (arguing that the closed list denies a party's normal right to choose his own arbitrator).

²⁶ FIFA Statutes, Article 57, par. 1, http://resources.fifa.com/mm/document/affederation/generic/02/78/29/07/fifastatutsweben_neutral.pdf; BYLAWS OF THE UNITED STATES SOCCER FEDERATION, Bylaw 707, <https://www.ussoccer.com/about/governance/bylaws>.

²⁷ Request for Arbitration, *supra* note xx, at 3-4.



CAS order the principle of promotion and relegation to be implemented. Since the Claimants must succeed on the first claim in order to win the others, the crux of the case is whether promotion and relegation is mandatory under FIFA regulations.

Will CAS rule that U.S. Soccer must adopt a promotion and relegation system under FIFA regulations? This essay concludes that the odds are against it. There are at least three possible obstacles to the Claimants' case, although some are more formidable obstacles than others.²⁸ First, it is not clear that CAS will accept jurisdiction in this case or conclude that it is ripe for arbitration. Second, even if it does decide to rule on the merits, there is legislative history that suggests that FIFA's adoption of Article 9 was intended to regulate existing promotion and relegation systems rather than force nations with closed leagues to convert to open ones. Finally, the Claimants' request for declaratory relief may have trouble satisfying the narrow conditions under which CAS jurisprudence and Swiss law permit the issuance of a declaratory judgment.

Jurisdiction

Since CAS is a private, independent arbitration body without any official government sanction or authority, it may only hear cases in which both parties agree to submit to arbitration and to be bound by the results.²⁹ The Claimants have submitted to CAS's authority as part of their request for arbitration. The question as to jurisdiction is not so much whether FIFA, the Confederation of North, Central American and Caribbean Association Football nations (CONCACAF), and U.S. Soccer (collectively, the "Respondents") have agreed to submit disputes to CAS arbitration,³⁰ but whether the matter is "ripe" for arbitration.

²⁸ It is possible that U.S. Soccer could be forced to adopt promotion and relegation by American courts under some other legal principle in U.S. law, such as antitrust law, but that is not analyzed in this essay.

²⁹ COURT OF ARBITRATION FOR SPORT, CODE OF SPORTS-RELATED ARBITRATION R38 (Jan 1, 2017) ("CAS Code"), http://www.tas-cas.org/fileadmin/user_upload/Code_2017_FINAL__en_.pdf.

³⁰ Article 57 of the FIFA Statutes states that FIFA "recognizes" CAS as a forum "to resolve disputes between FIFA, member associations, confederations." FIFA STATUTES, Art. 57, par. 1, at 54 (April 2016 ed.), https://resources.fifa.com/mm/document/affederation/generic/02/78/29/07/fifastatutswen_neutral.pdf. Although that isn't the same as an agreement to submit to binding arbitration, see CAS 2009/A/1996, *Riza v. Trabzonspor & TFF*, Award on Jurisdiction of 10 June 2010, para. 73, <https://jurisprudence.tas-cas.org/Shared%20Documents/1996.pdf>, Claimants assert that FIFA "systematically argue" in courts that this "constitutes a binding arbitration agreement." Request for Arbitration, *supra* note xx, at 9; see *Mehr v. FIFA*, Case No. 4:14-CV-03879-PJH, at 7 (N.D. Ca. 2015), <http://www.leagle.com/decision/In%20FDCO%2020150615626/MEHR%20v.%20FEDERATION%20INTERNATIONALE%20DE%20FOOTBALL%20ASSOCIATION>, (in a case brought against FIFA to enforce concussion rules, FIFA asserted that its regulations required arbitration). Both CONCACAF and U.S. Soccer's governing documents contain language required by FIFA's Article 59 that binds them to take disputes to arbitration rather than ordinary courts, although the language allows for an arbitral body other than CAS in certain cases. *Id.*, Art. 59, par. 3, at 55; Request for Arbitration, *supra* note xx, at 9-12.



In this case, the Claimants have not filed their request for arbitration as an appeal of a FIFA decision.³¹ They do not assert that FIFA has rejected their claim that U.S. Soccer is in violation of FIFA regulations by not requiring a promotion and relegation system. Rather, they simply assert that the “non-enforcement” of the regulations has caused them injury.³² This has some practical importance for jurisdictional purposes. For an appeal, FIFA provides that “[r]ecourse may only be made to CAS after all other internal channels have been exhausted.”³³ Similarly, under the CAS Code, there is a requirement that all other legal remedies should be “exhausted” before proceeding to arbitration.³⁴

Even though the parties filed this request citing the rule for ordinary arbitrations, it is at least theoretically possible that CAS could reclassify it as an appeal. The Statutes of the Bodies Working for the Settlement of Sports-Related Disputes, which precedes the CAS Code’s procedural rules, provides that

The CAS is composed of two divisions, the Ordinary Arbitration Division and the Appeals Arbitration Division ... Arbitration proceedings submitted to CAS are assigned by the CAS Court Office to the appropriate Division. Such assignment may not be contested by the parties nor be raised by them as a cause of irregularity.³⁵

This suggests that the CAS Court Office may exercise some discretion in how it classifies filings, notwithstanding the characterization of the party. If so, it could interpret the non-enforcement of the FIFA regulations in this case as a decision from which the Claimants are seeking to appeal.³⁶ Alternatively, it could conclude that this is an inchoate appeal because non-enforcement does not yet rise to the level of a decision until the Claimants formally request that FIFA act and it issues a letter declining to do so. Either way, CAS could delay the proceedings until the Claimants had appealed the “decision” internally to the proper authorities within FIFA.

The CAS Court Office could be particularly attracted to this approach because forcing FIFA to consider and articulate its reasoning might resolve the

³¹ We know this because the cover letter requesting arbitration cites “R38,” which is a request to proceed under the Ordinary Arbitration Division. CAS Code, *supra* note xx, at R38. If Claimants considered this an appeal, it would have been filed pursuant to R47. CAS Code, *supra* note xx, at R47.

³² Request for Arbitration, *supra* note xx, at 17.

³³ FIFA STATUTES, Art. 58, par. 2, at 54.

³⁴ CAS Code, *supra* note xx, at R47.

³⁵ CAS Code, *supra* note xx, at S20

³⁶ Antonio Riggozi & Erika Hasler, *Sports Arbitration under the CAS Rules*, in ARBITRATION IN SWITZERLAND: THE PRACTITIONER’S GUIDE, 935, 990 (Manuel Arroyo, ed., 2013), <https://lk-k.com/wp-content/uploads/RIGOZZI-HASLER-in-ARROYO-ed-Arbitration-in-Switzerland-2013-Chap.-5-Arts-R37-R47-R70-CAS-Code.pdf>, (In defining a decision, “The form and/or denomination of the challenged act are not determinative, what matters is whether the latter contains a ruling affecting the parties’ legal positions”).



matter without the need for arbitration. This is particularly true in a case of non-enforcement. Unlike a disciplinary matter in which an athlete complains about the improper enforcement of a regulation and FIFA's action serves as evidence of its interpretation of the regulation, there is ambiguity in a case of non-enforcement. FIFA could conclude that the regulation was never intended to be enforced as the Claimants suggest and it could revise it or repeal it altogether to clarify that, rendering the Claimants' argument moot. FIFA would not be entitled to delay a final decision indefinitely or refuse to consider the matter internally,³⁷ but CAS might be less likely to consider this issue as time-sensitive as a disciplinary matter involving an athlete. In effect, this would kick the matter back to FIFA without a hearing on the merits of the Claimants' argument.

Even if a jurisdictional resolution to the case might be attractive, is it likely? There does not appear to be any information available as to how often, if ever, the CAS Court Office has "re-classified" a request for arbitration as an appeal. Although appeals constitute the vast majority of cases CAS hears every year,³⁸ there is no way to know whether how they were filed differs from how they were ultimately considered by CAS. Moreover, reclassifying a case involving an alleged "non-enforcement" of a regulation would appear to require more than a ministerial decision, but rather a decision about the nature of the case. That might make the CAS Court Office hesitate to invoke any discretion it might have to remove it to the Appeals Arbitration Division.

Merits

If CAS did keep the request in the Ordinary Arbitration Division and agreed to provide a hearing on the merits of the Claimants' arguments, the arguments are not as strongly in the Claimants' favor as it might at first appear. First, the legislative history of Article 9 appears to support the argument that promotion and relegation is not mandatory for countries with a closed league system. Second, the Claimants' prayers for relief may not meet the requirements for declaratory relief and therefore could be ruled inadmissible.

Article 9

The Claimants' principal argument is that FIFA regulations require promotion and relegation, and MLS's closed system violates that regulation. They cite Article 9, paragraph 1 of the Regulations Governing the Application of Statutes, which is titled "Principle of Promotion and Relegation."³⁹ It provides that a

³⁷ *Id.* at 991

³⁸ CAS Statistics, 1986-2016, http://www.tas-cas.org/fileadmin/user_upload/CAS_statistics_2016_.pdf.

³⁹ Request for Arbitration, *supra* note, xx, at 17.



club's entitlement to take part in a domestic league championship shall depend principally on sporting merit. A club shall qualify for a domestic league championship by remaining in a certain division or by being promoted or relegated to another at the end of a season.⁴⁰

The Claimants do not actually offer an interpretation of this language, but merely quote Article 9, paragraph 1 and underline the words “principally on sporting merit,” “shall,” and “or by being promoted or relegated.”⁴¹ The remainder of their argument is that CONCACAF and U.S. Soccer are bound to apply the FIFA statutes and regulations, including Article 9.

Presumably, the Claimants believe, under a plain meaning form of statutory interpretation, that the language of Article 9 makes a promotion and relegation system mandatory. Even the most bare bones of plain meaning interpretations, though, permit the consideration of the provision in its totality, rather than a sentence or two in isolation. In this case, paragraph 2 of Article 9 backs off the bright line “sporting merit” requirement by offering a member nation some discretion in applying paragraph 1:

2. In addition to qualification on sporting merit, a club's participation in a domestic league championship may be subject to other criteria within the scope of licensing procedure, whereby the emphasis is on sporting, infrastructural, administrative, legal and financial considerations. Licensing decisions must be able to be examined by the member association's body of appeal.⁴²

This suggests that a federation could include other criteria in determining whether a club merited promotion, including criteria that MLS has identified in its expansion decisions such as (1) a committed and well-financed local ownership group, (2) a geographically desirable market with strong fan support that is attractive to corporate and television sponsors, and (3) a comprehensive stadium plan.⁴³ Nevertheless, it is likely that the word “principally” in paragraph 1, plus the language “in addition to qualification on sporting merit” in paragraph 2, would negate an approach that did not take sporting merit into account at all.

Although this is one possible interpretation, there is some ambiguity in the FIFA regulation that might lead CAS to look beyond the four corners of the document. For example, there is no attempt to define “domestic league championship.” In an organized pyramid of leagues, the domestic league champion presumably refers to the team that wins the first division league. In the United States, however, there has been no attempt to create an organized pyramid of

39 Request for Arbitration, *supra* note, xx, at 17.

40 FIFA REGULATION GOVERNING APPLICATION OF STATUTES, Article 9, par. 1, at 73.

41 Request for Arbitration, *supra* note xx, at 17.

42 FIFA REGULATION GOVERNING APPLICATION OF STATUTES, Article 9, par. 1, at 73.

43 Ben Couch, *MLS Announces Expansion Process and Timeline*, MLSOCCER.COM, Dec. 15, 2016, <https://www.mlssoccer.com/post/2016/12/15/mls-announces-expansion-process-and-timeline>.



leagues or to identify a “domestic league champion.” U.S. Soccer’s policies do not limit each division to a single league and, indeed, U.S. Soccer sanctioned two leagues in the second division in 2017.⁴⁴ Under U.S. Soccer rules, there could even be multiple first division leagues. Even in the current MLS setup, there are arguably multiple champions because, in a nod to European-style champions, it recognizes the team with the best record in the league (the “Supporters’ Shield Winner”) and, in a nod to American-style champions, it also recognizes the team that wins in the playoffs (the “MLS Cup Champions”).⁴⁵ It is therefore plausible to read Article 9 as only applying in member nations where the federation sponsors a true domestic league championship. Under both Swiss law and CAS jurisprudence in *Juventus Football Club S.p.A. & A.S. Livorno Calcio v. Chelsea Football Club, Ltd.*, when a provision “is not entirely clear” and there are other possible interpretations, you go beyond the plain meaning to look at other factors.⁴⁶ These include its “context,” the “goal pursued,” and the “intent of the legislator as it is reflected” in the history of its adoption.⁴⁷

Based on these broader tools of statutory interpretation, some commentators have suggested that Article 9 may not apply in a country like the United States that has a closed league system.⁴⁸ Instead, they suggest that Article 9 was adopted in order to regulate open systems and prevent the abuse of promotion and relegation, rather than mandate its adoption in countries that did not have such a system. Although legislative history is sometimes hard to discern, there is some evidence to support this position. When the FIFA Executive Committee adopted what became Article 9 in December of 2007, it released Circular 1132 to FIFA members explaining that the new policy was prompted “by cases of attempts to facilitate qualification for a particular competition and/or the issue of a licence through the implementation at short notice of procedures permitted

⁴⁴ United States Soccer Federation Policy Manual 2017-2018, Policy 202(1)(H)-(I), at 13, available at <https://www.ussoccer.com/about/governance/bylaws>. Jeff Carlisle, *U.S. Soccer Grants NASL and USL Provisional Division II Status for 2017*, ESPNFC, Jan. 6, 2017, <http://www.espnfc.com/united-states/story/3033480/us-soccer-grants-nasl-and-usl-provisional-division-ii-status-for-2017>.

⁴⁵ Compare MLS Cup Champions, <https://www.mlssoccer.com/history/mls-cup>, and MLS Supporters’ Shield Winners, <https://www.mlssoccer.com/history/trophies/mls-supporters-shield>.

⁴⁶ *Juventus Football Club S.p.A. & A.S. Livorno Calcio v. Chelsea Football Club, Ltd.*, CAS 2013/A/3365 at 34-35, par. 139, http://www.tas-cas.org/fileadmin/user_upload/Award_3365-3366__internet_.pdf.

⁴⁷ *Id.*

⁴⁸ Paul Kennedy, *Pro-Rel to CAS: The Hurdles Proponents Face*, SOCCER AMERICA, Aug. 3, 2017, <https://www.socceramerica.com/article/74410/pro-rel-to-cas-the-hurdles-proponents-face.html>; Beau Dure, *The Probably Counterproductive Promotion/Relegation Legal Action*, DURE SPORT, Aug. 3, 2017, <https://duresport.com/2017/08/03/the-probably-counterproductive-promotionrelegation-legal-action/>; Terence D. Brennan, *Does U.S. Soccer’s League Set-up Violate FIFA Rules?*, MEDIUM, Feb. 9, 2017, <https://medium.com/@terryblaw/does-u-s-soccers-league-set-up-violate-fifa-rules-ceec15f54244>.



under company law.⁴⁹ In March 2008, when FIFA publicly announced its intent to submit the principles adopted by the Executive Committee to the FIFA Congress for approval as a new article in the regulations governing the statutes, it elaborated on its objective:

- *Concept:* Results on the pitch decide whether a club goes up or down a level in every championship around the world except in the United States and Australia, where there are “closed” leagues. Recently it has been possible to achieve promotion artificially by buying or moving a club. FIFA wishes to make sure that this cannot happen again.
- *Objective:* To protect the traditional promotion and relegation system for clubs based purely on sporting criteria – which is the very essence of football.
- *Application:* The decision was taken at the FIFA Executive Committee meeting on 15 December in Tokyo. The article will now be submitted to the Congress next May for approval and implementation as a “new article” within the rules governing the application of the Statutes.
- *Example:* In Spain, the president of fourth division club Granada bought second-flight Murcia then moved the club near to Granada, allowing Granada 74 to move up artificially into the second tier.⁵⁰

FIFA specifically acknowledged, without disapproval, that the United States and Australia had closed league systems, and specified that its objective was to protect traditional promotion and relegation systems from schemes like the one employed by the owners of Granada 74. Although it did describe promotion and relegation based on sporting merit as “the very essence of football,” it also spoke in terms of “protect[ing] the traditional” system from abusive schemes, not spreading it to the countries it had just identified as not using it.

Whether member nations voting in the FIFA Congress viewed the proposal in this way is difficult to discern. They all received the official descriptions of the proposal before the Congress convened, but that does not mean that they interpreted the language or objective in the same way. There is no official transcript of the debates over this proposal, but at least one account suggests the United

⁴⁹ FIFA Circular 1132, Dec. 27, 2007, https://resources.fifa.com/mm/document/affederation/administration/circular_1132_en_34078.pdf.

⁵⁰ *FIFA to Tackle Areas of Concern*, FIFA.COM, March 12, 2008, <http://www.fifa.com/governance/news/y=2008/m=3/news=fifa-tackle-areas-concern-709098.html>.



States was concerned about the proposal while it was being debated on the floor.⁵¹ It may be that the sentiment among at least some voters was that this would be used to require promotion and relegation, whether or not that was the intention of the drafters.

Nevertheless, the fact that FIFA has not used Article 9 to force the United States to adopt promotion and relegation since its adoption in 2008 is some evidence that the official explanation carried more weight. According to the CAS panel in *Juventus Football Club*, the “systematic interpretation of the law,” which can refer to any subsequent interpretation in applying the provision to later facts, is an additional tool in discerning the core meaning of a provision.⁵² Not only has FIFA not used Article 9 to force the United States to adopt a promotion and relegation system, but the citation of Article 9 appears to have largely been confined to the kinds of schemes used in Spain. For example, the Uganda Football Federation refused to permit the merger of a lower division club with a club in the Ugandan Super League partially on the grounds that it would permit a promotion in violation of FIFA regulations.⁵³ FIFA’s recent intervention in Australia has been characterized as an attempt to force it to adopt an open system,⁵⁴ but Australia already committed to adopt promotion and relegation at some point in the future soon after FIFA adopted the principles of promotion and relegation.⁵⁵ To the extent it is being brought up now, it is because it is symptomatic of the lack of access to seats on the nation’s football federation for lower division clubs that has led to Australia’s governance crisis and a possible solution as well.⁵⁶

⁵¹ Murray, *What Hope for Promotion and Relegation*, SBS, March 10, 2016, <http://theworldgame.sbs.com.au/blog/2016/03/10/what-hope-promotion-and-relegation>. Murray reported the following exchange took place:

At the 2008 FIFA Congress, after the promotion/relegation resolution was moved, a delegate from the United States got up to argue that no investor in fledgling leagues would put his or her money into a club that stood the risk of being relegated from the top tier after a set of bad results. He was shouted down by a delegate from another country who bellowed that football was not just about business and money.

Id.

⁵² *Juventus Football Club S.p.A. & A.S. Livorno Calcio v. Chelsea Football Club, Ltd.*, *supra* note xx, at 34, par. 139.

⁵³ *Pro-Line Academy Has Taken the Football Governing Body FUFU to Court After the Federation Failed to Sanction a Merger Between Pro-Line and Nalubaale FC*, GOAL, Sept. 18, 2009, <http://www.goal.com/en/news/89/africa/2009/09/18/1508646/ugandan-league-on-the-brink-of-collapse> (citing Article 19, which was the previous number for Article 9).

⁵⁴ *See FIFA in Australia and the American Possibility*, THE FIRST ELEVEN, Oct. 3, 2016, <http://thefirsteleven.com/fifa-in-australia-and-the-american-possibility/> (discussing and including a photo of a letter from FIFA about promotion and relegation).

⁵⁵ *Id.* Interestingly, FIFA cited that commitment, but supported the notion that it was not yet the appropriate time in Australia for promotion and relegation. *Id.*

⁵⁶ Nick Mulvenney, *Australia Governance Talks End in Deadlock as FIFA Deadline Looms*, N.Y. Times, Aug. 10, 2017, <https://www.nytimes.com/reuters/2017/08/10/sports/soccer/10reuters-soccer-australia.html>.



At least one commentator, Terence Brennan, has suggested that the problem with an interpretation concluding that Article 9 does not apply to closed leagues systems is that even if MLS could originally be classified as a closed league, it may no longer have that distinction.⁵⁷ The argument is that MLS had expanded before 2008, but never to bring in a team from a lower division. The first time a lower division team was “promoted” was in 2009 with the entry of the Seattle Sounders to the league, and since then several others have entered from lower division leagues, including most recently Minnesota United, which was not the champion in NASL the year before it started play in MLS. Brennan posits that “this process—where one team was able to leapfrog teams with better records—resembles scenarios FIFA was trying to prevent when it enacted Article 9.”⁵⁸ In effect, under this view, MLS has become an open league that does not determine participation based principally on sporting merit.

It is certainly plausible that CAS could be persuaded by this argument. U.S. Soccer, however, would likely present testimony from experts explaining that this type of league entry is characteristic of closed leagues in the United States, with the only distinction being the fact that U.S. Soccer is required to classify leagues in a divisional structure and that does not exist in other American sports leagues.⁵⁹ Perhaps bolstering this response is that CAS has previously taken notice of the difference between the European and North American systems of organizing sports leagues, referring to promotion and relegation as a key aspect of the European model as distinguished from the North American model.⁶⁰

Declaratory Judgment

A final avenue for CAS to dispose of the case is to rule that it fails the requirements for receiving declaratory relief. The Claimants have asked CAS to declare that the absence of promotion and relegation violates Swiss law on associations and Swiss compensation law, and that Article 9 mandates promotion and relegation.⁶¹ These are requests for declaratory judgments that are preconditions to all of their other prayers for relief. In other words, they are requests to resolve a legal uncertainty

⁵⁷ Brennan, *supra* note xx.

⁵⁸ *Id.*

⁵⁹ For example, the National Football League, the National Basketball Association, and the National Hockey League all expanded at one time or another by “promoting” teams from other leagues that could have been classified as “lesser” at the time. MATTHEW J. MITTEN ET AL., *SPORTS LAW AND REGULATION* 479 (3rd ed. 2013).

⁶⁰ Clubul Sportiv Municipal Ramnicu Valcea v. RFF & RFPL, CAS 2014/A/3855 12, par. 67 (2015), <https://jurisprudence.tas-cas.org/Shared%20Documents/3855.pdf>. See AEK Athens and SK Slavia Prague v. UEFA CAS 98/20 at 15, par. 21, <https://jurisprudence.tas-cas.org/Shared%20Documents/200.pdf> (noting that “it is very difficult to compare [the European football structure] to the sports structure in the United States. Not only are there in Europe no closed professional leagues such as the NBA or the NFL, but there are no collegiate competitions such as the NCAA either.”).

⁶¹ Request for Arbitration, *supra* note xx, at 22, par. 71.



about whether promotion and relegation is required under the applicable FIFA statutes and regulations, as well as under Swiss law, and, if so, whether it applies to U.S. Soccer. This is distinguished from requests to resolve a dispute about a specific decision as to whether their clubs are entitled to promotion.

The CAS is reluctant to issue declaratory judgments except where absolutely necessary. “According to well-settled CAS jurisprudence,” CAS held in *Ik-Jong Kim v. FILA*, “declaratory relief can be granted only if the requesting party establishes a special legal interest to obtain such declaration.”⁶² Indeed, under Swiss precedent on declaratory judgments that was discussed in *WADA v. Hardy & USADA*, there are several conditions that must be satisfied in order to grant declaratory relief:

According to the predominant view the prerequisites for a declaratory judgment are—in principle—threefold. According thereto the party seeking declaratory relief must show a legal interest to do so. The latter presupposes that the declaratory judgement is necessary to resolve a legal uncertainty that threatens the Claimant. According to constant Swiss jurisprudence a legal interest is missing if a declaratory judgement is insufficient or falls short of protecting the Claimant’s interests. The latter is the case—inter alia—if a party must file a further claim or request in order to obtain the judicial relief sought or if there are better or easier ways to pursue and protect the Claimant’s legal interests. Furthermore, according to the predominant view, the legal uncertainty must relate to the existence or non-existence of a claim or a defined legal relationship between the parties to the dispute.⁶³

In addition “there must be a certain urgency to resolve the uncertainty in order to protect the respective party’s right, i.e., there must be an immediate interest for solving the uncertainty now.”⁶⁴

Thus, in order for the request for declaratory relief to be admissible, the Claimants must establish that they are suffering harm from the uncertainty that can be resolved by the requested declaratory judgment and there is urgency to do so immediately. The Claimants allege that they have been deprived of “any right (and in addition of any chance) to access the ‘US premium club market,’ the ‘CONCACAF premium club market’ and the ‘FIFA premium club market.’”⁶⁵ They go on to suggest that this “causes severe financial damage.”⁶⁶

⁶² *Ik-Jong Kim v. FILA*, CAS 2013/A/3272, at 13, par. 69, <https://jurisprudence.tas-cas.org/Shared%20Documents/3272.pdf>.

⁶³ *WADA v. Hardy & USADA*, CAS 2009/A/1870 at 34-35, par. 132, <https://www.usada.org/wp-content/uploads/hardy-cas.pdf> (citations omitted).

⁶⁴ *Id.* at 35, par. 132 (citing Vogel/Spühler, *Grundriss des Zivilprozessrechts*, 8. Aufl. 2006, no 23 et seq.).

⁶⁵ Request for Arbitration, *supra* note xx, at 17, par. 50.

⁶⁶ *Id.* at par. 52.



The problem is that it is not clear that the relatively vague “principle of promotion and relegation” requested in the prayer for relief would solve that harm. Because of the flexibility to include other licensing factors under paragraph 2 in Article 9, the design of the promotion and relegation system would matter in resolving the Claimants’ concerns. Declaring that promotion and relegation is required would be insufficient. The Claimants might not meet the non-sporting merit criteria even if they were the “champion” of their respective leagues as specified in the Claimants’ prayer for relief.⁶⁷

For example, if U.S. Soccer established that in the next round of expansion MLS must select the highest placing club from the previous season that has an approved ownership group, stadium, market size, etc., and can pay the \$200 million expansion fee, it’s not clear that this would address the Claimants’ concerns about access, even though sporting merit would become a precondition to eligibility. The Claimants would need to seek additional judicial relief depending upon the paragraph 2 factors adopted by U.S. Soccer under the promotion and relegation system it adopted to determine whether it actually provided the access they seek. Indeed, the fact that the Claimants reject as merely “theoretical” the access already provided to the CONCACAF Champions League, and therefore the FIFA World Cup, via the U.S. Open Cup because “de facto and historically” only one non-MLS team has won the competition since MLS started in 1996 would likely be cited by CAS in determining that declaratory relief would be insufficient since the access would be theoretical rather than real under the Claimants’ standards.⁶⁸ Under *WADA v. Hardy & USADA*, this would mean that a declaratory judgment would fall short of protecting the Claimants’ interests and therefore they would lack the requisite legal interest in the requested declaratory relief.

Finally, even if the Claimants were able to persuade CAS that a right to promotion and relegation that might only be nominal was sufficient to address their harms, they have made no attempt to identify the urgency to address the uncertainty now with a declaratory judgment. Of course, the Claimants could certainly supplement their Request for Arbitration to do so at a later point, but it is not clear what they would say. There is nothing about the performance of the Claimants’ respective teams that would make it urgent in their cases to resolve the uncertainty about whether a promotion and relegation system is required.

Conclusion

It may come as little surprise to the Claimants that their arguments might fall on deaf ears. Their strategy all along may be to force FIFA to respond to their Request for Arbitration and thereby put promotion and relegation in the United States on the agenda. They may also hope to pressure U.S. Soccer to embrace

⁶⁷ See Kennedy, *supra* note xx (“Indeed, the likely outcome of promotion and relegation in the United States, at least between D1 and D2, would be that the ‘licensing requirements’—e.g., similar to U.S. Soccer’s sanctioning requirements or MLS’ requirement of expansion bidders—would exclude most promoted teams as things exist now.”).

⁶⁸ Request for Arbitration, *supra* note xx, at 16, par. 48 and 17, pars. 49, 51.



promotion and relegation in order to secure the 2026 World Cup in a joint bid with Canada and Mexico.⁶⁹ This, however, may be exactly why CAS is an awkward fit for this type of claim. Although CAS is useful in resolving disputes, this is as much a policy or political question as it is a legal one. Moreover, to the extent there is a legal issue present about equal access to the first division, the judicial resolution may not be to mandate promotion and relegation, but to strip international sport federations of the power to create a first division and mandate exclusive pathways for reaching that division.⁷⁰ In pursuing promotion and relegation through the courtroom, proponents may need to be careful about being hoisted by their own petard.

⁶⁹ Morocco has submitted a rival bid, which would provide a bit of leverage if FIFA chose to use it on this issue. *Morocco Challenges U.S. Joint Bid to Host 2026 World Cup*, ESPNFC, Aug. 11, 2017, <http://www.espnfc.com/morocco/story/3177030/morocco-challenges-us-joint-bid-to-host-2026-world-cup>.

⁷⁰ Cf. Nicholas Hirst, *Sports Bosses on Thin Ice in EU Antitrust Probe*, POLITICO, Aug. 15, 2017, <http://www.politico.eu/article/sports-bosses-ice-skating-antitrust-probe/> (European Commission antitrust investigation of a complaint by speed skaters regarding a ban from their governing body “could further the erosion of international federations’ power and ‘open the market’ of sports competition organization far beyond skating.”).

