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The RFC Seraing's Saga Goes on: Arbitration Clause Contained in FIFA's Statutes Held Invalid under Belgian Law

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Introduction

The Fédération Internationale de Football Association's ban ("FIFA") on Third Party Ownership ("TPO") agreements in the football field has, since its implementation, been dividing the football *aficionados*.

By way of background, such agreements, which enable a third party to provide financial resources to a player's club in exchange for the player's economic rights related to their future transfer fee, (1) have been prohibited by FIFA since 2015 "to protect the integrity of the game and the players". (2) Article 18ter of FIFA's Regulations on the Status and Transfer of Players ("RSTP") entitles FIFA to sanction such agreements. In case of a dispute, the FIFA's statutes ("Statutes") contain an arbitration clause providing for a mandatory resolution of the dispute by the Court of Arbitration for Sport ("CAS") seated in Lausanne.

In this context, Belgian state courts were seized by a Belgian football club to challenge the legality of FIFA's TPO ban. In an interlocutory decision rendered on 29 August 2018, the Brussels Court of Appeal ("Court") deciding upon its own jurisdiction over the matter, reached the conclusion that the arbitration clause enshrined in the FIFA's Statutes is overly broad and therefore illegal in the eyes of Belgian law, causing quite a stir in the football community.

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Factual background

The RFC Seraing *versus* FIFA case has been a long-winded saga that started in 2015 and which is still being played out in extra time. In July 2015, RFC Seraing, a Belgian third division football club ("Club"), concluded TPO-type agreements regarding several players in violation of FIFA's RSTP. Such violations were sanctioned by FIFA, sanctions ultimately upheld by the CAS in March 2017. A challenge was brought before the Swiss Supreme Court seeking the annulment of the award primarily on the ground of a lack of independence of the CAS. (3) As in its previous finding, in the *Lazutina* decision, (4) the Swiss Supreme Court confirmed CAS's independence in its decision 4A_260/2017 issued on 20 February 2018. (5)

In parallel to Swiss proceedings before the Supreme Court, the Club, along with its TPO investor, Doyen Sports, and other parties ("Appellants"), introduced a claim before the **Belgian state courts** against FIFA, the Union of European Football Association ("UEFA"), the International Federation of Professional Footballers ("FIFPro") and the Royal Belgian Football Association ("RBFA", or together "Respondents") in order to **annul the ban** on TPO-type agreements, claiming it notably violated EU competition law.

On 29 August 2018, the Brussels Court of Appeal rendered a new interlocutory judgement, rejecting the request for interim measures filed by the Appellants – which measures sought to suspend the application of the sanctions rendered by the CAS – as partially upheld by the Supreme Court. In this context, the Brussels Court of Appeal **confirmed its jurisdiction**, finding that the **arbitration clause contained in the FIFA's Statutes was invalid under Belgian law**.

Decision of the Brussels Court of Appeal

Defined legal relationship

After interpreting the arbitration clause contained in the Statutes, the Brussels Court of Appeal found that the arbitration exception raised by the Respondents did not apply, given that the arbitration clause **was not specific ● enough** and therefore invalid under Belgian law. In order to be valid under Belgian law, an arbitration clause must relate to a **defined legal relationship**, which element was absent in the case at hand.

The Court emphasised that arbitration is a consensual method of dispute resolution which is admitted only when parties consent to defer their dispute to an arbitral tribunal rather than to a national judge. According to Belgian law, to be valid, an arbitration agreement must also relate to a defined legal relationship, as expressed in Article 1681 of the Judicial Code. This provision sets forth (emphasis added): "An arbitration agreement is an agreement by which the parties submit to arbitration all or certain disputes which have

arisen or which may arise between them **with respect to a defined legal relationship**, whether contractual or not.” Such requirement, also found in Article II of the New York Convention, has notably to do with the right to a fair trial, as emphasised by Article 6.1 of the European Convention of Human Rights and Article 47 of the EU Charter of Fundamental Rights. As reminded by the Court, Belgian commentators consider that a “*defined legal relationship*” implies that it is not possible to “*generally provide that all disputes that may arise between two parties shall be settled by arbitration without reference at least to a defined legal relationship*”.

In view of the above, the Brussels Court of Appeal thus concluded that the arbitration clause contained in Articles 66 and 59 of the FIFA's Statutes **does not relate to a defined legal relationship and therefore is too general**. Upon this interpretation, the Court held that the arbitration clause is invalid under Belgian law. It notably indicated (emphasis added): “*Thus, submission to arbitration is generally provided for any dispute between certain parties, including FIFA, UEFA, RBFA and football clubs (i.e. RFC Seraing) but without any clarification or indication as to the legal relationship concerned. CAS arbitration is thus provided for as a means of dispute resolution for any dispute between these parties, with a general scope, save for certain provisions concerning disputes of a particular type. The intention of the drafters of the clause is clearly to address any type of dispute between the designated parties, which makes it a general clause [...]*”. It concluded that overly broad arbitration clauses are not admitted under Belgian law (emphasis added): “[such a general clause] cannot be applied because it **does not constitute an arbitration clause recognised under Belgian law**”.

P 925 ● Having exposed this, the Brussels Court of Appeal found that, when reviewing the validity of an arbitration clause, a distinction should be made between direct members of sports associations (i.e. such as national sports ● federations) and indirect members (i.e. such as RFC Seraing). The Court's conclusions should only apply to the latter.

The Respondents' arguments

The Court analysed the arguments raised by the Respondents regarding the validity of the arbitration clause contained in the FIFA's Statutes. *Inter alia*, the following arguments were raised by the Respondents and dismissed by the Court.

FIFA's contention that the arbitration clause in question would be “*implicitly limited*” as it was intended only to cover FIFA's activities and relationships with its members as covered by FIFA's Statutes was rejected by the Court. The Court stated that this argument was “[...] not sufficient to characterise a defined legal relationship. Following FIFA's position, legal entities could thus still validly agree between themselves on an arbitration clause applicable to any dispute arising between them, solely on the grounds that their activities would be limited by their statutes, which, as indicated above, is not permitted”.

The Court also dismissed FIFA's argument that such an arbitration clause would implicitly only cover “*sports disputes*” and therefore be sufficiently “*defined*”, given that the CAS could only rule on this kind of disputes. As recalled by the Court: “[...] Such a clarification is not included in the arbitration clause itself and the CAS is a third-party entity free to amend its statutes and regulations, regardless of whether the “*sporting*” nature of certain disputes would be sufficient to determine whether the clause relates to a defined legal relationship”.

Finally, the Court held that the principle of **favour arbitrandum**, as invoked, was merely a general principle which could not be used to circumvent the requirement of specificity of the arbitration clause. Accordingly, this argument was also rejected by the Court.

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Conclusion

The decision has caused a lot of ink to flow as to whether it would hinder the CAS's pivotal role in sports-related disputes. Its impact is, however, minimized by sport law practitioners such as Despina Mavromati or Antonio Rigozzi acting as Counsel for FIFA, (6) as well as by the CAS itself. In a statement released shortly after the Brussels Court of Appeal's decision, the International Council of Arbitration for Sport (“**ICAS**”) commented as follows: “[...] the problem lies only with the wording of the CAS clause in the FIFA Statutes; such drafting issue does not affect the jurisdiction of CAS globally. The Court neither expressed any objection nor reservation towards sports arbitration as a dispute resolution mechanism globally, nor criticized the CAS system. Furthermore, no CAS arbitration clauses have been declared “*illegal*” in the Brussels judgment.” (7)

While some commentators consider that this decision has the potential to serve as a precedent to defy the CAS's jurisdiction, it should be emphasised that, to this day, this decision only applies to Belgium state courts. In this context, there is a practical risk of having conflicting decisions between Belgian courts and decisions emanating from other jurisdictions (and arbitral tribunals).

Therefore, it does not appear that this decision is a radical game-changer. It provides, however, an incentive for sports federations to pay special attention to arbitration clauses in their statutes. Overly broad arbitration clauses which, in certain jurisdictions,

could be challenged, should be avoided.

This being said, with this decision, RFC Seraing has scored its first goal in this legal game, enabling it to proceed on the merits before the Brussels Court of Appeal. To be continued.

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References

- *1) Caroline Dos Santos: Lawyer, Lalive.
- 1) For recent developments as to the notion of third party see Shervine Nafissi, Players are no longer considered a Third Party according to the FIFA Disciplinary Committee, in *Football Legal*, n. 9, July 2018, <https://www.football-legal.com/content/players-are-no-longer-considered-a-third-party-according-to-the-fifa-disciplinary-committee>.
- 2) See Executive Committee says stop to third-party ownership of players' economic rights, <https://www.fifa.com/about-fifa/news/y=2014/m=9/news=executive-committee-says-stop-to-third-party-ownership-of-players-econ-2444471.html>.
- 3) Supreme Court Decision 4A_260/2017 of 20 February 2018, ASA Bull. 2/2018, p. 429.
- 4) Supreme Court Decision 4P.267/2002 (129 III 445), ASA Bull. 3/2003, p. 601.
- 5) See Supreme Court Decision 4A_260/2017 of 20 February 2018, ASA Bull. 2/2018, p. 429. Since this decision has been rendered, the independence of the CAS has been confirmed by the European Court of Human Rights, which has dismissed claims by two athletes who contended that proceedings before the CAS were insufficiently independent to be considered a fair trial. See *Mutu and Pechstein v. Switzerland*, Nos. 40575/10 and 67474/10, 2 October 2018.
- 6) See Tom Jones, Reports of CAS's death are greatly exaggerated, in *Global Arbitration Review*, 11 September 2018, <https://globalarbitrationreview.com/article/1174026/reports-of-cas%E2%80%99s-death-are-greatly-exaggerated>.
- 7) ICAS Statement regarding the case RFC Seraing / Doyen Sport / FIFA / UEFA / URBSFA, published on 12 September 2018.

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