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Brussels Court Holds Arbitration Agreement in FIFA Statutes Invalid: Final Call or Half-Time Whistle for CAS Arbitration in Sports Disputes?

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The authors write this contribution strictly in their own name.

Most arbitration laws require parties to identify in their arbitration agreement the "*defined legal relationship*" for which they wish to submit disputes to arbitration. Nonetheless, this requirement has given rise to little case law in practice. In a judgment of 29 August 2018 ("Judgment"), however, the Brussels Court of Appeal ("Court") assumed jurisdiction over a football-related dispute despite a clause providing for CAS arbitration in the FIFA Statutes, holding this arbitration clause invalid for failure to identify any defined legal relationship. While the Judgment may give rise to debates in ongoing cases, it is not expected to put CAS arbitration of future football disputes in jeopardy, provided that the shortcoming is remedied through appropriate drafting.

Background

At the heart of the dispute lies FIFA's prohibition of third-party ownership agreements ("3POs"). Under this practice, private investors acquire rights over football players to later profit from transfer fees. 3POs are controversial given their alleged links with game fixing, corruption and money laundering.

In 2015, RFC Seraing – a third division football club affiliated to the Belgian Football Federation ("URBSFA") – entered into a 3PO with Maltese company Doyen Sports Investments Limited ("Doyen Sports"). Following an investigation, FIFA fined RFC Seraing and imposed a four-year transfer ban. The decision was confirmed by FIFA's Appeal Committee. In an arbitral award dated 9 March 2017, a CAS tribunal reduced the transfer ban but confirmed all other sanctions.

RFC Seraing applied to set aside the arbitral award before the Swiss Federal Court, which dismissed the application on 20 February 2018.[1)]

In parallel, RFC Seraing and Doyen Sports started proceedings against URBFSA, UEFA and FIFA ("Respondents") before the Belgian Courts, arguing that FIFA's prohibition of 3POs is incompatible with EU Law. Respondents challenged the jurisdiction of the Belgian courts in light of the arbitration agreement in FIFA's Statutes, to which RFC Seraing had adhered through its own statutes.

In an interlocutory decision, the Court invited the Parties to address the validity of an agreement that submits any dispute without restriction to arbitration.

Decision

Belgian law – like the UNCITRAL Model Law and the New York Convention – requires the arbitration agreement to identify a "*defined legal relationship*".[2)]

By reference, *inter alia*, to the ICCA Guide, the Court explained that this requirement seeks to prevent parties from generally referring any and all disputes that may arise between them to arbitration. This requirement finds its ratio in (i) the right of access to justice (Article 6.1 ECHR, and Article 47 Charter of Fundamental Rights of the EU); (ii) party autonomy (notably the necessity to avoid that parties be surprised by the application of the arbitration agreements to disputes not anticipated), and (iii) the concern of preventing the party in a stronger bargaining position from imposing on the other party the jurisdiction of any other court.[3)]

Against this background, the Court proceeded to analyze the arbitration provisions in the FIFA Statutes.[4)] The Court considered that these provisions are drafted in very broad terms to generally submit to CAS arbitration all disputes between FIFA and "*leagues, members of leagues, clubs, members of clubs, players, officials and other association officials*", without any specification or indication of the legal relationship concerned.

The Court rejected Respondents' arguments that a limitation of the scope of the arbitration clause ratione materiae is implied by, or could be derived from, external elements. First, neither the nature of FIFA's statutes or activities, nor the fact that CAS can only be seized for sports-related disputes define a legal relationship. CAS is, moreover, an independent body that could amend its own bylaws. Further, the undertaking in RFC Seraing's statutes to comply with the "*statutes, regulations, directives, and decisions of URBFSA, FIFA, and UEFA*" would have represented the source of the duty to arbitrate, not the subject-matter of the arbitration agreement provided in FIFA's statutes. The court also recalled that the favor arbitrandum principle cannot be relied upon to deviate from a requirement provided by law. Finally, the Court rejected Respondents' analogy with arbitration clauses in bylaws of companies, which relate only to corporate law disputes between the company and its shareholders.

The Court, therefore, concluded that the FIFA statutes impose CAS arbitration as a general method of dispute resolution for any dispute between the parties, subject only to the exceptions provided for by FIFA. Absent any "*defined legal relationship*", these provisions do not constitute a valid arbitration agreement under Belgian law.

Commentary

Despite its widespread existence, the requirement of a "*defined legal relationship*" rarely gives rise to issues in practice.[5)] From this perspective, the Court's decision to hold FIFA's arbitration agreement invalid is surprising at first sight. However, upon closer examination, the Judgment raised a valid point. Three questions arise.

Why the Red Card? Far from the typical arbitration agreement, FIFA generally submits to CAS arbitration, without identifying the subject matter of the disputes submitted to arbitration. In its

2015 Statutes, "*FIFA recognizes [CAS] to resolve disputes between FIFA, Members, Confederations, Leagues, Clubs, Players, Officials, intermediaries and licensed match agent*".[6] Confederations, member associations and leagues are compelled to recognise CAS's authority and must, in turn, include a provision in their statutes or regulations to the effect that their disputes affecting leagues, clubs, plays, and officials must be settled by arbitration. Finally, these Statutes prohibit recourse to state courts even for provisional measures, unless provided otherwise by FIFA.

The Court's finding that FIFA's statutes lack any express reference to a "*defined legal relationship*" should be endorsed. It is telling that Respondents had to infer the existence of a "*defined legal relationship*" from elements external to FIFA's statutes. Furthermore, the Court's insistence on this criterion was based on widely applicable general principles of due process. It is therefore well possible that the Court's conclusion will receive following in other jurisdictions.

Why Only in Extra Time? Until the Judgment, the broad wording of the arbitration clause in the FIFA arbitration clause appears to have stayed below the radar. Moreover, the same dispute between RFC Seraing and FIFA had already been adjudicated by a CAS tribunal whose arbitral award was upheld by the Swiss Federal Court. What made the Court's review different?

In this case, the Court was faced with an arbitration exception raised by Respondents. Under Belgian law, courts in such case have to confirm that the dispute before them is the object of a valid arbitration agreement before declining jurisdiction.[7] During this analysis the Court raised the question regarding the validity of the arbitration clause in the FIFA Statutes.

The issue does not necessarily manifest itself in the same manner before an arbitral tribunal or annulment court. When neither party raises an objection to jurisdiction there seems to be little ground for an arbitral tribunal, seized with a specific dispute in which parties voluntarily take part, to raise sua sponte the issue of lack of a defined legal relationship in the FIFA statutes. Furthermore, the lack of validity of the arbitration is generally not a ground that may be raised *ex officio* by the annulment court if it has not been raised by a party.

In the parallel arbitration, the absence of a "*defined legal relationship*" was not raised before the CAS tribunal, nor was the lack of a valid arbitration agreement raised as a ground for setting aside before the Swiss Federal Court.

What's Next? As explained above, the Court only took issue with the general submission to CAS arbitration and rejected the arguments that a defined legal relationship could be implied by external elements. The Court did not rule out the ability for a football club to enter into an arbitration agreement by undertaking in its own statutes to comply with FIFA's statutes. Nor is there a reason to see an onslaught against CAS's ability to administer sports disputes, or a desire to deviate from the recent German Federal Court of Justice decision confirming the validity of arbitration agreements imposed to sports players by their federations, [8] as now confirmed by the ECHR.[9]

It is submitted that, to comply with the "*defined legal relationship*" requirement, it is sufficient for FIFA to redraft its arbitration provisions so as to expressly identify the disputes that must be submitted to CAS arbitration in the clause itself.

Conclusion

The Court rightly pointed to the existence of the requirement to identify a "*defined legal*

relationship" in arbitration agreements, as well as to its importance in light of due process rights. These principles are prevalent in most arbitration laws. FIFA's arbitration provisions can be redrafted to ensure compliance with this requirement. The Court's decision did therefore not sound the death knell of CAS arbitration as a valid forum to arbitrate football disputes. Nor did it create an earthquake like the *Bosman* ruling. As such, it may instead well constitute a wake-up call to anyone involved in drafting arbitration clauses in statutes or regulations. By contrast, the decision on the compatibility of FIFA's prohibition of 3POs with EU Law, which is still pending before the Court, may be more consequential and will surely be highly anticipated.

References

?1 Swiss Federal Court, 20 February 2018, 4A_260/2017 and "A Pyrrhic Victory for FIFA?".

?2 Article 1681 and Article 1682, § 1 of the Belgian Judicial Code ("BJC"), which adopt Articles 7 (Option II) and 8 of the Model Law, which mirrors Article II (3) New York Convention.

?3 The Court referred to the Advocate-General's Opinion in Powell Duffryn, C-214/89.

?4 In particular Articles 66 and 68 of the FIFA 2015 Statutes, which correspond to Articles 57 and 59 of the FIFA 2018 Statutes currently in force.

?5 Gary B. Born, International Commercial Arbitration, 2nd edition, Kluwer Law International, 2014, p. 295.

?6 Article 66 FIFA 2015 Statutes

?7 See M. Draye & E. Stein, "Article 1682" in M. Draye & N. Bassiri (eds.), Arbitration in Belgium – A practitioner's guide, Kluwer Law International, 2016, p. 93 at para. 22.

?8 See, "Claudia Pechstein's Challenge to the CAS", "Invalidity of arbitration agreement when lack of choice to refuse it", and "Federal Tribunal Rejects Pechstein Petition"

?9 See ECHR, Mutu and Pechstein v. Switzerland (nos. 40575/10 and 67474/10)

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