

RFC SERAING & DOYEN SPORTS V. FIFA:
CHANGING THE RULES OF THE GAME IN
INTERNATIONAL SPORTS ARBITRATION?

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I. INTRODUCTION

Third-Party Ownership (TPO) in association football¹ has generated considerable debate in recent years. TPO is a practice wherein a third party invests in the economic rights of a football player in order to receive a share of the value of any future transfer of that player.² A third party—whether an investment fund, company, private investor, or private individual—provides a club (or a player) with money in return for a percentage of a specific player’s future transfer fee. The transfer fee is the sum paid by a club to another club for signing a player still under contract, as compensation for early termination of that contract.³

While some view this as a legitimate way of financing football clubs, TPO raises many concerns regarding, *inter alia*, competition integrity, opacity of investors’ activities, risk of result manipulation, money laundering, and other criminal ac-

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1. This paper concerns association football, more commonly known as soccer in the United States. Hereinafter, this paper refers to the sport simply as “football.”

2. European Union Press Release PE 573.940, “Third-Party Ownership” of Football Players (Jan. 2016); FIFA, *THIRD-PARTY OWNERSHIP OF PLAYERS’ ECONOMIC RIGHTS* 1–2 (2016).

3. European Union Press Release PE 573.940, *supra* note 1.

tivities, as well as ethical considerations such as the question of property and trade of players' rights. These concerns led some Member States of the European Union—namely, England, France and Poland—to proscribe TPO.⁴ The Fédération Internationale de Football Association (FIFA), the world football governing body, sharing these concerns, decided to ban the practice of TPO as of May 1, 2015, in order to preserve the independence of clubs and players and to ensure the integrity of matches and competitions.⁵

In December 2014, the FIFA Executive Committee approved new provisions for inclusion in the Regulations on the Status and Transfer of Players (RSTP) concerning third-party influence on clubs and third-party ownership of players' economic rights. The text of the existing Article 18bis was only slightly amended, and now states “[n]o club shall enter into a contract which enables the counter club/counter clubs, and vice versa, or any third party, to acquire the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams.”⁶ The new Article 18ter contains the interdiction for clubs and players on entering into agreements with third parties, whereby the “third party is being entitled to participate, either in full or in part, in compensation payable in relation to the future transfer of a player from one club to another, or is being assigned any rights in relation to a future transfer or transfer compensation.”⁷ The RSTP defines the concept of a third party as “a party other than the two clubs transferring a player from one to the other, or any previous club, with which the player has been registered.”⁸

Several actors quickly challenged the legality of these regulations, including the Royal Football Club Seraing (RFC Sera-

4. EUROPEAN COMM'N, AN UPDATE ON CHANGE DRIVERS AND ECONOMIC AND LEGAL IMPLICATIONS OF TRANSFERS OF PLAYERS 39 (2018).

5. Circular No. 1464, from Jérôme Valcke, Secretary General, FIFA to the Members of FIFA, Regulations on the Status and Transfer of Players—Third Party Ownership of Players' Economic Rights (Dec. 22, 2014), https://www.fifa.com/mm/document/affederation/administration/02/49/57/42/tpocircular1464_en_neutral.pdf.

6. FÉDÉRATION INTERNATIONALE DE FOOTBALL ASSOCIATION, 2018 REGULATIONS ON THE STATUS AND TRANSFER OF PLAYERS, art. 18bis(1) (2018).

7. *Id.* art. 18ter(1).

8. *Id.* at 6.

ing, or the Club), a third division football club affiliated with the Royal Belgian Football Association (RBFA) and Doyen Sports Investment Limited (Doyen Sports), a company under Maltese law and one of the most prominent TPO providers.⁹ In this context, two sets of proceedings must be distinguished. On the one hand, RFC Seraing and Doyen Sports initiated proceedings before the Belgian courts challenging the legality of those regulations.¹⁰ On the other hand, the FIFA Disciplinary Committee sanctioned RFC Seraing for breaches of FIFA's rules regarding TPO. The Club appealed this decision to the FIFA Appeal Committee, the Court of Arbitration for Sport (CAS), and the Swiss Federal Tribunal (SFT).¹¹

Following a summary of the facts of the case, this paper begins by briefly describing the disciplinary proceedings before the FIFA Disciplinary Committee and the FIFA Appeal Committee, as well as the decisions issued by the CAS and the SFT. Next, it works to shed some light on the decision of the Brussels Court of Appeal. Although the Brussels Court's judgment appears at first sight to be limited to the drafting of the FIFA's arbitration clause, the judgment raises many other significant questions for international sports arbitration. Finally, the paper concludes with reflection on what these cases mean for TPO and the future of football.

II. BACKGROUND

On January 30, 2015, RFC Seraing and Doyen Sports entered into a TPO agreement, called the Cooperation Agreement, whereby the Club transferred to Doyen Sports 30% of the economic rights of three named players in exchange for 300 thousand euros. On July 7, 2015, RFC Seraing and Doyen Sports entered into a second agreement, the Economic Rights Participation Agreement. This agreement provided that the football club would sell Doyen Sports 25% of the economic

9. Jonas Baer-Hoffmann, *Third-Party Ownership of Football Players: Human Beings or Traded Assets?*, in GLOBAL CORRUPTION REPORT: SPORT 153, 154 (Transparency International 2016).

10. Despina Mavromati, *The Validity of FIFA's Arbitration Clauses and the Independence of the CAS: A Detailed Review of the RFC Seraing Cases*, L. SPORT (Oct. 4, 2018), <https://www.lawinsport.com/topics/articles/item/the-validity-of-fifa-s-arbitration-clause-and-the-independence-of-the-cas-a-detailed-review-of-the-rfc-seraing-cases>.

11. *Id.* The Swiss Federal Tribunal is the highest court in Switzerland.

rights of a Portuguese player for 50 thousand euros.¹² Following these two agreements, FIFA opened disciplinary proceedings against RFC Seraing for breaches of RSTP Articles 18bis and 18ter. On September 4, 2015, the FIFA Disciplinary Committee sanctioned the Club under RSTP Articles 18bis and 18ter for selling part of the economic rights of several players to a third party and entering into contracts enabling the third party to influence the Club's independence and policies in transfer-related matters.¹³ The FIFA Appeal Committee rejected the appeal lodged by RFC Seraing on January 7, 2016, and confirmed in its entirety the FIFA Disciplinary Committee decision to sanction the Club.¹⁴

On March 9, 2016, RFC Seraing appealed the decision of the FIFA Appeal Committee before the CAS. In its award of March 9, 2017, the CAS confirmed the legality of the TPO ban under E.U. freedom of movement and competition law, while holding that the Club failed to establish a violation under most of the other provisions mentioned.¹⁵ The Club then challenged the award before the SFT on the grounds that, *inter alia*, the CAS is not an independent arbitral tribunal and the

12. Nathalie Voser & Anya George, *Swiss Supreme Court Confirms Independence of CAS from FIFA*, SCHELLENBERG WITTMER (Mar. 14, 2018), https://www.swlegal.ch/files/media/filer_public/08/fb/08fbd611-59b2-407d-895c-2f3b938ff0d1/180314_nathalie_voser_anya_george_independence_of_cas_from_fifa_confirmed.pdf.

13. *Belgian Club FC Seraing Sanctioned Under Third-Party Influence and Third-Party Ownership Rules*, FÉDÉRATION INTERNATIONALE DE FOOTBALL ASSOCIATION (Sept. 17, 2015), <https://www.fifa.com/governance/news/y=2015/m=9/news=belgian-club-fc-seraing-sanctioned-under-third-party-influence-and-thi-2678395.html>.

14. *FIFA Rejects Appeal of Belgian Club Sanctioned Under Third-Party Influence and Third-Party Ownership Rules*, FÉDÉRATION INTERNATIONALE DE FOOTBALL ASSOCIATION (Feb. 22, 2016), <https://www.fifa.com/governance/news/y=2016/m=2/news=fifa-rejects-appeal-of-belgian-club-sanctioned-under-third-party-influ-2766428.html>.

15. Voser & George, *supra* note 11. The CAS Code provides that a CAS award is final and binding on the parties, subject only to judicial review by the Swiss Federal Tribunal. Awards made by the CAS, like other international arbitral awards, are legally enforceable, in accordance with the rules of International Private Law and under the provisions of the New York Convention. *Code: Procedural Rules*, TRIBUNAL ARBITRAL DU SPORT/COURT OF ARBITRATION FOR SPORT, <https://www.tas-cas.org/en/arbitration/code-procedural-rules.html> (last visited May 25, 2019).

award is contrary to substantive public policy.¹⁶ In a decision dated February 20, 2018, the SFT dismissed the appeal.¹⁷ The SFT's judgment is significant in acknowledging the independence of the CAS from FIFA for the first time. Described as "the 'sequel' of Lazutina judgment,"¹⁸ the judgment confirmed that the CAS was indeed a genuine independent arbitral tribunal and made reference to other cases, including *Pechstein*,¹⁹ to explain that such case law was well established. Moreover, the SFT considered the Club's argument regarding alleged violations of public policy inadmissible and did not explicitly address the legality of the FIFA regulations under E.U. law.²⁰ The SFT stressed, however, that CAS decisions are equivalent to judgments of state courts, since it constitutes a genuine arbitral tribunal.

16. The CAS awards can be legally challenged in the Swiss Federal Court, but only in very limited circumstances, under the provisions of Article 190(2) of the Swiss Federal Code on Private International Law. Ian Blackshaw, *ADR and Sport: Settling Disputes Through the Court of Arbitration for Sport, the FIFA Dispute Resolution Chamber, and the WIPO Arbitration & Mediation Center*, 24 MARQ. SPORTS L. REV. 1, 22 (2013).

17. Tribunal fédérale [TF] Feb. 20, 2018, 4A_260/2017 (Switz.). Since the seat of CAS arbitrations is Lausanne, the court of competent jurisdiction to hear actions to set aside CAS awards is the Swiss Supreme Court, pursuant to Article 191(1) of the Swiss Private International Law Act. Antonio Rigozzi, *Challenging Awards of the Court of Arbitration for Sport*, 1 J. INT'L DISP. SETTLEMENT 217, 220 (2010).

18. Mavromati, *supra* note 9. In the 2013 Lazutina judgment, two Russian cross-country skiers, Larissa Lazutina and Olga Danilova, challenged the independence of the CAS in the Swiss Federal Tribunal. The Swiss Federal Tribunal held that the CAS offered all the guarantees of independence and impartiality to be regarded as a real court of arbitration, even where the International Olympic Committee was a party in its proceedings. Blackshaw, *supra* note 15, at 23–24.

19. In June 2016, the Federal Supreme Court of Germany held that the CAS was a proper arbitral tribunal. Claudia Pechstein challenged this decision and brought a constitutional complaint to the Federal Constitutional Court (Bundesverfassungsgericht). On October 2, 2018 the European Court of Human Rights issued its decision in the matter *Mutu/Pechstein v. Switzerland*. The court confirmed the independence of the CAS as an arbitral tribunal, considering Article 6(1) of the ECHR. Antoine Duval, *The "Victory" of the Court of Arbitration for Sport at the European Court of Human Rights: The End of the Beginning for the CAS*, ASSER INT'L SPORTS L. BLOG (Oct. 10, 2018), <http://www.asser.nl/SportsLaw/Blog/post/the-victory-of-the-court-of-arbitration-for-sport-at-the-european-court-of-human-rights-the-end-of-the-beginning-for-the-cas>.

20. Voser & George, *supra* note 11.

III. DECISION OF THE BRUSSELS COURT OF APPEAL

Besides the disciplinary proceedings FIFA initiated, RFC Seraing and Doyen Sports each commenced several proceedings relating to the prohibition of TPO and the legality of RSTP Articles 18bis and 18ter before national courts, national competition authorities, and the European Commission. In particular, the legality of the global TPO ban has been the subject of legal challenges before the Belgian courts, including the Brussels and Liege Courts of First Instance and the Brussels Commercial Court. The dispute eventually ended up before the Brussels Court of Appeal (Brussels Court), in a case involving appellants RFC Seraing, Doyen Sports and other parties against defendants FIFA, the European Football Union (UEFA), the RBFA, and the International Federation of Professional Footballers (FIFPro). The appellants claimed that FIFA's ban on TPO violated E.U. law, whereas the defendants objected to the jurisdiction of the Brussels Court, on the basis of both the arbitration clause included in the FIFA Statutes and the rules governing the international jurisdiction of the courts.²¹

On January 11, 2018, the Brussels Court issued an interlocutory decision and reopened the debates in order to receive the parties' arguments regarding the legality of the arbitration clause, expressed in general terms, together with the interdiction to resort to state courts, and the qualification of such clause under Articles 1681 and 1682(1) of the Belgian Judicial Code.²² The Brussels Court issued another interlocu-

21. In this case, FIFA invoked a clause of arbitration "by reference," meaning that the reference in the RFC Seraing Statutes to its compliance with the FIFA Statutes, which include an arbitration clause, was supposed to constitute a valid arbitration agreement. Antoine Duval, *Seraing vs. FIFA: Why the Rumours of CAS's Death Have Been Greatly Exaggerated*, ASSER INT'L SPORTS L. BLOG (Sept. 11, 2018), <https://www.sportsintegrityinitiative.com/seraing-vs-fifa-why-the-rumours-of-cass-death-have-been-greatly-exaggerated>.

22. CODE JUDICIAIRE [C.JUD.] art. 1681 (Belg.) ("An arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which may arise between them in respect of a defined legal relationship, whether contractual or not") (New York Convention translation); CODE JUDICIAIRE [C.JUD.] art. 1682(1) (Belg.) ("The Court before which is brought a dispute that is also the object of an arbitration agreement shall declare itself without jurisdiction at the request of the party, unless the arbitration agreement is invalid with regard to this dispute or has ceased to exist.") (New York Convention translation).

tory decision on August 29, 2018, whereby the court accepted its jurisdiction, decided that it could hear the case to the extent that its effects are limited to the Belgian territory and rejected the request for provisional measures filed by RFC Seraing and Doyen Sports.²³

Regarding its jurisdiction, the Brussels Court rejected the *exception d'arbitrage* the defendants invoked on the ground that the arbitration clause does not refer to a defined legal relationship and therefore cannot be recognized as an arbitration clause within the meaning of Articles 1681 and 1682(1) of the Belgian Judicial Code. After reaffirming the arbitration's consensual nature, the Brussels Court explained that Belgian law requires the arbitration clause to refer to a defined legal relationship. This requirement is codified in Article 1681 of the Belgian Judicial Code and Article 1 of the European Convention Providing a Uniform Law on Arbitration, as well as Article 2 of the 1958 New York Convention and the International Council for Commercial Arbitration (ICCA) Guide to the Interpretation of this Convention. While the Brussels Court recognized that this requirement has rarely been a source of challenge before the courts, it is nonetheless applicable. The Brussels Court then explained that this requirement relates to the right of access to justice, based on Article 6(1) of the European Convention of Human Rights (ECHR) and Article 47 of the E.U. Charter of Fundamental Rights (E.U. Charter); respect for the will of the parties, to avoid surprising the parties with the application of the arbitration clause to disputes they had not anticipated; and even the concern that the party in a situation of greater economic power would impose a specific forum upon the weaker one.

In the present case, the arbitration clause is the result of a combination of different statutory provisions. Under Article 37 of its statutes, RFC Seraing undertakes to respect the statutes, regulations, directives, and decisions of RBFA, FIFA, and UEFA. Article 57 of the 2018 FIFA Statutes provides that "FIFA recognises the independent Court of Arbitration for Sport (CAS) . . . to resolve disputes between FIFA, member associations, confederations, leagues, clubs, players, officials, in-

23. Cour d'Appel [CA] [Court of Appeal] Bruxelles, Aug. 29, 2018, JOURNAL DES TRIBUNAUX [JT] 2018, 2016/AR/2048, 2752 (Belg.) [hereinafter RFC Seraing v. FIFA]; Mavromati, *supra* note 9.

intermediaries and licensed match agents.”²⁴ Under Article 59(1) and 59(2) of the 2018 FIFA Statutes, “[t]he confederations, member associations and leagues shall agree to recognise CAS as an independent judicial authority and to ensure that their members, affiliated players and officials comply with the decisions passed by CAS,” and “[r]ecourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations. Recourse to ordinary courts of law for all types of provisional measures is also prohibited.”²⁵ The obligation to refer disputes to the CAS is also expressed in UEFA Statutes Article 61 and RBFA Statutes Article 104.²⁶

The arbitration clause covers any dispute between a club and FIFA (per FIFA Statutes Article 59(1)) or between a club and UEFA (per UEFA Statutes Article 61), regardless of the subject matter of such disputes, and prohibits submitting such disputes to state courts, unless specifically provided for by the FIFA Statutes (FIFA Statutes Article 59(2)). According to the Brussels Court, CAS arbitration is provided as a method of settlement for any dispute between these parties. Since such a clause is general and does not include any reference to a defined legal relationship, it does not constitute an arbitration clause recognized under Belgian law, and so the Brussels Court cannot apply it.

Finally, the Brussels Court rejected the opposing parties’ arguments that the clause is not too broad, but is instead limited. The Brussels Court first did not consider sufficient the argument that the clause would only apply to disputes arising because of FIFA’s activities and decisions in the context of its purpose (*objet social*) and relations with its members and entities. The Brussels Court also dismissed the argument that the CAS only has jurisdiction over sports-related disputes, as such clarification does not appear in the clause and the CAS is free

24. FÉDÉRATION INTERNATIONALE DE FOOTBALL ASSOCIATION, FIFA STATUTES, art. 57 (Aug. 2018 ed.).

25. *Id.* arts. 59(1)–(2).

26. “The CAS shall have exclusive jurisdiction, to the exclusion of any ordinary court or any other court of arbitration, to deal with the following disputes in its capacity as an ordinary court of arbitration: a) disputes between UEFA and associations, leagues, clubs, players or officials” UNION OF EUROPEAN FOOTBALL ASSOCIATIONS, UEFA STATUTES: RULES OF PROCEDURE OF THE UEFA CONGRESS, REGULATIONS GOVERNING THE IMPLEMENTATION OF THE UEFA STATUTES, art. 61 (Feb. 2018 ed.).

to amend its statutes and regulations. The parties also could not pretend that the clause is limited because it only applies to some entities, as it must still relate to a defined legal relationship. The Brussels Court also explained that the FIFA Statutes' provision of jurisdiction of Swiss courts over certain matters confirms the general jurisdiction of the CAS. The Brussels Court rejected the parallel the parties made to the arbitration clauses inserted in articles of incorporation of a company, on the basis that the present dispute involves a club, which is not a direct member of FIFA and UEFA. Lastly, the Brussels Court clarified that the principle of *favor arbitrandum* is not a general principle of law that would allow it to circumvent the provisions of the Belgian Judicial Code.

The Brussels Court then dismissed the *exception d'incompétence internationale* that FIFA and UEFA raised, and claimed jurisdiction in this case pursuant to Article 6(1) of the 2007 Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Lugano Convention). Pursuant to Article 6(1), when there is more than one defendant, the person who should in principle be sued in the courts of his place of residence (for FIFA and UEFA, in Switzerland) may be sued in the courts of the domicile of any of the other defendants (for RBFA, in Belgium), provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. The Brussels Court held that there is connectedness between the claims against FIFA, UEFA and RBFA, but only regarding the measures that have effects in the Belgian territory. Therefore, the Brussels Court had jurisdiction on the basis of Article 6(1) of the Lugano Convention, but limited to the effects of the contested regulations in Belgium.

The Brussels Court considered that, contrary to FIFA and UEFA's allegations, RBFA was not part of the proceedings only in order to justify the jurisdiction of the Belgian courts. The Brussels Court mentioned elements demonstrating that the interest of RBFA in the proceedings is justified and not artificial, due in particular to its autonomous regulatory power, its own power of action and its intervention in the world football pyramid, comprised of both international and national organizations. Moreover, in the court's opinion, this stems from the international nature of the parties' activities and the pyramidal

structure of the game of football. In addition, this prevents a situation in which RFC Seraing and Doyen Sports would have to sue FIFA and UEFA before the Swiss courts and RBFA before the Belgian courts, leading to irreconcilable decisions.

IV. COMMENTARY

The Brussels Court, asked to rule on the legality of the TPO ban, drew noteworthy conclusions on the validity of the arbitration clause contained in the FIFA Statutes. According to the Brussels Court, the clause is too general and does not refer to any defined legal relationship. As it does not constitute a valid arbitration clause under Belgian law, it therefore cannot be applied. This decision prompted varying reactions.²⁷ In a statement dated September 11, 2018, the International Council of Arbitration for Sport (ICAS) explained that the arbitration clause in the FIFA Statutes had not been declared illegal in the judgment, the problem instead lying with its wording. Had the “specific CAS clause been more detailed, the arbitration exception would have been upheld and the Brussels Court of Appeal could have denied its jurisdiction.” In the ICAS’s view, “such drafting issue does not affect the jurisdiction of CAS globally” and the Brussels Court did not express “any objection nor reservation towards sports arbitration as a dispute resolution mechanism globally, nor criticize the CAS system.” The ICAS further highlighted that “[s]uch judgment also does not revisit the reasons expressed by the German Federal Tribunal in the case ISU/Pechstein in 2016, whose deci-

27. See, e.g., Maarten Draye & Benjamin Jesuran, *Brussels Court Holds Arbitration Agreement in FIFA Statutes Invalid: Final Call or Half-Time Whistle for CAS Arbitration in Sports Disputes?*, KLUWER ARB. BLOG (Oct. 20, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/10/20/brussels-court-holds-arbitration-agreement-fifa-statutes-invalid-final-call-half-time-whistle-cas-arbitration-sports-disputes-2> (analyzing the impact of the decision and concluding that CAS arbitration may still be a valid forum); Duval, *supra* note 20 (representing the opinion that the media has exaggerated the effect of the decision); Simon Grossobel, *Brussels Court of Appeal Challenges CAS Jurisdiction Clause in FIFA Statutes*, NAT’L L. REV. (Sept. 17, 2018), <https://www.natlawreview.com/article/brussel-s-court-appeal-challenges-cas-jurisdiction-clause-fifa-statutes> (concluding that it is “unlikely that there will be any significant movement away from the CAS”).

sion confirmed the status of CAS as a genuine independent arbitration tribunal.”²⁸

From the other side, the legal counsel of RFC Seraing and Doyen Sports expressed conclusions he drew from the judgment that contrast with the ICAS statement. In his opinion, the Brussels Court totally rejected all the opposing parties’ arguments and accepted his clients’ claims because “the arbitration clauses were unfair since they were unilaterally imposed by the federations, which were guaranteed before the CAS to play ‘at home,’” since they fund most of this “pseudo arbitral tribunal.”²⁹ He concluded that, first, the Brussels Court ruled that the entire forced arbitration system imposed by the clauses of the national and international federations violates ECHR Article 6 of the and E.U. Charter Article 47, and second, FIFA and UEFA will no longer be able to hide behind the CAS but may be sued before any judge in all countries where their regulations are effective, including through the collaboration of the national federations.³⁰ The parties’ counsel added that the illegality pronounced by the Brussels Court could be transposed to all similar clauses of all sports federations in Europe; the federations could no longer impose CAS arbitration; and the validity of many CAS awards could be called into question because CAS arbitration clauses are illegal.³¹

A close reading of the judgment of the Brussels Court of Appeal reveals an opinion closer to the ICAS stated view. Indeed, it seems that “the media has reacted rather dramatically to the decision”³² and that “most articles and comments on

28. Press Release, International Council of Arbitration for Sport, Statement of the International Council of Arbitration for Sport (ICAS) Regarding the Case RFC Seraing / Doyen Sport / FIFA / UEFA / URBSFA (Sept. 11, 2018), https://www.tas-cas.org/fileadmin/user_upload/ICAS_statement_11.09.18.pdf [hereinafter ICAS Press Release].

29. Martin Hissel, *Cour d’Appel Bruxelles : Le Recours Forcé au TAS Déclaré Illégal* [Brussels Court of Appeal: Forced Use of CAS Declared Illegal], ELEGIS (Sept. 7, 2018), <http://www.elegis.be/fr/nouvelle/cour-dappel-bruxelles-le-recours-force-au-tas-declare-illegal> (translation provided by the author).

30. *Id.*

31. Le Monde, *Football : Le Recours au TAS qu’Impose la FIFA est Illégal, Selon la Cour d’Appel de Bruxelles* [Football: FIFA’s Use of CAS is Illegal, Says Brussels Court of Appeals], LE MONDE (Aug. 31, 2018), https://www.lemonde.fr/football/article/2018/08/31/football-le-recours-au-tas-qu-impose-la-fifa-est-illegal-selon-la-cour-d-appel-de-bruxelles_5348695_1616938.html; *id.*

32. Grossobel, *supra* note 26.

this matter do not properly reflect the reasons expressed by the Brussels Court of Appeal.”³³ The Brussels Court did not address the forced nature of the CAS arbitration (as in *Pechstein*) and did not call the CAS status as an arbitral institution into question. The Brussels Court considered the clause neither illegal nor abusive, instead holding that the clause was too broad and therefore inapplicable since it did not constitute a valid arbitration agreement under the Belgian Judicial Code. Moreover, the court’s decision does not call the validity of many CAS awards—including the CAS award of March 9, 2017—into question since “CAS Panels are called to rule on their jurisdiction based on the Kompetenz-Kompetenz doctrine and on a case-by-case basis.”³⁴

The Brussels Court’s decision appears to be limited to the drafting of the arbitration clause and is a “good reminder that sports federations should draft their clauses carefully since CAS jurisdiction is neither self-evident nor automatic and should rely upon a valid—and therefore not too broad—arbitration clause.”³⁵ While it is possible that a similar judgment could be levied upon similar arbitration clauses, FIFA and UEFA, as well as other sports federations, will likely carefully redraft their arbitration clauses to make them more precise and compliant with the requirement of a defined legal relationship in order to avoid future challenges.

This is not to suggest that the Brussels Court’s decision is unimportant. It is worth noting that, unlike the SFT, the Brussels Court undertook a strict analysis of the arbitration clause. In a relevant Swiss decision, the SFT stated that in sports matters, the SFT “reviews the agreement of the parties to call upon an arbitral tribunal with some ‘benevolence’; this is with a view to encouraging quick disposition of disputes by specialized tribunals, which, like the CAS, offer adequate guarantees of independence and impartiality.”³⁶ In recent years, most of the debate around FIFA’s arbitration clause has focused on the clause’s forced nature (and if the athlete’s consent is validly

33. ICAS Press Release, *supra* note 27.

34. Mavromati, *supra* note 9.

35. *Id.*

36. Louise Reilly, *An Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes*, 2012 J. Disp. RESOL. 63, 67 (2012) (citing Tribunal fédérale [TF] Apr. 18, 2011, 4A_640/2010 (Switz.)).

given)³⁷ as well as the issue of arbitration by reference.³⁸ The decision of the Brussels Court is therefore novel in questioning the legality of the clause owing to its the lack of reference to a defined legal relationship. The judgment essentially demonstrates that, even if “there appears to be no viable alternative to this institution,”³⁹ the CAS arbitration is not above the law and remains likely to be subject to a “potential interference from national or regional civil courts.”⁴⁰

The consequence of the decision is that the Brussels Court now has jurisdiction to make a decision on the merits of the case and must therefore deliver a judgment on the legality of the TPO ban under E.U. law. Such situation may be lauded by some, but will certainly be criticized by others. Per Matthew J. Mitten, “[to] achieve the objective of a uniform, world-wide body of *lex sportiva*, a valid CAS award should bar post hoc re-litigation of the merits of the parties’ dispute under national or transnational law in a judicial forum.”⁴¹ Mitten cites the *Stanley* decision, in which the U.S. Court of Appeals for the Seventh Circuit explained that the U.S. judicial system “is not meant to provide a second bite at the apple for those who have sought adjudication of their disputes in other forums and are not con-

37. The European Court of Human Rights recognized the CAS arbitration as forced arbitration in the case of *Mutu and Pechstein v. Switzerland* (Oct. 2, 2018). Previously, the German Federal Court of Justice held that domestic courts should not hear Pechstein’s case after the CAS rejected her appeal, stating that the arbitration agreement between Pechstein and ISU was valid. *Pechstein’s Doping Ban Damages Suit Dropped by German Court*, REUTERS, June 7, 2016, <https://www.reuters.com/article/us-sport-doping-pechstein/pechsteins-doping-ban-damages-suit-dropped-by-german-court-idUSKCN0YT0U1>.

38. In its *Canas* judgment, the Swiss Federal Tribunal accepted the “arbitration by reference” for sport cases, holding that “it promotes the swift settlement of disputes, particularly in sport, by specialized arbitral tribunals that offer sufficient guarantees of independence and impartiality.” Reilly, *supra* note 33, at 67 (citing Tribunal fédérale [TF] Mar. 22, 2007, ARRÊTS DU TRIBUNAL FÉDÉRAL SUISSE (RECUEIL OFFICIEL) [ATF] 129 III 445 (Switz.)).

39. *Id.* at 81 (citing Tribunal fédérale [TF] Mar. 22, 2007, ARRÊTS DU TRIBUNAL FÉDÉRAL SUISSE (RECUEIL OFFICIEL) [ATF] 129 III 445 (Switz.)).

40. Arnout Geeraert, Michaël Mrkonjic & Jean-Loup Chappelet, *A Rationalist Perspective on the Autonomy of International Sport Governing Bodies: Towards a Pragmatic Autonomy in the Steering of Sports*, 7 INT’L J. SPORT POL’Y & POL. 473, 477 (2015).

41. Matthew J. Mitten, *Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations*, 10 PEPP. DISP. RESOL. L.J. 51, 65 (2009).

tent with the resolution they have received.”⁴² Mitten argues that “it is inappropriate to allow the merits of CAS awards to be judicially reviewed on legal grounds other than those set forth in the New York Convention or the Swiss Federal Code on Private International Law,” since this would threaten “to undermine the development of a single uniform legal regime for Olympic and international sports competition.”⁴³

As ICAS explained, the risk would be to “end up with two contradictory decisions: one issued by the Belgian courts, enforceable in Belgium only, and the original one issued by CAS (and which was confirmed by the Swiss Federal Tribunal), enforceable in the rest of the world,” since “[t]he decision of the Brussels Court of Appeal does not affect the decision issued by CAS in this matter in 2017, which remains in force.”⁴⁴ The Brussels Court, in its decision, noted that such a situation should be especially avoided in cases involving E.U. law. It reasoned that “if the appellants were under an obligation to sue FIFA and UEFA before the Swiss courts while citing the RBFA before the Belgian courts, such situation could lead to irreconcilable solutions, yet a violation of E.U. law is asserted.”⁴⁵

Moreover, FIFA has not yet commented on the interlocutory decision of the Brussels Court of Appeal. It is entirely conceivable that FIFA or UEFA will refuse to implement the forthcoming decision of the Brussels Court. In 2009, FIFA sanctioned the Swiss football club FC Sion, and both the CAS and the SFT confirmed this sanction. The club was later sanctioned by UEFA and excluded from the Europa League. In response, FC Sion filed a claim in the Swiss courts, and a Swiss cantonal court granted interim relief in FC Sion’s favour. UEFA refused to implement the court’s decision, arguing that to do so would violate its own statutes, which prohibit members from having recourse to ordinary courts.⁴⁶

However, the validity of the TPO ban under E.U. law remains disputed, particularly concerning whether the ban pursues legitimate objectives and is proportionate to those objec-

42. *Id.* (quoting *Slaney v. Int’l Athletic Amateur Fed’n*, 244 F.3d 580, 601 (7th Cir.), *cert. denied*, 534 U.S. 828 (2001)).

43. *Id.* at 66–67.

44. ICAS Press Release, *supra* note 27 (citation omitted).

45. RFC Seraing v. FIFA, *supra* note 22.

46. Reilly, *supra* note 33, at 79–80.

tives.⁴⁷ In 2015, the Spanish Professional Football League, the Portuguese Professional Football League, Doyen Sports, RFC Seraing, the former President of the FC Twente, and the Club's supporters filed complaints with the European Commission on FIFA's ban on TPO, alleging violations of E.U. competition law and fundamental rights to free movement of labor and capital. UEFA and FIFPro subsequently launched a joint legal action with the European Commission, requesting its endorsement of FIFA's ban on TPO.⁴⁸ The European Commission nevertheless decided not to initiate formal proceedings, and upheld the prohibition on TPO, noting that "potential conflicts of interests between clubs, players, and investors resulting from third-party ownership of players justify the proportionality of the absolute ban."⁴⁹

Even if the primary objective of the CAS was to "take international sports disputes out of national courts,"⁵⁰ the question remains as to whether it is appropriate to leave the assessment of the legality of the TPO ban under E.U. law exclusively in the hands of arbitrators. The SFT has jurisdiction to hear actions to set aside CAS awards, but may only do so on very narrow

47. See, e.g., Christian Duve, *Blog Symposium: Why the FIFA's TPO Ban is Justified*, ASSER INT'L SPORTS L. BLOG (Apr. 30, 2015), <http://www.asser.nl/SportsLaw/Blog/post/blog-symposium-the-justification-of-fifa-s-tpo-ban-by-prof-dr-christian-duve> (demonstrating one perspective on why the TPO ban is justified); Donnacha Egan, *One Neymar and A Coffee To Go: An Analysis of the Legality of the FIFA Ban on Third-Party Ownership with European Union Competition Law and the Free Movements of People and Capital* (June 9, 2016) (unpublished LL.M thesis, Europa-Kolleg Hamburg, University of Hamburg), <https://www.researchgate.net/publication/308120802> (maintaining that Article 18ter RSTP is disproportionate to the objectives pursued by FIFA); Pedro Henrique Rebello de Mendonça, *Third-Party Ownership Prohibition in Football and European Union Fundamental Freedoms: CAS Decision on RFC Seraing Case*, 18 INT'L SPORTS L. J. 39 (2018) (arguing that the TPO prohibition is not compatible with E.U. fundamental freedoms).

48. *European Commission Upholds Third-Party Ownership Ban*, EPSN (Oct. 13, 2017), <http://www.espn.co.uk/football/blog-fifa/story/3228435/european-commission-upholds-third-party-ownership-ban>; *UEFA and FIFPro Launch Complaint Against Third-Party Ownership*, UEFA (Apr. 1, 2015), <https://www.uefa.com/insideuefa/stakeholders/players-unions/news/new-sid=2230203.html?redirectFromOrg=true>.

49. Branislav Hock & Suren Gomtsian, *Private Order Building: The State in the Role of the Civil Society and the Case of FIFA*, 17 INT'L SPORTS L.J. 186, 197 (2018).

50. Reilly, *supra* note 33, at 63.

grounds, and rarely does so.⁵¹ The European Commission refused to make a clear pronouncement on the new FIFA regulations, and the Court of Justice of the European Union (CJEU) has not yet commented on the legality of the TPO ban. In these circumstances, it may be advisable for the Brussels Court to refer the matter to the CJEU for preliminary ruling. A unanimous CJEU decision would close the debate on the validity of the TPO ban under E.U. law. As things currently stand, however, it seems clear that the CAS today constitutes “the only instance where [the parties] can assert their rights” and bears a “heavy responsibility” as an institution.⁵² This is further evidence that the goal of making CAS a “supreme court for world sport”⁵³ is fulfilled, for better or for worse.

V. CONCLUSION

Although widely subject to commentary, the scope of the Brussels Court of Appeal in the *RFC Seraing & Doyen Sports v. FIFA* decision appears at first sight to be limited to the drafting of FIFA’s arbitration clause. However, the judgment of the Brussels Court raises many other questions and is not without significance. The Brussels Court undertook a strict analysis of the arbitration clause, as opposed to the SFT usual method, and took a new path in questioning its legality regarding its lack of reference to a defined legal relationship. Most importantly, the Brussels Court, which refused to apply FIFA’s arbitration clause and accepted its jurisdiction, will soon consider the legality of the TPO ban under E.U. law, and will perhaps take a conflicting position to that of the CAS. While it is uncertain how such a decision would be received, especially by FIFA and UEFA, it means that it could be “too soon to declare the

51. Blackshaw, *supra* note 15, at 22; Rigozzi, *supra* note 16, at 264 (“[I]t is clear that while the number of actions filed is increasing exponentially, the number of awards set aside remains very limited.”).

52. Rigozzi, *supra* note 16, at 265.

53. See Lorenzo Casini, *The Making of a Lex Sportiva by the Court of Arbitration for Sport*, in *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance* 439, 445 (Armin von Bogdandy & Ingo Venzke eds., 2010) (stating that Juan Antonio Samaranch’s idea to create a sports court that would become “the supreme court of world sport” is reported in the decision *Lazutina/Danilova* of the Swiss Federal Tribunal).

end of TPO.”⁵⁴ What seems certain, however, is that “the evolution of sports arbitration into a globalized and rather closed system” is a recent development, and its implications have not seen full explanation.⁵⁵

54. de Mendonça, *supra* note 42, at 45.

55. RFC Seraing v. FIFA, *supra* note 22.

