

FC Seraing and Doyen Sports Investments Ltd. and others vs UEFA and FIFA and others / is the compulsory arbitration before the CAS really in danger?

By a decision dated 29 August 2018 (a copy of which will be sent to any person interested, upon request by email to ca@ilf.ch), the Court of appeal of Brussels decided that the arbitration clauses contained in the bye-laws of both FIFA and UEFA are illegal and thus that FC Seraing, Doyen Sports Investment s Ltd. and others can plead before the ordinary Courts the invalidity of the prohibition of TPOs (third party ownerships).

Since that decision, commentators around the world claim that it is no longer compulsory that an athlete or a club seizes the CAS in case of dispute against FIFA and/or UEFA.

Such statements are not correct and for several reasons:

First, a decision by the Court of appeal of Brussels is not applicable internationally and especially not in Switzerland, country where it has no chance to be even used as a reference one day.

Second, in its decision above, the Court of appeal considered that the arbitration clauses were invalid because they do not specifically mention to which disputes they apply. Needless to say that in the future FIFA and UEFA will draft very precise clauses at the bottom of every regulation they have adopted or will adopt and they will circumvent the difficulty.

Third and unfortunately, the decision by the Court of appeal does not address the main problem caused by compulsory arbitration before the CAS in sport disputes. As everyone knows, the choice not to plead before State Courts must be free to be opposed to the parties to any agreement, which means that compulsory arbitration (imposed to persons or entities having no possibility to influence the content of the rules they are meant to respect, since they are not members of the international federation) is a serious breach to fundamental guarantees included in most Constitutions around the world, as well as in international Treaties such as the European Convention on Human Rights.

To date and because it has mostly been seized of appeals against a CAS award where the only argument on the merits the appellant could raise is that that such award is contrary to public policy, the Swiss Supreme Court never admitted that it was a problem that arbitration is imposed to athletes or clubs, under the pretext that it is efficient that sport disputes are pleaded before the CAS.

Therefore, in order to be able one day to question the competence of CAS on the grounds that they had no choice nor possibility to choose the ordinary Courts instead, athletes and clubs, who and which are the weak parties when opposed to an international federation, will need a precedent by an international Court such as the Court of Justice of the European Union or the European Court of Human Rights in Strasbourg. Meanwhile, compulsory arbitration before the CAS shall continue as before and the decision by the Court of appeal in Brussels, although positive, shall have no impact whatsoever.

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