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Yearbook of International Sports Arbitration 2017

Antoine Duval
Antonio Rigozzi *Editors*

Springer

Yearbook of International Sports Arbitration

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Editors

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ISSN 2522-8501 ISSN 2522-851X (electronic)
Yearbook of International Sports Arbitration
ISBN 978-94-6265-318-4 ISBN 978-94-6265-319-1 (eBook)
https://doi.org/10.1007/978-94-6265-319-1

Published by T.M.C. ASSER PRESS, The Hague, The Netherlands www.asserpress.nl
Produced and distributed for T.M.C. ASSER PRESS by Springer-Verlag Berlin Heidelberg

This T.M.C. ASSER PRESS imprint is published by the registered company Springer-Verlag GmbH, DE part of Springer Nature.
The registered company address is: Heidelberger Platz 3, 14197 Berlin, Germany

Preface

It gives me great pleasure to preface what is now the third volume in the YISA series.

The collection of writings gathered in this volume, covering the year 2017 in international sports arbitration, is once again testament to the richness of our field of interest.

The decisions commented in the following pages touch upon a range of important issues and topics, including the need for increased transparency in CAS arbitration; the scourges of match-fixing, state-sponsored doping and political interference in sports; the validity of FIFA's ban of third-party ownership, in particular vis-à-vis EU law; the protection of minors under FIFA's RSTP; the handling of ADRVs caused by incorrect medical advice; the criteria for admission as a member of UEFA, and the enforcement of CAS awards outside their country of origin, Switzerland.

The contributing authors themselves hail from different backgrounds and represent a variety of sports law and arbitration-related professions. Indeed, and like its predecessors, this volume features papers written by academics, sports federations' in-house lawyers and practitioners acting as sports counsel or arbitrators.

As an *avant-goût* of this great deal of expertise, what follows is my short overview of the articles that my co-editor Antoine Duval and I are happy to bring to our readers with this volume.

The opening piece represents in fact a leap two years into the future in relation to the contents of the remainder of the volume. We take the temporal licence of including it here in view of the overarching importance of the topic it deals with, and because today's readers, even as they flip through the pages of a volume devoted to the year 2017, will be very much aware that the then anxiously awaited ruling of the ECtHR in the *Pechstein v. Switzerland* case has now been delivered. Antoine Duval argues that a correct reading of that ruling must now lead the CAS and its governing body, ICAS, to embrace transparency to a significantly greater extent than is their current (and longstanding) practice. In the author's view, the CAS's function as the exclusive adjudicator of transnational sports disputes and the non-consensual basis of its jurisdiction can only continue to exist if it can claim the

legitimacy that comes from full compliance with the due process requirements of Article 6(1) ECHR, including publicity of its institutional governance, process and decisions. Needless to say that the *Pechstein* ruling and its impact on international sports arbitration will be examined further in the 2018 volume of the YISA.

David McArdle's contribution raises certain sensitive issues surrounding the award rendered in the doping dispute opposing the Belarus Canoe Association and members of the Belarusian men's canoe and kayak team to the International Canoe Federation (ICF). This was one of the many cases involving Meldonium that arose in the period after the substance was added for the first time to WADA's prohibited list in 2016. While the fact that WADA had put a special transitory regime in place for that substance was relevant to the Panel's decision, the more important aspect of the ruling is the fact that it annulled the sanction imposed by the ICF in breach of its own statutes and of the principle of legality. While the author agrees with the Panel's analysis and ruling, zooming out from this particular dispute, he deplores both the current state of sports and anti-doping governance under the notoriously oppressive Belarusian regime and the SGB's seeming indifference to that domestic situation.

Antoine Duval examines the CAS award that rejected Belgian club's RFC Seraing's challenge against the third party ownership (TPO) ban implemented by FIFA in 2015. This award is noteworthy for being one of the relatively few instances where a CAS Panel has conducted a thorough analysis of the disputed issues under EU law, specifically under the rules governing free movement rights and competition law. Giving effect to a principle enshrined in Article 19 of the Swiss Private International Law Act, the Panel determined that the relevant EU law provisions should be taken into account in its decision, in addition to the applicable Swiss law and FIFA regulations, in view of their status as overriding mandatory rules with a close connection to the subject matter of the dispute. As we now know, RFC Seraing went on to challenge the CAS award before the Swiss Supreme Court, arguing, inter alia, that the CAS lacks independence vis-à-vis FIFA. The Swiss Supreme Court decision, rendered in February 2018, is highly interesting and will also be covered in the next volume of the YISA.

Cem Kalelioğlu discusses the award rendered in the joint CAS appeal proceedings brought by Turkish football powerhouses Trabzonspor and Fenerbahce against each other and UEFA. In the aftermath of the match-fixing scandal that marked Turkey's Süper Lig Championship in 2010/2011, spawning numerous claims and related proceedings in disciplinary and criminal fora, the CAS Panel in this case was called to interpret UEFA's regulations on the exact disclosures to be made, in relation to such proceedings, by clubs applying to participate in subsequent UEFA Europa League Competitions. The award also dealt with the jurisdictional question of whether the parent company and majority shareholder of Fenerbahce could rely on the arbitration clause in the UEFA Statutes, to which only the club was subject, in order to substitute itself for the club as the appellant before the CAS. The decision is commendable for its clear exposition of the theory of *Durchgriff* (piercing the corporate veil) under Swiss law.

Serhat Yilmaz's article on the *Real Madrid v. FIFA* award, revolving around the requirements for the transfer and first registration of minors examines, step by step, the Sole Arbitrator's decision in ruling over FIFA's claim that Real Madrid had breached one or more of Articles 19, 19bis, 9 and 5 RSTP in connection with several players. The award provides helpful clarifications on the scope of application of some of these provisions, in particular with regard to minors under the age of 12, and on the proper construction of the concept of "organized football" and of the term "registration" in the RSTP. As is well known, cases similar to Real Madrid's were heard before and after it, with regard to FC Barcelona (in 2014) and Atlético Madrid (later in 2017), respectively. As noted by the author, of these three, Real Madrid is the only club that was able to persuade the CAS that there were grounds to reduce the sanctions originally imposed on it by FIFA.

The CAS award in the appeal brought by FIS against Norwegian cross-country skier Therese Johaug's case resulted from an inadvertent anti-doping rule violation for using, upon her doctor's recommendation, a lip cream containing a prohibited substance. Trond Solvang and Nina Lauber-Thommesen offer an insightful reading of the (majority) award, which extended Ms Johaug's period of ineligibility, causing her to miss the 2018 Winter Olympics. The central issue was the correct assessment of the athlete's degree of fault, but the authors argue that a more in-depth analysis would have been warranted with regard to the (connected) questions whether a delegation of anti-doping responsibilities should be permitted, whether it had effectively taken place, and if so, what the bearing of such delegation on the athlete's degree of fault should be. The authors also express the view the award is a missed opportunity to engage with an athlete's argument that the principle of proportionality should inform the application of sanctions under the WADA Code. More on this in the next issue of the YISA, in connection with the *Guerrero* case.

Benoît Keane's study of the award dealing with the Jersey Football Association's application for UEFA membership sets the scene by summarizing the key precedents in admission disputes, namely the cases relating to Gibraltar's applications for UEFA and FIFA membership and Kosovo's application for UEFA membership. The author highlights how not only the wording of the relevant rules but also the CAS's analysis of such rules have evolved over the years. Ultimately, both FIFA and UEFA have revised their statutes so as to incorporate the public international law definition of a country as the basis for their admission requirements, abandoning the earlier, more specific and sport-oriented definitions they used. While reliance on political reality as a starting point has the advantage of clarifying things, the difficulties in, then, satisfactorily dealing with "shifting" and/or sensitive political realities should not be overlooked, as illustrated by the very recent CAS appeal brought by the Palestinian FA against FIFA in connection with Israeli clubs based in disputed West Bank territories. Again, *affaire(s) à suivre*.

The encounter of CAS awards with domestic laws in the context of recognition and enforcement proceedings outside Switzerland has, in 2017 again, yielded interesting jurisprudence. Audrey Cech and Carlos Schneider draw our readers' attention to a decision that went relatively unnoticed, possibly because it is in

Spanish. This is the ruling of the *Audiencia Nacional* in the case brought by runner and steeplechase specialist *Marta Dominguez* against her country's Ministry of Education Culture and Sports' decision to strip her of elite athlete status as a consequence of the three-year doping ban she had received from CAS. The court found that the CAS award could not be given effect in Spain without first being recognized by the competent authorities in accordance with Spanish law. By the same token, the court clarified which authority is the competent one, within the Spanish system, with regard to CAS awards rendered in doping cases. The immediate result of the Audiencia Nacional's decision, however, was that Marta Dominguez had to be reinstated as a *deportista de alto nivel* in Spain and could thus again take advantage of the benefits attached to that status, notwithstanding her conviction for doping.

In the last chapter, continuing what can now be considered a tradition, Erika Hasler and Yann Hafner summarize the decisions rendered over the year 2017 by the Swiss Federal Tribunal (SFT) in cases involving CAS awards. As most readers of this publication will know, the SFT plays a crucial role in the functioning of the CAS, given that it has exclusive jurisdiction to hear applications for the annulment or revision of CAS awards. This year's digest of SFT case law covers a number of interesting decisions, including the Court's ruling on ex-UEFA President Michel Platini's challenge against the award that banned him from all football-related activities for 4 years.

Neuchâtel, Switzerland Antonio Rigozzi
May 2020

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General Articles

Time to Go Public? The Need for Transparency at the Court of Arbitration for Sport

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A. Duval and A. Rigozzi (eds.), Yearbook of International Sports Arbitration 2017
https://doi.org/10.1007/15757_2019_29

Abstract Has the time come for the Court of Arbitration for Sport to go public? This article argues that after the Pechstein decision of the European Court of Human Rights, CAS appeal arbitration must be understood as forced arbitration and therefore must fully comply with the due process guarantees enshrined in Article 6 (1) ECHR. In particular, this entails a strong duty of transparency with regard to the hearings at the CAS and the publication of its awards. This duty is of particular importance since the rationale for supporting the validity of CAS arbitration, if not grounded in the consent of the parties, must be traced back to the public interest in providing for the equality before the (sports) law of international athletes. Thus, the legitimacy and existence of the CAS is linked to its public function, which ought to be matched with the procedural strings usually attached to judicial institutions. In short, if it is to avoid lengthy and costly challenges to its awards, going public is an urgent necessity for the CAS.

Keywords Transparency · Court of Arbitration for Sport · Pechstein · Public hearing · European Convention on Human Rights · Lex sportiva

1 Introduction

> Without publicity all other checks are insufficient: in comparison with publicity, all other checks are of small account.[1]

The CAS has become what it was originally designed to be: a 'Supreme Court of World Sport'.[2] There are very few high profile international sporting disputes that escape its jurisdiction.[3] As sports gained in prominence in the second half of the twentieth century, so did its economic impact and social prestige, and with societal relevance came also an increasing juridification of traditionally informal processes of decision-making and dispute resolution.[4] The rapidly growing popularity of the CAS is a direct institutional consequence of this evolution. It is nowadays the beating judicial heart of a transnational regime governing international sports.[5] Nowhere is this more evident than in the anti-doping context, as Article 13.2.1 of the WADA Code endows the CAS with the ultimate competence to review anti-doping decisions involving international-level athletes.

As its name betrays, the CAS is originally rooted in arbitration law. It was conceived as an arbitral tribunal and was recognized as such by the SFT in its

[1] Bentham (1843, p. 355).

[2] This is a much-rehearsed expression, usually attributed to former IOC President Juan-Antonio Samarranch, in the literature on the CAS. See Foster (2006a, p. 13) or Maclaren (2010, p. 306).

[3] Recently, the decision of the CAS in the Caster Semenya case led to a massive public debate. See the award at CAS 2018/O/5794, *Mokgadi Caster Semenya v. International Association of Athletics Federations*, Award of 30 April 2019.

[4] Foster (2006b).

[5] On this transnational regime, see Latty (2007); Casini (2010); Duval (2013).

famous Gundel decision back in 1993.[6] Yet, as we will discuss further below, it is also a very unusual one. The CAS panels take decisions affecting the whole range of sporting actors and in particular professional athletes. Arbitrators decide on sporting life or death and can by the stroke of a pen end a career through a doping ban or saddle a football player (or her club) with a considerable debt. The CAS acts also as an administrative and constitutional court that adjudicates on who is to govern the SGBs and how. These decisions have distributive effects for the individuals and institutions involved and directly influence the policies of the SGBs. Such transnational judicial power raises necessarily the acute question of the legitimacy of the CAS.[7] If the CAS is taking distributive decisions affecting people and institutions, often without them having the choice to consent to its jurisdiction, then it needs to do so in a way that secures fundamental procedural guarantees.[8] This issue was at the heart of the recent decision of the ECtHR in the joint Pechstein and Mutu ruling (hereinafter referred to as the Pechstein ruling).[9] The present article reflects in particular on its important push for more transparency in CAS proceedings.[10] Indeed, if the CAS is functionally comparable to a court then it must also be equally accountable to the general public. While transparency is rarely deemed a sufficient condition for accountability and democratic legitimacy,[11] it is almost always considered a necessary step towards it.[12]

As will be touched upon in the first section of this article, this call for transparency at the CAS is part of a wider shift away from the entrenched confidentiality of arbitration. This shift is premised on the recognition that arbitral bodies are not only affecting the disputing parties but are exercising a form of judicial governance and impacting on the public interest. I will then show in the second section that the emphasis of the ECtHR on transparency and publicity is linked to the recognition of

[6]SFT 119 II 271.

[7]For a comparable questioning with regard to international courts, see Venzke and von Bogdandy (2014).

[8]See Cernic (2012).

[9]ECtHR, *Mutu and Pechstein v. Switzerland*, 40575/10 and 67474/10, 2 October 2018.

[10]A push immediately noted by some commentators, see Nick Di Marco, The right to a fair hearing in sports' cases: lessons from the ECtHR's decision in Mutu & Pechstein, 15 October 2018. https://www.lawinsport.com/content/articles/item/the-right-to-a-fair-hearing-in-sports-cases-lessons-from-the-ecthr-s-decision-in-mutu-pechstein. Accessed 1 November 2019, and Edith Wagner, Putting an end to forced arbitration behind closed doors: the need for a public hearing before the Court of Arbitration for Sport, 8 November 2018. https://blogdroiteuropeen.com/2018/11/08/putting-an-end-to-forced-arbitration-behind-closed-doors-the-need-for-a-public-hearing-before-the-court-of-arbitration-for-sport-by-edith-wagner/. Accessed 1 November 2019.

[11]For a relatively skeptical view on the virtues of transparency, see Baume and Papadopoulos (2015). For an even more critical perspective, see Bianchi (2013).

[12]See Peters (2015, p. 8) ["Transparency is obviously a *conditio sine qua non* for the informed consent of the governed. It is critical for uncovering abuses and defending interests. Transparency can arguably alleviate the 'democratic deficit' of global governance. But transparency in itself does not bring about democracy—it is solely a precondition for democratic procedures."]. More generally on transparency, see Peters (2013).

the non-consensual foundation of the jurisdiction of the CAS in appeal cases, before highlighting, in the third section, the various transparency deficits plaguing the CAS and suggesting pragmatic fixes to tackle them.

2 The Context: The Public Backlash Against Confidentiality in Arbitration

The academic and public debates on transparency and/or publicity in arbitration are not limited to the context of the CAS. While the attractiveness of arbitration is often premised on its reliance on confidentiality and its reputation as behind-closed-door justice, there have been strong calls for greater transparency in particular in investment arbitration but also in international commercial arbitration.

2.1 Confidentiality as a Hallmark of Arbitration

The baseline of international (commercial or investment) arbitration is confidentiality. It is also one of its main selling points.[13] The essence of arbitration is to allow for the resolution of a specific dispute between two parties who consent to taking their case out of the courts. Consequently, corporations can avoid the potential costs, in terms of reputation, of washing their dirty laundry in public and can preserve the possibility of future cooperation. In investment arbitration, states (and in particular their governments) are also interested in keeping the details of a particular instance out of the public eye, in order to limit the political consequences of a particular decision, which might translate into a heavy load on the public purse. The privacy of arbitration is thus very much entrenched in its private *raison d'être* and reflected in its operation.

In fact, the overwhelming majority of arbitral proceedings are unfolding in private, and the existence of many of them will never even be known to the public. During the proceedings interventions by interested third parties are also seldom tolerated. Furthermore, arbitral awards are in general not publicly available. Nonetheless, some arbitral institutions are providing summaries of a limited amount

[13]In the 2018 International Arbitration Survey conducted by White and Case and Queen Mary University London, 36% of the respondents considered confidentiality and privacy one of the three most valuable characteristics of international arbitration. See 2018 International Arbitration Survey: The Evolution of International Arbitration. https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-19.pdf. Accessed 1 November 2019.

of carefully edited awards,[14] and others, in particular in the context of investment arbitration, are publishing awards more systematically.[15] In general, it is therefore extremely difficult for the public, journalists or academics to assist to arbitral proceedings and access their outcomes. This lack of publicity is in recent years, especially with regard to investment arbitration, at the heart of a public backlash that has led to a progressive opening of arbitration.

2.2 *Heeding the Call for Transparency in International Arbitration*

The idea of arbitrators deciding of the financial fate of a country (and its people) in a closed hotel meeting room dominates the critical imaginary of the public backlash against trade agreements (in particular the infamous Transatlantic Trade and Investment Partnership and the Comprehensive Economic and Trade Agreement) and has led to a noticeable improvement in the transparency of investment arbitration in recent years.[16] Furthermore, this trend towards transparency has not been without effects on international commercial arbitration.

2.2.1 The Slow Turn to Transparency in International Commercial Arbitration

In most instances, international commercial arbitration involves two relatively big private companies doing business on a transnational scale. Accordingly, it can be difficult to argue that there is a compelling public interest for the case to be resolved publicly and the final award to be made accessible beyond the parties to a particular dispute. And yet, some have argued precisely that there is a strong case in favour of making international commercial arbitration more accessible to the wider public.[17] It might be true that "it remains the mainstream view that ICA cannot do without [confidentiality]"[18] or that "States and arbitral institutions are reluctant to require greater publication of awards for fear that parties will take their business

[14]For example, the International Chamber of Commerce's Digital Library provides to its paying subscribers access to extracts of 644 awards (on 20 September 2019), available at https://library.iccwbo.org/dr.htm?AGENT=ICC_HQ&AGENT=ICC_HQ. Accessed 1 November 2019.

[15]To date the International Centre for Settlement of Investment Disputes's database includes 167 published awards (on 20 September 2019) out of 332 awards issued.

[16]The Stop ISDS alliance of over 200 organisations against Investor State Dispute Settlement is currently spearheading this fight in Europe. See Stop ISDS Alliance. https://stopisds.org/alliance/. Accessed 1 November 2019.

[17]See Buys (2003), Rogers (2006) and the many authors cited in Karton (2012, p. 447). For a recent forceful call for greater transparency, see Stone Sweet and Grisel (2017).

[18]Stone Sweet and Grisel (2017, p. 228).

elsewhere",[19] yet heterodox voices are advocating greater transparency for an ensemble of complementary reasons. First, publishing awards would be a way to ensure the emergence of a relatively stable jurisprudence on which businesses could rely to increase the predictability of their commercial activities.[20] Second, publishing information on arbitrators and their awards is likely to reinforce their legitimacy.[21] Third, greater transparency in international commercial arbitration can incentivize arbitrators to render better awards, more likely to survive a potential public policy challenge in national courts.[22]

This relatively moderate push for transparency in international commercial arbitration has had some concrete effects. An increasing number of arbitral institutions have started to publish, in redacted forms, a sample of their awards.[23] However, this limited transparency comes at a steep price and is primarily aimed at the primary consumers of arbitration (corporations and their legal counsels); it hardly matches the publicity given to decisions of national courts. The urge for transparency was, however, much more pressing and transformative in the context of investment arbitration.

2.2.2 The Pressing Urge for Transparency in Investment Arbitration

Investment arbitration has been in the eye of the cyclone lately. Civil society organizations have mounted successful public campaigns to challenge the use of arbitration in investor-state disputes. They have vehemently denounced the lack of publicity of arbitral panels despite the fact that the cases handled raise strong public interests, insofar as they involve the public purse and the regulatory capacity of states. This so-called "backlash" against investment arbitration is perceived as a threat to its legitimacy and led to intense academic soul-searching and the

[19]Karton (2012, p. 448).

[20]See Karton (2012, p. 463) ["Publication of international arbitral awards would promote the systemic interest of consistency, especially since international arbitration lacks the harmonising benefits of appellate courts and universally-applicable laws."] and Ruscalla (2015, p. 12) ["Confidentiality, transparency and the establishment of a system of binding precedent are strictly connected. In fact, where decisions are not publicly available, precedents cannot develop"]; Pislevik (2018) ["[…] precedent is inherently associated with a minimum level of award publication, as the former cannot develop effectively without the latter"].

[21]Karton (2012, p. 462) ["Since dispute resolution systems have an interest in being perceived as fair in both process and outcome, they must be as transparent as possible, including by making known (at least to the parties) the reasons for judgments. Exceptions to the maxim 'justice must be seen to be done' should be limited because transparency is the most important means by which a system can demonstrate its legitimacy. Not all transparent systems are legitimate, but opaque systems are necessarily suspect."].

[22]Stone Sweet and Grisel (2017, p. 239).

[23]For example, the digital library of the International Chamber of Commerce includes extracts from 635 (on 14 October 2019) ICC arbitral awards published in the Bulletin from 1990 to date.

disbursement of considerable reformist energy in the past few years.[24] In this context, substantial criticism has been directed at the confidential nature of investment arbitration, which triggered numerous procedural reforms and institutional innovations aimed at enhancing the transparency of the arbitral process.[25] In fact, confidentiality in investment arbitration "is virtually no longer defended".[26]

Most prominently, in 2014, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (UNCITRAL Transparency Rules) entered into force and were complemented by the Mauritius Convention on Transparency.[27] The UNCITRAL Transparency Rules were previously endorsed by a Resolution of the United Nations General Assembly in 2013.[28] They apply to investor-state arbitration 'initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors ("treaty") concluded on or after 1 April 2014 unless the Parties to the treaty have agreed otherwise'.[29] Amongst others, they provide for the following transparency requirements:

- The publication of information at the commencement of arbitral proceedings, including the name of the disputing parties, the economic sector involved and the treaty under which the claim is being made (Article 2)
- The publication of a number of documents (Article 3), including:
  - The notice of arbitration, the response to the notice, the statement of claim, the statement of defence and any further written statements or submissions by the parties;
  - A table listing all exhibits to the submissions and to expert reports and witness statements;
  - Written submissions by non-disputing parties;
  - The orders, decisions and awards of the arbitral tribunal;
  - If requested, the expert reports and witness statements.
- The participation under strict conditions of third parties to the proceedings (Article 4)
- The publicity of hearings and their facilitation through specific logistical arrangements, such as video links (Article 6)
- The introduction of a publicly accessible repository of published information (Article 8)

[24]Waibel et al. (2010).

[25]As well as a massive scholarly production, see amongst many others: Mourre (2006), Boisson de Chazournes and Baruti (2015), Maupin (2013), Malintoppi and Limbasan (2015).

[26]Stone Sweet and Grisel (2017, p. 228).

[27]See in general Shirlow (2016).

[28]Resolution adopted by the General Assembly on 16 December 2013 [on the report of the Sixth Committee (A/68/462)] 68/109. United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013).

[29]Article 1(1) UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.