

World Cup Final, 90th minute, a penalty kick against international arbitration...

28 June 2018 - [by Francisco Cortez](#)

... saved! In a [recent decision of 20 February 2018](#)^[1], the *Cour de droit civil* of the Swiss federal court rejected an important and aggressive annulment request of the arbitral award of 9 March 2017 rendered, in the context of international arbitration, by the Court of Arbitration for Sport (CAS), in the case RFC Seraing v. FIFA, CAS 2016/A/4490.

The basis for the annulment request was, among others, the lack of independence of the CAS' arbitrators owing, according to the annulment request, to *Fédération Internationale de Football Association* (FIFA) being the main financier of CAS, as its "main client" – because of the upsurge of international football disputes and the mandatory arbitration provided for under the FIFA statutes –, and the loss of this important "client" could therefore influence arbitral awards to the detriment of the parties opposing FIFA.

It was a vigorous attack: the dependence on FIFA is so strong, according to the annulment request, that "unlike state judges who are protected by their judiciary status, CAS' employees and arbitrators would be directly affected in their private property if FIFA were to withdraw its membership of the CAS".^[2]

The Swiss Federal Court utterly rejected the argument in its decision of 20 February 2018, firstly, since it concluded that the CAS' financial independence cannot be called into question as the annual amount contributed by FIFA to the CAS as a litigant, of approximately 1,500,000 Swiss francs, represents less than 10% of the CAS' annual budget (16,000,000 Swiss francs), and, secondly, because it was not demonstrated in any way that the CAS has a tendency to favour FIFA in arbitration proceedings to which FIFA is a party.

However, a very important point for future consideration follows from this decision of the Swiss Federal Court: over 65% of the cases currently decided by the CAS in the context of international arbitration involve football and, even though FIFA is not a direct party to most of these, it is affected indirectly since these cases involve disputes to which continental confederations, such as the Union of European Football Associations (UEFA), or national football federations are parties. A point that clearly illustrates the

growing importance of the football business as a “client” of international arbitration and naturally of domestic arbitration too.

It is indeed very interesting to note that the RFC Seraing v. FIFA case decided by the award rendered by the CAS, challenged in the annulment request, unlike the case with traditional proceedings which opposed athletes to federations, relates precisely to the burning topic of the financing model of football clubs, i.e., the FIFA ban – from 2008 onwards but taking effect in 2015 – on ownership by third parties of the economic rights of football players – the Third Party Ownership (TPO).

The famous and controversial TPO enabled and fostered, in recent years, particularly in the Latin American and southern European (such as Spain and Portugal) markets, the development of the business of transferring football players, with major advantages for the players, the clubs and third-party financiers involved, but raising doubts regarding the transparency of the financing, the conflicts of interests involved and even the match fixing it would permit.

In the case under analysis, the CAS’ award of 9 March 2017 confirmed FIFA’s decision that ordered the club, which had violated the ban, not to register new players for three full and successive recruitment periods.

Since its creation in 1984, the CAS has been subjected to successive attacks which led to question the independence and impartiality of its arbitrators, as happened in 1992 (the Gundell case), 2003 (the Lazutina case) and 2016 (the Claudia Pechstein case), primarily on the ground of excessive influence of the International Olympic Committee (IOC) on the CAS by virtue of the funding of its budget and of the imbalance existing between the power of the international federations to appoint arbitrators to the closed list of CAS’ arbitrators in comparison to the athletes’ associations.

Despite the annulment requests having been dismissed by the various judicial courts, the CAS was forced to make extensive reforms which sought to guarantee fair arbitration proceedings and arbitrators’ independence, particularly through the CAS’ independence from the IOC, which are key conditions for the successful resolution of disputes in the world of sport by way of international arbitration, as institutionalised under the CAS.

However, this new case of RFC Seraing v. FIFA and the increasing weight of football as a supplier of

disputes to be settled through international arbitration – and of FIFA as a CAS’ “client” – demonstrate that these reforms may not have been enough and that new solutions will have to be found. However, these cannot involve increasing the contributions of the litigating parties or they will risk undermining the effective protection of the rights of less financially strong parties such as athletes.

The problem of how institutionalised international sports arbitration is funded and its growing reliance on football also affects national institutions that are dedicated to sports arbitration, since, like the CAS, it was on the basis of the national Olympic Committees that most of the sports arbitral tribunals in Europe [the *Tribunal Arbitral do Desporto (TAD)*, in Portugal, the *Tribunal Español de Arbitraje Deportivo*, in Spain, the *Chambre Arbitrale du Sport*, in France, and the *Tribunale Nazionale di Arbitrato per lo Sport*, in Italy] were created in recent decades and because, also at national level, football has taken on a predominant role.

The Portuguese case of the TAD is a good example. Created with the support of the Olympic Committee of Portugal, which is responsible by law for promoting its set-up and functioning (Article 1(4) of Law no. 74/2013, of September 6), over 30% of the TAD’s annual budget is subsidised by the Olympic Committee of Portugal (subsidy of € 88,000 in 2017).

And, like the CAS, football is the main “client” of the Portuguese TAD: the *Federação Portuguesa de Futebol* (Portuguese Football Federation) was a party to 110 of the 284 pending cases over the last four years at the TAD, while the next four of its biggest “clients” are the Portuguese Football League (58 cases) and the three largest national football clubs (Futebol Clube do Porto, with 43 cases, Sporting Clube de Portugal, with 13 cases, and Sport Lisboa e Benfica, with 10 cases). It is likely that over 85% of all the cases at the TAD are related to one single sport: football.

In the meantime, the ball keeps rolling and the millions keep rolling in. The greatest spectacle in the world is taking place this summer of 2018 in Russia – the World Cup –, where 32 national teams from around the world will play 64 football matches that will be watched by over 3.2 billion people. It is estimated that there will be a record number of over 8 billion social network interactions, including likes and comments on the posts of the 736 players who are taking part.

A magnificent spectacle which is also a global business. Will football be skilful enough to avoid the next penalty kick against arbitration, the best form invented to settle its own disputes?

[1] 4A_260/2017 of 20 February 2018.

[2] Free English translation from the original: “contrairement aux juges étatiques protégés par leur statut de magistrats, les employés du TAS et les arbitres souffriraient directement dans leur patrimoine privé, si la FIFA renonçait à son affiliation au TAS”.

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