Seraing Case: Sports Arbitration at Risk or a storm in a teacup? (1)

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On 29 August 2018 the *Cour d'appel* of Brussels rendered a decision that was widely reported as potentially causing an 'earthquake' in sports arbitration. Is that really the case?

Analysing a dispute between, among others, Doyen Sports Investments Limited ("Doyen") and the Belgian club ASBL Royal Football Clube Seraing United ("Seraing") against FIFA, UEFA and La Union Royale Belge des Sociétés de Football Association ASBBL ("ASBL"), the *Cour d'appel* decided that the clause of arbitration in FIFA's Statutes (current Articles 57 and following), that stipulates that the Court of Arbitration for Sport in Lausanne ("CAS") is competent to resolve disputes between FIFA, member associations, confederations, leagues, clubs, players, officials, intermediaries and licensed match agents, does not comply and cannot be recognized as a valid arbitration clause in accordance with Articles 1681 and 1682, first paragraph, of the Belgium *Code Juciciaire*, and Article II of the New York Convention on the Recognition and Enforcement of Arbitral Awards.

The case in dispute started with a complaint presented before the Belgian Courts by Doyen and Seraing on the validity of TPO (third party ownership) prohibition rules approved by FIFA and implemented by UEFA and ASBL. FIFA and the other Respondent parties objected to the jurisdiction of the Belgian Courts on the basis of the arbitration clause contained in Article 59 of the FIFA Statutes. However, Doyen and Seraing questioned the validity of the arbitration clause in FIFA's Statutes, claiming that such clause does not comply with the requirement of Article 1681 of the Belgium *Code Juciciaire* that is inspired by Article II, paragraph 1, of the New York Convention.

It was this latter question that, together with a request for provisional measures (to suspend the sanctions imposed by the CAS on the Belgian club for having violated the prohibition of TPO), was analysed and decided by the *Cour d'appel* of Brussels this past August.

The arbitration clause of the FIFA Statutes, specifically Article 59, 1., reads as follows:

"*The 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. The same obligation shall apply to intermediaries and licensed match agents*"

Article 1681 of the Belgium *Code Judiciaire* stipulates:

"*An arbitration clause is an agreement by which the parties submit to arbitration all disputes or some of the disputes that arose or could arise between them concerning a defined legal relationship, contractual or non-contractual.*"

In turn, Article II of the New York Convention provides as follows:

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

Analysing these provisions, the *Cour d'appel* decided that the scope of the arbitration clause in FIFA's Statutes was so broad that it went beyond a *defined legal relationship* concerning a subject matter, as it intended to grant to the CAS the power to decide all disputes with international dimension between football entities.

In order to support this conclusion, the *Cour d'appel* points out that the arbitration clause was drawn in a way that only clarifies which specific disputes (the "exceptions" in the words of the *Cour d'Appel* are the ones that comply with the *defined legal relationship* requirement of) that are out of the CAS' competence, meaning that any and all other disputes would purportedly fall into the scope of the arbitration agreement and, thus, belong to the competence of the CAS.

The *Cour d'appel* also explains why it does not accept FIFA's arguments that: (i) the arbitration clause is only applicable to the disputes regarding the activities and the decisions of FIFA that are included in its objectives and in its relationship with its affiliates; and (ii) the CAS, according to its statutes, only has competence to decide disputes regarding sports matters; and, therefore, the arbitration clause would comply with Article II of the New York Convention. When assessing these questions, the *Cour d'appel* considered instead that, for the purpose of complying with the *defined legal relationship* requirement, it

is not enough to define the scope for the arbitration clause by a sole reference to the activity (or the purpose) established in the statutes of a specific entity. In addition, the *Cour d'appel* also considered that the fact that the CAS is only competent for disputes of a *sports nature* is not enough to characterize a *defined legal relationship* concerning a subject matter, stressing that, on the one hand, said mention of the *sports nature* is not even included in the arbitration clause of the FIFA Statutes and, on the other hand, CAS's Statutes may be subject to amendment at any time, thus being able to enlarge the CAS' scope of competence to any other disputes, beyond sports matters.

This decision is, for the moment, restricted to Belgium, as it was before its courts that the question was presented and it was under Belgian law that the arbitration clause was analysed. Furthermore, this decision does not affect the previous CAS arbitral award that upheld FIFA's ruling imposing sanctions on Seraing on the basis of the breach of TPO ban. This being said, it must also be noted that Article 1681 of the Belgium *Code Judiciaire*, the provision that was on the basis of *Cour d'appel's* decision, essentially reproduces Article II of the New York Convention and, in particular, the *defined legal relationship* requirement is derived from the New York Convention and is present in the laws of many countries. In fact, a similar question was already analysed and decided in a similar way by the Spanish Supreme Court in 2005 in Roberto Hera's case. The Spanish Supreme Court concluded that a similar wide arbitration clause, contained in the Constitution of the Union Cycliste Internationale (and replicated in the statutes of the national federations), that also determines the CAS' competence was not valid, not only because it found that athletes do not have a real option to accept or reject that clause, i.e., do not voluntarily accept the arbitration agreement (an issue not reviewed by the *Cour d'appel*), but also due to its general scope, with similar arguments to those of the *Cour d'appel*.

In this context, it is very likely that this same issue is brought before Courts of other jurisdictions and it remains to be seen how such other Courts will apply this *defined legal relationship* requirement.

In the case here at stake, both Doyen and Seraing have already asked the Court (before the issuance of this decision) to submit the legal questions raised in their claims to the Court of Justice of the European Union ("CJEU"), in order for it to decide whether both the TPO' prohibition and the arbitration clause comply with European Union Law. If that happens, then, the decision to be rendered by the CJEU will certainly be a landmark in the sports arbitration system, whether it confirms or denies the validity of the system. If the CJEU reaches the same conclusions the *Cour d'appel* of Brussels and the Spanish Supreme

Court did, we may face a major change in the sports international dispute resolution system.

As for now, it is important to note that, in any event, the *Cour d'appel's* decision does not question the overall legitimacy of the CAS or the sports arbitration system, as highlighted by the International Council of Arbitration for Sports in a media release (http://www.tas-cas.org/fileadmin/user_upload/ICAS_statement_11.09.18.pdf), but rather whether the relevant arbitration agreement is properly drafted in compliance with the applicable law. Therefore, and irrespective of whether one agrees or not with the reasoning of the *Cour d'appel*, sports institutions are well advised to review carefully their arbitration agreements and, where appropriate, introduce necessary adjustments.

Finally, it should be noted that the reasoning of the Belgian Court, when stating the invalidity of an arbitration clause, does not apply, exclusively to the sports world. In fact, the decision is clear: any arbitration clause that is written in a way that intends to include within its scope all the disputes that may arise between two parties, independently of the matters that those parties have to solve, is not valid. This decision shows a restrictive view of the scope of Article II of the New York Convention and can be, if generalized, a landmark for the arbitration world, irrespective of the nature of the activity at stake.

(1) Article revised on 26 September 2018.

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