

Yearbook of International Sports Arbitration

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The Yearbook of International Sports Arbitration is the first academic publication aiming to offer comprehensive coverage, on a yearly basis, of the most recent and salient developments regarding international sports arbitration, through a combination of general articles and case notes. It is a must-have for sports lawyers and arbitrators, as well as researchers engaged in this field. It provides in-depth articles on burning issues raised by international sports arbitration, and independent commentaries by esteemed academics and seasoned practitioners on the most important decisions of the CAS and national courts.

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Editors

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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 Fenerbahçe 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 Fenerbahçe 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
May 2020

Antonio Rigozzi

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