

Yearbook of International Sports Arbitration

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.

Antoine Duval · Antonio Rigozzi
Editors

Yearbook of International Sports Arbitration 2018–2020



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Preface

This fourth volume in the *Yearbook of International Sports Arbitration* (YISA) series covers the period 2018–2020, an eventful triennium in the world of sports law and arbitration, marked as it was, in its first year, by the ECtHR’s much-awaited decision in the *Pechstein* case.¹ Although *Pechstein* may have at that time felt as somewhat of a ‘dodged bullet’ for the CAS system,² its reverberations are still perceptible today, within that system and beyond. In the aftermath of the *Pechstein* decision, the CAS Code was amended to include a new provision on the right for parties in disciplinary cases to request a public hearing;³ the ICAS’s composition, reviewed at the end of 2018, showed that more attention was being given to bolstering its independence, with the inclusion of new members having no obvious ties to the sports movement, and in significant part hailing from the international or domestic judiciary;⁴ the Swiss Supreme Court (SFT), in its capacity as the court of supervisory jurisdiction over CAS, has seen an increase in references

¹*Mutu & Pechstein v. Switzerland* (Applications nos. 40575/10 and 67474/10), Judgment of 2 October 2018, <https://hudoc.echr.coe.int/eng/?i=001-186828>.

²See Rigozzi, A. (2020). Sports Arbitration and the European Convention of Human Rights-Pechstein and Beyond. In Müller, Ch., Besson, S., Rigozzi, A. (eds), *New Developments in International Commercial Arbitration 2020*. Stämpfli, Bern, 77–130, at p. 95, available at <https://lk-k.com/wp-content/uploads/2020/12/RIGOZZI-in-M%C3%9CLLER-et-al.-Eds-New-Developments-in-Intl-Comm.-Arb.-2020-2020-Sports-Arb.-ECHR-Pechstein-beyond-pp.-77-130-1.pdf>. Accessed 22 November 2022; Rigozzi, A. (2022). *Claudia Pechstein v. Court of Arbitration for Sport: Advantage CAS? Football Legal n. 17*, Special Report, June 2022, <https://lk-k.com/wp-content/uploads/2022/07/RIGOZZI-Claudia-Pechstein-v.-Court-of-Arbitration-for-Sport-Football-Legal-17-2022-pp.-108-119.pdf>. Accessed 22 November 2022.

³Amended Article R57(2) CAS Code, introduced in January 2019; see Duval, A. (2019). Time to Go Public? The Need for Transparency at the Court of Arbitration for Sport. In: Duval, A., Rigozzi, A. (eds) *Yearbook of International Sports Arbitration 2017*. Yearbook of International Sports Arbitration. T.M.C. Asser Press, The Hague. https://doi.org/10.1007/15757_2019_29.

⁴CAS Media Release of 28 December 2018, Composition of the International Council of Arbitration for Sport (ICAS) for the Period 1 January 2019–31 December 2022, available at https://www.tas-cas.org/fileadmin/user_upload/ICAS_media_release_-_ICAS_2019-2022.pdf. Accessed 22 November 2022.

to Article 6(1) ECHR in the applications for annulment brought before it since the issuance of the *Pechstein* ruling;⁵ and the German courts, it turns out, are not done grappling with that same case, since the *Bundesverfassungsgericht*'s reversal, in June 2022, of the German Supreme Court's decision that had previously upheld the validity of CAS arbitration—meaning that the *Oberlandesgericht München* will now rehear part of the case.⁶ The ECtHR itself has, since *Pechstein*, received more applications against Switzerland arising from CAS arbitrations.⁷

In parallel to the (still) unfolding effects of the *Pechstein* saga, the CAS's docket has continued to grow, as is shown most recently in the ICAS Annual Report and Financial Statements 2021,⁸ with football disputes consistently representing a large share of incoming cases.

The importance of football and its law is reflected in this volume's table of contents. Part I features a thorough review, by **Antoine Duval**, of the CAS's jurisprudence on the various iterations of the FIFA Code of Ethics, examining the cases that resulted, *inter alia*, in the downfall of the highest executives in the sport, from Sepp Blatter to Michel Platini, Jérôme Valcke to Ricardo Terra Texeira, and Ahmad Ahmad and several others. The second chapter in Part I is **Christopher Flanagan**'s extensive study of UEFA's Financial Fair Play Rules and the role played by CAS jurisprudence in their development.

Part II then opens with a contribution relating to the 'other' (i.e., American) football, namely **Yann Hafner**'s commentary of the CAS award that put an end to a tumultuous contest for the IFAF Presidency in the *Tommy Wiking* case.

Co-authors **Antoine Duval** and **Pedro José Mercado Jaén** then critically examine the sensitive *Palestine Football Federation v. FIFA* award, relating to FIFA's handling of the PFA's ill-fated application for member status in 2017. In the following chapter, **Howard Jacobs**, **Katlin Freeman** and **Aaron Mojarras** discuss the controversial case of *José Paolo Guerrero v. FIFA* and *WADA v. Guerrero & FIFA*, which cast a stark light on the lack of room, under CAS case law, for proportionality considerations in the application of the 2015 WADA Code. Yet another football dispute is covered in **Madalina Diaconu**'s chapter on the *Samir Arab v. UEFA* award, dealing with the case of an U21 player entangled in a notorious match-fixing network. And staying in the football context, **Carol Etter** analyzes the CAS's decision in the *Paris Saint-Germain and Neymar v. UEFA* case, which dealt with the determination of the appropriate sanction for the use of abusive language by a player on social media, in the context of a match. In Part III, which

⁵Cf., in the period under review, SFT decisions 4A_438/2018 of 17 January 2019, 4A_54/2019 of 11 April 2019, 4A_248/2019 & 4A_398/2019 of 25 August 2020 [*Semenya*], 4A_268/2019 of 17 October 2019, 4A_486/2019 of 17 August 2020 [*Trabzonspor*].

⁶BVerfG, Order of the Second Chamber of the First Senate of 3 June 2022-1 BvR 2103/16, https://www.bundesverfassungsgericht.de/erfk20220603_1bvr210316gen.html. Accessed 22 November 2022.

⁷Cf., e.g., *Valcke v. Switzerland*, Application no. 57476/19; *Semenya v. Switzerland*, Application no. 10954/21.

⁸https://www.tas-cas.org/fileadmin/user_upload/ICAS_Annual_Report___Financial_Statements_2021.pdf, pp. 16–17. Accessed 22 November 2022.

covers the decisions rendered by domestic courts in various jurisdictions, **Despina Mavromati** discusses the SFT's decision in *Trabzonspor et al. v. Turkish Football Federation, Fenerbahçe & FIFA*, a matter resulting from the well-known and much-litigated 2010–2011 match-fixing scandal in Turkey, which also provided an illustration of the ripple effects of the ECtHR's *Pechstein* ruling in CAS arbitration, given that one of the grounds relied upon by Trabzonspor for challenging the award was the denial by CAS of its request for a public hearing. Finally, football cases (including Trabzonspor and the SFT limbs of the Guerrero saga) also represent the lion's share of the more than 50 decisions summarized in **Yann Hafner, Riccardo Coppa** and **Erika Hasler**'s digest of the SFT's case law for the period 2018–2020.

Other salient topics in international sports law and arbitration were at stake in the remainder of the CAS awards covered in Part II. The *Fédération Royale Belge de Gymnastique v. FIG & Japan Gymnastics Association* award, commented by **Jan Kleiner**, decided a dispute in connection with the Belgian and Japanese gymnastics federations' competing bids to host the 2023 World Championships of Artistic Gymnastics. **Giulio Palermo** and **Panagiotis Kyriakou** then discuss the first CAS award in the famous *WADA v. Sun Yang & FINA* dispute, a case that featured the first CAS public hearing post-*Pechstein* and raised numerous procedural challenges, including the handling of protected witnesses. In the following commentary, **Rosmarijn van Kleef** considers the interesting dispute in the matter of *International Surfing Association (ISA) v. International Canoe Federation (ICF)*, where the CAS was asked to determine which federation should be the international governing and administering body for the sport of stand-up paddle. **Marjolaine Viret**'s chapter on the 2020 *Blake Leeper v. IAAF* award examines the thorny issues arising in cases involving the use of prosthetic aids by disabled athletes. Finally, in addition to the *Mutu & Pechstein v. Switzerland* ECtHR decision, which is discussed in this volume by **Richard Lungstras**, Part III features **Björn Hessert**'s study on the *Behrens and Tillmann v. Deutscher Volleyball-Verband* case—yet another German domestic ruling dealing with the issue of athletes' forced consent to sports arbitration, and again one arising in the wake of the ECtHR's *Pechstein* decision.

This overview confirms that the law and practice of sports arbitration remains a vibrant, evolving field and a fascinating subject to study. It also highlights, once more, the pivotal role played by the CAS in this field, as the supreme adjudicator and interpreter of the applicable laws and regulations, but also the responsibilities weighing on CAS arbitrators, the CAS itself, and Switzerland, as the juridical seat of CAS arbitrations, in cases where so much can be at stake—in commercial, societal, ethical, and political terms, as well as for the livelihood, health, dignity, and human rights of the individuals concerned.

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