

## National Law in International Sports Disputes

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*The law applying to a (sports-related) dispute can often be the decisive factor in the outcome of such a dispute. Nevertheless, and despite its critical importance, the applicable law is also an element that is quickly overlooked by the respective parties and, most unfortunately, the parties' representatives and/or lawyers. This situation happens all the more frequently in international sports law disputes where the regulations of international bodies, such as FIFA and World Anti-Doping Agency (WADA), are often deemed to have an unchallengeable status. The focus of this article is not on providing a summary of which laws can, theoretically, be applied in each kind of international sports-related dispute.<sup>1</sup> Rather, its emphasis is on two practical cases whose outcomes were or could have been totally different depending on the (non-) application of specific national laws.*

### Company X v. Football Club A

This dispute relates to the transfer of a Serbian football player from Serbian Football Club A to Belgian Football Club B in the summer of 2013. The transfer fee for this move was comprised of both (i) a fixed amount of EUR 5,000,000 and (ii) 20% of the added value in the event of a subsequent transfer from Football Club B to a third club. In this context, a service agreement was signed between Company X and Football Club A, in which Company X, through its players' agents,<sup>2</sup> provided legal, administrative and technical assistance to Football Club A

relating to the transfer. Company X's remuneration for providing these services was calculated as an amount of 10% of the transfer fee received by Football Club A from Football Club B. The facts used in this article are based on a public Belgian case regarding this dispute. Nevertheless, further details about the relevant CAS proceedings are protected by the confidentiality provided in R43 of the CAS Code.<sup>3</sup> For this article's purpose, it is sufficient to state that the main dispute revolved around the (non-) payment of this remuneration to Company X regarding the Serbian football player's transfer.

The fees that Company X is now claiming from Football Club A are exclusively based on the

service agreement both parties had concluded in 2013. A prerequisite for awarding these fees to Company X is therefore that the service agreement is valid and legal. As such, the agreement has to comply with all applicable laws. Given the international elements of this case (*i.e.* a Serbian club, a Belgian club, a Serbian player, an English company [Company X]), defining the applicable law is a task that requires, to say the very least, careful consideration. More important, carefully defining the applicable law(s) is likely to determine the outcome, as will be shown.

A first instinct in international football disputes is usually to look at the relevant FIFA Regulations. The service agreement dates from the summer of 2013, at a time when the FIFA Players' Agents

<sup>1</sup> Such an article was already implemented in the previous edition of Football Legal, *i.e.* L. FERRER DE ROBLES, "Applicable law in Sport-related Disputes and the influence of Swiss Law", *Football Legal*, December 2015 edition, 129-132.

<sup>2</sup> The agreement predated the FIFA Regulations on Working with Intermediaries and so this article refers to them as *agents* (rather than the current *intermediaries*).

<sup>3</sup> Code of Sports-related Arbitration, latest edition in force as from 1 January 2016  
[www.tas-cas.org/fileadmin/user\\_upload/Code\\_2016\\_final\\_en.pdf](http://www.tas-cas.org/fileadmin/user_upload/Code_2016_final_en.pdf)

Regulations<sup>4</sup> were still in force. Indeed, these Regulations can and should be applied to the service agreement to determine its validity. As such, the validity can be tainted by, for example, issues with the licence of the agent<sup>5</sup> or by non-fulfilment of the minimum requirements of the representation contract.<sup>6</sup> Going through all requirements imposed by these Regulations on the service agreement would be, at first, to go beyond the scope of this article and would, secondly, not be particularly interesting given the replacement of these Regulations by the new FIFA Regulations on Working with Intermediaries<sup>7</sup> that apply to future agreements and have changed the system thoroughly by entrusting the regulation of the intermediary market to national associations. What needs to be remembered for future intermediary agreements is that the FIFA Regulations on Working with Intermediaries and, more importantly, the national regulations implementing these FIFA Regulations, are applicable and can affect the validity of such agreements.

As indicated in the introduction, checking the compliance with FIFA Regulations, as described in the previous paragraph, is where this process often stops for the parties in a dispute and, in some cases, even for the legal representatives of these parties. Clearly this would be a mistake,

given that the regulations of a private entity like FIFA can, by no means, put a stop to the application of national laws that usually apply to such agreements. In the event of a conflict between a FIFA rule and a national labour law provision, priority must be given to the latter.<sup>8</sup> Also, even when parties have contractually agreed that their agreement is to be governed by certain national laws and/or regulations, this fact does not *ipso facto* mean that other national laws do not also apply to that particular contract. Indeed, some national laws are considered as crucial to a legal system, so that they cannot be set aside, not even by mutual agreement.<sup>9</sup> These laws are commonly referred to as laws of *public policy*. It should be noted that it is impossible to execute CAS awards that violate these national laws of public policy (by not applying them (correctly)) on the basis of the New York Convention.<sup>10</sup> This is one of the main reasons why CAS should take into account these national laws with a public policy character, in addition to the provisions imposed by international regulations and the laws chosen by the parties.

It is precisely such a law of (Belgian) public policy that is

extremely relevant for the service agreement concluded between Company X and Football Club A. As a side note, it must be said that even when Football Club A would not be able to stop the enforcement in Serbia of a CAS award by relying on Belgian public policy, this Belgian law of public policy should nevertheless be taken into account by a CAS Panel when it assesses the merits of the dispute. Indeed, a Brussels' Ordinance dated 14 July 2011 and issued by the Brussels Capital Region (the "*Ordinance*"), which partially converts an EU Directive<sup>11</sup> into national law, specifically states that it applies to the activity of placing and recruiting professional athletes on Brussels' territory.<sup>12</sup> Therefore, an important question for applying the Ordinance is whether the services provided by Company X were indeed rendered on Brussels' territory. Without going into detail, it seems at least defensible that this situation was indeed the case as the whole transfer operation took the Serbian football player to Football Club B, a club on Brussels' territory, and this step required, without any doubt, negotiation with Football Club B regarding both the transfer and employment terms. As such, the Ordinance seems to apply to the service agreement and the CAS Panel ought to apply it accordingly.

<sup>4</sup> [www.fifa.com/governance/agents/players-agents/regulation.html](http://www.fifa.com/governance/agents/players-agents/regulation.html)

<sup>5</sup> Art. 5 and further FIFA Players' Agents Regulations

<sup>6</sup> Art. 19 and further FIFA Players' Agents Regulations

<sup>7</sup> These regulations came into force on 1 April 2015 [www.fifa.com/mm/Document/AFFederation/Administration/02/36/77/63/RegulationsonWorkingwithIntermediariesII\\_Neutral.pdf](http://www.fifa.com/mm/Document/AFFederation/Administration/02/36/77/63/RegulationsonWorkingwithIntermediariesII_Neutral.pdf)

<sup>8</sup> See, for example, S. VAN DEN BOGAERT, *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman*, Kluwer, 2005, p. 282

<sup>9</sup> See, for example, CAS 2013/A/3395 Anderson Luis de Souza Deco v. CBF at paragraph 49. This principle has been confirmed and commented on extensively in legal doctrine.

<sup>10</sup> Art. V.2 (b) of the New York Convention stipulates that "[Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:] The recognition or enforcement of the award would be contrary to the public policy of that country". The New York Convention is available at [www.newyorkconvention.org/english](http://www.newyorkconvention.org/english). See also G. Kaufmann-Kohler and A. Rigozzi, *International Arbitration: law and practice in Switzerland*, Oxford University Press, 2015, par. 8.249 and further

<sup>11</sup> Directive 2006/123/EC of 12 December 2006 on services in the internal market <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32006L0123&from=NL>

<sup>12</sup> Art. 3, 1°, a) of the Ordinance of 14 July 2011 concerning the mixed management of the employment market in the Brussels Capital Region, a Dutch version is available at [www.ejustice.just.fgov.be/cgi/loi/change\\_lg.pl?language=nl&la=N&cn=2011071417&table\\_name=we](http://www.ejustice.just.fgov.be/cgi/loi/change_lg.pl?language=nl&la=N&cn=2011071417&table_name=we)

At first, the Ordinance foresees a prior registration of sports agents' activities.<sup>13</sup> The requirements for this prior registration are, in essence, not too hard to fulfil and the registration is valid for an indefinite period of time. Nevertheless, the registration is a prerequisite to be allowed to render sports agents' services as it triggers a set of obligations for the registered agent that are intended to limit abusive behaviour. For example, the agent must ensure that he or she will respect specific Belgian laws regarding employment conditions, social security, taxes and privacy.<sup>14</sup> Furthermore, the prior registration guarantees the necessary competence of the agents by imposing experience and/or education requirements.<sup>15</sup> In this specific case, as neither Company X nor any of its agents were duly registered in accordance with the Ordinance and were, consequently, not allowed to render sports agents' services on Brussels' territory, the service agreement concluded between Football Club A and Company X seems to have manifestly violated the Ordinance. Taking into account that this Ordinance has a public policy character, it further seems that the validity of the service agreement is untenable and that all obligations arising from the agreement, including the payment of compensation from Football Club A to Company X, do not have any legal basis. This is a clear example of a situation where

the application of national (public policy) laws, next to the FIFA Regulations, can have a crucial and decisive effect on the outcome of a case.

### **>> The application of national (public policy) laws, next to the FIFA Regulations, can have a crucial and decisive effect on the outcome of a case**

In such international disputes involving parties with different nationalities and obligations being performed in different countries, it is important to always double-check which of the relevant national laws could potentially apply to the dispute and not just checking the applicability of only international regulations such as the FIFA Players' Agents Regulations.

#### **WICKMAYER and MALISSE**

This case, while specifically concerning doping in tennis, also demonstrates the importance of national laws in the world of sports in general and, therefore, in football as well. *WICKMAYER* and *MALISSE* are two professional tennis players who were sanctioned with a one-year ban by the Flemish Doping Tribunal<sup>16</sup> on 5 November 2009 for not complying with their whereabouts obligations.<sup>17</sup>

More specifically, *MALISSE* did not provide his whereabouts in accordance with the applicable regulations twice and missed one control and *WICKMAYER* did not provide her whereabouts three times. As a consequence, both players had three strikes within a timeframe of 18 months, which was considered a doping violation and punishable with a ban from one up to two years. While technically both players had indeed gathered three strikes and so should have been banned, in total accordance with the WADA Code,<sup>18</sup> in the end both avoided any suspension by basing their arguments on the applicable national (Belgian) law.

While the WADA Code is the first instrument that comes to mind in the light of the battle against doping, it is not on the basis of this piece of legislation that athletes and/or clubs are usually sanctioned. The WADA Code basically sets out the principles of most anti-doping programmes worldwide, and is further incorporated and applied by the regulations of (inter)national sports federations and by national laws.<sup>19</sup> Even when most federations and countries adopt a textually near-identical regulation or law, athletes and/or clubs are not punished on the basis of the WADA Code, but on the basis of the incorporated version. In the cases of *WICKMAYER* and *MALISSE*,

<sup>13</sup> Art. 15-16 of the Ordinance

<sup>14</sup> Art. 17 of the Ordinance

<sup>15</sup> Art. 21 of the Decree of the Government of Brussels of 12 July 2012 regarding the execution of the aforementioned Ordinance, a Dutch version is available at [www.eijustice.just.fgov.be/cgi\\_loi/chan\\_ge\\_lg.pl?language=n&la=N&cn=2012071239&table\\_name=wet](http://www.eijustice.just.fgov.be/cgi_loi/chan_ge_lg.pl?language=n&la=N&cn=2012071239&table_name=wet)

<sup>16</sup> Belgium is a federal state in which doping (and sports) is a competence of the regional authorities.

<sup>17</sup> Decision of the Flemish Doping Tribunal of 5 November 2009, unpublished

<sup>18</sup> Edition of 1 January 2015 available at [www.wada-ama.org/en/resources/the-code/world-anti-doping-code](http://www.wada-ama.org/en/resources/the-code/world-anti-doping-code)

<sup>19</sup> In football, both FIFA Anti-Doping Regulations ([www.fifa.com/mm/document/affederation/administration/02/49/28/61/circularno.1458-fifaanti-dopingregulations\\_neutral.pdf](http://www.fifa.com/mm/document/affederation/administration/02/49/28/61/circularno.1458-fifaanti-dopingregulations_neutral.pdf)) and UEFA Anti-doping Regulations ([www.uefa.org/MultimediaFile/Download/EuroExperience/uefaorg/Anti-doping/01/96/66/07/1966607\\_DOWNLOAD.pdf](http://www.uefa.org/MultimediaFile/Download/EuroExperience/uefaorg/Anti-doping/01/96/66/07/1966607_DOWNLOAD.pdf)), as well as national laws can be relevant.

both athletes were suspended on the basis of (i) a Decree of 13 July 2007<sup>20</sup> and (ii) various Implementation Decrees.<sup>21</sup> *WICKMAYER* and *MALISSE* tried to fight their suspension through, on the one hand, a variety of national procedures and, on the other hand an appeal procedure at CAS (both the athletes and WADA appealed the decision).<sup>22</sup> In this regard, it is also worth noting that the athletes tried to suspend the CAS decision pending the various national proceedings. CAS, however, held, in an interim decision, that these pending national proceedings did not force CAS to suspend its own decision. This view was confirmed by the Swiss Federal Tribunal.<sup>23</sup>

Despite CAS's refusal to wait for the national decisions to be issued and to take these decisions into account when taking its final decision, it was other Belgian proceedings that eventually determined the outcome of the appeal before CAS. Two Council of State judgments declared an implementation Decree of the Secretary General of 17 December 2008 null and void because this Decree contained provisions that went further than a pure implementation of the Decree of 13 July 2007 regarding ethical and medical sportsmanship and that these

provisions should therefore have been implemented by a Decree issued by the Flemish government, which was not the case.<sup>24</sup> As this implementation Decree contained the specific provisions that formed the basis of *WICKMAYER* and *MALISSE*'s respective suspensions, there was *de facto* no legal basis left to suspend the athletes after these Council of State judgments. Clearly, WADA shared this view and consequently withdrew its appeal against both athletes. In the appeal procedures launched by the athletes, CAS ruled that the parties had reached a *tacit agreement* on the non-validity of the decision of the Flemish Doping Tribunal and consequently the decision was annulled in its entirety. As such, both athletes avoided any suspension.

This case demonstrates that looking at all the possibilities in national law (including at national procedures concerning the validity of the national legislation on which basis a sanction was imposed) could result in a completely opposite outcome compared to simply accepting the alleged dominance of both international regulations (WADA Code) and international proceedings (CAS Appeal Procedure).

## **Final note and conclusion**

The two cases described in this article are clear examples of the importance of national law and national procedures in international sports-related disputes. Many more concrete examples can be given, but the conclusion in the majority of them will be the same: the regulations of (international) sports federations do not exclude the application of national law. On the contrary, in the event of a conflict between them, priority must be given to national law. This conclusion leads to the unavoidable fact that, to be a qualified football lawyer, it is not sufficient to know every detail about FIFA's, UEFA's (and other confederation's) and national federation's regulations. While this point may seem self-evident, the reality shows that it is not.

## **>> The regulations of (international) sports federations do not exclude the application of national law**

The importance of national law is also confirmed by the FIFA Regulations themselves. For example, Article 17.1 of the FIFA Regulations on the Status and Transfer of Players<sup>25</sup> explicitly refers to "*the law of the country concerned*" to determine the compensation that becomes

<sup>20</sup> Decree of 13 July 2007 regarding medical and ethical sportsmanship, a Dutch version is available at [www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=nl&la=N&table\\_name=wet&cn=2007071363](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=2007071363)

<sup>21</sup> Such as the Implementation Decree of the Secretary General of 17 December 2008, a Dutch version is available at [http://reflex.raadvst-consetat.be/reflex/index.reflex?page=chrono&c-detail\\_get&d=detail&dodid=1119388&tab=cervs](http://reflex.raadvst-consetat.be/reflex/index.reflex?page=chrono&c-detail_get&d=detail&dodid=1119388&tab=cervs)

<sup>22</sup> CAS 2009/A/1994 and 1995 Xavier Malisse and Yanina Wickmayer v. Vlaams Doping Tribunaal; CAS 2009/A/2020 and 2021 WADA v. Vlaams Doping Tribunaal, VTV, Xavier Malisse and Yanina Wickmayer

<sup>23</sup> SFT 13 February 2012, 4A\_428/2011

<sup>24</sup> CoS 15 February 2012, judgment 218.000 and CoS 15 February 2012, judgment 218.001. Both judgments available, in Dutch, at [www.raadvst-consetat.be](http://www.raadvst-consetat.be)

<sup>25</sup> October 2015 edition is available at [http://resources.fifa.com/mm/document/affederation/administration/02/70/95/52/regulationsstatu-sandtransfer\\_2015\\_e\\_v051015\\_neutral.pdf](http://resources.fifa.com/mm/document/affederation/administration/02/70/95/52/regulationsstatu-sandtransfer_2015_e_v051015_neutral.pdf)

due when an employment contract of a football player is terminated without just cause. Despite such a clear and direct reference, an analysis of previous breach of contract cases learns that national law is only very rarely a decisive element in the calculation of compensation. One of the evident reasons for this finding is that the decision-making bodies (*i.e.* FIFA DRC and CAS) are not familiar with the applicable national law. It is precisely for this reason that it is all the more crucial that the parties' lawyers are experts on these national laws and that they describe them extensively and step-by-step in their submissions, rather than, sometimes randomly, throwing in a reference to a national provision that may or may not be beneficial to their case, while reasoning that these decision-making bodies do not know what the provision is about. FIFA DRC Judges and CAS Arbitrators are competent people that may indeed not be familiar with the national laws referred to, but they will follow logical and correct reasoning concerning such laws, as long as this reasoning is presented to them in a complete and comprehensive way. Contrary to what critics tend to state, CAS also checks the legality, validity and/or applicability of sports regulations. A very clear, recent example of such checking has been the *MUTU* case, in which the Italian clubs, *Juventus* and Livorno, opposed the English club, *Chelsea*, and where the (mainly non-Swiss) CAS Panel applied detailed and complex Swiss Law on the interpretation of regulations to reach their

conclusion on Article 14.3 of the FIFA RSTP, 2001 edition.<sup>26</sup>

In summary, it is important to always keep in mind that the regulations of (international) sports federations are regulations of private entities. While sometimes these regulations are sufficient to solve disputes, most cases also require the application of superior legal sources such as national laws. •

<sup>26</sup> CAS 2013/A/3365 and 3366 Juventus FC and Livorno Calcio S.p.A. v. Chelsea FC