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Double Hatting, Sports Arbitration and Article 6(1) ECHR: A Recent Decision by the Paris Court of Appeal

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On 8 June 2021, the Paris Court of appeal (CoA) rendered an interesting decision dealing with the issue of so-called "double hatting" in sports arbitration. The issue of double hatting can no longer arise with respect to proceedings before the Lausanne-based Court of Arbitration for Sport (CAS), as Article S18(3) of the Code of Sports-related Arbitration (CAS Code) explicitly provides, since its 2010 edition, that "CAS arbitrators and mediators may not act as counsel or expert for a party before the CAS". The Paris CoA's decision is notable as it concerned annulment proceedings brought against an award rendered by the *Chambre Arbitrale du Sport* of the French National Olympic Committee (CAS-CNOSF), an institution that, like the CAS, requires that arbitrators be appointed from a closed list, but, at the relevant time, did not bar lawyers on that list from acting as party representatives in CAS-CNOSF proceedings.

The dispute at the origin of the challenged award had arisen from a sports agency contract concluded in 2015 between Serge Aurier,[1)] a professional football player of Ivorian nationality (the Player), then playing in France, and Sports Management International SA (SMI), a Swiss-incorporated company (the Agency contract). The Agency contract provided for the CAS-CNOSF's jurisdiction to resolve disputes between the parties. In August 2017, when he was with Paris Saint-Germain, the Player terminated the Agency contract, and, shortly thereafter, he signed an employment contract with the English club Tottenham Hotspur FC. In February 2018, SMI filed a request for arbitration with the CAS-CNOSF, seeking the payment of fees under the Agency contract.

A three-member Tribunal was constituted under the CAS-CNOSF Rules then in force. During the arbitration, SMI requested that Mr Aurier's counsel be precluded from representing him, as she was on the CAS-CNOSF list of arbitrators. That request was rejected.

The CAS-CNOSF Tribunal issued its Award on 21 January 2019, dismissing most of SMI's claims.

SMI filed an application for the annulment of the Award before the Paris CoA in February 2019, on the ground that the CAS-CNOSF Tribunal's independence and impartiality and the regularity of its constitution had been compromised by the fact

that the Player was represented by a lawyer who was also on the CAS-CNOSF list of arbitrators. SMI relied *inter alia* on the guarantee of the right to a fair trial under Article 6(1) of the European Convention on Human Rights (ECHR).

Before ruling on the merits of the application, the CoA dealt with two preliminary objections raised by the Player, who challenged both the admissibility of the application and the admissibility of the ground for annulment relied upon by SMI.

Admissibility of the Application for Annulment

The Player argued that SMI had incorrectly initiated the proceedings under Article 1492 of the French Code of Civil Procedure (CPC), which governs the annulment of French domestic awards, when in reality the arbitration at hand was international.

As is well known, the distinction between domestic and international arbitration under French law is based solely on an economic criterion, namely whether the "interests of international trade" are implicated in the underlying dispute (Article 1504 CPC). Contrary to the criteria adopted by other dualist laws of arbitration (e.g. Swiss law), the parties' domiciles or places of incorporation are not relevant in this respect.

In this case, the CoA noted in particular that i) the object of the Agency contract, which was governed by French law and registered with the French Football Federation, was to facilitate the conclusion of employment contracts exclusively with French clubs and in accordance with the French Professional Football League's requirements; ii) at the time the Agency contract was concluded, the Player was and had been employed by French clubs for several years, and iii) even though SMI had a Swiss bank account, no monetary transfers had been made to that account (§§24-27).

Accordingly, the CoA ruled that the Award had been rendered in a domestic arbitration and dismissed the Player's objection.

Admissibility of the Ground for Annulment Relied Upon by the Applicant

The Player argued, *inter alia*, that by agreeing to submit the dispute to arbitration, SMI had waived its rights under Article 6(1) ECHR, including the right to have its claims heard by an independent and impartial tribunal (§29).

The CoA dismissed this objection in two paragraphs. First, it affirmed that "[*a*]*lthough the [ECHR] is binding on States and does not directly bind arbitrators, it is for the court hearing the application to set aside an arbitral award to ensure, within the scope of its review, that the award made by the arbitrators does not infringe any of the guarantees protected by Article 6(1) [ECHR] that the parties have not validly waived*" (§35, free translation).

Then, it held that "*the mere fact of submitting the dispute to an arbitral tribunal as provided in an arbitration clause, and of referring the dispute to the [CAS-CNOSF],*

cannot be regarded as a waiver of the right to challenge the impartiality or independence of an arbitrator" (§36, free translation).

Merits of the Application for Annulment

Turning to the merits, the CoA stated that the question to be addressed was *"whether the mere fact that [M.], counsel for one of the parties is on the [CAS-CNOSF] list of arbitrators constitutes a circumstance that is likely to create reasonable doubt in the minds of the parties as to the independence or impartiality of the arbitral tribunal*" (§43, free translation).

In answering this question in light of the applicable standards of independence and impartiality (§§44-45), the CoA noted, in characteristically brisk prose, that SMI had agreed to arbitrate under the rules of the CAS-CNOSF, which did not prohibit [M.] from acting as a party representative, which in turn was why the CAS-CNOSF had rejected SMI's request to forbid [M.] from representing the Player. As an aside, the CoA observed that granting the request would also have affected the Player's right to choose his lawyer. SMI, the CoA noted, had raised the fact that the Tribunal was composed of three members, as requested by the Player and against its wish for a sole arbitrator, but then failed to put forward any elements supporting the existence of a "dependence relationship" between the members of the Tribunal and [M.], or suggesting that the Tribunal's ability to decide the case in an impartial manner was affected by the circumstance that [M.] was counsel to one of the parties (§§46-49). The CoA concluded that the latter circumstance alone could not, in and of itself, be deemed to create reasonable doubts as to the impartiality and/or independence of the Tribunal (§50), and thus dismissed the application.

Was the Arbitration Domestic or International?

Although it seems oblivious to the fact that the transfer market for football players of Mr Aurier's level is intrinsically transnational in nature, the CoA's decision appears to be in line with the well-established French case law interpreting Article 1504 CPC, seeking as it does to determine whether, in the context of the parties' relationship, there had been "any cross-border transfer" of goods, persons or money. Be that as it may, had the Court found that the arbitration was international instead of domestic, its ruling on the admissibility of the application would likely have been the same, given that the ground invoked by SMI (irregular constitution of the tribunal) is available for both domestic and international arbitrations. Similarly, if the case had been governed by the Swiss *lex arbitri*, the Swiss Supreme Court would have deemed the action admissible even if it was based on the wrong (but inconsequential) assumption that the arbitration was domestic and not international (or viceversa), given that the ground invoked is (also) the same under both regimes.[2)]

The CoA's Reasoning on the Applicability of Article 6(1) ECHR

The most interesting part of the decision concerns the other objection to admissibility raised by the Player, namely the argument that, by agreeing to arbitrate, the parties had waived the applicability of Article 6(1) ECHR. As just noted, in rejecting this argument, the CoA affirmed that "*it is for the court hearing the application to set aside […] to ensure, within the scope of its review, that the award […] does not infringe any of [Article 6(1) ECHR's guarantees] that the parties have not validly waived*". On its face, this statement (which is not further developed in the decision) could be taken to mean that compliance with the fundamental guarantees of the ECHR constitutes a separate ground for annulment, independent from the grounds provided by the *lex arbitri*. If this was indeed what the CoA meant, then the solution is different from the **Swiss Supreme Court's approach**, which invariably requires that applicants relying on Article 6(1) ECHR's guarantees establish in which way an infringement thereof amounts to a violation to one of the (exhaustive) grounds for annulment under Article 190(2) PILA (or Article 393 Swiss CPC for domestic arbitrations).

It is also striking that the CoA did not refer to the ECtHR's most relevant case law on this specific issue, in particular the *Mutu & Pechstein* decision (see also here and here). In *Mutu/Pechstein*, the ECtHR held that in cases like the present one, where the arbitration is not mandatorily provided for by the applicable sports rules, limitations of the guarantees of Article 6(1) ECHR contained in the applicable arbitration rules can be valid if they are "free[ly], lawful[ly] and unequivocal[ly]" agreed to (§ 96). It is submitted that silence on a particular issue in the rules (here the absence of an explicit prohibition of double hatting) is not "unequivocal", and that the CoA was thus correct in rejecting the Player's objection to admissibility. Conversely, one could argue that the fact that the CAS-CNOSF Arbitration Rules explicitly set out (in Article 20) that the proceedings are confidential, means that the parties must be deemed to have unequivocally waived their right to a public hearing pursuant to Article 6(1) ECHR.

Double Hatting and the Importance of Appearances

As to whether the fact that a party was represented by counsel who happened to be on the closed list of arbitrators is in and of itself a ground to set aside the award for lack of independence and impartiality, the CoA's approach is sensible. It requires a demonstration that, in the specific circumstances of the case, such double hatting can "*create reasonable doubt in the minds of the parties as to the independence or impartiality of the arbitral tribunal*". This cannot be ruled out for instance if being on the list of arbitrators of a particular institution can create a strong sense of community between arbitrators. Notwithstanding the CoA's decision, it is submitted that the CNOSF was well inspired to amend the CAS-CNOSF Arbitration Rules to expressly prohibit double hatting, as it did in December 2020. This will avoid future challenges and strengthen the perception that CAS-CNOSF's Tribunals act with independence and impartiality: as was also emphasized by the ECtHR in *Mutu/Pechstein*, appearances are important when "what is at stake is the confidence which the courts in a democratic society must inspire in the public" (§143).

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References

↑1 While the Player's name is anonymized in the decision, the chronology of events and the indication of the clubs he was employed by allow for his identification.

↑2 Gabrielle Kaufmann-Kohler & Antonio Rigozzi, International Arbitration – Law and Practice in Switzerland, OUP, 2015, para. 8.17 (the ground of "irregular constitution of the tribunal" is available under both Article 190(2)(a) PILA and Article 393(a) Swiss (CPC)).

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