



Arbitration CAS 2007/A/1363 TTF Liebherr Ochsenhausen v/ETTU, award of 5 October 2007

Panel: Mr Stephan Netzle (Switzerland), Sole Arbitrator

Table tennis

Disciplinary sanctions against a club

Standing to sue of another club

Interpretation of rules and regulations of an association

Definition of “playing season”

Purpose of a rule restricting the transfer of athletes during the playing season

Principle of legality and predictability of sanctions

1. **A club substantially affected by an allegedly incomplete sanction imposed on another club has a valid legal interest to appeal against the decision.**
2. **By interpreting rules and regulations of associations, the starting point and the predominant element of construction is the wording (literal interpretation). Other elements such as the systematic context, the purpose and the history of the rule may contribute to the correct understanding of the meaning of the rule. This principle is accepted in both civil and common law and it has been constantly applied by CAS panels.**
3. **In common speech, the expression “playing season” is used to describe the period between the first and the last match of a certain championship.**
4. **Sports associations restrict the transfer of athletes during the playing season to ensure the quality and integrity of the competition as well as the stability of the teams. Such restrictions also safeguard the contractual stability between athletes and clubs. However, while sporting reasons may justify a restriction during ongoing competitions, no such justification can be seen in a post-competition blocking period. There are material concerns as to whether such a blocking period would be compatible with the athletes' fundamental right to labour mobility and contractual freedom.**
5. **The principle of legality and predictability of sanctions requires a clear connection between the incriminated behaviour and the sanction and calls for a narrow interpretation of the respective provision.**

The Appellant is a German table tennis club whose athletes compete at European level.

The Respondent is the European governing body for table tennis. It runs the Men's European Champions League (ECL), a competition for the sixteen best European table tennis clubs. Its constitutional objectives are, among others, (the number refers to article A 1.4.1 of the Constitution of the ETTU, Edition August 2007):

(f) to organise and conduct 'European' table tennis events (competitions, tournaments, etc.) and to authorise the organisation of such events.

Between September 2006 and May 2007 the Respondent organised the 2006/2007 edition of the ECL. The competition was organised and conducted in accordance with the "Men's European Champions League Regulations".

The Appellant participated in the ECL 2006/2007, starting in group B.

After the preliminary rounds, the Appellant reached the quarter final, which was played in two rounds. On 7 January 2007, the Appellant played against the Belgian club Royal Vilette Charleroi (Charleroi) and won the first round with the score 3:0.

On 12 January 2007, Charleroi won the second round against the Appellant with the score 3:0. One of Charleroi's team members was the Chinese player Ching Li. Due to a better record of the single matches, Charleroi reached the semi-finals and finally won the ECL 2006/2007 on 5 May 2007.

After the final of the ECL 2006/2007 Mr. Li Ching left Charleroi and played for the Club "Haitian" in the Chinese Super League beginning on 9 June 2007 and ending on 12 September 2007.

This information was passed to the Respondent by another German table tennis club, TTV Gönnern, on 10 June 2007.

On 4 July 2007, the Club Competition Official (CCO) fined Charleroi EUR 5'000 for a violation of article G.15.6 of the ECL Regulations which prohibits a player from competing for different organisations under the jurisdiction of the ETTU in the same playing season. The CCO reasoned that (i) Charleroi had not intended to violate the ECL regulations, (ii) when the matches were played in the ECL, the player was eligible to play and (iii) only after the ECL was finished, had he played for another club. Therefore, only a fine, but no change of the match results or ban from participating in next year's tournament was imposed.

On 13 July 2007 and 25 July 2007, the Appellant together with three other German table tennis clubs filed a protest against the decision of the CCO with the Respondent's Board of Justice (Board of Justice). The Appellant requested that the result of all matches played by Charleroi during the ECL 2006/2007 be amended to reflect a 0:3 loss for Charleroi, and that the Appellant be declared as a semi-finalist of the tournament.

On 8 August 2007, the Appellant asked the Executive Board of the Respondent (Executive Board) for admission to the ECL 2007/2008.

On 13 August 2007, the Executive Board decided that it would not deal with the Appellant's application before the Board of Justice had decided on the Appellant's protest.

On 31 July 2007, the Board of Justice dismissed the protest of the Appellant and the three other German clubs and, only on 17 August 2007, informed the Appellant accordingly.

On 21 August 2007, the Appellant filed an appeal against the decision of the Board of Justice with the Respondent's Board of Appeal (Board of Appeal).

On 29 August 2007, the Board of Appeal upheld the decision of the Board of Justice.

By letter dated 6 September 2007, the Respondent's counsel informed the Appellant that the Executive Board had rejected the Appellant's request to participate in the 2007/2008 ECL edition in a telephone conference of 5 September 2007. The letter referred to article G.3.2 of the ECL Regulations and stated that *"there is no legal possibility to comply with your application according to the ETTU Regulations. In Regulation G.3.2 it is mentioned that no more than 4 clubs of the same Association are entitled to participate in the Champions League."* It was revealed during the hearing at the CAS that the Respondent had already admitted four German clubs to the ECL 2007/2008.

On 7 September 2007, the first round of the 2007/2008 edition of the ECL was played. The Appellant's team did not participate.

On 27 August 2007, the Appellant submitted its Statement of Appeal and a request for provisional measures to CAS.

In its Statement of Appeal, the Appellant submitted the following (provisional) requests for relief:

- (1) *Each match of the quarter finals of the ECL 2006/2007 between the Appellant and Royal Vilette Charleroi TT (Charleroi) is rescored with a win of 3:0 for the Appellant. In case this is not possible, the Respondent shall be obligated to rescore each match of the quarter-finals between the Appellant and Charleroi.*
- (2) *The Appellant is declared to be semi-finalist of the ECL 2006/2007. In case this is not possible, to obligate the Respondent to declare the Appellant to be semi-finalist of the ECL 2006/2007.*
- (3) *By cancelling the Appellants right to take part in "ETTU - Cup 2007/2008, the Respondent is obligated to let the Appellant participate in the ECL 2007/2008 and*
 - *to give the Appellant an appropriate time limit of no less than 7 working days for submitting any missing forms (entry forms, etc.) including a proof of having paid the complete entry fee,*
 - *to redraw the groups of the ECL 2007/2008 in consideration of the Appellant or to draw the Appellant in one of the existing groups,*
 - *to redo the schedule of the ECL 2007/2008 in consideration of the participation of the Appellant,*
 - *to let the Appellant participate in the games of the ECL 2007/2008 in terms of the modified schedule including the Appellant and to take its results in the official list of results.*

By letter dated 30 August 2007, the Appellant forwarded a copy of the decision of the Board of Appeal to the CAS, together with additional arguments to be considered as a combined statement of appeal and appeal brief.

In its correspondence dated 30 August 2007, the Appellant further requested the following (provisional) measures:

- (4) *The decision of the Board of Appeal of the Respondent from 29 August 2007, is to be set aside,*
- (5) *The Respondent bears the costs of the arbitration procedures.*

The Appellant bases its claim on articles G.8.5 and G.15.6 of the ECL Regulations. Article G.8.5 says that a player shall compete only for one club in the period between the day before the first match of a season until June 30th. A violation of article G.8.5 leads to the sanctions listed as set out in article G.15.6. The CCO *may* disqualify the club from all competitions under the jurisdiction of the ETTU, and *may* ban the club for one or two seasons and impose a fine up to (EUR) 5000. But the CCO has no choice but to declare that the team of such a player will lose all matches of the current playing season by 3:0. The explicit use of the word "*will*" (instead of "*may*") demonstrates that the regulations grant the CCO no discretion when it comes to the rescoring of the matches. Therefore, when the CCO learned that Charleroi's Mr. Li Ching played in the Chinese Super League before June 30th, 2007, the quarter final-matches of Charleroi should have been rescored by 3:0 for the Appellant. Consequently, the Appellant would have won the quarter-finals, reached the semi-finals and become automatically eligible for the ECL 2007/2008.

By email dated 16 January 2007, the Respondent explicitly reminded Charleroi and the other semi-finalists to comply with articles G.8.5 and G.15.6 of the ECL Regulations.

The fine of EUR 5000 indicates that the CCO must have assumed that article G.8.5 had been violated by Charleroi. However, it appears that the CCO failed to impose the correct sanctions as provided by article G.15.6.

In a similar case during the Women's Table Tennis European Champions League 2005/2006, all matches of the clubs TV Busenbach and Linz AG Froschberg were declared lost by 3:0 when it appeared that at the same time, some of the players had also played in Japanese and Chinese leagues.

The fact that the competition has already begun and four other German table tennis clubs have been admitted cannot prevent the Respondent from still admitting the Appellant to the ECL 2006/2007 at this stage. The Respondent decided not to comply with the Order on provisional measures and let the matches start without the Appellant's team. It is therefore up to the Respondent to find a reasonable solution for the re-integration of the Appellant's team.

It is not the primary objective of the Appellant to replace or eliminate another team already admitted to the ECL 2007/2008. It rather proposes to exceptionally continue the ECL with 17 clubs. Under these very particular circumstances, article G.3.2 of the ECL, which allows only 4 teams from one member association to participate in the ECL, should be disregarded. Anyway, the financial and sporting disadvantages of the Appellant because of the exclusion from the ECL

2007/2008 overbalance the mere organisational complications of the Respondent by accepting a seventeenth club to the ECL 2007/2008.

On 30 August 2007, the Respondent wrote to the Court Office: *"I was informed that the appellant asks for provisional measures. We don't agree to those proceedings as we need time to prepare our defence"*. The Respondent was invited by the Court Office to submit a written brief before the hearing but decided not to do so.

On 6 September 2007, the Deputy President of the Appeals Arbitration Division issued an Order on provisional measures and admitted *"the request for provisional measures filed by the TTF Liebherr Ochsenhausen on 27 and 29 August"*. The Order did not cause the Respondent to admit the Appellant to the ECL 2007/2008. No further judicial steps to enforce the Order were taken by the Appellant.

On 10 September 2007, the Appellant asked for an expedited procedure and the appointment of a sole arbitrator.

By letter dated 12 September 2007, the Respondent informed the Court Office that he would *"anyway not take any decision concerning the ECL 2006/2007 as long as the final judgement of the CAS in this case "Ochsenhausen versus ETTU" has not yet been passed and is not yet available"*.

On 13 September 2007, the Respondent agreed to an expedited procedure according to article R44.4 of the Code of Sports-related Arbitration (the "Code").

On 17 September 2007 a hearing took place at the headquarters of the CAS.

At the hearing, the Respondent requested the Panel to fully reject the Appellant's appeal. It listed four arguments in support of its position:

- (1) The meaning of article G.15.6 is clear: The word *"will"* does not imply any obligation for the CCO to declare the matches lost with 3:0 but leaves a margin of discretion for the sanctioning body. Otherwise the Respondent would have used the word *"shall"* as it did in other provisions of the ECL Regulations where a statutory obligation has been established.
- (2) The case in the Women's ECL quoted by the Appellant as a precedent cannot be compared to the situation at stake. The relevant players of the Women's club played for two different teams *during* the season of the ECL whereas in the present case, the player moved to another league only *after the end* of the ECL 2006/2007.
- (3) The deadline of 30th June mentioned in article G.8.5 was chosen since the season for summer sports, like table tennis, starts on 1st July and ends on 30th June. However, the "philosophy" behind this provision was to restrict players' transfers *during* the competition season of the ECL. The competitions of the Respondent's ECL 2006-2007 ended already on 5 May 2007.
- (4) When imposing a sanction, the Respondent must respect the fundamental principle of proportionality. During the entire competition of the ECL 2006/2007, Charleroi fully complied with the ECL Regulations. A violation of G.8.5 appeared only *after* the finals of the ECL 2006/2007. Mr. Li Ching had already fulfilled his contractual obligations with Charleroi when he continued his career in the Chinese Super League. Any further sanction than the fine

of EUR 5'000 would have been disproportionate to Charleroi's infringement of the ECL Regulations.

The Respondent stated that the annual Congress of ETTU held in March 2007 in Belgrade changed the relevant provision coming into force for the ECL 2007/2008 for clarification purposes. The new wording of the corresponding article now says that a player shall compete only for one club in the period between the day before the first club match of the season until one day after the final of the ECL.

If the Appellant's claim would be granted, this would lead to a very problematic situation for the ECL. A championship roster of seventeen teams would be impossible to manage and trigger protests and appeals from the other clubs. Furthermore, the Respondent is bound by several contractual obligations such as TV and sponsorship contracts and the additional participation of the Appellant and a change of the competition format would endanger the entire competition. It would also infringe article G.3.2 since four German teams have already been admitted to the ECL. In addition, even if the Appellant's team would be declared semi-finalist of the ECL 2006/2007, this would not automatically allow it to participate in the ECL 2007/2008 because such participation is subject to the approval of the responsible national Association, i.e. the German Table Tennis Federation.

On 20 September 2007, the parties were informed in writing by the CAS Court Office that the Sole Arbitrator had dismissed the appeal and would provide the parties with the reasoned award at a later date.

LAW

Jurisdiction of CAS

1. The jurisdiction of the CAS *in casu* results
 - from article A.5.8 of the ETTU Constitution according to which a final decision of the Juridical Boards may be forwarded to CAS;
 - from the signatures on behalf of the Parties of the Order of Procedure dated 14 September 2007.

Applicable Law

2. The applicable rules are the Rules and Regulations of the European Table Tennis Union, in particular the Constitution, Edition August 2007, and Men's European Champions League Regulations, Edition 2006/2007 (the "ECL-Regulations") which include the following rules:

- G.3.2 No more than four clubs from the same Association are entitled to participate in the ECL [...].*
- G.3.3 The ECL shall be open only to teams fulfilling the required sporting and financial conditions set up by the Executive Board. Provided they meet the above mentioned requirements the teams qualified for the ECL shall be:*
- the four teams having reached the semi-finals of the ECL of the previous season;*
 - twelve teams with the highest number of ranking points for their three best ranked players on the current World Ranking (only one "foreign" player will be considered).*
- G.5.1 The competition shall be held each season between 1 August and end of June, according to the schedule agreed by the Executive Board.*
- G.8.5. A player shall only compete for one club in the period between the day before the first club match of a season until June 30th in the international competitions under the control of ETTU or any other Continental Federation/Union.*
- G.15.6. If in the same playing season a player competes in different team championships under the authority of an ITTF member Association (except commitments for his national team) either in Europe and/or in other Continents, the club may be disqualified from all competitions under the jurisdiction of the ETTU, and may be banned for one or two seasons and fined up to 5'000 ?. (sic!) The team of such a player will lose all matches of the current playing season 3:0.*
- G.15.8 All these penalties shall be imposed by the Club Competitions Official.*
3. According to R58 of the Code, the law of the country in which the federation which has issued the challenged decision is domiciled is applicable where the applicable rules provide no solution. Since the Respondent is domiciled in Luxembourg, the law of Luxembourg is applicable subsidiarily.

Procedural issues

4. Upon the inquiry of the Sole Arbitrator at the hearing, the Appellant confirmed that its appeal was directed exclusively against the decision of the Board of Appeal dated 29 August 2007 and not the decision of the Executive Board dated 5 September 2007.
5. The decision of the Board of Appeal was issued and communicated on 29 August 2007. The appeal to CAS was submitted on 30 August 2007, i.e. within the 21 day-deadline mentioned in article R49 of the Code.
6. According to article G.16.3 of the ECL Regulations the decisions of the Board of Appeal are final. The Appellant has therefore exhausted all internal legal remedies in compliance with article A.5.8 of the ETTU Constitution and article R47 of the Code.

Standing of the Appellant

7. The Board of Justice rejected the initial protest of the Appellant for various reasons, including lack of standing. The Board of Appeal acknowledged the standing of the Appellant but rejected the appeal for other reasons. In the present procedure before the CAS, the Respondent has not challenged the standing of the Appellant.
8. The Sole Arbitrator concurs with the Board of Appeal's reasoning concerning the standing of the Appellant. The Appellant is substantially affected by the allegedly incomplete sanction which the CCO imposed on Charleroi on 4 July 2007 and has a valid legal interest to protest against the decision of the CCO. Since the Respondent's rules and regulations do not explicitly exclude protests, claims and appeals by competing clubs, the Appellant is admitted also to the present Appeal.

Undisputed facts

9. The facts of the case as outlined above are undisputed.

Interpretation of article G.15.6 of the ECL Regulations

10. It has been undisputed by the parties that the essential provision for the determination of this case is article G.15.6 of the ECL Regulations with the wording quoted above. The email of ETTU Assistant Secretary to the semi-finalist of the ECL 2006/2007 used a different wording ("in case of infringement of G.8.5, the club may be disqualified...") but it has not been asserted by either party that this was the official version of article G.8.5.
11. The parties disagree over the meaning of article G.15.6 of the ECL Regulations. The disagreement concerns two elements:
 - (1) What is meant by "*playing season*" as referred to in the first part of the rule ("*If in the same playing season a player competes in different team championships...*")? Does it end after the last match of the ECL or only on the 30th June?
 - (2) Does the use of the word "*will*" in the second sentence ("*The team of such a player will lose all matches of the current playing season 3:0.*") require that the sanction of losing all matches by 0:3 is mandatory if the condition of the first part of the rule has been met?
12. By interpreting rules and regulations of associations, the starting point and the predominant element of construction is the wording (literal interpretation). Other elements such as the systematic context, the purpose and the history of the rule may contribute to the correct understanding of the meaning of the rule. This principle is accepted in both civil and common law and it has been constantly applied by CAS panels. It is also embedded in the law of Luxembourg (see, e.g., Art. 1156 of the Code Civil of Luxembourg) and the parties have not argued otherwise.

13. The expression "playing season" has not been defined or used in another article in the ECL-Regulations. Article G.5.1 yet provides "*(t)he competition shall be held each season between 1 August and end of June, according to the schedule agreed by the Executive Board*" but this provision sets only the time frame within which the matches of the specific competition (*in casu* the ECL) shall be played. The actual competition does not necessarily cover the entire period, but is somewhat shorter. For the ECL 2006/2007, it lasted from 3 September 2006 until 5 May 2007. The expression "playing season" seems to fit perfectly to define the period (or "season") between the date on which the first round of the competition is *played* and the date on which the final of the competition is *played*. In fact, there is no other expression available in the ECL-Regulations to describe this time period. Also in common speech, the term "playing season" is used to describe the period between the first and the last match of a certain championship.
14. This interpretation also makes sense when it comes to the purpose of the rule. Sports associations restrict the transfer of athletes during the playing season to ensure the quality and integrity of the competition as well as the stability of the teams. Such restrictions also safeguard the contractual stability between athletes and clubs. In European table tennis, there seems to be a substantial risk of distorted competition because of the rich reservoir of world-class players especially from Asia. It might be attractive for European clubs to hire such top players for certain key matches while they are still engaged in leagues in e.g. Japan or China. It is therefore understandable that the Respondent reminded the semi-finalists as to their obligation not to reinforce their teams for the final rounds with players from non-European leagues. On the other hand, there are also a few top European players who are able to compete at the level of leagues in other continents who might consider "switching" between clubs and leagues. Article G.15.6 of the ECL regulations is designed to prevent such moves during the "playing season".
15. The Respondent submits that article G.15.6 must be read in the context of article G.8.5 of the ECL Regulations, which says that "*(a) player shall only compete for one club in the period between the day before the first club match of a season until June 30th in the international competitions under the control of ETTU or any other Continental Federation/Union*". It concludes that if a player who participated in the ECL plays for a second club before 30 June, *but after the final of the championship*, the sanctions of article G.15.6 must still apply. In other words, according to the Appellant, there is a certain period of time after the end of the ECL during which a player is prohibited from moving to another club and playing in another competition. Such blocking period was intended to make it less attractive for European clubs to hire top players from Asia because such players are way too expensive for European clubs if they have no perspective to continue to play in, for example, the Chinese super league after the end of the European playing season.
16. This argument is not persuasive in various respects. Firstly, article G.8.5 does not contain a sanction. On the other hand, article G.15.6, which does contain a sanction, does not refer to article G.8.5 at all. Although both provisions address the situation of players' transfers in the context of the ECL, only article G.15.6 provides for sanctions of certain behaviour stipulated in the same article ("*If in the same playing season a player competes in different team championships...*")

and does not refer to the behaviour described in article G.8.5. Thus, the question of whether the club has to be sanctioned or not has to be adjudicated exclusively based on article G.15.6. This is also in line with the principle of legality and predictability of sanctions which requires a clear connection between the incriminated behaviour and the sanction and calls for a narrow interpretation of the respective provision.

17. Secondly, the suggested idea of a blocking period between the last match of the championship final and 30 June has not been supported by any evidence (e.g. "*matériaux préparatoires*") and there is no backup of this mere theory in the rules and regulations of the Respondent. It rather triggers the question why, of all dates, *30 June* was chosen which may delay, but not necessarily prevent, the transfer of a player from one league to another. In addition, while it may be correct that a blocking period may indeed increase the price for top players, it would still allow certain European clubs to engage such expensive players which would distort the competition even more.
18. Thirdly, there are material concerns as to whether a blocking period, as suggested by the Appellant, would be compatible with the athletes' fundamental right to labour mobility and contractual freedom. While sporting reasons may justify a restriction during ongoing competitions, no such justification can be seen in a post-competition blocking period.
19. Finally, there are even more concerns in endorsing a rule which may result in such a harsh sanction of forfeiting all games 0:3 even if the penalized club acted without any fault or negligence. It is yet true that various sports provide for disqualification of teams if ineligible players have been fielded. However, in all these situations (and deviant from the situation before us), the ineligibility must exist already at the time of the match or game even if this was detected only afterwards. In the Charleroi case, the club fielded a perfectly eligible player in all matches and acted in good faith. No contrary evidence has been offered by the Appellant. The Sole Arbitrator finds it untenable to declare these matches lost by 0:3 because of behaviour of the player after termination of his engagement.
20. The cases of the Austrian clubs which were sanctioned because of players *simultaneously* playing in the Women's Champions League 2005/2006 and Japanese/Chinese leagues are perfect examples for the kind of behaviour against which the sanction of article G.15.6 (and the corresponding rule for the women's league) is directed. Because of the decisively different facts, they do not support Appellant's case.
21. The fact that the ECL-regulations contain two manifestly uncoordinated provisions (articles G.8.5 and G.15.6) addressing the same issue with different words and different consequences is indeed disturbing and an example of negligent rule-making. (The Sole Arbitrator has noted that the Respondent has already undertaken an effort to improve the clarity of the rules in question.) Apparently, the articles confused even the executive organs of the Respondent when the CCO fined Charleroi and other clubs because their players accepted to play in other leagues after the end of the ECL playing season but before 30 June 2007. Whether the fines may be justified otherwise is not for the Sole Arbitrator to decide.

22. Because of the above considerations, the Sole Arbitrator finds that article G.15.6 of the ECL-Regulations did not require the Respondent to forfeit all matches of Charleroi 3:0 because Mr. Li Ching participated in the Chinese Super League after the final game of the ECL, i.e. after the playing season. The confusion of the CCO is not enough to impair the legal analysis of the respective articles of the Regulations for the ECL 2006/2007.
23. Under these circumstances, it is not necessary to examine the true meaning of the last sentence of article G.15.6 (*"The team of such a player will lose all matches of the current playing season 3:0."*), i.e. whether the word *"will"* grants the CCO any discretion.

Further Considerations

24. The Respondent submits that the prayers of relief of the Appellant would seriously endanger the Champions League 2007/2008 with the first matches already played. Considering the outcome of this procedure, this argument is no longer relevant. Nevertheless, the Sole Arbitrator feels obliged to underline that such considerations had no impact on his decision at all. The Respondent deliberately decided not to follow the Order on provisional measures and started the first round of the Champions League 2007/2008. This was a rather unfortunate decision of the ETTU. It accepted the risk of losing the case with all the burdensome consequences which could have been avoided or mitigated if the Respondent had respected the Order on provisional measures.
25. The CAS provides the sports community with a unique system of fast and uniform dispute resolution from which all stakeholders may benefit in many ways. However, the system requires a minimum of co-operation and voluntary compliance, even when losing a case, as it is also expected from athletes, teams and supporters in sports competitions. The Sole Arbitrator invites the Respondent to change its attitude and to respect such Orders on provisional measures in the future.

The Court of Arbitration for Sport rules:

1. The appeal filed by TTF Liebherr Ochsenhausen is dismissed.
2. The decision of the European Table Tennis Board of Appeal of 29 August 2007 is upheld.
- (...)
5. All other prayers for relief are dismissed.