Chapter 15
Young Football Players: Protection of Minors

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15.1 CAS 2008/A/1485 FC Midtjylland A/S v. Féderation Internationale de Football Association

In the Midtjylland case the CAS considered the transfer of young minors coming from poorer countries. In 2006 and 2007 the Danish Football Club Midtjylland A/S transferred young Nigerians to Denmark. Against this background FIFPro contacted FIFA and pressed charges against FCM for having systematically transferred minor Nigerians in violation of Art. 19 par. 1 of the FIFA Regulations for the Status and Transfer of Players. According to this, '[i]nternational transfers are only permitted if the player is over the age of 18'. The FIFA Players' Status Committee issued a strong warning against FCM and DBU—a

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decision ultimately confirmed by CAS. The author analyses the scope of Art.19 RSTP and its telos—the protection of minors and guaranteeing their education. Great store is set on the analysis of EC Law, particularly the Cotonou Agreement.

15.2 Facts

In the past few years FC Midtjylland A/S (FCM), a Danish Premier League Club and FC Ebedei, a Nigerian Club, established a cooperation concerning the transfer of young Nigerian talents to FCM. In the course of this agreement, FCM registered three minor Nigerian players in June 2006. In accordance with the Amateur Regulations in the relevant version of the Danish Football Association (DBU), the DBU registered these players as amateurs (however according to Article 3 para 4 Annex 3 of FIFA's Regulations for the Status and Transfer of Players (RSTP) on a provisional basis, since there was no reply from the Nigeria Football Association concerning the relevant International Transfer Certificate request).[1] When FCM applied for the registration of three other Nigerian players of FC Ebedei in February 2007, the Danish Football Association declined to issue amateur player licenses pending resolution of an ongoing case before the Players' Status Committee concerning potential violation of Article 19 RSTP.

All the players took part in the youth teams of FCM. The younger players attended in 10th grade—at the age of 16—the Ikast Youth Centre—a public council school. The schedule at Ikast Youth Centre consisted of 10 lessons of 1 h and 20 min, in total 13.3 h a week. At the age of 17 they were taught at Idrætshøjskolen Ikast (Ikast Sports School), a school that is also open to everyone. The older players attended the public upper secondary school (Ikast Sports School) right from their arrival. The players under the age of 18 received room and board as well as a little allowance. According to the statement of FCM the minor Nigerians received not more than DKK 24,000 per year[2] that draws the line for the determination of the status as amateur in the sense of the DBU's Amateur Regulations.

At the age of 17 the players became enrolled under FCM's football academy. The Danish Immigration Service granted the needed residence permits excluding the right to work and limited to a short-term stay as students. In February 2007, the Fédération Internationale des Associations de Footballeurs Professionels (FIFPro) got in touch with FIFA and pressed charges against FCM for having systematically transferred minor Nigerians in violation of Article 19 para 1 of the RSTP that says that "International transfers are only permitted if the player is over the age of 18". On 25 October 2007, the Players' Status Committee of FIFA issued a strong

[1] As the Players' Status Committee of FIFA noted, FIFA had received no request—neither from DBU nor from FCM - for authorization to register these Nigerian minors.

[2] € 3.219.

warning against FCM and DBU.[3] This decision was served on FCM on 25 January 2008. On 14 February 2008, FCM brought an appeal against this decision before the Court of Arbitration for Sport (CAS).

15.3 Submissions Made by the Parties

FCM considered amateur players being outside of the scope of Article 19 para 1 RSTP. Since the players would meet the criteria of the amateur status according to the DBU's Amateur Regulations, the transfers at issue would thus not violate Article 19 para1 RSTP.

Yet acting on the assumption that the minor Nigerians were professionals in the sense of Article 2 RSTP there would have been no violation of Article 19 para 1 RSTP. This would result from the application of the Cotonou Agreement, a Partnership Agreement between the European Community and the ACP Group of States.[4] These provisions would be subject existing EU legislation and also binding upon FIFA. The Nigerian minors, legally residing in Denmark, would have the right to be treated equally to Danish citizens. Therefore the application of Article 19 para 1 RSTP made by the Players' Status Committee would mark a discrimination based on nationality since it would prevent minors, coming from a non-EU or non-European Economic Area, from the participation in playing football in an organized Danish Football club. Thus the exceptions in Article 19 para 2 b RSTP should be also applied to the Nigerians since being professional players, they would also have the status of workers. Otherwise there would be an unjustified discrimination in the context of working conditions. This would violate Article 13 para 3 Cotonou Agreement that could be invoked by the players. In that respect FCM stressed the *Simutènkov* award rendered by the Court of Justice of the European Union, the CJEU.[5]

The application of Article 19 RSTP should be limited purely to minors, whose intention for gaining a residence permit is solely motivated by sporting reasons.

[3] The warning of the DBU was based on the violation of Article 19 para 4 RSTP that says that "Each association shall ensure the respect of this provision by its clubs." The Committee issued its warning with regard to the transfers in June 2006 and the pending application of the above mentioned three more Nigerian minors. The persistence of registering minor players in violation of Article 19 para 1 RSTP would have "severe consequences" both to FCM and DBU.

[4] The ACP Group of States-African, Caribbean and Pacific Group of States-consists of 79 countries. They all (also Nigeria) signed the Cotonou Agreement on 23 June 2000 in Cotonou (Benin) with the exception of Cuba. In contrast to Denmark, Switzerland is not a party of this agreement. The Cotonou Agreement involves about 683 million people.

[5] C-265/03, *Simutènkov* [2005] ECR I-2579. In this award the CJEU ascertained the direct effect of the partnership agreement between the European Communities and the Russian Federation. The CJEU ruled that the provisions set by the RFEF—containing a non-European clause—would break European Law as regards the partnership agreement. Thus Russian players have to be treated equal to European Union players.

Another application would result in an obviation of the spirit of Article 19 RSTP. In the present case there would not be any exploitation and abuse. The Nigerians would have been merely registered for the purpose of participating in youth tournaments within the DBU regime during their leisure time that means for the sake of playing football on an amateur level. Thus football would only amend the players' studies. This in turn, would enable a personal, social, cultural and educational development.

The interpretation of Article 19 RSTP made by the Players' Status Committee of FIFA would contravene the human rights, namely Article 12 Charter of Fundamental Rights, the freedom of assembly and association and Article 21 Charter of Fundamental Rights, the protection against discrimination caused by nationality.

Furthermore the strong warning would mark an unequal treatment since FIFA had not imposed any sanctions on another club who handled a comparable transfer.[6]

FIFA in turn was of the opinion that Article 19 RSTP would be applicable to professional and amateur players. Article 13.3 Cotonou Agreement as well as the exceptions of Article 19 para 2 RSTP would not be given since the Nigerian would not be workers in the sense of the European Law, but students. With reference to the case law of the CAS, FIFA submitted, that Article 19 RSTP would not violate mandatory principles of public policy and Swiss law, insofar as the Regulations intend a legitimate objective, e.g. the protection of young players from international transfers which could disrupt their lives (*cf. Cádiz & Acuña* CAS 2005/A/955 & 956).

Solely based on the parties' written submissions,[7] on 6 March 2009 the Panel concluded,

> … that the Appellant has breached Art. 19 of the RSTP and that it was justified to impose a sanction for the registration of the Players. Furthermore, the Panel is of the opinion that the nature and the level of sanction imposed on the Appellant is totally appropriate.

In detail the relevant ruling of the Panel can be summarized as follows[8]:

1. "The Panel […] considers that Article 19 of the Regulations applies equally to amateur and professional minor players."
2. "[…] the status of "Professional" or "Amateur" as defined by the RSTP is not to be confused with any other status, which is not specific to the RSTP or to the activity of playing football, such as the status of "Worker" or "Student"."
3. "[…] the list of exceptions Article 19 para 2 is not exhaustive and that this provision has been construed as allowing other exceptions, concerning students."

[6] FC Bayern Munich transferred a South-American minor.

[7] A hearing was not held as according to Article R 57 of the Code both parties deemed this not to be necessary.

[8] According to Article R 57 of the Code the remarks given by the Panel concerning the RSTP were based on the RSTP 2005, since this version was not disputed between the parties.

These unwritten exceptions need to be applied in a restrictive sense. An international transfer is therefore only legal if the transfer is driven by reasons of better education or if the clubs provide that strict conditions e.g. academic guarantees, limited period of time because of a development program between the association of origin and the new club, are given. These exceptions are not given in the present case. In the instant case the transfers were motivated primarily by sporting reasons.

4. EC Law is basically not binding upon the CAS as regards FIFA Regulations, unless the parties have chosen the direct application of EC Law provisions.

Both parties accepted Article 60 para 2 FIFA Statutes, within the RSTP and additionally Swiss Law. E contrario the direct application of the EC Law provisions was excluded by the parties since a decision regarding these provisions was not made by the parties. However the Panel asserts, that

> … an Arbitral Tribunal, having its seat in Switzerland, has to a certain extent to take into consideration the application of mandatory foreign laws where this is justified by a sufficient interest (Jean-François Poudret/Sébastian Besson, Comparitive Law of International Arbitration, 2nd edition, London 2007, N.707 c, page 615). In order to claim that a specific provision of EC Law is to be applied in cases involving FIFA Regulations and submitted to Art. 60 par. 2 of the FIFA Statutes, one has to establish that the relevant EC provisions are of a mandatory nature according to Swiss law, which is the law of the seat of arbitration.

5. Article 19 RSTP does not contradict any provision, principle or rule of EC Law, of mandatory nature or not.
   a. Article 13 para 1 and 2 Cotonou Agreement is not directly applicable in contrast to Article 13 para 3 Cotonou Agreement. The players do not have employment contracts and are not employed in Denmark. According to the Danish immigration legislation the players are students. Thus the players are not workers and not inside of the scope of Article 13 para 3 Cotonou Agreement.
   b. Since the players are either workers nor legally employed, the *Simutènkov* case is not applicable to the present case.
   c. "[…]the registration with a football club is not protected by the right of freedom of assembly and of association, Article 12 of the Charter" of Fundamental Rights of the European Union. Beyond that generally spoken there is also possibility to justify limitations (see Cádiz & Acuña CAS 2005/A/955 & 956 and CAS 2002/A/256[9]).
6. There is no equality in illicit situations. This principle (*nemini dolus alienus prodesse debe)* is recognized by Swiss Law and the case law of the Swiss Supreme Court referring to the prohibition of discrimination (see Auer/Malinverny/Hottelier,

[9] According to the CAS the protection of young players builds a legitimate objective that justifies the contested FIFA Rules limiting the international transfers of minors.

Droit constitutional Suisse, vol. II. 2ème edition, Berne 2006, pp. 501 et suivantes). The only exception of this principle marks a constant illegal practice. However evidence has not been adduced. According to Article 60 Swiss Civil Code FCM or DBU could invoke a claim against FIFA.

15.4 Analysis

The decision made by the CAS is in the outcome correct and strengthens FIFA and FIFPro in the combat against the exploitation of minor players.

(I) With the CAS one has to admit that all in all the better arguments are striking for an interpretation of Article 19 RSTP that beholds both professional and amateur minors inside of the scope of that provision. The Panel therefore correctly failed to determine whether the Nigerian minors fulfill the status of amateur or professional players.

Of course it is quite easy to understand that FCM tried to advance the wording of Article 19 para 2 b ii RSTP, that could indeed *prima facie s*peak in the favor of the exclusion of amateur minors by the scope of Article 19 para 2 b ii RSTP. For a better understanding of the debate we should turn our attention to the wording of Article 19 par. 2 b ii RSTP, which is the following:

> It shall guarantee the player an academic and/or school and/or vocational education and/or training, in addition to his football education and/or training, which will allow the player to pursue a career other than football should he cease playing professional football.

While reading only the simple wording of this paragraph one might get the impression that Article 19 para 2 b ii RSTP would expressly state the exclusion of amateur minors. However as we set our sight both on the spirit and purpose—the *telos*—and the systematic of Article 19 RSTP, it becomes clear that CAS made the only correct decision. It is to assert (how the Panel did) that the titles of Chapter V of the RSTP and Article 19 RSTP purely name "minors". There is no determination made between professional and amateur minors. On the contrary, the title of Chapter IV names explicit the "professionals". It shall also be noted that the wording of Article 19 RSTP as a whole does not terminologically differentiate between amateurs and professionals, while this happens e.g. in Article 10 para 1, 15, 17 para 2 RSTP (just to call some of the numerous provisions that contain such a differentiation). This shows that the legislator was aware of the different terms while creating his provisions. He knew well in which cases he wanted to rule situations concerning either amateurs or professionals or both together. One can assume that the legislator would have named solely the professionals if he had intended to rule only the transfers of professional minors. In this case the legislator would not have used the words "the player" (see Article 19 para 2 b ii RSTP), but "professional", like he did in Article 10 para 1, 15, etc.

Furthermore the systematic and the spirit and purpose of Article 19 RSTP are important tools of a provisions' interpretation and shall be therefore also applied:

Article 19 RSTP is titled "International Transfers involving Minors". With the Panel it is to assume that this title cannot be understood without reflecting the system of the provisions of the RSTP. Thus the term "Transfer" is to be linked with the notion of "Registration". According to Article 5 para 1 RSTP this procedure concerns professionals *and* amateurs.

Article 19 RSTP was enacted before the background of the human trafficking, particularly of minors coming from poorer countries like South America and Africa. It has occurred and unfortunately still happens that mostly socially deprived minors were unscrupulously exploited by agents or clubs who wanted to make big money. Especially the home-grown initiative bears the risk of child trafficking as some clubs could transfer children below the age of 16. Starting as amateurs, the minors build cheap investments. Thus a transfer marks only a low financial risk for the clubs and agents linked with the perspective of earning a high transfer fee in the future or getting cheap labor forces earning important money for the club by a good performance on the pitch. In the perspective of the transferred minor players the situation is completely different. The risk to fail is often totally out of scale. The minors are asked to leave their home countries and to settle down in countries the culture and the way of living are completely different to what they are used to. If they do not live up to expectations they are abandoned, not knowing how to survive in a foreign country without an education and mostly without any relations to people they know.

In March 2001 the European Commission, FIFA and UEFA concluded an agreement setting *inter alia* the goal to protect the minors in an efficient way. As a consequence of this agreement FIFA enacted Article 19 RSTP. Thus the intention of Article 19 RSTP is on the one hand to protect minors from becoming victims of the said transfers and on the other hand to secure the education of minors. This education is important to enable the players to make their careers outside the professional football and provide them with a social guarantee. The Players' Status Committee mentioned in its decision on 25 October 2007, "that solely an interdiction allowing only very limited exceptions under specific circumstances could bring a halt to such a situation and protect minor players from their rights being infringed upon".[10]

Considering the wording of Article 19 para 2 b ii RSTP once more, one should consider the term "should he cease professional football" in the context as outlined above. This being said it is clear that the status as amateur player must be seen as included in the wording of Article 19 para 2 b ii RSTP as a consubstantial minus of the professional players' status. Another interpretation of Article 19 RSTP would mark a legal loophole in favor of the clubs and agents but stacked against the minors. Clubs would be able to take minors from all over the world pretending to let them play football only in their leisure time without providing

[10] Decision of the Players' Status Committee dated 25 October 2007, para 13.

them with a written contract and not paying more than the expenses the players effectively incur (*cf.* definition of a professional according to Article 2 para 2 RSTP). Such an application would completely contravene the intention of the legislator—the protection of minors—by adding Article 19 RSTP. FIFA itself insists on the strict application of the rules on the protection of minors and averred this by its Circular Letter no. 801, dated 28 March 2002. However such a strict ruling could lead in individual cases to undue hardships for the clubs and even for the minors. Thus the legislator introduced the exceptions named in Article 19 para 2 RSTP. Furthermore the Panel rightly accepts several unwritten exceptions—concerning students—as compensation for this strict ruling. Marking a further "minor protection barrier" it is for the club to prove that the minors are transferred not for sporting but educational reasons or that a development program that fulfills strict conditions is given between the association of the country of origin and the new club. No one of these written and non-written exceptions is met in the instant case, even not Article 19 para 2 b RSTP. A possible benefit of this provision by the Nigerians however is to be issued in the context of EC Law, particularly the Cotonou Agreement.

(II) After having examined the scope of Article 19 RSTP we should now turn our attention to the statements of the Panel concerning the contradiction of any mandatory provision of public or any other provision of EC Law by Article 19 RSTP.

The Panel put its scope of the examination on the question whether Article 19 RSTP contradicts "EC Law" that means "The Cotonou Agreement", "The *Simutènkov* case" and the "Freedom of assembly and of association" in the Sense of the Fundamental Rights.

Even if the parties did not declare the direct application of EC Law, the Panel is right in its assertion that it has "to a certain extent, to take into consideration the application of mandatory foreign laws where this is justified by a sufficient interest" (see also Jean-François Poudret/Sébastian Besson, Comparative Law of International Arbitration, 2nd edition, London 2007, N.707 c, p. 615).

Yet the Panel left the question unanswered whether the relevant EC Law is mandatory. For the Panels purposes this was correct, since it came to the result that Article 19 RSTP does not contradict any provision or principle of EC Law; albeit a statement would have been interesting as regards future cases concerning the Cotonou Agreement. Thus reference is made at this point to the CAS 98/201 *Celtic Plc/UEFA* award of 7 January 2000.[11] Here the CAS made statements regarding Article 19 of the Swiss Federal Act on Private International Law ("LDIP") and the determination of mandatory foreign laws, especially Article 39 EC.[12]

[11] CAS 98/201 *Celtic Plc UEFA*, p. 6.

[12] The statements in the context of the EC Treaty are based on the valid version before the Lisbon Treaty became operative. The valid provisions are named in the footnotes. Article 39 EC corresponds now to Article 45 TFEU.

15.4.1 Cotonou Agreement

The Panel examined whether Article 19 RSTP would contradict the Cotonou Agreement. At this juncture the Panel failed to broach the issue of the direct effect on the signatory States of that agreement and of the legal binding to FIFA—the so-called horizontal effect. The Panel just asserted that Article 13 para 3 Cotonou Agreement "could have a direct effect on the signatory States". This approach made by the Panel dues to the fact that the Panel firstly found its final result—the nonexistence of a contradiction of Article 13 para 3 Cotonou Agreement—and subsequently took—fully correct and appropriate to the practice related needs—the shortest way to constitute this result. From a more dogmatic perspective however it would have been preferable to broach the issues named above. This shall be done in the following.

15.4.2 Direct Effect of the Cotonou Agreement

Regarding Article 9, 13 para 1 and 13 para 2 Cotonou Agreement a direct effect is to negate. With the CJEU it is to be said that "in regard to well-established case-law, a provision in an agreement concluded by the Communities with a non-member country must be regarded as being directly applicable when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure (judgments in Case C-63/99 *Gloszczuk* [2001] ECR I-6369, paragraph 30, and in Case C-171/01 *Wählergruppe Gemeinsam* [2003] ECR I-4301, para 54)".[13] These requirements are not fulfilled by Article 9, 13 para 1 and 13 para 2 Cotonou Agreement. The terms of these Articles do not contain a clear and precise obligation.

Up to now the CJEU has not ruled about the direct application of Article 13 para 3 Cotonou Agreement. As FCM stated there is a ruling of the CJEU about the direct effect in the *Simutènkov* case. In this case the CJEU ruled that the Partnership Agreement between the European Communities and Russia would only be of a direct nature if the non-EU national was already a lawful resident of a Member State, owning a work permit for that respective Member State and where a national regulation bared the aggrieved party to enjoy the same settings of employment as were granted to EU nationals in a comparable way.

Before dwelling on the direct effect of Article 13 para 3 Cotonou Agreement it is important to read the wording of the relevant provisions:

Article 23 para 1 Agreement between the European Communities and the Russian Federation, signed in Corfu on 24 June 1994

[13] C-265/03, *Simutènkov* [2005] ECR I-2579, para 21.

> Subject to the laws, conditions and procedures applicable in each Member State, the Community and its Member States shall ensure that the treatment accorded to Russian nationals, legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals.

Article 13 para 3 Cotonou Agreement

> The treatment accorded by each Member State to workers of ACP countries legally employed in its territory, shall be free from any discrimination based on nationality, as regards working conditions, remuneration and dismissal, related to its own nationals. Further in this regard, each ACP State shall accord comparable non discriminatory treatment to workers who are national of a Member State.

When drawing a comparison between the wording of Article 13 para 3 Cotonou Agreement and Article 23 para 1 Communities Russian Agreement one can find a small, maybe important difference. ACP workers are granted a treatment "free from any discrimination based on nationality" while according to Communities Russian Agreement the "Member States shall ensure that the treatment accorded […] shall be free from any discrimination based on nationality". Just focusing on the wording, one could get the impression that the Communities Russian Agreement intends to emphasize stronger the obligation of Member States ensuring a non-discriminatory treatment. This perspective however seems to be too narrow minded. Article 3 of the Cotonou Agreement states that "The Parties shall, each as far as it is concerned in the framework of this Agreement, take all appropriate measures, whether general or particular, to ensure the fulfillment of the obligations arising from this Agreement […]". Therefore Article 13 para 3 Cotonou Agreement is to be considered as having a direct effect. This interpretation may implicate far reaching consequences for the EU, however this becomes qualified by the double criterion of lawfully employment and working in the EU.

15.4.3 FIFA and the Cotonou Agreement

The agreements made by the Communities are basically addressed just to the signatory States. In the *Simutènkov* case however the CJEU laid down, that the doctrines of *Bosman*[14] and of *Kolpak,*[15] led to a horizontal effect in regard to Article 23 para 1 Communities-Russia Agreement, binding the Royal Spanish Football Association. Both the text and the intention of Article 13 para 3 Cotonou Agreement is very similar to the wording and the intention of the relevant provisions in the doctrine of *Kolpak* and *Simutènkov* and to the wording and intention of Article 39 para 2 EC[16] in which context the CJEU stated a horizontal effect.

[14] C-415/93 *Bosma*n [1995] ECR I-4921.

[15] C-438/00 *Kolpak* [2003] ECR I-4135.

[16] Article 45 para 2 TFEU.

Even if the obligation to equal treatment in Article 39 EC outreach the one of Article 13 para 3 Cotonou Agreement as regards the access to a market, both provisions have the prohibition of discrimination in the working conditions in common. In the *Walrave and Koch* case[17] the CJEU pointed out that for the purpose of an effective and consistent EC Law, the EC Law "does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services".[18] For these reasons and for the sake of the *effet utile* it is to expect that the CJEU would answer the question of the horizontal effect of Article 13 para 3 Cotonou Agreement in the affirmative. However, one should consider the following.

In the *Walrave and Koch* case the CJEU stated that the application of EC Law was limited to rules that were not of pure sporting interest, but had something to do with economic activities, the fundamental idea of the EC Treaty fixed in Article 2 EC.[19] In its *Bosman* ruling the CJEU also stated: "Having regard to the objectives of the Community, sport is subject to Community law in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty, as in the case of the activities of professional or semi-professional footballers, where they are in gainful employment or provide a remunerated service".[20] One could therefore raise the question, whether the application of Article 13 para 3 Cotonou Agreement also requires an economic activity[21] and if so, whether the players at hand fulfilled this requirement. This would be an interesting topic in case the players had to be considered as amateurs. Unfortunately the Panel did not mention this issue at all. It should be seriously questioned whether the Panel has realized this issue or whether the Panel just wanted to avoid this delicate matter.

Yet the answer to this question would be too far reaching at this place. It would be worth being the topic of an own comment.

15.4.4 Application of Article 13.3 Cotonou Agreement

According to the wording of Article 13 para 3 Cotonou Agreement only "workers of ACP countries legally employed in its territory" are inside of the scope.

With the Panel it is to assert that Article 13 para 3 Cotonou Agreement is only applicable to workers who are already standing inside the labor market that means workers who have already taken the hurdle of access to employment. The term

[17] C-36/74 *Walrave and Koch* [1974] ECR I-1405.

[18] C-36/74 *Walrave and Koch* [1974] ECR I-1405, para 17.

[19] C-36/74 *Walrave and Koch* [1974] ECR I-1405, para 4. See Article 3 TEU.

[20] C-415/93 *Bosman* [1995] ECR I-4921.

[21] This could be said if Article 13 para 3 Cotonou Agreement is considered to be the corresponding rule to Article 39 para 2 EC.

"its" is to be read in connection to "each Member State". It is therefore irrelevant whether the players were legally employed in their home countries. The Panel rightly noted that according to the submissions of FCM the players either had employment contracts, nor were employed in Denmark. Furthermore, their visa excluded the right to work and were limited to a short-term stay as students. Thus the players did not fulfill the requirements of Article 13 para 3 Cotonou Agreement as they were not "legally employed" and not inside of the scope.

With respect to the question whether the players fulfilled the status of workers (that was negated by the CAS), basically there is to refer to the CJEUs' doctrine of Lawrie Blum[22] that legally defines the EU worker term. However precaution is demanded. According to the CJEU the similar wordings of the association agreement and comparable provisions of the EC Treaty do not justify the transfer of the interpretation made by the CJEU in the context of Article 39 EC, to the interpretation of the association agreement.[23] Both the association agreement and the Treaty have to be interpreted in the context of their spirit and intentions.[24] The terms "working conditions, remuneration or dismissal" *in* Article 13 para 3 Cotonou Agreement however argue for an interpretation in the sense of the interpretation in the context of Article 39 EC.

15.4.5 Simutènkov Case

The Panel based its examination on the assumption whether "the case law of the European Court of Justice especially the *Simutènkov* case would support the point of view that the Players have a legal claim to be treated equally to citizens of the European Union or of the European Economic Area, that is to say, to benefit from the exception of Article 19 para 2 b of the RSTP". However the Panel failed to make clear, that at hand, case law can only be linked to a special provision, here Article 13 para 3 Cotonou Agreement. This dues to the fact that the Simutènkov ruling was based on an agreement between the EU and Russia. According to Article 310[25] and 300 para 7 EC,[26] such an agreement takes only effect *inter partes* that means between the signatory States. Therefore it is not possible to apply the ruling about such an agreement as general principle to cases in which parties are involved who are not members of the agreement. Each case has to be solved individually.

It is therefore to be mentioned that the *Simutènkov* ruling with all its facts and in particular Article 23 para 1 of the Communities-Russia Agreement can only be examined from the perspective of a transfer to Article 13 para 3 Cotonou

[22] C-66/85 *Lawrie Blum* [1986] ECR I-2121.

[23] C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049, para 32.

[24] C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049, para 33.

[25] Article 217 TFEU.

[26] Article 216 para 2 TFEU.

Agreement. Thus the correct question begged to be asked was, whether the principles of the Simutènkov ruling in the determination of the direct effect could be applied to the question of the direct effect of Article 13 para 3 of the Cotonou Agreement. This is to be answered in the affirmative as addressed above. The Panels' determination of its scope of examination however bears the risk to be misunderstood. Without bringing home the relation to the Cotonou Agreement, it is not traceable for the reader—who is not well versed in the European Law—that the application of the *Simutènkov* decision is closely linked to the issue of the Cotonou Agreement and the benefit from the exception of Article 19 para 2 b RSTP.

15.4.6 Fundamental Rights

The Panel was right in stating that the Charter of Fundamental Rights is not a legal document having binding effect. Furthermore the players are outside of the scope both personally—as they cannot invoke an equal treatment with citizens from the EU or the non-European Economic Area—and objectively. Additionally it has to be mentioned that on 1 December 2009 the Lisbon Treaty came into force. Since this date the Charter of Fundamental Rights is legally binding according to Article 6 para 1 TEU (Lisbon).[27] It can be let unanswered in the instant case whether there is also a binding effect for FIFA and whether this provision is mandatory according to Swiss Law.

15.5 View

With its ruling the CAS braced FIFA in its fight against the exploitation of minors. The application of Article 19 RSTP for amateurs is of particular importance. This will be of great effect for the clubs also in the context of the home-grown initiation,[28] predominantly however for the protection of the minor players.

[27] However there are several exceptions caused to the opting out clauses: Great Britain, Poland and Czech Republic (the latter will be ratified with the next contract amendment) are not bound to the Charter.

[28] The English Premier League for example introduced a home-grown player rule that requires all teams to have 8 home-grown players out of a squad of 25 and came into force with the beginning of the 2010/2011 campaign. A home-grown player is hereby a player that is trained for three years under the age of 21 inside the English or Welsh club (see http://news.bbc.co.uk/sport2/hi/football/eng_prem/8255784.stm).

The UEFA's definition of home-grown players differs minimal. Thus home-grown players are players who, regardless of their nationality or age, have been trained by their club or by another club in the national association for at least three years between the age of 15 and 21. It shall be applied to clubs participating in UEFA's competitions (see http://en.archive.uefa.com/uefa/keytopics/kind=65536/index.html).

Referring to the Cotonou Agreement it is to state that this agreement does not provide for the employment market access. Thus it is still up to the Member States whether employment market access, residence or work permit is granted. However it has to be noticed that the players—coming from one of the ACP states and being legally employed as workers in the Member States (that is very controvertible for amateur players)—can invoke their right of non-discrimination resulting from the Cotonou Agreement, but not regarding the access to the labor market.

Intending to avoid the protection of minors and to guarantee at this an equal treatment, FIFA established a special sub-committee appointed by the Players' Status Committee that started on 1 October 2009 and supervises all international transfers of minors. This was announced by FIFA with its Circular letter no. 1190 dated 20 May 2009. According to the new Article 19 para 4 RSTP—that came into force on 1 October 2009—this sub-committee is in charge of the examination and possible approval of each transfer of every minor and each first registration of a minor, who has never previously been registered with a club and is not a national of the country in which he wishes to be registered for the first time. Each violation (both to the future and the former association (!)) of this Article is to be sanctioned by the Disciplinary Committee in accordance with the FIFA Disciplinary Code.

The sub-committees' approval is obligatory for each of these transfers or first registrations and must be obtained prior to any request from an association for an International Transfer Certificate and/or first registration. According to the new Article 19 bis RSTP all clubs that operate an academy with legal, financial or de facto links to the club are obliged to report all minor players to the association upon whose territory the academy operates. In addition, each association is bound to ensure that all players who are attending an academy that is not linked to a club in the aforementioned sense are reported to the association. However under special circumstances an exemption of the approval by the sub-committee can be done according to the Annex 2 that came into force with the new RSTP. These exemptions can only be granted, if minor amateur players intend to be registered with purely amateur clubs. However Article 19 and 19 bis RSTP have to be respected. The amateur club registering the amateur player is only entitled to possible future training compensations or solidarity contributions when the association concerned is enabled to prove that the provisions protecting the minors are respected. Article 19 and Article 19 bis RSTP are now on the list of Articles that are binding at national level and must be included without amendment in association regulations.

The official website of FC Midtylland still[29] contains details describing the cooperation between FC Midtjylland and FC Ebedei. However, contrary to the old version, the current website does not contain any longer information about the transfer of players below the age of 18.

We will see what the future might hold.

[29] Dated 20 November 2010.