4A_314 / 2017

Judgment of May 28, 2018

First Civil Law Court

Composition
Federal Judges Kiss, Presiding, Klett, Hohl, Niquille and May Canellas.
Clerk: Mr. Carruzzo.

Participants in the proceedings :

International Motorcycling Federation, represented by Antonio Rigozzi and Fabrice Robert-Tissot,
Appellant,

against

Kuwait Motor Sports Club, represented by Jean-Marc Reymond
Respondent.

Facts:

**A.**

**A.a.** The International Motorcycling Federation (hereinafter: the FIM), an association within the meaning of Article 60 of the Swiss Civil Code (CC; SR 210) with headquarters in Mies (canton of Vaud), is the supreme and unique international authority in motorcycling sport. Consequently, it can adopt whatever rules it deems necessary for the organization of events in connection with these titles, subject to the ones that may be brought before the Court of Arbitration for Sport (CAS) (Article 3 para. 2 of the FIM Statutes; hereinafter: the Statutes).

The FIM is composed of Affiliate Members and Associate Members. The first are National Motorcycling Federations which, in the opinion of the FIM, are not-for-profit and which are representative of - and exercise effective control over - motorcycling activities in their own countries provided that only one FMN per nation can become a member of the FIM (*Ein-Platz-Prinzip*)[1] (Article 11.1.1 of the Statutes). The latter are international or national motorcycling organizations which the FIM considers representatives in the motorcycling field, such as a motorcycling industry body or a motorcycling event promoter (Article 11.2.1 of the Statutes). Only the FMNs have the right to vote at the General Assembly (GA) which is the supreme authority of the FIM (Article 12.1.1 and Article 12.1.2.1 of the Statutes).

In accordance with Article 11.1.3 and 15 of the Statutes, the procedure for the consideration of applicants for and FMN as an Affiliated Member of the FIM and of the relevant Continental Union (CONU) is defined by the Governing Council (CD) and set out in the FIM Internal Regulations (RI) approved by the General Assembly, organ that is competent to accept the new FMN and to exclude the existent FMN (Article 12.1.7(e) of the Statutes). In order to become an Affiliate Member of the FIM, an FMN must send to the administration of this association an application for admission accompanied by a series of documents

[1] Translator's Note: in German in the original text.

listed in Article II.1.1 of the RI. It must include, in particular, a declaration by which the candidate undertakes to respect and to enforce by its members and licensees the Statutes, Regulations and Decisions of the FIM (Article II.1.1 (f) of the RI). The application for admission is treated in the first place by the DC, which can carry out any further investigation to check that the FMN candidate meets the admission requirements to the FIM and, if that is not the case, to reject the application. request; in the opposite case, the admission becomes effective at the earliest on January 1 of the year following its acceptance by the General Assembly (Article II.1 para. 3 to 5 of the RI).

According to article 4 para. 1 third sentence of the Statutes, "[t]he legal status of the FIM is governed by Swiss law that governs all disputes between the FIM and its members or organizations, as well as the associated organizations or individuals, in particular the licensed riders". Article 4 para. 2 of the Statutes sets the forum for any dispute against the FIM -which is not covered by the arbitration clause – in Geneva.

Inserted in Article 5 of the Statutes and imported almost word for word in Article 9 of the Disciplinary and Arbitration Code (CDA) as well as Article 3.2 the Sporting Code (CS), 2012 version, said clause states the following:

*"Any recourse to state tribunals against the final decisions rendered by the adjudicating instances or the General Assembly of the FIM is excluded. Said decisions must be exclusively referred to the Court of Arbitration for Sport (CAS) which shall have exclusive authority to impose a rule on the dispute, in accordance with the Code of Arbitration applicable to sport."*

The jurisdictional bodies to which the arbitration clause refers are listed in Article 12 of the Statutes. These are the International Disciplinary Court (CDI), the International Appeal Tribunal (TIA) and the Arbitration and Advisory Tribunal (TAC), whose respective jurisdiction is indicated in Articles 3.3.2, 3.4.2 and 3.5.2 of the Statutes.

**A.b.** The Kuwait International Automobile Club (KIAC) is, since 1980, the FMN recognized by the FIM as an Affiliate Member for the UAE (hereinafter: Kuwait).

The Kuwait Motor Sports Club (hereinafter: KMSC) is a non-profit entity of Kuwaiti law which was validated on October 18, 1997 by the Public Authority for Youth and Sports (APJS) of Kuwait.
By letter of September 16, 2009, the KMSC announced, for the first time, the FIM's desire to become a member of the latter. Informed of this step, the KIAC opposed it, in January 2010, availing itself of the support of the APJS.

On November 1, 2011, the KMSC relaunched the FIM, also availing itself of the support by the APJS. Once again challenged, KIAC maintained its opposition to KMSC's application for affiliation.

Invited by the FIM to give its opinion on the subject, the Automobile & Touring Club of the United Arab Emirates (UAE), by letter of February 14, 2012 from its chairman, Mr. A._____, said that the APJS had recognized three clubs of motorized sports in Kuwait, in ignorance of the rule limiting FIM affiliation to a single FMN per country. It also suggested that FIM should maintain the national federation that was already recognized, namely the KIAC. Following this advice, the umbrella association informed APJS and KMSC that KIAC would remain its Affiliate Member for Kuwait.

On May 7, 2013, the KMSC filed a new membership application with the FIM through its then board. In particular, it explained that KIAC could not remain a member of the FIM and represent Kuwait. Relaunched by the counsel of the KMSC board August 9, 2013, the FIM addressed a letter to it,

also to KIAC and APJS, informing them that it had appointed a mediator in the person of M. A_____, mentioned above, to assess the possibility for all to work together for the sake of the future of motorcycling in Kuwait. However, by letter of October 3, 2013, the KMSC rejected the offer of mediation, which did not take into account, according to them, the desire to become the only Kuwaiti association affiliated with the FIM; it also referred to the appointment of the President of the UEMC as mediator, the latter having previously expressed his support for the KIAC, and proposed the establishment of a mediation procedure to be conducted by a neutral person according to the CAS Rules. Without a response from the FIM, the KMSC board sent a reminder on November 25, 2013.

At the same time, a legal proceeding involving KMSC and KIAC was pending in Kuwait. On December 3, 2013, a Kuwait Court of Appeals issued a decision apparently recognizing KMSC as the sole entity authorized to organize motorcycle sports in Kuwait and enjoining KIAC to cease all activity in this area.
Based on this judgment, KMSC reiterated its request for affiliation by letter of December 20, 2013 to which it annexed the operative part of this decision.
In January 2014, KIAC appealed against the judgment of December 3, 2013 before the Kuwait Court of Cassation.
On February 4, March 5 and April 14, 2014, the KMSC Board relaunched the FIM.
By letter of May 5, 2014, the latter informed it that its CD would deal with the KIAC situation during its June 2014 meeting and that it would provide its explanations after this meeting.
On May 9, 2014, Mr. B_____, a member of the CD, sent a brief report to the FIM, by e-mail, about the situation in Kuwait. In particular, he noted that KIAC organized motorcycling events and that it should remain an affiliated member of the FIM. This report was based on the documents furnished by the KIAC President and CEO, Mr. C_____.
At the meeting of the FIM CD on June 27, 2014 in Copenhagen, the question of KMSC was submitted, but no decision was taken on the applicant's affiliation request.
The APJS seems to have rendered, on March 18, 2015, a decision to establish a Motor Sports Organizing Committee including, among others, a member of KIAC and a member of KMSC. This decision mentions in passing that KIAC "is the only authorized body to license motor sports activities and responsible for road safety in the state of Kuwait."
On July 9, 2015, Mr. B_____ gave the FIM a copy of a letter that AJPS sent on June 30, 2015 to the KIAC President and CEO. According to Mr. B_____, this letter "clarifies that the KIAC is the acknowledged Federation in Kuwait by the government in Automobile and Motorcycle."

During exchanges during the summer of 2015, the KMSC counsels informed FIM that their client did not agree to be recognized as a FIM affiliated federation for Kuwait and that an arbitration request would be filed with the CAS.

On October 5, 2015, the Court of cessation of Kuwait gave its decision in the appeal from KIAC against the judgement of December 3, 2013. This decision, which partially admitted the KIAC appeal, makes it quite clear that this association is a for-profit which is not able to be regarded as a sport organization, it seems that KMSC is not recognized as the only entity authorized to organize automobile and motorcycle sport in Kuwait, and in other part that KIAC has the right to continue its activities in this field.

**B.**

**Ba** On November 26, 2015, the KMSC filed a request for arbitration before the CAS against the FIM. Without formally notifying KIAC as the respondent, it invited the CAS to notify it of the said request.
On May 10, 2016, the CAS Secretariat informed the parties that the Panel, consisting of three arbitrators, was constituted.

On May 30, 2016, the FIM filed a response to the arbitration request. It raised an objection of lack of jurisdiction and requested that this question be decided, with a partial award and separately from the merits, request that was denied by the Panel.
KIAC indicated, by letter of 23 September 2016, that he did not wish to use the option to participate in the proceedings.

A hearing was held on December 6, 2016 in Lausanne.

In the final state of its conclusions, the KMSC invited the CAS (1) to order the FIM to accept and register the affiliated federation as the sole and legitimate body for Kuwait; (2) to order the FIM to exclude KIAC as an FIM affiliated federation for Kuwait and to enjoin KIAC to immediately cease all activity involving the exercise of FIM's powers in that country; (3) to make the FIM pay KMSC for an amount of EUR 3,218,297.30 in compensation for its claims resulting from the illegal retention of KIAC as an affiliated member, thus preventing the KMSC from joining the FIM.

For its part, the FIM focused on its objection to the CAS' jurisdiction and, consequently on the inadmissibility of the KMSC's request. In the alternative, in the event that the Panel would accept its jurisdiction, it requested that the claim be rejected in its entirety.

**B.b.** On May 1, 2017, the Panel rendered its final award. It declined its jurisdiction to render a decision on number (3) of KMSC's requests; for the rest, it admitted the claim, found that the absence of decision of the FIM in connection with the application for affiliation of the KMSC as a full member of the FIM was a denial of justice and ordered FIM to issue a decision on the affiliation request of KMSC as a full FIM member within nine months from the date of the notification of the award, in applying the rules in force from the filing of the affiliation request of May 7, 2013 and in respect of the right to be heard of the KMSC. All other or further requests were rejected.

**C.** On June 12, 2017, the FIM (hereinafter: the Appellant or the FIM) lodged an appeal in civil matters to the Federal Court requesting the annulment of the award of May 1, 2017 and the finding of lack of jurisdiction of CAS to rule in the dispute in CAS 2015/O/4316, in particular on all matters relating to the KMSC's affiliation application of May 7, 2013. The Appellant contended that the Panel wrongly declared itself competent in this case (Article 190 para. (2)(b) PILA) ruled *ultra* or *extra petita* (Article 190 para. (2)(c) PILA).
On July 14, 2017, the Panel, represented by its President, made brief submissions on the appeal without taking a formal stance as to the fate of the appeal.
In its response of August 8, 2017, the KMSC requested that the appeal should be dismissed.
The Appellant, in its reply of August 24, 2017, and the Respondent, in their rejoinder of September 11, 2017, upheld their respective submissions.
The suspensive effect was granted to the appeal by Presidential Order of September 19, 2017.

Considering in law:

**1**. In the field of international arbitration, a civil law appeal is permitted against the decisions of arbitral tribunals under the conditions set forth in Article 190 to 192 PILA (Article 77 para. (1)(a) LTF). Whether as to the subject of the appeal, the standing to appeal, the time limit to appeal, the Appellant's submissions or the ground for appeal invoked, none of these admissibility requirements raises any problem in the case at hand. The merits of the appeal may therefore be addressed.

**2**. Invoking Article 190 para. (2) (b) PILA, the Appellant argues that the CAS wrongly accepted its jurisdiction to hear the requests submitted by the respondent.

**2.1**
Seized of a jurisdictional defense, the Federal Tribunal freely reviews the legal issues, including the preliminary issues that determine the jurisdiction of the arbitral tribunal or the lack thereof. However, this does not render the Federal Tribunal an appellatory court. Thus, it does not behoove this Court to research which legal arguments could justify upholding the ground for appeal of Article 190 para. (2)(b) PILA in the award under appeal. Instead, it behooves the Appellant to draw the Tribunal's attention to them in order to comply with the requirements of Article 77 para. (3) LTF (ATF 134 III 565 at 3.1 and the cited cases).
With this reservation, the Federal Tribunal, in the framework of its free judicial review of all legal issues involved (jura novit curia) may reject the argument in question on other grounds than those indicated in the award under appeal as long as the facts found by the arbitral tribunal suffice to justify a different reasoning (judgment 4A_392/2008 of December 22, 2008, at 3.2). Conversely and with the same reservation, the Federal Tribunal may uphold the jurisdictional defense on the basis of new legal arguments developed by the appellant on the basis of the facts found in the award under appeal. (ATF 142 III 239 at 3.1).

However, the Federal Tribunal does not review the factual findings even when it decides on the grounds of lack of jurisdiction of the Arbitral Tribunal (last judgment quoted, ibid.)

**2.2.** The Appellant complains that the Panel wrongly dismissed his defense of lack of jurisdiction. It challenges the jurisdiction of the CAS with respect to both the respondent and the subject matter of the dispute. His arguments can be summarized as follows.

**2.2.1.** As for the jurisdiction *ratione personae* it should be noted that the KMSC is not a member of the FIM, but applied in order to replace the actual FIM member from the title of the FMN for Kuwait, namely KIAC. It must be considered whether it can still rely on the arbitration clause inserted in Article 5 of the Statutes, which presupposes an interpretation of the latter and, more specifically, Article 5 and Article 4.1, third sentence. The result of the interpretation by the Panel is untenable.

The text of the disputed arbitration clause, i.e. Article 5 of the Statutes, does not include the possibility for non-members to attack a decision rendered by the FIM or even the refusal of the latter to render such decision (denial of justice). Proof of this is the fact that the Panel had to resort to Article 4 para. 1, third sentence, of the Statutes to extend the scope of the arbitration clause, without appearing to be very convinced by its interpretation. The aforesaid clause, like Article 75 CC, sees its scope limited to the members - direct or indirect - of the FIM. A third party could not reasonably understand, by reading Article 5 of the Statutes in good faith, that this arbitration clause could be invoked also by a non-member of the FIM, since it is difficult to imagine that candidate FMNs could be qualified as related organizations, covered by Article 4 para. 1, third sentence, of the Statutes, or even "licensed" (legal) persons, subject to the latter clause. In reality, federations that really want to submit their affiliation dispute to the CAS, like the International Federation of Football Association (FIFA), provide for a specific arbitration clause - in casu Article 3 para. 1(s) of the Regulations for the Admission of Associations to FIFA (version 2013), which contains the following: "... all disputes related to the application must be arbitrated by the CAS ..." -in order to remedy the insufficiency of the general clause relating to arbitral disputes. Moreover, the reference made by the CAS to the case Kenya Football Federation vs FIFA (CAS 2008/O/1808) is not relevant, since, the CAS admitted its jurisdiction in this case, despite the fact that according to FIFA it was not one of its members anymore, because the dispute related to a party that supported being still a FIFA member.
Moreover, the Panel simply ignored, in this case, the special rule of interpretation, established by the jurisprudence of the Federal Tribunal, according to which the will of a party to have recourse to arbitration

should not be admitted lightly. It also departed from the required restrictive interpretation limiting itself to the simple possibility that the arbitral clause is extended to a third party wishing to join the FIM.

**2.2.2.** The Panel was also not competent *ratione materiae* to settle the dispute that was brought to its attention.
If one follows its reasoning, its substantive jurisdiction would presuppose that the FIM committed a formal denial of justice, failing which there would have been no "final decision" within the meaning of Article 5 of the Statutes, which may be the subject of an arbitration procedure before the CAS. The Federal Tribunal can therefore quite openly examine the question of whether or not has been a formal denial of justice has been committed in this case, since it is a crucial preliminary question for the admission of jurisdiction *ratione materiae* of the CAS.
It is hardly conceivable that a formal denial of justice can be committed in legal relationship that emanates exclusively from private law. In this respect, the disciplinary cases cited in the award are in no way comparable to the one in question here.

In any event, the facts retained by the Panel in no way reveal the existence of a formal denial of justice. Indeed the FIM, in line with the rules of the law imposing it to admit only one FMN by country, could not possibly decide on the application for affiliation of KMSC before a definitive decision was made by the Kuwait court on respective status of KIAC (current member of FIM) and KMSC (candidate for affiliation). Such a decision was taken on October 5, 2015 by the Kuwait Court of Cassation. It was only then that the FIM obtained all the necessary data enabling it to be decided on the affiliation request of the KMSC. The time elapsing between the notification of this decision and the filing of the arbitration claim on November 26, 2015, was clearly not sufficient to support the contention of a formal denial of justice.
Consequently, in the absence of a final decision, within the meaning of Article 5 of the Statutes, or a refusal to decide that can be assimilated to a decision, the CAS was not competent *ratione materiae* to decide on KMSC's request.

**2.3.**
**2.3.1**. When called to examine its jurisdiction on a specific dispute, the arbitral tribunal must resolve, among other issues, the subjective scope of the arbitration agreement at issue. It must determine what are the parties bound by this convention and to look, if necessary, whether third parties not designated can still fall within its scope (ATF 128 III 50 at 2b/bb p. 55).
The arbitration agreement must comply with the form under Article 178 para. 1 PILA. Although this requirement cannot be totally ignored, the Federal Tribunal examines the consensual nature of sports arbitration with a certain generosity, with the aim of promoting the swift resolution of disputes by specialized tribunals that have sufficient guaranties of independence and impartiality, such as the CAS (ATF 133 III 235 at 4.3.2.3). The broad interpretation given in the federal jurisprudence is shown in the flexibility when examining the validity of an arbitration clause by reference (judgment 4A_246/2011 of November 7, 2011 at 2.2.2 and the case law cited); it also appears implicit in the case law, according to the circumstances, (ATF 129 III 727 at 5.3.1 p.735). In short, it is considered that the arbitration clause of the CAS is *branchentypisch* in sports matters. This means that it is practically impossible to have elite sport without consent to sports arbitration (judgment 4A_490/2017 of February 2, 2018 at 3.1.2, judgment 4A_428/2011 of February 13, 2012 at 3.2.3 and references).
When it comes to interpreting statutes, the methods of interpretation may vary according to the type of entity considered. For the interpretation of the statutes of large corporations, we apply rather the methods of statutory interpretation. For the interpretation of the statutes of small companies, we apply interpretation principles applying to contracts, such as the objective interpretation according to the principle of trust (ATF 140 III 349 at 2.3 and the above mentioned). Applying this criterion of distinction, the Federal Tribunal has interpreted the statutes of major sports associations, such as UEFA, FIFA or the IAAF, in a similar way, particularly their clauses relating to jurisdiction (4A_490/2017, cited above, recital 3.3.2, 4A_600 / 2016

of June 29, 2017 at 3.3.4.1 and 4A_392/2008 of 22 December 22, 2008 at 4.2.1, on the evolution of case law LUDWIG/BRÄGGER, Auslegung von Vereinssatzungen am Beispiel von Art 5 Abs.1 of the UEFA-Statuten, in causa sport 2017 pp.19 ff., No. 3.3, p.21). The Federal Tribunal applied the same in order to find the meaning of the rules under the statutes that are dictated by a sport association of such importance (opinion 4A_600/2016, cited above, ibid.).
Any interpretation begins with the letter of the law (literal interpretation), but this is not decisive: we still have to find the true scope of the norm, which also derives from its relationship with other legal provisions and its context (systematic interpretation), the aim pursued, particularly the protected interest (teleological interpretation), as well as the will of the legislator as it may be understood from the "travaux préparatoires" (historical interpretation). The judge departs from a clear legal text only when the aforementioned methods of interpretation show that this text does not correspond in all respects to the true meaning of the provision in question and leads to results which the legislator could not have wanted, which conflict with the sense of justice or the principle of equal treatment. In short, the Federal Tribunal does not favor any method of interpretation and does not establish a hierarchy, based on a pragmatic pluralism in order to seek the true meaning of the norm (ATF 142 III 402 at 2.5.1 and the judgments quoted).

**2.3.2**. Applied *in casu*, these principles call for the remarks made below.

**2.3.2.1.** As the supreme and sole international authority on motorcycle sport, the FIM is one of the major sports associations. It is therefore appropriate to interpret the clauses of its Statutes and the rules of a lower level than the Statutes (the RI and the CDA) which govern it in the same way as the provisions of a law or a regulation and not according to the principle of trust. There is no doubt that the Panel couldn't clearly decide in the award for the one or the other of these two models of interpretation but opted rather for the one that governs the interpretation of contracts, as the Appellant highlights. It does not matter, however, since this is an issue that the Tribunal may review of its own motion (see 2.1 above).

Before proceeding to the interpretation, we should reject a hypothetical preliminary objection which, if it was admitted, would allow to avoid to examine such element. The objection consists of suggesting, based on the principle of autonomy, that each association of Swiss law is free to admit members as it deems fit and, as such, may reject without the need to justify itself, whoever wished to be part of it, while the unfortunate candidate would never be able to force such association to accept it through a motion before the state or arbitral courts. Such a thesis could not be accepted, at least now and particularly, when it comes to major sports associations of monopolistic character, such as the FIM. Indeed, Article 28 CC (to cite only one example), which may be invoked both by natural and legal persons, gives the right to whoever suffered an illicit damage to its personality the right to seek justice against any person that contributed to such damage. This is the case, in certain circumstances, when a person is not admitted to an association, because the denial to membership may constitute an infringement of the personality rights of the candidate when it comes to membership in a professional, economic or trade association (judgment 5A_21/2011 of February 10, 2012 at 5.1, 5.2 and 5.2.1.3 and references cited therein). This opinion is shared by two authors who have examined the FIFA membership process; accordingly, the freedom of admission is only on paper for those important associations and the CAS case law recognizes that candidate members have a right to be admitted as long as they fulfil the statutory and / or regulatory conditions (SCHERRER /BRÄGGER, Aufnahmeverfahren in Sportverbände am Beispiel der FIFA, in causa sport 2016 pp. 99 ff, No. 2.2 pp. 99/100 and No. 6 on page 107, with reference, footnote 63, p. 107, to a CAS award, apparently unpublished, rendered on April 27, 2016 in CAS case 2014/A/3776, Gibraltar v. FIFA).

**2.3.2.2.** In this case, the arbitration clause appears in Article 5, already cited (see Aa) of the Statutes, the content of which should be recalled for a better understanding of the following explanations:

“It is not allowed to have recourse to ordinary courts against final decisions rendered by the adjudicating instances or the AG of the FIM. Such decisions must be referred to the Court of Arbitration for Sport (CAS) which shall have exclusive authority to decide on the case in a final way in accordance with the Code of Sports-Related Arbitration”.
From the reading of the text, it appears from the outset that the arbitration clause at issue is formulated in a very broad way. Firstly, the emphasis is primarily placed on the exclusion of recourse to ordinary courts – which must be understood as state courts – in order to challenge the association’s decisions. Then, the FIM shows its wish to see similar disputes decided by an arbitral jurisdiction specialized in the resolution of sports-related disputes, defined as the CAS, which almost has a monopoly position in this field. Finally, the applicable procedure, namely the CAS Code, is indicated. Looking closer at this text, three additional findings can be made.
The first is based on the words "appeal... against final decisions ...of the FIM". It follows that the CAS is considered in this clause as an appeal venue, since its referral implies the existence of a final decision rendered by an organ of the association. On the basis of this finding, we can exclude, for example, that a dispute between the FIM and a contractor who executed work in the building of the association’s headquarters can be submitted to the CAS ordinary procedure (Article R38 of the Code) without the agreement of both parties. This is also the reason which led the Panel to decline its jurisdiction to decide on a request for damages (3) filed by the Respondent (see Award, No. 10.36, 10.37 and number 1 of the operative part), decision which cannot, in any event, be reviewed by this Tribunal in the absence of an appeal by the person concerned.
The second finding consists of highlighting the fact that the arbitration clause does not concern only the final decisions issued by the FIM's judicial bodies, namely the IFA, the TIA and the TAC (see also A.a., last §, above) but also those emanating from the General Assembly of the association. These decisions also include the admission of new FMNs and the exclusion of existing FMNs (Article 12.1.7 letter of the Statutes).

As the third and final finding we should note that the text of the arbitration clause does not specifically mention the persons entitled to challenge the final decisions of the adjudicating instances or the General Assembly of the FIM. As such, it is drafted in a less restrictive way than Article 75 CC, which only gives such right to members (“any member”), in other words only to the association’s members, including direct members, indirect members impacted by the decision of a major association to which a member association belongs and third parties that are subject to the association’s regulation that pronounced the sanction, and excludes the non-members such as old members, creditors or third interested parties (ATF 119 II 271 at 3b p 276 f.; BENEDICT FOEX, in Commentaire romand, Code Civil I, 2010, No. 4-6 ad art. 75 CC; HANS MICHAEL RIEMER, in Commentaire bernois, 1990, nos 46-48 ad art. 75 CC; HEINI/ SCHERRER, in Commentaire bâlois, Zivilgesetzbuch I, 5e éd. 2014, n° 16 ad art. 75 CC). Article 75 CC is definitively ius cogens in that the statutes cannot exclude the control of the association’s decisions by an independent tribunal, either state- or arbitral tribunal, such as the CAS (see the aforementioned judgment 4A_600/2016, at 3.2.1 and references). It is however hard to see why this imperative provision would prohibit an association to insert in its statutes a clause authorizing other parties than the members to file a claim of Article 75 CC or a similar claim (cf. PERRIN / CHAPUIS, Droit de l’association, 3rd ed., 2008, p. 169; see also p. 123 f., at a more general level, the arguments of these two authors in favor of the introduction of a judicial way to control refusals of admission). Article 5 of the Statutes is formulated more broadly as well as Article 66 of the FIFA Statutes (2014 edition) which limits the jurisdiction of the CAS to quarrels between "FIFA members, confederations, leagues, clubs, players, officials, match officials and agents of official players." Since this list did not include third parties who had applied for membership, it is clear that FIFA considered it necessary to introduce Article 3.1 let. s of the Regulations for the admission of associations to FIFA, a provision stipulating that the application for admission by the Association should contain the confirmation by the candidate association “that all disputes related to the application procedure should be brought in arbitration before the Court of Arbitration for Sport (CAS),

based in Lausanne (Switzerland)". That is to say that the appellant wrongly invokes, in the case of a specific arbitration clause for membership disputes, the CAS award in the case CAS 2014/A/3776 XFA c. FIFA in which the Panel denied its jurisdiction *ratione personae* on the basis of the general arbitration clause in Article 66.1 of the FIFA Statutes, in connection with Article 67.1 of the same statutes, but only by virtue of the express special clause inserted in the above-mentioned regulatory provision (para. 255). Indeed, the arbitration clause in question does not preclude the FMN whose application has been rejected by the FIM General Assembly, i.e. a non-member.

**2.3.2.3.** With regard to the systematic interpretation, there is much discussion, before the CAS, of the existence of a relationship between, on the one hand, the arbitration clause inserted in Article 5 of the Statutes and, on the other hand, the last sentence of Article 4.1 which states that *"[t]he legal status of the FIM shall be governed by Swiss law which governs all disputes between the FIM and its organs or members, as well as with the organizations or individuals associated with – or linked to it, in particular the licensed riders"* (see Aa, 4th §, above). In this respect, the Panel first connected the second provision to the first one in order to determine the scope of the latter, and held that as long as Article 4.1, last sentence of the Statutes mention third parties, i.e. non-members of the FIM, the latter could be covered by the arbitration clause (award, para. 10.30 in fine). However, in its answer to the appeal, the Panel, waiving any reference to the other statutory clause, deduced such a consequence from the sole text of Article 5 of the Statutes. The Appellant complains about this, with some vehemence, in its reply, without fearing to hold that the Panel, by changing its argumentation at the stage of its reply to the Federal Tribunal "would make a joke out of the appeal against the CAS Award" (sic; reply p.3, footnote 6). Such an outburst is out of place. The appellant forgets, in fact, that the Federal Tribunal, when dealing with a jurisdictional objection, is not bound by the grounds contained in the Award, nor by the legal arguments brought by the parties, not even by a potential modification of these legal arguments reasons and argumentation (see 2.1, above).
It is true that Article 4.1, last sentence of the Statutes is not of great help for the interpretation of the arbitration clause inserted in Article 5 thereof, since this sentence refers to the law (in casu Swiss law) called to govern the disputes between the FIM and various entities, including "associated" or "related" organizations or individuals, i.e. legal or physical persons not further defined by the Statutes, unlike the FMNs (Article 11.1.1 paragraph 1 of the Statutes) and the Associate Members (Article 11.2.1 of the Statutes). The only thing that can be said on this issue is that Swiss law also applies to disputes between FIM and persons other than the affiliated members of the FMNs (direct members) and this applies also to indirect members, particularly licensed riders. That being the case, apart from this choice of law clause, Article 4 of the Statutes still contains, in its paragraph 2, a choice of forum (in favor of Geneva) for any challenge raised against the FIM and not covered by the arbitration clause, which confirms the remark, made above, that not all disputes to which FIM is a party fall within the scope of Article 5 of the Statutes.
What is worth noting, however, in the context of systematic interpretation - is a state of affairs already mentioned - the generalization of the exclusion from ordinary courts, in favor of the CAS, as an appeal venue against the decisions taken by the FIM bodies, a fact that is irrefutably proven by its repetition in Article 9 of the CDA and Article 3.2 of the CS of the arbitration clause inserted in Article 5 of the Statutes.

In this context, it should be noted - with regard to the admission procedure of the FMNs that Article 11.1.3 of the Statutes entrusts the DC to define the RI - that under Article II.1.1(f) of the Statutes, in order to become an affiliated member of the FIM, a FMN must make a demand of admission accompanied, among other documents, by a declaration that it will obey the statutes, regulations, and decisions of the association. In Article 5 of the Statutes can be found the exact arbitration clause that forms one of the candidate's obligations. Therefore, it is possible to infer from the combination of the arbitration clause and the notion of the existence of an implicit duty of the candidate FMN with the FIM to bring exclusively before the CAS the FIM decisions and particularly potential decisions rejecting applications made by the AG of the FIM.

**2.3.2.4.** Even though it is not expressly stated, the aim pursued by the FIM by means of the arbitration clause included in its Statutes can be easily understood. It is to remove from the ordinary courts, as far as possible, the disputes of the organization of international motorcycling sports activities implemented under its aegis, in order to bring them to an international arbitral tribunal specialized in sports, a tribunal presenting sufficient guarantees of independence to be assimilated to a state court, condition that the CAS fulfils (on the latter point, published on February 20, 2018 in 4A 260/2017, X. v. FIFA, at 3.4).

It goes without saying that, in the case of a state-of-the-art mechanical sport, depending on the circumstance, it will be necessary to call upon persons in the field of technical knowledge to resolve contentious issues and it will undoubtedly be easier to find them in the list of the CAS arbitrators than in the judges of a state court, since the latter are rarely, if at all, called upon to settle a claim falling within this category of sports law. Moreover, specialized referees both in the field of arbitration and in professional motorcycling problems may be better placed to verify the content of the numerous documents that are produced by a candidate member association than the state courts, irrespective of the question of the language of the proceedings.

Moreover, even when the case doesn't ask technical questions at first sight, like the case at hand, it is conceivable that the FIM is reluctant to submit the case to a state court for one or another reason, particularly in view of its supranational position as the supreme international authority in the field of motorcycling sport.

It should be noted that the affiliation of an FMN to the FIM is governed by the *Ein-Platz-Prinzip*. This implies that the admission of the candidate association (i.c. the KMSC) within the umbrella federation (i.c. the FIM) is necessarily leading to the exclusion of the FMN (i.c. the KIAC) representing the same country as the one taking its place (i.c. Kuwait), with the exception of a hypothetical resignation. For part of the doctrine, the exclusion terminates the membership with effect *ex nunc*, so that a possible action based on Article 75 CC does not preclude the effect of the exclusion decision, subject to a retroactive reinstatement in its rights of the member in case of admission of such claim (FOËX, cited above, No. 9 ad 72 CC; RIEMER, op. cit., no. 6 ad Article 72 CC; another opinion: HEINI/SCHERRER, op. cit., No. 15 ad Article 72 CC and HEINI/PORTMANN/SEEMANN, Grundriss des Vereinsrecht, 2009, n. 295, for which the rights attached to membership are somehow suspended [Schwebezustand] during the judicial proceedings). There is no doubt that the association has the right to challenge its exclusion before the CAS by availing itself of the arbitration clause contained in the statutes of the umbrella federation (see, among others: FOEX, op cit, No. 5 ad art 75 CC, for a case of an application, see the aforementioned CAS award, Kenya Football Federation c. FIFA, para. 52-57). Therefore, if we admit, along with the first two authors mentioned above, that the exclusion puts an immediate end to the membership, there would be some inconsistency in refusing the candidate FMN the right to invoke the same arbitration clause to contest the rejection of its application, because, in both cases (in case of denial of an application), or even more than that (in case of exclusion of membership) for the purpose of dismissing the candidate FMN or excluding the FMN previously in place. Also, to use the words of PERRIN / CHAPUIS (op.cit., p.124, first paragraph in fine), "[a]n excluded member and a candidate member find themselves in the same situation".

From a practical point of view, the refusal to accept the jurisdiction of the CAS with regard to an excluded association would not be a good solution when such a measure emanates from an umbrella association submitted to the *Ein-Platz-Prinzip*. The following is a working hypothesis: the situation in which the FIM simultaneously decides to exclude KIAC while refusing to host KMSC in its place and invites Kuwait to submit a new application. In this case, the KIAC should request to annul this decision before the CAS on the basis of Article 5 of the Statutes, in order to challenge its exclusion, while the KMSC should seize the

competent state jurisdiction of the canton of Vaud, in which the FIM has its headquarters, in order to challenge the denial of its application. Always assuming that the Vaud court upheld the FIM's decision, but that ultimately, upon exhaustion of the cantonal proceedings, this decision is modified by the Swiss Federal Tribunal and FIM is forced to admit the KMSC while, at the same time, CAS accepts KIAC's appeal and annuls the exclusion decision taken by the FIM against this national federation, and that an appeal is unsuccessfully filed with the Federal Court against the arbitral award, it would follow that under these two decisions, the FIM would be required to accept KMSC as the FMN for Kuwait without being able to simultaneously exclude the affiliated Member for Kuwait (KIAC), and this would go against the *Ein-Platz-Prinzip*. Conversely, if this double decision were submitted to CAS for examination, it could render an award that is enforceable and in conformity with that principle by ordering the FIM to admit the KMSC application and to exclude the KIAC or, otherwise, to reject said application while renouncing its exclusion measure. In addition to avoiding contradictory decisions, while simplifying the enforcement procedure, this solution would have the advantage of placing the interested parties on an equal footing as to a possible appeal they would file against the CAS award. The other solution, apart from the longer duration needed to exhaust the cantonal proceedings, would have the disadvantage of allowing the unsuccessful candidate to bring the case as a last resort before the Federal Tribunal by way of an ordinary civil court (Article 72 ff. LTF) and thus obtain a free examination of the Vaud Cantonal Court's decision concerning the application of the law, whereas the excluded member could only bring an action for annulment of an arbitral award before the Federal Tribunal (Article 77.1 LTF) authorizing it to raise only the grievances exhaustively set out in Art. 190(2) PILA.

No doubt it would be conceivable to suspend one of the two cases until one final decision is rendered. However, this would hardly be compatible with the principle of procedural economy. This would probably result in an uncertain situation, likely to be prolonged, and unfavorable to all parties concerned.

**2.3.2.5**. The interpretation of Article 5 of the Statutes, as it has been made above, shows that the FIM, contrary to what it claims today, did indeed intend to give the arbitration clause at issue the most weight and ability to hear and include disputes related to the application process. In so doing, the umbrella association was guided by the desire to exclude the jurisdiction of the ordinary courts as far as possible in favor of that of a specialized sports court. As much as we like it or not, recourse to CAS appears to have established itself as the unavoidable jurisdictional path in the field of sports law. As a result, the restrictive interpretation of the arbitration clause, as advocated by the Appellant, is not justified. It is all the less appropriate that, if there were still a slight doubt as to the interpretation of the arbitration clause examined, *quod non*, it is the Appellant who should bear the consequences as the drafter of the Statutes including said clause (*in dubio contra proferentem*).

Finally, Article 5 of the Statutes constitutes a unilateral offer by the FIM to submit the disputes it mentions to CAS arbitration, a general offer not limited to the members of the association as addressees. By seizing the CAS, the KMSC accepted the offer by a conclusive act (see MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, 2015, No. 4 ad art R27 of the Code; for a comparable mechanism in investment dispute arbitration, see ATF 141 III 495 at 3.4.2 at 502).

Hence it follows that the Panel rightly recognized its competence *ratione personae* with respect to the KMSC. Nevertheless, it is important to note as a final remark that, while the Court focused on the *Ein-Platz-Prinzip*, it did so on purpose in order not to give to its judgment a too broad meaning and to avoid, for example, that one can invoke it as such in the context of an action for annulment of the refusal of membership to an internal association under Swiss law, risk however low since forcing an association through judicial means to admit a member against its will would only happen in exceptional cases.

**2.4.**

**2.4.1.** From the examination of the aforementioned case, it appears, on the one hand, that the KMSC, as a candidate member association, has a right to the admission within the umbrella association, in casu the FIM, provided that it fulfills the conditions laid down in the Statutes and the RI of that international federation (recital 2.3.2.1, second paragraph), and, secondly, that the right to appeal to the CAS is open in case the FIM refuses to admit it as an FMN representing Kuwait (at 2.3.2.5).

However, the disputed case has a peculiarity because the FIM has still not made a final decision on the admission of KMSC to its ranks and, correspondingly, to the exclusion of KIAC, for which the respondent complains and brought its claim to the CAS. It must therefore be asked whether the unjustified delay which the applicant attributes to the Appellant, in other words the formal denial of justice it brings forward, is comparable to a negative decision which may be subject to a control by the CAS.

In view of the case law and the doctrine relating thereto, we must answer this question in the affirmative. Indeed, the CAS has already repeatedly accepted the principle that a lack of decision by a competent body extending beyond a reasonable period of time may constitute a denial of justice possible to appeal against (see, among others: award of 5 January 2016 in the matter CAS 2015/A/ 4213, Khazar Lankaran Football Club v. FIFA, para. 58, award of 23 February 2015 in the matter CAS 2014 / A / 3670, Traves Smikle v. Jamaica Anti-doping Commission, para. 68, Award of December 17, 2008 in case CAS 2008/A/1634, Hertha BSC GmbH & CO KgaA v. Football Association of Serbia, para. 10 c; of December 16, 2008 in CAS case 2008/A /1633, Shalke 04 v. Confederação Brasileira de Futebol, para. 10 c; sentence of June 7, 2006 dans la cause CAS 2005/A/944, Aris Thessaloniki v. FIFA, n. 7). As for the aforementioned commentators, they are on the same wavelength (MAVROMATI / REEB, op cit, nos 23-25 ad art R47 of the Code). According to them, "[i] f there is a lacuna in the rules of the sports body regarding cases of inactivity and lack of response to a request, a decision not to open a case or the absence of reaction in general must be considered decision subject to appeal to CAS "(n. 24); likewise, "[a] denial of justice should also be affirmed if the first-instance body failed to render a decision within a reasonable period of time" (n. 25).[2] And these authors specify that the victim of a denial of formal justice is, logically, not required to act within the 21-day appeal period set in Article R49 of the Code (ibid.).

In attempting to disregard the application of these case law principles, the Appellant explains, in the first place, that it is hardly conceivable that the denial of justice may be committed in a purely private law relationship, more particularly in the case where the recipient of the offer which is the membership request (in casu the FIM) takes time to decide, whereas in accordance with the contractual freedom which characterizes the Swiss contract law, it is free to accept or refuse this request. The argument is not very solid. Whereas it is true that the formal justice of the law is not ordinarily blossoms in the private law garden, this legal figure, which is more a matter of judicial law, and, consequently, of public law, is not unknown in arbitration (see, e.g., JAN PAULSSON, Denial of Justice in International Law, 2015, pp. 176-178, KAUFMANN-KOHLER / RIGOZZI, International Arbitration, Law and Practice in Switzerland, 2015, No. 8.180). In addition, it has been shown that the FIM has no right to reject the application of the KMSC if it complies with the requirements of its statutes and when, by hypothesis, that of KIAC is no longer doing so. It argues that this is the case, since this freedom must be removed to the position of the candidate for membership. In other words, as the Respondent rightly points out, "[t]he Appellant cannot prevent indefinitely the respondent from becoming a member by its prolonged silence and inaction".

Finally, it is not clear where the Appellant is going when it contends that the above-mentioned awards were rendered by the CAS "in disciplinary cases, which are in no way comparable to the present case". The Appellant does not explain how the nature of the case should play a decisive role in terms of the

[2] Translator's Note : in English in the original text.

denial of formal justice. Moreover, in this respect, there is little difference, in principle, between the athlete who complains to the CAS of the inaction of an internal appeals commission of the association of which he/she is a member and which imposed on him/her a sports sanction, on the one hand, and a national sports association which, in order to exercise its rights and thus ensure its survival, is limited to requesting its affiliation to the umbrella international association, but, failing to obtain a response within a reasonable time, is obliged to bring its claim to the CAS to this effect.

**2.4.2.** Examining the factual circumstances of the case in dispute, the Panel found a formal denial of justice because the FIM failed to reach a decision within a reasonable time, since over two and a half years having elapsed between the moment of submission of the application for membership (May 7, 2013) and the introduction of the arbitration procedure (November 26, 2015).

**2.4.2.1.** According to the Appellant, since, by the admission of the Panel, its jurisdiction ratione materiae presupposes that the FIM has committed a formal denial of justice, comparable to a "final decision" within the meaning of Article 5 of the Statutes and subject to arbitration before the CAS, the Federal Tribunal could freely examine the question whether the existence of a denial of formal justice was properly the case, since it is a decisive preliminary question for admitting the competence ratione materiae of the CAS. Nothing, however, could be less certain.

In order to answer to this, it is useful to refer to the pertinent provisions of the Swiss legislation on the question of the formal denial of justice. We retain two provisions, namely Article 46a of the Federal Act of December 20, 1968 on administrative procedure (PA; RS 172.021) and Article 94 LTF. Under the title "Denial of justice and undue delay", these two provisions, the text of which is almost identical, provide the following:

"The appeal is admissible if, without having the right, the jurisdiction [Article 94 LTF; Article 46a PA uses the term: "authority"] seized refrains from making a decision subject to appeal or delay in doing so. "

According to the case-law and the doctrine relating to these two provisions, an action for miscarriage of justice presupposes that the person concerned has not only requested a decision from the competent authority, but also has a right to be notified of such a decision. ; moreover, this decision must be subject to appeal before the court deciding on the denial of formal justice (ATAF D-4253/2013 of August 15, 2013, page 3, 1-4, judgment 5A_393 / 2012 of August 13, 2012). at 1.2, BERNARD CORBOZ, in LTF Commentary, 2nd ed., 2014, No. 11 ad art 94 LTF). On the other hand, whether the court has refrained without good reason from making the decision required or has been too slow to do so is a problem which falls within the grounds of the appeal and does not affect the jurisdiction of the court, which, if it does not agree with the Appellant's views, must dismiss the appeal, and not declare it inadmissible (CORBOZ, op.cit., No. 15 ad art 94 LTF).

Applying these principles by analogy to this case, it appears that the KMSC, which filed a request for FIM membership on May 7, 2013 and which had re-launched its request on several occasions at a later date, had also a right to a decision by FIM concerning its application, which corresponded to a claim which it could judicially bring forward if necessary against said federation; moreover, the KMSC should indeed have applied to the CAS had the FIM notified it of an express decision rejecting its application. Therefore, the existence or not of an unjustified delay invoked by the KMSC did not put into question the jurisdiction of the CAS but constituted an element that the arbitral tribunal should examine for the upholding or dismissal of the appeal and not the admissibility or the inadmissibility of the appeal for denial of justice.

In fact, reading the pertinent part of the award (paras. 10.9), it is understandable why the Panel considered the question of a formal denial of justice. It was for the Panel (even if this is no longer relevant at this

stage of the judgment) to rule out the argument that the letter sent on May 5, 2014 by the FIM to the KMSC board could be considered as a decision in proper form which would have sufficed to reject the application since the interested party had clearly not appealed within the time limit of Article R49 of the Code.

That being so, as the question of undue delay relates to the merits, not the jurisdiction, it cannot be examined by the Federal Tribunal. It could only do so within the narrow limits of any of the other grievances listed in Article 190 (2) LDIP. However, such a possibility is irrelevant in this case, since the Appellant does not invoke any of these grievances (Article 77 (3) LTF).

**2.4.2.2.** Moreover, the outcome of this argument would not be different if, contrary to what has just been stated, the existence of the unjustified delay attributed to the FIM should be treated as a condition sine qua non for the admission of the jurisdiction of the CAS.

We need to reiterate that an appeal against an arbitral award must satisfy the reasoning requirements arising from Article 77(3) LTF in conjunction with Article 42(2) LTF and the case-law relating to the latter provision (ATF 140 III 86 at 2 and references). This presupposes that the Appellant considers the reasons for the award and precisely indicates why it considers that the Panel has infringed the law. It needs to do so imperatively with its appeal brief. It would therefore be in vain to use the reply to supplement, after the deadline has expired, an insufficient reasoning (judgment 4A_460/2017, cited above, at 2.1).

The few lines that the FIM devotes to its criticism of the considerations made by the Panel in admitting the unjustified delay clearly do not constitute a decent reasoning, and the meager additional elements added in the reply are not admissible. The only admissible argument in the first submission relates to the decision rendered on October 5, 2015 by the Kuwaiti Court of Cassation. The Appellant believes that it can be inferred that it was only from that date that it could make an informed decision on the application for membership. Presented in this way, without any context and without considering the doubts expressed by the Panel as to the scope of this decision (award, para. 11.3), such an argument cannot be admitted as much as, according to the case law, it would be contrary to the principle of the autonomy of the association to oblige an international federation to wait, in deciding on an application for membership, that the government of the relevant country chose, between two or more entities, which will designate as an FMN candidate member (award of 17 September 2015 in case CAS 2014/A/3828, Indian Hockey Federation v. International Hockey Federation and Hockey India, para. 159).

**2.5.** It is therefore necessary, in so far as it is admissible, to reject the plea of lack of jurisdiction for the CAS.

**3.**

**3.1.** In a subsidiary plea, based on Article 190 para. 2(c) PILA, the Appellant complains that the Panel exceeded its jurisdictional limits by finding, in its award, the existence of a formal denial of justice (n. 3 of the operative part) and inviting the Appellant to decide within nine months on KMSC's application for membership, according to the rules in force at the time of the filing of its request and in respecting the respondent's right to be heard (n. 4 of the operative part), whereas the latter had asked him to order the FIM to accept its membership, to exclude KIAC as FMN for Kuwait, ordering it to cease immediately any activity falling under the powers of the FIM in that country and finally, to order the latter to pay EUR 3,218,297.30 in damages. According to the Appellant, the Panel would have ruled ultra or at least *extra petita* by allocating something other than what was asked. In its opinion, reverting the case back to the FIM, in the absence of an ad hoc agreement, could have been justified at most on the basis of Article R57 of the Code, but this provision was not applicable *in casu* because the dispute was submitted to the ordinary procedure for which there is no similar provision.

In its observations, the Panel recalls that some CAS arbitrations may include both ordinary procedural and appellate findings, as would be the case here. It states that according to Article S20 para. 2 of the Code, the allocation of a case by the CAS Registry to the ordinary Arbitration Chamber or the Appeals Chamber cannot be challenged by the parties or be invoked by them as a cause of irregularity. Likewise, the Panel notes that the allocation of a mixed case to the ordinary arbitration procedure cannot reduce the powers of the Panel in relation to the conclusions which in principle fall under the appeal procedure.

For its part, the Respondent points out that the Panel declined the possibility to admit the claims filed by the Respondent it in order to allow the Appellant to rule first on the application for membership. Accordingly, the CAS, in doing so, did not rule ultra petita, but merely ordered the resistant international federation to make the requested decision itself without too much delay.

**3.2.**

**3.2.1.** Under Article 190 (2)(c) PILA it is possible to attack the award, in particular when the arbitral tribunal has ruled beyond the claims submitted to it. Under this provision fall awards that allocate more or something other than what has been requested (*ultra* or *extra petita*). However, according to case law, the arbitral tribunal does not adjudicate beyond the claims if it ultimately allocates not more than the total amount claimed by the plaintiff, but assesses some of the elements of the claim in a different way or when, being seized of a negative action of law which it considers unfounded, it finds the existence of the contentious legal report in the operative part of the award rather than dismissing it. The arbitral tribunal does not violate the principle of *ne eat iudex ultra petita partium* if it gives to an application a different legal classification than the one submitted by the applicant. The *jura novit curia* principle, which is applicable to arbitral proceedings, requires arbitrators to apply the law ex officio, without limiting themselves to the reasons advanced by the parties. It is therefore possible to refer to legal considerations not invoked by the parties, because there is no new request or application, but only one new characterization of the facts of the case. The arbitral tribunal is, however, bound by the object and the amount of the requests submitted to it, in particular when the interested party qualifies or limits its claims in the requests for relief (judgment 4A_50/2017 of July 11, 2017 at 3.1 and the case law mentioned).

**3.2.2.** According to the case law, in view of the autonomy of sports federations, it is not for the CAS to substitute itself for the competent organ of an international federation to decide on the merits of a federation's application for membership (judgment of July 15, 2015 in Case TAS 2004/A/776, Federacio Catalana de Patinatge v. International Roller Sports Federation, para. 49). In this case, the Panel, with the help of this case, referred the case to the FIM in order to respect the freedom of association of this international federation (award, para. 11.5) and to preserve its rights, in particular its autonomy, by not upsetting the order of competences in the processing of an FMN's application for membership. By objecting to this referral to the lower instance, decided in its favor, the Appellant adopts an attitude that seems difficult to reconcile with the rules of good faith. Considered from the point of view of the international federation in question, such an attitude is tantamount to complaining that it did not receive a direct order to accept a candidate for affiliation against its will and to exclude at the same time the FMN in place.

The arguments put forward by the Appellant on Art. R57 of the Code with respect to the initial choice of the ordinary procedure made by the Panel do not deserve further scrutiny either since it is not possible to challenge such choice given the Article S20.2 of the Code, a choice which was undoubtedly dictated by the existence of a damages claim, even though the procedure conducted based on the other claims had all the characteristics of an appeal procedure.

Finally, in view of the principle *a maiore minus*, it is clear that the Panel has not ruled neither *ultra* or *extra petitaen* acting as it did, namely by granting less to KMSC than what was requested.

On the borderline of recklessness, this second complaint should also be dismissed.

4. The rejection of the appeal entails *ipso jure* the lapse of the suspensive effect granted to the appeal on September 19, 2017. Therefore, the period of nine months from the date of notification of the arbitral award of May 1, 2017, in which the FIM had to decide on the application for affiliation of the KMSC - deadline which is suspended since September 19, 2017 - will resume from the date indicated at the beginning of this judgment (Article 61 LTF).

5. The appellant, who is unsuccessful, will have to pay the costs of the federal proceedings (Article 66(1) LTF) and pay the respondent an award of costs (Article 68 (1) and (2) LTF).

For these reasons, the Federal Court pronounces:

1. The appeal is rejected to the extent that it is admissible.

2. Legal costs, fixed at 5,000 CHF, shall be borne by the Appellant.

3. The Appellant will pay the Respondent an indemnity of 6,000 CHF as costs.

4. This judgment is being issued to the representatives of the parties and to the Court of Arbitration for Sport.

Lausanne, May 28, 2018

On behalf of the First Civil Law Court of the Swiss Federal Court

Presiding: Kiss

The Clerk: Carruzzo