Arbitration CAS 2008/A/1485 FC Midtjylland A/S v. Fédération Internationale de Football Association (FIFA), award of 6 March 2009

Panel: Mr Stuart McInnes (England), President; Mr Lars Halgreen (Denmark); Prof. Luigi Fumagalli (Italy)

Football
International transfer of minor players
Scope of application of Art. 19 RSTP
Exceptions to the principle prohibiting the transfer of minor players
Application of EC Law in general
Application of the Cotonou Agreement
Application of the Charter of Fundamental Rights of the EU
Breach of the non-discrimination principle

1. **Art. 19 RSTP applies equally to amateur and professional minor players.**

2. **The list of exceptions contained in Art. 19 para. 2 RSTP is not exhaustive. This provision has been construed as allowing other exceptions concerning students, namely in cases where the players concerned could establish without any doubt that the reason for relocation to another country was related to their studies, and not to their activity as football players or in cases in which the Association of origin and the new club of the players concerned have signed an agreement within the scope of a development program for young players under certain strict conditions (agreement on the academic and/or school education, authorization granted for a limited period of time).**

3. **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 the arbitration.**

4. **Players who have no employment contract and who, according to the national immigration legislation, are to be considered not as "workers", but as "students", are outside of the scope of application of Art. 13 par. 3 of the Cotonou Agreement.**

5. **The Charter of Fundamental Rights of the EU is not a legal document having binding effect. In consequence, one cannot rely upon it in order to assert any legally enforceable right. Furthermore, the registration with a football club is not protected by the right to freedom of peaceful assembly and to freedom of association provided by the Charter.**

6. In general, one cannot claim to benefit from the same treatment as another in circumstances where the treatment granted to a third party would be illegal. There is an exception to this principle when it can be evidenced that the constant practice of the authorities is to benefit third parties with treatments that are illegal. However, if evidence has not been adduced that the constant practice of FIFA is to accept the registration of minor players from outside the EC, the exception does not apply.

FC Midtjylland A/S ("the Appellant" or "Midtjylland") is a football club with its registered office in Herning, Denmark. It is affiliated to the Danish Football Association, which in turn has been affiliated with the Fédération Internationale de Football Association since 1904.

Fédération Internationale de Football Association (FIFA, "the Respondent") is the governing body of international football. It exercises regulatory, supervisory and disciplinary functions over continental confederations, national associations, clubs, officials and players, worldwide. FIFA is an association established in accordance with Art. 60 ff. of the Swiss Civil Code and has its seat in Zurich (Switzerland).

Midtjylland is a Danish Premier League Club. It has established cooperation with FC Ebedei, a Nigerian Club. The official website of Midtjylland contains the following information on this cooperation, according to a translation produced by FIFA, which is not disputed by the Appellant:

> *"FC Ebedei*
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> *FC Midtjylland has established cooperation with the Nigerian club FC Ebedei, which plays in the second tier of Nigerian football. The club lies in Nigeria's largest city, Lagos, which - as home to over 15 millions inhabitants - has a lot potential when it comes to seeking talents. The club's director is Churchill Oliseh, the brother of the Nigerian national team player Sunday Oliseh.*
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> *The cooperation with FC Ebedei means that FC Midtjylland has the purchase option on the club's biggest talents. O., who debuted with FC Midtjylland in 2004 as a 19 years old, is the first talent to come from FC Ebedei to FC Midtjylland.*
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> *The cooperation also includes players below the age of 18, as FC Midtjylland has the possibility of enrolling young Nigerian talents in the Club's Football Academy".*

On 6 June 2006, Midtjylland registered the following three minor Nigerian players ("the Players"), previously registered with the Nigerian club FC Ebedei:

- I., born on 9 June 1989;
- L., born on 1 December 1989;
- A., born on 14 March 1989.

On 1 February 2007 Midtjylland applied for player permits for the following three players ("the Younger Players") also previously registered with the Nigerian club FC Ebedei:

- U., born on 11 April 1990;
- S., born 5 June 1990;
- E., born 8 September 1990.

The Danish Football Association issued the necessary licences in favour of the Players and registered them as amateurs in accordance with the Danish Football Association's definition of amateur players. According to this definition, a player may receive a maximum total amount of DKK 24,000 (EUR 3,219) per calendar year without losing his amateur status. The Danish Football Association declined to issue amateur player permits to the Younger Players pending resolution of an ongoing case before the Players Status Committee concerning potential violation of Article 19 of FIFA's Regulations for the Status and Transfer of Players ("the RSTP").

Both the Players and the Younger Players have been granted a residence permit by the Danish Immigration Service, allowing a short-term stay, as students. The permits granted to the Players and the Younger Players do not include the right to work.

The Players have been given an upper secondary school education, in a public school in Denmark. The Younger Players have likewise participated in 10th grade schooling at Ikast Youth Center and have attended school for 13,3 hours per week (10 lessons of 1 hour and 20 minutes), which comprise lessons in ordinary Danish classes, English classes, sports classes, Danish culture classes, art and human rights classes.

The Appellant explained that the Nigerian students under the age of 18 who play football with the Appellant receive contributions towards board and lodging and a little pocket money. According to the Appellant, the total amount of these contributions do not exceed DKK 24,000 per student, on an annual basis, in order for these students to be registered as amateur players according to the regulations of the Danish Football Association.

In February 2007, the Fédération Internationale des Associations de Footballeurs Professionnels (FIFPro) contacted FIFA alleging that Midtjylland was systematically transferring minor Nigerian players, in violation of Art. 19 para. 1 RSTP. FIFA investigated these allegations and, on 25 October 2007, the Players' Status Committee issued a decision in English, against Midtjylland and the Danish Football Association, stating as follows in relevant parts ("The Decision"):

> *"(…)*
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> *7. The members of the Committee, first and foremost, deemed it important to highlight that Art. 19 of the Regulations relating to the protection of minors is applicable to both amateur and professional players.*
>
> *(…)*
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> *13. Reverting to the crucial issue of the protection of minors in the matter at stake, the Committee wished to emphasize that the aim of the relevant provision in the Regulations is the protection of minors. The protection of minors, in fact, constitutes one of the principles included in the agreement that was concluded between FIFA, UEFA and the European Commission in March 2001 and is one of the pillars of the Regulations. In this respect, the Committee recalled that the inclusion of this provision was the result of an alarming situation that had occurred relating to abuse and maltreatment of many young players, mostly still children. The Committee*

emphasized 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. Furthermore, the Committee agreed that such aim can only be reached by a strict, consistent and systematic implementation of Art. 19 of the Regulations pointing out that no means allowing a more lenient modus operandi appear to exist. Moreover, the members of the Committee underlined that the consistent implementation of Art. 19 of the Regulations offers clubs and players legal security and complies with the principle of good faith.

14. On account of the above considerations and in strict application of Art. 19 of the Regulations, the Committee has to reject the arguments put forward by both the DBU and FC Midtjylland.

(…)".

For the above mentioned reasons, the Players Status Committee decided the following:

"1. The Danish Football Association (DBU) has been issued with a strong warning for the infringement of Art. 19 para. 1 of the FIFA Regulations for the Status and Transfer of Players.

2. FC Midtjyland has been issued with a strong warning for the infringement of Art. 19 para. 1 of the FIFA Regulations for the Status and Transfer of Players.

3. According to Art. 61 para. 1 of the FIFA Statutes, this decision may be appealed against before the Court of Arbitration for Sports (CAS). The statement of appeal must be sent to the CAS directly within 21 days of receipt of notification of this decision and shall contain all the elements in accordance with point 2 of the directives issued by the CAS, a copy of which we enclose hereto. Within another 10 days following the expiry of the time limit for filing the statement of appeal, the Appellant shall file a brief stating the facts and legal arguments giving rise to the appeal with the CAS (cf. point 4 of the directives)".

The Decision of the Players Status Committee was served on the Appellant on 25 January 2008.

On 14 February 2008, Midtjylland filed a statement of appeal with the Court of Arbitration of Sport (CAS) directed against FIFA. It challenged the Decision and submitted the following requests for relief:

"The Appellant challenges the Decision of the Players Status Committee and requests that CAS admits the appeal, set aside and annul the Decision of the Players Status Committee in its entirety, and cancel the sanction of a strong warning for the infringement of Art. 19 para. 1 of the FIFA Regulations for the Status and Transfer of Players.

The Appellant requests to be acquitted of all charges".

On 25 February 2008, Midtjylland filed its appeal brief. The Appellant's submissions are, in essence, the following:

- Should the Nigerian students be considered to be professionals according to Art. 2 of the RSTP, then the Nigerian students must also be considered as workers according to the European Union Legislation. The Appellant alleges that FIFA must comply with the EU legislation which embraces a partnership agreement with a number of African countries, including Nigeria, named the *"Cotonou Agreement"*. The obligations drawn up in the Cotonou Agreement would be subject to existing EU legislation and be binding

upon FIFA. A Nigerian citizen, who is a legal resident in Denmark, could invoke Art. 13.3 of the Cotonou Agreement, to be treated equally to a Danish citizen. It would therefore be indisputable that the Cotonou Agreement could be invoked by the Nigerian students in the present case, to claim protection against any act of discrimination.

- The exception in Art. 19 para. 2 b of the RSTP should be interpreted such that it can also benefit citizens from third countries which have made a bilateral agreement with the European Union, to secure third countries' citizens from discrimination caused by nationality in terms of working conditions. Such would be the case of a Nigerian citizen, with reference to Art. 13.3 of the Cotonou Agreement. In that respect, the Appellant refers to a decision of the European Court of Justice, dated 12 April 2005, concerning a Russian citizen (Igor Simutenkov), who had a residence permit in Spain and was a professional football player in that country.
- The application of Art. 19 of the RSTP for the Nigerian students under 18 years of age, who have gained a legal permit to remain in Denmark in order to study and who in their leisure time wish to play football on an amateur level would be too far reaching and would exceed the substance and spirit of the Article. The application of Article 19 should be limited to those players under the age of 18 wanting to gain a resident's permit for the purpose of playing football and not be applicable to players with a permit to study but wishing to play football in their leisure time as an adjunct to their studies.
- The purpose of entering Art. 19 for the protection of minors would have been to protect the minor players who have the status of workers, that is to say professional players under the age of 18. This opinion would be supported by the wording of Art. 19.2 (b) ii of the RSTP. Hence, Art. 19.2 (b) ii of the RSTP refers to the situation in which the player should cease playing professional football.
- The Appellant also submits that Art. 19 has been adopted to prevent the exploitation and abuse of young players. In this specific case, there is no trace of exploitation and abuse, as the students have the opportunity to develop both personally, socially, culturally, and in terms of education.
- The Appellant furthermore submits that the interpretation of Art. 19 of the RSTP, made by FIFA, would be inconsistent with the Nigerian students' human rights including the right of freedom of assembly and association and the protection against discrimination caused by nationality. As students residing in Denmark, the Nigerian students should be granted the possibility to play football and to be registered as an amateur player with a Danish club, for instance Midtjylland.

On 19 March 2008, FIFA filed an answer, requesting CAS:

"1. To reject the present appeal as to the substance and to confirm, in its entirety, the decision passed by the Players Status Committee on 25 October 2007.

2. To order the Appellant to bear all costs incurred with the present procedure.

3. To order the Appellant to cover all legal expenses of the Respondent related to the present procedure".

The submissions made by FIFA can be summarized as follows:

- The Appellant did not raise any new cogent argument that would justify setting aside the decision reached by the Players Status Committee.
- Art. 19 of the RSTP applies to amateur and professional players.
- The listed exceptions to the principle of the prohibition of the transfer of players below the age of 18 and the facts of the instant case do not fulfil the necessary conditions to be considered as an exception to the general principle.
- The case law of CAS, FIFA submits that Art. 19 of the RSTP does not violate any mandatory principle of public policy under Swiss law or any other national or international law insofar as the Regulations pursue a legitimate objective, namely the protection of young players from international transfers which could disrupt their lives.
- The provisions of the Cotonou Agreement invoked by the Appellant do not have a direct effect, from which any enforceable right could be deduced, except for Art. 13 para. 3 of the Cotonou Agreement. Referring to the *Simutenkov* case, FIFA alleges that Art. 13 para. 3 of the Cotonou Agreement is applicable to workers lawfully employed in the territory of a member of the EC Community, so that it creates no rights for the benefits of Nigerian students.

On 28 November 2008, the Appellant filed a further legal statement, commenting on the remarks contained in the answer of FIFA. It also produced further exhibits, relating to the educational program of both the Players and the Younger Players. In this further legal statement, the Appellant referred to the situation of a minor player from South America, submitting that an important European football club transferred this minor player, apparently without sanction from FIFA.

On 15 December 2008, FIFA filed a response to the Appellant's further legal statement, in which it referred the Panel to the consideration of the challenged decision and to its answer dated 19 March 2008. FIFA furthermore underlined that the Appellant had not responded to the allegations of FIFA that Midtjylland was systematically transferring minor players from Nigeria through a cooperation agreement with a Nigerian club from Lagos.

With the consent of the Parties, the Panel has decided, pursuant to Art. R57 of the Code of Sports-related Arbitration ("the Code"), that it was not deemed necessary to hold a hearing and that it was sufficiently well informed to issue a decision on the basis of the parties' written submissions.

LAW

CAS Jurisdiction

1. The jurisdiction of CAS, which is not disputed, derives from Art. 60 ff. of the FIFA Statutes in force as of 1 August 2006 and Art. R47 of the Code. It is further confirmed by the order of procedure duly signed by the parties.

2. It follows that the CAS has jurisdiction to decide on the present dispute.

3. Under Art. R57 of the Code, the Panel has the full power to review the facts and the law. The Panel therefore heard the case *de novo*, evaluating all facts and legal issues involved in the dispute.

Applicable law

4. Art. R58 of the Code provides the following:

   "The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

5. Art. 60 para. 2 of the FIFA Statutes further provides for the application of the various regulations of FIFA and, additionally, Swiss law.

6. In the present matter, the parties have not agreed on the application of any particular law. Therefore, the rules and regulations of FIFA shall apply primarily and Swiss law shall apply complementarily.

7. Both parties base their submissions on the RSTP 2005, which shall apply to the present matter.

Admissibility

8. The appeal was filed within the deadline provided by Art. 60 of the FIFA Statutes and stated in the Decision, that is within 21 days after notification of such Decision. The parties complied with all of the other requirements of Art. 48 of the Code, including the payment of the Court Office fee.

9. It follows that the appeal filed by Midtjylland is admissible, which is undisputed.

Main Issues

10. The main issues to be resolved by the Panel are:

    a) Is Art. 19 of the RSTP applicable to professional and amateur minor players?

    b) Which are the exceptions to the principle prohibiting the transfer of minor players and are any of these exceptions applicable to the present case?

    c) Does the application of Art. 19 RSTP to the present case contradict any mandatory provision of public policy or any of the provisions of EC Law?

    d) Is the alleged inconsistent approach of FIFA in the application of Art. 19 a breach of the non-discrimination principle?

A. Is Art. 19 of the RSTP applicable to professional and amateur minor players?

11. The present dispute is focused on the application and construction of Art. 19 of the RSTP, in force as of 1 July 2005. The challenged Decision is mainly based on this provision and its operative part expressly mentions Art. 19 para. 1 of the RSTP. Both parties have developed their submissions on the assumption that the question at stake has to be addressed according to Art. 19 of the RSTP.

12. Art. 19 of the RSTP is the only provision of the 5th chapter of the RSTP, entitled *"V. International transfers involving minors"*. It reads as follows:

    "Art. 19 Protection of Minors

    1. International transfers of players are only permitted if the player is over the age of 18.

    2. The following three exceptions to this rule apply:

        a) The player's parents move to the country in which the New Club is located for reasons not linked to football; or

        b) The transfer takes place within the territory of the European Union (EU) of European Economic Area (EEA) and the player is aged between 16 and 18. In this case, the New Club must fulfil the following minimum obligations:

            i) It shall provide the player with an adequate football education and/or training in line with the highest national standards.

            ii) 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.

            iii) It shall make all necessary arrangements to ensure that the player is looked after in the best possible way (optimum living standards with a guest family or in club accommodation, appointment of a mentor at the club, etc.).

iv) It shall, on registration of such a player, provide the relevant Association with proof that it is complying with the aforementioned obligations; or

c) The player lives no further than 50km from a national border, and the club for which the player wishes to be registered in the neighbouring Association is also within 50km of that border. The maximum distance between the player's domicile and the club's quarters shall be 100km. In such cases, the player must continue to live at home and the two Associations concerned must give their explicit consent.

3. The conditions of this article shall also apply to any player who has never previously been registered for a club and is not a national of the country in which he wishes to be registered for the first time.

4. Each Association shall ensure the respect of this provision by its clubs.

5. The Players' Status Committee shall be competent to decide on any dispute arising in relation to these matters and shall impose appropriate sanctions in case of violation of this provision".

13. The Appellant's submissions are based on the assumption that Art. 19 would have to be applied only to professional players especially because Art. 19 para. 2 (b) ii) mentions the case where the minor should *"cease playing professional football"*.

14. The Panel however considers that Art. 19 of the Regulations applies equally to amateur and professional minor players.

15. Firstly, a literal construction of the provision does not indicate that the application of the provision would be limited to professional players. The title of the chapter V of the RSTP, under which Art. 19 has been set, refers to *"International Transfers involving Minors"*. The term *"Transfer"* is to be linked with the notion of *"Registration"*, which applies to both amateur and professional players (Art. 5 para. 1 of the RSTP). Furthermore, Art. 19 is entitled *"Protection of Minors"* and Art. 19 para. 1 refers to *"Players"* without any specification as to the status of these players. It is thus clear to the Panel that Art. 19 has been drafted to apply to minor players in general, irrespective of whether they are professional or amateur according to the Regulations. Any other construction would be contrary to the clearly intended objective and spirit of the regulation. The Panel accepts that to apply Art. 19 of the RSTP restrictively to professional players only could result in obviating protection of young amateur players from the risk of abuse and ill treatment which was clearly not within the anticipation of the scope of the regulation.

16. In view of the finding that the protection provided by Art. 19 of the RSTP applies equally to amateur and professional minor players there is no need for the Panel in the present dispute to determine whether the Players registered with the Danish Football Association are to be considered as amateur or professional according to Art. 2 of the RSTP. On this issue, despite registration of the Players as amateurs by the Danish Football Association, the Panel notes that CAS case law has taken a broad approach in the interpretation of the notion of professional status, in the application of the RSTP 2001 (see CAS 2006/A/1177, especially para. 8.4).

17. Finally, the Panel notes that 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"*. The Panel will elaborate on these questions hereunder, as necessary to address the Appellant's submissions.

B. Which are the exceptions to the principle prohibiting the transfer of minor players and are any of these exceptions applicable to the present case?

18. Art. 19 of the RSTP prohibits international transfers of minor players (Art. 19 para. 1 RSTP, *a contrario*). However, it is noted that there are exceptions to the general principle in Art. 19 para. 2 *et seq.* and the Panel examined whether any of the additional exceptions could be invoked in the instant case.

19. Art. 19 para. 2 of the RSTP lists three exceptions to the general rule which can be summarized as follows:

- The player's parents move to the country of the new club for reasons which are not linked to the activity of the minor as a football player (Art. 19 para. 2 a);
- The transfer takes place within the territory of the EU or the European Economic Area and the player is aged between 16 and 18, under certain circumstances, (Art. 19 para. 2 b);
- The player lives near a border and the registering club is located close to this border (maximum distance of 100 km, Art. 19 para. 2 c).

None of these exceptions is applicable to the factual nexus of the instant case, irrespective of the question whether the Players should enjoy the benefit of protection of the right of transfer within the EU, provided by Art. 19 para. 2 b), which will be addressed hereunder.

20. According to FIFA, the list of exceptions contained in Art. 19 para. 2 RSTP is exhaustive and should be strictly interpreted by the Players' Status Committee although it accepts that two further exceptions (relating to students only) exist as follows:

- The international transfer of minors is allowed in cases where the players concerned could establish without any doubt that the reason for relocation to another country was related to their studies, and not to their activity as football players.
- The international transfer is also allowed in cases in which the Association of origin and the new club of the players concerned have signed an agreement within the scope of a development program for young players under certain strict conditions (agreement on the academic and/or school education, authorization granted for a limited period of time).

21. In the light of the aforementioned, the Panel deduces that the list of exceptions contained in Art. 19 para. 2 is not exhaustive and that this provision has been construed as allowing other exceptions, concerning students.

22. The Panel accepts that neither of these further exceptions concerning students is applicable to the present case.

23. Firstly, no evidence of an agreement between the Appellant and the Association, which the Panel understands to be the national association of the country of origin of the player, was adduced.

24. Secondly, there is no evidence that the relocation of the players to Denmark was related to their studies. It appears to the Panel, when considering the evidence related to the presentation on the club's website of the cooperation between the Appellant and FC Ebedei, that the principal objective of the relocation of minor players to Denmark is to enable the Appellant to find new talent in the field of football, not to select the best Nigerian students in order to develop their academic abilities in Northern Europe. Even if the transferred player is studying, in a public school, and is attending a serious and recognized educational program, that does not mean that the relocation of the player was driven by reason of education and not for sporting reasons and as such it is not sufficient for such players to benefit from one of the two additional exceptions permitted by FIFA.

25. In the instant case, it is the Panel's view that the main reasons for the players to remove to Denmark were related to football and not to the furtherance of their education.

26. In conclusion, the Panel is of the opinion that no exception to the principle of the prohibition of international transfer of minor players can be invoked in the present case.

C. Does the application of Art. 19 RSTP to the present case contradict any mandatory provision of public policy or any other provision of EC Law?

27. The Appellant submits that a strict application of Art. 19 of the RSTP would contravene the EC Legislation, especially the Cotonou Agreement, which would have to be considered as included in the existing EC Legislation, the case law of the European Court of Justice prohibiting any discrimination based on nationality as regards working conditions and Art. 12 of the Charter of Fundamental Rights of the European Union providing for the freedom of assembly and of association.

a) Application of EC law?

28. The Appellant's submissions are based on the assumption that EC Law would be binding upon the CAS, as regards disputes connected with FIFA Regulations. This assumption is not correct. Art. R58 of the Code provides that the Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties. In the present case, it is not disputed that the parties have accepted Art. 60 para. 2 of the FIFA Statutes, which provides for the application of the various regulations of FIFA and, additionally, Swiss law. It is

recognized by the relevant Swiss authors, as well as by CAS case law, that Art. 187 of the Swiss Private International Law (SPIL) allows an Arbitral Tribunal to decide the dispute in application of private rules of law, as sporting regulations or rules issued by an international federation (see amongst others RIGOZZI A., L'arbitrage international en matière de sport, Bâle 2005, N. 1178; see also TAS/2005/A/983-984, especially para. 62 ff.). In consequence, the direct application of EC Law provisions or principles has been excluded by the parties and the Appellant cannot claim the application of non mandatory provisions of EC law.

29. Even if the parties have chosen to submit their dispute to private rules of law and to Swiss law, 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 (see POUDRET/BESSON, Comparative Law of International Arbitration, 2nd ed., London 2007, N. 707c, p. 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 para. 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 the arbitration.

30. Before deciding whether Art. 19 of the RSTP contradicts a provision or principle of EC Law that would have to be considered as mandatory by the Panel, it is to be examined whether Art. 19 of the RSTP contradicts any provision of EC Law at all. The Panel will in consequence address the submissions made in connection with the Cotonou Agreement, the case law of the European Court of Justice on the prohibition of discrimination of workers and the freedom of assembly and of association.

b) The Cotonou Agreement

31. The members of certain African, Caribbean and Pacific States of the one part, and the European Community and its Member States, on the other part, have entered into a partnership agreement called the Cotonou Agreement. The Cotonou Agreement has been concluded in order to promote and expedite the economic, cultural and social development of the African, Caribbean and Pacific group of States, with a view to contributing to peace and security and to promoting a stable and democratic political environment (Art. 1 para. 1 of the Cotonou Agreement). According to Art. 3 of the said agreement, *"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 fulfilment of the obligations arising from this Agreement and to facilitate the attainment of the objectives thereof. They shall refrain from any measures liable to jeopardize this objective"*.

32. It is not disputed that the Federal Republic of Nigeria is a party to the Cotonou Agreement. Switzerland is not a party to the Cotonou Agreement, although Denmark is a signatory.

33. As pointed out by FIFA, the Appellant refers to certain provisions of the Cotonou Agreement which are not directly applicable, such as Art. 9 (essential elements and fundamental elements) and Art. 13 para. 1 and 13 para. 2. Therefore, the Appellant cannot claim any direct right from these provisions and there is no possible contradiction with Art. 19 of the RSTP.

34. The Appellant also refers to Art. 13 para. 3 of the Cotonou Agreement, which reads as follows:

"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".

It seems to the Panel that this provision could have a direct effect on the signatory States.

35. The Panel is of the opinion that Art. 13 para. 3 of the Cotonou Agreement confers the right to non discrimination of ACP nationals only as regards employment terms and conditions, but not as regards access to employment. The text of Art. 13 para. 3 of the Cotonou Agreement refers expressly to *"Workers of ACP countries legally employed in its territory"*. The Panel has concluded that the Players are not to be considered as legally employed in Denmark. The Appellant submits that they have no employment contract and are not employed in Denmark. Furthermore, according to the Danish immigration legislation, they are to be considered not as "workers", but as "students". The Residence permits of the Players, produced with the Appeal Brief, mention expressly that the residing authorisation does not include the right to work.

36. It is accordingly to be considered that the Players are outside of the scope of application of Art. 13 para. 3 of the Cotonou Agreement, because they are not workers. In consequence, this provision is not relevant as regards the registration of the Players with the Appellant.

c) The *Simutenkov* case

37. The Appellant furthermore submits that the case law of the European Court of Justice, especially the *Simutenkov* 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 Art. 19 para. 2 b) of the RSTP.

38. The Appellant refers to the judgment of the Court of Justice dated 12 April 2005, in the case C-265/03, *Igor Simutenkov v. Ministerio de Educacion y Cultura and Real Federacion Espanola de Futbol*. In this case, the Court considered the direct effect and the scope of Art. 23 para. 1 of the Partnership Agreement between the EC and the Russian Federation, which ensures 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.

39. In the *Simutenkov* case, the Court ruled that Art. 23 para. 1 of the above mentioned agreement must be construed to preclude application to a professional sportsman of Russian nationality, who is lawfully employed by a club established in a member State, of any rule drawn up by a sports federation of that State, which provides that clubs may field, in competitions organized

at national level, only a limited number of players from countries which are not European Economic Area nationals.

40. In the Panel's view, this decision concerns only citizens who are lawfully employed, that is to say players which have to be considered as "workers". The Panel has determined that the Players do not hold the status of workers but are students. For this first reason, the Panel considers the Appellant cannot rely on the *Simutenkov* case in the context of the registration of the Players.

41. Furthermore, it is clear to the Panel that the European Court of Justice interpreted Art. 23 of the Agreement between the EC Community and the Russian Federation as being relevant only with regard to working conditions, remuneration or dismissal, and not as regards the rules concerning access to employment (see *Simutenkov* case, C-265/03, para. 37). The Agreements concluded between the EC Community and third countries, prohibiting discrimination as regards working conditions, have a scope of application which is clearly limited to foreigners legally employed in the member States. They do not apply to foreigners who are not yet legally employed and want to enter the employment market. Any other construction of these agreements would be in total contradiction with the immigration limitations of each member state and allow any national of the states with which the EC Community has an agreement to enter the territory of the Member State, without any restriction.

42. In the light of the above mentioned, the Panel is of the opinion that the rules provided by Art. 19 RSTP do not contradict any provision, principle or rule of EC Law, of mandatory nature or not.

d) Freedom of assembly and of association

43. The Appellant also claims that Art. 19 RSTP contradicts Art. 12 of the Charter of Fundamental Rights of the European Union, on the freedom of assembly and of association. As submitted by FIFA, the Charter of Fundamental Rights is not a legal document having binding effect. In consequence, one cannot rely upon Art. 12 in order to assert any legally enforceable right.

44. Furthermore, the Panel considers that the registration with a football club is not protected by the right to freedom of peaceful assembly and to freedom of association provided by Art. 12 of the Charter. In that respect, it is clear that Art. 19 of the RSTP does not prevent the Players from playing football or from joining other people in order to play football.

45. Finally, the Panel also notes that certain rules may constitute a restriction to fundamental rights, when such rules pursue a legitimate objective and are proportionate to the objective sought. In the instant case, the Panel fully endorses the opinion expressed in the Arbitral Award CAS 2005/A/955 and CAS 2005/A/956, especially in para. 7.2, and considers that FIFA rules limiting the international transfer of minor players do not violate any mandatory

principle of public policy and do not constitute any restriction to the fundamental rights that would have to be considered as not admissible.

46. In conclusion, the Panel is of the opinion that Art. 19 RSTP, as applied by the Players Status Committee in the challenged decision, does not contradict any provision of public policy or any provision of EC Law.

D. Is the alleged inconsistent approach of FIFA in the application of Art. 19 a breach of the non-discrimination principle?

47. The Appellant submits that the club of Bayern München has registered a minor player from South America and that FIFA did not react to this registration, and that this must lead to the conclusion that FIFA is not treating the small clubs in the same manner as the big European clubs.

48. The Panel will not comment on the assertions made by the Appellant that the attitude of FIFA would be more favourable to big European clubs. It will focus on the legal aspect of this assertion and the claim that the Appellant could deduce from such an unequal treatment.

49. As pointed out by FIFA, there is a general principle that no one can claim for equal treatment by referring to someone else who has adopted an illegal conduct, without sanction (*nemini dolus alienus prodesse debet*).

50. This principle is recognized by Swiss Law and the case law of the Swiss Supreme Court referring to the prohibition of discrimination (see AUER/MALINVERNI/HOTTELIER, Droit constitutionnel suisse, vol. II, 2nd ed., Bern 2006, p. 501 ff.). In general, one cannot claim to benefit from the same treatment as another in circumstances where the treatment granted to a third party would be illegal. There is an exception to this principle when it can be evidenced that the constant practice of the authorities is to benefit third parties with treatments that are illegal.

51. In the instant case, evidence has not been adduced that the constant practice of FIFA is to accept the registration of minor players from outside the EC. The situation referred to by the Appellant has apparently not been examined by FIFA, which has not ruled in favour of the club or, at least, apparently not decided to renounce or pronounce any sanction.

52. It can be added that the Appellant or its national association, as a member of FIFA, would probably have a claim under the relevant provisions of Swiss Law on the associations (Art. 60 ff. of the Swiss Civil Code) in order to ensure that FIFA lawfully applies its relevant regulations to any situation in contradiction with Art. 19 of the RSTP.

Conclusion

53. Based on the foregoing, and after taking into due consideration all evidence produced and all arguments made, the Panel finds 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.

54. Midtjylland's Appeal is therefore dismissed.

The Court of Arbitration for Sport rules:

1. The appeal filed on 14 February 2008 by FC Midtjylland A/S against the decision issued on 25 October 2007 by the FIFA Players' Status Committee is dismissed.

2. The decision issued on issued on 25 October 2007 by the FIFA Players' Status Committee is confirmed.

(…).