**Arbitration CAS 2018/A/5987 Bernard Giudicelli v. International Tennis Federation (ITF), award of 21 May 2019**

Panel: Prof. Philippe Sands QC (United Kingdom), Sole Arbitrator

*Tennis*
*Removal and ineligibility of a board member following criminal conviction*
*English law principle of contractual interpretation*
*Limits to CAS' power of interpretation*

1. **English law principles of contractual interpretation consist of interpreting the relevant terms as they would be understood by a reasonable reader having the background knowledge that would have been available to its drafters.**

2. **CAS panels cannot adopt an interpretation of a provision that would involve correcting the draftsman's presumed mistake and adding extra words into the contents of a rule. It is not CAS panels' role to rewrite the words of a rule where its meaning appears relatively clear and without ambiguity.**

## I. PARTIES

1. Mr Bernard Giudicelli (the 'Appellant') is the President of the *Fédération Française de Tennis* (the 'FFT') and was, until recently, a member of the Board of Directors of the International Tennis Federation. He is a French national.

2. ITF Limited (the 'Respondent' or 'ITF') is a company incorporated in The Bahamas and headquartered in London. Its objects include performing the functions of the world governing body for the sport of tennis.

## II. FACTUAL BACKGROUND

3. A summary of the relevant facts and allegations is set out below, based on the parties' written submissions and evidence adduced. Additional facts and allegations found in the parties' written submissions and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all of the facts, allegations, legal arguments and evidence submitted by the parties and deemed admissible in the present proceedings, he refers in this Award only to the submissions and evidence he considers necessary to explain his reasoning and conclusions.

4. These proceedings arise from the Appellant's conviction for an offence of public defamation under French law before the *Tribunal Correctionnel de Lyon* on 19 September 2017. There is little (if any) dispute between the parties as to the factual background.

5. Since 1991 the Appellant has held various positions within the FFT, including his present role as President. On 25 September 2015, the Appellant was elected to the Board of Directors of the ITF (the 'Board'). It is common ground between the parties that the Appellant has made a significant contribution to the sport of tennis over many years.

6. From 2009 the Appellant became involved in efforts to eradicate the re-sale of preferential tickets for matches organised by the FFT, including the French Grand Slam tournament at Roland-Garros. The Appellant came to believe that a number of former tennis players had been involved in reselling tickets through intermediaries (*concierges*). One of the former players the Appellant suspected of being involved in this practice was Gilles Moretton ('Mr Moretton').

7. In 2017 Mr Moretton stood as a candidate for the office of President of the regional tennis league of Auvergne-Rhônes-Alpes. On 5 March 2017, the Appellant attended a press conference during which he was asked by a journalist of *Le Dauphiné Libéré* newspaper about the candidature of Mr Moretton. The Appellant replied as follows:

> *"Yes I learned that he was a candidate for the presidency of the future Grande Ligue …, but personally I don't approve of it (he waves a supporting document). He is accused of being one of those players who, in 2011, supplied the network of concierges who obtained tickets and resold them at ten times face value. The page has been turned, but I cannot morally accept, and on an ethical basis, that someone who breached simple rules wants to lead such a significant region. We don't need former top-level players to manage the leagues, but top-level managers. Gilles can run, of course, this is a democracy, but I say clearly to him: he will have to face me. Today, I don't want people in our federation who have taken advantage of the system to make money off the back of the FFT".*

8. The next day, on 6 March 2017, the Appellant's statement was published in the paper and online versions of *Le Dauphiné Libéré.*

9. On 16 March 2017, Mr Moretton brought proceeding against the Appellant before the *Tribunal Correctionnel de Lyon* alleging defamation under articles 29 and 32 of the French law of 29 July 1881. The French public prosecutor joined the proceedings seeking the imposition of criminal sanctions, rendering the case both civil and criminal in nature.

10. On 19 September 2017, the *Tribunal Correctionnel* determined that the Appellant's statement constituted an allegation or imputation of a fact that attacked the honour or reputation of Mr Moretton. It was also held that the Appellant had not been able to prove the truth of his statement and had not established that he was acting in good faith by pursuing a legitimate goal. As a result, the Appellant was found guilty of the criminal offence of public defamation of a private individual, and was fined €10,000 (the 'conviction').

11. The Appellant appealed the conviction on 20 September 2017, but subsequently withdrew his appeal after reaching a settlement with Mr Moretton.

12. The ITF became aware of the conviction in March 2018. At that time, Article 21(k)(iii) of the ITF Constitution provided that:

> *"The office of a member of the Board of Directors shall ipso facto be vacated in the event that a member:*
>
> *(…)*
>
> *(iii) Has been convicted of a criminal offence or receives a custodial sentence".*

13. In early April 2018, the President of the Board (Mr Haggerty) sought legal advice on the interpretation and application of Article 21(k)(iii) of the ITF Constitution. The Appellant was invited to provide an explanation of the defamation proceedings.

14. On 25 May 2018, external counsel for the ITF wrote to the Appellant informing him that *"until the issue is resolved one way or the other, you must not exercise any of the powers of an ITF Board member".*

15. On 10 July 2018, the Board was provided with detailed legal advice on the application of Article 21(k)(iii) to the case of the Appellant. It was noted that:

> *"based on the Article as now written, a conviction for <u>any</u> criminal offence, whatever its nature, and whether or not it carries with it a custodial sentence, automatically disqualifies the director from office, and the Board does not have any discretion to avoid that result by making an exception on the particular facts of the case".*

16. At the ITF Annual General Meeting held in Florida on 13-16 August 2018 (the '2018 AGM'), the Board proposed a resolution to amend Article 21(k)(iii). ITF member federations voted in favour of the resolution so that Article 21(k)(iii) now provides:

> *"The office of a member of the Board of Directors shall ipso facto be vacated in the event that the member:*
>
> *(…)*
>
> *Has been convicted of a criminal offence where (1) the offending conduct would constitute a criminal offence in the majority of jurisdictions in which the sport is played; and (2) (A) the member receives a custodial sentence (whether suspended or otherwise) for that offence, or (B) in the opinion of an independent expert appointed by the Board the conviction means the continued presence of the member on the Board would bring the ITF into disrepute".*

17. On 29 August 2018, President Haggerty appointed Michael Beloff QC (the 'independent expert') to provide him with an opinion as to whether the Appellant's presence on the Board following the conviction by the *Tribunal Correctionel* would bring the ITF into disrepute. On 27 September 2018, the independent expert provided an opinion which concluded that (i) as a result of the conviction the Appellant's presence on the Board would bring the ITF into disrepute; and (ii) that the Appellant would be ineligible for membership of the Board, whether by election or appointment, for 4 years from the date of the conviction (the 'opinion').

18. On 15 October 2018, President Haggerty wrote to the Appellant stating his position on two decisions that had been taken (the 'decision letter'):

    - *"In July 2018, it was concluded that your position on the ITF Board would be vacated, owing to the application of Article 21(k) of the 2018 Constitution (as it applied at the time)"* (the 'Removal Decision').

    - *"As you know, the Board recently appointed Michael Beloff QC to provide it with an opinion as to whether your presence on the Board following the Conviction would bring the ITF into disrepute. Mr Beloff has recently provided the requested opinion and I am afraid it is my duty to inform you that he has concluded that your presence would bring the ITF into disrepute and that you should not sit on the Board of Directors for a period of four (4) years following the date of your conviction – that is, until 19 September 2021 – at the earliest"* (the 'Ineligibility Decision').

19. Four days later, on 19 October 2018, the Appellant wrote to members of the Board to let them know he was withdrawing from all responsibilities within the ITF, with immediate effect.

## III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

20. In accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (2017 edition) (the 'Code') the Appellant filed his Statement of Appeal against the decision letter on 3 November 2018. Pursuant to Article S20 of the Code these proceedings were assigned to the CAS Appeals Arbitration Division.

21. On 14 November 2018, the parties notified the CAS Court Office of their agreement to nominate Philippe Sands QC, Barrister and Professor of Law in London, as Sole Arbitrator.

22. In accordance with Article R51 of the Code, the Appellant filed his Appeal Brief on 16 November 2018.

23. On 28 November 2018, Professor Philippe Sands QC was appointed as Sole Arbitrator pursuant to Article R54 of the Code.

24. On 29 November 2019, Mr Remi Reichhold was appointed as *ad hoc* clerk.

25. In accordance with Article R55 of the Code, the Respondent filed its Answer on 14 December 2018, having been granted a short time extension pursuant to Article R32 of the Code. By way of written submissions in its Answer, the Respondent requested that the dispute be re-assigned to the Ordinary Arbitration Division. The Appellant was invited to comment on this request and did so by way of letter dated 20 December 2018.

26. On 18 January 2019, the parties were notified by the CAS Court Office that:

    - the procedure would not be re-assigned to the Ordinary Arbitration Division and will continue to be dealt with under the Appeals Arbitration Division; and

- the Sole Arbitrator decided to grant the parties a second round of written submissions pursuant to Article R56 of the Code.

27. Pursuant to the time limits imposed by the Sole Arbitrator, the Appellant filed his Reply on 29 January 2019 and the Respondent filed its Rejoinder on 12 February 2019.

28. On 11 April 2019, the CAS Court Office sent an Order of Procedure to the parties. The parties duly transmitted signed copies of the Order of Procedure to the CAS Court Office, both dated 15 April 2019.

29. In accordance with Article R57 of the Code, a hearing was held on 24 April 2019 at Matrix Chambers in London, United Kingdom. The Appellant was present and represented by counsel Mr Rupert Reece, assisted by Mrs Saadia Bhatty and Mr Arthur Lauvaux. The Respondent was represented by counsel Mr Jonathan Taylor QC, assisted by Mr Richard Rush. The hearing was also attended by Mr François l'Hospitalier (Legal and Compliance Director of the FFT) and Mr Kelly Fairweather (Chief Operating Officer of the ITF).

30. The Sole Arbitrator was assisted at the hearing by Mr Daniele Boccucci (Counsel to CAS) and Mr Remi Reichhold (*Ad hoc* clerk).

## IV. SUBMISSIONS OF THE PARTIES

31. By way of these proceedings the Appellant challenges both the Removal Decision and the Ineligibility Decision. As to the Removal Decision, the parties' submissions focused on the interpretation and application of Article 21(k)(iii) of the ITF Constitution as it applied prior to the 2018 AGM (the '2015 text'). By contrast, submissions on the Ineligibility Decision addressed the interpretation and applicability of the new version of Article 21(k)(iii) of the ITF Constitution adopted at the 2018 AGM, in August 2018 (the '2018 text').

### A. The Removal Decision

32. The Appellant's submissions on the Removal Decision may be summarized as follows:

- The ITF proceeded on an erroneous application of the 2015 text because it was assumed that a *"criminal offence"* means any offence, whether serious or minor. The term *"criminal offence"* should be interpreted in light of (a) its ordinary and objective meaning; (b) in accordance with the overall purpose and spirit of Article 21(k)(iii); (c) so that every word serves a purpose; (d) taking into account the facts and circumstances known or assumed by the Board at the time the 2015 text was drafted; (e) in such a way as to ensure consistency between the different language versions of the ITF Constitution; and (f) to allow Article 21(k)(iii) to have business efficacy. Applying these principles, the Appellant's conviction does not amount to a *"criminal offence"* for the purposes of the 2015 text:

  (a) The natural and ordinary meaning of the term *"criminal offence"* is a *"grave offence"*.

(b) The purpose of Article 21(k) is to address extreme circumstances that require automatic removal. Viewed in this context, the reasonable reader would interpret *"criminal offence"* as an offence so serious that it would immediately and manifestly render a person unfit to continue to sit on the Board.

(c) If *"criminal offence"* is interpreted to encompass any offence, this would result in the second limb of the 2015 text (*"or receives a custodial sentence"*) serving no useful purpose.

(d) During the adoption of the 2015 text, Board members principally had in mind offences that could lead to a custodial sentence.

(e) The terms adopted in the French and Spanish versions of the 2015 text refer to more serious offences.

(f) Interpreting the term *"criminal offence"* as encompassing any offence would be unreasonable and commercially unworkable.

- Defamation offences (including of a criminal nature) have been the subject of debate, including before the European Court of Human Rights, because of the threat they are said to pose to the fundamental human right of freedom of expression. This has led to the decriminalization of defamation in a number of jurisdictions.

- As a matter of fact, the Appellant's position on the Board was not *ipso facto* vacated. After the conviction, the Appellant continued to attend and exercise voting rights at Board meetings including meetings of the Davis Cup Committee, which he chaired by virtue of his position as a Board member.

- The 2015 text is unenforceable because its application to the conviction would be unjust and disproportionate, and lead to an irrational result.

33. The Respondent's submissions on the Removal Decision may be summarized as follows:

- The Appellant's challenge to the Removal Decision is moot and academic. This is because (i) the Appellant withdrew from the Board and is therefore no longer a member; and (ii) even if the Appellant's position was not *ipso facto* vacated, the 2018 text now applies so the only question is whether this renders him ineligible to sit on the Board.

- The 2015 text should be interpreted in accordance with English law principles of contractual interpretation. It is necessary to determine what the 2015 text would mean to a reasonable reader having all of the background knowledge that would have been available to members when the provision was adopted. In response to the Appellant's approach to the interpretation of the 2015 text:

(a) The natural and ordinary meaning of the words *"criminal offence"* is any offence that constitutes a criminal offence under the relevant applicable law.

(b) The Appellant's interpretation that a *"criminal offence"* is limited to a *"grave offence"* would add a vague (if not unworkable) gloss and introduce an unacceptable element of subjectivity and uncertainty. Such an approach would be inconsistent with the rest of Article 21(k).

(c) The second limb of the 2015 text (*"or receives a custodial sentence"*) is not otiose. It was intended to address custodial sentences imposed on the basis of a *'nolo contendere'* or 'no contest' plea.

(d) In the adoption of the 2015 text the Board specifically agreed a change of wording so that a conviction for a criminal offence would automatically trigger disqualification even in the absence of a custodial sentence.

(e) There should be no recourse to the French and Spanish versions of the 2015 text because Article 31(a) of the ITF Constitution expressly states that in the event of discrepancy, the English version shall prevail.

(f) The intention was to make the ambit of the 2015 text very wide and there is nothing absurd or unworkable about such a rule.

- The requirement for a criminal conviction imports a base level of seriousness. The *Tribunal Correctionnel* rejected the Appellant's argument that he acted in good faith. It cannot be said that it was irrational to require the removal of the Appellant from the Board in such circumstances.

- The Appellant did not disclose the conviction to the ITF which is why it only became known six months later. Thereafter the ITF engaged in a careful process to gather facts and obtain legal advice on the proper application of the 2015 text.

## B. The Ineligibility Decision

34. The Appellant's submissions on the Ineligibility Decision may be summarized as follows:

- The 2018 text cannot serve as the legal basis for the Ineligibility Decision because it does not apply to a person who has already been removed from the Board.

- Even if the 2018 text does apply to the Appellant, the conditions therein are not satisfied because (a) the Appellant was not convicted of a *"criminal offence"*; (b) his conduct would not constitute a criminal offence in the majority of jurisdictions in which tennis is played; and (c) the opinion of the independent expert is flawed. In relation to these three points:

(a) The first requirement in the 2018 text (*"convicted of a criminal offence"*) remains unchanged. For the same reasons advanced in relation to the Removal Decision, the Appellant was not convicted of a *"criminal offence"*.

(b) The Appellant's offending conduct would constitute an offence in only 81 of the ITF's 210 member jurisdictions (38.6%).

(c) The opinion is flawed because (i) the independent expert was asked to proceed on the basis of incorrect assumptions; (ii) the opinion incorrectly concludes that the conviction would bring the ITF into disrepute; and (iii) the 4-year ineligibility period imposed has no legal basis and/or is disproportionate.

- The term *"the offending conduct would constitute a criminal offence in the majority of jurisdictions in which the sport is played"* is so vague as to render the 2018 text unenforceable.

35. The Respondent's submissions on the Ineligibility Decision may be summarized as follows:

- Nothing in the 2018 text prevents the ITF from obtaining an expert opinion prior to appointing a candidate to the Board in order to prevent a futile appointment.

- The three relevant conditions in the 2018 text are satisfied on the basis that:

(a) The term *"criminal offence"* properly interpreted in its context within the 2018 text means any criminal offence, not only a *"grave offence"*.

(b) If the Appellant is given the benefit of the doubt in all jurisdictions where the position is not easily ascertainable, the conduct that led to the conviction would constitute a criminal offence in at least 142 of the ITF's 210 member jurisdictions (67.6%). Even adopting the narrower approach advanced by the Appellant and focusing more granularly on the specifics of his conduct, such conduct would be a criminal offence in at least 113 ITF member jurisdictions (53.8%).

(c) There is no basis to disregard the opinion because (i) it was not based on erroneous assumptions; (ii) the independent expert has not misapplied the law; and (iii) the independent expert did not act outside the scope of his instructions and the conclusion reached is not irrational or manifestly disproportionate.

- The term *"the offending conduct would constitute a criminal offence in the majority of jurisdictions in which the sport is played"* refers to the jurisdictions of the ITF's national federation members. The 2018 text is intended to be reflective of the values and norms prevailing in the ITF's member federations.

## C. The parties' requests for relief

36. With regard to the Appellant's request for relief, paragraph 101 of the Reply states as follows:

*"The Appellant hereby respectfully seeks from the Panel:*

*(1) A declaration that:*

*(a) the ITF's Decision of 15 October 2018 that Mr Giudicelli's position on the Board of Directors has been vacated, whether in July 2018 or at all, shall be annulled;*

*(b) the ITF's Decision of 15 October 2018 that Mr Giudicelli be ineligible for re-appointment to the Board of Directors until 21 September 2021, shall be annulled or alternatively varied, as the Panel should see fit; and*

*(2) An order that the Respondent be required to bear all the costs of these proceedings including the Appellant's legal costs".*

37. With regard to the Respondent's request for relief, Part 4 of the Rejoinder states as follows:

*"4.1 For all of the foregoing reasons, and the reasons previously set out in the ITF's Answer Brief, the ITF respectfully asks the Sole Arbitrator to:*

*4.1.1. Dismiss Mr Giudicelli's challenge to the Removal Decision in its entirety.*

*4.1.2. Dismiss Mr Giudicelli's challenge to the Ineligibility Decision or, in the event that he considers the Ineligibility Decision to be flawed in any respect, to substitute his own decision that rectifies the flaw(s).*

*4.2 The ITF continues to reserve its position in respect of costs".*

## V. JURISDICTION

38. Article R47 of the Code provides that:

*"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body.*

*An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned".*

39. Article 33 of the ITF Constitution expressly provides for the referral of legal disputes to CAS, stating in relevant part as follows:

*"33. Arbitration*

*(a) This Article 33 applies to any legal dispute of any kind arising (i) between the company and one or more members; (ii) between the company and any other individual or organization that does business with the company or is involved in any of the circuits or competitions of the company or that otherwise operates within the sport of tennis; and (iii) between two or more members (each, a "dispute").*

*(…)*

*(c) Where a dispute is not referred under any of the ITF Rules and Regulations to the ITF Internal Adjudication Panel or the Independent Tribunal, the parties to the dispute will be deemed to have agreed to submit the dispute to the Court of Arbitration for Sport in Lausanne, Switzerland ("CAS"), for resolution by arbitration in accordance with the CAS code of sports-related arbitration, they shall not bring any action or claim that conflicts with that submission to the jurisdiction of the CAS, and they shall be bound by the decisions of the CAS".*

40. Neither party has disputed that CAS has jurisdiction in this case. The jurisdiction of CAS is further confirmed by the signature of the Order of Procedure by both parties. It follows that CAS does have jurisdiction to resolve the dispute between the parties.

## VI. ADMISSIBILITY

41. The Appellant's Statement of Appeal was filed on 3 November 2018 in compliance with the requirements of Article R48 of the Code. The Appeal Brief was filed on 16 November 2018 in compliance with Article R57 of the Code.

42. It is observed that there are no alternative legal remedies available to the Appellant under the ITF Constitution. In these circumstances, the requirement under Article R47 of the Code to exhaust all legal remedies is satisfied. The Sole Arbitrator concludes that the appeal is admissible.

## VII. APPLICABLE LAW

43. Article R28 of the Code provides that:

*"The seat of CAS and of each Arbitration Panel ("Panel") is Lausanne, Switzerland. However, should circumstances so warrant, and after consultation with all parties, the President of the Panel may decide to hold a hearing in another place and may issue the appropriate directions related to such hearing".*

44. Article R58 of the Code states that:

*"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

45. Article 33(d) of the ITF Constitution provides that:

*"Where the company is a party to a dispute, the governing law of the dispute shall be English law, the proceedings to resolve the dispute shall be conducted in English, and (unless otherwise agreed by the company) any hearings shall take place in London, England".*

46. In light of the provisions above, the Sole Arbitrator agrees with the contention of both parties that the law applicable to the present dispute is English law.

## VIII. MERITS

### A. The Removal Decision

47. The Appellant's challenge to the Removal Decision falls to be determined by reference to the terms of the 2015 text, as it is that version of Article 21(k) which was in effect and applicable at the time when the judgment of the *Tribunal Correctionnel* was handed down. Before turning to the merits it is necessary to consider the Respondent's submission that the challenge to the Removal Decision is moot and academic.

48. On 19 October 2018, four days after the decision letter was written, the Appellant sent an email to Board members in which he wrote: *"At the end of the whole process regarding the amendment of article 21(k), I have decided to withdraw myself from all my responsibilities within the International Tennis Federation"*. In his witness statement, the Appellant states that he announced his withdrawal *"to avoid public controversy which might be damaging to the ITF"*.

49. Bearing in mind the prevailing circumstances, as well as the timing of the Appellant's email, it appears that the Appellant's withdrawal from the ITF was directly related to the decision letter and the conclusions reached therein, namely that the Appellant's position on the Board had been vacated (the Removal Decision) and that he would be ineligible to sit on the Board for a period of 4 years from the date of the conviction (the Ineligibility Decision). Neither party has sought to argue otherwise.

50. If the ITF was wrong to decide that the Appellant could not continue to serve on the Board, then the lawfulness of the Removal Decision would have to be addressed. It is in any event necessary for the Sole Arbitrator to determine whether the Appellant's position on the Board had become vacated by operation of the 2015 text.

51. Turning to the merits of the Removal Decision, the issue to be determined is whether the conviction amounts to a *"criminal offence"* within the meaning of 2015 text. The parties agree that the normal English law principles of contractual interpretation apply. This is an objective exercise, seeking to interpret the terms as they would be understood by a reasonable reader having the background knowledge that would have been available to the drafters.

52. The Appellant argues that the words *"criminal offence"* in Article 21(k)(iii) are to be interpreted as being limited to a *"grave offence"*. It must be observed, however, that the words *"criminal offence"* in the 2015 text are not limited or qualified in any way. In the view of the Sole Arbitrator, the applicability of the 2015 text only to grave or serious offences would not accord with the natural and ordinary meaning of the terms used. Moreover, in light of the clear and unambiguous language adopted, it is not necessary to have recourse to the other language versions of the ITF Constitution, not least because the English text prevails in the event of discrepancy.

53. This approach is supported by the objective factual matrix which underpins the adoption of the 2015 text, based on the text that preceded it. That text was subject to two amendments at the 2015 ITF Annual General Meeting, as follows:

> *"The office of a member of the Board of Directors shall ipso facto be vacated in the event that a member:*
>
> *(…)*
>
> *(iii)* ~~*Is*~~ *Has been convicted of a criminal offence* ~~*and*~~ *or receives a criminal sentence"*[1].

54. Both parties made reference to the minutes of the Board meeting in 2015 at which amendments to Article 21(k)(iii) were discussed (the 'minutes'). One of the two amendments adopted was replacing the conjunction *"and"* with the disjunctive *"or"* (the '2015 amendment'). The legal advice obtained by the Board, which formed the basis of the Removal Decision, describes the adoption of the 2015 amendment as follows:

> *"More importantly for present purposes, the undeniable effect of the second change is that now any criminal conviction automatically disqualifies a director from office, even if it carries no custodial sentence. During the Board's discussions, it was specifically noted that the Article as revised would cover convictions for crimes that many would regard as 'minor' (e.g., for a driving offence), as well as convictions on 'political' grounds, and convictions under religious laws for conduct (e.g., drinking alcohol, women driving cars) that most countries would regard as not criminal. The then ITF President, Francesco Ricci Bitti, sought to address those concerns, and draw the debate to a close, with the following statement:*
>
> *'The matter is to represent a message that looks good, then the application is not the reference. If there is a case, then I think the people will deal with it at the time but at the moment one of the requirements is to have a message that is simple and covers us in terms of image, in terms of … something – this is my interpretation of the needs. So if you want to be … Nelson Mandela could not be president as he was in jail, so you have many cases in which … but I think this is the application. I believe that we should send a message and finish.'*
>
> *The Board then unanimously agreed to propose the amendments as set out above. It therefore appears that the decision was that a broadly drafted rule was necessary to send a clear message and to protect the image of the ITF, and that any difficulties in practice could be 'dealt with at the time'. However, Article 21(k)(iii) as written does not give the Board of Directors discretion to 'deal at the time' with any conviction that they feel should not trigger disqualification. Instead, based on the Article as now written, a conviction for any criminal offence, whatever its nature, and whether or not it carries with it a custodial sentence, automatically disqualifies the director from office, and the Board does not have any discretion to avoid that result by making an exception on the particular facts of that case. There is an argument, therefore, that the Article does not properly reflect the intent of the Board. However, I do not think that in itself is enough to avoid the effect of the Article as written, since (as I explain below) the issue is what the words would mean objectively to a reasonable reader, not what the Board subjectively intended".*

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1 Words deleted in 2015 are marked with a strikethrough ("~~*Is*~~", "~~*and*~~"); words added appear as underlined ("*Has been*", "*or*").

55. Three points may be made in relation to the minutes and the legal advice quoted:

a. First, Board members considered the practical implications of the 2015 amendment, and the fact that any criminal conviction would result in removal from the Board. The 2015 amendment expressly detached the requirement for a custodial sentence from the condition requiring a criminal conviction. The Sole Arbitrator is not persuaded by the contention that Board members only had in mind offences that could result in a custodial sentence. For instance, during the discussion on the 2015 amendment one Board member stated his understanding that: *"I think if you don't get a custodial sentence you have still been convicted, that should disqualify"*.

b. Second, the absence of discretion in the 2015 text does not suffice to discount the plain meaning of the terms used. Even if the drafters proceeded on the mistaken belief that they would be able to *"deal at the time"* with individual cases, adopting the Appellant's interpretation would – in the words of another CAS panel – *"involve correcting the draftsman's presumed mistake and adding extra words into the language of the rule"* (CAS 2006/A/1165). It is not the role of the Sole Arbitrator to rewrite the words of the ITF Constitution as actually drafted, where the meaning appears relatively clear and without ambiguity.

c. Third, while it is perhaps difficult to conceive of many situations, if any, in which an individual would receive a custodial sentence without a conviction, it is evident from the minutes that Board members had in mind the possibility of a 'no contest' plea (albeit that such a plea would nonetheless ordinarily be interpreted as a conviction).

56. Article 21(k) of the ITF Constitution seeks to address a range of possible circumstances in which a member of the Board's position is automatically vacated, on the occurrence of an event. The range of events include bankruptcy, physical or mental incapacity, or violating the disclosure requirements of the International Business Companies Act 2000 of The Bahamas. In this context, the Sole Arbitrator is unable to conclude that the requirement that there be a *"conviction"* for a criminal offence could be said to impose a threshold that is *per se* disproportionate, irrational or absurd.

57. The fact that the Appellant continued to exercise the powers of an ITF Board member after the conviction does not and cannot nullify the consequence of his automatic removal. Likewise, the views expressed by members of the Board after the conviction, including the President, cannot alter the legal position. In the Respondent's Answer it is noted that:

> *"Mr Giudicelli never disclosed his conviction to the ITF, and as a result it only came to the knowledge of the ITF some six months later, in March 2018. Thereafter, a careful process was followed in which all relevant facts were gathered and legal advice was taken as to the proper application of the* [2015 text]*, as a result of which the de facto position now accords with the de jure position"*.

58. At the hearing on 24 April 2019, counsel for the Respondent submitted that to his knowledge this case is the first time that the ITF has had cause to consider the application of Article 21(k)(iii) of its Constitution. In these circumstances, it is understandable that a sports governing

body such as the ITF would proceed with care in coming to a definitive view as to the application of a provision of this kind.

59. In interpreting the 2015 text by reference to the applicable principles of English law, the Sole Arbitrator concludes that the Appellant's conviction for defamation, by a French criminal court applying French criminal law, was properly to be treated as a *"criminal conviction"* within the meaning of Article 21(k)(iii). It follows, on the basis of the plain meaning of the 2015 text, which was applicable at the time of the conviction, that the Appellant's position on the Board was vacated. The ordinary meaning of the words *"ipso facto"* in the chapeau of Article 21(k)(iii) is that removal from the Board occurs by the mere fact of a criminal conviction or a custodial sentence. The effect of those words is that, as a matter of plain interpretation, the Appellant's position on the board was automatically vacated on 19 September 2017, by the mere fact of the conviction having been decided. That may seem problematic, particularly where an appeal is filed, and all the more so if such an appeal is successful.

60. In the view of the Sole Arbitrator, however, the text of Article 21(k)(iii), which was applicable at the relevant time, said what it said. It made no mention of a 'final conviction', or a 'conviction from which no appeal is possible'. Accordingly, on the basis of the text as drafted and adopted, the filing of an appeal against conviction or sentence would not have the effect of suspending the operation of the 2015 text. It follows that the effect of the 2015 text was to remove the Appellant from the ITF Board. The conclusion of the Board to that effect, in its decision dated 15 October 2018, was correct.

## B. The Ineligibility Decision

61. The Ineligibility Decision concerns the interpretation and application of the 2018 text, which was actually adopted eleven months after the Appellant's conviction (and did not come into force until 1 January 2019). The 2018 text provides that:

> *"The office of a member of the Board of Directors shall ipso facto be vacated in the event that the member:*
>
> *(…)*
>
> *Has been convicted of a criminal offence where (1) the offending conduct would constitute a criminal offence in the majority of jurisdictions in which the sport is played; and (2) (A) the member receives a custodial sentence (whether suspended or otherwise) for that offence, or (B) in the opinion of an independent expert appointed by the Board the conviction means the continued presence of the member on the Board would bring the ITF into disrepute".*

62. By virtue of this provision, the office of a Board member shall become automatically vacated in the event of a conviction for a criminal offence where the offending conduct would constitute a criminal offence in the majority of jurisdictions in which the sport is played, provided also that one of two additional conditions is met: (A) there is a custodial sentence, or (B) in the opinion of an independent expert the criminal conviction in question means that the continued presence of the member on the Board would bring the ITF into disrepute. The Sole Arbitrator observes that limbs (A) and (B) are disjunctive (*"or"*). It follows that if there is a criminal offence

for which no custodial sentence is imposed, the Board member's position would still be vacated if the condition in limb (B) is met.

63. Before considering the application to the Appellant of the criteria in the 2018 text, it must be determined whether this provision is applicable in the circumstances of this case at all. The Appellant argues that the 2018 text does not afford a legal basis for the Ineligibility Decision because it does not apply to a person who is no longer a member of the Board. The Appellant seeks support for this contention in the language of the 2018 text, and in particular the reference to the *"continued presence of the member on the Board"*. The Sole Arbitrator observes, moreover, that the chapeau of the 2018 text is premised on the office of a *"member of the Board of Directors"* becoming vacated. Applying ordinary principles of interpretation under English law, the 2018 text is plainly addressed to those who hold the office of ITF Board member. The question to be determined is whether the 2018 text – despite being addressed to current Board members – could also act as an eligibility criteria for those seeking nomination, appointment or election as future Board members.

64. In its Answer the Respondent argues that:

> *"while the paradigm application of the* [2018 text] *is to a Board director who is convicted of a criminal offence while serving as a director, nothing in the* [2018 text] *prevents the ITF Board obtaining the opinion of an independent person before the possible appointment of a candidate to the ITF Board, in order to ascertain his/her eligibility to serve and so prevent a futile appointment"*.

No doubt this may be correct as a matter of practicality, since the ITF Board could have an interest in seeking the opinion of an independent expert on matters other than removal from the Board. The question in these proceedings, however, is whether the 2018 Constitution allows this to be done.

65. Having regard to the plain meaning of the 2018 text, the Sole Arbitrator considers that its terms cannot be applicable to the Appellant in the period after the conviction, and after he has vacated the office of Board member, for the simple reason that he was no longer a member of the Board. On its face, the 2018 text is directed only to the matter of removal from the Board, not eligibility of an individual for nomination, appointment or election to the Board. The Sole Arbitrator notes that this view was clearly expressed in the legal advice obtained by the Board, from external counsel back in 2015:

> *"If the Board thinks such a change to Article 21(k)(iii) is important, I see no reason to delay in proposing it, i.e., I think it could be proposed to members at the 2018 AGM. However, that would not reprieve Mr Giudicelli. His office is vacated automatically, as of now, and therefore even if Article 21(k)(iii) was amended so that it would not apply in his case, he would still have to be re-elected to office first to get the benefit of that change"*.

66. The Sole Arbitrator further notes that a different provision of the ITF Constitution – Article 19(c) – addresses the eligibility criteria of prospective Board members:

*"No person shall be eligible for nomination, election or appointment as a member of the Board of Directors unless he:*

*(i) Is a national of a country (including a newly formed independent country resulting from the division of a former country) which has played in the Davis Cup Competition at least ten times; and*

*(ii) Has attained the age of twenty-one (21) and enjoys civil and political rights".*

The criteria as to eligibility for nomination, election or appointment to the Board do not include any factor in relation to a past criminal conviction.

67. It follows from this analysis that the Board had no legal basis in the ITF Constitution on which to take Ineligibility Decision. In relation to the Appellant, under the current version of the ITF Constitution no power was granted to the Board to declare the Appellant ineligible for nomination, election or appointment by reason of the conviction. Without a legal basis, the decision falls to be annulled.

68. It further follows that if the Appellant meets the eligibility criteria set forth in Article 19(c) of the ITF Constitution, then there can be no bar to him from seeking nomination, election or appointment to the Board.

69. Having regard to the ITF Constitution as presently drafted, it is therefore possible that the Appellant could be re-appointed or re-elected to the Board in the course of the next election cycle. If that were to occur, the 2018 text would then appear to become applicable, and it would then be necessary to consider its application to the Appellant's conviction in 2017, including in particular (i) whether the Appellant's offending conduct would constitute a criminal offence in the majority of jurisdictions in which the sport is played, and (ii) whether that conviction means that his continued presence on the Board would bring the ITF into disrepute.

70. It is understandable that the ITF may be concerned about the nomination, appointment or election of an individual in circumstances where the office that they hold might then automatically be vacated by operation of the 2018 text. That possibility arises because of an apparent lacuna in the current text of the ITF Constitution – a disconnect between the criteria for removal and eligibility – which does not address the situation. At the hearing, counsel for the Respondent made the point that *"the ITF has to follow its rules in good faith and without fear or favour".*

71. The Sole Arbitrator considers, in those circumstances, that the Board would have to start afresh. It is doubtful whether the opinion of the independent expert dated 27 September 2018 could be relied upon in the future, because it was drafted in different circumstances, and at a time when the 2018 text was not in force or applicable to the Appellant. One relevant new circumstance that might be taken into account by an independent expert, for example, would be the weight to be given (if any) to the fact of the Appellant's re-election (if it occurred) as offering an indication of the view (of the electors) that his membership of the Board would not be considered to have the effect of bringing the ITF into disrepute.

72. As the Appellant is not presently a member of the Board, however, there is no legal basis upon which the Sole Arbitrator can offer a view as to whether the Appellant's hypothetical re-election or re-appointment would or would not bring the ITF into disrepute, assuming that the other conditions of the 2018 text were met. In this regard, the Sole Arbitrator wishes to make clear that whilst he considers that the Board was not entitled to request the independent expert to give an opinion, he expresses no view on the conclusions reached by the independent expert.

73. It is plain that the 2018 text is inadequate to deal with the range of possible situations that may arise in the future. The Sole Arbitrator notes the positive and cooperative spirit in which these proceedings have been conducted, as well as the quality of both parties' arguments. In that light, it may be useful for the Board to revisit the 2018 text, together with a review of the eligibility criteria for nomination, election and appointment to the Board, to ensure consistency across the Constitution. The Board might also find it useful to reflect further on a point that arose throughout the proceedings, namely the question of whether a gravity threshold might be integrated into any further revision of the Constitution's provision on removal from office (and eligibility to stand for office, assuming the desire for a consistent approach). In this regard, the Sole Arbitrator notes the current trend towards the decriminalization of defamation, reflected for example in Resolution 1577 (of 4 October 2007) of the Parliamentary Assembly of the Council of Europe. The call for decriminalization suggests that a conviction for criminal defamation might not easily be regarded as an offence of the kind that could be said to give rise to disrepute such as to preclude the holding of office as a Board member.

## ON THESE GROUNDS

**The Court of Arbitration for Sport rules that:**

1. The appeal filed by Bernard Giudicelli on 3 November 2018 against ITF Limited is partially upheld.

2. The decision of the ITF dated 15 October 2018 that Mr Giudicelli's position on the Board of Directors of the ITF was vacated is confirmed.

3. The decision of the ITF dated 15 October 2018 that Mr Giudicelli could not serve on the Board of Directors of the ITF for a period of 4 years from 19 September 2017 is annulled.

4. (…).

5. (…).

6. All other motions or prayers for relief are dismissed.