

In the Matter of

[the Appellant]¹
(hereinafter: the “**Appellant**”)

vs.

FÉDÉRATION INTERNATIONALE DE VOLLEYBALL
(hereinafter: the “**Respondent**”)

DECISION
of the FIVB APPEALS PANEL in the Case [year]-03

Date: [date]

This is an appeal brought by [the Appellant] against the Fédération Internationale de Volleyball decision dated [date of the Decision] (hereinafter the “**Decision**”) to declare that [the Appellant]’s application to change her Federation of Origin was not complete because she did not satisfy the relevant conditions provided in the FIVB Sports Regulations.

I. FACTUAL BACKGROUND

- 1 The following is an overview of the relevant facts of this case, listed in a summary manner for the sake of brevity. However, the FIVB Appeals Panel notes that it has considered every submission in the file thoroughly even if it has not been specifically addressed herein.
- 2 The Appellant is a female volleyball player [having the nationality of the Appellant’s country of birth, hereinafter “Country of Birth”], who was born in [the Appellant’s place of birth] on [the Appellant’s date of birth] to a [mother [who has the nationality of the Country of Birth] and a father [from a different country, hereinafter the “Father’s Country”]. Originally [holding the nationality of the Country of Birth], the Appellant acquired the [Father’s Country] nationality on [date]. The Appellant was raised in [Country of Birth] where she spent most of her life until [date].

¹ In the interest of the protection of privacy, this is a redacted version of the decision. Any reductions are marked with bold brackets

- 3 The Appellant began her volleyball activities and was first registered in [Country of Birth] in [date]. In particular, the Appellant studied three years at the sports boarding school “[name of the school, hereinafter the “School”]” which has a dedicated section for volleyball players (the [name of the volleyball section of the School]). It is uncontested that her original Federation of Origin is the [Country of Birth] Volleyball Federation. The Appellant played for the [Country of Birth] national team at both the junior and senior levels.
- 4 Throughout her childhood, the Appellant spent various holidays, such as Christmas, Easter and summer holidays, in [Father’s Country], where part of her family lives. In August [year], the Appellant moved to [a place in Father’s Country] where she was accommodated by her volleyball club at the time, [club of the place in Father’s Country]. [Two years later], the Appellant moved to [another place in Father’s Country] where she was accommodated by her new club, [second club in Father’s country].
- 5 During the [relevant volleyball season], the Appellant moved to [third country, neither Country of Birth nor Father’s Country, hereafter “Third Country”] where she played for the club [club in Third Country].
- 6 On [date], the Appellant filed an application to change Federation of Origin from the [Country of Birth] Volleyball Federation to the [Father’s Country] Volleyball Federation (hereafter the “**Application**”) before the Fédération Internationale de Volleyball (“**FIVB**” or “**Respondent**”)
- 7 On [date], the FIVB dismissed the Appellant’s Application.
- 8 On [date], the Appellant filed a request for reconsideration to the FIVB challenging the findings of the FIVB’s dismissal dated [date].
- 9 For the avoidance of doubt, the Appellant and the Respondent are hereinafter referred to as the “**Parties**”.

II. THE DECISION UNDER DISPUTE

- 10 On [date of the Decision] the FIVB confirmed the findings of the FIVB communication [date] (the “**Decision**”).
- 11 The Decision under dispute reads as follows:

“Reference is made to your request for reconsideration dated [date] with regards to the application to Change Federation of Origin by [the Appellant].

The Fédération Internationale de Volleyball (FIVB) understands from the content of your Request for reconsideration that your Client wishes the FIVB to review its findings of the FIVB communication dated [date].

The FIVB has carefully reviewed the information you provided the FIVB with in your request for reconsideration as well as your original submission. The FIVB hereby confirms the central findings of the FIVB communication as the Player has failed to demonstrate that she satisfies all of the conditions defined in Article 5.2 of the FIVB Sports Regulations.

Regarding the residency requirement, Article 5.2.1 requires the Player to demonstrate that she has established residence in the country of her new Federation of Origin for a minimum of two (2) continuous years immediately prior to the time of filing the application for the Change. In the FIVB Sports Regulations, “residence” is defined as the place where the player “lives and sleeps” and can be found in the majority of the days of the year. The Player has the burden of satisfying this condition. The FIVB is not sufficiently convinced that the Player has met her burden of proving that she has satisfied this condition based on the evidence submitted and taking into account the definition of “residence”.

Regarding the approval of her current Federation of Origin, a Federation of Origin is entitled to withhold its approval unequivocally, i.e. without providing any justification, in cases of a request under Article 5.2 of the FIVB Sports Regulations. The “reasonable and justifiable objections”

language cited by the Player only apply in cases involving Article 5.4.2 of the FIVB Sports Regulations, which is not the present case. Had the FIVB wanted to include such a requirement in Article 5.2 of the FIVB Sports Regulations, it could have done so by changing the FIVB Sports Regulations through the proper channels, i.e. an amendment to the FIVB Board of Administration. The FIVB administration is not empowered to take a decision resulting in the change in the language of the regulations as this would circumvent the powers of the FIVB Board of Administration.

*Consequently, the FIVB **decides** as follows:*

- 1. The FIVB confirms the findings of the FIVB communication dated [date]; and*
- 2. The application to Change Federation of Origin by [the Appellant] cannot be considered complete because [the Appellant] does not meet the conditions set forth in the FIVB Regulations.*

*An appeal may be filed against this **decision** exclusively before the FIVB Appeals Panel, in accordance with the FIVB Disciplinary Regulations (available using: <http://www.fivb.org/EN/FIVB/Legal.asp>).*

The FIVB wishes to stress that [the Appellant] may file an application to Change Federation of Origin when [the Appellant] has met the conditions set forth in the FIVB Sports Regulations.”

III. APPEAL BY THE APPELLANT AGAINST THE DECISION

a) Proceedings before the Appeals Panel

- 12 On [date], the Appellant filed the present appeal against the Decision. This appeal is recorded under the following case number: Case AP [year]-03.
- 13 On [date], the FIVB Appeals Panel Secretariat acknowledged receipt of the Notice of Appeal filed by the Appellant, and of the payment of the administrative fee of CHF 2'000 received on [date]. The FIVB Appeals Panel Secretariat also provided a deadline of [date] to file the Reasons for Appeal and informed the Appellant that the

FIVB Appeals Panel would consist of the FIVB Appeals Panel Chairperson, Ms. Damaris Young, and two additional members, stating that the proceedings would be conducted in English and providing the Appellant with the relevant information regarding the FIVB Disciplinary Regulations.

- 14 On [date], the FIVB Appeals Panel Secretariat acknowledged receipt of the Appellant's Reasons for Appeal and fixed a deadline of [date] for the FIVB to file its Answer in the present proceedings.
- 15 On [date], the Respondent filed a request to extend the deadline to file its Answer until [date].
- 16 On [date], the request for extension was granted by the FIVB Appeals Panel Chairperson.
- 17 On [date], the Respondent filed its Answer.
- 18 On [date], the FIVB Appeals Panel Secretariat acknowledged receipt of the Respondent's Answer and informed the Parties of the composition of the FIVB Appeals Panel. The FIVB Appeals Panel was to sit in the following composition:
 - Ms. Damaris Young (PAN), Chairperson;
 - Ms. Emba Wun-Man Leung (CHN), Member; and
 - Mr. Thomas Berend (LUX), Member.

The FIVB Appeals Panel Secretariat further informed the Appellant and the Respondent that the FIVB Appeals Panel would review their respective submission(s) and deliberate on the case AP [year]-03 in due course.

- 19 On [date], the FIVB Appeals Panel Secretariat informed the Parties that the FIVB Appeals Panel had recently issued a decision in a different case regarding the provision of the FIVB Sports Regulations at the centre of this case. Consequently, before issuing a decision in this matter, the FIVB Appeals Panel Secretariat invited the Parties to provide their comments on the decision communicated by no later than [date].

- 20 On [date], the Appellant filed her comments on the relevant FIVB Appeals Panel decision.
- 21 On [date], the FIVB Appeals Panel Secretariat acknowledged receipt of the Appellant's submission, noted that the Respondent did not file any comments and informed the Parties that the FIVB Appeals Panel would review their respective submissions and deliberate on the case shortly.

b) Positions of the Parties

- 22 The position of the Appellant can be summarised as follows:
- Preliminarily, the purpose of the FIVB is to develop volleyball in a beneficial and helpful way.
 - The *ratio legis* of Article 5 FIVB Sports Regulations is to preserve the authenticity of the bond between a player and a National Federation and to avoid abuses such as “nation shopping”.

Impossibility for the Player to comply with Article 5 FIVB Sports Regulations:

- Article 5.2 FIVB Sports Regulations sets out five conditions which need to be satisfied in order to change Federation of Origin. These are practically impossible to satisfy.
 - Article 5.2.3 FIVB Sports Regulations gives a disproportionate veto right to the relevant Federation of Origin. In this case, the Appellant's original Federation of Origin (the [Country of Birth] Volleyball Federation) did not approve the requested Change of Federation of Origin.
 - The residency period requirement in Article 5.2.1 FIVB Sports Regulations is indirectly controlled by the relevant Federation of Origin as it is calculated according to the date of filing of the application, which depends on the Federation of Origin's approval.
- The refusal of the Appellant's Federation of Origin has caused her considerable damage. Additionally, her Federation of Origin has no reasonable and justifiable motives to object to the Change of Federation of Origin. Consequently, the Appellant's Federation of Origin is exercising its veto right in an abusive way.

The alternative – mandatory interpretation of Article 5 FIVB Sports Regulations:

- A governing body such as a volleyball federation is comparable to an administrative authority. As such, it must comply with the same requirements that apply to such an authority including: the obligation that a decision must state its reasons, the requirement of transparency, the principle of equality and the principle of proportionality.
- The Decision states that the Federation of Origin is not required to justify its refusal. Without any required justification there is no protection against wrongful conduct. This could hypothetically allow a federation to request anything from a player in order to approve a Change of Federation of Origin.
- In the absence of justification, there is no transparency. This is contrary to the good governance principles established by the International Olympic Committee.
- The possibility for a Federation of Origin to refuse an application for Change of Federation of Origin without a right of appeal for the Player is evidently disproportionate.
- The lack of requirement to justify a Federation of Origin's refusal creates inequality between high- and low-level players. Federations of Origin will have a natural tendency to refuse the Change of Federation of Origin of an experienced player in order to keep a competitive advantage on other national federations.

FIVB Appeals Panel's power and duty to interpret Article 5 FIVB Sports Regulations:

- An *ad litteram* application of Article 5 FIVB Sports Regulations has effects contrary to the fundamental principles that the FIVB protects. According to Court of Arbitration for Sport ("**CAS**") case law, a clearly worded rule can be interpreted if there are reasons to believe that it must be understood in another way than its literal meaning.
- Based on the above, Article 5 FIVB Sports Regulations must be interpreted in light of i) its *ratio legis* and ii) Article 5.4.2 FIVB Sports Regulations.
- As an FIVB judicial body, the FIVB Appeals Panel is entitled to depart from the literal reading of Article 5 FIVB Sports Regulations and approve the Change of Federation of Origin. This is supported by CAS case law.

Player's compliance with Article 5 FIVB Sports Regulations:

- The Decision states that the FIVB is not sufficiently convinced that the Appellant has met the relevant burden of proof related to the requirement of residence. With reference to the standard of proof usually used by the CAS, the Appellant has provided abundant evidence and, as such, has comfortably demonstrated a three-year residency period in [Father's Country]. In addition, should the clearly evidenced residence of the Appellant not be sufficient, [the Appellant] still satisfies the *ratio legis* of Article 5 FIVB Sports Regulations.
- In light of the Appellant's submission accompanying her Application and the fact that the validity of a Federation of Origin's refusal to approve a Change of Federation of Origin should be assessed in light of Article 5.4.2 FIVB Sports Regulations, the [Country of Birth] Volleyball Federation's refusal should be considered abusive and be disregarded.

The outmost alternative – invalid restriction of the free movement of workers:

- The CAS has confirmed that sports governing bodies, such as the FIVB, must comply with European Union law ("**EU law**"). In light of Article 45 of the Treaty on the Functioning of the European Union on the freedom of movement for workers, and under an *ad litteram* approach, the objective of Article 5 FIVB Sports Regulations is not achieved and the means used to achieve it are disproportionate.

23 The Request for Relief of the Appellant was as follows:

1. *“approve the Change and declare it effective from the day of its notification to the New FoO; and*
2. *allow the Player to play for the New FoO's national team without the two-year national team ban / waiting period. In case the FIVB Appeals Panel would not cancel the ban / waiting period, to:*
 - *approve the Change and declare it effective from the day of the last match of the Player with the Former FoO's national team; and*
 - *to declare that the ban / waiting period ended on [date].*
3. *order the FIVB to:*
 - *implement the approval of the Change; and*

- *reimburse the Player an amount of two thousand Swiss francs (CHF 2.000) as administrative.”*

24 The position of the Respondent may be summarised as follows:

- The Appeal should be dismissed as the FIVB’s Decision correctly found that the Player does not meet the required (cumulative) conditions for changing her Federation of Origin.

Article 5.2.1 FIVB Sports Regulations not satisfied:

- At the time of filing her application to Change Federation of Origin, i.e. [date], the Appellant did not meet the two-year residency requirement outlined in Article 5.2.1 FIVB Sports Regulations.
- The interpretation of a regulation may never overcome the wording of said regulation. Consequently, the Appellant’s suggested interpretation of Article 5.2.1 FIVB Sports Regulations, disregarding the requirement of immediacy, would be *contra legem* and cannot be sustained.

Article 5.2.3 FIVB Sports Regulations not satisfied:

- The Appellant did not get the approval of her Federation of Origin required by Article 5.2.3. FIVB Sports Regulations.
- Article 5.2.3 FIVB Sports Regulations does not require any “*reasonable and justifiable objections*” to be provided by the Federation of Origin. This is only relevant for Article 5.4.2 FIVB Sports Regulations (special cases). This is in accordance with the decision taken by the FIVB’s Board of Administration in 2017. Furthermore, the FIVB’s judicial bodies do not have the power to overturn the will of a competent legislative body and *de facto* grant itself legislative powers by completely disregarding the clear wording of a provision. This would be a violation of the principle of separation of powers deriving from the FIVB Constitution.
- If “*reasonable and justifiable objections*” were required in the context of Article 5.2.3 FIVB Sports Regulations, said objections would be given in the present case, as the Appellant’s Federation of Origin provided reasons for its refusal.

Appellant's allegations as to the invalidity of Article 5.2 FIVB Sports Regulations should not be taken into account:

- The FIVB Appeals Panel's competence is limited to determining whether the FIVB administration correctly applied Article 5.2 FIVB Sports Regulations.
- Article 5.2 FIVB Sports Regulations does not infringe EU law. As shown by Article 6.5.4 FIVB Sports Regulations, it is consistent with general principles of law to make the change of Federation of Origin dependent upon the consent of the Federation of Origin as the current rights holder.
- Furthermore, other international federations have even more restrictive regulations regarding the right to change federation of origin. Consequently, an international federation such as the FIVB, who has decided to make such a right available, is free to determine the conditions governing how said right is exercised.
- Given that the Player's Federation of Origin provided valid reasons for denying the requested change, it has not abused its veto right.
- Article 5.2 FIVB Sports Regulations is not in itself contrary to the general principles of law as argued by the Appellant. Only a potential abusive application of said provision might fall under this category. However, this would not justify disregarding it or applying it *contra legem*.
- As a worldwide sport governing body, the FIVB must uniformly apply its rules and regulations to all its members and athletes across the globe. This holds particularly true with regards to the concept of Federation of Origin and to prevent "nation shopping". This is supported by FIVB and CAS jurisprudence. Consequently, EU law should not be taken into consideration.
- Alternatively, Article 5.2 FIVB Sports Regulations complies with EU law, should it be taken into consideration. With the aim of preventing "nation shopping", said provision creates an appropriate balance in between the players' interests (having the possibility of changing Federation of Origin) and National Federations' interests (safeguarding the concept of national representation and protecting the investments in their athletes).

Article 5.5.2 FIVB Sports Regulations is not subject to interpretation

- The two-year waiting period provided by Article 5.5.2 FIVB Sports Regulations is a *lex specialis* relevant to players like the Appellant, who have previously played for another national team. In addition, there is no possibility under Article 5.5.2 FIVB Sports Regulations for the Executive Committee to determine the starting point of said waiting period. Consequently, even if the Appellant's previous arguments were successful, this does not imply that Article 5.5.2 FIVB Sports Regulations could/should be interpreted in her favour.

25 The Request for Relief of the Respondent was as follows:

1. *"dismiss the Appellant's appeal in its entirety;*
2. *confirm the decision of the FIVB dated 14 May 2019;*
3. *order the Appellant to pay the entire costs of the present proceedings;*
4. *order the Appellant to pay a contribution to the Respondent's legal fees"*

26 The Appellant's comments filed on [date], relating to the FIVB Appeals Panel decision communicated to the Parties (FIVB AP [year]-03), can be summarised as follows:

- The analysis made by the FIVB Appeals Panel in the case AP [year]-03, to determine which edition of the FIVB Sports Regulations was applicable to the procedural matters and merits of the case, illustrates the FIVB Appeals Panel's power to assess the relevance of a regulatory or legal basis and decide on its application to a case.
 - The determination of the relevant criterion to be taken into consideration to decide which edition of the regulations was applicable further confirms that the FIVB Appeals Panel, when deciding on a case, proceeds to an analysis *in concreto* of the situation and an application *in tempore* of the FIVB Sports Regulations.
 - The reasoning in AP [year]-03 further demonstrates that the FIVB Appeals Panel considers the consequences of its findings and may thus decide to reject a finding based on different considerations including, for instance, its possible negative effects.
- As a consequence, the FIVB Appeals Panel has the authority to decide, in the present case, that the relevant moment for satisfying the conditions of Article 5 FIVB Sports Regulations is when the Appellant attempted to obtain the approval of her Federation of Origin for the change and not the filing of the Application.

- Following the same reasoning, the FIVB Appeals Panel would also be able to disregard the abusive veto right of the Federation of Origin and allow the application of Article 5 FIVB Sports Regulations in accordance with its *ratio legis*.
- A failure to do so would in fact endorse an inapplicable regulation and breach EU law as acknowledged by a working group of the FIVB in the evidence submitted by the Respondent.
- Swiss law – which the FIVB Appeals Panel found was applicable in the case AP [year]-03 – recognises the applicability of EU law, in particular with respect to an arbitral tribunal with its seat in Switzerland, such as the CAS. The CAS also stated that EU law must be taken into consideration when the conditions of Article 19 of the Swiss Federal Private International Law Act (“PILA”) are fulfilled. Consequently, the FIVB Appeals Panel must consider EU law which includes the principle of free movement of workers.
- The FIVB Appeals Panel rightfully highlighted the need for consistency and predictability in the application of the FIVB Sports Regulations. This is also supported by further CAS case law.

IV. ADMISSIBILITY OF THE APPEAL BY THE APPELLANT

- 27 The FIVB Appeals Panel notes that two set of FIVB Disciplinary Regulations may apply to the admissibility of the appeal by the Appellant, namely:
- The FIVB Disciplinary Regulations 2018, which were approved by the FIVB Board of Administration on 4 May 2018 and entered into force on 1 June 2018; and
 - The FIVB Disciplinary Regulations 2019, which were approved by the FIVB Board of Administration on 24 May 2019 and entered into force on 31 May 2019.
- 28 In accordance with general procedural principles, the relevant regulations applicable for procedural purposes are those in place at the time that the action was commenced.
- 29 The FIVB Appeals Panel notes that the Notice of Appeal was filed with the FIVB Appeals Panel Secretariat on [year] when the FIVB Disciplinary Regulations 2018 were still in force. Even though the FIVB Disciplinary Regulations 2019 were approved by the FIVB Board of Administration four days prior to this date, they entered into force

only on 31 May 2019, i.e. after the filing of the appeal. Consequently, the FIVB Appeals Panel finds that the admissibility of the appeal by the Appellant shall be examined based on the criteria set forth in the FIVB Disciplinary Regulations 2018².

30 Additionally, the FIVB Disciplinary Regulations 2018 will also guide the FIVB Appeals Panel with regards to any other procedural issue related to the present proceedings (e.g. allocations of costs).

a) FIVB Appeals Panel Competence: Pre-requisites

31 The FIVB Appeals Panel notes that certain admissibility requirements must be fulfilled for the FIVB Appeal Panel to consider an appeal. With regards to the foregoing, the Appellant must:

- i. file the appeal within fourteen (14) days of notification of the decision (Article 31.1 of the FIVB Disciplinary Regulations 2018). The Appellant filed an appeal with the FIVB Appeals Panel on [date], namely fourteen (14) after receipt of the Decision on [date]; and
- ii. pay an administrative fee of CHF 2'000 (Article 31.2 of the FIVB Disciplinary Regulations 2018). The Appellant also paid the administrative fee on [year]. On [year], the FIVB Appeals Panel Secretariat confirmed receipt of the administrative fee which was received on [year].

32 In light of the above, the FIVB Appeals Panel is satisfied that the Appellant complied with both requirements.

b) FIVB Appeals Panel Competence: General principles

33 The FIVB Appeals Panel is competent to hear appeals filed by an affected party against decisions of FIVB bodies or Confederation bodies (Article 30.1 of the FIVB Disciplinary Regulations 2018). In the present case, it is undisputed that:

² For the sake of completeness and transparency, the FIVB Appeals Panel reiterates that there have been no changes to the admissibility requirements with regards to appeals against decisions by FIVB bodies or Confederations bodies between the FIVB Disciplinary Regulations 2018 and the FIVB Disciplinary Regulations 2019.

- i. the Appellant is an affected party within the meaning of Article 30.1 of the FIVB Disciplinary Regulations 2018. The FIVB held that the Appellant did not meet all the conditions to request a change of Federation of Origin at the time of her Application; and
- ii. the Decision was issued by an FIVB body within the meaning of Article 30.1 of the FIVB Disciplinary Regulations 2018. The Respondent is the FIVB and the FIVB Secretariat is acting under the authority of the FIVB President, who is considered a “Governing Institution” of the FIVB (Article 2.1.2.1 of FIVB Constitution 2019 in conjunction with Article 8.1 of the FIVB General Regulations 2019).

34 In light of the above, the FIVB Appeals Panel appears to be, on a *prima facie* basis only, competent to hear the appeal filed by the Appellant against the Decision.

c) FIVB Appeals Panel Competence: Exclusion of certain appeals

35 The FIVB Appeals Panel notes that not all decisions by FIVB bodies or Confederations bodies may be appealed.

36 The FIVB Appeals Panel is satisfied that the restriction set forth in Articles 28.6 and 30.2 of the FIVB Disciplinary Regulations 2018 does not apply in the present case because the appeal does not concern a fine in an amount of less than CHF 5'000 or a referee's decision.

37 In light of the above, the FIVB Appeals Panel is satisfied that the FIVB Appeals Panel is competent to hear the appeal filed by the Appellant against the Decision.

V. THE APPEALS PANEL DECISION

38 The FIVB Appeals Panel shall a) decide on the law applicable to the present dispute before examining the merits of the decision. As it relates to the merits, the FIVB Appeals Panel must then determine b) whether the Appellant satisfied the conditions to change her Federation of Origin at the time that the Decision was issued, and

c) whether Article 5.2 FIVB Sports Regulations 2018 imposes an invalid restriction on the free movement of workers.

a) The Law Applicable to the Appeal

39 The Appellant did not make any express arguments regarding the law applicable to the merits of this dispute. However, the Appellant argues that the FIVB's regulations must comply with European Union law ("**EU law**"). As such, the Appellant is indirectly claiming the applicability of EU law to this dispute.

40 The Respondent argues that the FIVB rules and regulations, particularly the FIVB Sports Regulations, are applicable to this dispute, and, subsidiarily, Swiss law is applicable. As regards EU law, the Respondent argues that, as an organisation governing the sport of volleyball worldwide, the FIVB's global activities regarding purely sports-related interests shall not be subject to restrictions under EU law.

41 The FIVB Appeals Panel highlights that the Decision was issued on [date] based on the FIVB Sports Regulations 2018, in force at the time. Therefore, it is uncontested that the FIVB Sports Regulations 2018 shall apply³.

42 Additionally, the FIVB Appeals Panel finds that the approach argued by the Respondent, i.e. subsidiary applicability of Swiss law, would ensure that there is consistency in the applicable law throughout the entire appeals procedure defined in the FIVB Sport Regulations, i.e. an appeal before the CAS. It is clear from Article R58 of the Code of Sports-related Arbitration that Swiss law would be applied. The CAS confirmed this approach in a previous appeal against a FIVB Appeals Panel decision and found that Swiss law applied subsidiarily (CAS 2015/A/4095, para. 58). Plus, the FIVB Appeals Panel observes that Article 1.2 FIVB Disciplinary Regulations 2019 explicitly states that Swiss law shall be applicable to the merits. This provision, while not present in the FIVB Disciplinary Regulations 2018, merely codified an existing principle that decisions of the FIVB, which is a Swiss non-profit association, are

³ For the sake of completeness and transparency, the FIVB Appeals Panel emphasises that there have been no changes to Article 5 between the FIVB Sports Regulations 2018 and the FIVB Sports Regulations 2019. However, changes to this provision have been implemented under the FIVB Sports Regulations 2020.

governed by Swiss law. Therefore, the FIVB Appeals Panel finds that Swiss law shall apply subsidiarily.

43 Turning now to the question of the applicability of EU law, the FIVB Appeals Panel notes that the Appellant claims that, as CAS has confirmed that sports governing bodies, such as the FIVB, must comply with EU law, it should be considered in this case. The Respondent argues that EU law should not be taken into consideration in order to preserve the uniform application of its rules and regulations to its members and stakeholders worldwide, in particular as regards the prevention of “nation shopping”.

44 The FIVB Appeals Panel notes that the FIVB Sports Regulations 2018 do not address this question.

45 However, Swiss law, in particular, Article 19 PILA provides the following:

“1 If, pursuant to Swiss legal concepts, the legitimate and manifestly preponderant interests of a party so require, a mandatory provision of a law other than that designated by this Code may be taken into account if the circumstances of the case are closely connected with that law.

2 In deciding whether such a provision must be taken into account, its purpose is to be considered as well as whether its application would result in an adequate decision under Swiss concepts of law.”⁴

46 The FIVB Appeals Panel notes the CAS’ position on the matter, i.e. pursuant to Article 19 PILA, an arbitral tribunal sitting in Switzerland “*must take into consideration foreign mandatory rules where three conditions are met: (i) such rules belong to a special category of norms which need to be applied irrespective of the law applicable to the merits of the case; (ii) there is a close connection between the subject matter of the dispute and the territory where the mandatory rules are in force; (iii) in view of Swiss legal theory and practice, the mandatory rules must aim to protect legitimate interest[s] and crucial values and their application must lead to a decision which is appropriate. [...] EU provisions on fundamental freedoms guaranteed by the Treaty on the Functioning of the European Union meet these three conditions and constitute foreign*

⁴ Loose translation.

mandatory rules. Therefore, compliance with these provisions must be taken into account by a CAS panel.”⁵

- 47 In this regard, the FIVB Appeals Panel notes that it is not an arbitral tribunal like CAS. Rather, it is a judicial body of a Swiss non-governmental non-profit organisation⁶. However, given the position of the CAS regarding provisions of EU law on fundamental freedoms, which are also well enshrined in the Swiss legal system⁷, and that one of the Parties to this case is within the European Union, the FIVB Appeals Panel cannot dismiss taking into consideration fundamental principles of EU law.
- 48 Therefore, the FIVB Appeals Panel shall also take EU law into consideration for this dispute.

b) Did the Appellant satisfy the conditions to change her Federation of Origin at the time of the Decision?

- 49 The crux of this dispute is whether the Appellant satisfied the conditions to change her Federation of Origin at the time that the Decision was issued. The relevant conditions to change Federation of Origin are defined in Article 5.2 of the FIVB Sports Regulations 2018:

“A change of Federation of Origin (hereinafter “the Change”) may be approved only if the following conditions are cumulatively met:

5.2.1 The player has established residence in the country of his new Federation of Origin (hereinafter “the new Federation”) for a minimum of two (2) continuous years immediately prior to the time of filing the application for the Change.

5.2.2 The player has obtained the nationality of the country of the new Federation.

5.2.3 The player’s Federation of Origin agrees to the Change.

5.2.4 The new Federation agrees to the Change.

⁵ Arbitration CAS 2016/A/4492 Galatasaray v. Union des Associations Européennes de Football (UEFA), award of 3 October 2016 (operative part of 23 June 2016), para. 1 of the summary.

⁶ Article 2.7.2 FIVB Constitution 2018.

⁷ With regards to workers, see the Bilateral Agreement on the free movement of persons.

5.2.5 *The applicable administration fee for the Change has been paid to the FIVB (see Article 5.3 below)."*

50 It is uncontested between the Parties that the conditions found in Articles 5.2.2, 5.2.4 and 5.2.5 are met in the present case. Thus, the crux of this dispute is whether the Appellant met the conditions found in Articles 5.2.1 and 5.2.3 at the time of the Decision. The FIVB Appeals Panel will examine each of these conditions in turn.

51 However, preliminarily, the FIVB highlights that the Appellant argues that the Decision, which follows a literal interpretation of Article 5.2 FIVB Sports Regulations 2018, leads to a lack of motivation, transparency, proportionality and equality. These effects are, according to the Appellant, contrary to the principles that the FIVB protects and is bound by.

52 The FIVB Appeals Panel notes that, according to the Swiss Federal Tribunal, the law is interpreted primarily according to its letter (literal interpretation). If the text is not absolutely clear, if several interpretations are possible, the judge will look for the true scope of the regulation, by extracting it from its relation to other provisions and from its context (systematic interpretation), from the objective pursued, in particular the interest being protected (teleological interpretation), as well as from the will of the legislator as reflected in particular in the relevant preparatory works (historical interpretation) (ATF 137 III 337, para. 3.1).

53 Therefore, the FIVB Appeals Panel will apply these principles when examining the conditions under Articles 5.2.1 and 5.2.3 FIVB Sports Regulations 2018 below.

- i. Does the Appellant meet the condition of establishing residence in her new Federation of Origin for a minimum of two continuous years immediately prior to the filing of the Application?

54 The Appellant argues that the Decision does not refer to the used standard of proof to examine this question, which should be "comfortable satisfaction" given that these proceedings are not criminal in nature. Additionally, the Appellant claims that the evidence provided is sufficient to establish the veracity of the Appellant's authentic

bond and a three-year residence period in [Father's Country] to the comfortable satisfaction of the FIVB.

- 55 The FIVB Appeals Panel notes that Article 5.2.1 FIVB Sports Regulations 2018 requires a minimum of two continuous years of residency immediately preceding the time of filing the application. The term "immediately" is defined as an adverb meaning "*now or without waiting or thinking*" or "*close to something or someone*"⁸. Additionally, Article 5.3.1.b FIVB Sports Regulations 2018 defines the term "residence" as "*the place where the player "lives and sleeps" and can be found in the majority of the days of the year*".
- 56 In this regard, the FIVB Appeals Panel notes that it is uncontested that the Appellant moved to [Father's Country] no later than [four years before the Decision], as also established by the evidence provided by the Appellant. However, the Appellant claims that she has established residence for three continuous years prior to filing the Application. The FIVB Appeals Panel notes that the evidence provided by the Appellant proves her residence in [Father's Country] only until [three years after relocation to Father's Country]. Additionally, the Appellant states that, [three years after relocation to Father's Country], she moved to [Third Country] to play for the [name of the club in the Third Country]. This is further supported by the Appellant's International Transfer Certificate ("ITC") available in the Volleyball Information System for the [relevant volleyball season], created [date] by the aforementioned [Third Country] club.
- 57 Consequently, the FIVB Appeals Panel notes that the Appellant moved to [Third Country] in summer [year], or, at the very latest, in autumn [year]. Considering that the Application was filed on [date], the FIVB Appeals Panel must conclude that the place where the Appellant lived and slept during the period leading up to and on the date of the Application was not in [Father's Country] but in [Third Country].
- 58 Therefore, while the FIVB Appeals Panel agrees that the Appellant has established a three-year residence period in [Father's Country], the condition of immediacy prior to filing the Application is not fulfilled, as correctly stated by the Respondent. The FIVB

⁸ <https://dictionary.cambridge.org/dictionary/english/immediately>.

Appeals Panel also highlights that the Appellant recognises this in her Reasons for Appeal dated [date] while claiming that she had no choice due to having to wait for her Federation of Origin to agree to the change. The latter point will be addressed by the FIVB Appeals Panel hereafter.

59 As such, the Appellant's argument related to the applicable standard of proof is irrelevant and does not need to be examined by the FIVB Appeals Panel.

60 Finally, the FIVB Appeals Panel notes that no argument has been put forward that the text of Article 5.2.1 FIVB Sports Regulations is not absolutely clear. Therefore, and as demonstrated above, there is no room for further interpretation of this provision.

61 In light of the above, the FIVB Appeals Panel finds that the Decision did not err in finding that the Appellant did not satisfy the residency condition immediately prior to filing the application defined in Article 5.2.1 of the FIVB Sports Regulations 2018 in order to change her Federation of Origin.

ii. Does the Appellant meet the condition of her Federation of Origin agreeing to the change?

62 The Appellant argues that – while she has not satisfied this condition on a literal reading – her Federation of Origin has an excessive potestative power as it is given the ability to control the fulfilment of both conditions under Article 5.2.1 and 5.2.3 FIVB Sports Regulations 2018. According to the Appellant, her Federation of Origin is, as such, granted a veto right of which it has abused by exercising it beyond its normal and appropriate use, and the relevant lack of approval must be disregarded.

63 Article 5.2.3 FIVB Sports Regulations 2018 contains a condition in which a party seeking to change Federation of Origin must prove that his/her Federation of Origin agrees to the change.

64 In this regard, the FIVB Appeals Panel highlights that the Appellant does not claim that the text of Article 5.2 FIVB Sports Regulations 2018 is unclear. Rather, the Appellant disputes that the requirement of raising "*reasonable and justifiable objections*" provided for in Article 5.4.2 FIVB Sports Regulations 2018 should be applicable to

Article 5.2.3 FIVB Sports Regulations 2018 failing which said provision violates its *ratio legis* and the principle of transparency.

- 65 The FIVB Appeals Panel notes that the *ratio legis* of Article 5 FIVB Sports Regulations 2018 is to maintain the balance between a player's interest in changing sporting nationality and the investments made by the relevant national federation. As regards transparency, the FIVB Appeals Panel agrees with the Appellant in principle: the current wording of Article 5.2.4 FIVB Sports Regulations 2018 creates a window for a Federation of Origin to refuse a change of Federation of Origin without providing valid justification, which, as outlined below, is within its rights under the relevant regulatory framework. Having said that, the FIVB Appeals Panel also agrees with the Respondent whereby this risk certainly does not justify disregarding Article 5.2.3 FIVB Sports Regulations 2018 altogether or interpreting it contrary to its wording.
- 66 In addition to this, the FIVB Appeals Panel highlights that the requested interpretation of the FIVB Sports Regulations is incompatible with the guarantees of legality, transparency, proportionality and equal treatment by which the FIVB is bound. Deviating from a consistent interpretation of these regulations without valid grounds is likely to lead to uncertainty and a lack of predictability in the application of the FIVB's rules and regulations. Such result is not in line with the common framework that the FIVB Sports Regulations seek to establish for the global volleyball family. Regardless, there is no room for interpretation considering that the wording of Article 5.2.3 FIVB Sports Regulations is absolutely clear.
- 67 In light of the above, it is uncontested that the Appellant's Federation of Origin did not agree to the change requested and that the condition under Article 5.2.3 FIVB Sports Regulations 2018 is not fulfilled.
- 68 Turning now to the question of whether the lack of consent should be disregarded, the FIVB Appeals Panel highlights that that would only be possible should Article 5.2.3 FIVB Sports Regulations 2018 be deemed illegal and, thus, inapplicable.
- 69 The FIVB Appeals Panel notes that the Appellant simply states that the lack of approval must be disregarded due to the Federation of Origin allegedly having abused its veto right. The main argument of the Appellant in this regard seems to be that the Appellant's Federation of Origin did not have, or at least did not give, sufficient reasons

for its veto. However, the FIVB notes that Article 5.2.3 FIVB Sports Regulations 2018 does not require the Federation of Origin to provide any reasons for its veto. This reflects the fact that the FIVB Sports Regulations 2018 do not oblige the Federation of Origin to agree to a change of its athletes' Federation of Origin. Likewise, Article 5.2.3 FIVB Sports Regulations 2018 does not provide that a Federation of Origin could veto a change of Federation of Origin only under certain circumstances. Instead, it is within the Federation of Origin's sole discretion whether or not to agree to a change of Federation of Origin. The FIVB notes that the Appellant fails to demonstrate the illegality of such a rule under Swiss law (or under EU law, see section (c) below). Additionally, the FIVB Appeals Panel fails to see which Swiss law provision would consider the application of Article 5.2.3 FIVB Sports Regulations 2018, or the Appellant's Federation of Origin's refusal to agree, unlawful. As such, the lack of consent of the Appellant's Federation of Origin may not be disregarded.

- 70 Given that the conditions to change Federation of Origin in Article 5.2 FIVB Sports Regulations 2018 must be cumulatively met and that it is uncontested that 1) the Appellant has not established residence in [Father's Country] for two continuous years immediately prior to filing the Application, and 2) her Federation of Origin has not agreed to the change, the FIVB Appeals Panel must conclude that the Appellant failed to satisfy all of the conditions of Article 5.2 FIVB Sports Regulations 2018 in order to change her Federation of Origin.

c) Does Article 5.2 FIVB Sports Regulations 2018 impose an invalid restriction on the free movement of workers?

- 71 The Appellant argues that the unequivocal veto right of the Federation of Origin violates the freedom of movement of workers under EU law (Article 45 of the treaty on the functioning of the European Union).

- 72 However, the Appellant fails to specify how this would be the case.

- 73 The FIVB Appeals Panel is aware that CAS jurisprudence has found that fundamental freedoms under EU law have been applicable in cases involving other sports

governing bodies⁹. Given that the present case involves a party within the European Union and, as mentioned above, principles such as the freedom of movement of workers which are also enshrined in the Swiss legal system, the FIVB cannot dismiss the applicability of this principle in the present case.

- 74 Having examined the facts of the present case, particularly, the Appellant's Reasons for Appeal, the FIVB Appeals Panel fails to see how Article 5 FIVB Sports Regulations 2018 violates the right to work due to an alleged unequivocal veto right of the Federation of Origin. Article 5 FIVB Sports Regulations 2018 governs the changing of sporting nationality, not how or whether a player can find employment. The unequivocal veto right itself does not in and of itself raise an issue related to the right to work.
- 75 The Appellant also failed to specify how the freedom of movement of workers is impacted by her inability to change Federation of Origin. She is not prevented from playing for a club in Europe, nor is she blocked from moving to a different country, as the Appellant fully demonstrated by moving to [Third Country] and playing for a [Third Country] club. While the Appellant may not be considered a local player for purposes of registration in the national league, which would be her preferred treatment in the country that she is in, that does not mean that she is entitled to such registration. Whether or not a club wishes to hire her due to her registration status lies with the registration rules of the league in question, not the sporting nationality rules of the FIVB. In this regard, the FIVB Appeals Panel emphasises that in the famous Bosman case¹⁰, it was not sporting nationality rules that were challenged but, rather, the imposition of quotas on foreign players for registrations within leagues (within members States of the European Union) that were overturned. In this case, the FIVB Appeals Panel has to separate the sporting nationality rules of the FIVB from the league registration rules of the territory in question.
- 76 In light of the above, the FIVB Appeals Panel finds that Article 5.2 FIVB Sports Regulations 2018 does not impose an invalid restriction on the free movement of workers.

⁹ Namely, CAS 2016/A/4492 para. 41ss.

¹⁰ ECJ C-415/93 - Union royale belge des sociétés de football association and Others v Bosman and Others.

VI. SUMMARY

77 The FIVB Appeals Panel finds that the Appellant failed to satisfy the conditions in Articles 5.2.1 and 5.2.3 FIVB Sports Regulations 2018 in order to change her Federation of Origin and, thus, the Decision is upheld.

78 The decision above does not prevent the Appellant from re-submitting her application to change her Federation of Origin once she satisfies all of the conditions defined in Article 5.2 FIVB Sports Regulations.

VII. COSTS

79 The FIVB Appeals Panel notes that Article 31.2 *in fine* of the FIVB Disciplinary Regulations 2018 provides that the administrative fee can be reimbursed if a party prevails. In the present case, the Appellant did not prevail on her appeal. Consequently, the FIVB Appeals Panel finds that it cannot reimburse the administrative fee paid by the Appellant.

80 The FIVB notes that there is no provision in the FIVB Disciplinary Regulations 2018 with regards to legal costs which allows for the FIVB Appeals Panel to attribute said costs to a specific party. Consequently, the FIVB Appeals Panel finds that the Appellant and the Respondent shall bear their own costs.

VIII. FIVB APPEALS PANEL DECISION

For the reasons set forth above, the FIVB Appeals Panel decides as follows:

1. **The appeal filed by [the Appellant] is dismissed;**
2. **The FIVB decision dated [date of the Decision] is confirmed;**
3. **No reimbursement of the administrative fee shall be granted;**
4. **Each party shall bear their own legal costs and**
5. **Any other requests for relief are dismissed.**

Lausanne, [date]

Ms. Damaris Young
Chairperson

Ms. Emba Wun Man Leung
Member

Mr. Thomas Berend
Member

NOTICE OF APPEALS

An appeal may be filed against this decision exclusively before the Court of Arbitration for Sport (CAS), in accordance with

- Article 32 of the FIVB Disciplinary Regulations 2018 which provides as follows:

“A further appeal against the decision by the Appeals Panel can only be lodged with the Court of Arbitration for Sport in Lausanne, Switzerland, within twenty-one (21) days following receipt of the decision”.

- The CAS Code of Sport-related Arbitration, which is available under www.tas-cas.org

The address and contact details of the CAS are the following:

Court of Arbitration for Sport
Avenue de Beaumont 2
1012 Lausanne, Switzerland
Tel: +41 21 613 50 00
Fax: +41 21 613 50 01
e-mail: info@tas-cas.org

In the event of an appeal, this decision shall remain in effect while under appeal unless the CAS orders otherwise.