4A_260/2017[1]

Judgment of February 20, 2018

First Civil Law Court

Composition

Federal Judge Kiss (Mrs.), Presiding

Federal Judge Klett (Mrs.)

Federal Judge Hohl (Mrs.)

Federal Judge Niquille (Mrs.)

Federal Judge May Canellas (Mrs.).

Clerk of the Court: Mr. Carruzzo.

Parties

X._____,

Represented by Mr. Jean-Louis Dupont and Mr. Martin Hissel, c/o Mr. Alexandre Zen-Ruffinen,

Appellant,

v.

International Federation of Association Football,

Represented by Mr. Antonio Rigozzi,

Respondent.

Subject-matter:

International sports arbitration,

Civil law appeal against an award rendered by the Court of Arbitration for Sport on March 9, 2017 (CAS 2016/A/4490).

[1] Translator's Note: X._____ v. International federation of Association Football, 4A_260/2017. The judgment was issued in French. The original text is available on the website of the Federal Tribunal, www.bger.ch.

Facts:

A.

A.a. The International Federation of Association Football (FIFA), an association under Swiss law registered in Zurich, is the world's governing body for football. It has enacted, among other legal documents, the Regulations on the Status and Transfer of Players (RSTP), the current version of which has been approved by the FIFA Council on October 27, 2017 and entered into force on January 1, 2018. One of the aims of this regulation consists in limiting the influence of actors outside the football's world and to prevent third parties from acquiring ownership of the players' economic rights (chapter V of the RSTP: "Influence of third parties and ownership of players' economic rights by third parties").

Normally, the ownership of the federative rights arising from the player's mandatory registration to a national association (possibility of having the player participate in competitions organized by this association, power to impose sanctions, etc.) and the ownership of economic rights concerning the said player (e.g. transfer fee) are inseparable. However, for several years now, certain countries of South America and Europe (Spain and Portugal in particular) have introduced a practice consisting in the disconnection of these two categories of rights. This practice is called *third party ownership of economic rights on football players* or better known under its English name - Third Party Ownership (TPO) - and consists in having a professional football club selling, totally or partially, his economic rights over a player to a third-party investor, so that this investor may benefit from any potential capital gain that the club will make upon the future transfer of the player. In return, the investor provides financial assistance to the club to allow it to resolve cash flow problems or helping it acquire a player, among other objectives. In this case, a club that is interested in a player but is unable to pay the transfer fee required by the player's current employer, calls upon an investor who will provide the necessary funds for the payment of all or part of the transfer fee. In exchange, the investor obtains a profit-sharing on the indemnity that the club will get in case of subsequent transfer of the player. Similar transactions have provoked controversy in many countries and have been banned in France since 1988, in England since 2008 and, more recently, in Poland.

Aware of the problem, FIFA adopted, in 2008, Art. 18bis RSTP that reads as follows:

"1. No club shall enter into a contract which enables any other party to that contract or any third party to acquire the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams.

2. The FIFA Disciplinary Committee may impose disciplinary measures on clubs that do not observe the obligations set out in this article."

In 2012, FIFA conducted several studies, consultations and discussions related to the TPO along with the principal stakeholders. The results of this large-scale study led its Executive Committee to introduce a new Art. 18ter to the RSTP during a session that took place on December 18 and 19, 2014. The text of this provision was addressed to the member associations of FIFA through a circular note N° 1464 of December 22, 2014. It reads as follows:

"1. No club or player shall enter into an agreement with a third party whereby a third party is being entitled to participate, either in full or in part, in compensation payable in relation to the future transfer of a player from one club to another, or is being assigned any rights in relation to a future transfer or transfer compensation.

2. The interdiction as per paragraph 1 comes into force on 1 May 2015.

3. Agreements covered by paragraph 1 which predate 1 May 2015 may continue to be in place until their contractual expiration. However, their duration may not be extended.

4. The validity of any agreement covered by paragraph 1 signed between one January 2015 and 30 April 2015 may not have a contractual duration of more than 1 year beyond the effective date.

5. By the end of April 2015, all existing agreements covered by paragraph 1 need to be recorded within the Transfer Matching System (TMS). All clubs that have signed such agreements are required to upload them in their entirety, including possible annexes or amendments, in TMS, specifying the details of the third party concerned, the full name of the player as well as the duration of the agreement.

6. The FIFA Disciplinary Committee may impose disciplinary measures on clubs or players that do not observe the obligations set out in this article."

Within the meaning of the RSTP, the "third party" is a party other than the two clubs which transfers a player from one club to another, or any club to which the player has been registered. As to the "TMS") (Transfer Matching System), or system regulating the transfers, it is an online information system that aims primarily in simplifying the international transfer procedures of players as well as to improve the transparency and the information flow.

A.b. On January 30, 2015, X_____ (hereafter: X._____ or the club), a third division football club registered with the Royal Belgian Football Association (RBFA), on the one side, and W._____ Limited (hereafter: W._____), an investment company under … law, calling itself "the world leader in "Third Party Ownership"",[2] on the other side, signed a TPO contract, entitled "Cooperation Agreement",[3] according to which the Club would transfer to W._____ 30% of its economic rights associated to three designated players versus payment by W._____ of EUR 300'000 in three parts, the last expiring in February 2016. Said contract should be valid until July 1, 2018, with the reservation of a potential extension. On July 7, 2015, the same parties signed a second contract of the same type according to which X._____ sold to W._____ 25% of the economic rights of a Portuguese player for EUR 50'000. The club also signed a contract with that player, who was free agent. These various contracts were forwarded to the FIFA department that administers the TMS.

A.c. On July 2, 2015, the Secretariat of the FIFA Disciplinary Commission, via the RBFA, opened a disciplinary proceeding against X._____ for violation of Art. 18bis and 18ter of the RSTP related to the cooperation agreement. On July 21, 2015, it extended the scope of this proceeding after being informed of the existence of a second agreement.

The FIFA Disciplinary Commission rendered a decision on September 4, 2015. It found the club liable for violation of Art. 18bis and 18ter RSTP and prohibited the latter from registering players, at national and

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

international level, for four transfer periods following the notification of its decision and imposed a payment of a CHF 150'000 fine.

With a decision rendered on January 7, 2016, the FIFA Appeal Committee dismissed the appeal filed by the club and confirmed the first-instance decision.

B.

B.a. On March 9, 2016, X._____ filed an appeal with the Court of Arbitration for Sport (CAS). The arbitral proceedings were conducted in French by a Panel of three arbitrators (hereafter: the Panel), chaired by M. A._____, French State Counsellor, who conducted a hearing and rendered its decision on October 17, 2016, in the seat of CAS in Lausanne, in the presence of the Appellant and his counsel, as well as the FIFA representatives. On April 12, 2016, the CAS informed the parties that the challenged decision was suspended until notification of its award.

The Appellant club repeatedly requested the suspension of the arbitral proceedings, until the issuance of decisions concerning the legality of the TPO in other pending proceedings before the European Commission and before the Belgian courts, and also until the communication of the judgment rendered by the First Civil Law Court of the Federal Tribunal on December 13, 2016 in the case 4A_116/2016 between Sporting Clube de Portugal - Futebol, SAD, and W._____. All these requests, to which FIFA objected, were dismissed by the Panel, the former because there was uncertainty as to the time limits within which the final decisions would be rendered in the relevant proceedings, and the latter because there was no connection between the procedure filed before the Swiss Federal Tribunal and the ongoing arbitration.

On March 9, 2017, the Panel rendered its final award. Partially allowing the appeal, it amended the challenged decision in that the prohibition on X._____ to register players at national and international level, was reduced to three full and consecutive registration periods following the notification of the arbitral award. For the rest, the decision of the FIFA's Appeals Commission was confirmed.

B.b. The grounds of the award can be summarized as follows. For the sake of simplification, the description will be made in the form of a direct speech.

B.b.a. It is undisputed that the CAS has jurisdiction based on Art. R47 of the Code of Sports-related Arbitration (hereafter: the Code) and Art. 67par.1 of the FIFA Statutes, given that the appeal is directed against a final decision of the FIFA's Appeal Committee against a club member of a national federation affiliated to this association. Moreover, the appeal is admissible.

Regarding the law applicable to the merits, according to Art. R58 of the Code and Art. 66 par. 2 of the FIFA Statutes, the Panel will first apply the FIFA's internal regulations, and in particular Art.18a and 18b RSTP and Swiss law subsidiarily. The mandatory rules of the European Union (EU) law invoked by the parties will also be considered since the three cumulative conditions set by CAS case law are met in the present case. However, and according to the aforementioned provisions, Belgian law will not be applied in this case. In any case, the Appellant does not demonstrate that the invoked principle of proportionality of the sanction would have any specificities compared to the European law and Swiss law.

B.b.b. The Panel will start by analyzing the legality of Art.18bis and 18ter RSTP with respect to the European law (*B.b.b.a*), the relevant provisions of the ECHR and the EU Charter of Fundamental Rights (hereafter: the Charter; *B.b.b.b*), as well as Swiss law (*B.b.b.c*) and CAS case law (*B.b.b.d*).

In this respect, the existence of numerous procedures, listed under para. 88 of the award, related -more or less - to the current problem, should not preclude such review or anticipate its outcome. The same applies for decisions already rendered or to be rendered as part as these proceedings. Assuming that the sanctions imposed on the club stand up to the analysis on legality, they will still have to conform with the principle of proportionality and, if necessary, be adapted to meet this standard (B.b.c). Finally, it might be necessary to determine the date as of which the sanctions will apply (B.b.d).

B.b.b.a. X._____ invokes a number of rights guaranteed by the Treaty on the Functioning of the EU (TFEU). The provisions invoked are applicable to FIFA's regulatory activity. First, regarding the free movement of capital (Art. 63 TFEU), is it true that the Art.18bis and 18ter RSTP establish restrictions on capital movements from, to or between the EU Member States. However, such restrictions do not necessarily constitute obstacles prohibited by the Treaty, as long as they pursue a legitimate objective, they are appropriate to achieve such objective and the do not go beyond what is necessary in order to achieve said objective. These conditions are fulfilled in this case. Safeguarding the regularity of sports competitions, the balance between clubs and the uncertainty of results, preventing conflicts of interest and protecting the image and ethics of football are all legitimate objectives. In this respect, however, the PTO practice creates many risks: risks associated with the opacity of investors, who are beyond the control of the football regulatory bodies and can freely and without any control dispose of their investments; risks to endanger the professional freedom and the rights of players because the investor may influence the transfer of players in a speculative interest; risk of conflicts of interest, even match-fixing or match-manipulation, since the same investor can have TPOs in several clubs of the same competition; ethical risks, since the objective pursued has a speculative financial interest, unrelated to sporting- or even moral considerations. These measures do not prohibit clubs to use certain sources of financing to recruit players, but only certain financing schemes which give the investor the power to influence the independence and policy of a club. For that matter, they respect the principle of proportionality.

Moreover, since FIFA cannot control the interests of persons who are not affiliated to it, the Panel considers that measures other than the prohibition on clubs and players entering into TPO-type contracts do not appear reasonably capable of achieving the objectives pursued. The arguments developed by the Appellant regarding the free movement of workers (art. 45 TFEU) and the freedom to provide services (Art. 56 TFEU), consolidated by Art. 15 (freedom to provide services and the right to work) and 16 (freedom of establishment) of the Charter, are similar to those developed with respect to the free movement of capitals and therefore call, to some extent, for the same answer, more or less, as to the one for that freedom.

With respect to EU competition law, it must be noted that FIFA is an association of undertakings, in the sense of Art. 101 TFEU, in that it is constituted by sports federations bringing together football clubs which are undertakings covered by this conventional standard. The latter measure – Art. 18bis and 18ter RSTP - must also affect trade between EU Member States. This is the case when these regulatory provisions have an impact on the European transfer market. However, depending on the definition of the market to be adopted (e.g. the one of players *stricto sensu*), there may be no competitive relationship between the

clubs and the third-party organizations called upon to finance them. In any event, the third condition of Art. 101 TFEU is not fulfilled, since the Art. 18bis and 18ter RSTP do not have the purpose of restricting, preventing or distorting competition, but regulating the player transfer market in order to pursue the legitimate objectives invoked by FIFA. Assuming that these regulatory provisions could have the effect of restricting competition in the transfer market, the objectives pursued would justify such a prejudice.

As regards the possible existence of an abuse of a dominant position prohibited by Art. 102 TFEU, the Appellant, on whom was placed the burden of proof, did not produce any substantial economic analysis capable of defining the relevant market and demonstrating the alleged anti-competitive effects of such provisions. In any event, the Panel may refer here, *mutatis mutandis*, to the above explanations and, therefore, find again that the legitimate objectives pursued by FIFA are such as to justify the infringements of competition law invoked, but not established, by X._____.

B.b.b.b. According to the Appellant, the cited above Art. 18ter para. 5 RSTP, requiring clubs to publish all TPO agreements, would constitute a violation of Art. 8 ECHR and Art. 7 of the Charter. However, no argument has been given by the Appellant as to why the first provision, concerning the right to respect private and family life would apply in the present case, nor as to why the abovementioned regulatory provision would constitute an interference with the rights which football clubs would derive from Art. 8 ECHR.

As for the Charter, it can only be invoked, in accordance with its Article 51, against EU institutions, bodies, offices and agencies as well as against Member States when implementing EU law. Therefore, the Appellant cannot validly rely on the provisions of the Charter with regard to the adoption of the Art. 18ter para. 5 RSTP by FIFA. In the absence of sufficient reasoning, Art. 1 of the first Additional Protocol to the ECHR, which is supposed to create a right to respect investments, among other goods, is also not applicable. Moreover, Switzerland has not ratified said Protocol.

B.b.b.c. Under Swiss law, the Appellant brings forward arguments based on Art. 5 and 7 of the Federal Act on Cartels and Other Restrictions of Competition (SR 251) which prohibit, respectively, unlawful agreements and unlawful practices by undertakings having a dominant position. At this point, the Panel limits itself to referring to its explanations relating to the comparable provisions of Art. 101 and 102 TFEU. It therefore considers that the Appellant has not demonstrated that the Art. 18bis and 18ter RSTP would be contrary to the Art.5 and 7LCart.

X._____ has not established a conflict between these two provisions, on the one hand, and European and Swiss competition law, on the other, nor has it demonstrated their alleged illegality in relation to Art. 26 (guarantee of property) and 27 (economic freedom) of the Swiss Federal Constitution (Cst; SR 101).

B.b.b.d. The Appellant relies on the precedent case rendered by the CAS on December 21, 2015 which has given rise to the aforementioned judgment of the Federal Tribunal of December 13, 2016 in the matter 4A_116/2016 (cf. lit. B.a, 3rd paragraph above). According to the Appellant, in this award, endorsed by the Federal Tribunal judgment, the CAS had validated the legality of TPO-type contracts. Therefore, FIFA, which must respect CAS case law according to its own Statutes, breached this obligation by prohibiting TPO.

This is not the case. An award rendered by a CAS panel is only intended to settle a specific dispute. The award referred to by the Appellant did not concern the present dispute but involved other parties.

Furthermore, it did not deal with the compliance of the TPO-type contracts with Art. 18bis and 18ter RSTP, nor with their legality in relation to the standards invoked by the Appellant. Therefore, it does not constitute a relevant example for the solution of the dispute.

B.b.c. The proportionality between the offence and the imposed sanction is a general principle that is widely applied by the arbitral tribunals established under the CAS and recognized under most legal systems. This principle is obviously applicable to this case.

In this respect and by examining the scale of sanctions provided for in the FIFA Disciplinary Code (FDC), the sanctions imposed on the Appellant are definitively not the most serious or the most severe. In order to judge on the proportionality of the sanctions, the Panel notes, first of all, that X._____ committed two offences that did not occur simultaneously but are ranked equally with each other: first, it disregarded Art. 18bis RSTP by reaching the cooperation agreement on January 30, 2015. The latter, by its content, deprived the club of any management autonomy over the transfer of the three players since the club's policy could be determined by said transfers. Secondly, the Club signed on July 7, 2015 an agreement with W._____ which was in direct contradiction with Art. 18ter RSTP since it granted the company the right to compensation payable on the future transfer of the player covered by such agreement. However, each of these two separate offences justifies a ban on registering new players during two transfer periods. In addition, the club's deliberate and repeated violations of the RSTP and its unwillingness to cooperate in the proceedings before the FIFA authorities should be stressed. Finally, it should be noted that X._____ has not demonstrated how the amount of the fine – CHF 150'000 - would be excessive as to jeopardize the operations of the club, nor has it challenged any information to the effect that W._____ would actually pay the fine.

The Panel observes, however, that this is the first sanction imposed for violation of Art. 18ter RSTP and that there was therefore no case law on this matter. Moreover, the offences were committed during a transitional period for the TPO regulation. Their gravity is thus slightly reduced, which justifies reducing the prohibition imposed on X._____ to register players, both nationally and internationally, to three consecutive registration periods, while confirming the amount of the fine.

B.b.d. As regards the date of entry into force of the registration of players' ban, the Panel notes that the contested decision, taken by the FIFA Appeal Committee, has been suspended, so that the penalty imposed has never been applicable to date. Consequently, the (reduced) sanction ordered by the Panel shall replace the one resulting from the contested decision and shall be applied from the first registration period following the notification of this award.

C.

On May 15, 2017, X._____ (hereafter: the Appellant) filed a civil law appeal before the Swiss Federal Tribunal requesting the annulment of the award dated March 9, 2017. It also requested that the appeal is granted a suspensive effect. In short, the Appellant argues that the CAS cannot be regarded as a genuine arbitral tribunal and also that the conduct adopted by the President of the Panel towards its lawyers during the hearing of October 17, 2016 infringed its right to be heard. On the merits, the Appellant contends that the Panel rendered an award incompatible with substantive public policy by endorsing FIFA's total ban on TPO and imposing sanctions that are manifestly disproportionate. In its reply of June 27, 2017, FIFA (hereafter: the Respondent) requested the inadmissibility and, alternatively, the dismissal of the appeal.

On the same day, the CAS, represented by its Secretary-General, produced the case file and filed its observations requesting the dismissal of the appeal. In the Appellant's reply of July 14, 2017, and the Respondent's rejoinder of August 2, 2017, the parties maintained their respective submissions. The request for suspensive effect was rejected by means of a Presidential Order on August 7, 2017.

On 24 January 2018, the Appellant's counsel sent the Federal Tribunal a copy of the judgment rendered on 11 January 2018 by the 18th Chamber of the Brussels Court of Appeal in a case between X._____, among other appellants, and FIFA, among other respondents.

Reasons:

1. In the field of international arbitration, appeals in civil matters are admissible against decisions of arbitral tribunals under the conditions laid down in Art. 190 to 192 of the Swiss Federal Code on Private International Law of December 18, 1987 (PILA; SR 291), and in accordance with Art. 77(1)(a) of the Federal Tribunal Act of June 17, 2005 (LTF; SR 173.110).[4]

1.1. The CAS is based in Lausanne and the Respondent association in Zurich. The Appellant is a club football.... The provisions of chapter 12 of the PILA are therefore applicable (art. 176(1) PILA).

1.2

1.2.1. An appeal in civil matters under Art. 77(1)(a) LTF is admissible only against an award, whether final, partial, preliminary or interlocutory. On the other hand, a simple procedural order which may be amended or revoked in the course of the proceedings is not subject to appeal (judgment 4A_384/2017 of October 4, 2017, at 1.2). Seen from this angle, the contested decision, delivered on March 9, 2017, in the appeal procedure (Art. R47 ff. of the Code), by a CAS Panel composed of three arbitrators, is a final award which rules once and for all on the disciplinary sanctions imposed on September 4, 2015 by the FIFA Disciplinary Committee against the club and approved on January 7, 2016 by the Appeals Committee of this association

1.2.2. According to Art. 75 of the Swiss Civil Code of December 10, 1907 (CC; SR 210), all association members are authorized by law to take legal action against decisions to which they have not subscribed and which violate legal or statutory provisions within one month of becoming aware of them. This provision is mandatory in the sense that the association's statutes cannot exclude the review of the association's decisions by an independent court. It is generally accepted that disputes related to such decisions, including those related to disciplinary sanctions, may be submitted to an arbitral tribunal as far as this tribunal constitutes a true judicial authority and not the mere judicial body of the association having stakes at the outcome of the dispute (judgment 4A_600/2016 of June 29, 2017 at 3.2.1 and references). These principles also apply when, the ones affected by the decision of the organ of an association are only indirectly part of that association (ATF 119 II 271 at 3b p. 276), like the case with the Appellant. In this respect, the case-law is of the opinion that a party that appeals to the CAS against a decision taken by the FIFA Judicial Committee files an action for annulment of a decision of a Swiss association before a private judicial body, pursuant to Art.75 CC (cf. ATF 136 III 345 at 2.2.1, p. 349).

However, the Appellant firmly maintains that the CAS is not a proper arbitral tribunal and that the awards rendered by said tribunal cannot be assimilated to judgments rendered by a state court. The Respondent

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brings forward that the Appellant should have brought an action for annulment before the state courts, pursuant to the Art. 75 CC, because it is contrary to the rules of good faith to file an appeal to the Federal Tribunal against an arbitral award -whose character as an arbitral award is denied – while considering the same decision as an arbitral award for the sole purpose of filing the appeal. This contradiction in the implementation of state or private judicial authorities called upon to review disciplinary sanctions imposed by a Swiss sports association on athletes was noted, some fifteen years ago, in an unpublished part of the *Lazutina* judgment of May 27, 2003 (ATF 129 III 445; hereafter: the *Lazutina* judgment). The First Civil Law Court of the Federal Tribunal, at that time called the First Civil Court, declared that it disregarded "the illogical behavior adopted by [the Appellants] in referring the contested decision of the relevant association (the IOC [the International Olympic Committee]) to a biased arbitral tribunal (the CAS) instead of bringing an action for annulment of that decision, under Art. 75 CC, before a State court" (at 2.1)". It was mostly for expediency reasons that the Tribunal did not declare the appeal inadmissible, as well as the need to decide on the issue, which had remained open for ten years, as to whether the CAS, when deciding on an application seeking the annulment of an IOC decision, renders a genuine arbitral award.

It is doubtful that said grounds can still be invoked today, despite the Appellant's desire to establish the present case as a matter of principle. It is therefore legitimate to question the admissibility of the present appeal in this respect. It must, however, be noted, on the other hand, that the Federal jurisprudence published to date has apparently not yet declared inadmissible an appeal where a party that challenges the decision of an arbitral tribunal, such as the CAS, before the Federal Tribunal, with the intention of having the highest court in the country declare that this decision cannot be qualified as an arbitral award and, therefore, of obtaining the annulment of the "*pseudo"*-award. It also results from the case file, in particular the decisions cited under paras. 88 of the contested Award, that the Appellant has challenged the possibility of treating the CAS as a true arbitral tribunal before various State courts, in particular the Brussels courts. These are undoubtedly reasons to put in perspective the criticisms made to him for adopting a contradictory behavior by seizing an arbitral tribunal that it would not consider as being one. This is the reason why this Tribunal will not consider such conduct as a ground for inadmissibility of the appeal.

1.3. The Appellant, who initiated the proceedings before CAS, is particularly affected by the contested decision. The latter decision confirms, subject to the duration of one of them, the disciplinary sanctions imposed by the FIFA Appeal Committee as the final instance. Consequently, it has an interest that is personal, present and worthy of protection that this decision was not rendered in violation of the guaranteed rights he has invoked, which gives him the right to appeal (Art. 76 (1) LTF).

The appeal was submitted within the applicable time limits. The Appellant has established that it received the contested decision on March 30, 2017. The 30-day time limit, provided for in Art. 100(1) LTF, expired on May 14, 2017, considering the Easter judicial holidays (Art. 46(1)(a) LTF). As this day was a Sunday, the time limit to appeal expired on the first following working day (Art. 45(1) LTF), i.e. on May 15, 2017, the date on which the appeal was filed.

1.4. The Appeal is therefore admissible. It must now be examined the admissibility of the plea, in view of the way that the Appellant has presented its arguments.

2.

2.1. An appeal brief against an arbitral award must comply with the motivation's requirements stipulated in Art. 77(3) LTF in relation with Art. 42(2) LTF as well as the case law regarding the latter provision (ATF

140 III 86 at 2 and references). This requires that the Appellant disputes the grounds of the contested award and indicates precisely in what way it considers that the contested award disregarded the law (4A_522/2016 of December 2, 2016, at 3.1). Obviously, it can only do so within the limits of the admissible grounds against such award, namely only with regard to the grounds enumerated in Art. 190(2) PILA when the arbitration is of an international character. Moreover, since that reasoning must be contained in the appeal brief, the Appellant is not entitled to request the Federal Tribunal to refer to the grounds, evidence and evidence contained in the arbitration file. Similarly, it should not use its rebuttal to the appeal in order to invoke legal or factual grounds that were not presented within the applicable time limits, that is before the expiry of the non-extendable time limit (Art. 100(1) LTF in relation to Art. 47(1) LTF) or to complete, outside the time limit, an insufficient reasoning (4A_50/2017 of July 11, 2017, at 2.2).

2.2. The Federal Tribunal rules on the basis of the facts established in the challenged award (Art. 105(1) LTF). It may not rectify or supplement the factual findings of the arbitrators, even if they are blatantly inaccurate or based on a violation of the law (Art. 77(2) LTF, excluding the application of Art. 105(2) LTF). Moreover, its task, when it is seized of an appeal in civil matters against an international arbitral award, does not consist in deciding with full power of review, like an appellate court, but only in examining whether the admissible claims formulated against the said award are founded. Allowing the parties to allege facts other than those established by the arbitral tribunal, apart from the exceptional cases reserved in the jurisprudence, would no longer be compatible with such a mission, should these facts be established by the evidence contained in the arbitration file (4A_386/2010 of January 3, 2011, at 3.2). However, as it was already the case under the federal law on the judiciary organisation (ATF 129 III 727, at 5.2.2; 128 III 50, at 2a and the judgments cited), the Federal Tribunal is entitled to review the established facts on which the challenged sentence is based if one of the grievances listed in Art. 190(2) PILA is raised against the stated facts or against new facts or evidence that are exceptionally taken into consideration in the context of the appeal procedure in civil matters (ATF 138 III 29 at 2.2.1 and the judgments cited). The findings of the arbitral tribunal as to the conduct of the proceedings shall also be binding on the Federal Tribunal, subject to the same limitations, whether they relate to the parties' submissions, the facts alleged or the legal explanations given by the parties, the statements made in the course of the proceedings, the taking of evidence or even the content of a testimony or expertise or information gathered during an eye inspection (4A_668/2016 of July 24, 2017 at 2.2 and the precedent cited).

3.

In its first ground of appeal, based on art. 192(2)(a) PILA, the Appellant submits that the challenged award was rendered by an irregularly composed arbitral tribunal.

3.1. This statement is based on several grounds which can be summarized as follows.

3.1.1. As the Appellant has argued in length during the arbitration proceedings, the CAS does not constitute a genuine arbitral tribunal within the meaning of the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (RS 0.277.12) and the obligation to have recourse to CAS arbitration is all the more illegal as it is imposed by the statutes of an organization (FIFA) described by the criminal prosecution authorities as "mafia-like".

In a decision of November 12, 2010, the Brussels Court of Appeal, ruling in interim proceedings, indicated that the CAS may not be a genuine arbitral tribunal, but rather an appellate body of the sports federation that rendered the challenged disciplinary sanction.

Moreover, the Respondent's own counsel also expressed his doubts as to the nature of this arbitral institution in an article devoted to the contentious issue in which he highlighted, among other criticisms, the predominant weight of sports organizations in the appointment of members of the International Council of Arbitration for Sport (ICAS) and the limited effectiveness of the process of challenging CAS arbitrators (ANTONIO RIGOZZI, L'importance du droit suisse de l'arbitrage dans la résolution des litiges sportifs internationaux, in Revue de droit Suisse [RSJ/ZSR] 2013 I p. 301 ff).

3.1.2. Endorsing the above criticisms by the state court and the aforementioned author, the Appellant invites the Federal Tribunal to review its case law on the matter. In its opinion, since the Respondent was only bound by the jurisdiction of the CAS after the Lazutina case, which had confined itself to examining the links existing between that arbitral tribunal and the IOC, FIFA's relationship with the CAS has never really been put to the test of the Federal Tribunal to date.

According to the Appellant, it is well known that FIFA is today the dominant federation in terms of 'volume of business' for CAS and that it finances CAS, as do the other sports federations and associations, through large financial contributions, to such an extent that the turnover achieved by this arbitral tribunal comes, to a large extent, from this "major client" through the combined effect of the explosion of disputes relating to international football and the forced arbitration resulting from the Statutes of FIFA. Thus, the mere prospect of losing this important client could influence the awards to the detriment of the parties opposed to FIFA. Such a risk is even higher because, unlike the State judges protected by their status as judges, CAS employees and arbitrators would suffer directly in their private assets if FIFA stopped recognizing the CAS in its Statutes.

Moreover, the Appellant also challenges Art. 59(2) of the Code, which obliges the Panel to communicate the award, before signing it, to the CAS Secretary General, who may make formal corrections and draw the Panel's attention to fundamental questions of principle. The Appellant considers this to be an external circumstance that could influence the outcome of the case.

Two examples from the pending proceedings would further convince the Appellant of the power imbalance in favor of the respondent federation: first, his counsel was interrupted by the President of the Panel when criticizing the morality of FIFA's leaders; second, the CAS' repeated refusal to suspend the proceedings pending the outcome of the trials on the legality of the TPO prohibition pending before the European courts.

Finally, the Appellant argues the authority of Mr. B. _____, a former Judge of the Court of Justice of the European Union (ECJ), from whom it cites large parts from an article that was neither quoted nor produced, in order to demonstrate that the Appellant itself would simply be deprived of its right enshrined in the European public policy to be heard by a judge required to apply European law, in particular in matters of competition law.

3.1.3. The Appellant summarizes its argumentation in the form of the following statement, with elements borrowed from the football language:

"In summary, how could [the Appellant] consider for a single moment that its right to a fair trial has been respected when, having been imposed the CAS arbitration by FIFA's statutes and by those of its Belgian member federation, after having done everything to prevent or delay as far as possible the legality issue filed by X._____ before the Belgian state courts, after – on the contrary - having done everything to speed up the disciplinary procedure? When FIFA plays the "arbitral" match at home, before an arbitral

institution – CAS – whose major contributors and one of the most recurrent “clients”, before a panel composed of the “sports establishment”,[5] appointed by another member of such establishment and - for good measure - whose draft decision is "reread" by the CAS Secretary General, of which X._____ finds it hard to believe that it is as sensitive to the interests [of the Appellant] as to those - well understood - of the "sports movement" that keeps it alive?"

3.2. In response to these arguments, the Respondent puts forward a number of grounds which can be summarized as follows.

3.2.1. The independence of the CAS, as an institution, is a matter that the Federal Tribunal examined already in 2003 in the aforementioned judgment of principle Lazutina. This case law has since been applied on numerous occasions, so that the question is generally considered as settled under Swiss law. The Federal Tribunal's analysis was recently confirmed by the German Bundesgerichtshof in its judgment of June 7, 2016 in the case of Claudia Pechstein, a German skater sanctioned by CAS for doping, against the International Skating Union. Surprisingly, the Appellant completely disregards the aforementioned judgment, even though the doctrine has extensively commented on it.

Moreover, the Belgian case law, to which the Appellant refers, is an interim decision, and not a decision to the merits; it is, in fact, carefully drafted, judging by the translated extract from the Flemish language quoted by the Appellant (double use of the adverb "maybe").

Moreover, in a judgment of November 17, 2016, which the Appellant omits to mention, the Francophone Brussels Commercial Tribunal, seized of the merits of the case, declared itself incompetent to hear X._____'s action against FIFA. It explains, in one of the recitals of that decision, that the plaintiff claimed in vain that the CAS was not a genuine arbitral tribunal and that the fact that it had to seize that arbitral tribunal amounted to depriving it of its right to be heard by a judge required to apply European law.

3.2.2. The Respondent then endeavors to demonstrate how, in its opinion, the rules governing the ICAS and the CAS have been modified in order to reflect the improvements in the organization of these two institutions by the various stakeholders. It infers from this that the Lazutina case law remains even more valid in the light of the changes that have occurred.

3.2.3. Concerning football in particular, the Respondent points out that none of the 20 members of the ICAS is active within FIFA and that only one of them is stemming from the football world. Moreover, the IOC appoints 20% of the members of this umbrella institution, while FIFA, in its capacity as International Federation (IF), can only make proposals to the Summer Olympic IF Associations (ASOIF), along with the thirty other IF members of the latter. The ASOIF is responsible for appointing three of the four members of the IF contingent, the last member being appointed by the Olympic Winter IF Association (AIOWF).

The Respondent also contests the argument based on the CAS funding. Thereupon, it reminds that, for the Federal Tribunal, there is no necessary causal relationship between the methods of financing a judicial body and the degree of independence of that particular body. Furthermore, it strongly contests, in the absence of any evidence relating thereto, the Appellant's assertion that the CAS arbitrators need to

[5] Translator’s note : in English in the original text.

"please" FIFA so that the latter would continue to recognize the jurisdiction of that arbitral tribunal and, consequently, its income and the income its employees would not be endangered.

As to the two aforementioned examples put forward by the Appellant in order to establish an alleged imbalance of power between FIFA and its opposing parties, the Respondent contests their relevance: the first because it has nothing to do with the CAS institution as such; the second, because the Panel provided convincing reasons in support of its decisions dismissing the request to suspend the arbitral procedure.

Finally, the Respondent disagrees with the Appellant's argument, based on the opinion of Mr B._____, alleging that FIFA, like the Union of European Football Associations (UEFA), inserted arbitration clauses in favor of CAS in order to circumvent the application of European law. Such argumentation does not take into account the fact that, like all other arbitral tribunals with their seat in Switzerland, the CAS – as it actually did in casu - is obliged to apply European competition law even when the underlying legal relationship is governed by Swiss law. Moreover, the fact that the Federal Tribunal does not review the application of European competition law with regard to substantive public policy, cannot change this duty.

3.3.

3.3.1. In its Answer, the CAS, through its Secretary General, also notes the apparent contradiction in the Appellant's behavior by submitting the case to it while objecting to its status as an arbitral tribunal independent of the parties. It also insists on the fact that the German *Bundesgerichtshof*[6] examined in detail, in its judgment of June 7, 2016, the question of the CAS' independence and that it answered it in the affirmative.

3.3.2. The Secretary General also indicates that, since 2011, the ICAS and the CAS have continued their evolution by regularly making structural and regulatory changes. First of all, Art. S14 of the Code has been amended to abolish the quotas for arbitrators appointed on the proposal of various sports entities (IOC, IF and NOC[for National Olympic Committees]), so that, henceforth, any person meeting the criteria provided for by this provision - having appropriate legal training, recognized competence in sports law and/or international arbitration, a good knowledge of sport in general and a command of at least one of the CAS working languages - may apply to become a member of CAS. Furthermore, the composition of the ICAS has changed considerably over time, so that, on the one hand, more women can join this body - parity is now a reality - and, on the other hand, more personalities from the judicial world can be part of it. The latter goal was achieved in 2015, since the ICAS is now composed of 8 independent lawyers specializing in international arbitration, 6 judges at national or international level, active or retired, 4 professional sports leaders and 2 law professors. Thus, after 32 years of existence, including 13 since the CAS was recognized by FIFA, and more than 5'000 procedures handled, the ICAS/CAS, according to its Secretary General, enjoys a very broad recognition in the world and has no interest in wanting to "protect itself" by positioning itself under external influence.

3.3.3. Regarding FIFA's potential control over the CAS, the Secretary General recalls that, even though the IOC had played an important role in the creation of the CAS and then the ICAS and had relatively extensive initial financial and regulatory powers over the CAS, FIFA has never played such a role. Also, the ICAS has only one member from the football world.

6 Translator's Note: in English in the original text.

In terms of financing, although it is true that FIFA pays an annual contribution amounting to CHF 1'500'000 in order to contribute to CAS' overhead costs, this amount is qualified as relatively modest by the Secretary General in comparison with the CHF 7'500'000 paid by the entire Olympic movement out of a total budget of CHF 16'000'000. The reason why FIFA's financial participation is not substantial, is that most football arbitrations proceedings are self-financing in that the parties involved have to pay their arbitration fees. The Secretary General also stresses that FIFA only takes an active role in the CAS proceedings which fall under its Disciplinary Code and Code of Ethics, where it acts in most cases as a respondent most of the time. These cases correspond to about 5% of all CAS procedures on average. Moreover, while it is true that currently more than 65% of CAS cases concern football, almost half of them do not involve FIFA at all, such as purely national cases, cases concerning decisions handed down by continental confederations such as UEFA and so-called "direct" proceedings involving parties wishing to bring their case to the CAS without going through the FIFA instances. Furthermore, always according to the Secretary General, if FIFA decided one day to remove the CAS arbitration clause from its statutes, the CAS would certainly be deprived of the aforementioned financial contribution and its workload would be substantially reduced, but its very existence would not be jeopardized, since the only consequence of a reduction in its income would be a reduction in its current activities and a restructuring of its services.

3.3.4. Regarding the Art. 59(2) of the Code, the Secretary General notes that the powers conferred upon him by this provision have not been condemned by the Federal Tribunal, which has examined them in the light of Art. 190(2)(a) PILA (4A_612/2009 of February 10, 2010 at 3.3), and which correspond in any case to a system applied by other arbitral institutions, such as the Court of Arbitration of the International Chamber of Commerce (ICC).

Finally, in the opinion of the Secretary General, the two examples cited by the Appellant as to the alleged favoritism from the Panel and/or its President, are merely procedural twists in which one cannot see concrete signs of a desire to favor FIFA to the detriment of the Appellant.

3.4.

3.4.1. In the judgment of principle *Lazutina* of May 27, 2003, the Federal Tribunal, after having examined this question in depth, concluded that the CAS is sufficiently independent of the IOC, as well as of all the parties calling upon its services, so that the decisions it renders in cases concerning this body can be considered as real awards, assimilated to state court judgments (ATF 129 III 445, at 3.3.4). The unpublished recital 2.1 of said judgment on the relation between the International Equestrian Federation (FEI), on the one hand, and the CAS in its original organizational structure of June 30, 1984, on the other hand, already stated that it is "clear that the contested decisions have the status of awards since they were rendered in cases opposing the Appellant to the FIS [International Skiing Federation]." This recital refers to a previous decision of March 15, 1993 concerning the relations between the International Equestrian Federation (FEI), on the one hand, and the CAS in its original organization of June 30, 1984, on the other hand (ATF 119 II 271, *Gundel* judgment). From an independence point of view, the Federal Tribunal has therefore always found that the links established by the International Summer Olympic Federations (in casu, the FEI) or the International Winter Olympic Federations (in casu, the FIS) with the CAS less problematic than those between this arbitral tribunal and the IOC. Therefore, prima facie, there is no reason why this should not be the case today.

Since then, this jurisprudence has been confirmed on numerous occasions in cases where one or the other of the existing IFs appeared as parties (cf. e.g. 4P.149/2003 of October 31, 2003 at 1.1, 4P.172/2006

of March 22, 2007 [= ATF 133 III 235] at 4.3.2.3, 4A_548/2009 of January 20, 2009 2010 at 4.1 [with FIFA as a party], 4A_612/2009 of February 10, 2010 at 3.1.3, 4A_640/2010 of April 18, 2011 at 3.2.2 [with FIFA as a party], 4A_246/2011 of November 7, 2011 [= ATF 138 III 29] at 2.2.2, 4A_428/2011 of February 13, 2012 at 3.2.3 and 4A_102/2016 of September 27, 2016 at 3.2.3). It was last upheld in the judgment 4A_600/2016 of June 29, 2017 opposing *Michel Platini* to FIFA in an appeal seeking the annulment of disciplinary sanctions endorsed by the FIFA Appeal Committee and subsequently reduced by the CAS.

In the aforesaid judgment of June 7, 2016, the German *Bundesgerichtshof*[7] examined in detail the independence of the CAS in order to establish whether the German courts had jurisdiction to rule on a claim for damages brought by the German athlete Claudia Pechstein against the International Skating Union (ISU). Acknowledging the defendant's objection, it concurred with the Swiss Federal Tribunal that the CAS is a genuine, independent and impartial arbitral tribunal (n. 23: "*Der CAS ist ein «echtes» Schiedsgericht im Sinne der Zivilprozessordnung und nicht lediglich ein Verbandsgericht*";[8] n. 25: " Der CAS stellt eine solche unabhängige und neutrale Instanz dar. "). There is no need to quote here this judgment, the full reading of which is most instructive and in which most of the complaints which the German judges dismissed corresponded to those invoked by the Appellant in the present proceedings. Thus, the fact that the said landmark judgment is not even mentioned in the statement of claim may not be just a coincidence.

It goes without saying that the judgment relied on by the Appellant, which the Brussels Court of Appeal delivered some six years earlier at the end of an interlocutory procedure - in which the Court merely mentioned the possibility that the CAS might not constitute a genuine arbitral tribunal - does not bear comparison with the German judgment in which the question of the CAS's independence was examined in detail. It could not be otherwise, given the limited procedural framework in which the Belgian court ruled. It is equally not possible to base its argument on the judgment rendered on November 17, 2016 by the Francophone Brussels Commercial Tribunal, which appears to contradict the decision of the Court of Appeal of the same city. It was the subject of an appeal before the 18th Chamber of the Brussels Court of Appeal, which has not yet reached a final decision on it. In fact, it results from the decision handed down on January 11, 2018 by this Belgian court – excluding here the inadmissibility of this evidence, subsequent to the date of the challenged decision, that the Appellant's counsel produced on the 24th of the same month -, that said judicial authority ordered the reopening of the proceedings prior to any ruling. In any event, whether or not it confirms the *Lazutina* judgment, and in accordance with the principle of sovereign nations, the opinion expressed by the superior court of an EU member state has no more weight than that of the supreme judicial authority of the country in which the case in dispute is pending, namely Switzerland.

3.4.2. Therefore, the Federal Tribunal has no reason to depart from a well-established jurisprudence. Only compelling reasons which would command to distinguish FIFA from the other IFs with respect to its independence from the CAS. However, this Court did not find sufficiently strong arguments in the Appellant's brief to justify treating FIFA as a distinct case from that point of view. Undoubtedly, the Federal Tribunal is not unaware of the criticisms on the CAS by a part of the doctrine (cf., among others, AXEL BRUNK, Der Sportler und die institutionnelle Sportschiedsgerichtsbarkeit, 2015, p. 237 ff., 262 ff., 275 ff, 305 ff. et 343 ff; PIERMARCO ZEN-RUFFINEN, La nécessaire réforme du Tribunal Arbitral du Sport, in Citius, Altius, Fortius, Mélanges en l'honneur de Denis Oswald, 2012, p. 483 ff., passim). In the *Lazutina* judgment (ATF 129 III 445, at 3.3.3.3, p. 463), the Court itself described the arbitral tribunal as a

7 Translator's note : in German in the original text.

8 Translator's note : in German in the original text.

"perfectible institution". However, apart from the improvements that were made to the institution, as rightly stressed by its Secretary General in his Answer, and from the fact that it does not seem conceivable, in many respects, to replace it with another mechanism for dealing with sports disputes, unless athletes and other interested parties are referred to a State court with all the disadvantages that this entails, the Federal Tribunal, as the judicial authority called upon to rule on appeals in international arbitration matters, does not have the mission to reform this institution itself, nor to recast its governing regulations but must only ensure that it reaches the independence level required to be assimilated to a State court. This is certainly the case, despite the Appellant's contentions, given the convincing explanations provided by the Respondent and the CAS in their replies to the Appeal. It suffices to add the following observations.

3.4.3. Regarding the structural independence of the CAS in relation to the IFs in general and FIFA in particular, the Appellant essentially limits itself in reproducing verbatim a long part from the aforementioned doctrinal article published by the Respondent's counsel. However, the latter clearly demonstrates, in paras. 65 to 76 of its Answer, that the situation has changed significantly since then. For example, the President of the Appeals Chamber, who appoints the sole arbitrator or the president of the arbitral panel (Art. R54 of the Code), is no longer, as was the case at the time of publication of this article, the IOC Vice-President, but a former athlete designated by the ICAS for this purpose. Moreover, and contrary to what previously prevailed, as a result of the amendment to Art. S14 of the Code occurred in the meantime, the ICAS is no longer required to have a quota of arbitrators selected from among the persons proposed by the sports organizations (1/5th each for the IOC, the IFs and the NOCs). The latter no longer have a privileged status since, like their athletes' commissions, they can only bring to the ICAS' attention the names and qualifications of arbitrators likely to appear on the ad hoc list, which must include at least 150 names (Art. S13 para. 2 of the Code) and actually includes more than 370 at present, which correspond to arbitrators from 87 different countries (MATTHIEU REEB, The Court of Arbitration for Sport [CAS] in 2017, in "Justice-Justiz-Giustizia" 2017/14 n. 1). Moreover, if, when the Federal Tribunal rendered the *Lazutina* judgment, the ICAS President, who is also the President of the CAS pursuant to Art.S9 of the Code, was elected by the ICAS from among its members "on the proposal of the IOC", it is now elected after consultation with the IOC, the ASOIF, the AIOWF and ANOC (Art. S6(2) of the Code) and any member of the ICAS may apply for the presidency of this body (Art. S8(3) of the Code). It is therefore reasonable to state, as the Respondent does, that the analysis of the relations between the CAS and the IOC, which the Federal Tribunal carried out in the Lazutina decision, applies *a fortiori* to FIFA.

Regarding the financial independence of the CAS from FIFA, it must be noted that the CHF 1'500'000 paid annually by FIFA as a contribution to the CAS' general costs represents less than 10% of the institution's budget (CHF 16'000'000), which is less than the percentage suggested by PIERMARCO ZEN-RUFFINEN (op. cit., p. 500 et seq.) and remains well below the CHF 7'500'000 paid by the Olympic movement as a whole for the same title. It is equally difficult to see to whom else the CAS could turn in order to collect the necessary funds for its general expenses if not to the sports organizations using its services. It is further not conceivable that athletes and sports organizations could be charged with a contribution equal to the full financing of this institution, unless the former are harmed and denied access to CAS. Moreover, the situation of sportspersons is not comparable to that of the parties to an ad hoc commercial arbitration, who are required to pay all the costs of the arbitral tribunal on an equal footing. As for the desire of CAS arbitrators and employees to seek to preserve their advantages by doing everything in their power not to lose a "big client" such as FIFA, this entails a state of mind that is not in line with the qualities that can be expected of persons working at a tribunal, even a private tribunal. Nonetheless, the Appellant has not provided any evidence to that effect. Nor has it attempted to demonstrate, by statistical analysis or otherwise, that there is a propensity on the part of the CAS to agree with FIFA when it is a party to a CAS arbitration procedure.

The system of preventive control of the arbitral award established by Art. R59 para. 2 of the Code (in English: "Scrutiny of the award"; cf. KAUFMANN-KOHLER/RIGOZZI, International Arbitration, Law and Practice in Switzerland, 2015, n. 7.157 ff, spec. 7.161) is not just for the CAS since it also applies to ICC arbitrations. The Federal Tribunal has found nothing wrong with it, since the preventive control does not question the decision-making power of the arbitrators acting within the scope of a Panel (4A_612/2009, cited above, at 3.3). Moreover, this opinion is shared by the German Bundesgerichtshof (cf. judgment cited, n. 34-39).

The two examples drawn by the Appellant from the Panel's and the President's conduct in this case have nothing to do with the matter of the CAS's independence as an institution. The Appellant makes a specific grievance from the first example, which will be examined later (cf. recital 4). Regarding the second example, through which the Appellant invokes the repeated refusals to suspend the proceedings until the rendering of the decision in the pending proceedings before the European courts on the legality of the TPO prohibition, it should be noted that, unless particularly serious or repeated errors which would constitute a manifest violation of its obligations, procedural errors or a materially incorrect decision are not sufficient to establish the appearance of prevention of an arbitral tribunal (4A_606/2013 of September 2, 2014 at 5.3 and the precedents cited). This exception is not relevant in this case. Indeed, the reasons stated by the Panel in paras. 79 to 82 of its Award appear to be at least plausible. This is in particular the case for the consideration that the time limits within which decisions could be handed down by the European authorities and the Belgian national courts seized of similar questions are uncertain and potentially long, since it is true, for example, that the 18th Chamber of the Brussels Court of Appeal has not yet given a final ruling on the appeal submitted to it against the judgment of November 17, 2016 by the Francophone Brussels Commercial Tribunal (cf. at 3.4.1, penultimate §, above). In other words, this first complaint cannot lead to the nullification of the challenged award under Art. 190(2)(a) PILA.

Finally, nothing can be drawn in favor of the Appellant based on Mr. B. _____'s article (not referred to by him) based on the –incorrect- premise that CAS is not required to apply European competition law. The fact that the Federal Tribunal has not incorporated this right into the concept of substantive public policy within the meaning of Art. 190(2)(e) PILA does not change this. Thus, it is impossible to assess the independence of an arbitral tribunal based on the State judicial authority's power to review appeals against arbitral awards. This also applies in the case of a state court; in fact, no one would have the absurd idea of questioning the independence of a cantonal court on the sole ground that some of its judgments can only be challenged *ratione valoris* through a subsidiary constitutional remedy (Art. 113 ff. LTF), which limits the Federal Tribunal's power to examine violations of constitutional rights alleged and justified by the Appellant (Art. 116 LTF in relation with Art. 106(2) LTF by reference of Art. 117 LTF).

In these circumstances, the Appellant's claim based on Art. 190(2)(a) PILA is unfounded.

4. In its second grievance, the Appellant alleges a violation of its right to be heard resulting from certain statements made by the President of the Panel during the hearing of October 17, 2016.

4.1. In principle, the right to be heard, as guaranteed by Art. 182 para. 3 and 190 para. 2 letter d of PILA, does not have a content different from that enshrined in constitutional law. Thus, in arbitration, it was recognized that each party had the right to express itself on the essential facts of the case, to present its legal arguments, to submit evidence on relevant facts and to participate in the arbitral tribunal's proceedings. However, the right to be heard does not include the right to an oral hearing. Nor does it require that an international arbitral award be reasoned. Nevertheless, the jurisprudence has also inferred a minimum duty for the arbitral tribunal to examine and address the relevant issues. This obligation is breached when, inadvertently or by misunderstanding, the arbitral tribunal fails to take into consideration

allegations, arguments, and evidence presented by one of the parties and important for the award to be made (ATF 142 III 360, at 4.1.1 and the judgments cited). The party that considers to be the victim of a violation of its right to be heard or of another procedural defect must immediately raise this in the arbitration proceedings, otherwise it will be time-barred. Indeed, it is contrary to the principle of good faith to raise a procedural irregularity outside the scope of the appeal against the arbitral award, when the irregularity could have been pointed out within the course of the proceedings (4A_150/2012 of July 12, 2012, at 4.1). Similarly, the party intending to challenge an arbitrator must raise the ground for challenge as soon as it becomes aware of it (4A_110/2012 of October 9, 2012, at 2.1.2). Art. 180(2) PILA is the basis for this jurisprudential principle which Art. R34(1) of the Code materializes by stipulating that a challenge must be brought within seven days after the cause of the challenge is known.

4.2. To support its claim, the Appellant cites, as follows, a verbal exchange that took place during the aforementioned hearing between one of its counsel and the President of the Panel:

"Lawyer: (...) W. _____ leads the debate, starts talking about the issue of legality. (...) W._____, unlike FIFA, has had no proceedings brought against it so far, let alone for slanderous reasons. On the other hand, FIFA (and this is always the problem), the people in front of us are obviously charming, perfectly respectable people, but we tend to forget that FIFA is FIFA, which is currently under examination before...

President: Oh no, look, I don't want to get into this debate, otherwise...!

Advocate: it is extremely relevant, it is not a debate, it is a fact.

President: All right, then, we're all leaving! Let's just say everybody's rotten and get out of here, that's it! (...) "

Due to the statements made by the President of the Panel, the Appellant claims that it was prevented from explaining that the TPO prohibition, allegedly introduced in the name of morality, had in fact been adopted by a FIFA Executive Committee, of which at least half of the members are currently being prosecuted in the United States of America pursuant to an anti-mafia law. It sees in what he considers to be an "attitude of prejudice", the direct result of the method of appointment of the President of the Panel by the President of the CAS Appeals Division, the effects of which would be particularly sensitive when a party tries to restrict the regulatory flexibility of a federation.

The Appellant then asserts, directly attacking the President of the Panel, that A._____ showed by his aforementioned statement that he "is part of the same sports establishment as FIFA" and is therefore "judge and party". Indeed, it states that he is or was president of the Arbitration Chamber of Sport set up by the French National Olympic Committee whose mission would be to avoid that disputes concerning the sports movement end up before national courts which are sometimes unfamiliar with the specificities of the sport field.

4.3.

4.3.1. The Appellant confuses grievances based on the violation of the right to be heard (Art. 190 para. 2 let. d PILA) and the ones based on the irregular composition of the arbitral tribunal (Art. 190 para. 2 let. a PILA). However, in the heading as well as in the development of its grounds, only the first of these two objections is addressed. Accordingly, this Court cannot rule on the second ground (Art. 77(3) LTF).

Regardless, the Appellant is barred from invoking either of these two grounds for not having immediately intervened after having heard the President's allegations. However, it appears that, *a posteriori*, this party over-exaggerated certain remarks among others that one of its counsel and the President of the Panel had exchanged in the course of a judicial debate necessarily adversarial but which, in spite of their undeniable “bite”, had not even reached the threshold of a procedural incident. Indeed, one should put them in their context, i.e. a long hearing whose transcript covers about sixty pages (cf. pce 5 of the Respondent). The exchange referred to by the Appellant, which apparently took place in the middle of the hearing (p. 27 of the transcript), did not prevent the parties and the Panel from continuing the proceedings until their term, nor did one of the Appellant's counsel eventually express their satisfaction with their conduct (transcript, p. 59). In his response, the other counsel of the Appellant seeks to minimize the scope of his colleague's statement, based on his own statements made before it. Such attempt is unsuccessful. It appears, in fact, from these earlier statements that their originator, without finding anything to object to the way in which President A._____ had conducted the procedure, refused to give discharge to the Panel in order to prevent the Federal Tribunal, seized of an appeal, from opposing him, as an exception to the general rule (cf.4A_730/2012 of April 29, 2013, at 3.3.2), that a declaration such as the one in para. 54 of the contested award ("... During the hearing, the Appellant and the Respondent did not file any grievance relating to the conduct of the proceedings or the hearing.") was not merely a stylistic clause but prohibited both parties from invoking the argument that CAS, as such, would not constitute a true arbitral tribunal.

4.3.2. In addition, the President of the Panel, by virtue of his position, should direct the debates, ensure that they are concise and invite the parties to focus on the subject of the dispute (Art. R44.2(2) of the Code by reference to Art. R57 (1) [now: para. 3] of the latter). This is what he did by preventing the hearing of October 17, 2016 from becoming a trial outrunning the rules of FIFA and, in particular, the morality of certain members of its Executive Committee. Moreover, the President reminded one of the Appellant's counsel that, if there were to be moral lessons, the lawyer had already given them in his written submissions. Indeed, a proof of this is the statement in the appeal brief of March 17, 2016 in which the Appellant reiterated part of the grounds he had put forward in his brief submitted to the FIFA Appeal Committee on December 7, 2015:

" Unfortunately, we must at the same time note that - at present, and in the eyes of the whole world and especially the American and Swiss justice systems - FIFA is altogether a criminal organization, of the mafia type, and about half of its Executive Committee members (those who voted for a total prohibition of the TPO) are subject to criminal proceedings for very serious offenses. The Appeals Chamber, in its wisdom, will easily understand that this does not incite any particular respect. In short, we believe that it would be prudent for FIFA's bodies to avoid moral judgements in this case."

It is therefore by no means established that the Panel, by the conduct adopted by its President, has in any way violated the right of the Appellant to be heard. Moreover, the latter is not convincing when it assimilates A._____ to FIFA without good reason, by relying on their alleged common membership to the same sporting establishment, and thus qualifies him as judge and party in any proceedings in which that association is involved.

4.3.3. In any event, the Appellant does not explain how his argument concerning the morality of certain members of the FIFA Executive Committee, which it was allegedly prevented from developing by the President of the Panel, is relevant in the present case. It probably tried to remedy this lack of reasoning

in its reply (p. 3, ad point 100), but it was not entitled to do so because of the aforementioned case-law (cf. at 2.1 in fine). Therefore, the ground of the breach of the right to be heard, if it had not been reached by foreclosure, could only have been rejected as unfounded.

5. Finally, the Appellant submits that the challenged award is incompatible in many respects with substantive public policy pursuant to Art. 190(2)(e) PILA and the relevant case-law.

5.1. An award is incompatible with public policy if it disregards the essential and widely recognized values which, according to the prevailing concepts in Switzerland, should constitute the basis of any legal order (ATF 132 III 389, at 2.2.3). An award is contrary to substantive public policy when it is in breach of fundamental principles of substantive law to such an extent that it can no longer be reconciled with the decisive legal order and value system: these principles include, in particular, contractual reliability, respect for the rules of good faith, prohibition of abuse of law, prohibition of discriminatory or spurious measures, and protection of persons lacking civil capacity.

As the adverb "in particular" stresses unambiguously, the list of examples drawn up by the Federal Tribunal to describe the content of substantive public policy is not exhaustive, despite its permanence in the case law relating to Art. 190(2)(e) PILA. It would also be difficult, even dangerous, to attempt to identify all the fundamental principles that would certainly belong thereto, at the risk of forgetting one or the other. It is therefore better to leave it open. Moreover, the Federal Tribunal has already incorporated other fundamental principles which are absent from it, such as the prohibition of forced labor (4A_370/2007 of February 21, 2008, at 5.3.2), and it would not hesitate to sanction, as violating substantive public policy, an award that violates the fundamental principle of human dignity, even though this principle is not expressly included in the latter list of principles. (ATF 138 III 322, at 4.1 and the judgments cited). While it is not easy to define material public order or to define its exact definition, it is easier to exclude one element or another. This exclusion affects, in particular, the whole process of interpretation of a contract and the consequences which are logically drawn from it, as well as the interpretation made by an arbitral tribunal of the statutory provisions of a private law body. Moreover, it is not sufficient that a ground upheld by the arbitral tribunal is contrary to public policy; it is the result of the award which has to be incompatible with public policy (ATF 138 III 322 at 4.1; 120 II 155 at 6a, p. 167; 116 II 634 at 4, p. 637).

5.2. In the *Tensacciai* judgment of March 8, 2006, the Federal Tribunal, after examining the question, came to the conclusion that the provisions of any competition law are not part of the fundamental values (ATF 132 III 389, at 3). It has subsequently referred to this judgment at least twice, in a non-arbitral dispute decided on October 1, 2009 (ATF 136 III 23, at 6.6.2.2, p. 40) and in an arbitral procedure concerning international investment disputes (4A_34/2015 of October 6, 2015, at 5.3.1 not published in ATF 141 III 495). In the latter judgment, it reminded that the primacy of international law over domestic law is certainly a generally accepted principle, including in Switzerland (Art. 5 Cst.). However, it added, referring to the *Tensacciai* judgment, that an award imposing on a party an obligation to compensate the other party fairly, even if that injunction contradicts a norm derived from supranational law, should not be considered as incompatible with the restrictive definition of substantive public policy (ibid).

In the present case, the Appellant, although claiming the opposite, seeks, in a few lines, to question said case law. In its opinion, due to the undeniable worldwide generalization of the most essential competition regulations, it would be reasonable to assume that, while competition law as a whole does not form an unconditional part of public policy pursuant to Art. 190(2)(e)PILA, on the other hand, competition law, and

in particular the EU and Swiss competition law, is one of them insofar as it sanctions the most serious unconstitutional conduct, such as restrictions by object or abuses of a dominant position aimed at excluding all "third parties" from a given market (boycott) in order to reserve it for a few elected representatives, in the case at hand the clubs (creation of a monopoly or an oligopoly). There is no need here to examine the merits of this statement on its own or re-examine the challenged case law. Indeed, even if it were necessary to follow the Appellant's arguments and soften the case-law, the ground that there had been a violation of substantive public policy for serious breaches of competition law and the same ground based on the failure to respect the right to the free movement of capital (and related rights) should nevertheless be rejected.

In this respect, it must be noted that, as a motivation, the Appellant refers to a long scholarly article written by a French author (JEAN-MICHEL MARMAYOU) which was published in 2016 with the title "Lex sportiva and Investments: prohibition of the Third Party Player Ownership" but the version produced as Annex 2 to his appeal is entitled: "TPO: in favor or against the the “appropriation" of the labor force?" In a criticism of appellatory nature, it quotes parts of this article, or rather simply refers to other parts without consideration to the grounds developed by the Panel in the award relating to the competition law and the free movement of capital (cf. letter B.b.b above). In the Appellant’s opinion, it would be sufficient to “compare the really serious analysis made by Mr. Marmayou in his above-mentioned article with the ersatz (sic) on competition law contained in the challenged award". However, by arguing in such a way the Appellant seriously disregards the federal jurisprudence on the grounds for appeal of an arbitral award, which requires the Appellant to question the grounds of the award and to indicate precisely how the Appellant considers that the award has disregarded the law (cf. at 2.1 above).

Consequently, the appeal is not admissible on these grounds.

5.3. According to the Appellant, the challenged award is also in breach of public policy by rendering “out of trade” an entirely lawful activity, according to the Federal Tribunal itself. It is unclear to what element of the aforementioned definition of substantive public policy the Appellant links the Panel’s approach due to the lack of precision on this issue.

Furthermore, the fact that the Appellant substantiates its allegation blindly based on the aforementioned judgment 4A_116/2016 cannot convincingly give precedential value to that judgment, which concerned different parties. In any event, the circumstances of the two cases were not identical in this respect, first because the violation of public policy was alleged by a club that had itself made use of the TPO mechanism and, second, because the player acquired through this mechanism had been transferred to one of the best clubs in Europe, so that the player's own interests and those of the investment company were connected. Moreover, contrary to what is the case here, TPO contracts did not fall, *ratione temporis*, under Art. 18ter RSTP pursuant to a transitional rule contained in para. 3 of the said provision. Finally, the First Civil Law Court underlined, in recital 4.2.3 of that judgment, that it was not it task to examine the system of the ownership of players' economic rights by third parties or third property (TPO) and that it was grateful to the CAS for having rightly refused to interfere with problems that are, in the first place, the prerogative of the competent professional football bodies at international level, and for limiting itself to the analysis of the specific circumstances of the case pursuant to the applicable law and to a conclusion only for the parties concerned. Therefore, the Panel rightly did not consider itself bound by this case law and disregarded it in rendering its award.

As for the additional statements made by the Appellant, which are essentially of appellatory nature, it is not possible to link them to the criticism based on the aforementioned federal judgment. Indeed, the Appellant discusses the 'margin of autonomy of the associations' with regard to the elements of the European law approach that it raised before the Brussels Court of Appeal, the conditions which must be fulfilled regarding an 'exception to the principle of free movement', as well as the Federal Tribunal jurisprudence concerning European public policy. However, the supposed relationship between the discussed matters and the considerations issued by the First Civil Law Court in its judgment 4A_116/2016 does not emerge from its appeal. Consequently, the allegation based on a violation of substantive public policy must be dismissed since it is grounded on the alleged carte blanche given by the Federal Tribunal to the use of the TPO system.

5.4.

5.4.1. The Appellant further explains that, according to a generally accepted – even though questionable – perception, the clubs are the indirect members of the IFs. As a result, there is a contractual relationship between the Respondent and itself, according to which would prohibit the Appellant from undertaking any TPO activity with any "third party". In its view, such a contract would constitute a breach of public policy since Art. 27(2) CC prohibits excessive contractual restrictions on the economic freedom of the parties. In this case, however, the litigious FIFA regulations would simply suppress the freedom of football clubs throughout the world to make certain types of investment.

5.4.2. According to the jurisprudence, the violation of Art. 27 para. 2 CC is not automatically contrary to the substantive public policy as defined above; there also needs to be a severe and obvious violation of this fundamental right. Under Art. 27 para. 2 CC, however, a contractual restriction of economic freedom is considered excessive only if the oblige is given over to his contractual counterpart's arbitrariness, suppresses his economic freedom, or restricts it in such a way that the basis of his economic existence is jeopardized (4A_312/2017 of November 27, 2017, at 3.1 and the precedent cited therein).

The conditions established by this jurisprudence are not fulfilled in the present case. By prohibiting TPOs, FIFA is restricting the economic freedom of the clubs, but does not suppress it. Clubs remain free to pursue investments, as long as they do not secure them by assigning the economic rights of the players to third party investors. The Appellant acknowledges that the suppressed freedom concerns only 'certain types of investment'. Moreover, should the violation of Art. 27(2) CC be so detrimental to the economic freedom of clubs, one would have to ask how professional clubs established in countries that have already prohibited the establishment of TPOs, such as France and England, still find the funds necessary for their operation, which they are widely known to do.

Consequently, this ground is unfounded.

5.5.

5.5.1. As a final ground, the Appellant submits that 'the punishment is highly disproportionate, to such an extent as to violate public policy'. The Appellant first refers to the abovementioned case-law on Art. 27(2) CC and the protection of rights of personality, with particular reference to the Matuzalem judgment of March 27, 2012 (ATF 138 III 322). Having established these legal principles, the Appellant submits, *in concreto*, that the sporting sanction confirmed by the challenged decision, namely the prohibition to register players during the next three registration periods, seriously impairs its right to an economic

development and deprives it of all substance of its social purpose, so that it could jeopardize the existence of the club and, in other words, lead to its bankruptcy. Moreover, it notes that most of the players in its first team have only a contract expiring in June 2017, which means that from July 1, 2017, this team will only count 6 professional players. Furthermore, according to the Appellant, it would result from a document produced at the CAS hearing, that the sporting sanction will deprive approximately 500 children and young people, i.e. all categories of juniors, of the practice of football.

In the Appellant's view, there is no interest for the Respondent to uphold such a restrictive sporting sanction, which it had never imposed before or after this decision, since it is a sanction that should be considered to be "illicit". In fact, there is every reason to believe that this is a retaliatory measure against a third-division club that is one of the leaders of the current campaign to prohibit the TPOs. Finally, the fine imposed on the club is clearly disproportionate in comparison with its annual turnover.

5.5.2. As it is submitted, this final ground is not admissible. Indeed, the Appellant obviously confuses the Federal Tribunal ruling on an appeal in international arbitration with a court of appeal authorized to freely examine the extent of the sanction pronounced by a lower criminal court and to consider, for this purpose, all relevant factual circumstances. Moreover, by disregarding all rules governing the procedure for appeals in civil matters concerning international arbitration (cf. 2, above), it alleges facts that do not correspond to a statement made by the Panel in the challenged award - in particular, concerning the effective impact of the sanction on the first team and on the young players - without raising any of the exceptions that would question the factual situation set out therein, and does not discuss the reasons set out by the arbitrators to justify the contested sanctions (cf. B.b.c, above) and hopelessly attempts to complete its argument in its reply.

6.

The appeal must therefore be dismissed to the extent that it is admissible.

The Appellant loses and shall pay the judicial costs of the federal proceedings (Art. 66 (1) LTF) and shall compensate the Respondent for its legal costs (Art. 68 (1) and (2) LTF).

Therefore, the Federal Tribunal pronounces:

1.

The appeal is rejected.

2.

The judicial costs, set at CHF 10'000, shall be borne by the Appellant.

3.

The Appellant shall pay to the Respondent an amount of CHF 12'000 for its legal costs.

4.

This judgment shall be notified to the representatives of the parties and the Court of Arbitration for Sport.

Lausanne, February 20, 2018

In the name of the First Civil Law Court of the Swiss Federal Tribunal

The Presiding Judge : Kiss (Mrs.)

The Clerk: Carruzzo