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Parties
Claimant, X.
Defendant, Fédération Internationale de Football Association

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Caroline Dos Santos

(2)

Swiss Federal Supreme Court Confirms Independence of CAS

Note on Decision 4A_260/2017 (1) of 20 February 2018

Introduction

In recent years, the validity of Third Party Ownership agreements ("TPO") has been a hot topic in the football community. Under such agreements, a club transfers, totally or partially, a player's economic rights to a third-party in return for a financial counterpart to the club. This entails the dissociation of players' federative rights (which consist in the possibility of having the player participate in competitions) and its economic rights (which are the rights to obtain proceeds from their transfer). Such practices have been tracked by the Fédération Internationale de Football Association ("FIFA") in order to limit the influence of actors outside the football world and prevent third-parties from acquiring ownership of players' economic rights. In this context, Articles 18 *bis* and 18 *ter* of the Regulations on the Status and Transfer of Players ("RSTP") were adopted, enabling FIFA to sanction the conclusion of such contracts – which have been on the rise in recent times.

In its decision 4A_260/2017 of 20 February 2018, the Swiss Supreme Court examined two important issues. The first, concerns the independence of the Court of Arbitration for Sports (the "CAS"). The *Lazutina* decision, (3) in 2003, had already ruled on this issue. This new case strengthens the Supreme Court's previous finding. The second concerns the recently adopted – and controversial – FIFA regulations banning TPO agreements.

Factual background

This case relates to a sports arbitration between RFC Seraing, a Belgian third division football club, (the "Club") and FIFA with regards to a TPO agreement. In July 2015, the Club
P 430 was accused of having concluded ● TPO-type agreements regarding several players in violation of FIFA's RSTP. After initiating a disciplinary procedure, the FIFA Disciplinary Committee sanctioned the Club, banning it from registering players at a national and international level for the next four transfer periods and imposing a fine of CHF 150'1, in accordance with Articles 18 *bis* and *ter* of the RSTP. The FIFA Appeal Committee confirmed this decision in 2016, which led the Club to file an appeal with the CAS. The CAS upheld this decision, in March 2017, reducing the ban from four to three months but confirming the rest of the decision. (4)

Ultimately, a challenge was brought by the Club to the Supreme Court seeking the annulment of the award which, as examined below, was finally rejected.

Decision of the Supreme Court

Pursuant to Article 75 of the Swiss Civil Code ("CC") any member of an association who has not consented to a resolution which infringes the law or the articles of association is legally entitled to challenge such resolution before an independent tribunal. According to case law, such tribunal may be an arbitral tribunal – such as the CAS – as long as it acts as a judicial authority. The Supreme Court first considered whether the challenge was inadmissible on grounds of estoppel (*venire contra factum proprium*) as the Club had lodged an appeal with the CAS while at the same time denying that the CAS was a proper arbitral tribunal; finally, the Supreme Court accepted to hear the case.

The first argument raised by the Club related to the independence of the CAS. The Club argued that the award was not rendered by a proper tribunal ("*un véritable tribunal*") and therefore should be annulled on the ground of Article 190 al. 2 lit. a of the Swiss Private International Law Act ("PILA"). According to the Club, the *Lazutina* case only concerned the relationship between the CAS and the International Olympic Committee ("IOC") and therefore the relationship between the CAS and FIFA – described by the Club as a *mafia* (*"une organisation mafieuse"*) – had never been examined. Essentially, the Club argued that FIFA is the CAS's "biggest client" in terms of "business volume" which would make the CAS a dependent institution. Additionally, it was the Club's contention that the CAS's
P 431 funding method (i.e. financial contributions made by the sports ● federations to fund

the CAS's budget) would only reinforce its dependence from FIFA given the latter's large contributions. Against this background, the CAS would be in no position to be independent in cases involving FIFA. Furthermore, arbitrators – unlike national judges – would suffer direct financial consequences from a reduction in the caseload guaranteed by FIFA, inducing them to favour this federation in disputes involving it.

The Supreme Court confirmed its previous decisions as to this issue, by following its own precedent, in the leading case *Lazutina*. Essentially, the Supreme Court found there was no reason to revisit its jurisprudence, observing that FIFA's contribution to the CAS was less than 10% of the total budget, thus dismissing the Club's argument. The Supreme Court further rejected the Club's argument that arbitrators would be influenced by financial concerns when dealing with cases involving FIFA.

The Club then made the complaint that his right to be heard was violated during the hearing that had taken place on 17 October 2016. This grievance was dismissed by the Supreme Court which emphasized once again that any alleged violation of the right to be heard must be raised immediately and that failure to do so will cure the violation and render the award unchallengeable, on this ground, before the Supreme Court. That said, the Supreme Court went on to add that, with regards to the alleged violation, the Chairman only directed the proceedings just as he was supposed to.

Last but not least, the Club formulated a grievance based on Article 190 al. 2 lit. e PILA, arguing that the award was against public policy as it went against competition law. After recalling its restrictive jurisprudence in the matter, the Supreme Court, citing the *Tensacciai* case, (5) pointed out that competition law was not part of Swiss public policy.

Basing its argument on a prior case where a TPO agreement had been considered as lawful under Swiss law by the Supreme Court, (6) the Club further submitted that the present decision would violate public policy by putting "out of business" (*"hors commerce")* a perfectly lawful activity. The Supreme Court found that decision 4A_116/2016 had been rendered in a very different context from the one in this case. First, the player's interest and the investor's interests were identical, which was not the circumstance in the present case. Second, decision 4A_116/2016 had been rendered when
P 432 FIFA's ● regulation banning TPO agreement was not in force yet. Third, the Supreme Court had not focused on judging the TPO system, *per se*. For these reasons, the two cases were not comparable and therefore the Supreme Court rejected the argument.

Furthermore, the Club argued that clubs, as their indirect members, were in a contractual relationship with federations. By virtue of this contractual relationship and in accordance with FIFA's regulation, clubs were being prohibited from concluding TPO agreements. By prohibiting the recourse to TPO agreements *via* its regulation, FIFA was restricting the clubs' freedom in violation of Article 27 (2) CC, and as such was violating public policy, The Supreme Court considered the grievance unfounded, emphasizing that not every violation of Article 27 CC would be tantamount to a violation of public policy.

In its last argument, the Club asserted that the sanction was disproportionate and therefore contrary to public policy; in particular, the Club argued that the sanction jeopardized its right to economic development and therefore its very existence and that such a sanction should have been considered unlawful and the decision annulled. The Supreme Court determined that the grievance was unfounded, indicating it was not for the court to revisit the sanction itself or to review the findings of fact.

In view of the above, the Supreme Court rejected the annulment request, reaffirming once again the independence of the CAS.

Conclusion

Although this decision has remained slightly in the shadows, it represents an important victory not only for the CAS but for FIFA as well.

Although the independence of the CAS as an institution has already been established in the *Lazutina* case, this case is noteworthy as it is the first to examine the relationship between the CAS and FIFA. The Supreme Court upholds the CAS as a structurally independent institution, confirming it is independent from international federations, including FIFA. More importantly, the Supreme Court confirms that the CAS is financially independent, therefore validating its funding scheme. By doing so, the Supreme Court emphasizes that CAS's funding method does not necessarily lead to a dependent relationship with its funders. In any case, as pointed out by the Supreme Court, another financial method would be hardly conceivable. Requesting the athletes to contribute would bar them from ● reaching the CAS thus preventing them an access to justice and
P 433 harming them. This decision, alongside the *Gundel* (7) decision, the *Lazutina* decision, and the *Pechstein* (8) decision issued by the German *Bundesgerichtshof*, contributes to shape a consistent *corpus* of case law in the field.

This decision is also an important win for FIFA which, in the midst of a controversial *saga* around the ban of TPO agreements, sees its regulation upheld both by the CAS and the Swiss Supreme Court, thus strengthening its application in the future. Whereas pending procedures involving TPO contracts are taking place in different jurisdictions in Europe, a decision rendered by the Swiss Supreme Court certainly holds a certain weight. Moreover, this decision confirms the Supreme Court's interpretation of Article 27 CC with relation to

TPO agreements. While it admits that FIFA's regulation restricts the clubs' economic freedom, it concludes that such agreements do not suppress it, thus not resulting in a violation of the Swiss public policy.

It is however important to mention that the validity of Article 18 *ter* of the RSTP under EU competition law is being reviewed by the Belgian Courts. Such decision, should it consider the ban of TPO contracts to be against EU competition law, could well have an impact on the CAS' and the Supreme Court's future decisions on TPO agreements.

P 433

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6) Supreme Court Decision 4A_116/2016.
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8) Bundesgerichtshof, Az. KZR 6/15, Pechstein v. International Skating Union (ISU), 7 June 2016.