4A_312/2017[1]

Judgment of November 27, 2017

First Civil Law Court

Federal Judge Kiss, Presiding
Federal Judge Klett
Federal Judge Niquille
Clerk of the Court: Mr. Carruzzo.

Club X._____,
Represented by Mr. Sébastien Besson,
Appellant,

v.

A._____,
Represented by Mrs. Alexandra Johnson and Mr. Mercédeh Azeredo da Silveira,
Respondent.

Facts:

A.
The Court of Arbitration for Sport (CAS) rendered an award on April 19, 2017, in accordance with the ordinary arbitration proceedings (Art. R38 ff. of the Code of Sports-Related Arbitration; hereafter: the Code) and ordered the respondent X._____, a professional football club..., to pay to the claimant A._____, a former players' agent of …nationality, the amount of EUR 2'700'000, plus interest, as a payment for a commission of EUR 3'100'000 due according to the contract concluded on August 23, 2013. According to the contract, the claimant undertook to ensure the transfer of a player named B._____ (hereafter: the Player) to the respondent, for the payment of a commission. The transfer took place in 2014 and the Player joined the Club for a duration of five years (*i.e*. from July 1, 2014 to June 30, 2019) by paying a total remuneration of EUR 1'360'000.

The Panel therefore rejected the counterclaim filed by the respondent, aiming at the reduction of the disputed commission to EUR 68'000 and, consequently, to the reimbursement of EUR 332'000 of the advance payment of EUR 400'000 made to the claimant, and even a reduction up to the latter amount which would entail the full dismissal of the main claim.

[1] Translator's Note: Quote as Club X._____ *v.* A._____, 4A_312/2017.
The decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

The grounds relied upon by the CAS Panel to justify the operative part of its decision will be presented below where it is deemed useful.

B.
On June 12, 2017, X._____ (hereafter: the Appellant) filed a civil law appeal to the Federal Tribunal requesting annulment of the aforementioned award holding that it was incompatible with public policy (Art. 190(2)(e) PILA).

In its answer filed on September 14, 2017, A._____ (hereafter: the Respondent), requested the appeal be dismissed, insofar as it was admissible. The CAS also requested the dismissal of the appeal in its answer filed on October 5, 2017.

The Appellant filed a reply on October 24, 2017.

Reasons:

1.
According to Art. 54(1) LTF[2] the Federal Tribunal issues its decision in an official language,[3] as a rule in the language of the decision under appeal. When the decision is in another language (here, English) the Federal Tribunal resorts to the official language chosen by the parties. Before the CAS they used English. In the briefs sent to the Federal Tribunal the Appellant used French, thus respecting Art. 42(1) LTF in connection with Art. 70(1) CST[4] (ATF 142 III 521[5] at 1). According to its practice, the Federal Tribunal will consequently issue its judgment in French.

2.
In the field of international arbitration, a civil law appeal is permitted pursuant to the requirements of Art. 190-192 PILA[6] (Art. 77 (1)(a) LTF). Whether as to the subject matter of the appeal, the standing to appeal, the time limit to appeal, the submissions made by the Appellant, or the grounds for appeal invoked, none of these admissibility requirements raises any problem in the case at hand. The appeal is therefore admissible.

It must now be examined the admissibility of the plea, questioned by the Respondent in view of the way that the Appellant has presented its arguments.

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[2] Translator's Note: LTF is the French abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173. 110.
[3] Translator's Note: The official languages are French, German, and Italian.
[4] Translator's Note: CST is the French abbreviation of the Federal Constitution of April 18, 1999, RS 101.
[5] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/federal-tribunal-upholds-independence-members-cms-network
[6] Translator's Note: PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.

3.
In its sole argument, the Appellant submits that the Award under appeal is incompatible with substantive public policy. Before examining the merit of the criticism raised based on this argument (at 3.3), it is worth recalling the scope of the substantive public policy provided by Art. 190(2)(e) PILA (at 3.1), and then summarize the reasons behind this Award and the arguments developed by each of the parties and the CAS in their respective submissions, either to invalidate these reasons, or to support them (at 3.2).

3.1. An award is incompatible with public policy when it disregards the essential and broadly recognized values which, according to prevailing theories in Switzerland, should constitute the basis of any legal order (ATF 132 III 389[7] at 2.2.3). There is a distinction between procedural and substantive public policy. An award is incompatible with substantive public policy when it violates fundamental legal principles and consequently becomes completely inconsistent with the legal order and the system of essential values. Among such principles are, in particular, the sanctity of contracts, the respect of the rules of good faith, the prohibition of the abuse of rights, the prohibition of discriminatory and confiscatory measures, as well as the protection of incapable persons.

As the wording "in particular" unambiguously shows, the list of examples thus set forth by the Federal Tribunal to describe the content of substantive public policy is not exhaustive, although it is consistently expressed in case law relating to Art. 190(2)(e) PILA. Incidentally it would be difficult and potentially dangerous to try to set forth all the fundamental principles that should undeniably be included as one or another may be omitted. It is therefore preferable to leave the list open. Moreover, the Federal Tribunal already included some other fundamental principles in it, such as the prohibition of forced labor (Judgment 4A_370/2007[8] of February 21, 2008, at 5.3.2) and this Tribunal would not hesitate to sanction an award for violating substantive public policy if said award disregards, for example, the fundamental principle of the respect of human dignity, even though that principle is not expressly mentioned in the aforesaid list (ATF 138 III 322[9] at 4.1 and case law cited therein).

According to the jurisprudence, the violation of Art. 27 CC[10] does not necessarily violate substantive public policy as it is defined; there needs to be a severe and obvious infringement of this fundamental right. However, a contractual restriction of the economic freedom for the purposes of Art. 27(2) is considered to be excessive only if the obligee 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; Art. 27(2) CC also refers to commitments that are excessive due to their subject matter, namely those concerning certain personality rights, the importance of which is such that a person cannot commit her/himself for the future in this respect (for a general plan, in particular as to the decisive moment to decide on the excessive character of the disputed violation, cf. Judgment 4A_45/2017 of June 27, 2017,

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[7] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/violation-of-public-policy-notion-of-public-policy-exclusion-of-

[8] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/appeal-against-interlocutory-and-partial-awards-violation-of-pub

[9] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/landmark-decision-of-the-swiss-supreme-court-international-arbit

[10] Translator's Note: CC is the French abbreviation for the Swiss Civil Code of December 10, 1907, RS 210.

to be published, at 5; in sports arbitration, and particularly in football, see the judgment 4A_458/2009[11] of June 10, 2010 at 4.4.3.2 and the precedent cited therein).

If it is not easy to define substantive public policy positively or to determine its scope precisely, it is easier to exclude some elements from it. Such exclusion particularly concerns the entire process of interpreting a contract and the legal consequences logically drawn therefrom, as well as the interpretation by an arbitral tribunal of the statutory provisions of a private law body. By the same token, in order to find incompatibility with public policy, a concept which is more restrictive than that of arbitrariness, it is not sufficient that evidence was wrongly assessed, a factual finding was manifestly inaccurate, or a rule of law was clearly violated (Judgment 4A_304/2013[12] of March 3, 2014, at 5.1.1).

Moreover, a mere reason given by the arbitral tribunal that violates public policy is not sufficient, it is the result reached in the award that must be incompatible with public policy (ATF 138 III 322[13] at 4.1; 120 II 155 at 6a p. 167; 116 II 634 at 4 p. 637).

3.2.
3.2.1. After laying out the legal basis for the Respondent's debt, which is not disputed before the Federal Tribunal, the Panel, by applying Swiss law subsidiarily according to Art. R45 of the Code, examined whether the commission provided in the recruitment contract was excessive or not. In this respect, it first recalled that the principle of the sanctity of contracts, *pacta sunt servanda*, is a cardinal principle of the law of obligations and must be taken seriously. In this context, it highlighted that the Respondent had accepted a reduction in price for his services, initially fixed by him at EUR 3'500'000, to EUR 3'100 000, from which the Panel inferred that the amount fixed in the contract was not unilaterally imposed on the player's agent but was rather the result of negotiations. The Panel also pointed out that the fact that one year after the signature of the recruitment contract, more specifically on August 30, 2014, the parties had signed a document, entitled *Letter of Acknowledgement*,[14] in which the amount of the commission stipulated in the contract was confirmed and only the modalities of its payment were modified. This led the Panel to question why the Appellant, if it considered the commission to be excessive, had not reacted at that time instead of waiting to file a request for arbitration and make this plea.

As to the possibility of applying *clausula rebus sic stantibus* to the above principle, the Panel dismissed it outright because it did not find an unforeseeable event that would have enabled the Appellant not to honor his commitment. The Panel pointed out, in this respect, that the Player hired by the Club... was a free agent, for whom no transfer fee had been paid to anyone, so that the Club had acquired the possibility to transfer the player to another club and thereby collect a transfer fee that could have been greater than the commission claimed by the Respondent. Thus, for the Panel, the Appellant's contract had to be

[11] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/challenge-of-arbitrators-sitting-on-cas-panel-rejected-claim-of-

[12] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/definition-public-policy-reaffirmed

[13] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/landmark-decision-of-the-swiss-supreme-court-international-arbit

[14] Translator's Note: In English in the original text.

regarded as a “rational commercial opportunity.”[15] Moreover, it did not matter that the player might have failed to meet the expectations of his new employer. Indeed, the estimated value of the player was a chance situation to be considered *ex tuncet* and not retroactively, once verified. In other words, the player's potential was an element of luck that could not be taken into account in deciding whether or not the stipulated commission was excessive. The Appellant had again argued on the basis of Art. 20(4) of the Players' Agents Regulations (hereafter Regulations I) and Art. 7(3)(b) of the Regulations on Working with Intermediaries (hereafter: Regulations II) issued by the International Federation of Football Associations (FIFA) to support that the remuneration due to the Respondent, in his capacity as intermediary mandated by a club in order to conclude a contract of employment with a player, could not exceed *"3% of the total potential gross income of the player over the entire duration of the contract of employment"*.

The Panel rejected this argument on the grounds that the Regulations I did not fix a ceiling on the remuneration of the services of intermediaries but merely provided a solution to compensate for the absence of an *ad hoc* provision in the recruitment contract and the Regulations II did not apply in the present case since they were not yet in force at the time of the conclusion of the recruitment contract at issue.

The Panel further stated that it did not consider the comparison between the Player's salary and the intermediary's commission as a relevant criterion for deciding whether or not the commission under investigation was excessive. According to the Panel, using such a criterion would be tantamount to penalizing a dedicated intermediary who negotiated for the club a low salary with a player, since this intermediary would then see his commission reduced rather than being rewarded for having spared the finances of his principal. Moreover, it should be kept in mind that the lump-sum commission of the intermediary acting on behalf of the club is generally fixed before the salary of the player sought by the club, so that the fact that this salary was finally fixed at an amount inferior to what was expected was, in principle, not a reason for reducing the commission agreed with the intermediary. Finally, the Panel indicated that, although invited by the Appellant to do so, it did not consider necessary to express in the case at hand, as an *obiter dictum*, any opinion on the question of when a commission should be considered excessive in general but preferred to limit itself in noting that the commission of EUR 3'100'000 due to the Respondent was certainly high but not excessive in the circumstances of this case.

3.2.2. The Appellant devotes more than two thirds of its appeal to the description of the facts of the case and the proceedings conducted before the CAS Panel, in particular reproducing verbatim its submissions filed in the arbitration proceedings and the summary made by said Panel of the arguments it raised, first in the original English version followed by its own French translation.

In the last, relatively brief, part of this appeal, the Appellant seeks to demonstrate how the Award of April 19, 2017 is incompatible with substantive public policy within the meaning of Art. 190(2)(e) PILA. After reiterating the definition of this concept, it states that the agreement in question is a recruitment contract, which concerns the placement of an employee with an employer, and stresses that this is a sensitive and regulated area. In this respect, it refers, first of all, to Art. 417 CO,[16] which urges the judge to reduce the

[15] Translator’s Note: In English in the original text.
[16] Translator’s Note: CO is the French abbreviation of the Federal Code of Obligations of March 30, 1911, RS 211.

broker's excessive salary in fairness and specifies, supported by references of case law (ATF 88 II 511 at 3b) and doctrine (Pierre Engel, *Contracts of Swiss Law*, 2nd edition 2000, p. 526), that this provision not only protects the inexperienced or reckless principal against the exaggerated claims of a skilled – or even experienced – broker but also seeks to avoid excessive remuneration that may have repercussions on the labor market.

Secondly, the Appellant refers to Art. 9(4) of the Federal Act of October 6, 1989, on the Service of Employment and Leasing of Services (LSE, RS 823.11), which urges the Federal Council to fix the placement commissions, in Art. 20(1) of the Decree of January 16, 1991 on the Service of Employment and Leasing of Services (OSE, RS 823.111), according to which the placement commission is calculated as a percentage of the gross annual wage agreed with the worker placed, and Art. 3(1) of the Decree of January 16, 1991 on emoluments, commissions, and securities provided for by the Employment Service Act (OEmol-LSE, RS 823.113), which specifies the placement fee of 5% maximum of the first gross annual salary. In its view, by these mandatory provisions, which exclude the autonomy of the parties as to the amount of the commission due to a broker in connection with the placement of an employee, the Swiss legislator demonstrates, regardless of the scope of the LSE, that excessive commissions in this area cannot be admitted because they are likely to influence the normal play of the relationship between an employee and his employer.

Lastly, the Appellant, returning to the field of football, reproduces the text, cited above, of Art. 7(3)(b) of FIFA Regulations II. Having done so, it draws from all these provisions the conclusion that Art. 190(2)(e) PILA prohibits an excessive commission, *i.e*. one that exceeds a certain percentage of the worker's wages in the field of recruitment. Referring finally to its subsumption, the Appellant disagrees with the opinion of the Panel that the salary of the employee would not be a relevant criterion for determining whether the disputed commission is excessive or not. It also disputes the Arbitrators' application of the principle *pacta sunt servanda*, as the public policy rules limit the autonomy of the parties' will. Moreover, it does not consider it relevant that the Player acquired by the Appellant was a free agent and that he could have been transferred to another club, having found no findings in the facts of the Award under appeal supporting such an argument. In its view, since the recruitment contract clearly showed that the Respondent's remuneration depended solely on the signing of an employment contract between the Appellant and the Player, there was no reason to expand the analysis and include other "arrangements" between the parties, which, moreover, were not apparent from the facts found by the Panel.

Finally, what the Appellant considers truly relevant is that the recruitment contract provides for a commission of EUR 3'100'000, that the salary of the Player for a period of five years was EUR 1'360'000 (that is EUR 272'000 per year) and that said commission represents 228% of the salary of the Player for the full duration of the employment contract, *i.e.*, more than ten times the annual salary of the Player. In view of these circumstances, the Panel, by endorsing a commission percentage grossly exaggerated in relation to the Player's salary, violated a public policy principle, namely the prohibition of excessive commissions in the field of recruitment. Therefore, the Award rendered led to a result contrary to public policy and should be annulled pursuant to Art. 190(2)(e) PILA.

3.2.3. In his Answer, the Respondent seeks to show, first, that the Appellant's arguments are appellatory in nature and seeks merely to make the Federal Tribunal examine, with a full power of review, the

questions of substantive law dealt with in the Award. Secondly, the Respondent explains why, in his view, the Appellant's arguments are manifestly unfounded. He seeks to demonstrate, first, by numerous references to jurisprudence and doctrine, that the violation of a mandatory provision of Swiss law or a provision of public interest does not amount to a violation public order within the meaning of Art. 190(2)(e) PILA. He then asserts that the prohibition of excessive commission is not one of the fundamental principles the violation of which is incompatible with the public policy according to this provision. Lastly, the Respondent notes that the Appellant has not established or even alleged that the result of the Award would excessively restrict its economic freedom and endanger its existence to the point of having to be qualified as a confiscatory measure or that the commitment made in the contract was contrary to Art. 27 CC.

3.2.4. For its part, the CAS notes that the Appellant invokes the LSE for the first time at the stage of the civil law appeal. It recalls, in this regard, that the CAS was once sanctioned by the Federal Tribunal for having applied this law of its own motion (Judgment 4A_400/2008[17] of February 9, 2009 at 3.2). In any event, this law is not applicable in the present case as the mere reference to Swiss substantive law does not constitute a sufficient connection to justify its application. It is also clear to the CAS that the LSE could not apply in the context of an international relationship between a club and an agent, which arises solely from the contractual freedom of the parties. Therefore, it is not necessary to go further into the question of whether the commission is excessive or not.

3.2.5. The Appellant responds in its Reply that it did not invoke a direct application of the LSE in its appeal but only referred to this law, as well as to Art. 417 CO, in order to determine the relevant Swiss public policy principles.

3.3. Examined in the light of the specific concept of substantive public policy governing the field of international arbitration, as defined by the aforementioned case law, and faced with the objections lodged against it by both the Respondent and the CAS, the Appellant's plea based on Art. 190(2)(e) PILA must be dismissed.

3.3.1. It must be noted from the outset, as pointed out by the Respondent, that the manner in which the Appellant formulates this single grievance leaves much to be desired from the point of view of the requirement to give reasons in a civil law appeal against an international arbitral award where the incompatibility with substantive public policy is sought (see Art. 42(2) and 77(3) LTF). At this point it must be recalled that, in order to satisfy its obligation to give reasons, the Appellant must discuss the reasons for the decision rendered and indicate precisely why it considers that the previous authority has infringed the law (ATF 140 III 86 at pp. 89 and the cited case law). In this case, however, the Appellant devotes most of its appeal to the textual repetition (with an unofficial translation of the original English version) of the submissions of the parties and the summary, made by the Panel, of the legal arguments it had submitted to the Arbitrators. Then the Appellant refers, under the mandatory provisions of the Swiss legal system, not only Art. 417 CO, on which it had already been based in the arbitral proceedings, but also the

[17] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/annulment-of-an-award-by-the-federal-tribunal-because-of-the-use

LSE and its enforcement decrees, which it invokes for the first time before the Federal Tribunal. Lastly, in the last page of its appeal, it limits itself in opposing in a few words its legal analysis to the one made in the Award under appeal. The admissibility of the appeal is therefore questionable. In any event, in view of the arguments developed in this appeal, this Tribunal cannot find that the award is incompatible with substantive public policy, given the circumstances surrounding the case at issue.

3.3.2. First, it is worth noting at this point what was expressed almost a year ago in a case related to football, and specifically, to the transfer of players (Judgment 4A_416/2016 of December 13, 2016 at 4.2.3):

> It is not a question here of the financing of professional football as a whole, nor of all the economic and legal aspects of player transfers, ... The CAS Panel has therefore rightly refused to interfere with the analysis of the circumstances of the specific case in light of the applicable rules of law and draw a conclusion that is valid for the disputing parties alone. Even more importantly, this Tribunal, whose reasoning is limited in the present case to the plea of incompatibility of the Award with the substantive public policy within the meaning of Art. 190(2)(e) PILA, must refuse to enter the minefield of football-money relations in which the Appellant would like it to enter, among other reasons because it is true that these reports seem to elude understanding, given the astronomical sums at stake and the opacity of the relationships established by the various stakeholders. As for the Appellant's point on the definition of the concept of substantive public policy, that there are good morals in the field of sport in general and football in particular, this is a step that this Tribunal will not make. Apart from the fact that it seems difficult to determine what the morals are in the field, modifying the concept of substantive public policy according to this or that activity and, even more, of a particular branch of the activity, *i.e*. sport and more particularly football, would somehow amount to diluting the strength and diminishing the scope of that concept by allowing the umbrella organization of the relevant branch, in this case FIFA, to define the concept of good morals specific to this branch. This would result in a fragmentation, a dilution of the concept of substantive public policy and, consequently, in an increased difficulty in defining its scope, not to mention the creation of a kind of casuistry that is poorly suited to legal certainty. Moreover, while it is true that the particularities of sports arbitration have been taken into consideration by federal case law in the treatment of certain procedural issues, such as the waiver of the right to appeal (ATF 133 III 235 at 4.3. 2.2, p. 244), this does not mean that the same must be done with respect to the general plea of incompatibility of the award with substantive public policy, unless it were to create a true *lex sportiva* by the court, which could raise problems from the point of view of the division of powers between the legislature and the judiciary of the Confederation (Judgment 4A_488/2011[18] of June 18, 2012 at 6.2, penultimate paragraph).

Considered in the light of this general remark, the size of the disputed commission, set at EUR 3'100'000, can only be put in perspective *in abstracto* and, even more, in view of the circumstances in which this amount was fixed.

[18] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/the-federal-tribunal-leaves-undecided-the-issue-as-to-whether-an

3.3.3. Art. 163(3) CO orders the judge to reduce the penalties that s/he considers to be excessive and falls under the Swiss public order, in the sense that the judge must apply this mandatory provision even if the debtor of the contractual penalty did not expressly request a reduction of its amount. According to well-established case law, this does not mean that the violation of the aforementioned provision would contravene the public policy of Art. 190(2)(e) PILA (Judgments 4A_536, 540/2016 of October 26, 2016 at 4.3.2, 4A_510/2015[19] of March 8, 2016 at 6.2.2 and 4A_634/2014[20] of May 21, 2015 at 5.2.2). This observation also applies to Art. 417 CO, as well as Art. 9 al. 4 LSE, 20(1) OSE and Art. 3(1) OEmolLSE, which are mandatory provisions invoked by the Appellant in support of the complaint of a breach of substantive public policy. Moreover, as the CAS rightly points out in its answer, the LSE was not applicable in the present case, as the Federal Tribunal had already ruled in 2009 in a comparable case (judgment 4A_400/2008, cited above, at 3.2). The Appellant has also implicitly confirmed this, by arguing in its reply that it has not invoked the direct application of the LSE in this appeal (No. 5). As for Art. 7(3)(b) of FIFA Regulations II, mentioned under n. 46 of the appeal, the Panel considered that it was not applicable *ratione temporis* to the case in dispute, without the Appellant objecting thereto. Finding in principle, as the Appellant would have wanted, that substantive public policy within the meaning of Art. 190(2)(e) PILA prohibits all excessive commissions in the field of recruitment, while stating that a commission is excessive if it exceeds a certain percentage of the worker's salary, is not necessary or even desirable.

Such a principle is not necessary, as the definition of substantive public policy covered by this provision is already sufficient to sanction, in particular by referring to Art. 27(2) CC, the aforementioned abuses and inadmissible situations which would undermine the essential and widely recognized values that, according to the prevailing views in Switzerland, are the foundation of any legal order. Nor would it be desirable to endorse a principle that, based entirely on the vague notion of "excessive commission," would still require a "fixed percentage" of the worker's salary in order to be fixed once and for all and, irrespective of the profession exercised by the worker from whom any commission equal or superior to this percentage would render the award endorsing it incompatible with substantive public policy. Moreover, definitively setting such a percentage in order to remunerate the placement of any worker would entail the risk of treating equally situations that require a different approach. An example would be the huge salaries that are currently been paid to the world's football stars. It is not forbidden to consider that a commission paid to a players' agent for the transfer of a footballer falling into this category may exceptionally violate fundamental principles of substantive law to the point of no longer being reconcilable with the legal order and its determining values, even if it does not exceed the percentage fixed *in abstracto*, whereas that would not be the case of the remuneration of an agent of a "normal" worker, calculated on the same basis. This Tribunal will therefore not endorse the principle advocated by the Appellant.

3.3.4. It remains to be considered whether the Panel, taking into account the facts of the present case, did or did not disregard substantive public policy by accepting the Respondent's submissions. A positive answer to this question requires that the result reached in the Award under appeal, and not the reasons underlying it, is incompatible with public policy.

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[19] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/domestic-public-policy-v-international-public-policy

[20] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/domestic-public-policy-not-pertinent-international-arbitration

3.3.4.1. An introductory remark is however necessary. Under n.52 of its appeal, the Appellant alleges that the facts of the Award under appeal do not contain any element supporting its finding that the Player was a free agent and could have been subsequently transferred to another club. Such an allegation is invalidated by the text of the Award itself (n. 77). It does not matter that the relevant finding, as it appears from this text, appears in the legal reasoning of the Award, and not in its factual summary (see Judgment 4A_231/2010 of August 10, 2010 at 2.2; Hansjörg Seiler, in *Bundesgerichtsgesetz* (BGG), 2nd ed. 2015, n°18 ad Art. 112 LTF). It is still a finding of fact that binds the Federal Tribunal (4A_384/2017 of October 4, 2017 at 2).

3.3.4.2. In this case, the gross enumeration of the figures of the case, which the Appellant holds solely relevant as to whether the disputed commission could be endorsed by the Panel without violating substantive public policy, is enough to impress at first sight, as it is true that the disputed commission, which amounts to EUR 3'100'000, represents more than ten times the annual salary of the Player (EUR 272,000) and is equivalent to 228% of this salary over the full duration of the contract (EUR 1'360'000), in other words it is the entire salary multiplied by 2,279. However, if this gross enumeration in placed in its context, as was done by the Panel, this results in a completely different picture, a more nuanced one. There is the Appellant, one of the most widely known clubs of the football championship … of the A series, discovering a young footballer ... and unsuccessfully trying to approach him directly, calling on a Player's agent..., *i.e.*, the Respondent, so that he can get involved and take the necessary steps for the Appellant to hire this Player. A negotiation follows during which the Player's Agent agrees to reduce the amount of his commission claimed for his services from EUR 3'500'000 to EUR 3'100'000. A mediation contract is then signed by the parties on this basis. The efforts of the broker led to the conclusion of a contract of employment for a duration of five years between the Appellant and the Player.... A year later, the Appellant and the Respondent sign the "*Letter of Acknowledgment*"[21] in which it is recalled that the latter holds a claim of EUR 3'100'000 against the former, without the debtor raising any objection as to the extent of this claim. Formal notice to pay its due and then the Appellant pays a deposit of EUR 400'000, after which the parties attempt in vain to conclude an arrangement regarding the unpaid balance of the Respondent's commission. The latter then lodges his request for arbitration, and it is only then that the debtor invokes the excessive nature of the aforementioned commission. It must be confirmed, as the CAS Panel did, that such procrastination is already, to say the least, dubious in the light of the rules of good faith. Applying the legal principles that it considers relevant to the factual findings after its assessment of the evidence, the Panel subsequently explains why in the present case the doctrine of unforeseeability (*clausula rebus sic stantibus*) cannot be applied to exclude the principle of the sanctity of contracts (*pacta sunt servanda*). In doing so, it refuses to liken the potential of the player to an unforeseeable circumstance, in the framework of an *ex tunc* examination of the question and retains that it cannot be excluded that the Appellant that acquired a free player on the market (free agent), could eventually transfer him to another club against payment of compensation potentially greater than the commission agreed with the Respondent. The Panel also stresses why it cannot take into account the provisions of FIFA Regulations I and II.

Finally, the Panel attempts to deny, with reasons, any relevance of the comparison between the Player's salary and the broker's remuneration in order to decide whether or not the disputed commission is excessive. All of the above is based on the legal assessment of the relevant facts. In this respect, it must

[21] Translator's Note: In English in the original text.

be recalled that the Federal Tribunal, even though it is called upon to rule on an appeal against an award rendered by an arbitral tribunal with its seat in Switzerland and authorized to apply Swiss law subsidiarily, it is bound to respect, as to the manner in which this law has been applied, the same distance as it would have as to the application made of any other right and that it must not yield to the temptation to examine with full power of review whether the pertinent rules of Swiss law have been interpreted and/or correctly applied, as it would do if it dealt with a civil law appeal against a cantonal judgment (Judgment 4A_32/2016 of December 20, 2016 at 4.3). In the particular case, therefore, this Tribunal cannot set aside the award for breach of substantive public policy for the mere fact that the Panel grossly misunderstood the concept of contractual fidelity and unpredictably or arbitrarily applied the sporting regulations as to the criteria to be used in order to determine whether or not an intermediary's remuneration is excessive.

3.3.4.3. For the rest, in order to establish the current scope of the infringement that it would suffer for having signed the recruitment contract at issue in 2013 (see Judgment 4A_45/2017, cited above, at 5, 1st paragraph), the Appellant fails to demonstrate how the fact of having to pay the Respondent the remaining sum of EUR 2,700,000 and the additional interest would make it fall into the arbitrariness of the Respondent and would suppress its economic freedom to such an extent that the basis of its existence would be endangered: in sum, how it would constitute an excessive restriction in view of Art. 27(2) CC (Judgment 4A_668/2016 of July 24, 2017 at 4.2 and the case law cited). In the case of an operation which, taken as a whole, could prove to be ultimately neutral or even profitable for the Club, it is difficult to discern how the Award that ratifies this would be incompatible with substantive public policy. The Panel was therefore right not to sanction such an operation. The Panel has also rightly refrained from formulating a definitive opinion as to when a commission should be regarded as generally excessive. For the aforementioned reasons, this Tribunal will also refrain from doing so, being aware of the importance of taking into account the circumstances of each case at issue.

3.4. As the only argument raised by the Appellant is unfounded, this appeal must be rejected.

4.
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 20'000, shall be borne by the Appellant.

3.
The Appellant shall pay to the Respondent an amount of CHF 22'000 for its legal costs.

4.

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

Lausanne, November 27, 2017

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

The Presiding Judge: Kiss (Mrs.)

The Clerk: Carruzzo