4A_116/2016[1]

Judgment of December 13, 2016

First Civil Law Court

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

X._____ Club,
represented by Mr. Antonio Rigozzi and Mr. Sébastien Besson,
Appellant,

v.

Z._____ Limited,
represented by Mr. Jean Marguerat,
Respondent.

Facts:

A.
The Fédération Internationale de Football Associations (FIFA), the leading football authority at the international level, issued, among other directives, a Regulation for the Status and Transfer of Players (RSTP), whose present version entered into force as from June 1, 2016, with the aim of especially supporting the "contractual stability between professional players and clubs" (Chapter IV, Arts. 13-18) that is, to ensure the observation of the principle expressed by the Latin proverb *pacta sunt servanda*. According to this regulation, a contract between a professional player and a club, the duration of which is set to a maximum of five years with no exception, can be terminated only on the expiration date or by mutual agreement. Thus, contrary to practice in the relevant private law on employment termination, none of the contracting parties is entitled to unilaterally terminate this time-limited work contract, unless just cause can be invoked, upon pain of paying an amount to the other contracting party and – should the breach of contract occur during a so-called protected period – an additional sport sanction being imposed. Once the parties have signed the contract, they can mutually agree to break this legal tie before the date of expiry stipulated in the work contract. As employer, the club of the professional player, as a general rule, will not agree to this breach of contract, unless the club that will become the player's new employer pays a sum of money, which is specified in a transfer contract to be concluded between the two clubs. The contracting parties also have the opportunity to specify in the employment contract the amount of money the player will have to pay to his current club, to compensate it for the right he will be given to unilaterally terminate their contractual relationship. By virtue of this so-called "redemption" or "exit" clause, the player is

[1] Translator's Note: Quote as X._____ *v*. Z._____ 4A_116/2016. The decision was issued in French. The original text can be found on the website of the Federal Tribunal, www.bger.ch.

entitled to withdraw at any given moment and at his own convenience, without incurring a sporting sanction. This capacity, corresponding to the will of the individual player, to prematurely terminate the contractual relationship, is the basis that the transfer mechanism of professional players operates on today. Indeed, if it did not exist, the contracting parties would have to observe the expiration date of the time-limited work contract, after which, the player, having regained his contractual liberty and having become what has been convened to be called a free agent, would only then be able to offer his services to the new club of his choice, without having to indemnify his employer and without his new employer having to pay whatever amount of money to the player's previous employer. This is the situation which has prevailed ever since the Court of Justice of the European Communities (ECJ), in a famous decision in the mid-1990s, sanctioned the practice according to which a professional football player (coming from a member state) could not be employed by a club of another member state after the expiration of the contract tying him to his current club unless the new club had paid a transfer amount to the original club (Judgment of December 15, 1995, C-415/93, *Union royale belge des sociétés de football association* [Royal Belgian Football Association] *v. Jean-Marc Bosman*, Rec. 1995 I-4921).

The transfer amount – the amount of money the current employer will accept to waive the enforcement of the work contract until the date stipulated in order to allow the transfer of the player to the club that wants to employ him – is a future claim, having monetary value. It is an economic right relating to the player, the similar to the training allowance and the solidarity contributions established by Arts. 20 and 21 of the Regulation for the Status and Transfer of Players (RSTP), as opposed to federal rights (the opportunity for the player to take part in competitions organized by an association, the ability to sanction him, *etc*) which are derived from the compulsory registration of the player with an association and the consequences arising therefrom (Art. 5 RSTP). Usually, the ownership of federal rights and economic rights with respect to a player are inseparable. Nevertheless, for several years in certain South American and European countries there has been a practice of separating these two categories of rights. Going by the name of third-party ownership of economic rights of football players and better known by its English name – Third-Party Ownership (TPO), or, more seldomly, Third-Party Participation (TPP) – this practice consists, for a professional football club, of the club relinquishing its economic rights over a player to a third-party investor, in full or in part, in order for the investor to be able to benefit from the added value the club may obtain from the future transfer of the player. In return, the investor provides this club with financial help. This help can allow the club to, for example, to solve cash-flow issues, or to help the club acquire a player. In this latter case, as is the case in this matter, a club that is interested in a player but that does not have the financial means to pay the transfer amount requested by the current employer of said player, partners with an investor who provides the club with the necessary funds to fully or partly pay for the transfer amount. This is done in exchange for a profit-sharing of the amount which may be obtained if the player is transferred in the future. As such arrangements were controversial, they were banned, effective May 1, 2015, by FIFA, who introduced into the RSTP an Art. 18ter, whose first paragraph, titled "*Third-party ownership of players' economic rights*,"[2] reads as follows:

> 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.

The third paragraph of the same article provides that agreements that predate May 1, 2015, may remain in place until their expiration but they cannot be extended.

[2] Translator's Note: The English here is taken from the official FIFA version of the document in English.

This is, in broad terms, the background of the dispute, so one may better grasp the 'ins and outs' of the case before this Court. It remains to now set out the particular circumstances of the legal dispute and examine the merits of the criticisms in the written submissions of the contracting parties.

B.

B.a. On July 19, 2012, A._____, a professional [name of country omitted] football club, and X._____ Club (hereinafter: X._____ or the Appellant), a professional [name of country omitted] football club, signed a contract concerning the transfer from the first to the second of V._____ (hereinafter: V._____ or the player), a [nationality omitted] professional football player. The transfer amount was set at EUR 4'000'000. Additionally, X._____ committed to transfer 20% of the total amount of the transfer amount paid by the player's new club to A._____ if it transferred the player before August 31, 2015, and was able to obtain an amount higher than EUR 5'000'000.

On August 23, 2012, X._____ and V._____ signed a work contract, valid until June 30, 2017. The contract includes an exit clause, allowing the player to prematurely terminate it, in exchange for an immediate payment of EUR 30'000'000 to the employer.

In order to finance the player's transfer, X._____ approached Z._____ Limited (hereinafter: Z._____ or the Respondent), an investment company. After a month of negotiations, the parties entered into a complex contractual relationship, based on five distinct agreements, on August 23, 2012. The most important of the agreements was titled Economic Rights Participation Agreement (ERPA)[3]. Briefly, by this agreement, Z._____ granted the amount of EUR 3'000'000 (also referred to as "the Grant Fee") to X._____. In exchange, X._____ relinquished 75% of the economic rights with respect to V._____, the balance of these rights being kept by the player, as well as 100% of the federal rights. In case of the player's transfer to another club, among other clauses, the investment company would receive from X._____, (under the heading "*FUND's Interest*") 75% of the amount transfer paid by the new club, less the amount of EUR 450'000, but, under any circumstances, a minimum of EUR 4'200'000 (the Fund's Minimum Interest Fee), an amount the investment company could also claim, especially if the player became a free agent before the expiration of his work contract. As a result of the two contracting parties estimating the value of V._____ as EUR 8'000'000 on the transfer market, an ERPA clause obliged X._____, if it was asked to do so by Z._____, to accept a transfer offer, equal or higher to this amount, and to pay its co-contractor the 75% of the received transfer amount or, in case the offer was to be rejected, to indemnify the investment company to the tune of 75% of the amount of this offer. Among other duties imposed by the ERPA, X._____ was obliged to inform Z._____ of all received offers regarding a potential transfer of the player and to do everything possible so the latter could be transferred before the expiration of his time-limited work contract. For its part, the investment company committed to not interfere with the Club's transfer policy and not to disclose to third parties, without the written agreement of the club, the information disclosed to it by the Club on the topic of a possible future transfer of the player. By another ERPA clause, X._____ granted Z._____ a "put option"[4], under which its co-contractor could oblige it anytime to redeem, for the price of EUR 3'708'000, its participation in the economic rights of the player, should X._____ have not transferred him by July 1, 2015, at the latest. Additionally, it agreed to provide security to guarantee the payment of this amount, in accordance with the terms and conditions specified

[3] Translator's Note: In English in the original text. In French, this contract is known as *"Contrat principal de participation sur les droits Économiques*," abbreviated as "CPDE". This translation will use the English abbreviation.

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

in the other agreements that were signed on the same day. Governed by Swiss law, the ERPA, which included an arbitration clause in favour of the Court of Arbitration for Sport (hereinafter, the CAS), as well as a confidentiality clause, was supposed to end after X._____ club would have transferred the final payment to which investment firm was entitled.

The Football World Cup, organized every four years by FIFA, took place in Brazil from June 12 to July 13, 2014. During the World Cup, V._____ performed exceptionally well for the football team of Y._____; so well, in fact, that he was considered to be one of the ten best players of the competition. The result of this was that his value on the transfer market rose considerably and he piqued the interest of several clubs. There is no need to recount here the negotiations that ensued between the different interested parties, with the active participation of Z._____. Besides, the circumstances under which they were conducted – like the role played there by the investment company – are in part disputed and were not all clarified. It is sufficient to note that, on August 19, 2014, X._____ finally accepted an offer to transfer V._____ to the E._____ Club (hereinafter: E._____), an English football club in the Premier League, in exchange for a transfer amount of EUR 20'000'000 and the loan, until the end of the 2014-2015 season, of the player M._____.

B.b. On August 23, 2012, X._____ and Z._____ signed a second ERPA, with respect to the transfer of the professional football player W._____, transferred from D._____, a [name of country omitted] professional football club. Aside from the monetary amount and certain small points, the contract used to secure funding from Z._____ for the acquisition of this player was identical to the one the contracting parties used to interest the investment company in the economic rights concerning V._____.

By contract of January 8, 2014, X._____ loaned W._____ to a [name of country omitted] club C._____, until July 30, 2015. The loan had been agreed upon without compensation, at the expense of the borrower, who had to pay the salary of the player and insure him.

B.c. On August 21, 2014, Z._____ sent X._____ a bill of EUR 15'000'000. X._____ paid EUR 4'500'000: EUR 3'000'000 for V._____ and EUR 1'500'000 for W._____, on August 28, 2014. The investment company confirmed the receipt of this amount on September 9, 2014, noting that it considered it a partial payment of what was owed.

C.
C.a. On October 16, X._____ filed a request for arbitration with the Court of Arbitration for Sport (hereafter: CAS) against Z._____. It asked the CAS to find, in essence, that the ERPAs were legally void or, in the alternative, that they had been validly nullified, and in the further alternative, should their validity be recognized, that it was entitled to receive damages for non-performance, amounting to EUR 10'000'000. Each of these submissions was accompanied by a request for payment of EUR 3'000'000, meant to remedy the alleged moral prejudice suffered by X._____ club.

Z._____, on its part, arguing for the validity of the ERPAs and their unjustified nullification, requested that X._____ pay EUR 10'050'000 (before interest) – *i.e.*, 75% of the transfer amount received from E._____, minus the deduction of EUR 450'000 foreseen by the ERPA with respect to V._____ and the imputation of the EUR 4'500'000, already paid by the claimant, of a sum corresponding to 75% of the loan value of M._____, as well as 75% of the amount X._____ club would receive from E._____ should V._____ be transferred in the future.

C.b. On December 21, 2015, the CAS, in its ordinary arbitration proceedings (Art. R38 of the Code of Sports-Related Arbitration), issued its final Award. Establishing the validity and the binding nature of the ERPAs signed on August 23, 2012, by the contracting parties, the CAS ordered X._____ to pay Z._____ EUR 5'050'000, plus 5% interest per annum as of August 23, 2014; EUR 5'000'000, plus a 5% interest per annum, as of December 4, 2014; and GBP 1'433'596.15, plus a 5% interest per annum, as of August 23, 2014. Apart from that, X._____ must pay Z._____ 75% of any amount received by it, as a result of its right to 20% from all amounts above EUR 23'000'000, should E._____ have V._____ transferred to another club. All further requests or conclusions were rejected.

In an introductory remark, the Panel of three arbitrators, especially relying upon on the testimony and exhibits before it in the arbitration and on the evidence provided by the contracting parties, highlighted the controversies TPO and other similar agreements are the currently the subject of in the sporting, economic, and legal circles. The Panel emphasised that if the prohibition of such contracts, as announced by FIFA and entering into force on May 1, 2015, is in line with the views expressed by the Union of European Football Associations (UEFA) and the International Federation of Professional Footballers Association (FIFPro) on respect for the dignity of the concerned employees and sporting equity, among other concerns. There are significant criticisms from those who have used or are still using the now-prohibited practice – such as Spanish football clubs – whose users see in this prohibition an abuse of a dominant position from the part of an private association as well as a restriction on competition, which has led several of them to file complaints before competent European or national tribunals.

However, the CAS has clarified that the issue fits into the broader issue of funding for sport clubs but calls for a nuanced response considering its highly political nature. In light of those political considerations, the Panel considered it preferable to confine itself to the factual circumstances of the matter before it and to be content to examine, having in view relevant provisions, whether the ERPAs concluded by the contracting parties were valid and enforceable.

On the merits, X._____ argued the nullity of the ERPAs, with respect to Arts. 19, 20, and 21 CO, the Swiss employment legislation (Art. 319 ff CO). Art. 157 CP of the FIFA rules, Art. 27 CC, Art. 2 of the Swiss Federal Law on Unfair Competition (LCD), Arts. 45 and 101 of the Treaty on the Functioning of the European Union (TFEU), to Arts. 4, 5, and 13 of the Universal Declaration of Human Rights (DUDH), as well as Arts. 4, 5, and 8(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (CEDH). The CAS rejected this plea. It excluded from the outset the argument that the disputed legal relationships, to which the players where not parties, could be qualified as work contracts. It also ruled that Art. 157 CP was inapplicable, as this Swiss criminal law norm did not have independent scope in relation to the "prejudice" referred to in Art. 21 CO, a provision that could not be applied in this case, as the one-year period, within which the prejudiced party could have terminated the contracts, had passed – without X._____ having invalidated the ERPAs – and additionally, the territorial and material loan conditions prohibited by Art. 157 CP were not given in the current case. As to the FIFA rules, the Panel found that it did not likely constitute grounds for a claim of wrongfulness under Swiss law and that in any case, it could not be used against Z._____, who was not, directly or indirectly, affiliated to said association.

As to the alleged "morality issue" of the ERPAs was concerned, the CAS dismissed this argument, after having made a comprehensive evaluation of the two contracts, based on the figures referring to the respectively invested funds by the co-contractors, in order to acquire the economic rights associated with the two players

transferred from A._____ and of D._____, as well as the part of these rights acquired by each of them, while recognizing that the market concerning the economic rights in relation to W._____ was obviously more favourable to X._____ than that relating to the economic rights of V._____. It furthermore stressed that the disparity between the profits obtained by X._____ and by Z._____ as a result of the transfer of V._____ to E._____ was not immoral *per se*, but, at most, fell within Art. 21 CO, a provision that, however, X._____ was no longer entitled to invoke, due to the expiry of the time limit to do so. According to the CAS, this Club, who had yielded 95% of its economic rights on V._____ to third parties (75% to Z._____ and 20% to A._____), had obtained a reasonably good return on its investment, as, by keeping just 5% of these economic rights, it was still able to hire, in exchange for an initial investment of EUR 1'000'000, a key player, whose value on the market was much higher, a player whose transfer to E._____ had allowed it to cash in EUR 1'450'000, once the claims of Z._____ and A._____ had been deducted, and who had the potential to generate a new cash flow if he was to be subsequently transferred for an amount higher than EUR 23'000'000 (20% of the premium, minus the 75% owed to Z._____). The CAS further noted that, contrary to what X._____ had alleged, one could not say that Z._____ was taking no financial risk in the transactions at issue, as the financial position of X._____ was quite precarious at the time the ERPAs were signed. On the other hand, X._____ had not been exposed to any real risk between the period when he had hired V._____ and the moment he had transferred the player to E._____. Finally, by examining the morality of the ERPAs form the point of view of Art. 27(2) CC, the CAS ruled out that there had been, in this case, such an imbalance that one could find that X._____ had assigned its economic freedom, in favour of the investment company, to an immoral extent. Indeed, besides the fact that only two players – V._____ and W._____ – were linked to Z._____, among the 35 to 40 players whose economic rights X._____ shared together with other investment companies, the creditors of X._____ represented a consolidated debt of EUR 500'000'000, therefore, Z._____ was certainly not able to prevent the Club from continuing its activities. Moreover, the alleged control of the investment company over them, and the opportunity of Z._____ interfering with the transfer policies of X._____ had not been proven. In fact, the facts found rather established that on important occasions, X._____ had had the liberty of acting as it pleased.

The CAS has also excluded the applicability of the provisions of (Swiss and community) competition law, as X._____ did not show that the actions of Z._____ had an effect on the Swiss market and that the conditions for the application of Art. 101 TFEU were met.

As to the other norms, derived from international law, were concerned, the CAS dismissed their application, because they were rules of law in favour of the players, who were neither the signatories of the ERPAs, nor parties to the arbitration procedure.

The Panel examined the relevant provisions of the two ERPAs (which it found valid) alongside the conduct of each of the contracting parties in the fulfilment of their contractual obligations and found in favour of Z._____.

D. On February 22, 2016, X.____a____ (hereinafter: the Appellant) filed a civil law appeal to the Federal Tribunal, in order to have the judgment from December, 21, 2015, annulled. It also filed for a stay of enforcement.

In its Reply of April 4, 2016, Z._____ (hereinafter: the Respondent) submitted that the matter is not capable of appeal and in the alternative, that the appeal be dismissed if it were deemed admissible.

The CAS submitted its file but did not make any observations as to the subject of the appeal.

The Appellant, in its Reply from April 20, 2016, and the Respondent, in its Rejoinder from May 9, 2016, reiterated their earlier submissions.

The request for a stay of enforcement was rejected by Presidential Order of May 24, 2016.

Reasons:

1.
According to Art. 54(1) LTF,[5] the Federal Tribunal issues its judgment in an official language, as a general rule in the language of the decision under appeal. As this Award was issued in another language, the Federal Tribunal will use the official language chosen by the parties. Before the Court of Arbitration, they used English; in their submissions to the Federal Tribunal, the parties used French, thus observing Art. 42(1) LTF, in conjunction with Art. 70(1) Cst. (ATF 142 III 521[6] at 1). According to its practice, the Federal Tribunal will consequently issue its judgment in French.

2.
A civil law appeal is admissible against international arbitral awards, according to the conditions specified by Art.190-192 PILA[7] (Art.77(1)(a) LTF). Whether as to the subject matter of the appeal, the standing to appeal, the time limit to do so, the submissions of the Appellant or the grievances raised in its appeal, none of these admissibility conditions present any problems for this case. The matter is therefore capable of appeal.

3.
The Federal Tribunal rules on the basis of the facts found in the award under appeal (Art. 105(1) LTF). It cannot rectify or supplement *ex officio* the findings of the arbitrators, even if the facts have been established in an obviously incorrect manner or in violation of the law (Art. 77(2) LTF, which excludes the application of Art. 105(2) LTF). In a civil law appeal against an international arbitration judgment, the Court's role does not consist of ruling with full discretion, like in an appeal jurisdiction, but to solely examine whether the admissible grievances raised against said judgment, are justified or not. To allow the parties to submit facts other than those that were found by the arbitral tribunal, aside from those exceptional cases reserved in the case law, would not be compatible with such a task, these facts having been established by the evidence submitted in the arbitration proceedings (Judgment 4A_386/2010[8] of January 3, 2011 at 3.2). However, as it was already the case under the authority of the Federal Judiciary Organization Act (ATF 129 III 727[9] at 5.2.2; 128 III 50 at 2a and the judgments quoted), the Federal Tribunal reserves the right to review the facts the award under appeal is based upon, should one of the complaints mentioned in Art. 190(2) PILA be raised against said facts or should new facts or new evidence

[5] Translator's Note: LTF is the French abbreviation for the Federal Statute of June 17, 2005, organizing the Federal Tribunal RS 173.190
[6] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/federal-tribunal-upholds-independence-members-cms-network
[7] Translator's Note: PILA is the most commonly used abbreviation for the Federal Statute on International Private Law of December 18, 1987 RS 291
[8] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/award-allegedly-issued-by-a-truncated-tribunal-claim-that-cas-de
[9] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/extension-arbitration-clause-non-signatory

be exceptionally taken into consideration within the civil appeal (ATF 138 III 29[10] at 2.2.1 and the judgments quoted).

4.
In a sole argument divided into two parts, the Appellant argues that the Award under appeal is incompatible with substantive public policy within the meaning of Art. 190(2)(e) PILA. Before examining the justification of the criticism formulated in support of this plea, the Court must recall what is meant by the notion of substantive public policy, laid down in this provision.

4.1. An award is incompatible with public policy if it disregards some essential or widely recognized values which, according to the prevailing views in Switzerland, should represent the grounds of a legal order (ATF 132 III 389[11] at 2.2.3). Procedural public policy is distinguished from substantive public policy.

An award is inconsistent with substantive public policy when it violates some fundamental principles of law to such a degree that it is no longer consistent with the governing legal order and system of values; among such principles are, in particular, the principle of contractual fidelity, compliance with the rules of good faith, the prohibition of the abuse of rights, the prohibition on discriminatory or confiscatory measures, and the protection of legally incapable persons.

As the adverb "in particular" unambiguously states, the list of examples is not exhaustive, despite its permanence in the case law relating to Art. 190(2)(e) PILA. Besides, it would be difficult, perhaps even dangerous, to try to identify all fundamental principles that could unquestionably be considered a part of this list, at the risk of forgetting one or the other. It is preferable to leave it open. Indeed, the Federal Tribunal has already added other fundamental principles, such as the prohibition on forced labour (Judgment 4A_370/2007[12] of February 21, 2008, at 5.3.2), and it would not hesitate to sanction, as a violation of substantive public policy, an award that would infringe upon the cardinal principle of respect of human dignity, even if this principle is not expressly listed (ATF 138 III 322[13] at 4.1 and the judgments quoted).

If it is not easy to positively define substantive public policy, it is easier to exclude one element or the other to provide a precise delimitation. This exclusion touches particularly on the totality of the process of interpretation of a contract and the consequences that are logically drawn therefrom in law, as well as the interpretation, made by an arbitral tribunal, of the statutory provisions of a private law body. Also, in order to find an incompatibility with public policy, a more restrictive notion than arbitrariness, it is not enough for the evidence to have been wrongly assessed, for a factual finding to be clearly wrong, or even for a legal norm to have been clearly violated (Judgments 4A_304/2013[14] of March 3, 2014, at 5.1.1; 4A_458/2009[15] of June 10, 2010 at 4.1).

---

[10] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s
[11] 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-
[12] 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
[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: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/definition-public-policy-reaffirmed
[15] 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-

Moreover, it is not enough for a ground held by the arbitral tribunal to offend public order; the result of the decision itself must be incompatible with public order (ATF 138 III 322 at 4.1; 120 II 155 at 6a, page 167; 116 II 634 at 4, page 637).

4.2.
4.2.1. The Appellant first seeks to prove that the Award violated substantive public policy by giving effect to "usurious, unconscionable, and unduly burdensome" contracts.

By examining the case of V._____, supported by figures, based on the ERPA relating to this player, X._____ states that the topical clauses of this contract guaranteed to the Respondent a minimum return for EUR 3'000'000 invested by it, in order to allow the Appellant to hire V._____: 12.36% if the player was not transferred within the three years and the Respondent decided to waive the "*put option*"; 40% if the player was not transferred at all before the expiration of his employment contract or if he was transferred for an amount below EUR 8'000'000. By stressing the absence of any limit regarding the return the Respondent could obtain in the case of a transfer of the player for a higher amount than this amount, the Appellant argues that the transfer of V._____ to E._____ for an amount of EUR 20'000'000 would allow the Respondent to cash in EUR 15'000'000 and to make a profit of 400% on its investment, perhaps even 460%, if we take into account the 75% of the loan value of the player M._____. X._____ compares this profit to its own, which, according to it, was null, as just EUR 1'000'000, or 5% of the transfer amount, would remain for the club after the 75% deduction for the Respondent and the 20% owed to A._____. In other words, the very amount it paid to A._____, in addition to the EUR 3'000'000 paid in advance by the Respondent, in order to acquire the federal rights of V._____. Therefore, in the Appellant's view, the ERPA, which it argues qualifies as a partial loan, contravenes legal provisions regarding usury and takes on an unconscionable character and, from there, would be null and void under Swiss law.

Furthermore, the Appellant explains that it unduly burdened its own freedom in an inadmissible manner, from the point of view of Art. 27 CC, by accepting contractual clauses that allowed its co-contractor to impose on it, in fact if not in law, the acceptance of a transfer offer its co-contractor considered to be sufficiently interesting, on pain of paying the latter 75% of the offer amount, without receiving the transfer amount, if it refused. According to the Appellant, the Respondent could thus not only force it to transfer V._____, even if it would have preferred to keep him in its own ranks due to sporting considerations, but, more importantly, the Respondent was entitled to demand of the Appellant that it do everything in its power to ensure the player was transferred to another club before the expiration of his work contract.

The Appellant also argues that the ERPAs also contain clauses according to which, being aware of the brutal and severe character of certain commitments made by it, he commits not to take advantage of their excessive character. Analysis of similar clauses would show that the CAS, in its examination from the point of view of Art. 157 CP, ignored the contractual reality. It would not matter, from the point of view of public policy, if this provision of Swiss criminal law was not territorially applicable in the case at hand.

Finally, citing Art. 18b RSTJ, as produced above (letter A., third-to-last paragraph), the Appellant maintains that the Respondent knows very well, after having tried, in vain, to argue the validity of this provision before the Belgian state courts, that ERPAs are contrary to the regulation that was adopted by FIFA in order to forbid operations like TPOs, which are of an immoral character. No doubt, it conceded to the CAS, a regulation emanating from a private association, such as FIFA, does not always constitute a reason for nullity within the

meaning of Art. 20 CO. It points out, however, that such a rule did not remain unheard of at the state level, with the European Parliament adopting a resolution in 2008 calling for tangible action to introduce more transparency into the player-transfer system. Moreover, still according to the Appellant, it would be appropriate to recognise the existence of a concept of morals, applying to sports generally and to football in particular, in order to avoid the players of becoming an objects of speculation, such that investment funds take advantage of the financial situations of the clubs in order to make indecent profits, and so that clubs lose the command of the situation from a sporting point of view. This would contribute to the reinforcement of contractual fidelity, which is a cardinal principle in this domain.

4.2.2. In its Reply, the Respondent, after having contested the admissibility of the Appellant's first argument and having raised the manner of operation of ERPAs by citing excerpts from the Award under appeal, seeks to prove the absence of "allegedly usurious interests". Concerning interest, ranging from between 12.36% to 40%, it states that they were calculated for a period, respectively, of three and five years, which, if reduced to a year, results in interest lower than 15%, which is in full accordance with Swiss law. The Respondent contests, furthermore, that its remuneration, linked in the present matter only to the transfer amount the Appellant would collect from E._____, corresponds to an interest in the legal sense of the term and due to that falls within the scope of legal restrictions applicable to conventional interest rates, which, in its view, would not be sufficient to have it appear be contrary to substantive public policy, according to the case law of the Federal Tribunal.

As to the alleged excessive nature of the disputed undertaking of the Appellant is concerned, the Respondent defers entirely to the CAS reasoning in this regard.

4.2.3. This case is not about examining the question of financing of professional football on the whole, nor all of the economic and legal aspects of the transfer of players, nor even the system of the ownership of the economic rights of players by third parties, also known as third party ownership (TPO). These are problems of general nature and that have powerful political implications in the sporting context, is the preserve of competent bodies of professional football organizations at the international level, while the state judicial authorities on national or supranational level and the specialized arbitration courts have only a residual supervisory power in the matter. Thus, the Panel of the CAS has rightfully refused to interfere there, in order to analyse the circumstances of the given case, in the light of applicable legal norms and in order to draw a valid conclusion only for the litigating parties.

This Court, whose knowledge is limited *in casu* to the examination of the complaint arising from the alleged incompatibility of an award under appeal with substantive public policy, according to Art. 190(2)(e) PILA, had to give up from venturing on the mine field of the connections between football and money, to where the Appellant wanted to involve it, since it is true that these connections seem to be incomprehensible, taking into account the astronomical sums of money at stake and the opacity of the relations built up by different interests, among other reasons. Concerning the acknowledgement, with the Appellant, of the definition of the concept of substantive public policy, that there is an own decency for sport in general and for football in particular, this is a step one could not know how to overcome as it is. Apart from the fact that it seems difficult to determine moral decency in this domain, to adjust the concept of substantive public policy according to one activity or another and, moreover, according to a particular branch of the activity in question (in this case, sport, particularly, football) would amount, to a certain extent, to diluting the force and to reducing the range of this concept, by allowing the eligible umbrella association – in this case, FIFA – take care of the definition of the moral decency notion, which is specific for this branch. The result would be a dissipation, a dilution of the notion of substantive public policy

and, subsequently, an increased difficulty in drawing the outline of this notion, not to mention the creation of a legal sophistry antithetical to legal certainty. Moreover, if it is certainly true that the particularities of sports arbitration were taken into consideration by the federal case law when handling certain problems of specific procedures, such as the waiver of appeal (ATF 133 III 235 at 4.3.2.2, page 244), it does not follow that one should do the same regarding a general principle of law, deriving from the incompatibility of the award with substantive public policy, except to create a veritable *lex sportiva* by way of awards, which could raise questions as to the division of competencies between the Swiss legislative and judicial powers of (Judgment 4A_488/2011[16] from June 18, 2012 at 6.2, penultimate paragraph).

The fact is, as we have seen, that FIFA has prohibited TPO-type operations from May 1, 2015. However, it should be observed that the same prohibition was appealed by certain football leagues and other interested parties before the competent European or national courts, and so, up to this day, its destiny cannot yet be considered sealed (*see* Section C.b, *supra*, second paragraph). In any event, in accordance with the transitional rule to be found at Art. 18ter al. 3 RSTJ, the two ERPAs, given they were signed on August 23, 2012, do not fall under this prohibition. It is very likely that, if FIFA had found that contractual relations of this kind infringe upon fundamental principles of substantive law to such a degree that their continuation was unsustainable, it would not have accepted their continuation until their expiration, by enacting the transitional rule mentioned above. It would also be somewhat contradictory to want to annul an arbitral award that merely ratifies contractual relations that a transitional rule emanating from the competent sports association has allowed to persist until its expiration.

Insofar as it directly attacks the legal reasoning the Panel used to, by which the it specifically excluded the application of Art. 21 CO in the present matter, on the grounds of lack of timeliness, and that of Art. 157 CP, on the grounds of lack of territorial and material conditions of lending, the Appellant mistakes the Federal Tribunal for a court of appeal which oversees the CAS and can freely examine the validity of the international arbitral awards rendered by this private jurisdictional body. The Appellant intends, in this way, to have this Court exercise full review of the substantive legal issues dealt with in the Award under appeal, as it would do it as a preliminary matter in a jurisdictional appeal (ATF 140 III 134[17] at 3.1 and the judgments quoted). Yet, this is not the role of the Federal Tribunal according to the definitions in Art. 77(1)(a) LTF, under which the incompatibility of the Award with public policy has been invoked. However, there still remains the possibility, prompted by this very definition, to take into account, if applicable, of relevant provisions and general Swiss law principles touching on undue burdens entered into by one of the co-contractors, as long as one could see there the expression of essential and widely recognized values which, "according to the perceptions prevailing in Switzerland" (ATF 132 II 389[18] at 2.2.3), should constitute the foundation of the entire legal order (*mutatis mutandis* Judgment 4A_458/2009[19], mentioned *supra*, at 4.4.2).

Returning, first of all, to the figures derived from the relevant clauses of the ERPA concerning the economic rights related to V._____, as well as to the result of applying that data to the circumstances of this specific case, one cannot fail to observe, with the Respondent, that the minimum yield rates of 12.36% and of 40%,

[16] 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
[17] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/arbitration-clause-survives-termination-its-scope-be-interpreted-liberally
[18] Translator's Note: The original French text refers to ATF 132 II 389, however, we believe the Court is in fact referring to ATF 132 III 389. The English version of that judgement is available here: http://www.swissarbitrationdecisions.com/violation-of-public-policy-notion-of-public-policy-exclusion-of-
[19] 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-

which he could have obtained under certain conditions, thanks to its investment of EUR 3'000'000, correspond to a calculus made for a period of three years or five years, respectively, which, reduced to one year, results in interest lower than 15% and thus still permissible under Swiss law. At this point, one should note, in any case and in order to cite only one example, that according to recent case law of the Federal Tribunal, the combined application of a stipulated default interest of 12% per annum, of a conventional penalty of 10% on the due capital, and default interest of 5% per annum on the amount of this penalty, does not make the award under appeal incompatible with substantive public policy in the respect of Art. 190(2)(e) PILA, notwithstanding the fact that Art. 163(3) CO, which directs a judge to reduce excessive penalties, is a public policy norm, according to Swiss law (judgements 4A_536/2016 and 4A_540/2016 of October 26, 2016, at 4.3.2). The reflections the Appellant resorts to, in the same context, concerning the subject of the rate of return of 460% the Respondent could obtain in the present case, as a result of the transfer of V._____ to E._____ are irrelevant. Just as well, the reasoning on this point in terms of interest, as the Appellant proposes it, is not correct, although it is true that, in case of this figure, the remuneration of the one making the loan does not fall within the scope of the conventional interest - *i.e.* the compensation due to the creditor for the capital it is deprived of, a compensation whose amount is set in accordance with the loaned sum, the applied interest, and the loan period (Tercier/Favre, *Les contrats spéciaux*, 4th Ed. (2009), n. 3038) - depends solely on the amount of the transfer, also being tantamount to a partial loan, remunerated by the participation of the one making the loan in the benefit obtained by the borrower at the moment of a subsequent transfer operation. Yet in such a case, public law restrictions concerning rates of return, basically do not apply (Rolf H. Weber, *Commentaire bernois*, *Obligationenrecht, Das Darlehen,* Art. 312-318 OR, 2013, n° 38 des *Remarques préliminaires aux Art*. 312-318 CO).

Effectively, while we are merely talking here about relations between loaner and borrower, it is not very clear what exactly would be usurious, unconscionable or plainly immoral for an investment company loaning to a football club three quarters of the funds necessary for the purchase of the rights concerning a player whom this club wishes to integrate into its team - in the fact of acquiring an identical proportion of economic rights associated with the said player and to have the beneficiary of the loan promise to pay an equivalent part (*i.e.* 75%) of the sum paid by the new club, where the same player would be the subject of a later transfer. In fact, the unique feature of the present matter is represented above all by the enormous added value – 500%, apart from the loan value of the player M._____ – which V._____ made within a short period on the transfer market, given that the Appellant bought him from A._____ at the price of EUR 4'000'000, on July 19, 2012, and transferred him two years later, namely on August 19, 2014, to E._____ for the sum of EUR 20'000'000, and in exchange for the free loan of the [name of country omitted] international player M._____. This added value constitutes an essentially random element, which results from the excellent performance of V._____ with his national team in Brazil throughout the 2014 World Football Cup. Yet, none of the ERPA's signing parties had the power to control this element, the same way they could not have had the power to control it in the reverse and radically different situation of a drastic decrease of the value of the player, if, for example, the player had instead destroyed the hopes that had been placed in him, if he had seriously hurt himself or, even worse, if he had died when playing for the [name of country omitted] club. Also, the Appellant cannot draw anything from this random element in favour of its thesis. Moreover, one can very well imagine that he would not have been so affronted by the result of this transfer had he been able to keep the entire benefit of this operation, if had been able to buy V._____ without the financial aid of a third party.

By contrast and curiously, the Appellant has not called into question the validity of the engagement, which he had signed in the first transfer contract, that of paying to A._____ 20% of the entire amount of any amount higher than EUR 5'000'000 he could obtain in the case of the future transfer of V._____ before August 31,

2015, an engagement which reduced to EUR 4'000'000 (20% of EUR 20'000'000) the indemnity part-paid by E._____ which he could retain, thereby reducing this part to only 5% (100% - 75% [to be paid to Z._____] - 20% [to be paid to A._____]). In any case, this transfer operation has brought it a reasonable return on its investment, as the Panel finds, given the fact that, by spending the amount of EUR 1'000'000, it could hire a key player, whose market value had been estimated at EUR 8'000'000 by the ERPA's signatories, to let him grow in his first team for two years, and to cash in EUR 1'450'000 in remaining indemnities resulting from the transfer of the player to E._____, while also still being able to hold onto the possibility that it may obtain yet *more* money under certain conditions, in the event of a future transfer of the player by the English club. Apart from this, the Panel also finds that the Appellant has carried out a good venture due to the simultaneous acquisition of the other player, W._____, an operation that could have been even more profitable, based upon the same ERPAs if this player and not V._____ had been the one who was transferred for an amount of EUR 20'000'000, as in this hypothesis, the Appellant could have received EUR 13'000'000 for a player whose acquisition was financed entirely by the Respondent.

The *in concreto* application of the figures shown in the ERPAs thus disprove the conclusions drawn by the Appellant in relation to Art. 190(2)(e) PILA.

The Appellant also claims that the ERPAs were gravely detrimental to its freedom, meaning that the Panel handed down an award that was incompatible with substantive public policy. Art. 27 CC can be invoked by a legal entity (*see, e.g*. judgments 4A_536/2016 and 4A_540/2016, *supra*, at 4.3.2, second paragraph) even if this is usually being invoked by a natural person in sports-related disputes (ATF 138 III 322 at 4.3). Nevertheless, according to case law, the violation of this provision is not automatically contrary to public policy; there still must be a grave and clear-cut violation of a fundamental right. A contractual restriction of economic liberty is not considered to be excessive or undue under Art. 27(2) CC unless it leaves the obliged party at the mercy of the arbitrariness of its co-contracting party, suppresses its economic freedom, or limits it to such an extent that the basis of its very existence is endangered; Art. 27(2) CC also aims at unduly burdensome arrangements on the grounds of their subject matter, that is to say those that touch upon certain personality rights, whose importance is of such a kind that a person cannot make future commitments in relation to them (ATF 123 III 337 at 5 and the judgments quoted). The same reflection can be done, *mutatis mutandis*, under Art. 20(1) CO (Judgment 4A_458/2009, *see also* Section 4.4.3.2).

There is no such issue in the case at hand, no matter what the Appellant argues. In fact, according to the factual findings of the Panel, it is instead X._____ that was not unexperienced in the matter of sharing economic rights of the players with investment funds and that took the initiative of contacting the Respondent in order to obtain its financial assistance for the purpose of acquiring the services of two players the club was interested in, an acquisition the club made freely at the end of a month of negotiations, conducted with the assistance of experts and legal representatives and whose validity the members of its new management did not question until August 2014. Nor is it proven that this double acquisition, to be integrated into a squad of 35 to 40 players then at the disposal of X._____, deteriorated the financial situation of the club, as it is undisputed that the Respondent was certainly not in a position to hamper the continuation of the business or other kind of activities of the Appellant. Furthermore, the Panel noted that, on the basis of on the evidence before it, on important occasions, X._____ had acted as it saw fit, without worrying about the recommendations of the Respondent. No doubt the Appellant makes a big deal about the stipulations of the ERPAs in which he sees the strictness of certain of their clauses, while renouncing any reliance on them. Therefore, it does not matter that these stipulations remained unused in this instance, any interested party could have put before the Panel all the

criticisms the contentious clauses inspired, from whatever angle. Otherwise, if not, that party could have considered limiting the ground of the incompatibility of the Award with substantive public policy only to those stipulations alone while maintaining the ERPAs without them (Art. 20(2) CO, by analogy).

4.3.
4.3.1. In the second part of its sole argument, the Appellant submits that the Award violates substantive public policy, by giving effect to contracts which gravely disregard the personality rights and the fundamental rights of the players.

The Appellant argues that the ERPAs severely infringe upon first category of rights, by exerting pressure upon the Club through several clauses, such as the clause obliging it to pay the Respondent a minimum of EUR 4'200'000 (the Fund's Minimum Interest Fee) where the player concerned was not transferred to another club before the end of his work contract, in order to force the club to do everything possible to persuade the player to leave the club before the expiration of the contractual term. This player, although not being part of the ERPAs concerning him, will thus see his right to free economic growth heavily restrained if not extinguished, especially in respect of his ability to choose the course of his sporting career and the club he intends to offer his services to. Furthermore, the interested person would have to mention different endeavours undertaken on different levels, in order to put an end to what FIFPro qualifies as an affront to the dignity of professional players.

From the point of view of fundamental rights, the Appellant asserts that the mechanism of the ERPAs entails devising the conditions allowing an investment fund to indirectly decide whether a player must continue to grow with his club or whether he must accept signing a contract with another club. In the Appellant's opinion, such a situation would violate the prohibition of forced labour found in Art. 4(2) CEDH, among other juridical instruments, and, more broadly, it would violate human dignity.

4.3.2. The Respondent questions the admissibility of the appeal on this specific point, on the ground that the Appellant made a purely theoretical analysis of the provisions of the ERPAs, without explaining how the personality or fundamental rights of the players V._____ and W._____ had been violated in the case at hand. On the merits, he rejects the criticisms of the Appellant, by contrasting them with the findings of the CAS, according to which the investment company did not force X._____ to accept a transfer offer and, on the other part, V._____ had wanted to be transferred to E._____. Furthermore, the Respondent wonders whether the Appellant can validly invoke the protection of a third-party personality in this case, as the two players did not sign the ERPAs and did not take part in the procedure.

4.3.3. It should be noted here, as above regarding first tranche of this argument (cf. Section 4.2.3, *supra*), that, generally, the Appellant generally stays on a hypothetical level, by broadly limiting its submissions to theoretical reflections touching on fundamental guarantees that may be automatically invoked by a natural person, particularly an employee, without trying, conversely, to concretely prove how, by the implementation of the ERPAs, a serious violation of the personality rights and of the fundamental rights of V._____ and of W._____, as human beings and employees, would have occurred. However, it is not by arguing like this that he will succeed in proving why the result the Panel reached in the Award under appeal would not be compatible with substantive public policy within the meaning of Art. 190(2)(e) PILA – which is the only thing that counts given the limited power of review this Court has concerning international arbitration. The Appellant definitely provided many more details on this topic in its Rejoinder. However, it is worth mentioning that such a writing

cannot be used in order to supplement otherwise insufficient reasons after the time limit has passed (Judgment 4A_488/2014 from February 25, 2015 at 2).

Then, without being suspect, the interest X._____ asserts in the fate of the two players in question is not consistent at all with the fact that the club has resorted over and over to the TPO mechanism, before the expiration of the ERPAs. It certainly begs the question as relates to V._____ whether its interest would have been the same in the event that the Appellant could have kept the entire transfer amount paid by E._____.

Furthermore, the Respondent asks whether the Appellant in fact has standing to complain about the violation of rights strictly belonging to the players, in order to be freed from its contractual responsibility regarding the ERPAs are concerned (*exceptio de jure tertii*; cf. Judgment 4A_304/2013[20] from March 3, 2014, at 3). On its face and hypothetically, it is difficult to deny the potential legitimacy of an argument against permitting a claim where a contracting party was gravely violating the fundamental rights and human dignity of third parties who were not parties to the contract but could still be permitted to demand the payment of an amount due from its co-contractor under such a contract. However, there is no need to further examine this issue, as the circumstances of the case at hand are not comparable to such a hypothetical case.

Also, it is not established nor even alleged that one or other of the players referred to in the ERPAs had complained of a serious violation of his rights. Regarding W._____, we do not know much, as the contracting parties and the CAS have focused their attention on V._____. It is the Appellant who carries the burden of proof and bears the consequences of not meeting it, as the Appellant was the one that had to prove that the ERPAs in respect of this player had seriously violated the player's personality and fundamental rights. Regarding V._____, not only did he not complain but, perhaps more importantly, he in fact welcomed the honor of being transferred to E._____, thus being able to play for the biggest club in the world. While under his work contract he would have received an altogether quite comfortable annual salary of EUR 1'140'000 from the Appellant for the 2013/2014 season, it is reasonable to believe that this transfer was accompanied by an increase of his remuneration. Under such circumstances, making an argument based on the prohibition of forced labor or the violation of human dignity relative to this player, as the Appellant does, is frankly audacious. Moreover and at a more general level, it must be acknowledged that the great mobility of professional players and their frequent change of employer are, to some extent induced by the regulations FIFA has enacted concerning the maximum duration of a work contract binding a player to a football club, the conditions of a subsequent transfer of the same player to another club, and concerning the way in which the transfer system is being applied nowadays by the interested parties.

However, in this specific case, the fact remains that annulling the Award on the grounds raised by the Appellant is not justified.

5.
As a result, the appeal must be dismissed. The Appellant, which has been unsuccessful here, must pay the costs of the proceedings before the Federal Tribunal (Art. 66(1) LTF) and the Respondent's legal expenses (Art. 68(1) and (2) LTF).

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

For these reasons, the Federal Tribunal pronounces:

1.
The appeal is rejected.

2.
The judicial costs, set at CHF 40’000, shall be borne by the Appellant.

3.
The Appellant shall pay the Respondent CHF 50’000 for the federal judicial proceedings.

4.
This judgment shall be communicated to the Parties’ representatives and to the Court of Arbitration for Sport.

Lausanne, December 13, 2016

On behalf of the First Civil Law Court of the Swiss Federal Tribunal

The Presiding judge:	The Clerk:
Kiss	Carruzzo (Mr.)