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FIFA Ban on Third-Party Ownership: A Pyrrhic Victory for FIFA in Front of the Swiss Federal Supreme Court?

Simon Bianchi (LALIVE) · Monday, October 1st, 2018 · Young ICCA

Over the last few years, third-party ownership of soccer players ("TPO") has become controversial. TPO is a mechanism through which a soccer club assigns a player's economic rights, including the right to benefit from transfer fees every time the player is transferred to another club, to third-party investors in return for a financial counterpart. Considering that TPO threatens the integrity of sporting competitions, the Fédération Internationale de Football Association ("FIFA") eventually banned TPO in 2015. On 20 February 2018, the Swiss Federal Supreme Court rendered decision 4A_260/2017 addressing two important legal issues in this context: (i) the legality of the prohibition of TPO and (ii) the independence of the Court of Arbitration for Sport (the "CAS") towards FIFA. In this decision, the Supreme Court rejected an appeal from the Belgian club RFC Seraing against a CAS award confirming the validity under European and Swiss law of Articles 18bis and 18ter of the FIFA Regulations on the Status and Transfer of Players ("RSTP"), which prohibit TPO agreements.

Background

The dispute originated from two contracts entered into between RFC Seraing and Doyen Sports Investments Limited ("Doyen") in 2015, according to which Doyen acquired ownership of certain soccer players' economic rights against payment of a fixed fee to RFC Seraing. On 4 September 2015, the FIFA Disciplinary Committee found that RFC Seraing had violated Articles 18bis and 18ter RSTP and sentenced it to (i) a ban on recruitment for four consecutive registration periods and (ii) a fine in the amount of CHF 150,000 (approx. EUR 132,000).

On 9 March 2016, RFC Seraing brought the case before the CAS arguing that the decision of the FIFA Disciplinary Committee was to be rescinded as Articles 18bis and 18ter RSTP were in breach of (i) the free movement of persons, services and capital enshrined in the Treaty on the Functioning of the European Union ("TFEU"), (ii) European and Swiss competition laws, and (iii) RFC Seraing's right to respect for private and family life under the European Convention on Human Rights ("ECHR"). Furthermore, RFC Seraing submitted that, in a previous case leading to the decision 4A_116/2016, the Swiss Federal Supreme Court following the CAS had already recognized the legality of TPO agreements.

In its final award dated 9 March 2017, the CAS rejected all legal arguments raised by RFC Seraing. In a nutshell, the CAS found the following:

(i) Even though Articles 18bis and 18ter RSTP restricted the free movement of persons, services

and capital, these restrictions pursued legitimate objectives, such as preserving the regularity of sporting competitions and ensuring the independence and autonomy of soccer clubs and players. Furthermore, the possible anti-competitive effects of such restrictions were inherent to the pursuit of these objectives and proportionate to their achievement, especially since other financing schemes remained available to soccer clubs.
(ii) With regard to European competition law, it had already been recognized by the European Commission that FIFA constituted an association of undertakings within the meaning of Article 101 TFEU. However, Articles 18bis and 18ter RSTP did not have as their object the prevention, restriction or distortion of competition, but rather the regulation of the transfer market for soccer players in order to reach the above-mentioned legitimate objectives. In addition, RFC Seraing did not produce any documents evidencing the anti-competitive effects of these Articles. These considerations applied mutatis mutandis for Swiss competition law.
(iii) As to Article 8 ECHR, RFC Seraing did not demonstrate how it would apply and in which way Articles 18bis and 18ter RSTP would violate such provision.
(iv) Regarding the previous decision 4A_116/2016, the dispute did neither concern the conformity of TPO agreements with Articles 18bis and 18ter RSTP, nor deal with the legality of these Articles in light of the above-mentioned statutory provisions. Since the *ratio decidendi* of this decision did not concern the subject-matter of the present case, it did not bind the CAS in any respect.

Therefore, the CAS concluded that Articles 18bis and 18ter RSTP were valid under European and Swiss law and that the TPO agreements entered into between RFC Seraing and Doyen constituted a breach of these Articles. However, in light of the proportionality principle, the CAS reduced the ban on recruitment to three consecutive registration periods since the infringements occurred during the transitional period of the RSTP in its new version.

The Swiss Federal Supreme Court Decision
On 15 May 2017, RFC Seraing lodged an appeal to the Supreme Court against the CAS award and raised three legal arguments. First, the award was rendered by an arbitral tribunal which had been improperly constituted under Article 190(2)(a) of the Private International Law Act ("PILA"), in particular the CAS did not qualify as a proper arbitral tribunal because it lacked structural and economic independence from FIFA. Second, the arbitral award rendered by the CAS was incompatible with substantive public policy (Article 190(2)(e) PILA). Third, its right to be heard had been violated by the CAS (Article 190(2)(d) PILA).

The Supreme Court rejected RFC Seraing's appeal and upheld the CAS award. In its judgment, the Supreme Court recalled the *Lazutina* decision, which recognized the CAS independence towards the International Olympic Committee, and affirmed that there is no *prima facie* justification to depart from this jurisprudence. Furthermore, since the *Lazutina* decision, the CAS had implemented numerous measures to reinforce its structural independence vis-à-vis sports federations. Concerning the economic dependence, FIFA financial participation to the CAS general expenses represented less than 10 % of the CAS total budget. That said, the Supreme Court also referred to the decision rendered in the *Pechstein* case by the German Federal Court of Justice which, after an extensive review of the CAS functioning, considered that it constituted a proper, independent and impartial arbitral tribunal. In conclusion, the Supreme Court did not find any valid legal ground to overturn its previous jurisprudence and confirmed that the independence of the CAS from FIFA was sufficient to consider the former as an independent and impartial arbitral tribunal.

Concerning the alleged breach of substantive public policy, the Supreme Court reiterated that

competition law provisions, whether Swiss or European, do not form part of substantive public policy within the meaning of Article 190(2)(e) PILA as already decided in the *Tensacciai* case. Therefore, despite the fact that a Swiss arbitral tribunal shall consider Swiss and European competition laws when rendering an award, the Supreme Court would not review how the arbitral tribunal applied these competition law provisions in appeal proceedings.

Furthermore, the Supreme Court rejected RFC Seraing's submission that TPO agreements were already declared lawful in the decision 4A_116/2016. Indeed, this decision concerned TPO agreements entered into prior to the ban adopted by FIFA, so that the CAS and the Supreme Court only reviewed whether such agreements were contrary to mandatory provisions of European and Swiss law. More specifically, the CAS and the Supreme Court noted in their respective decision that issues related to the financing of professional soccer clubs, such as the legality of TPO, had to be regulated by the relevant sports authorities. Therefore, these previous decisions did neither prevent FIFA from banning TPO, nor address the validity of such prohibition under European and Swiss law.

Finally, RFC Seraing's contention that the prohibition of TPO violates Article 27(2) of the Swiss Civil Code, as it constitutes an excessive contractual restriction to its economic freedom, was dismissed since RFC Seraing remained free to resort to alternative financing mechanisms.

As to the alleged violation of RFC Seraing's right to be heard, the Supreme Court found that RFC Seraing shall be precluded from raising such argument since it did not react immediately during the arbitral proceedings.

The Legality of TPO Remains Uncertain

While this decision of the Supreme Court adds to the already existing decisions about the independence of the CAS so that this issue can almost be considered as finally settled, the legality of the prohibition of TPO under European law remains far from being definitively confirmed. Indeed, the Brussels Court of Appeal, seized by RFC Seraing in parallel to the proceedings in front of the Swiss Supreme Court, rendered a partial decision on 29 August 2018 affirming that the obligation for soccer clubs to submit to the jurisdiction of the CAS was null and void as the corresponding arbitration clause was overly broad and not limited to a defined legal relationship (Article II of the New York Convention). Now that the objection to jurisdiction raised by FIFA has been rejected, the Belgian court is expected to address whether the prohibition of TPO is lawful under European law. To add complexity to this issue, the FIFA Disciplinary Committee issued a press release on 26 June 2018 indicating that players were not to be considered as "third party" under Article 18ter RSTP, which could trigger the return of TPO in another form. The TPO saga is just beginning and the Swiss Supreme Court decision might turn out to be a Pyrrhic victory for FIFA.

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