4A_312/2012[1]

Judgment of October 1st, 2012

First Civil Law Court

Federal Judge Klett (Mrs), Presiding
Federal Judge Corboz,
Federal Judge Rottenberg Liatowitsch (Mrs.),
Clerk of the Court: Carruzzo

Club X._____ Ltd.,
Represented by Afshin Salamian,
Appellant,

v.

Club Y._____,
Represented by Mr. Pascal Philippot,
Respondent,

Facts:

A.
A.a On July 17, 2007, X._____ Ltd. (hereafter: X._____), a professional football club and V._____ Ltd. (hereafter: V._____), a company entrusted with transferring players for X._____, collectively referred to as the Firm (hereafter: X._____ to simplify) on the one hand and Y._____ (hereafter: Y._____), a professional football club on the other hand, entered into an agreement (hereafter: the Contract), concerning the transfer of a professional football player (hereafter: the Player) from Y._____ to X._____. Pursuant to the Contract the transfer price was € 4'000'000 payable in four installments in addition to which, as the case may be, some additional payments would be made conditionally: € 375'000 if X._____ qualified for the 8th final of the Champions League in the 2007/2008 season, an additional € 500'000 if it reached the quarter final of this competition and an additional € 750'000 if it came first in its national championship at the end of the aforesaid season (Art. 3.1 of the Contract); should the Player be transferred to another club by X._____, 20% of the difference between the amount received by X._____ in doing so and the amount paid to Y._____ for the acquisition of the Player (Art. 3.2 of the Contract). Moreover X._____ undertook to pay 5% of the transfer amount directly to the latter, namely € 200'000 in addition to the amount it would receive upon execution of the employment contract with X._____ (Art. 3.3 of the Contract). The Player countersigned the Contract.

The following day, July 18, 2007, X._____ - acting without V._____'s assistance – and Y._____ signed a contract (hereafter: the Protocol) concerning the transfer of the same Player for

[1] Translator's note: Quote as Club X._____ Ltd. *v.* Club Y._____, 4A_312/2012. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch

the same amount. However the conditions to which Y._____'s right to some additional amounts was subject did not coincide with those contained in the Contract: the additional € 375'000 would have to be paid if X._____ qualified for the 16th final (instead of the 8th final) of the Champions League in the 2007/2008 season (Art. 5 of the Protocol); the additional amount of € 500'000 would be paid if X._____ qualified for the 8th final (and not for the 4th final only) of the competition (Art. 6 of the Protocol); as to the additional € 750'000 they would be due to Y._____ if X._____ was first in its national championship either at the end of the aforesaid season or – a new hypothesis – at the end of the 2008/2009 season (Art. 7 of the Protocol). The amount to be paid by X._____ should the Player be transferred to another club was taken over as such (Art. 4 of the Protocol) while the one concerning the CHF 200'000 to be paid to the Player was not contained in the Protocol at all. Moreover X._____ undertook to pay an amount of 5% of the Player's transfer to a club Z._____ in compliance with a 2002 agreement between Y._____ and the aforesaid club (Art. 2 of the Protocol). Finally it agreed to pay the solidarity contribution of 5% in addition to the transfer price, as stated in the *ad hoc* Regulation of the Fédération Internationale the Football Association (FIFA; Art. 3 of the Protocol). The Player did not countersign the Protocol at the bottom of which are signatures of B._____, the President of X._____ and that of D._____, the General Manager of Y._____, respectively preceded and followed by the hand written mention "read and approved".

A.b X._____ won its national championship at the end of the 2008/2009 season. It did not reach the 16th final of the Champions League in the 2007/2008 season.

A.c A disagreement arose between the parties as to the payment of the additional amounts pursuant to the aforesaid agreements.

In 2009 Y._____ took X._____ to the competent bodies of FIFA with a view to obtaining the payment of the amounts pursuant to Art. 2, 3 and 7 of the Protocol. The case was divided into two distinct proceedings in view of the different nature of the claims.

The submissions based on Art 2 (compensation to be paid to club Z._____) and 3 (solidarity contribution) of the Protocol were submitted to the FIFA Dispute Resolution Chamber (hereafter: the DRC); that based on Art. 7 (payment if the club won the national championship in the 2008/2009 season) was given to the FIFA Players Status Committee (hereafter: the Committee). In a decision of December 7, 2010, the reasons of which were communicated to the parties on January 19, 2012, the DRC rejected the claim based on Art. 3 of the Protocol, apparently without adjudicating the one based on Art. 2 of the Protocol. On January 23rd, 2012 Y._____ appealed this decision to the Court of Arbitration for Sport (CAS); it submitted its arguments in a brief of February 3rd, 2012. The case registered under number [number omitted] (hereafter: case B) appears to be still pending.

In a decision of November 16, 2010 the single judge of the Committee ordered X._____ to pay the amount of € 750'000 to Y._____ with interest at 5% yearly from June 15, 2009.

B.
B.a On August 30, 2011 X._____ appealed the November 16, 2010 decision to the CAS and the case was given number [number omitted] (hereafter: case A). X._____ submitted its appeal brief on September 12, 2011, stating that the decision under appeal should be annulled and that the claim upheld in the first instance should be rejected. In its answer of September 23rd, 2011 Y._____ submitted that the CAS should confirm the first decision.

The CAS Panel held a hearing in Lausanne on January 25, 2012. It heard two witnesses – lawyer C._____, counsel for X._____ – and D._____, mentioned above, an executive of Y._____ – as well as some representatives of the Parties and asked them to state their views as to the Appellant's argument that there was no legally binding consent to the Protocol. The Panel heard final arguments. Both at the beginning and at the end of the hearing the Parties specifically stated that they were was satisfied with the manner in which the proceedings had been conducted.

B.b In its answer of March 19, 2012 to the appeal filed by Y._____ (case B), X._____ preliminarily applied for cases A and B to be consolidated and for the production by Y._____ of all contracts concluded with the Player. Faced with the refusal of Y._____ the CAS rejected the request on the basis of Art. 52 of the Sport Arbitration Code (hereafter: the Code) on March 22nd, 2012.

On March 26, 2012 X._____ applied to the CAS again for the following:

- An exceptional time limit for the Parties to supplement their briefs in case A pursuant to Art. 56 of the Code after case B would be decided, alternatively the deposit of the entire record of the latter case into the file of the former;
- An inclusion into the file of case B of the witness statements made in case A, in the alternative an order for witnesses C._____ and D._____ to be heard again in case B.
- The inclusion into the file of case A of the witness statements of the witnesses to be heard in case B.

After soliciting Y._____'s views and as to case B, the CAS rejected the request contained in the March 26, 2012 letter in a letter of April 3rd, 2012 and stated that its award in case A would be notified to the Parties within the prescribed time limit. Moreover it took notice that X._____ agreed that the Panel called upon to decide case B could consult the record of case A and hear the witnesses already heard in the former case. Finally the CAS upheld X._____'s request concerning the production by Y._____ of the contracts concluded with the Player.

B.c The following day, April 4th, 2012, the CAS issued its award. It rejected the appeal, confirmed the November 16, 2010 decision of the single judge of the Committee and rejected all claims or submissions.

The Panel started by emphasizing the various elements by which the Protocol was different from the Contract. Seeking to determine the relationship between these two agreements it then rejected the thesis of a new contract, argued by Y._____ and upheld by the single judge of the Committee and reached the conclusion that the two agreements could coexist and impact each other, thus being both apt to govern the relationships between Y._____ and X._____. Indeed the Panel took the view that it was not possible to reach the conclusion that the Contract had been substituted by the Protocol because, among other things, the Parties to the two agreements were not the same, as V._____ had not signed the Protocol and the signatories of the second agreement had not specified that it would substitute the Contract when they could have easily done so. This being said, the three CAS Arbitrators held that the obligation for X._____ to pay the additional amount of € 750'000 could be deducted *ratione temporis* from Art. 7 of the Protocol but not from Art. 3.1 of the Contract and analyzed the pertinent facts with a view to deciding which of these two incompatible clauses should prevail. In this respect they pointed out the following seven circumstances: the Protocol had been signed after the Contract; B._____ signed at the bottom of the Protocol with the hand written mention "read and

approved" and was consequently aware of the binding commitment thus subscribed; the idea that he could have thought that the terms used in the Protocol were identical to those in the Contract could not be seriously considered under the circumstances; moreover X._____ had specifically acknowledged the existence and the effects of the Protocol in the letters exchanged with Y._____; X._____ had also referred to the obligations arising only from the Protocol in two letters; moreover the differences emphasized between the Protocol and the Contract suggested that certain conditions of the transfer of the Player had been renegotiated to be included in the new agreement; finally, X._____ itself had proposed a settlement to Y._____ as to the performance of the obligation arising from Art. 7 of the Protocol. On this basis the Panel reached the conclusion that X._____ had accepted the conditional obligation to pay the additional € 750'000 to Y._____ should it win its national championship in the 2008/2009 season and that condition had been fulfilled.

C.
On May 23rd, 2012 X._____ (hereafter: the Appellant) filed a Civil law appeal to the Federal Tribunal with a view to obtaining the annulment of the April 4th, 2012 award. It argues a violation of the right to be heard (Art. 190 (2) (d) PILA[2]) and the incompatibility of the award with procedural and substantive public policy (Art. 190 (2) (e) PILA).

In its answer of June 19, 2012 Y._____ (hereafter: the Respondent) mainly submitted that the matter is not capable of appeal and in the alternative that the appeal should be rejected.

The CAS produced its file and submitted that the appeal should be rejected in its observations of July 10, 2012.

The Appellant maintained its submissions and the reasons in support in a reply filed on July 27, 2012. The Respondent and the CAS did not express a view on this brief within the time limit they were given to do so.

The Appellant's request for a stay of enforcement was rejected by decision of the Presiding Judge of June 21st, 2012.

Reasons:

1.
According to Art. 54 (1) LTF[3], the Federal Tribunal issues its decision in an official language[4], 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. In front of the CAS, they used English. In the brief sent to the Federal Tribunal, the Appellant used French. In accordance with its practice the Federal Tribunal shall resort to the language of the appeal and consequently issue its decision in French.

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[2] 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] Translator's note: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.

[4] Translator's note: The official languages of Switzerland are German, French and Italian.

2.
In the field of international arbitration, a Civil law appeal is allowed against the decisions of arbitral tribunals pursuant to the requirements of Art. 190 to 192 PILA (Art. 77 (1) LTF). The seat of the CAS is in Lausanne. At least one of the parties (in this case both) did not have its domicile in Switzerland at the decisive time. The provisions of chapter 12 PILA are accordingly applicable (Art. 176 (1) PILA in connection with Art. 21 (1) PILA).

The award under appeal is final and may consequently be appealed on all the grounds provided at Art. 190 (2) PILA. The grievances raised by the Appellant are in the exhaustive list of such grounds.

The Appellant was a party to the proceedings in front of the CAS and it is particularly affected by the award under appeal as the latter confirmed a decision ordering it to pay the amount of € 750'000 to the Respondent with interest. The Appellant therefore has a personal and present interest worthy of protection to ensure that the award was not issued in violation of the guarantees arising from Art. 190 (2) PILA, which gives it standing to appeal (Art. 76 (1) PILA.

The appeal was filed in the legally prescribed format (Art. 42 (1) LTF). Although the Respondent argues the contrary, it was filed timely. Pursuant to Art. 100 (1) LTF the appeal must be filed with the Federal Tribunal within 30 days after the full decision is notified. According to case law, the notification by fax of a CAS international arbitral award does not cause the time limit of Art. 100 (1) LTF to start running (judgment 4A_428/2011[5] of February 13, 2012 at 1.3 and the case quoted). In this case, the original award, signed by the Chairman of the Panel, was notified to the Parties by registered mail on April 20, 2012 and the Appellant states without being contradicted by the Respondent that it was received on the 23rd of the same month. By filing its brief on May 23rd, 2012, 30 days after the day following receipt of the award under appeal (see Art. 44 (1) LTF), the Appellant consequently complied with the legally prescribed time limit to appeal to the Federal Tribunal. There is accordingly no reason not to address the merits of the appeal.

3.
The Federal Tribunal issues its decision on the basis of the facts found in the award under appeal (see Art. 105 (1) LTF. It may not rectify or supplement the factual findings of the arbitrators *ex officio*, even if the facts were established in a blatantly inaccurate manner or in violation of the law (see Art. 77 (2) LTF ruling out the applicability of Art. 105 (2) LTF). However the factual findings on which the award under appeal is based may be reviewed if one of the grievances mentioned at Art. 190 (2) PILA is raised against such factual findings or when some new facts or evidence are exceptionally taken into consideration in the framework of the Civil law appeal (judgment 4A_428/2011[6] of February 13, 2012 at 1.6 and the cases quoted).

In this case the Appellant argues that the Panel failed to accept a number of facts in violation of its right to be heard (appeal nr 36 to 49). The pertinence of the argument and consequently the necessity to supplement the factual findings on which the award under appeal rests will be reviewed with the argument based on Art. 190 (2) (d) PILA.

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[5] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/dismissal-of-an-appeal-to-set-aside-a-cas-award-on-the-grounds-o/

[6] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/dismissal-of-an-appeal-to-set-aside-a-cas-award-on-the-grounds-o/

4.
4.1
The right to be heard as guaranteed by Art. 182 (3) and 190 (2) (d) PILA is not different in principle from that which is consecrated in constitutional law (ATF 127 III 576 at 2c; 119 II 386 at 1b; 117 II 346 at 1a p. 347). Thus it was admitted with regard to arbitration that each party has the right to state its views on the facts that are essential for the disposition of the dispute, to submit its legal arguments, to propose evidence on pertinent facts and to participate in the hearings of the arbitral tribunal (ATF 127 III 576 at 2c; 116 II 639 at 4c p. 643).

As to the right to adduce evidence, it must have been exercised timely and according to the applicable formal requirements (ATF 119 II 386 at 1b p. 389). The arbitral tribunal may refuse to adduce evidence without violating the right to be heard if the evidence is unfit to persuade, if the fact is already established, if it is devoid of pertinence or also if the arbitral tribunal, by weighting the evidence in advance, reaches the conclusion that it has already made its opinion and that the result of the evidence proposed would not change it (judgment 4A_440/2010[7] of January 7, 2011 at 4.1). The Federal Tribunal may review such assessment of the evidence in advance only from the extremely narrow point of view of public policy. The right to be heard does not entitle a party to demand evidence unfit to prove the facts (judgment 4A_600/2010[8] of March 17, 2011 at 4.1).

The party taking the view that its right to be heard was violated or claiming any other procedural error must raise the issue in the arbitral proceedings immediately under penalty of forfeiture. It is indeed contrary to good faith to raise a procedural error only in the framework of the appeal against the arbitral award when it could have been raised during the proceedings (judgment 4A_150/2012[9] of July 12, 2012 at 4.1).

4.2
4.2.1 The Appellant argues that it was necessary for the CAS to deal with cases A and B in parallel on four grounds:

- Firstly because the two decisions emanated from the same Federation (FIFA), concerned the same parties, were based on the same facts, concerned claims arising from the same contract and required an answer to the same preliminary issue (*i.e.* that of the relationship between the Protocol and the Contract);
- Secondly because the Respondent's position had changed as to two pertinent issues between the two proceedings: on the one hand the Respondent had argued in case B that the Contract had to be renegotiated because it violated the FIFA Regulations prohibiting a club from signing a transfer agreement with a third party (in this case V._____) other than a club, while it had claimed in case A that the Contract was in reality a mere preliminary agreement to the Protocol; on the other hand, contrary to what it had done in case A the Respondent had no longer argued in case B that B._____ would have been assisted by lawyer C._____ when the Protocol was signed on July 18, 2007;

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[7] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/claim-of-award-ultra-petita-rejected-claim-of-violation-of-publi/

[8] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/cas-award-allocating-fees-and-costs-in-violation-of-the-right-to/

[9] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/federal-tribunal-reiterates-that-the-principle-of-pacta-sunt-ser/

- Thirdly because the CAS could not deny the pertinence for case A of the documents concerning the Contract concluded by the Respondent with the Player because it had upheld the Appellant's request concerning the production of the same documents in case B; indeed, the documents should enable the Appellant to show that the alleged "reciprocal concessions" that both contractual partners would have made according to the Respondent when they signed the Protocol – and in particular the renunciation to demand that the Appellant pay the € 200'000 to the Player pursuant to Art. 3.3 of the Contract – were nothing but new demands to the Appellant's exclusive detriment; in any event the documents showed that ultimately it was the Appellant that paid this amount to the Player;
- Fourthly because the CAS did not consider the fact that the Contract was signed by the Player as opposed to the Protocol.

According to the Appellant its request of March 26, 2012 (see B.b above) was based on these four grounds. Hence, by rejecting the request and refusing to take these new elements into account, the Panel would have disregarded some important factual circumstances in violation of its right to be heard. Therefore the formal nature of the guarantee would require the annulment of the award without further consideration, *i.e.* irrespective of whether or not the arguments raised could justify another solution on the merits.

4.2.2 The Respondent points out in its answer that at the hearing of January 25, 2012 the Parties expressly admitted that the proceedings had been conducted to their mutual satisfaction. It adds that the refusal to join the two cases was in accordance with Art. R52 of the Code and denies that its position would have changed from one case to the other, while pointing out that all allegedly new elements the Appellant claims were discussed at the hearing and finally the Respondent claims that the contractual documents to which the Appellant refers have no pertinence to determine whether the contractual parties made any reciprocal concessions or not.

For its part the CAS sets forth that the proceedings in case A were already "practically terminated" when the proceedings in case B started on January 30, 2012 as the former had been closed after the hearing of January 25, 2012 without the Parties raising any objection as to the manner in which it had been conducted. It adds that the Appellant had merely requested the two cases to be consolidated in the proceedings concerning case B but not in those concerning case A. Moreover the material requirements of Art. R52 of the Code were not met. Furthermore the two cases are in its view obviously of a different nature since case A concerns the payment of an additional transfer fee to the Respondent, subject to a condition, while case B concerned the payment of a possible contribution to a training club on the basis of the solidarity mechanism instituted by FIFA. According to the CAS the Appellant ultimately attempts to challenge the decision issued on the merits of case A under the disguise of an alleged violation of its right to be heard.

4.3

4.3.1 Pursuant to Art. 52 (4) of the Code, when a party files a statement of appeal concerning a decision with regard to which an appeal is already pending in front of the CAS, the President of the Panel, after consulting the parties, may decide to join the two proceedings. As the CAS pertinently points out in its answer to the appeal (nr 10 ff), the material requirement to which this provision subjects the consolidation of two cases is not met here as the appeals in cases A and B concern two different decisions, issued on November 16, 2010 (case A) and December 7, 2010 (case B) respectively. This is not the challenge by the Appellant (appeal nr 38). However compliance with this provision governing the

proceedings in front of the specialized arbitral jurisdiction would not by itself rule out a violation of the right to be heard, which is guaranteed by Art. 182 (3) PILA "irrespective of the procedure chosen" (see *mutatis mutandis* judgment 4A_274/2012[10] of September 19, 2012 at 3.2.1; also see: KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, 2nd ed. 2010, nr 839). Moreover, when its request for the cases to be joined was rejected, the Appellant submitted a new request on March 26, 2012, based on Art. R56 of the Code this time. Paragraph 1 of this provision would have empowered the President of the Panel to authorize the production of new documents or the submission of new evidence by way of an exception to the general rule.

With a view to addressing some of the arguments submitted in the CAS observations, it must be stated with the Appellant (reply nr 5) that it submitted its requests to the Panel before the award was issued, namely at a time when the proceedings in case A were not yet terminated; it is probably hardly compatible with the prohibition of excessive formalism to blame the Appellant for making them in the proceedings concerning case B and not in those concerning case A when it specifically explained in its letter of March 26, 2012 why some of them concerned the former; finally, the statements made by the Parties at the end of the hearing of January 25, 2012 could not be held against the Appellant as it challenges the refusal to grant some requests submitted after this hearing.

This being said, the issue is whether or not the Panel violated the Appellant's right to be heard by denying the procedural requests it submitted. This must be decided on the basis of the four grounds invoked (see 4.2.1 above). It goes without saying that the issue is not whether or not it was appropriate to deal with cases A and B separately although they could not be consolidated formally, because addressing such an issue would go beyond the limits that Art. 190 (2) PILA sets for judicial review by the Federal Tribunal when seized of an appeal against an international arbitral award.

4.3.2 Considered in the light of the aforesaid principles of case law (see above 4.1) and on the basis of the arguments submitted by the Respondent and by the CAS, the Appellant's arguments does not appear justified. Indeed this Court is in particular unable to persuade itself of the pertinence of the factual elements allegedly justifying the new evidentiary phase requested by the Appellant. Whilst there is no denying that cases A and B have much in common, deciding whether or not it was justified to wait until the end of the evidentiary phase in case B before deciding case A, in which evidence had already been adduced, is essentially a matter of opportunity, which is outside the scope of judicial review. The request made in this respect could moreover be based on other grounds than merely clarifying the debate and it could for instance seek to postpone the execution of the obligation in dispute. The possibility that contradictory awards may be issued in the two cases, while inherent to the refusal to consolidate cases A and B, did not imply by itself a violation of the Appellant's right to introduce evidence, which had not been restricted in any way during the evidentiary phase of case A.

Moreover it does not appear from the briefs submitted by the Respondent in case B – such as its appeal brief of February 3rd, 2012 – that its position would have changed between the two proceedings. To the contrary, it appears that it always took the view that the Protocol had substituted the Contract. Furthermore, as to the presence of lawyer C._____ next to B._____ when the Protocol was signed, the Appellant acknowledges in footnote 11 at page 12 of its brief that the Respondent had maintained that the lawyer was in attendance on July 18, 2007 to assist the President of the Appellant, albeit in another capacity than before (translator instead of counsel). Be this as it may, the Panel points

[10] Translator's note: Forthcoming publication on www.praetor.ch

out that it would reach the same conclusion whether or not B._____ was assisted by lawyer C._____ in this occasion (award nr 73b). Therefore the Appellant has no interest to have this issue clarified.

Moreover the Appellant wrongly claims that the production of the documents concerning the contracts between the Respondent and the Player would be apt to demonstrate the absence of the alleged reciprocal concessions made by the Parties in the Protocol signed on July 18, 2007. The circumstance it alleges, namely that the Respondent had undertaken in some internal agreements already concluded with the Player in 2005 to pay him the CHF 200'000, does not change the fact that removing from the Protocol the Appellant's undertaking to pay this amount to the Player was indeed a concession in the Appellant's favor. From a legal point of view, this suppression was tantamount to the debtor (*i.e.* the Respondent) renouncing the internal assumption of the debt agreed upon with the transferee (*i.e.* the Appellant) and consequently caused the extinction of the Respondent's claim against the Appellant on this basis. To determine whether or not there was a concession by the Respondent, it hardly matters to know who finally paid the CHF 200'000 to the Player. Incidentally the two documents dated October 24, 2007 and November 7, 2007, which the Appellant introduced to show that it paid (see reply nr 38) show that it was not necessary to adduce additional evidence In this respect.

Finally one does not see why the fact that the Contract was countersigned by the Player, as opposed to the Protocol, would be of any interest to clarify the relationship between the two agreements. The somewhat unclear explanations given by the Appellant in this respect in its reply (nr 34 to 47) could not in any event substitute for the lack of appropriate arguments in the appeal itself (appeal nr 49). Indeed a party may not resort to a reply to substitute insufficient arguments beyond the term to appeal (judgment 4A_14/2012[11] of May 2nd, 2012 at 4).

4.4
The Appellant's argument as to the alleged violation of the right to be heard must therefore be rejected.

5.
The Appellant argues moreover that the award under appeal would be inconsistent with procedural public policy.

According to constant case law, procedural public policy within the meaning of Art. 190 (2) (e) PILA, is merely an alternative guarantee that can be invoked only if none of the grounds for appeal at Art. 190 (2) (a) to (d) PILA comes into consideration. Conceived in this way, the guarantee is only an alternative protection for procedural errors which the legislator would have omitted when adopting the other letters of Art. 190 (2) PILA. It does not at all purport to enable a party to raise an argument falling within Art. 190 (2) (a) to (d) PILA that would be inadmissible for another reason (judgment 4A_488/2011[12] of June 18, 2012 at 4.5).

The Appellant disregards case law when submitting as an alleged violation of procedural public policy the very same arguments presented under Art. 190 (2) (d) PILA.

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[11] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/an-international-arbitral-tribunal-seating-in-switzerland-is-gen/

[12] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/the-federal-tribunal-leaves-undecided-the-issue-as-to-whether-an/

6.
In a last argument the Appellant seeks to demonstrate that the award under appeal would be inconsistent with substantive public policy because it would disregard the principle of *pacta sunt servanda*.

6.1
An award is inconsistent with substantive public policy within the meaning of Art. 190 (2) (a) PILA when it violates some fundamental principles of substantive law, such as fidelity to contracts to the extent that it is no longer consistent with the determining legal order and system of values.

The principle of *pacta sunt servanda*, within the restrictive meaning given by case law concerning the aforesaid provision, is violated only when the arbitral tribunal refuses to apply a contractual clause while admitting that it binds the parties or, conversely, if it imposes compliance with a clause of which it considers that it is not binding. In another words, the arbitral tribunal must have applied or refused to apply a contractual provision in contradiction with the results of its own interpretation as to the existence or the contents of the legal instrument in dispute. However the process of interpretation itself and the legal consequences logically derived therefrom are not governed by the principle of fidelity to contracts, so that they could not base an argument of violation of public policy. The Federal Tribunal has repeatedly emphasized that disputes arising from breaches of contract are almost all outside the scope of protection of the principle of *pacta sunt* servanda (judgment 4A_150/2012[13] of July 12, 2012 at 5.1).

6.2
According to the Appellant the CAS would have acknowledged the validity of the Contract while refusing to apply some of its clauses, in particular the one concerning the claim in dispute, thus violating the principle of fidelity to contracts.

It is not so. Rejecting, whether rightly or wrongly, the conclusion that a new contract had been concluded, the Panel held that the contract and the Protocol could coexist with some exceptions. One exception pertained to the fact that the Appellant's obligation to pay the additional compensation of € 750'000 to the Respondent was not subject to the same condition in the two agreements. The Panel thus sought to determine which of the two deeds should prevail. Pursuant to its analysis of the circumstances of the case, it reached the conclusion that it was the Protocol. Finding then that the condition at Art. 7 of the Protocol was met, it concluded that the claim in dispute existed and that the obligee, namely the Appellant had to comply with the corresponding obligation by paying the additional compensation to the creditor, *i.e*. the Respondent. In so doing it did not at all contradict the results of its own interpretation, no matter what the Appellant claims.

7.
The appeal must therefore be rejected. The Appellant shall pay the judicial costs (Art. 66 (1) LTF) and compensate its opponent for the federal proceedings (Art. 68 (1) and (2) LTF).

[13] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/federal-tribunal-reiterates-that-the-principle-of-pacta-sunt-ser/

Therefore the Federal Tribunal pronounces:

1.
The appeal is rejected.

2.
The judicial costs, set at CHF 9'500, shall be paid by the Appellant.

3.
The Appellant shall pay to the Respondent an amount of CHF 10'500 for the federal proceedings.

4.
This judgment shall be notified to the Representatives of the Parties and to the Court of Arbitration for Sport (CAS).

Lausanne October 1st, 2012.

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

The Presiding Judge: The Clerk:

Klett (Mrs.) Carruzzo

Keywords: *Decision concerning the Court of Arbitration for Sport ("CAS"), violation of due process (right to be heard), violation of public policy.*

Title: *Right to be heard not violated by refusal to consolidate proceedings.*