4A_604/2010[1]

Judgment of April 11, 2011

First Civil Law Court

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

Parties to the proceedings
Luis Fernandez,
Appellant,
Represented by Mr. Jean-Jacques Bertrand, but electing domicile in Mr. Gérard Montavon's firm,

v.

Fédération Internationale de Football Association (FIFA),
Respondent,
Represented by Mr. Christian Jenny,

Facts:

A.

A. Luis Fernandez is a French football coach. He is currently the manager of the Israel national team.

The Fédération Internationale de Football Association (FIFA) is an association as defined by art. 60 ff of the Swiss Civil Code (CC). FIFA's registered office is in Zurich.

[1] Translator's note : Quote as Luis Fernandez *v.* Fédération Internationale de Football Association (FIFA), 4A_604/2010. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch.

A.b On June 24, 2005, Luis Fernandez was hired as coach of the Al-Rayyan Sports Club, the football club of Doha (Qatar). On November 13 of that same year, he terminated his employment contract early with the consent of his employer, to join the Israeli club Beitar Jerusalem FC, chaired by Arcadi Gaydamak. As counterpart, he undertook to pay to the Qatari club the amount of €400'000. On the same day he was given the bank details of the Club for him to proceed with the payment of said amount.

Later on, a representative of Luis Fernandez received, by means of a fax sent by a company named Imperial Foundation based in Curacao (hereinafter: Imperial), the instruction to transfer said amount to a bank account in Geneva in the name of the company. On January 16, 2006, a transfer order for € 400'000 in favor of this company was given by a company named Amatti SA, in Seychelles.

A.c On February 22, 2006, Al-Rayyan Sports Club filed a claim with FIFA aimed, in particular, at obtaining from its former coach the payment of € 400'000 that he had committed to pay.

Alleging that he had already paid, Luis Fernandez submitted that the claim should be rejected.

In a decision dated March 13, 2008, the FIFA Players' Status Committee (PSC FIFA), finding that the payment had not been proven, ordered the French coach to pay to the Qatari club the amount of € 400'000 plus accrued interest within 30 days of notification of the decision.

Luis Fernandez appealed the decision before the Court of Arbitration for Sport (CAS). However, the case was struck off the record, by decision dated November 18, 2008 of the deputy President of the Appeals Arbitration Divisions of the CAS, as the advances on costs had not all been paid. A Civil law appeal filed by Luis Fernandez against this decision was dismissed, to the extent that the matter was capable of appeal, in a judgment of the Tribunal federal dated February 20, 2009[2], (case 4A_600/2008).

A.d On May 27, 2009, Al-Rayyan Sports Club requested from FIFA the opening of disciplinary proceedings against Luis Fernandez on the grounds that he still had not transferred the € 400'000, plus accrued interest, that he had been ordered to pay by the PSC FIFA, whose decision dated March 13, 2008 was final.

[2] Translator's note : an English version of the decision is available at www.praetor.ch

By decision rendered on November 26, 2009 and drafted in English, the Disciplinary Committee of FIFA (hereafter: CD FIFA), applying Art. 64 of the FIFA Disciplinary Code (hereafter: FDC), gave Luis Fernandez a final 60-day time limit to settle his debt, under penalty of an automatic suspension by FIFA of any football-related activity upon first demand of the creditor.

B.

On December 23, 2009, Luis Fernandez filed an appeal before the CAS to obtain the annulment of this decision. Preliminarily, he requested the CAS to grant a stay of enforcement and to postpone a ruling until the criminal complaint that he was about to file against Arcadi Gaydamak in Geneva was examined.

The Appellant did indeed file a criminal complaint on January 13, 2010 with civil claims in the criminal proceedings against the latter for embezzlement and/or fraud.

In his appeal brief of January 14, 2010, Luis Fernandez completed his submissions.

On January 18, 2010, the CAS ordered the stay of enforcement of the decision under appeal and FIFA did not oppose it.

The Respondent submitted that the appeal should be rejected in its answer dated February 11, 2010.

On September 3, 2010, the CAS panel, consisting of three arbitrators, issued its award in French. Dismissing the appeal, it confirmed the disciplinary decision under appeal, ordered that each party should bear its own costs except the filing fee paid by the Appellant. The reasons of the award shall be referred to below to the extent necessary to address the grievances raised by the Appellant.

C.

On October 28, 2010, Luis Fernandez filed a Civil law appeal before the Federal Tribunal, with a view to obtaining the annulment of the award.

FIFA submits that the appeal should be rejected to the extent that the matter was capable of appeal. As for the CAS, it did not submit an answer.

In a decision dated November 23, 2010, the President of the First Civil Law Court dismissed the request for a stay of enforcement. In a second decision dated November 26, 2010, she dismissed the Appellant's submission that the Respondent should file its briefs in French.

On March 10, 2011, the President of the First Civil Law Court drew the Parties' attention to a press release which stated that the Appellant would have settled his debt towards Al-Rayyan Sports Club, which had led FIFA to lift the suspension that it had ordered in the meantime against him. As a consequence, she requested them to indicate if this was true and to express their position as to the impact of this situation on the proceedings pending before the Federal Tribunal. In a letter dated March 11, 2011 from counsel, FIFA stated that the Appellant had indeed settled his debt towards the Qatari club after the grace period had expired, so that it had lifted the suspension ordered previously pursuant to the decision of November 26, 2009, by CD FIFA. In its opinion, the matter should therefore be declared incapable of appeal, failing a legal interest of the Appellant in having the award under appeal annulled. As for the Appellant, in a letter from counsel of March 22, 2011, confirmed on March 24, he stated that he had indeed paid the amount of € 484'855,55 to the Qatari club, but that he had been coerced to do so, as he ran the risk of not being able to exercise his professional activity failing such payment, so that he still had standing to appeal the award that confirmed the disciplinary decision which made him run such a risk.

Reasons:

1.
In the field of international arbitration, a Civil law appeal is allowed against the decisions of arbitral tribunals under the conditions set forth at Art. 190 to 192 PILA[3] (Art. 77 (1) LTF)[4].

1.1 The seat of the CAS is in Lausanne. At least one of the parties (in this case, the Appellant) did not have its domicile in Switzerland at the decisive time. The provisions of chapter 12 PILA are applicable accordingly (Art. 176 (1) PILA).

1.2 Relying on the facts described at C above, the Respondent argues that the Appellant has no standing to appeal (Art. 176 (1) LTF, in its version prior to January 1, 2011). According to the

[3] Translator's note: PILA is the most frequently used English abbreviation for the Federal Statute of December 18, 1987, on Private International Law, RS 291.

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

Respondent, as the French coach finally fulfilled the obligation the nonperformance of which – within the set time-limit – had led the CD FIFA to give him formal notice to pay – under penalty of suspension of any activity related to football – in a decision dated November 26, 2009 confirmed by the award under appeal, he could no longer invoke a personal, present and legally protected interest to have the Federal Tribunal examine whether the award had been rendered in violation of the guarantees arising from Art. 190 (2) PILA.

The issue is indeed delicate. Before addressing it, it should be pointed out that, as the debtor paid the creditor after the filing of his appeal, his interest to appeal may have disappeared, as a consequence, when the federal proceedings were already pending. Therefore there is no issue as to the matter being incapable of appeal but, as the case may be, it could be without object now (on this distinction, Florence Aubry GIRARDIN, in Commentaire de la LTF, nos 11 ff at Art. 32 LTF and Bernard Corboz, in op. cit., no. 28 at Art. 76 LTF).

In its decision dated November 26, 2009, confirmed by the CAS award under appeal, the CD FIFA did not impose a disciplinary fine to the Appellant; it simply granted him a grace period to settle his debt, under penalty of a suspension of any activity related to football. As he settled his debt, the Appellant does not run the risk of a suspension anymore. Therefore, in principle, he no longer has a present interest to the annulment of the award which confirmed the validity of the granting of a grace period and spelled out the consequence of the failure to act timely. Moreover, even if the Federal Tribunal annulled the award, the Appellant could not obtain the reimbursement of the amount paid to the Qatari club, as his obligation to do so was held pursuant to a final decision of March 13, 2008 by the PSC FIFA.

It is however difficult to exclude any remaining interest of the Appellant to the annulment of the award under appeal. Firstly, should it turn out that the CD FIFA should not have ordered the Appellant to perform within the grace period, but should have postponed its ruling until a final decision in the criminal proceedings that the Appellant intended to initiate in Geneva, and assuming that these proceedings revealed that the Qatari club had received the amount of € 400'000 with interest twice, the Appellant, in the event that he could not obtain the refund by the Club of the amount paid twice, could consider a claim against the Respondent arguing that if the decision of November 26, 2009 had not been issued, he would not have paid twice.
Secondly, the Parties' explanations, and in particular the letter of March 7, 2011, in which FIFA lifted the ban, show that the Appellant was in fact suspended between the moment when the award of

September 3, 2010 was issued and when he settled his debt. If the suspension resulted in a financial / moral damage for him for which he might seek compensation, the Appellant still has an interest to have the Federal Tribunal issue a finding, that the CAS violated the guarantees of Art. 190 (2) PILA by confirming the decision of the CD FIFA, which led to his suspension. Thirdly, the Appellant, could, in any case, argue a violation of his rights, if not on the merits, at least as to the issue of costs. Indeed, the award under appeal holds that the filing fee of CHF 500 shall be kept by the CAS; moreover, it declares that each party shall bear its own costs, while the Appellant submitted that they be borne by the Respondent.

Consequently it must be admitted that the appeal is not without object, even if the Appellant's interest is far from obvious.

1.3 The Respondent also questions that the appeal has been filed timely. In this regard, it points out that the award under appeal was notified to the Parties by fax of September 6, 2010. In its opinion, the brief filed by the Appellant on October 27, 2010 (recte: October 28) was filed after the statutory 30-day time-limit starting from the notification had expired (Art. 100 (1) LTF). Such objection is unfounded.

Pursuant to Art. 100 (1) LTF, the appeal against a decision must be filed with the Federal Tribunal within 30 days from the notification of the complete decision. This time limit cannot be extended (Art. 47 (1) LTF). In a recent decision (judgment 4A_392/2010[5] dated January 12, 2011, at 2.3.2), which refers to a precedent with the same conclusion (judgment 4A_582/2009[6] dated April 13, 2010 at 2.1.2, section not published in ATF 136 III 200), the Federal Tribunal held that a fax notification of a CAS international award does not start the time limit of Art. 100 (1) LTF: on the one hand, the handwritten signature could not be replaced by the signature of the original document, a copy of which is faxed to the addressees of the award (see, *mutatis mutandis*, ATF 121 II 252 at 3); on the other hand, a fax is generally not a means of evidencing notification.
In this case, the CAS office faxed to the Parties a copy of the award and informed them that they would receive the original award later. The original was communicated on September 27, 2010. The Appellant states without being contradicted that he received the envelope containing the original award on September 28, 2010. By filing, on October 28, 2010, a brief that satisfies the formal legal requirements (Art. 42 (1) LTF), he therefore acted within the statutory time limit.

[5] Translator's note: an English version is available at www.praetor.ch

[6] Translator's note: an English version is available at www.praetor.ch

There is therefore no reason not to entertain this appeal. The examination of the admissibility of the different grievances brought forward by the Appellant is reserved.

2.

The Federal Tribunal issues its decision on the basis of the facts established by the Arbitral tribunal (Art. 105 (1) LTF). It may not rectify or supplement the factual findings of the arbitrators of its own motion, even when the facts were established in a clearly inaccurate manner or in violation of the law (see art. 77 (2) LTF which rules out the applicability of art. 105 (2) LTF). However, as was the case under the Federal statute organizing courts [Loi fédérale d'organisation judiciaire] (see ATF 129 III 727 at 5.2.2; 128 III 50 at 2a and the cases quoted), the Federal Tribunal retains the faculty to review the facts on which the award under appeal is based if one of the grievances contained at Art. 190 (2) PILA is raised against the factual findings or if some new facts or evidence are exceptionally taken into consideration in the framework of the Civil law appeal (Art. 99 (1) LTF).

2.2

2.2.1 In a first section of his brief, the Appellant indicates that he will "restate the facts in summarized form". However, when doing so, he does not only repeat the factual findings contained in the award under appeal, but departs from them substantially without raising one of the exceptions allowed by the above mentioned case law. For instance, when he states that he paid the amount of € 400'000 on the Geneva bank account of Imperial on January 16, 2006, the Appellant departs from the corresponding factual finding of the arbitrators, according to which the transfer order for the aforesaid amount was given by a company named Amatti SA, based in Seychelles. This also applies to his claim that the PSC FIFA and the CD FIFA ordered him or invited him to pay the amount at issue "again" or "a second time". Based on the factual findings of the award of September 3, 2010, the Federal Tribunal cannot therefore consider these two statements as averred.

2.2.2 The Appellant also comes back to the "factual findings contained in the arbitral award" in the presentation of his arguments.

According to him, by requesting the Panel to postpone its ruling until a decision was rendered on his criminal complaint for fraud and embezzlement filed in Geneva, he had offered to prove a relevant fact within the disciplinary proceedings initiated by FIFA against him, that is, his status as victim of the criminal offense committed by the Qatari club or the Israeli club. Therefore, by not granting his

ad hoc request, the arbitrators allegedly violated "the procedural public policy protected by Art. 190 (2) (e), that is, in particular, the right to be heard or the right to evidence of the Appellant and the right to a fair trial..." (appeal, p. 5/6 no. 2 f.). The admissibility of such grievance, as it is presented, is already doubtful: not only does the Appellant ignore the subsidiary nature of procedural public policy (judgment 4P.105/2006 dated August 4, 2006 at 5.3 and the references), but he also relates this concept to another guarantee, that of the right to be heard, which is the object of a specific provision - Art. 190 (2) (d) PILA - to which he does not refer. Yet the Federal Tribunal only examines the grievances which were raised and reasoned in the appeal (Art. 77 (3) LTF). In any case, the Appellant does not question the argument of the Panel, based on a published decision (ATF 119 II 386 at 1c), by which the principle that criminal proceedings have primacy over civil proceedings is not an integral part of public policy within the meaning of Art. 190 (2) (e) PILA. He does not question either the alternative reason given by the arbitrators, according to which he did not demonstrate how the criminal complaint regarding in particular Arcadi Gaydamak was likely to have an influence on the proceedings initiated by Al-Rayyan Sports Club, nor the arbitrators' conclusion that the criminal proceedings initiated against the latter had no influence on the proceedings opposing FIFA to the Appellant. Insufficiently reasoned, the first part of the grievance must be dismissed.

In the second part of that same argument, the Appellant criticizes the Panel for having "violated [his] right to be heard, [his] right to evidence and [his] right to a fair trial [...] by refusing to address the relevant issues regarding his license in a way that is incompatible with procedural public policy as protected by Art. 190 (2) PILA" (appeal, p. 6 no. 4). Once again, one must point out that the Appellant confuses different guarantees contained in this provision. Moreover, the Appellant does not raise, in his brief, the grievance of lack of personal jurisdiction of the CAS. As he does not allege a violation of Art. 190 (2) (b) PILA, his criticism of the factual finding at issue is without object, since, even if it was founded, it would not lead to the annulment of the award, failing a corresponding grievance. The second part of the grievance at issue must therefore also be dismissed.

3.

The Appellant then alleges a breach of material public policy.

3.1 An award is contrary to material public policy when it violates some fundamental rules of material law to the point of no longer being consistent with the determining legal order and system of values; among such principles are, in particular, in the duty to abide by contracts, respecting the

rules of good faith, the prohibition of abuse of rights, the prohibition of discriminating or confiscatory measures and the protection of incapables (ATF 132 III 389 at 2.2.1).

3.2

3.2.1 In support of his argument as to a violation of material public policy, the Appellant first criticizes the CAS for ignoring the principles *in dubio pro reo*, *ne bis in idem and nullum crimen sine lege*. He then invokes economic freedom, the prohibition of imprisonment for debts and the rule of proportionality. The Appellant also invokes Art. 6 (1) of the International Covenant on Economic, Social and Cultural Rights dated December 16, 1966 (ICESCR; RS 0.103.1), insofar as it provides that states shall recognize the right to work and take appropriate steps to safeguard this right. He also refers to Art. 27 (2) of the Federal Constitution of the Swiss Confederation that guarantees the freedom of choosing and exercising one's profession. Finally, he relies on the maxim "no punishment without guilt" (appeal, p. 7 no. 7 at 11).

The mere listing of these grievances shows that the Appellant confuses the Federal Tribunal with a Court of Appeals which would supervise the CAS and freely review the merits of international arbitral awards issued by this private judicial body. Yet, such is not the role of the supreme judicial authority of the land when seized of an appeal as defined by Art. 77 (1) LTF, in which it is alleged that the award is incompatible with public policy as defined.

It is not sufficient to present a list of liberties, of treaty or constitutional rights and legal principles governing criminal proceedings and allege without further explanations that they are all part of material public policy, for it to be the case. Moreover the Appellant mixes material guarantees (the right to work, economic freedom, etc.) and procedural guarantees (*in dubio pro reo, ne bis in idem*, etc.) which he puts all into a single category (material public policy), which is not acceptable. As a consequence, the admissibility of his grievance as to a violation of Art. 190 (2) PILA appears doubtful to the least.

3.2.2 Moving to “the case at hand” (appeal, p. 8 f. no.), the Appellant then presents his own legal assessment of the circumstances at issue; however, he does this in an appellate manner, occasionally departing from the factual findings in the award under appeal and referring, most of the time without further explanation, to the list of principles and guarantees presented by him. Such an argument does not comply with the strict requirements regarding the reasoning of a Civil law appeal based on a violation of public policy within the meaning of Art. 190 (2) (e) PILA. Furthermore the following can be remarked as to the grievances the Appellant brings forward in that context.

When he alleges having been the victim of a fraudulent and deceptive scheme of the leaders of one of the aforesaid clubs and states that it is an unquestioned fact that he believed, in good faith, that he was settling his debt by ordering the transfer of € 400'000 to an account in Switzerland indicated by his former employer, the Appellant goes well beyond the factual findings of the Panel in the award in dispute (see above at 2.2.1).

The same objection can be raised, for the same reason, against his argument that he did not act faultily and did nothing wrong since he ordered the transfer of the above mentioned amount.

Moreover, the Appellant relies still on the same factual assumption, which was not established as true, when he alleges that his freedom to choose and exercise his profession was affected, as a consequence of the ban imposed on him until he settled his debt towards the Qatari club. Besides, he admits that one could find acceptable that an association suspends one of its members who did not settle a debt towards another member out of mere complacency, but argues that he, in good faith, tries to settle his debt but is a victim of a fraudulent scheme by one of the members of the association, should be treated differently. However, as has been pointed repeatedly, the second hypothesis contemplated by the Appellant is not the one which arises from the award under appeal.

In any case, besides the fact that the Appellant was able to settle his debt towards the Qatari club during these appeal proceedings, his claims that he would lack the financial means to do so and the dramatic consequences that a ban until the settlement of the debt would have on his football coach career are not proven. This is the reason for which the Appellant's application for a stay of enforcement was rejected.
In these circumstances, the argument of a violation of material public policy, should it be admissible, is unfounded.

4.
The appeal must accordingly be dismissed to the extent that the matter is capable of appeal. As a consequence, the Appellant shall pay the costs of the federal proceedings (Art. 66 (1) LTF) and the Respondent's costs (Art. 68 (1) and (2) LTF).

Therefore, the Federal Tribunal pronounces:

1.
The appeal is rejected to the extent that the matter is capable of appeal.

2.
The judicial costs, set at CHF 5,000, shall be paid by the Appellant.

3.
The Appellant shall pay to the Respondent an amount of CHF 6,000 as costs.

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

Lausanne, April 11, 2011

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

The Presiding Judge:	The Clerk:
Klett (Mrs)	Carruzzo