4A_394/2010[1]

Judgment of January 12, 2011

First Civil Law Court

Federal Judge KLETT (Mrs), Presiding,
Federal Judge CORBOZ,
Federal Judge ROTTENBERG LIATOWITSCH (Mrs),
Federal Judge KOLLY,
Federal Judge KISS (Mrs),
Clerk of the Court: M. CARRUZZO.

Essam El Hadary
Appellant,
Represented by Mr Léonard A. Bender

v.

1. Fédération Internationale de Football Association (FIFA)
Represented by Mr. Christian Jenny
2. Al-Ahly Sporting Club
Respondents

Facts:

A.

A.a Essam El Hadary is an Egyptian professional football player born on January 15, 1973. As a goal keeper he conducted most of his professional carrier with the Egyptian team Al-Ahly Sporting Club and was part of the National Egyptian Team more than a hundred times.

[1] Translator's note : Quote as Essam El Hadary *v.* Fédération Internationale de Football Association (FIFA) and Al-Ahly Sporting Club 4 A_394/2010. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch.

Al-Ahly Sporting Club is a professional football club belonging to the Egyptian Football Federation (EFF), itself a member of the Fédération Internationale de Football Association (FIFA).

A.b On January 1st, 2007 Essam El Hadary and Al-Ahly Sporting Club signed an employment contract valid until the end of the 2009-2010 season.

On February 15, 2008 the player entered into an employment contract with FC Sion, a Swiss professional football club, valid until the end of the 2010-2011 season.

The EFF refused to issue the International Transfer Certificate (ITC) to the Swiss Football Association (SFA).

On April 18, 2008 the single judge of the FIFA Players' Status Committee provisionally authorized the SFA to register Essam El Hadary as a player for FC Sion immediately. The decision reserved the outcome of the dispute between the Egyptian club and its player as to the circumstances in which their employment relationship had been terminated, a dispute to be decided by the Dispute Resolution Chamber (DRC) of FIFA.

A.c On June 12, 2008 Al-Ahly Sporting Club took Essam El Hadary and FC Sion in front of the DRC with a view to their being severally ordered to pay EUR 2 million for breach of contract and inciting to such a breach as well as other sport sanctions.

On April 16, 2009 the DRC ordered the Defendants severally to pay an amount of EUR 900'000.- to the Claimant. Moreover it suspended the player for four months from the beginning of the next season and enjoined FC Sion from recruiting any new players during the two registration periods after the award.

B.

On June 18, 2009 Essam El Hadary appealed the aforesaid decision to the Court of Arbitration for Sport (CAS) (CAS 2009/A/1881). He indicated that he was doing so only to avoid jeopardizing his rights whilst denying the jurisdiction of the CAS.

The same day FC Sion Association too filed an appeal against the aforesaid decision with the CAS yet without questioning the jurisdiction of the Arbitral Tribunal (CAS 2009/A/1880).

In its brief on appeal of July 10, 2009 Essam El Hadary mainly submitted that the arbitral proceedings should be stayed until a decision on the merits in the civil case he had initiated in front of a Zurich Court with a view to obtaining the annulment of the DRC decision pursuant to Art. 75 CC[2]. Alternatively he asked the CAS to issue an interlocutory decision by which it would find that it had no jurisdiction to entertain the appeal.

The CAS joined the two aforesaid arbitral proceedings as to the merits. Yet it decided to deal with the issues of jurisdiction and *lis pendens* separately. In an award of October 7, 2009 it rejected the defenses and found that it had jurisdiction to address the merits of the appeal made by Essam El Hadary.

Against that award the Egyptian player filed a Civil law appeal that the Federal Tribunal rejected in a decision of January 20, 2010 (case 4A_548/2009).

C.

After addressing both cases on the merits the CAS, composed of Mr Massimo Coccia, Chairman, Olivier Carrard and Ulrich Haas, arbitrators, issued a final award on June 1st, 2010. Partially admitting the appeal by Essam El Hadary it ordered the latter to pay USD 796'500.- with interest to Al-Ahly Sporting Club and banned him from any official game for four months from the beginning of the 2010-2011 season.

After examining the evidence the arbitrators held in short that the Appellant had not been able to establish that the employment contract binding him to the Egyptian club had been terminated by agreement between the parties. They then applied to the case at hand the criteria set forth at 17.1 of the Regulations on the Status and Transfer of Players adopted by FIFA (RSTP) to determine the amount owed to the Respondent by the Appellant, reducing that amount to USD 796'500.- instead of EUR 900'000.-. Pursuant to Art. 17.3 RSTP the Panel also issued a sporting sanction against the Appellant.

D.

On July 1st, 2010 Essam El Hadary filed a Civil law appeal with a view to obtaining the annulment of the June 1st, 2010 award.

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[2] Translator's note : CC is the French abbreviation for the Swiss Civil Code.

FIFA and the CAS submit that the appeal should be rejected. Al-Ahly Sporting Club submitted no answer within the time limit it had been given for that purpose.

The request for a stay of enforcement submitted by the Appellant was granted *ex parte* and subsequently rejected by decision of the Presiding Judge of October 12, 2010 and so was the request seeking that this case be joined with case 4A_392/2010 relating to the appeal filed by the FC Sion Association against the same award.

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 and French. In the brief submitted to the Federal Tribunal the Appellant used French. The answer by Respondent FIFA was in German. According to its practice the Federal Tribunal will adopt the language of the appeal and consequently issue its judgment in French.

2.

In the field of international arbitration a Civil law appeal is possible against the decisions of arbitral tribunals under the conditions set forth at Art. 190 to 192 PILA[5] (Art. 77 (1) LTF). Whether as to the object of the appeal, the standing to appeal, the time limit to appeal, the submissions made by the Appellant or the grievances raised in the appeal brief, none of these admissibility requirements raises any problems in this case. There is accordingly no reason not to address the merits of the appeal.

3.

The Appellant had raised a first argument based on Art. 190 (2) (a) PILA in connection with the presence of arbitrator Ulrich Haas within the Panel which issued the award under appeal. He had

[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.

[5] 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.

also sought the introduction of evidence in order to substantiate his argument. Yet in a letter of November 16, 2010 he withdrew the argument and the evidentiary request in connection thereto. There is accordingly no reason to examine the argument or to decide on the admissibility of the evidence proposed in its support.

4.

4.1 According to the Appellant the CAS would have "severely breached the mandatory principles of procedure mentioned at Art. 190 (2) (e) PILA". According to him the award under appeal would breach his right to be heard and the rule of equal treatment of the parties to the extent that the panel would have disregarded its minimal duty to examine and handle the pertinent issues. The Appellant specifically seeks to demonstrate that the arbitrators did not take into account the testimony by Abdel Zeaf that would establish that his departure from the Egyptian club was mutually agreed.

4.2 It is far from sure that the matter is capable of appeal in this respect. Indeed Art. 190 (2) (e) PILA, which the Appellant quotes, mentions no mandatory principle of procedure as it refers to the incompatibility of the award with public policy. It is actually letter (d) of the same provision that the Appellant should have invoked to seek a finding that the guarantees embodied at Art. 182 (3) PILA (equality between the parties and right to be heard in contradictory proceedings) had been breached. Yet it might be too formalistic to reject the argument simply for that reason as the Appellant specifically mentioned the procedural guarantees that the Panel would not have abided by. However there is no need to examine the issue more in depth as the grievance raised is unfounded anyway.

The Appellant argues that the CAS did not take into consideration the crucial testimony of Abdel Zeaf. Formulated in this way the argument is almost temerary. Indeed the Panel devoted three paragraphs of the award to analyzing that testimony (nr. 190 to 192); two of these are moreover quoted *expressis verbis* in the appeal brief (p. 9 ff). In reality the Appellant submits arguments of a purely appellatory nature to criticize the results of the analysis. By doing so he merely criticizes the way in which the arbitrators assessed the evidence. This disregards the fact that the assessment of the evidence, even if it be arbitrary, is not among the grounds for appeal contemplated by Art. 190 (2) PILA, irrespective from what perspective.

Consequently there is no evidence at all in this case of the alleged violation of the Appellant's right to be heard or of any unequal treatment that he would have suffered.

5.
The Appellant further argues that the Panel would have disregarded the principle of "contractual observance" and consequently issued an award inconsistent with public policy.

5.1 The substantive review of an international arbitral award by the Federal Tribunal is limited to the issue of the compatibility of the award with public policy (ATF 121 III 331 at 3a).

An award is inconsistent with public policy if it disregards the essential and broadly recognized values which, according to prevailing Swiss concepts, should constitute the basis of any legal order (ATF 132 III 389 at 2.2.3). It is contrary to substantive public policy when it violates some fundamental principles of material law to the extent that it is no longer consistent with the determining legal order and system of values; among such principles is the observance of contracts embodied in the Latin maxim *pacta sunt servanda*.

The rule of *pacta sunt servanda*, within the restrictive meaning it has according to case law relating to Art. 190 (2) (e) PILA is violated only if the arbitral tribunal refuses to apply a contractual clause whilst admitting that it binds the parties or, conversely, if it orders them to comply with a clause of which it considers that it does not bind them. In other words the arbitral tribunal must have applied or refused to apply a contractual provision in a manner contradictory with the result of its interpretation as to the existence or the contents of the legal instrument in dispute. Yet the interpretation process itself and the legal consequences logically drawn therefrom are not governed by the principle of observance of contracts so, they cannot be challenged on the basis of an alleged violation of public policy. The Federal Tribunal pointed out repeatedly that almost the entire realm of contractual disputes is outside the scope of the rule of *pacta sunt servanda* (judgment 4A_43/2010 of July 29, 2010 at 5.2 and the cases quoted).

5.2 Assessing the evidence in the record of this case the Panel held that the Appellant had unilaterally breached the employment contract he had with the Respondent club. On that basis it imposed the monetary and sporting sanctions foreseen by the *ad hoc* rules in case of breach of an employment contract without cause. Such a reasoning contains no internal contradiction at all. This suffices to rule out any violation of the rule of *pacta sunt servanda* within the restrictive meaning it

has in this context. Whilst disputing this, the Appellant really criticizes merely the basis of that reasoning, namely the findings as to the conditions under which he left the Egyptian club. He is not allowed to do so in an appeal against an international arbitral award.

Finally the Appellant's mere allegations that the award under appeal would be shocking in its result, fly in the face of equity and are tantamount "to a kind of sporting death" are entirely improper to establish the inconsistency of the aforesaid award with substantive public policy within the narrow meaning given by the aforesaid case law.

6.
The appeal must be rejected to the extent that the matter is capable of appeal. In such an outcome of the proceedings the judicial costs shall be borne by the Appellant (Art. 66 (1) LTF). Moreover he shall compensate FIFA for the costs of the federal judicial proceedings (Art. 68 (1) and (2) LTF). The Respondent club filed no answer and is not entitled to compensation.

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 10'000.-, shall be borne by the Appellant.

3. The Appellant shall pay to Fédération Internationale de Football Association (FIFA) an amount of CHF 12'000.- for the federal judicial proceedings.

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

Lausanne, January 12, 2011

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

The Presiding Judge: The Clerk:

KLETT (Mrs) CARRUZZO