

4A\_550/2012<sup>1</sup>

Judgment of February 19, 2013

First Civil Law Court

Federal Judge Klett (Mrs.), Presiding  
Federal Judge Kolly,  
Federal Judge Niquille (Mrs.),  
Clerk of the Court: Carruzzo

X. \_\_\_\_\_ SA,  
Represented by Mr. Michel Zen Ruffinen,  
Appellant,

*v.*

Y \_\_\_\_\_,  
Represented by Mr. A. \_\_\_\_\_, Chairman,  
Respondent,

Facts:

A.

A dispute in connection with the transfer of the professional football player D. \_\_\_\_\_ from Y. \_\_\_\_\_ to X. \_\_\_\_\_ SA opposes these two clubs. After various procedural moves, it found its conclusion in the Court of Arbitration for Sport (CAS).

In an award of August 20, 2012, the three member Panel constituted to handle the dispute upheld the appeal made by Y. \_\_\_\_\_ against the October 28, 2011, decision of the Appeal Committee of the [name of country omitted] Football Federation in the aforesaid case and ordered X. \_\_\_\_\_ SA to pay to the Appellant the amount of EUR 800'000 plus VAT, with interest at 5% yearly from July 21, 2011.

B.

On September 19, 2012, X. \_\_\_\_\_ SA (hereafter: the Appellant) filed a civil law appeal with the Federal Tribunal with a view to obtaining the annulment of the

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<sup>1</sup> Translator's note: Quote as X. \_\_\_\_\_ SA *v.* Y. \_\_\_\_\_, 4A\_550/2012. The original decision is in French. The text is available on the website of the Federal Tribunal [www.bger.ch](http://www.bger.ch)

aforesaid award. It also sought a stay of enforcement. Upon invitation by the Federal Tribunal, the Appellant filed a French translation of its brief written in English.

By presidential order of November 5, 2012, Y. \_\_\_\_\_ (hereafter: the Respondent) and the CAS were invited to state their positions as to the stay of enforcement. The Respondent did so in a timely manner and filed a brief in which it also answered the Appellant's arguments. The CAS it sent its file to the Federal Tribunal on November 23, 2012, without stating its position on the request for a stay.

Reasons:

1.

According to Art. 54 (1) LTF<sup>2</sup> the Federal Tribunal issues its decision in an official language,<sup>3</sup> 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. Before the CAS they used English. In the briefs sent to the Federal Tribunal they used French. According to its practice, the Federal Tribunal will adopt the language of the appeal and consequently issue its judgment in French.

2.

The seat of the CAS is in Lausanne. At least one of the parties (here both) did not have its domicile in Switzerland at the decisive time. The provisions of chapter 12 PILA<sup>4</sup> are accordingly applicable (Art. 176 (1)(PILA).

3.

In the field of international arbitration, a civil law appeal is permitted against the decisions of arbitral tribunals pursuant to the requirements of Art. 190 to 192 PILA (Art. 77 (1) PILA). These requirements are met in this case and there is no reason not to address the appeal. A review of the admissibility of the grievances raised in the appeal is reserved.

4.

The Appellant mainly argues that the CAS interpreted the agreements concerning the transfer of the aforementioned player in disregard the true intentions of the contracting parties and ignoring the statements of the key witness in the case. In particular, it criticizes the manner in which the Panel analyzed Art. 5 of the Addendum to the

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

<sup>3</sup> Translator's note: The official languages of Switzerland are German, French, and Italian.

<sup>4</sup> 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.

August 30, 2004, transfer agreement between the two clubs and the player to be transferred.

#### 4.1

An award is incompatible with public policy when it disregards the essential and broadly recognized values which, according to prevailing concepts in Switzerland, 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 such an extent that it is no longer compatible with the determining legal order and system of values; among such principles is the sanctity of contracts expressed by the Latin principle of *pacta sunt servanda*.

Within the restrictive meaning it has been given by case law concerning Art. 190 (2) (e) PILA, *pacta sunt servanda* is violated only if the arbitral tribunal refuses to apply a contractual clause while acknowledging that it binds the parties or, conversely, if it imposes compliance with a contractual clause which it considers does not bind the parties. In other words the arbitral tribunal must have applied or refused to apply a contractual provision in contradiction with the result of its interpretation as to the existence or the contents of the legal deed in dispute. However, the process of interpretation as such and the legal consequences logically drawn therefrom are not governed by the principle of sanctity of contracts, so they cannot form the basis of an argument of violation of public policy. The Federal Tribunal has emphasized many times that almost all disputes derived from breaches of contracts are outside the scope of protection of the principle of *pacta sunt servanda* (judgment 4A\_276/2012<sup>5</sup> of December 6, 2012, at 3.1).

#### 4.2

The Panel interpreted the contractual agreements and, more precisely, Art. 5 of the Addendum as meaning that the Respondent had the right to demand the payment of EUR 800'000 plus VAT and interest from the Appellant. It then ordered the Appellant, in the operative part of the award, to pay this amount and its supplements to the Respondent. In doing so, it issued a decision perfectly consistent with the result of its interpretation of the contractual provisions and, in particular, of the Addendum clause in dispute.

On the basis of the principles of case law recalled above, it is therefore in vain that the Appellant criticizes the result of this interpretation. It is equally in vain that he criticizes the assessment by the Arbitrators of the statements of the key witness in the case.

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<sup>5</sup> Translator's note: Full English translation at [http://www.swissarbitrationdecisions.com/stipulated-facts-do-not-bind-court-arbitration-sport-sport-sanctions?search=%224a\\_276%2F2012%22](http://www.swissarbitrationdecisions.com/stipulated-facts-do-not-bind-court-arbitration-sport-sport-sanctions?search=%224a_276%2F2012%22)

The argument as to a violation of substantive public policy is therefore manifestly unfounded.

5.

In a second argument the Appellant appears to question the jurisdiction of the CAS due to the alleged existence of an arbitral tribunal that the [name of country omitted] Football Federation instituted and to which the Respondent should have submitted its appeal, instead of seizing the CAS.

The argument developed by the Appellant to substantiate this grievance is hardly comprehensible and furthermore it is based on statements that do not correspond to the factual findings in the award under appeal and on some evidence not submitted to the Arbitrators. Be this as it may, the Appellant must be confronted with the finding at nr 40 of the award under appeal, according to which the jurisdiction of the CAS was not disputed (“*The jurisdiction of the CAS, which is not disputed...*”<sup>6</sup>). Thus it cannot in good faith raise an *a posteriori* challenge of the jurisdiction of the CAS after becoming aware of the award issued against it.

6.

This being so, the appeal can only be rejected to the limited extent that the matter is capable of appeal.

The request for a stay of enforcement therefore becomes moot.

7.

The Appellant loses and it shall pay the costs of the federal proceedings (Art. 66 (1) LTF). The Respondent was not represented by counsel and is therefore not entitled to costs for the observations it made as to the stay of enforcement.

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.

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

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<sup>6</sup> Translator's note: In English in the original text.

Lausanne February 19, 2013.

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

The Presiding Judge:

The Clerk:

Klett (Mrs.)

Carruzzo