4A_684/2014[1]

Judgment of July 2, 2015

First Civil Law Court

Federal Judge Kiss (Mrs.), Presiding
Federal Judge Klett (Mrs.)
Federal Judge Hohl (Mrs.)
Clerk of the Court: Leemann

Club A._____,
Represented by Dr. Nicolà Barandun,
Appellant

v.

B._____,
Represented by Mr. Sébastien Besson,
Respondent

Facts:

A.
A.a. Club A._____ (Claimant, Counter-Defendant, Appellant) is an Egyptian football club playing in the highest league in Egypt. It is a member of the Egyptian Football Association (EFA), which belongs to the Fédération Internationale de Football Associations (FIFA).

B._____ (Defendant, Counter-Claimant, Respondent) is a professional football player who was active during the relevant time in the case at hand. He is a British and Ghanaian citizen.

A.b. On July 2, 2008, the parties entered into an employment contract for three seasons which provided for the following, among other things:

[1] Translator's Note: Quote as Club A._____ *v.* B._____, 4A_684/2014.
The original text of the decision is in German. It is available on the website of the Federal Tribunal, www.bger.ch.

> The Club agreed that the Player will join football team for the total amount of: (only Three million four hundred thousands Euro)
> Distributed on the duration of the years of the contract.
> *First Season amount of: (one million Euro).
> Advance payment: amount of 250000 Euro represents 25% of the value of the contract for the season settled on 2/7/2008 & 50% on monthly ten instalments maximum settled as follows:
> First instalment: amount of (250000 Euro).
> (only two hundred and fifty thousands Euro settled on 5/7/2008)
> Second instalment: amount (250000 Euro).
> (only two hundred and fifty thousands Euro settled on 1/1/2009 ...
> & 25% settled at the end of the season according to the proportion of the participation of the player. In playing the proportion of 80% of the number of matches will be considered the rate which the player is due for these amounts (25%) completely. The entry of the Player in the list of the match is considered participation in it."[2]

Also on July 2, 2008, the parties entered into an additional agreement in which the following points were noted:

> 2.1 The 25% dues of the Player settled at the end of each season as per the terms and conditions of the Contract shall be conditional upon the Player being available for participating in at least 80% of the matches in that season.
> ...
> 2.4 Paragraph (8) of Clause Five of the Contract entitled 'Commitments of the Club towards the Player' shall be amended to read as follows:
> If the player does not receive his due instalment within 14 business days after the due date, the issue will be submitted to the committee of player affairs for its determination.
> ...
> 2.8 The Player can get a house and a car of a reasonable choice to be paid for by the Club.[3]

A.c. On July 14, 2008, Club A._____ paid Player B._____ a gross amount of EUR 500'000 by check which – after deduction of EUR 100'000 in taxes and a membership fee of the national federation of EFA of EUR 34'000 – corresponded to a net payment of EUR 366'000.

At the same time, Club A._____ paid first for the stay in a hotel and then on August 10, 2008, EUR 24'000 for accommodation in a house. On September 24, 2008, B._____ entered into a lease agreement for a new house for the period from October 1, 2008, to September 30, 2010.

B._____ stayed away from training for several days in October 2008. On October 11, 2008, he took part in a qualifier with the Ghanaian national team. On October 15, 2008, against the will of Club A._____, he played in a friendly match against South Africa. Club A._____ took a payroll deduction of EGP 75'000 for these absences.

On October 17, 2008, B._____ missed a championship match.

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[2] Translator's Note: In English in the original text.
[3] Translator's Note: In English in the original text.

On October 26, 2008, Club A._____ played a championship match against C._____ in which B._____ too participated. Due to the generally weak performance and the lack of commitment of the whole team, Club A._____ sanctioned all players with a 4% reduction of their salaries; the payroll deduction concerning B._____ was accordingly EUR 40'000.

On November 18, 2008, B._____ was banned for the three following games and fined EGP 20'000 (corresponding to EUR 2'666) as a consequence for conduct during a football match on November 14, 2008, and that amount was to be deducted from the Player's salary by Club A._____ directly and paid to the EFA. Due to the ban, Club A._____ imposed an additional payroll deduction of EUR 72'202.

Subsequently, Club B._____ remitted several checks; it remained disputed, however, if and to what extent the outstanding debts were paid in this way.

In the middle of March 2009, B._____ returned to England. In a letter of March 28, 2009, his lawyer demanded that Club A._____ pay the amounts contractually due by March 31, 2009, at the latest. In a letter of April 1, 2009, Club A._____ stated that it terminated the July 2, 2008, employment contract without notice.

A.d. On May 29, 2009, Club A._____ sued in the FIFA Dispute Resolution Chamber submitting that B._____ should be ordered to pay EUR 3'408'892.40 for unjustified termination of the contract. He filed a counterclaim and asked for EUR 3'467'460 for payments in arrears in damages for breach of contract.

In a decision of June 28, 2013, the Dispute Resolution Chamber rejected the claim. Instead, it upheld the counterclaim in part and ordered Club A._____ to pay EUR 189'767 for arrears and EUR 1.4 million for damages (both with interest added).

B.
On December 10, 2013, Club A._____ appealed the decision of the FIFA Dispute Resolution Chamber of June 28, 2013, to the Court of Arbitration for Sport (CAS) and made the following submissions (adjusted during the proceedings):

> A). To fully accept the present appeal against the Decision of the FIFA Dispute Resolution Chamber dated 28 June 2013.
>
> B). Consequently, to adopt an award annulling said decision and declaring that:
> 1). The appealed Decision passed on 28 June 2013 in Zurich, Switzerland, is fully set aside and
> 2.1). The Player terminated with no just cause the Employment Contract it had signed with A._____,
> 2.1.1). As consequence of the above to state that the Respondent shall not be entitled to receive any financial amount from the Appellant following to its termination of the Employment Contract.

2.1.2). As consequence of the above to order the Respondent to pay to the Appellant a compensation in the amount of 3,525,000.00 Euros (Three Million Five Hundred and Twenty-Five Thousand Euro only).

OR, IN THE ALTERNATIVE

2.2) In the unlikely event that the Panel decides that the Appellant was in breach of contract, to mitigate the indemnification according to point 27 to 34 of the present Appeal Brief.

C). To fix the sum of 20,000 CHF to be paid by the Respondent to the Appellant, to help the payment of its legal fees and costs.

D). To condemn the Respondent to the payment of the whole CAS administration costs and the Arbitrators fees.

E). To order the Player to pay an additional 5% annual interest on the amounts due to the Appellant as from the date of the breach of the Employment Contract as from the date of the breach of the employment contract with no just cause, i.e. 1 April 2009.[4]

In his answer of April 9, 2014, the Counter-Claimant submitted that the appeal should be rejected and the decision under appeal confirmed.

In an arbitral award of October 31, 2014, the CAS upheld the appeal in part and substituted the FIFA Dispute Resolution Chamber decision with its arbitral award: It found that B._____ terminated the employment contract with cause on April 1, 2009, as a consequence of the contract violations by Club A._____ and ordered the Club to pay EUR 152'799 and USD 30'000 for arrears and EUR 654'736 and USD 66'000 in damages for breach of contract (both with added interest). All other submissions were rejected by the Arbitral Tribunal.

C.
In a civil law appeal, Club A._____ submits that the Federal Tribunal should annul the CAS arbitral award of October 31, 2014, and send the matter back to the Arbitral Tribunal for a new decision.

The Respondent submits that the matter is not capable of appeal; in the alternative, that it should be rejected. The CAS submits that the appeal should be rejected insofar as the matter is capable of appeal.

The Appellant submitted a reply to the Federal Tribunal and the Respondent a rejoinder.

Reasons:

[4] Translator's Note: In English in the original text.

1. According to Art. 54(1) BGG,[5] the decision of the Federal Tribunal is issued in an official language,[6] as a rule in the language of the award under appeal. When the award is in another language, the Federal Tribunal resorts to the official language used by the parties. The award under appeal is in English. As this is not an official language and the parties used various languages before the Federal Tribunal, the judgment of the Federal Tribunal shall be issued in the language of the appeal brief, in accordance with practice.

2.
In the field of international arbitration, a civil law appeal is admissible under the requirements of Art. 190-192 PILA[7] (SR 291) (Art. 77(1)(a) BGG).

2.1. The seat of the Arbitral Tribunal is in Lausanne in this case. Both parties had their domicile or their seat outside Switzerland at the decisive time (Art. 176(1) PILA). As the parties did not explicitly waive the application of Chapter 12 PILA, its provisions are applicable (Art. 176(2) PILA).

2.2. Only the grievances listed in Art. 190(2) PILA are admissible (BGE 134 III 186[8] at 5, p. 187; 128 III 50 at 1a, p. 53; 127 III 279 at 1a, p. 282). According to Art. 77(3) BGG, the Federal Tribunal reviews only the grievances that are raised and reasoned in the appeal brief; this corresponds to the duty to provide reasons in Art. 106(2) BGG as to the violation of constitutional rights and of cantonal and intercantonal law (BGE 134 III 186[9] at 7, p. 187 with references). Criticism of an appellate nature is inadmissible (BGE 134 III 565[10] at 3.1, p. 567; 119 II 380 at 3b, p. 382).

2.3. The Federal Tribunal bases its judgment on the factual findings of the arbitral tribunal (Art. 105(1) BGG). This applies to the findings as to the factual situation at the origin of the dispute and as to those concerning the course of the proceedings, *i.e*. the findings as to the facts of the case and in particular the submissions of the parties, their factual allegations, legal arguments, statements in the proceedings and offers of evidence, the contents of a witness statement, of an expert report or the findings during a visual inspection (BGE 140 III 16 at 1.3.1 with references). The Federal Tribunal may not rectify or supplement the factual findings of the arbitral tribunal even when they are blatantly inaccurate or rely on a violation of the law within the meaning of Art. 95 BGG (see Art. 77(2) BGG, ruling out the applicability of Art. 97 BGG and of Art. 105(2) BGG). However, the Federal Tribunal may review the factual findings of the arbitral award under appeal when some admissible grievances within the meaning of Art. 190(2) PILA are raised

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[5] Translator's Note: BGG is the German abbreviation for the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173.110.

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

[7] 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.

[8] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties

[9] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties

[10] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/extension-of-arbitration-clause-to-non-signatories-case-of-a-gua

against such factual findings or when new evidence is exceptionally taken into consideration (BGE 138 III 29[11] at 2.2.1, p. 34; 134 III 565[12] at 3.1, p. 567; 133 III 139 at 5, p. 141; each with references). Whoever wishes to claim an exception to the rule that the Federal Tribunal is bound by the factual findings of the arbitral tribunal and seeks to rectify or supplement the facts on this basis must show, with reference to the record, that the corresponding factual allegations were made in the arbitral proceedings in accordance with procedural rules (BGE 115 II 484 at 2a, p. 486; 111 II 471 at 1c, p. 473; each with references).

2.4. The Appellant disregards that the Federal Tribunal is bound by the findings in the award under appeal when his legal argument is preceded by a detailed statement of facts in which it presents the background of the legal dispute and of the proceedings from its point of view and departs, at least partially, in this respect from the factual findings of the Arbitral Tribunal or expands them without claiming any substantiated exceptions from the rule that they are binding. The corresponding allegations shall be disregarded.

3.
The Appellant argues that the Arbitral Tribunal decided an issue it was not presented with (Art. 190(2)(c) PILA).

3.1. It argues that it was the only one to appeal the June 28, 2013, decision of the FIFA Dispute Resolution Chamber. The Respondent filed no appeal although his submissions had not been upheld completely. In the FIFA proceedings, the Respondent sought payment of expenses for its rental from November 2008 to March 2009; the Dispute Resolution Chamber decided, however, that he had already been adequately compensated for his rental costs. The Respondent's submissions in the arbitral proceedings were limited to the rejection of the appeal and the confirmation of the June 28, 2013, decision under appeal. The Respondent accepted in this way the decision of the FIFA Dispute Resolution Chamber and also the negative decision to reject his alleged claim for expenses concerning rental in the period from November 2008 to March 2009. Yet, the CAS compelled the Appellant to pay USD 30'000 to reimburse some allegedly unpaid rental costs during this period and thus addressed an issue which had already been finally adjudicated in the FIFA proceedings and was not appealed by any party. In doing so, the Arbitral Tribunal awarded the Respondent more than what he sought and the requirements of Art. 190(2)(c) PILA are consequently met.

3.2.
3.2.1. According to Art. 190(2)(c) PILA, an arbitral award may be appealed when then arbitral tribunal decided issues which were not submitted to it or when it left some submissions undecided. According to the French wording of the legal text, one may challenge the award because the arbitral tribunal awarded a

[11] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s

[12] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/extension-of-arbitration-clause-to-non-signatories-case-of-a-gua

party more or something else than what it sought (BGE 116 II 639 at 3a, p. 642). According to the federal case law, there is no violation of the principle *ne eat iudex ultra petita partium* when the claimant's submission is legally assessed in a completely or partly different manner from the submissions of the parties, as long as this is covered by the legal submission (BGE 120 II 172 at 3a, p. 175; judgment 4A_440/2010[13] of January 7, 2011, at 3.1; 4A_428/2010 of November 9, 2010, at 3.1; 4P.134/2006 of September 7, 2006, at 4; see also BGE 130 III 35 at 5, p. 39). However, the arbitral tribunal remains bound to the subject and the scope of the submissions in particular when the claimant itself limits or qualifies the claims in its legal submissions (judgment 4A_440/2010[14] of January 7, 2011, at 3.1; 4A_464/2009 of February 15, 2010, at 4.1; 4A_220/2007 of September 21, 2007, at 7.2; see also judgment 4A_307/2011 of December 16, 2011, at 2.4).

3.2.2. Contrary to the view contained in the appeal brief, it is not clear why the Arbitral Tribunal awarded the Respondent more than what he sought. The FIFA Dispute Resolution Chamber awarded in its decision of June 28, 2013, EUR189'767 and EUR 1.4 million (both with interest) for payments due and damages for breach of contract, whilst the Arbitral Tribunal awarded him EUR 152,799 and USD 30'000 (both with interest) for payments due and EUR 654'736 and USD 66'000 as damages (both with interest). Whether in total or as to the payments due, the Arbitral Tribunal thus awarded the Respondent smaller amounts than the FIFA Dispute Resolution Chamber. The Appellant rightly does not submit that the Arbitral Tribunal was prevented from awarding the Respondent a partial amount in another currency than in Euros.

Contrary to what the Appellant appears to assume, the Respondent, being satisfied with the amounts awarded by the Dispute Resolution Chamber, was neither obliged nor entitled – for lack of standing – to appeal the corresponding decision simply because the decision making body did not completely follow his submissions as to various items. In particular, the Appellant disregards that according to federal case law, there is no decision *ultra petita* when the arbitral tribunal does not ultimately award more than what was sought but instead assesses the various components of the claim differently from the claimant (judgment 4P.95/1995 of May 6, 1996, at 3b with reference to BGE 119 II 396 at 2, p. 397 concerning individual heads of damage; see also BGE 123 III 115 at 6d, p. 119; judgment 4A_654/2014 of April 16, 2015, at 4.2; 4A_27/2012 of July 16, 2012, at 5.3).

The appeal ground of Art. 190(2)(c) PILA is therefore not made out, contrary to the Appellant's view.

4.
The Appellant argues a violation of the right to be heard in several respects (Art. 190(2)(d) PILA).

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[13] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/claim-of-award-ultra-petita-rejected-claim-of-violation-of-publi

[14] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/claim-of-award-ultra-petita-rejected-claim-of-violation-of-publi

4.1. It argues that the Arbitral Tribunal failed to address several decisive points in its view and did not address, or addressed insufficiently, some of its submissions:

The Appellant had submitted that the Respondent received a check of EUR 20'000 dated January 19, 2009; yet, the Arbitral Tribunal did not review whether or not the check had been cashed by the Respondent although the corresponding payment would have correspondingly reduced the Appellant's obligations. Nor did the Arbitral Tribunal address its argument that due to the Respondent's unauthorized contacts with the media a disciplinary fine of EGP 25'000 (approx. EUR 3'000) could have been imposed. The award under appeal did not then sufficiently explain why the sanction for the Respondent's unauthorized absences was merely for EGP 10'000 (EUR 1'333) and not EGP 75'000 (EUR 10'000) as requested. Just as little was to be found in the arbitral award as to why the Arbitral Tribunal "suddenly" adopted an amount of just EUR 52'202 instead of EUR 55'202 in connection with the ban imposed by the Egyptian Federation for improper behavior. Whilst initially reaching the conclusion in the award that the description of the requirements for the quarterly salary payments in the employment contract contained a two-step test, as argued in the appeal brief, the Arbitral Tribunal did not address the question as to whether or not the first part of the test was satisfied. Finally the Arbitral Tribunal wrongly left open the issue in dispute between the parties as to whether the Respondent actually attempted to cash the check of EUR 75'132 received on January 12, 2009, in January 2009 or whether it was only attempted in March 2009.

4.2. Art. 190(2)(d) PILA only permits an appeal on the basis of the mandatory procedural rules according to Art. 182(3) PILA. According to this, the arbitral tribunal must, in particular, guarantee the right of the parties to be heard. With the exception of the right to reasons, this corresponds to the constitutional right found in Art. 29(2) BV[15] (BGE 130 III 35 at 5, p. 37 *f.*; 128 III 234 at 4b, p. 243; 127 III 576 at 2c, p. 578 *f.*). Case law deduces from this, in particular, the right of the parties to state their views as to all the facts important to the judgment, to present their legal arguments, to prove their factual allegations important to the decision with appropriate means submitted in a timely manner and the proper format, to participate in the hearings, and to access the record (BGE 30 III 35 at 5, p. 38; 127 III 576 at 2c, p. 578 *f.*; each with references).

Whilst the right to be heard in contradictory proceedings according to Art. 182(3) and Art. 190(2)(d) PILA does not include the right to obtain reasons of an international arbitral award according to well-established case law (BGE 134 III 186[16] at 6.1 with references), this imposes a minimal duty upon the arbitrators to review and address the issues important to the decision. The arbitral tribunal breaches this duty when, due to oversight or misunderstanding, it fails to address some legally relevant submissions, arguments, evidence, or offers of evidence of a party. Yet, this does not mean that the arbitral tribunal must expressly address each and every submission of the parties (BGE 133 III 235 at 5.2 with references).

4.3. The Appellant's arguments disregard that the right to be heard does not entitle it to a materially accurate decision, which is why it is not a matter for the Federal Tribunal to review whether the Arbitral

[15] Translator's Note: BV is the German abbreviation for the Swiss Federal Constitution.
[16] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties

Tribunal took into consideration all items in the record and understood them properly. The substantive review of an international arbitral award by the Federal Tribunal is legally limited to the issue of the compatibility of the arbitral award with public policy (Art. 190(2)(3) PILA; BGE 127 III 576 at 2b, p. 578; 121 III 331 at 3a, p. 333).

The Arbitral Tribunal did not overlook that, among other things, the Appellant claimed to have given a check of EUR 20'000 to the Respondent at the beginning of the year 2009, but rather mentioned the corresponding submission several times in its award. There is no violation of the minimal duty of the Arbitrators to review and address the issues important to the decision in the fact that subsequently the Arbitral Tribunal no longer mentioned this check expressly, but in assessing the evidence submitted it held the receipt of a check of EUR 25'000 was proved and assumed an amount of EUR 118'799 for the payment due in January. The same applies to the alleged disciplinary fine of EGP 25'000 (approx. EUR 3'000) for unauthorized contact with the media, which is mentioned in the award under appeal but not expressly taken into account as to its impact on the computation of damages. In this respect as well, the Appellant takes the view that the Arbitral Tribunal should have reduced the payment due up to the corresponding amount, but it fails to show how it would have been denied the possibility to participate in the case, to influence it, and to present its point of view.

As to the disciplinary fine in the amount of EGP 75'000 (EUR 10'000), the Appellant also arrives at a different result to the award under appeal. The Arbitrators did not disregard that it had taken the view in the arbitral proceedings that it was entitled to impose a fine of EGP 75'000 for unauthorized absences in accordance with its internal guidelines. Contrary to its submissions, they held that according to the determining list of sanctions, only an amount of EGP 10'000 (EUR 1'333) was legal for missing four days of training. Under such circumstances, it cannot be argued that the Arbitral Tribunal disregarded its minimal duty to review and address the issues important to the decision; instead, in view of the reasons of the award, it must be assumed that the Appellant's submission was merely rejected as to the fine for unauthorized absences and set to an amount in accordance with the internal guidelines.

With regard to the salary deduction as a consequence of the ban ordered by the Egyptian Football Federation for inappropriate behavior, the Appellant disregards that according to well-established case law, there is no entitlement to reasons of an award that may be drawn from the principle of the right to be heard within the meaning of Art. 190(2)(d) PILA. In the award under appeal the Arbitral Tribunal mentions the Appellant's allegation that the amount of the fine set at EUR 72'202 at first was reduced by 12'000 on December 18, 2008, and further by EUR 5'000 on February 25, 2009, and this did not breach the minimal duty of reviewing and addressing the issues important to the decision as the Arbitral Tribunal simply did not follow the Claimant factually and found a proved salary deduction of EUR 52'202. Whether or not this finding is accurate cannot be reviewed in the appeal proceedings as the substantive assessment of an international arbitral award by the Federal Tribunal is limited to its compatibility with public policy, which the Appellant rightly does not argue. In this respect as well, the Appellant does not succeed in showing to what extent it was prevented from presenting its point of view during the arbitral proceedings.

The same applies to the issue decided by the Arbitral Tribunal as to the requirements of the contractually agreed quarterly salary payments. The Appellant shows no violation of the right to be heard but criticizes, in a prohibited manner, the interpretation of the contract by the Arbitral Tribunal when it argues that the Arbitral Tribunal rightly assumed a two-step test but applied it wrongly, describes the Arbitrators' approach as "contradictory," and submits its legal view to the Federal Tribunal, according to which, in view of the limited number of matches he played, the Respondent simply had no salary claim for the 2008/2009 season.

The Appellant shows no violation of the right to be heard either when it argues that the Arbitral Tribunal wrongly left open the disputed question as to when the Respondent tried to cash the January 12, 2009, check. In this respect as well, it submits unacceptable criticism of the contents of the award under appeal. Be this as it may, the Appellant assumes in its argument that its additional grievances must be upheld, which has proved to be inaccurate.

The argument that the Arbitral Tribunal would have violated the right to be heard proves to be completely unfounded.

5.
The appeal is unfounded and must be rejected insofar as the matter is capable of appeal. In such an outcome of the proceedings, the Appellant must pay the costs and compensate the other party (Art. 66(1) and Art. 68(2) BGG).

Therefore the Federal Tribunal Pronounces:

1.
The appeal is rejected insofar as the matter is capable of appeal.

2.
The court costs of CHF 12'000 shall be paid by the Appellant.

3.
The Appellant shall pay CHF 14'000 to the Respondent for the federal judicial proceedings.

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

Lausanne, July 2, 2015

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

Presiding Judge:	Clerk:
Kiss (Mrs.)	Leemann