4A_654/2011[1]

Judgment of May 23, 2012

First Civil Law Court

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

Football Association of Serbia,
Represented by Dr. Michael Mráz,
Appellant,

v.

M._____,
Represented by Mr Antonio Rigozzi, Mr Andreas Zagklis and Mr Christian Keidel,
Respondent,

Facts:

A.
A.a M._____ (the Claimant, Respondent in the appeal) is a professional football coach. After his career as a player he began a career as a coach in 1988 and was active in Spain for a long time, among other as coach of Real Saragossa, Real Madrid, Atlético Madrid and FC Barcelona. M._____ has been domiciled in Spain for almost 30 years and acquired Spanish citizenship in addition to his Serbian citizenship. The football association of Serbia (Appellant, Defendant in the other proceedings) is based in Belgrade and is the national association for the sport of football in the Republic of Serbia and as such a member of the Fédération Internationale de Football Association (FIFA) as well as of the Union des Associations Européennes de Football (UEFA).

A.b On August 25, 2008 M._____ entered into an employment contract with the football association of Serbia pursuant to which he was retained as chief coach of the Serbian national team during the round of qualifications (September 1st, 2008-November 30, 2009) for the FIFA-World Cup 2010.

After the national team qualified for the World Cup the parties discussed a continuation of their collaboration in December 2009. On December 16, 2009 they signed a new employment contract

[1] Translator's note: Quote as Football Association of Serbia *v.* M._____, 4A_654/2011. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch

for the period from January 1st, 2010 until June 30, 2012 that substituted the August 25, 2008 agreement. The new contract provided monthly compensation of € 70'000 between January 2010 and October 2011 and a monthly amount of € 100'000 for the balance of the contractual period, payable in the national Serbian currency, the Dinar (RSD), computed according to the exchange rate of the National Bank of Serbia on the day of payment. A bonus was moreover agreed in the form of a marketing fee meant to recognize the Claimant's efforts resulting in the successful positioning of the Serbian football association and additional income to the latter as a consequence of qualifying for the FIFA World Cup 2010. The marketing fee was set at € 660'000 payable in two installments at the end of 2009 and 2010 respectively.

Article 13 of the Employment Contract of December 16, 2009 provided the following for the resolution of disputes:
"*In case of a dispute arising out of this contract, the competent bodies of the FAS, UEFA and CAS (Court of Arbitration for Sports) in Lausanne, Switzerland shall have jurisdiction thereof. The parties hereto agree that the party initiating the procedure shall be entitled to choose the competent body before which the procedure will be instituted*"[2].

A.c On July 3, 2010 the Claimant was banned– a so called "touchline ban[3]" – for four games and fined CHF 14'000 by the FIFA Disciplinary Committee for insulting the referee during a game against Australia in the World Cup. On July 29, 2010 the FIFA Appeal Committee confirmed this decision. On August 15, 2010 the Defendant paid the fine for the Claimant.

The Parties then discussed an amendment to the contractually agreed compensation without success. The Defendant submitted in particular to the Claimant an Addendum to the employment contract on September 10, 2010, containing new compensation rules with a request that it should be signed within five days from receipt of the document.

On September 15, 2010 counsel for the Claimant submitted their comments to the proposed amendment via e-mail. On the same day the Defendant terminated the Claimant's employment contract without notice for an allegedly blatant breach of contractual obligations among other reasons.

B.
B.a On September 20, 2010 M._____ initiated arbitration proceedings in the Court of Arbitration for Sport (CAS), essentially seeking (and modifying its submissions during the proceedings) that the Football Association of Serbia should be ordered to pay the net amount of € 2'150'000, to be transferred in Dinars based on the average exchange rate of the Serbian National Bank and to pay compensation in the amount of € 280'000 according to Art. 337c (3) of the Swiss Code of Obligations, both with interest at 5%:
"*1. to order the Respondent to pay to the Claimant a net amount of EUR 2,150,000 in Dinar counter value at the average rate of the National Bank of Serbia on the following due dates:*
a. EUR 70,000 in Dinar counter value of 11 August 2010;

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

b. EUR 70,000 in Dinar counter value of 11 September 2010;
c. EUR 300,000 in Dinar counter value of 15 September 2010;
d EUR 1,710,000 in Dinar counter value of 15 September 2010.
2. to order Respondent to pay interest at the Swiss statutory rate of 5 per cent per annum as follows:
a. as of 11 August 2010, on the amount of EUR 70,000 in Dinar counter value;
b. as of 11 September 2010, on the amount of EUR 70'000 in Dinar counter value;
c. as of 15 September 2010, on the amount of EUR 300,000 in Dinar counter value;
d. as of 15 September 2010, on the amount of EUR 1,710,000 in Dinar counter value.
3. to order Respondent to pay to Claimant an indemnity of EUR 280,000 in Dinar counter value at the average rate of the National Bank of Serbia on the date of CAS' decision (Article 337c para. 3 of the Code of Obligations);
..."[4]

B.b In an award of September 23, 2011 the CAS held that the termination of the employment contract by the Defendant was illicit and essentially upheld the claim:
"*1. The relief requested by M._____ against the Football Association of Serbia is partially upheld.*
2. The Football Association of Serbia is ordered to pay to M._____, net of any taxes, the following amounts in RDS counter value at the selling exchange rate of the National Bank of Serbia prevailing on the dates indicated herein below:
a. EUR 70,000 plus 5% interest p.a. as of 11 August 2010 until the date of effective payment;
b. EUR 70,000 plus 5% interest p.a. as of 11 September 2010 until the date of effective payment;
c. EUR 1,710,000 plus 5% interest p.a. as of 15 September 2010 until the date of effective payment.
d. EUR 140,000 plus 5% interest p.a. as of 15 September 2010 until the date of effective payment.
3. The Football Association of Serbia is ordered to pay to M._____, net of any taxes, EUR 300,000 plus 5% interest p.a. as of 15 September 2010 until the date of effective payment.
..."[5]

C.
In a Civil law appeal the Defendant submits that the Federal Tribunal should annul the CAS arbitral award of September 23, 2011.
The Respondent submits that the appeal should be rejected to the extent that the matter is capable of appeal. The CAS asked that the appeal be rejected.
The Appellant filed a reply with the Federal Tribunal on February 17, 2012, the Respondent a rejoinder on March 7, 2012.

D.
A stay of enforcement applied for by the Appellant was rejected by the Federal Tribunal on January 16, 2012.

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

Reasons:

1.
According to Art. 54 (1) BGG[6] the Federal Tribunal issues its decision in an official language[7], as a rule in the language of the decision under appeal. Should the decision be in another language, the Federal Tribunal resorts to the official language used by the parties. The decision under appeal is in English. As this is not an official language and the parties used different languages in front of the Federal Tribunal, the judgment of the Federal Tribunal shall be issued in the language of the appeal in conformity with practice.

2.
In the field of international arbitration a Civil law appeal is possible pursuant to the requirements of Art. 190-192 PILA[8] (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 seat or domicile outside Switzerland at the relevant time. As the parties did not exclude in writing the provisions of chapter 12 PILA they are applicable (Art. 176 (1) (2) PILA).

2.2
Only the grounds for appeal limitatively listed in Art. 190 (2) PILA are admissible (BGE 134 III 186 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 brought forward and reasoned in the appeal brief; this corresponds to the duty to submit reasons contained in Art. 106 (2) BGG as to the violation of constitutional rights or of cantonal or intercantonal law (BGE 134 III 186 at 5 p. 187 with references). Criticism of an appellate nature is inadmissible (BGE 134 III 565 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 Court may not rectify or supplement the factual findings of the arbitral tribunal, even when they are obviously wrong or based 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 and 105 (2) BGG). However the Federal Tribunal may review the factual findings of the award under appeal when some admissible grievances within the meaning of Art. 190 (2) PILA are brought forward against such factual findings or exceptionally when new evidence is taken into consideration (BGE 138 III 29[9] at 2.2.1 p. 34; 134 III 565 at 3.1 p. 567; 133 III 139 at 5 p. 141; with references). Whoever wishes to depart from the

[6] Translator's note: BGG is the German abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173 110.

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

[8] 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.

[9] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s/

principle that the Federal Tribunal is bound by the factual findings of the lower Court and seeks to rectify or supplement the factual findings on this basis, must show with reference to the record of the proceedings that the corresponding factual allegations were already made in the arbitration proceedings in accordance with procedural rules (see BGE 115 II 484 at 2a p. 486; 111 II 471 at 1c S. 473; with references).

3.
The Appellant argues that the Arbitral tribunal wrongly accepted jurisdiction (Art. 190 (2) (b) PILA) as the dispute to be adjudicated could not be submitted to arbitration.

3.1
He argues in this respect that he would have pointed out in the arbitral proceedings already that according to Art. 49 (1) of the Serbian Private International Law, two parties may confer jurisdiction to a foreign Court only when at least one of them is a foreign citizen or company.

In the case at hand both Parties are domiciled in Serbia as appears clearly from the first page of the Employment Contract. The submission to a foreign arbitral tribunal was accordingly prohibited by mandatory Serbian law and the Parties could not have provided for a foreign arbitral tribunal to resolve the dispute arising from their employment contract.

The case at hand would be exclusively an internal Serbian dispute; both Parties would have had their seat or domicile in Serbia "at the pertinent time" and "the background – the exercise of the function as coach of the Serbian national football team by the Respondent – could not be 'more Serbian' irrespective of the international competitions".

Moreover there is no doubt that as a consequence of the clear violation of Art. 49 (1) of the Serbian International Private Law, the award under appeal will not be enforceable in Serbia on the basis of Art. V (1) (a) and V (2) (a) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (SR 0.277.12). No party would be served by an unenforceable award; this would violate the principle that an (arbitral) tribunal should provide the parties with effective justice, namely a solution to their dispute.

3.2
The argument that the matter in dispute is not arbitrable is to be examined as a jurisdictional issue (Art. 190 (2) (b) PILA) (BGE 133 III 139 at 5 p. 141; 118 II 353 at 3a p. 355). The Federal Tribunal exercises free judicial review as to jurisdiction according to Art. 190 (2) (b) PILA, including the preliminary substantive issues from which the determination of jurisdiction depends. Even in the framework of a jurisdictional appeal however, this Court reviews the factual findings of the award under appeal only when some admissible grievances within the meaning of Art. 190 (2) PILA are brought against such factual findings or exceptionally when new evidence is taken into account (BGE 138 III 29[10] at 2.2.1 p. 34 with references). Furthermore it must be kept in mind that according to the case law of the Federal Tribunal, the defense of inarbitrability – as the jurisdictional defense

[10] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s/

(Art. 186 (2) PILA) – must be raised at the earliest stage and before the merits are addressed; otherwise the corresponding grievance is no longer admissible in front of the Federal Tribunal, (judgment 4A_370/2007 of February 21st, 2008 at 5.2.2; 4P.217/1992 of March 15, 1993 at 5, not published *in* BGE 119 II 271).

3.3
The Appellant's arguments in support of its view that the matter is not arbitrable are not supported by the binding factual findings of the award under appeal – a point accurately made in the answer to the appeal. The award merely finds that the Respondent has had his legal domicile in Spain for 30 years and this is mentioned in the title of the judgment as well. No factual findings are to be taken from the award under appeal that would lead to the conclusion of a Serbian domicile of the Respondent at a certain point in time, let alone at the time the contract was concluded. To the extent that the Appellant argues in front of the Federal Tribunal that this would result from the signed contract, the argument is not admissible as this allegation is not connected with a specific grievance against the factual findings. Furthermore the Appellant does not show to what extent it would have already relied on the alleged Respondent's domicile in Serbia in the arbitration proceedings and disputed jurisdiction on this basis. The Appellant's argument that the CAS would have lacked jurisdiction as a consequence of Art. 49 (1) of the Serbian Private International Law due to the Respondent's Serbian domicile "at the relevant time", is not admissible.

3.4
The argument that the matter is not arbitrable would have been unfounded anyway. After arguing in the arbitral proceedings that the Parties could not submit their dispute to an arbitral tribunal because it is mandatory for a dispute as to an employment contract to be adjudicated by a State Court, the Appellant rightly no longer questioned the arbitrability of employment disputes in front of the Federal Tribunal (see BGE 136 III 467 at 4.2 p. 470 ff) and moreover confirms that such disputes are also arbitrable according to Serbian law. Neither does it argue that it or the Respondent would have no standing to act according to Serbian law, or generally not be capable to be a party in a Court or in arbitral proceedings; it rather relies on the "purely domestic contractual situation" causing the case at hand to be incapable of submission to a foreign arbitral tribunal according to Serbian law. To the extent that the Appellant supports its argument by claiming that the case at hand has no connection to another country or to another legal order, it relies on certain specificities of the case. Whether or not they exclude arbitrability is decided according to Art. 177 (1) PILA as the CAS adequately found and as the Appellant does not really dispute.

The aforesaid provision contains no substantial regulation of arbitrability; the legislature consciously renounced adopting a conflict rule in order to avoid the difficulties in determining the applicable law that would be connected with such a solution (BGE 118 II 353 at 3a p. 355). That the CAS had to adjudicate a proprietary claim within the meaning of Art. 177 (1) PILA by way of a damage claim resulting from the breach of an employment contract, is rightly not questioned by the Appellant. To the extent that this provision is applicable pursuant to Art. 176 (1) PILA the arbitrability of the matter cannot be questioned because it would be a purely internal matter from the point of view of another state. Admittedly, the case law of the Federal Tribunal considered the possibility to reject the arbitrability of a specific matter to the extent that foreign provisions provide for the mandatory jurisdiction of State Courts and should be taken into consideration from the point of view of public

policy (Art. 190 (2) (e) PILA) (BGE 118 II 353 at 3c p. 357; judgment 4A_370/2007 of February 21st, 2008 at 5.2.2). However the Appellant does not show that this would be the case of the provision of the Serbian IPR law it quotes. To the contrary, it states that the case at hand could be adjudicated by a Serbian arbitral tribunal; it is merely the adjudication by a foreign court or arbitral tribunal that would be excluded by mandatory Serbian law. The Appellant does not show any violation of a legal principle belonging to public policy (see BGE 132 III 389 at 2.2.1 with references; judgment 4A_558/2011[11] of March 27, 2012 at 4.1) which would rule out the adjudication of the dispute by the CAS in the case at hand due to a connection to another specific state.

Neither can the Appellant be followed when it argues that the alleged unenforceability of the CAS award under appeal in the Republic of Serbia should be taken into account. According to the intent of the legislature, which opted for a substantial regulation of arbitrability in full conscience, it must be accepted that some awards of international arbitral tribunals sitting in Switzerland finding a matter arbitrable on the basis of Art. 177 (1) PILA may conceivably be unenforceable in a specific country (BGE 118 II 353 at 3c p. 357 and at 3d p. 358).

4.
The Appellant argues a violation of public policy in connection with Swiss law being applied by the Arbitral tribunal (Art. 190 (2) (e) PILA).

4.1
The substantive judicial review of an international arbitral award by the Federal Tribunal is limited to the issue as to whether the award is compatible with public policy or not (BGE 121 III 331 at 3a p. 333). The adjudication of a substantive claim breaches public policy only when it disregards some fundamental legal principles and becomes incompatible with the important, generally recognized value order which according to the prevailing opinion in Switzerland, should be the basis of any legal order. Among such principles are the sanctity of contracts (*pacta sunt servanda*), the prohibition of abuse of rights, the general principle of good faith, the prohibition of expropriation without compensation, the prohibition of discrimination, the protection of incapables and the prohibition of beyond measure commitments (Art. 27 (2) ZGB[12]) when the latter represents an obvious and severe infringement of privacy. The award under appeal is annulled only when its result and not only its reasons are contrary to public policy (BGE 132 III 389 at 2.2 p. 392 ff with references; judgment 4A_558/2011[13] of March 27, 2012 at 4.1 also at 4.3.1 and 4.3.2).

4.2
The Appellant disregards the notion of public policy when he argues that the Arbitral tribunal arbitrarily assumed that the Parties had agreed that Swiss law should be applied, that it wrongly applied Art. 187 (1) PILA or that the reasons of the award contradict its own factual findings. Public policy is not the same as arbitrariness (BGE 132 III 389 at 2.2.2 p. 393) and the ground for appeal of Art. 190 (2) (e) PILA does not purport to sanction wrong or inadequate application of the law

[11] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/landmark-decision-of-the-swiss-supreme-court-international-arbit/
[12] Translator's note: ZGB is the German abbreviation for the Swiss Civil Code.
[13] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/landmark-decision-of-the-swiss-supreme-court-international-arbit/

governing the matter (BGE 132 III 389 at 2.2.2 p. 394) or a contradiction in the reasons of the award (judgment 4A_320/2009[14] of June 2, 2010 at 4.3; 4A_612/2009[15] of February 10, 2010 at 6.2.2; 4A_464/2009[16] of February 15, 2010 at 5.1) also, the Appellant does not show a violation of the general principle of good faith on which a violation of public policy could be based when it criticizes in an appellate manner the specific agreement of the Parties in Art. 13 of the Employment Contract of December 16, 2009 which, contrary to the award under appeal, could not be interpreted as an agreement to Swiss law being applied. Moreover it merely raises an inadequate application of Art. 187 (1) PILA without showing to what extent accepting that the Parties indirectly chose Swiss law, which according to the award under appeal, originates from the arbitral system chosen by the Parties – specifically R 45 of the CAS Code – would breach a legal principle belonging to the broadly recognized order of values that should be the basis of any legal order according to the opinion prevailing in Switzerland.

Contrary to what is claimed in the appeal, the fact that § 13 of the Employment Contract alternatively provided for jurisdiction of other bodies whose procedural rules do not contain a provision corresponding to R 45 of the CAS Code as to the applicability of Swiss law, which means that the law applicable to a specific dispute is conceivably different depending upon which body is called upon, does not show a violation of public policy by the Arbitral tribunal. According to the aforesaid contractual provision, the choice of the specific arbitral institution was specifically reserved to the Claimant. The insecurity alleged by the Appellant as to the governing law originates in the specific rules adopted by the Parties, in particular the lack of a direct choice of law. The argument that the Arbitral tribunal would have disregarded the general principle of good faith is unjustified. The argument that the arbitral award under appeal would be inconsistent with public policy (Art. 190 (2) (e) PILA) is unfounded.

5.
The Appellant argues that the Arbitral tribunal decided an issue that was not in front of the Arbitrators (Art. 190 (2) (c) PILA).

5.1
He states that pursuant to § 3 of the award the Arbitral tribunal awarded the Respondent an amount of € 300'000 with interest as from September 15, 2010, thus an amount in Euros. However the Respondent applied for a payment in Serbian Dinars in the Arbitration proceedings. Therefore the Arbitral tribunal violated the rule "*ne eat iudex ultra petita partium*".

5.2
Pursuant to Art. 190 (2) (c) PILA, according to the French version of the law, an award may be appealed when the arbitral tribunal awarded to a party more or something else than what it was claiming (BGE 116 II 639 at 3a p. 642). The submission related to the contractually agreed marketing fee referred to the payment of € 300'000, to be remitted in Serbian Dinars (€ 300'000 in

[14] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/facts-not-reviewed-by-federal-tribunal-claims-of-violation-of-du/

[15] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/limited-judicial-review-of-awards-independence-of-cas-reaffirmed/

[16] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/no-waiver-of-the-right-to-appeal-to-the-federal-tribunal-in-the-/

Dinars counter value[17]). The Arbitral tribunal considered that the marketing fee according to Art. 9 of the Employment Agreement was due in Euros and – as opposed to the salary – was payable in this currency too, thus rendering unnecessary a conversion into the national currency. Since the Respondent sought the payment of € 300'000 it cannot be claimed that the Arbitral tribunal awarded more than the submissions in the award when it awarded the Euro amount without the conversion additionally requested.

Contrary to the opinion advanced in the appeal, the Arbitral tribunal did not award the Respondent more or something else than what he sought. The grievance that the CAS would have violated the principles embodied in Art. 190 (2) (c) PILA is unjustified.

The appeal proves to be unfounded and is to be rejected to the extent that the matter is capable of appeal. In view of the outcome of the proceedings the judicial costs shall be borne by the Appellant and compensation must be paid to the other party (Art. 66 (1) and Art. 68 (2) BGG).

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 18'000, shall be borne by the Appellant.

3.
The Appellant shall pay to the Respondent an amount of CHF 20'000 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 May 23, 2012

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

The Presiding Judge: The Clerk:

Klett (Mrs.) Leemann

[17] Translator's note: In English in the original text.