4A_476/2012[1]

Judgment of May 24, 2013

First Civil Law Court

Federal Judge Klett (Mrs), Presiding
Federal Judge Corboz,
Federal Judge Niquille (Mrs),
Clerk of the Court: Leemann

X._____ S.A. *de* C.V. ,
Represented by Mr. Philipp J. Dickenmann and Mr. Reto Hunsperger,
Appellant,

v.

A._____,
Represented by Mr. Christophe Henzen and Mr. Heinz Germann,
Respondent

Facts:

A.
A.a
X._____ S.A. *de* C.V. (hereafter "X._____"), in [name of city omitted], Mexico (the Defendant, the Appellant), is a professional football club and as such a member of the Mexican Football Federation. A._____ (the Claimant, the Respondent) is a Brazilian football player domiciled in [name of city omitted], Brazil.

A.b
On July 23, 2007, the parties entered into an employment contract by which A._____ undertook to play for X._____ during the 2007/2008, 2008/2009, and 2009/2010 seasons. A yearly salary of USD 500'000 was agreed as compensation, payable in 10 installments of USD 50'000. Furthermore, the football club promised to the player a transfer bonus of USD 400'000 in total, payable in three installments (USD 120'000, USD 140'000, and USD 140'000).

Between August and December 2008, and between December 2008 and May 2009, A._____ was lent to a Brazilian football club pursuant to an agreement between the parties. At the end of the 2008/2009 season – the last installment of the transfer bonus amounting to USD 140'000 not having yet been paid – X._____ told the player that it wanted to terminate the contract before its term was completed. The parties then signed an Agreement of Early Termination of Contract on August 30, 2009, providing for a one-off payment of MXN 1'300'000 in the player's favor, payable by September 17, 2009.

[1] Translator's note: Quote as X._____ S.A. *de* C.V. *v.* A._____, 4A_476/2012. The original decision is in German. The text is available on the website of the Federal Tribunal: www.bger.ch.

Should the compensation for termination fail to be paid within the 10 days following September 17, 2009, the Agreement of Early Termination of Contract would be invalid.

B.

B.a

On March 11, 2010, A._____ filed a claim with the Dispute Resolution Chamber of the Fédération International de Football Association (FIFA). The latter decided on November 20, 2010, that it did not have jurisdiction .

B.b

On February 17, 2011, A._____ filed a claim with the Conciliation and Resolution of Controversies Commission (CRCC) of the Mexican Football Federation.

On July 26, 2011, the CRCC decided that it could not adjudicate the claim because the time limit to submit a claim according to Mexican employment law and Art. 11 of the CRCC Regulations had run out.

B.c

On August 16, 2011, the Claimant appealed the CRCC decision of July 26, 2011, to the Court of Arbitration for Sport (CAS).

On February 10, 2012, the CAS advised the parties that the President of the Appeals Arbitration Division had appointed Ms. Margarita Echeverria Bermúdez, attorney at law, as sole Arbitrator.

After hearing the parties, the Arbitrator decided to waive a hearing.

B.d

In an arbitral award of June 26, 2012, the Arbitrator upheld the Claimant's appeal (operative part § 1), she annulled the CRCC decision of July 26, 2011, (operative part § 2), and ordered X._____ to pay USD 590'000 to A._____, with interest at 5% from September 28, 2009, (operative part § 3). Furthermore, she decided on costs and compensation (operative parts § 4 and § 5) and rejected all other submissions (operative part § 6).

C.

In a civil law appeal the Defendant asks the Federal Tribunal to annul the CAS award of June 26, 2012, and to find that the Arbitrator was appointed in violation of the Rules, or, in the alternative, that the Arbitrator had no jurisdiction and that consequently the proceedings should be conducted before a three-member arbitral tribunal. In the further alternative, the arbitral award of June 26, 2012, should be annulled and the matter returned to the CAS – or, alternatively, to the Arbitrator – for a finding that the Arbitrator was appointed in violation of the rules, or alternatively for a finding that the Arbitrator had no jurisdiction and for the appointment of a three-member tribunal. In the even further alternative, §§1-5 of the award under appeal should be annulled and the matter sent back to the Arbitrator for a new decision.

The Respondent submits that the appeal should be rejected to the extent that the matter is capable of appeal. The CAS submits that the appeal should be rejected.

The Appellant sent a reply to the Federal Tribunal on April 17, 2013. In a letter of May 6, 2013, the Respondent waived the right to a rejoinder.

D.
In a decision of December 12, 2012, the Federal Tribunal upheld the Respondent's request for security for costs and asked the Appellant to post bond in the amount of CHF 9'500 as a security for the Respondent's costs. The corresponding amount was paid to the Office of the Federal Tribunal in a timely manner.

Reasons

1.
According to Art. 54(1)BGG,[2] the decision of the Federal Tribunal is issued in an official language,[3] as a rule in the language of the decision under appeal. When the decision is in another language, the Federal Tribunal resorts to the official language chosen by the parties. The award under appeal is in English. As this is not an official language, and the parties used German before the Federal Tribunal, the judgment of the Federal Tribunal shall be issued in German.

2.
In the field of international arbitration, a civil law appeal is allowed under the requirements of Art. 190-192 PILA[4] (SR 291) (Art. 77(1)(a) BGG).

2.1
The seat of the Arbitral Tribunal was in Lausanne in this case. Both parties had their seat or domicile outside Switzerland at the relevant time. As the parties did not waive in writing the provisions of Chapter 12 PILA, they are accordingly applicable (Art. 176(1) and (2) PILA).

2.2
A civil law appeal within the meaning of Art. 77(1) BGG may, in principle, seek only the annulment of the decision under appeal (see Art. 77(2) BGG, which rules out the applicability of Art. 107(2) BGG, to the extent that this empowers the Federal Tribunal to decide the matter itself). To the extent that the dispute concerns the jurisdiction or the composition of the arbitral tribunal, there is an exception to the effect that the Federal Tribunal may itself decide the jurisdiction of the arbitral tribunal or lack thereof and decide as to the challenge to the arbitrator concerned (BGE 136 III 605[5] at 3.3.4, p. 616, with references).

2.3
Only those grievances listed in Art. 190(2) PILA are admissible (BGE 134 III 186[6] 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

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

[3] The official languages of Switzerland are German, French, and Italian.

[4] PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291

[5] Translator's note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/node/332.

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

the grievances that are raised and reasoned in the appeal brief; this corresponds to the duty to provide reasons in Art. 106(2) BGG for the violation of constitutional rights and of Cantonal and inter-Cantonal law (BGE 134 III 186[7] at 5, p. 187, with reference). Criticism of an appellate nature is not permitted (BGE 134 III 565[8] at 3.1, p. 567; 119 II 380 at 3b, p. 382).

2.4
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 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 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 against these factual findings, or when new evidence is exceptionally taken into account (BGE 138 III 29[9] at 2.2.1 p. 34; 134 III 565[10] at 3.1, p. 567; 133 III 139 at 5, p. 141; each with references). The party claiming an exception to the rule that the Federal Tribunal is bound by the factual findings of the arbitral tribunal and seeking to have the factual findings rectified or supplemented on this basis must show, with reference to the record, that the corresponding factual allegations were raised during 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).

2.5
The Appellant relies, in several respects, on factual allegations that are not based on the factual findings in the award under appeal. Yet, it raises no sufficient grievances concerning the facts but merely submits that its new factual allegations should be considered as admissible new facts.

Its view that the award under appeal required new factual allegations cannot be shared. The Appellant itself submits to the Federal Tribunal that it already stated its position to the CAS as to the proposal that a sole arbitrator be appointed in a submission of October 18, 2011. Moreover it appears from the award under appeal that the parties were informed of the appointment of Ms. Margarita Echeverria Bermúdez as Arbitrator on February 10, 2012. To what extent the award under appeal calls for new factual allegations (see Art. 99(1) BGG) is therefore not understandable (see, in contrast, judgment 4A_425/2012 of February 26, 2013, at 3.1.2 with references, which will be published). To the extent that its factual allegations do not rely upon the factual findings in the award under appeal, they cannot be considered.

3.
The Appellant argues that the Arbitrator was appointed in violation of the rules (Art 190(2)(a) PILA) or that she had no jurisdiction (Art. 190(2)(b) PILA).

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

[8] 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.

[9] 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.

[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.

3.1
The party seeking the removal of an arbitrator (see Art 180(2)(ii) PILA) or a finding of lack of jurisdiction (see Art. 186(2) PILA) or which considers itself harmed by a relevant procedural violation according to Art. 190(2) PILA) forfeits its claims when it does not raise them in a timely manner in the arbitral proceedings and does not undertake all reasonable steps to remedy the violation to the extent possible (BGE 130 III 66 at 4.3 p. 75; 126 III 249 at 3c p. 253 f.; 119 II 386 at 1a p. 388; each with references). It is a violation of good faith to raise a procedural violation only in the framework of an appeal where the opportunity could have been given to the arbitral tribunal to remedy the alleged deficiency (BGE 119 II 386 at 1a p. 388). In particular, it is contrary to good faith and an abuse of rights for a party to keep a ground for appeal in reserve, only to postpone it in case of a disadvantageous outcome in the proceedings or a foreseeable loss of the case (see BGE 136 III 605[11] at 3.2.2 p. 609; 129 III 445 at 3.1 p. 449; 126 III 249 at 3c p. 254). When a party participates in an arbitration without questioning the composition or jurisdiction of the arbitral tribunal – although it had the opportunity to clear the issue before the award is issued – it forfeits the right to raise the corresponding grievances before the Federal Tribunal (BGE 130 III 66 at 4.3 with references).

3.2
The Appellant did not challenge the jurisdiction of the Arbitrator in the arbitral proceedings. Admittedly it took the view before the Arbitral Tribunal was constituted that a three-member panel should have been appointed. Yet after the President of the Appeals Arbitration Division appointed Ms. Margarita Echeverria Bermúdez as sole arbitrator, the Appellant did not question her jurisdiction, as to which the sole Arbitrator herself had to decide according to R55(4) of the CAS Code 2010 ed. but it got involved in the proceedings (see, in contrast, judgment 4P.40/2002 of April 16, 2002, in which the Federal Tribunal reviewed the issue of the pertinent number of arbitrators after the appellant had raised objections against the jurisdiction of the arbitral tribunal after it was constituted).

As the award under appeal holds, no party raised any jurisdictional objection in the arbitration; moreover, the Appellant does not claim that it expressed some reservations to the sole arbitrator as to her appointment after the constitution of the Arbitral Tribunal. The Arbitrator heard the parties after her appointment as to whether or not a hearing should take place. The Appellant raised no objections as to the appointment or the jurisdiction; instead it requested a hearing before the sole Arbitrator without any corresponding reservations.

The Appellant must have been aware that the Arbitrator – as opposed to in a challenge (R34 CAS Code) – would decide herself as to her jurisdiction according to R55(4) of the CAS Code. If it was of the opinion – as is now claimed before the Federal Tribunal – that there was no jurisdiction because the arbitration clause was concluded with a view to a three-member arbitral tribunal, it should have brought its objections, in good faith, to the Arbitrator after her appointment so that she could possibly issue a decision in this respect (see the facts in judgment 4P_40/2002 of April 16, 2002; see also BGE 138 III 29[12] p. 31) and it should not have participated in the proceedings without reservations. The Appellant raised no objections towards the Arbitrator appointed; neither did it claim any reservations as to her

[11] Translator's note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/node/332.

[12] 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

independence or impartiality that would have had to be decided by the Board of the International Council of Arbitration for Sport (ICAS) according to R34 of the CAS Code.

It was not acceptable to keep the grounds for appeal in reserve and to wait and see if the award would be in its favour. The Appellant thus forfeited the right to raise the alleged violations in the proceedings before the Federal Tribunal.

3.3
The Appellant's argument now raised in the Federal Tribunal that the parties had agreed on a three-member arbitral tribunal must be found new and therefore inadmissible (Art. 99(1) BGG) even irrespective of the fact that to substantiate its argument that the sole Arbitrator was appointed in violation of the rules (Art. 190(2)(a) PILA) it relies inadmissibly on factual allegations which are not found in the binding factual findings of the award under appeal (Art. 105(1) BGG). That it claimed such an agreement does not even appear from its own presentation of its submissions before the appointment of the sole Arbitrator. Thus its argument that the appointment of the sole Arbitrator was in violation of R50 of the CAS code and therefore contrary to the rules due to the alleged agreement of an arbitration clause providing for three arbitrators also comes to nothing for the same reason.

4
Furthermore, the Appellant argues a violation of its right to be heard (Art. 190(2)(d) PILA).

4.1
It submits that, due to the Respondent's submissions in the CAS, it concentrated on the issue as to whether or not Art. 25 of the Transfer Regulations of FIFA, Art. 16 of the Rules Governing the Status Committee and the Dispute Resolution Chamber of FIFA, and Art 10(4) of the FIFA Statutes would preclude the application of Art. 516 of the Mexican Employment Law. The Arbitrator did rightly decide that Art. 516 of the Mexican Employment Law was applicable despite the fact that the Respondent had invoked the FIFA rules. However, her finding that the Respondent had interrupted the time-limitation in Art. 516 by bringing his claim in the Dispute Resolution Chamber of FIFA on March 11, 2010, which caused a new time limit to begin to run from that day, so that the Respondent proceeded in a timely manner when he claimed in the CRCC on February 17, 2011, is based on legal arguments (interruption of the one year time limit by calling upon the Dispute Resolution Chamber of FIFA, compliance with the time limit by filing a claim against Y._____[13] in the CRCC) which were not mentioned in the previous proceedings, nor raised by the parties involved. Furthermore, accepting that the time limit was neither mentioned in the previous proceedings nor raised by one of the parties involved; and accepting that the time limit was interrupted by calling upon a FIFA body devoid of jurisdiction was "blatantly wrong" so that the Appellant could not have anticipated that.

4.2
4.2.1
According to the case law of the Federal Tribunal there is no constitutional right of the parties to be heard specifically as to the legal assessment of the facts they submit in the proceedings. Neither does it follow from the right to be heard that the parties should be heard in advance of the facts they submit in the proceedings. Neither does it flow from the right to be heard that the parties should be advised in advance as to the set of facts relevant to the decision. However there is an exception when the tribunal

[13] Translator's note: "Y._____" in the original text. It appears to refer to X._____.

intends to base its decision on a legal consideration not relied upon by the parties involved and which they could not reasonably have anticipated would be pertinent (BGE 130 III 35 at 5 p. 39; 126 I 19 at 2c/aa p. 22; 124 I 49 at 3c p. 52). The issue as to whether or not the application of the law by the arbitral tribunal must be considered as "surprising" within the meaning of the case law of the Federal Tribunal is a matter of appreciation as to which the Federal Tribunal exercises restraint in the field of international arbitration. The specificity of the proceedings – namely the mutual will of the parties not to bring their dispute in state courts and the fact that the arbitrators come from different legal traditions – must be taken into account and the argument that law was applied by surprise must not be abused in order to obtain a review of the substance of the arbitral award by the Federal Tribunal (BGE 130 III 35 at 5 p. 39 f.).

The Appellant does not show in its submissions to what extent it would have been impossible for it to submit its point of view as to the application of the Mexican statute of limitations. After the CRCC held in its decision of July 26, 2011, that the Respondent's claims were time-barred, the Appellant must have been aware that in the arbitral proceedings following the appeal of this decision, the issue of the statute of limitations would be at the forefront. It could not assume in this respect that the Arbitral Tribunal would limit itself to the review of the Respondent's submissions when deciding whether or not the claim was time-barred, but instead it should have assumed that the Arbitral Tribunal would review the legal aspect of the question comprehensively on its own initiative. This also encompasses whether or not the statute of limitations was complied with or interrupted by the commencement of legal proceedings.

The Appellant itself confirms in its brief that the applicable Mexican employment law provides for the time limitation to be interrupted at Art. 521, in particular by the introduction of a claim. When it now submits in the Federal Tribunal, with the support of a legal opinion, that it was "blatantly wrong" to consider in the award under appeal that the involvement of the Dispute Resolution Chamber of FIFA prevented the statute of limitations from running out, it does not raise any ground for appeal foreseen in Art. 190(2) PILA but merely criticizes, in an inadmissible manner, the application of the pertinent provisions by the Arbitral Tribunal. There is no application of the law by surprise as to which the Appellant should have been heard.

4.2.2

There is no violation of the right to be heard in the fact that the Appellant was not heard with regard to the issue of whether the time limit was safeguarded by the filing of a claim with the CRCC against Y._____[14] which, in the meantime, had signed a Transfer Contract with the Appellant. It was clear to all the parties that another company was also involved in the claim in the CRCC and that the Appellant only appeared as Respondent in the CAS proceedings even though it was easy to address this issue – also in connection with the statute of limitations – the Appellant waived the possibility to submit legal arguments in the arbitral proceedings in this respect. There can be no claim this would have prevented it from submitting its legal arguments as to the meaning of the substitution of the parties in the arbitral

[14] Translator's note: "Y._____" in the original text.

proceedings. Moreover its submission that the application of the law by the sole Arbitrator was “blatantly wrong” is not a ground for appeal admissible under Art. 190(2) PILA.

The argument that the sole Arbitrator violated the right to be heard (Art. 190(2)(d) PILA proves completely unfounded.

5.
The appeal is unfounded and must be rejected to the extent that 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). The costs of the other party will be paid from the deposit made with the Office of the Federal Tribunal. The Respondent’s application for legal aid becomes moot thereby.

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 8’500 shall be borne by the Appellant.

3.

The Appellant shall pay to the Respondent an amount of CHF 9'500 for the federal judicial proceedings. This amount shall be paid from the security for costs deposited with the Office of the Federal Tribunal.

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

Lausanne, May 24, 2013

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

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