4A_502/2017[1]

Judgment of June 25, 2018

First Civil Law Court

Federal Judge Kiss, presiding
Federal Judge Niquille, and
Federal Judge May Canellas
Clerk: Mr Carruzzo

X._____ Club, represented by Mr. Juan de Dios Crespo Pérez with service to Mr. Alexandre Zen-Ruffinen,
Appellant,

v.

1. A ._____, represented by Mr. Redouane Mahrach,
2. Z ._____ Club, represented by Mr. Lloyd Thomas,
Respondents.

Facts:

A.
By Award of July 11, 2017, the Court of Arbitration for Sport (CAS) rejected the appeal made by the professional player A._____ (hereinafter: the player) against the decision by the Dispute Resolution Chamber (DRC) of the International Federation of Football Associations (FIFA) of October 15, 2015, in the case between the player and the Egyptian professional football club X._____ (CAS2016/A/4520). The Panel partially admitted the appeal by X._____ against the decision in the parallel case between the player and Z._____ Club, a professional football club from Saudi Arabia which hired the player after the termination of the employment contract binding him to the Egyptian club (CAS 2016/A/4521). It set the amount of salary arrears to be paid by X._____ to the player, at USD 254'000 (instead of USD 256'500), plus interest. It also upheld the contested decision, which awarded the player compensation in the amount of USD 650'000 for termination of the employment contract without just cause by the Egyptian club.

[1] Translator's Note: Quote as X._____ Club *v.* A._____ and Z._____, 4A_502/2017.
The decision was issued in French. The original text can be found on the website of the Federal Tribunal, www.bger.ch.

B.
On September 22, 2017, X._____ Club (hereinafter: the Appellant) filed a civil appeal to the Federal Tribunal seeking annulment of that decision. The player (hereinafter: the Respondent) and the Saudi club did not file answers to the appeal. At the end of its response of December 11, 2017, the CAS submitted that the appeal should be dismissed.

Reasons

1.
According to Art. 54(1) LTF, the Federal Tribunal issues its judgment in an official language, as a general rule in the language of the contested decision. When the decision was rendered in another language (here English), the Federal Tribunal uses the official language chosen by the parties. Before the CAS they used English but in its brief to the Federal Tribunal, the Appellant used French, thus respecting Art. 42(1) LTF in conjunction with Art. 70(1) Cst. (ATF 142 III 521 at 1). In accordance with its practice, the Federal Tribunal will therefore issue its judgment in French.

2.
The civil appeal is admissible against decisions relating to international arbitration subject to conditions laid down in Art. 190-192 PILA (Art. 77(1)(a) LTF). Whether it is the subject matter of the appeal, the capacity to appeal, the deadline for lodging an appeal, or the grievances raised in the appeal, none of these admissibility conditions poses a problem in this case. Therefore nothing prevents judicial review in this case.

3.
First, the Appellant complains that the CAS failed to recognize its right to be heard.

3.1. Case law particularly infers from this right, as guaranteed by Art. 182(3) and 190(2)(d) PILA, a minimum duty of the arbitral tribunal to consider and deal with relevant issues. This duty is violated when, by mistake or misunderstanding, the arbitral tribunal does not take into consideration allegations, arguments, evidence, or offers of evidence, submitted by one of the parties, that are important for the outcome of the case (ATF 142 III 360[2] at 4.1.1, p. 361).

Relying on this case law, the Appellant submits that the CAS Panel failed to consider two points, examined below.

3.2.
3.2.1. The Panel found that, as of the date of termination of the working relationship on June 20, 2013, the backlog of wages owed by the Appellant to the Respondent amounted to USD 460'000 (Award, para. 95). It found, on the basis of a bank certificate establishing the cashing of checks as well as money transfers, that the debt had been cleared up to USD 206'000, which left a balance of USD 254'000 owed to the Respondent (Award, para. 96 and n.3 of the operative part). The Appellant claimed an additional

[2] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/agreed-upon-rules-procedure-do-bind-parties

imputation in its favor by producing a series of checks adding up to a total of USD 35'000 (Award, para. 96). However, after assessing the parties' respective allegations in this respect, the Panel did not take into consideration this latter amount, on the ground that it was not established that the checks, held in the file of the arbitration as exhibit no. 24, had actually been cashed (Award, para. 97).

Contesting the Panel's refusal to apply this USD 35'000 against the outstanding debt, the Appellant states that, in the same arbitral proceedings, it produced other checks to prove that payments had been made to the local tax administration. According to the Appellant, the Panel did not examine these elements of evidence. In its view, nothing except a violation of its right to be heard explains this difference in treatment applied to similar evidence, which placed it in an extremely difficult situation by simply preventing it from presenting its arguments.

3.2.2. The plea is unfounded for at least two independent reasons.

On the one hand, the different weight allegedly given to documents of the same nature by an arbitral tribunal, none of which have escaped the examination of the Panel, does not question the right to be heard of the parties, but is rather the result of an assessment of the evidence that the Federal Tribunal cannot reconsider when ruling on an appeal in international arbitration. On the other hand, as the CAS rightly points out in its response to the appeal (no. 3), with reference to the pertinent part of the Award under appeal (paras. 71-77), the Panel did not take into account the "other checks" to establish certain payments to the local tax authorities, and the principal matter – relating to these payments – was discussed only to determine whether the Appellant was entitled to make certain deductions from the Respondent's salary for income tax purposes. There was therefore no link between this question, which was decided in favor of the Appellant, and the taking into account of the checks, copies of which the Appellant produced in order to prove the partial repayment of its debt to the Respondent.

3.3.
3.3.1. Before the CAS, the Appellant had argued that under its internal rules ("*Financial List for the Football First Team*"[3]), produced as Exhibit 6 in the arbitral proceedings, it was entitled to deduct 25% from the salary of a player who has not participated in at least 80% of the matches played by his team. According to it, this assumption being satisfied in this case, the Respondent's salary had to be reduced by a quarter.

The Panel did not accept this reduction. According to it, the employment contract binding the parties certainly contains several references to a document entitled "*Regulation of Player Affairs*"[4] but it has not been established that the Exhibit 6, mentioned above, corresponds to this document. As the text of the contract does not mention expressly this Exhibit and given that the Respondent disputes that it signed it, the Panel found that the Appellant failed to prove the applicability of the *Financial List for the Football First Team* to the disputed employment contract. In the alternative, it notes the vagueness of the rules in question with regard to the matches to be taken into account in calculating the percentage of minimum participation imposed on the players (is it the scheduled matches or the matches actually played

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

by the club?) and also notes that the player claims to have taken part in more than 90% of his team's matches. In any event, the Panel denied the enforceability of unclear regulations issued by the employer, relying on the principle *in dubio contra stipulatorem* (Award, paras. 83-88). In this context, but relating to the charging of other fines ("*Deduction of Imposed Fines*," [5] Award, para. 91ff.) the Panel indicates that the burden of proof of the Respondent's absences lays with the Appellant, who had alleged the matter. In this respect, the Panel is unconvinced of the probative force of the written testimonies by the Appellant to support its claim.

Finally, from a legal point of view, it considers that the player's absences did not, as such, constitute breaches of the employment contract, as in all likelihood, they originated from a worker's dissatisfaction from not receiving the wages that were due to him.

3.3.2. The Appellant complains that the Panel dismissed, without good reason, a piece of important and regularly offered evidence, namely the "*Financial List for Football First Team*," a clear document that had been signed by the Respondent, whatever the latter may say. By arguing in this manner, it attacks the assessment of the evidence under the auspices of the violation of its right to be heard. However, such a criticism is not admissible in the context of an appeal against an international arbitral award.

The Appellant's complaints concerning the assessment of the probative force of the evidence of witnesses' written statements regarding Respondent's attendance at the matches disputed by his former club also fall within the scope of this exclusion.

Finally, the Appellant's criticism, on the one hand, of the application of the principle *in dubio contra stipulatorem* and, on the other hand, of whether or not the alleged motive justifies the player's absences (the non-payment of his salary), are not admissible, as they relate, in both cases, to the application of the law which is beyond the Court's knowledge in this procedural context.

3.4. Ultimately, the plea alleging breach of the appellant's right to be heard is clearly unfounded to the extent it is considered to be admissible.

4.
Second, the Appellant submits that the Award is incompatible with substantive public policy within the meaning of Art. 190(2)(e) PILA and related case law, in particular with the principle of contractual fidelity.

4.1. An award is contrary to substantive public policy when it violates fundamental principles of substantive law to the point of no longer being reconcilable with the legal order and the dominant system of values; among these principles is the principle of contractual fidelity (ATF 132 III 389[6] at 2.2.1.).

The principle of contractual fidelity, rendered by the adage *pacta sunt servanda*, in the restrictive sense that it is given in the case law relating to Art. 190(2)(e) PILA, is violated only if the arbitral tribunal

[5] Translator's Note: In English in the original text.
[6] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/violation-of-public-policy-notion-of-public-policy-exclusion-of-

refuses to apply a contractual clause while holding that clause in fact binds the parties or, conversely, applies a clause which it had held does not bind the parties. In other words, the arbitral tribunal must have applied or refused to apply a contractual provision while contradicting itself with the result of its interpretation concerning the existence or content of the contested legal instrument. On the other hand, the process of interpretation itself and the legal consequences that are logically drawn therefrom are not governed by the principle of contractual fidelity, so they are not subject to a complaint of a breach of public policy. The Federal Tribunal has repeatedly emphasized that almost the entire scope of litigation derived from breach of contract is excluded from the scope of this protection of the principle *pacta sunt servanda* (Judgment 4A_491/2017 of May 24, 2018, at 5.1).

4.2.
4.2.1. In the first line of pleas in question, the Appellant complains against the judgment of the Panel that "the tragic events of Port Said," followed by the cancellation of the championship, did not constitute a case of *force majeure*, despite the fact that for the Egyptian football clubs, this resulted in an immediate and massive loss of all revenue related to sponsorship as well as the sale of tickets. In the Appellant's opinion, as the concept of *force majeure* is a key element of the Swiss legal system, the unjustified refusal to apply it in a given case would imply a breach of substantive public policy within the meaning of Art. 190(2)(e) LDIP.

The gravity of the events to which the Appellant refers, without further details, is without question as they caused more than 70 deaths (Award, para. 45, p 11; see also Judgment 4A_682/2012[7] of June 20, 2013, at A.). However, there is another point. The Panel, did not, in fact, ignore the seriousness of the tragedy that occurred in Port Said on February 1, 2012, contrary to what the Appellant insinuates. Rather, it clearly explained in its Award (para. 101) the reasons why there was, in its opinion, no causal link between the events in Port Said and the failure to pay the Respondent's salary by the Appellant. According to it, the latter had not claimed the existence of a case of *force majeure* sufficient to justify the non-performance of its obligations to the Respondent at the time, instead it made such an argument much later; it also had not demonstrated that these same events had led it to not pay the salaries of the other players of the team.

These explanations, which make it possible to exclude the existence of a case of *force majeure* in this case, cannot be reviewed by the Federal Tribunal. They are sufficient to lead to the rejection of the plea in question without it being necessary to examine the relationship between the legal status of *force majeure* and the concept of substantive public policy in Swiss international arbitration law alleged by the Appellant.

4.2.2. Interpreting a clause found at pages 15 and 16 of the employment contract, the Panel questioned whether this clause allowed for the deduction of 3% of the total remuneration of the Respondent claimed by the Appellant for the administrative fees to be paid for the approval of the contract by the Egyptian Football Federation. It came to the conclusion that this was not the case, based in

[7] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/no-requirement-exhaust-extraordinary-legal-remedies-seizing-court-arbitration-sport

particular on the systematic nature of the contract, and accordingly refused to apply the deduction at issue (Award, para. 78- 82).

The Appellant complains that the Panel misinterpreted the pertinent clause of the employment contract. In this, it totally disregards the special meaning that the above-mentioned case law attributes to the principle of contractual fidelity in international arbitration. This principle would only have been violated *in casu* if the Panel had proceeded to the required imputation after having maintained, as it did, on the basis of its interpretation of the contract, that such imputation was not justified. The plea of incompatibility of the decision with substantive public policy is thus manifestly unfounded.

5.
The unsuccessful Appellant will be ordered to pay the costs of the federal proceedings (Art. 66(1) LTF). Having failed to file an answer, the Respondents are not entitled to costs.

For these reasons, the Federal Tribunal pronounces:

1.
The appeal is dismissed to the extent that it is admissible.

2.
The judicial costs, set at CHF 21'000, are to be borne by the Appellant.

3.
This judgment shall be communicated to the parties and the Court of Arbitration for Sport (CAS).

Lausanne, June 25, 2018

On behalf of the First Civil Law Court

The President:	The Clerk:
Kiss	Carruzzo