4A_716/2016[1]

Judgment of January 26, 2017

First Civil Law Court

Federal Judge Kiss, Presiding
Federal Judge Hohl,
Federal Judge Niquille.
Clerk of Court: Mr. Carruzzo.

X._____, a joint-stock company,
represented by Mr. Rocco Taminelli,
Appellant,

v.

1. Club Y._____,
   represented by Mr. Rafael Trevisan,
2. Z._____,
   represented by Mr. Daniel Mario Crespo,
Respondents

Facts:

A.
On June 4, 2009, the Argentinian professional football player Z._____ (hereinafter: the Player) and the joint-stock company, X._____ (hereinafter: X._____, or the Italian club), an Italian professional football club, concluded an employment contract starting July 1, 2009, and terminating on June 30, 2014.

By way of a notarized letter dated July 1, 2013, the player informed X._____ of his decision to terminate the aforesaid contract with just cause, imputable to the Italian club. On the July 26, the player concluded another employment contract, with an end date of June 30, 2015, with Club Y._____ (hereinafter: Y._____ or the Argentinian club), an Argentinian professional football club.

Following the claim by X._____ and the player's counterclaim, lodged before the Dispute Resolution Chamber (DRC) of the Fédération Internationale de Football Associations (FIFA), the latter held, by

[1] Translator's note: Quote as X._____ *v.* Y._____ and Z. 4A_716/2016.
The decision was issued in French. The original text is available on the website of the Federal Tribunal, www.bger.ch.

decision of July 2, 2015, that the player and Y._____ were jointly and severally liable to pay the Italian club the amount of EUR 5'265'000, including interest, as compensation for early termination of the employment contract without just cause. The DRC dismissed the player's counterclaim.

B.
Both Y._____ and the player separately appealed this decision before the Court of Arbitration for Sport (CAS).

By its decision of October 7, 2016, CAS partially found in favor of both appellants and removed all pecuniary obligations the player and Argentinian club had towards the Italian club.

C.
On December 15, 2016, the joint-stock company X._____ (hereinafter: the Appellant) filed a civil complaint before the Federal Tribunal, arguing a violation of its right to be heard (Art. 190(2)(d) PILA[2]), with a view to annulling the aforesaid CAS decision.

Neither the player nor Y._____, as Respondents, nor CAS, which supplied the file of the arbitration, were invited to submit a response.

Reasons:

1.
In accordance with Art. 54(1) LTF,[3] the Federal Tribunal renders its judgment in an official language,[4] as a rule, in the language of the decision under appeal. When the decision is in another language (here, English) the Federal Tribunal uses the official language chosen by the parties. Before the CAS, the Parties used English. In the brief submitted to the Federal Tribunal, the Appellant used French, in accordance with Art. 42(1) LTF, in connection with Art. 70(1) CST[5] (ATF 142 III 521 at 1). In accordance with its past practice, the Federal Tribunal will therefore issue its judgement in French.

2.
A civil law appeal may be filed against an international arbitral award, pursuant to the conditions of Art. 190-192 PILA (Art. 77(1)(a) LTF). Whether as to the subject matter, capacity, standing to appeal, or time limit to file the appeal, or the claims raised in the Appellant's brief, none of these requirements raises any issue in this case. The matter is accordingly capable of appeal.

[2] 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.
[3] Translator's Note: LTF is the French abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173. 110.
[4] Translator's Note: The official languages of Switzerland are German, French, and Italian.
[5] Translator's Note: CST is the French abbreviation for the Swiss Federal Constitution.

3.
Invoking Art. 190 (2)(d) of PILA in respect of a single ground of appeal, the Appellant claims the decision of CAS was based on unpredictable legal reasoning and consequently, the Appellant's right to be heard was violated.

3.1. In Switzerland, the right to be heard relates mostly to the fact finding. The right of parties to express a view on legal matters is limited in practice. Generally, and per the adage *jura novit curia*, courts or arbitral tribunals may independently assess the legal scope of facts, just as they can rule on the basis of legal grounds other than those invoked by the parties. Consequently, as long as the arbitration clause does not limit the ambit of the arbitral tribunal to decide solely within the legal grounds raised by the parties, the parties need not be heard specifically as to the applicable rules. Exceptionally, the parties may be asked for their views if the court or arbitral tribunal is seeking to base its decision on a norm or consideration of the law that was not raised during the proceedings and the pertinence of which the parties could not have reasonably anticipated (ATF 130 III 35, at 5., and references). Furthermore, determining what is unpredictable is a matter of appreciation. It thus follows that the Federal Tribunal applies the rule restrictively for this reason and also because of the particularities of these types of proceedings, in order to avoid a party raising the argument of surprise in order to achieve substantive review of the merits. (Judgment 4A_136/2016 of November 3, 2016, at. 5.1 and the referenced decisions).

3.2. In light of these principles, the issue raised here appears to be unfounded.

In subjecting the pertinent facts to the various criteria of Art. 17(1) of the Regulations on the Status and Transfer of Players (RSTP) in order to calculate the amount of compensation to be paid by the party who terminated the employment contract without just cause (meaning the player) to his co-contracting party (meaning the Italian club in this case), the CAS Panel reached the conclusion that, given the unique circumstances of the case, the Appellant had not suffered any direct or indirect damage as a consequence, whether they be of *damnum emergens* or *lucrum cessans* (Award, nn. 138-149). To reach this decision, the CAS Panel notably took into consideration the compensatory sum of EUR 2'700'000 that another Italian club, W._____, paid the Appellant for the latter temporarily loaning the player to the former, an amount that the CAS Panel imputed to the unamortized portion of the transfer fee and the solidarity contribution disbursed by the Appellant to obtain the services of the player.

The Appellant argues that they could not possibly have anticipated such reasoning, which they describe as absurd, especially as the Player never raised such a position.

The Appellant's claim of surprise is argued in vain. The Appellant acknowledges that, at n. 40 of its brief, the Player had specifically drawn the attention of CAS to this issue in his Appeal Brief of January 29, 2016, where he noted:

> 69. Moreover, the DRC [i.e. la CRL] also ignored that in the 2011-2012 season, the player was loaned to the club of W._____. For this loan, X._____ received the amount of EUR 2,700,000. (Annex 3).

This remark, noted under "Title (iv)" wherein the Player criticizes the fact that the DRC had granted a compensatory amount to the Appellant when the latter had suffered no damage as a result of the early

termination of the employment contract, can only be understood by a good-faith reader as the appellant complaining that the authority of first instance did not deduct the EUR 2'700'000 from the amount sought by the Appellant. Upon becoming aware of it, the Appellant had the opportunity to refute it. The Appellant can only blame itself for not having done so; it is also stated that its answer to the appeals was rejected because it was submitted late (Award, n. 55).

Under these conditions, the CAS Panel did not in any way infringe the Appellant's right to be heard by basing its decision on the disputed issue.

Moreover, even if the CAS Panel's reasoning on this element of fact were to be absurd, as is argued by the Appellant, the Federal Tribunal could not annul the Award on this ground, as an arbitrary judicial interpretation of a fact does not constitute in itself one of the grounds for appeal, as restrictively listed at Art. 190(2) PILA, that could possibly be invoked against an award issued in the context of international arbitration.

This being so, the appeal must be rejected.

4.
The Appellant fails and must pay the costs of the Federal proceedings (Art. 66(1) LTF). However, the Appellant does not have to compensate the Respondents, as they were not asked to submit a response.

Therefore, the Federal Tribunal pronounces:

1.
The appeal is rejected.

2.
The judicial costs, set at CHF 20'000, shall be borne by the Appellant.

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

Lausanne, January 26, 2017

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

Presiding Judge:	Clerk:
Kiss (Mrs.)	Carruzzo