4A_304/2013[1]

Judgment of March 3, 2014

First Civil Law Court

Federal Judge Klett (Mrs.), Presiding
Federal Judge Kiss (Mrs.)
Deputy Federal Judge Ch. Geiser
Clerk of the Court: Carruzzo

A._____,
Represented by Mr. Saverio Lembo and Mr. Vincent Guignet,
Appellant

v.

1. Z._____,
Represented by Mr. David Casserly and Mr. Antonio Rigozzi and Mr. Fabrice Tissot,
2. *Fédération Internationale de Football Association (FIFA)*, Represented by Mr. Christian Jenny,
3. X._____,
Represented by Mr. Juan Carlos Landrove,
Respondents

Facts:

A.
A.a.
X._____ is a Guinean professional football player born on January 2, 1985. Since 2005 he has been a regular member of the Guinean national team and became one of its best-known players.

Z._____ is a professional football club and a member of the Football Federation of the United Arab Emirates (hereafter: FAUAE) which is itself affiliated with the Fédération Internationale de Football Associations (FIFA).

[1] Translator's Note: Quote as A._____ *v.* Z._____ FIFA and X._____, 4A_304/2013.
The original decision is in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

A._____ is a French professional football club and a member of the French Football Federation (FFF) which is affiliated with the Union des Associations Européennes de Football (UEFA) as well as with FIFA. At the time of the events, which will be described hereafter, it was playing the League 2 championship (second division). Since then, it has been promoted to League 1 (first division).

A.b.
On September 2, 2010, X._____ was transferred from State B._____, a French club in League 1, and entered into an employment contract valid until June 30, 2014, with Z._____. The parties agreed that in the first year the player would be entitled to a total compensation of EUR 1'200'000 comprised of an advance of EUR 240'000, with the balance to be paid in installments the first week of each month. These terms also applied to the second year but the advance was increased to EUR 360'000.

On October 24, 2011, Z._____ deregistered (for the sake of clarity, this neologism and "deregistration" will be used hereunder in this judgment) X._____ from the list of foreign football players authorized to play for the club.

On January 31, 2012, X._____, who had definitively left [*name of place omitted*] without Z._____'s authorization on December 20, 2011, signed an employment contract with A._____.

The FAUAE refused to send the International Transfer Certificate (ITC) to the FFF because the Guinean player was still under contract with Z._____. However, in a decision of February 9, 2012, the single judge of the FIFA Players' Status Committee authorized the FFF to provisionally register X._____ as a player for A._____.

A.c.
On January 3, 2012, X._____ made a claim against Z._____ in the FIFA Dispute Resolution Chamber (DRC) with a view to obtaining the payment of EUR 3'400'000. It argued that the United Arab Emirates club had breached the employment contract by deregistering him from its team and, moreover, had failed to pay an installment of CHF 180'000 to which he was entitled.

In its answer of April 27, 2012, Z._____ disputed these grievances. It submitted, for its part, that the player and A._____ should be jointly ordered to pay it an amount of EUR 9'700'000 with interest for breach of contract. In a common answer of August 2, 2012, the counterclaimants rejected this submission. In any event, A._____ denied it had incited the player to breach his employment contract.

In a decision of November 16, 2012, the DRC partially upheld the main claim and ordered Z._____ to pay an amount of EUR 180'000 to X._____. Also granting the counter claim in part, it ordered the player and A._____ to jointly pay an amount of EUR 4'500'000 to Z._____, with interest accruing at 5% annually from November 16, 2012. Moreover, it banned X._____ from participating in any official games for four months, less three months already served. Finally, it forbade A._____ from registering any new

players, whether at the national or international level, during the next two consecutive registration periods after the decision was notified.

B.
On February 21, 2013, A._____ seized the Court of Arbitration for Sport (CAS) of an appeal against the DRC decision (case CAS/2013/A/3091). X._____ and Z._____ did the same the next day (cases CAS2013/A/3092 and CAS/2013/A/3093). The cases were joined. A three-member Panel was constituted to handle them. FIFA participated in the arbitral proceedings.

In an award of June 3, 2013, the CAS rejected the three appeals and confirmed the decision under appeal. In short, the Arbitrators examined whether the breach of contract by X._____ took place for just cause in light of the FIFA 2010 Regulations and Status Transfer (SRT) (Art. 14 SRT). In this respect, they found that the failure to pay half the installment of EUR 360'000 stipulated in the employment contract in a timely manner was not just cause, as this was an isolated breach by Z._____ of one of its obligations and because the player had failed to give prior notice without abruptly terminating the contractual relationships. The same applied to X._____'s grievances as to the payment of his salary. The Panel left open the issue as to whether or not the first year of employment terminated in June 2011 (the player's position) or in August 2011 (Z._____'s position). Indeed, it found that the salary of EUR 1'200'000 to which the player was entitled for the 2010/2011 season had been entirely paid in monthly installments of EUR 80'000 over a year in addition to the down payment of EUR 240'000. Moreover, the player had not disputed these terms of payment at the time. As to the player's deregistration, the Arbitrators acknowledged that it could constitute *per se* just cause for termination of the contract. However, in their view and under the circumstances, the player could not claim that his deregistration constituted just cause within the meaning of Art. 14 SRT to unilaterally and immediately terminate his obligations towards the club with which he still had a contract. Hence, X._____ had to pay compensation to Z._____ in an amount to be determined according to the criteria at Art. 17(1) SRT and A._____ was jointly liable for the payment of such compensation (Art. 17(2) SRT). According to the Arbitrators, the manner in which the compensation, assessed at EUR 4'500'000 by the DRC, had been set was not open to criticism on the basis of the arguments raised by both sides in this respect. The decision under appeal should accordingly be confirmed in this respect. The sporting sanctions issued against the Guinean player and A._____ were also confirmed on the basis of Art. 17(3) and (4) SRT. Furthermore, the French club had failed to reverse the presumption contained at Art. 17(4) SRT according to which a club signing a contract with a professional player having terminated his previous contract without just cause is deemed to have incited the professional player to a breach of contract until proof of the contrary.

C.
On June 10, 2013, A._____ (hereafter: the Appellant) filed a civil law appeal with the Federal Tribunal against the CAS award of which only the operative part had been communicated to the parties and sought an immediate stay of enforcement.

The stay of enforcement was granted *ex parte* by decision of the presiding judge of June 13, 2013.

On September 3, 2013, the Appellant submitted an additional brief after receiving the reasons of the award, which were notified to the parties on July 3, 2013. Besides the violation of the right to be heard (Art. 190(2)(d) PILA[2]), it argues that the award is incompatible with public policy (Art. 190(2)(e) PILA) because in its view, it infringes upon the player's economic freedom and personal rights, violates the rules concerning the burden of proof and the prohibition of excessive commitments.

In its answer of October 28, 2013, FIFA (hereafter: the First Respondent) submitted that the appeal should be rejected if the matter is capable of appeal. Z._____ (hereafter: the Second Respondent) took the same position in its answer of November 20, 2013. As to the CAS, it submitted that the appeal should be rejected in its answer of November 7, 2013. For his part, X._____ (hereafter: the Player) did not submit an answer within the time limit he had been given to do so.

The Appellant filed some short additional observations in a letter of December 6, 2013, as to which the First Respondent expressed its position in a letter of January 10, 2014.

D.
On September 25, 2013, the Player also filed a civil law appeal with the Federal Tribunal (case 4A_476/2013). However, his appeal was declared inadmissible in a judgment of January 6, 2014, because it had been filed too late.

Reasons:

1.
According to Art. 54 (1) LTF[3] the Federal Tribunal issues 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 resorts to the official language chosen by the parties. In the CAS, they used English. In the brief sent to the Federal Tribunal, the Appellant used French. The First Respondent's answer was in French and the Second Respondent's in French.

According to its practice, the Federal Tribunal will use the language of the appeal and consequently issue its judgment in French.

[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.

2.

2.1. In the field of international arbitration, a civil law appeal is admissible against the decisions of arbitral tribunals pursuant to the requirements of Art. 190 to 192 PILA (Art. 77(1)(a) LTF).

The seat of the CAS is in Lausanne. At least one of the parties (in this case, the Appellant and two of the three Respondents) did not have a domicile in Switzerland at the decisive time. The provisions of Chapter 12 PILA are accordingly applicable (Art. 176(1) PILA).

The award under appeal is final and may therefore be challenged on all the grounds set forth at Art. 190(2) PILA. The arguments submitted by the Appellant do not exceed this procedural framework.

The Appellant took part in the proceedings in CAS and is particularly affected by the award under appeal as it confirms a decision ordering him jointly with the player to pay an amount of EUR 4'500'000 with interest to the Second Respondent and prohibiting it from registering any new players, whether at the national or international level, during the next two consecutive registration periods. It therefore has a personal and present interest worthy of protection to ensure that the award was not issued in violation of the guarantees contained at Art. 190(2) PILA, which gives it standing to appeal (Art. 76(1) LTF).

Duly reasoned (Art. 42(1) and (2) LTF), the appeal was filed in a timely manner. Pursuant to Art. 100(1) LTF, an appeal against a decision must be filed with the Federal Tribunal within 30 days after the notification of the full decision. In this case, the reasoned award was notified to the Appellant on June 3, 2013. By filing its additional brief on September 3, 2013, 30 days after the day following its receipt (see Art. 44(1) LTF), taking into account that the time limit to appeal was suspended between July 15 and August 15, 2013 (see Art. 46(1)(b) LTF), the Appellant has accordingly complied with the legal time limit to seize the Federal Tribunal. As to the appeal brief filed on June 10, 2013, with a stay of enforcement, it was admissible albeit premature (see ATF 117 at 1a and the cases quoted). The two consecutive briefs are materially one appeal, so all the arguments contained there can be examined together (judgment 4P.44/2005 of June 21, 2005, at 1.3). Admittedly, the first does not contain any argument, which is logical because it was filed before the reasons of the CAS were known. There is therefore no reason not to address the appeal.

2.2. In the field of international arbitration, an appeal may be made only on the basis of one of the grievances exhaustively listed at Art. 190(2) PILA. Art. 90 to 98 LTF are inapplicable to this type of appeal, among other provisions (Art. 77(2) LTF), which particularly rules out the opportunity to argue that the law was applied arbitrarily. The substantive review of an international arbitral award by the Federal Tribunal is limited to the issue of its compatibility with public policy (ATF 121 III 331 at 3a). Moreover, only the grievances raised and reasoned by the Appellant may be examined (Art. 77(3) LTF).

The Federal Tribunal issues its decisions on the basis of the facts found in the award under appeal (see Art. 105(1) LTF). This Court may not rectify or supplement *ex officio* the factual findings of the arbitrators, even if the facts were established in a blatantly inaccurate manner or in violation of the law (see Art. 77(2)

LTF, ruling out the application of Art. 105(2) LTF). However, the factual findings on which the award under appeal is based may be reviewed if one of the grievances mentioned at Art. 190(2) PILA is raised against them or when some new facts or evidence are exceptionally taken into account in the framework of the civil law appeal (judgment 4A_428/2011[5] of February 13, 2012, at 1.6 and the precedents quoted).

3.
In its answer, the Second Respondent raises a preliminary objection. According to it, the Appellant invoked some strictly personal rights belonging to the player only. Yet, in its view, the violation of such rights – considering their specific nature – could be argued only by their owner. Consequently, the Appellant does not have standing to invoke the alleged violation of the player's personal rights (*exceptio de jure tertii*) and this worker's economic freedom or to acknowledge the excessive nature of that individual's commitments. This would cause the matter to be incapable of appeal or, at the very least, should lead to its rejection.

It is not so. Art. 17(2) SRT creates joint liability between a professional player terminating his employment contract and his new club as to the payment of compensation for breach of contract without cause. As the aforesaid provision does not specify the terms of this passive solidarity, the issue must be decided pursuant to Swiss law, whether according to Art. 58 of the Code of Sport Arbitration as the First Respondent is based in Switzerland, or pursuant to Art. 66(2) of the First Respondent's statutes, which provide for Swiss law to be applied in a supplementary manner (see award n. 83 to 86). Yet, Art. 145 of the Swiss Code of Obligations (CO) allows a joint debtor to raise the defenses arising from the cause of the joint obligation or, more precisely, from its very title, against a creditor (see among others Pierre Engel, *Traité des obligations et droit Suisse*, 2nd ed. 1997, p. 841; Heierli/Schnyder, in *Commentaire bâlois*, *Obligationenrecht* I, 5th ed. 2011, n. 1 ad Art. 145 CO). This is what the Appellant attempts in this case, at least indirectly, when claiming in substance that the CAS violated public policy by upholding in its award a decision which had found the player in breach of his contract with the Second Respondent by disregarding the player's personal rights and economic freedom which, if taken into account, would have demonstrated the existence of a termination for just cause (Art. 14 SRT) and consequently the absence of any joint debt of the player and his new club towards the Second Respondent. From a legal point of view, the situation would have been different if the Appellant had sued the player's former club to obtain damages for itself as a consequence of the alleged violation of the payer's personality rights by the Defendant. The latter would then certainly have successfully raised a defense of lack of standing. However, this does not correspond to the circumstances of the case at hand.

Moreover, and irrespective of any issue of passive solidarity, it must be emphasized that the Appellant was given a sporting sanction affecting it only by way of a temporary prohibition from hiring new players. Since this sanction results from its being presumed to have incited the player to breach his contract (see Art. 17(4) SRT), it is normal that it should be able to demonstrate within the limits of procedurally admissible

[5] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/dismissal-of-an-appeal-to-set-aside-a-cas-award-on-the-grounds-o

grievances that there was no termination without just cause by the player and consequently, no incitement to do so on the Appellant's part.

4.
4.1. In a first argument, the Appellant claims that its right to be heard was violated. According to the Appellant, the arbitrators simply failed to decide the issue of the "amount of the salary" of the player for the year 2010/2011. It adds that the issue was "essential" to decide the case, in particularly to establish the existence of an infringement upon the player's fundamental rights.

After these introductory remarks, the Appellant seeks to demonstrate that had the Panel interpreted correctly the topical provision of the employment contract in the light of the SRT, it should have held that the 2010/2011 season ended on June 5, 2011; that the player should have received his salary of EUR 1'200'000 for the season on June 30, 2011, at the latest; that by then, he had received only EUR 1'031'722; finally, that the payments made by the Respondent afterwards took place as part of the salary for the 2011/2012 season.

4.2. The right to be heard in contradictory proceedings within the meaning of Art. 190(2)(d) PILA certainly does not require an international arbitral award to be reasoned (ATF 134 III 186[6] at 6.1 and the references). However, it imposes upon the arbitrators a minimum duty to examine and dispose of the pertinent issues (ATF 133 III 235 at 5.2 p. 248 and cases quoted). This duty is violated when, inadvertently or due to a misunderstanding, the arbitral tribunal does not take into consideration some submissions, arguments, evidence, and offers of evidence presented by one of the parties and important for the decision to be issued.

If not inadmissible for its lack of sufficient reasons, this argument is deprived of any basis. On the one hand, and no matter what the Appellant says, the Arbitrators held that, on the basis of their factual findings and their interpretation of the employment contract, the Second Respondent had complied with all its financial obligations towards the player for the 2010/2011 season (award n. 210 to 219). This conclusion is outside the review of this Court because it results from the assessment of the evidence and the application of the law. On the other hand, the Appellant does not even to seek to demonstrate why the issue of the amount of the player's salary for the year 2010/2011 was essential, even though he never used it as reason to justify the termination of his employment contract.

5.
In a second argument divided into several parts, the Appellant claims that the award under appeal violates substantive and procedural public policy within the meaning of Art. 190(2)(e) in several respects. Before reviewing the merits of the criticisms raised in support of the argument, the concept of public policy as defined by this legal provision must be recalled.

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[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

5.1.

5.1.1. An award is incompatible with public policy if it disregards the essential and broadly acknowledged values which, according to prevailing views in Switzerland, should be constitute the basis of any legal order (ATF 132 III 389 at 2.2.3). Procedural public policy must be distinguished from substantive public policy. In its most recent case law, the Federal Tribunal defined the latter as follows (same judgment at 2.2.1).

An award is contrary to substantive public policy when it violates some fundamental principles of the law applicable to the merits to such an extent as it is no longer consistent with the notions of justice and system of values; among such principles are, in particular, the sanctity of contracts, compliance with the rules of good faith, the prohibition of abuse of rights, the prohibition of discriminatory and confiscatory measures, as well as the protection of incapable persons.

As the wording "in particular" shows without ambiguity, the list of examples thus set forth by the Federal Tribunal to describe the contents of substantive public policy is not exhaustive despite its permanence in the case law concerning Art. 190 (2)(e) PILA. Moreover, it would be a delicate and perhaps even dangerous task to try to list all the fundamental principles that would certainly belong there, at the risk of forgetting one or the other. It is therefore better to leave the list open. Moreover, the Federal Tribunal has already integrated some other fundamental principles there, such as the prohibition of forced labor (judgment 4A_370/2007[7] of February 21, 2008 at 5.3.2) and this Court would not hesitate to sanction, as a violation of substantive public policy, an award which would infringe upon the cardinal principle of respecting human dignity, even though this principle does not specifically appear in the aforesaid list (138 III 322[8] at 4.1 and the cases quoted).

If it is not easy to define substantive public policy positively and to set its boundaries with precision, it is easier to exclude one item or another from it. The entire process of interpreting a contract and the legal consequences logically drawn therefrom are excluded in particular; so is the interpretation of the statutory provisions of a private law body by an arbitral tribunal. Furthermore, it is not sufficient to show incompatibility with public policy – a concept more restrictive than arbitrariness – by showing that the evidence was wrongly assessed, a factual finding manifestly wrong, or a rule of law clearly violated (judgment 4A_458/2009[9] of June 10, 2010, at 4.1).

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[7] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/appeal-against-interlocutory-and-partial-awards-violation-of-pub

[8] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/landmark-decision-of-the-swiss-supreme-court-international-arbit

[9] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/challenge-of-arbitrators-sitting-on-cas-panel-rejected-claim-of-

5.1.2. Procedural public policy within the meaning of Art. 190 (2)(e) PILA guarantees to the parties the right to an independent judgment as to the submissions and the facts presented to the arbitral tribunal in accordance with applicable procedural law; procedural public policy is violated when some fundamental and generally recognized principles were violated, leading to an unbearable contradiction with the notion of justice, so that the decision is incompatible with the values recognized in a state of laws (ATF 132 III 389 at 2.2.1). Moreover, procedural public policy is only an alternate guarantee and a precautionary norm for procedural flaws that the legislator would not have thought of when adopting the other provisions of Art. 190 (2) PILA (ATF 138 III 270[10] at 2.3).

5.2.
5.2.1. Under the caption "violation of the player's economic freedom," the Appellant first argues that the Panel violated this freedom, guaranteed by Art. 27 CST,[11] by depriving the player of part of his salary and indirectly of the free exercise of gainful activity. According to the Appellant, the Arbitrators reached this result by finding the facts in a manifestly incorrect manner and interpreted the pertinent clause of the employment contract in disregard of the prohibition of arbitrariness within the meaning of Art. 9 CST.

Merely stating the argument shows its inanity. The Appellant's attempt to challenge the fixed factual findings of the Panel and the legal conclusions it drew from them is immediately doomed for the reasons indicated above (see above at 2.2). Be this as it may, the premise of the Appellant's reasoning is obviously erroneous because the Arbitrators held that the player had received his entire salary for the 2010/2011 season. The debate is therefore closed.

5.2.2. The Appellant further argues that the Panel violated the player's personal rights (Art. 28 CC[12]) and his personal freedom (Art. 10(2) CST) by deregistering him, which caused him to be banned lastingly from the competition and deprived him of the very opportunity to work.

It is true that, depending on the circumstances, a violation of a player's personality rights may be contrary to substantive public policy (ATF 138 III 322[13] at 4.3.1 and 4.3.2). It is also true that a worker may have legitimate interest to carry out his profession effectively in order to avoid losing his value on the employment market and jeopardizing his professional future; this is particularly true for professional football players (ATF 137 III 303 at 2.1.2 p. 307 and the references). The Panel acknowledges this by admitting with the SRT that the deregistration of a player may *per se* carry a violation of his personality rights (award n. 222). However, in its view, the circumstances of the case at hand were such that no such conclusion could be drawn. The provisional nature of the sanction, which extended only to a maximum of five games,

[10] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/an-international-arbitral-tribunal-seating-in-switzerland-is-gen
[11] Translator's Note: CST is the French abbreviation for the Swiss Federal Constitution.
[12] Translator's Note: CC is the French abbreviation for the Swiss Civil Code.
[13] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/landmark-decision-of-the-swiss-supreme-court-international-arbit

the fact that the player had continued to train with the Second Respondent and to receive his salary during the deregistration period and finally, the lack of any grievances before January 23, 2012, by the alleged victim of a violation of personality rights, were all elements of the case at hand which ruled out the violation alleged by the Appellant. Such assessment of the situation makes plenty of sense and therefore escapes any criticism. Indeed, to challenge it, the Appellant once again has to depart from the factual findings in the award and to allege in particular that the player's deregistration was for an undefined period (appeal n. 75). Moreover, assuming that he would have considered his temporary ban as a violation of his personal rights, contrary to what can be deduced from his lack of reaction at the time, the player should have started by inviting the Second Respondent to reregister him immediately under threat of immediate termination of the employment relationship. If such prior notice had remained unheeded, only then, he could have terminated the contract immediately for just cause.

Consequently, the Appellant wrongly bases its argument of a violation of substantive public policy on the alleged infringement upon the player's personal rights that the Second Respondent would have committed.

5.2.3. From the circumstances of the player's temporary deregistration described above, the Arbitrators drew the conclusion that he had consented to the measure (award n. 248). From the point of view of a violation of public policy, the Appellant argues that this conclusion disregards the rules concerning the burden of proof and Art. 8 CC in particular.

Such rules are not part of substantive public policy within the meaning of Art. 190(2)(e) PILA (aforesaid judgment 4A_458/2009 at 4.4.10). Moreover, the Panel reached a conclusion as to the player's acceptance of his temporary deregistration on the basis of its own assessment of the pertinent factual circumstances. Yet, when the assessment of the evidence convinces the judge that a fact has been established, the issue of the burden of proof becomes moot (See ATF 128 III 22 at 2d p. 25 and the cases quoted).

Under such conditions, the argument under review can only be rejected, even if it were admissible.

5.2.4. In the last part of the argument, the Appellant claims that the Arbitrators disregarded the prohibition of excessive commitments deriving from Art. 27(2) CC by failing to take into account the harmful consequences of the deregistration for an undefined period to which the player had consented. Here too it has to face the provisional nature of the sanction as described in the award under appeal, which deprives the argument of any merit.

6.
The Appellant loses and shall consequently pay the costs of the federal proceedings (Art. 66(1) LTF). It shall compensate the Respondents (Art. 68(1) and (2) LTF). However, the player did not file an answer and is therefore not entitled to costs.

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 20'000 shall be borne by the Appellant.

3.
The Appellant shall pay to the Z._____ and to the Fédération International de Football Associations (FIFA) an amount of CHF 22'000 each for the federal judicial proceedings.

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

Lausanne, March 3, 2014

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

Presiding Judge:	Clerk:
Klett (Mrs.)	Carruzzo