4A_276/2012[1]

Judgment of December 6, 2012

First Civil Law Court

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

X._____ Club,
Represented by Mr. Jorge Ibarrola,
Appellant,

v.

1. Z._____ Club,
Represented by Mr. Stephen Sampson and Mr. Mike Morgan,
2. Fédération Internationale de Football Association (FIFA),
Represented by Mr. Christian Jenny,
Respondents,

Facts:

A.
A.a
A._____ is a professional football player born on March 17, 1980.

Club X._____ (hereafter: X._____) and Club Z._____ (hereafter: Z._____) are two professional football clubs, members of [name omitted] Federation, itself affiliated to the Fédération Internationale de Football Association (FIFA).

A.b

[1] Translator's note: Quote as X._____ Club *v.* Z._____ Club and FIFA, 4A_276/2012. The original decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch

On October 1, 2005, A._____ and Z._____ executed an employment contract expiring on June 30, 2006. A new employment contract signed by the same parties on June 5, 2006, extended the contractual relationship between them until June 30, 2007.

At an unspecified date, the Player and Z._____ signed an addendum to the second employment contract extending it until June 30, 2009 (hereafter: the Annex).

On June 24, 2007, A._____ signed an employment contract with X._____ for the period from July 1, 2007, to June 30, 2009. Simultaneously, X._____ hired three other individuals still bound by a contract with Z._____, including the trainer of this team.

A.c
Z._____ opposed in vain A._____'s registration as a player for X._____. Lengthy administrative proceedings followed in [name of country omitted]. Deciding the matter as a court of last instance, the Court of Cassation of that country annulled the decision ratifying the registration in a judgment of February 9, 2011. According to the Court, the Annex was valid. Thus the player, still under contract with Z._____ until June 30, 2009, had breached his duty of fidelity by letting himself be hired by X._____ before this date.

A.d
On January 30, 2008, Z._____ filed a claim against A._____ and X._____ in the Dispute Resolution Chamber of FIFA (DRC) with a view to having them be ordered to pay jointly and severally one million dollars for unjustified breach of contract and inciting to such breach, as well as sport sanctions.

Among other decisions on May 6, 2010, the DRC ordered A._____ to pay the amount of USD 400'000 to Z._____ (§ 2 of the operative part of the decision), found X._____ jointly and severally liable for this amount (§ 3), banned the player from any official game for four months from the beginning of the next season (§ 6), and enjoined X._____ from recruiting any new national or international players in the two registration periods after the notification of its decision (§ 7). By way of reasons, the DRC held in substance that X._____ had induced the player to breach the employment contract with Z._____ without cause during the protected period. Such behavior must be sanctioned both financially and as a matter of sport pursuant to Art. 17 of the Regulations on the Status and Transfer of players adopted by FIFA (RSTP).

B.
B.a

On August 16, 2010, X._____ sent a statement of appeal to the Court of Arbitration for Sport (CAS) before filing its appeal brief on September 23, 2010. A._____ did the same on August 20 and September 23, 2012. Both submitted that the DRC decision should be annulled, any monetary sanction revoked, as well as the sport sanction involved. The Appellants took the view that the player had never intended to extend his contract with Z._____ and became the victim of a fraud by an employee of this club, who had presented the Annex as a mere administrative formality to be complied with in connection with the termination of the contract. With regard to this document they stated that it was entirely written in [name of language omitted] and that the English version had been inserted afterwards. In their view these facts, confirmed by other circumstances, proved that the contract between the player and Z._____ had expired on June 30, 2007, in other words one day before the beginning of the contractual relationship between A._____ and X._____. Consequently, in the Appellants' view, Art. 17 RSTP was not applicable to the case.

In its answer of November 1, 2010, FIFA endorsed the reasons of the DRC and submitted that the two appeals should be rejected and the decision under appeal confirmed.

Z._____ made similar submissions in his answer of November 8, 2010. In its view the issues relating to the alleged fraud against the player at the time the Annex was signed and as to the validity of this addendum had been conclusively decided by the courts of [name omitted], whose decisions were now *res judicata*. As to the Annex signed by the player it already contained the [name of language omitted] version and the English version. Moreover, the Appellants did not meet their burden of proving that the player would have been induced to sign the document by fraud of an employee of Z._____.

The CAS consolidated the two aforesaid cases for hearing and judgment purposes. At the request of the Appellants it stayed the enforcement of the disciplinary sanctions against them.

Pursuant to a request by X._____ the CAS ordered a forensic investigation of the Annex.

The CAS held a first hearing in Lausanne on June 22, 2011. It heard the player, the expert and several witnesses.

At the second hearing in Lausanne on January 10, 2012, X._____, A._____, and Z._____ announced that they had concluded a settlement agreement (hereafter: the

settlement) and that they had in particular agreed as to the following facts (hereafter: the stipulated facts; free translation from English):

- the player acknowledges having signed the Annex without realizing what he was effectively signing at the time; the player was prevented from playing for another club during the 2010-2011 season as a consequence of the present dispute;

- on the basis of the evidence furnished by the player, Z._____ acknowledges that it signed the Annex without fully understanding its meaning and that it did not intend to breach the employment contract between them, neither did it do so;

- the player confirms that X._____ did not induce him to breach his employment contract with Z._____.

- Z._____ acknowledges that X._____ did not induce the player to breach the employment contract between them.

In view of the settlement its signatories abandoned any further proceedings. Z._____ in particular did not present a number of witnesses who were there and for whom it had already submitted a written summary of the issues on which they would be interrogated. Counsel for the parties to the settlement invited the CAS Panel to take into account the stipulated facts while acknowledging that the Panel was free to assess their weight in view of the statements of the parties and the other evidence already gathered.

For its part, FIFA asked the Panel not to take into consideration the stipulated facts, to the extent that they were inconsistent with the evidence adduced and with the opinions put forward by the parties.

B.b
The Panel issued its award on February 29, 2012. Partially admitting the two appeals, it found that paragraphs 1 to 5 of the operative part of the DRC decision were to be annulled by consent of or failing any objection from all parties. All other submissions by the Appellants were rejected.

The three arbitrators reviewed the matter in dispute in light of Art. 17 RSTP in its version in force on January 1, 2008, and, alternatively, under Swiss law. Their main concern was to determine the impact of the settlement on the appeal proceedings. In their view, Z._____ had filed monetary claims against the Appellants, whether justified or not and was free to renounce them as it did by entering into this agreement with the player and his new club. However the DRC decision had two parts. Besides

granting financial compensation to the claimant club, it also imposed sport sanctions upon the Appellants. To this extent it affected FIFA and the Appellants but not Z._____. The arbitrators then wondered whether the parties could force the Panel by way of the settlement – namely an internal agreement – to accept their version of the facts. In this respect they shared FIFA's concern that it could be deprived of its disciplinary power and consequently of the possibility to sanction the breaches of the fundamental principle of sanctity of contracts if it could be enough for the parties to rewrite history without taking into account the real facts. Thus, they did not accept that the statements made and the evidence adduced could be withdrawn by the mere intent of the parties as though they had never existed, particularly since one of them – here FIFA – had opposed such a course of action. The arbitrators concluded that while they certainly could not ignore the stipulated facts they could and should determine the importance they were to be given in the context of all the other evidence available.

Having set its power of review, the Panel addressed the merits. It considered itself bound by the judgment of the Court of Cassation pursuant to the rule of *res judicata*, where it found that the Annex was not a forgery and that the player had not been induced to sign it by fraud as to the nature and the effects of this addendum to his employment contract. However, considering the possibility that it may understand the effects of the [name of country omitted] decision imperfectly, the Panel then proceeded to assess the evidence in the file of the arbitration. Notwithstanding the stipulated facts, the Panel concluded that the player had breached the contract with Z._____ without just reason and that the new club had not been able to disprove the presumption embodied in Art. 17 (4) RSTP that it had induced the professional player to breach the contract. After recalling that the purpose of Art. 17 RSTP is to promote contractual stability the Panel concluded that the parties could not circumvent the disciplinary regime meant to ensure this goal by seeking to escape the sport sanctions issued by the competent body of FIFA by way of an agreement contradicting the facts for which the sanctions were issued. However, it reserved the possibility – not found in the case at hand – in which the circumstances allegedly justifying the sport sanction would prove to be erroneous or incomplete *a posteriori* if this were done in an agreement approved by FIFA.

The arbitrators then endorsed the reasons contained in the DRC decision to justify the sport sanctions against the Appellants and confirmed them.

C.
On May 11, 2012, X._____ (hereafter: the Appellant) filed a civil law appeal with a request for a stay of enforcement with a view to obtaining the annulment of the February 29, 2012, award. However A._____ did not appeal the award to the Federal Tribunal.

By Presidential decision of May 31, 2012, the Appellant was invited to deposit the amount of CHF 7'000 with the Office of the Federal Tribunal as security for the costs of FIFA (hereafter: the Respondent) which had submitted a request to that effect. It did so in due course.

Pursuant to its observations of August 30, 2012, the CAS submitted its file and asked that the appeal be rejected.

The Respondent did the same in its answer of September 19, 2012.

As to Z._____ it did not file an answer in the time limit given to do so.

The Appellant did not avail itself of the possibility it was given to submit observations as to the answer of the CAS and the Respondent.

Reasons:

1.
According to Art. 54 (1) LTF[2] the Federal Tribunal issues its decision in an official language,[3] 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 proceedings they used English and French. In its brief to the Federal Tribunal, the Appellant used French. Respondent FIFA's answer was submitted in German. According to its practice the Federal Tribunal shall resort to the language of the appeal and consequently issue its judgment in French.

2.
In the field of international arbitration a civil law appeal is allowed against the decisions of arbitral tribunals under the requirements at Art. 190 to 192 PILA[4] (Art. 77 (1) LTF). Whether as to the object of appeal, the standing to appeal, the time limit to do so, the Appellant's submissions, or the grievances raised in the appeal brief, none of these admissibility requirements raises any problem in this case. There is accordingly no reason not to address the appeal.

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[2] Translator's note: LTF is the French abbreviation for the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173.110.

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

[4] 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.
First, the Appellant argues that the Panel disregarded the principle of sanctity of contracts and consequently issued an award incompatible with substantive public policy.

3.1
The substantive review of an international arbitral award by the Federal Tribunal is limited to the issue of the compatibility of the award with public policy (ATF 121 III 331 at 3a).

An award is inconsistent with public policy if it disregards the essential and broadly acknowledged values which, according to the dominant views in Switzerland, should constitute the basis of any legal order (ATF 132 III 389 at 2.2.3). It is contrary to substantive public policy when it violates some fundamental principles of law to such an extent that it is no longer consistent with the determining legal order and system of values; among such principles is the sanctity of contract, expressed by the Latin adage *pacta sunt servanda*.

Within the restrictive meaning given by case law concerning Art. 190 (2) (e) PILA, the principle of *pacta sunt servanda* is violated only if the arbitral tribunal acknowledges the existence of a contract or contractual clause but disregards its consequences or – conversely – denies the existence of a contract or a contractual clause but finds that there is a contractual obligation. In other words, the arbitral tribunal must have applied or refused to apply a contractual provision in a way that contradicts the result of its interpretation as to the existence or the contents of the legal deed in dispute. However, the process of interpretation itself and the legal consequences logically derived therefrom are not governed by the principle of *pacta sunt servanda* so that they could not be attacked from the point of view of public policy. The Federal Tribunal has repeatedly emphasized that disputes concerning breaches of contract are almost entirely outside the scope of protection of the principle of *pacta sunt servanda* (judgment 4A_150/2012[5] of July 12, 2012, at 5.1 and the cases quoted).

3.2
According to the Appellant the arbitrators, while admitting that the settlement was binding to decide the monetary claims made by Z._____, refused in a contradictory manner to take it into account as to the issue of the sport sanctions. They also misinterpreted Art. 17 (4) RSTP by holding that the sport sanctions pronounced by FIFA would be independent of any possible compensation to the Claimant.

[5] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/federal-tribunal-reiterates-that-the-principle-of-pacta-sunt-ser/

The Appellant's argument totally disregards the aforesaid case law concerning substantive public policy. As shown above in the summary of the award under appeal (see B.b), the Panel found that it was bound by the settlement to the extent that the DRC decision concerned the compensation granted to Z._____; consequently it admitted the appeals on this issue without reviewing their merits. However, the arbitrators refused to be bound by this settlement to the extent that the decision concerned the sport sanctions imposed upon the Appellants and freely reviewed the situation themselves, both factually and legally from this perspective, which led them to endorse the sanctions, notwithstanding the stipulated facts. Thus, not only is there no apparent incoherence in the reasons of the award under appeal – a flaw which, incidentally, would not fall within the definition of substantive public policy (aforesaid judgment 4A_150/2012 at 5.2.1) – but the foregoing shows that each of the two opposed conclusions drawn by the Panel corresponds to the premise upon which it is based. Therefore, a possible violation of substantive public policy could only be found here if the Panel had confirmed the sport sanctions challenged while admitting that it could not depart from the settlement no matter what the object of the dispute. Moreover, the Federal Tribunal does not have to verify if the CAS correctly applied the applicable sport regulations when assessing an argument of breach of substantive public policy in the framework of an appeal in the field of international arbitration.

The argument that substantive public policy was violated is therefore manifestly unsound.

4.
Secondly, the Appellant argues that the Arbitrators breached procedural public policy.

4.1
Procedural public policy within the meaning of Art. 190 (2) (e) PILA guarantees the parties the right to an independent judgment on the submissions and the facts presented to the arbitral tribunal in conformity with applicable procedural rules; procedural public policy is violated when some fundamental and generally recognized principles were violated, thus leading to an intolerable contradiction to the sense of justice, so that the decision appears inconsistent with the values acknowledged in a state governed by laws (ATF 132 III 389 at 2.2.1). Moreover, procedural public policy is only an alternative guarantee and constitutes a precautionary norm in this respect against any procedural flaws which the legislator had not considered when adopting the other letters of Art. 190 (2) PILA (ATF 138 III 270 at 2.3).

4.2
4.2.1 First, the Appellant argues that the Panel violated the "principle of factual unity" because it relied upon the circumstances contained in the settlement to endorse the

withdrawal of the monetary claims raised by Z._____ and then departed from them to confirm the sport sanctions pronounced by the DRC.

The argument is a mere presentation from a different perspective of the similar argument raised previously in support of an alleged breached of substantive public policy. The Appellant disregards the alternative nature of the guarantee by raising it again as an alleged violation of procedural public policy.

Moreover, the Appellant in no way demonstrates why the principle of factual unity – of which he gives no definition nor any precision as to its contents – would constitute a fundamental and generally recognized principle. Nor does it refer to a case that better defines the notion.

Furthermore the basis of the Appellant's reasoning is erroneous, as the Respondent rightly points out. The CAS did not rely on the stipulated facts to issue its award: on the one hand it saw in the settlement a renunciation by Z._____ to the compensation which this club had requested and obtained from the DRC and took notice of the renunciation without reviewing the facts on which it was based; on the other hand it departed from the stipulated facts to determine itself if there were some circumstances justifying a sport sanction against the Appellants.

4.2.2 According to the Appellant, the parties had withdrawn their entire arguments, counterarguments, and evidence submitted to the CAS as well as their claims, to submit jointly that the DRC decision should be annulled. Hence, by ignoring their position in the appeal proceedings, the Panel disregarded the rule of explanation of positions and the principle of party disposition, which the Appellant infers from Art. R51 of the Sport Arbitration Code (hereafter: the Code) and from Art. 190 (2) (e) PILA respectively, as well as from Art. R55 of the Code in its version modified as of January 1, 2010, to the extent that it no longer authorizes the submission of a counterclaim. The argument is not any better founded than the previous one.

The Appellant does not show why the rule of explanation of positions should be part of procedural public policy. As to the violation of a provision of the arbitration rules binding the parties, such as Art. R51 of the Code, it does not constitute ground for annulment of the award pursuant to Art. 190 (2) (e) PILA (ATF 117 II 346 at 1a p. 347; judgment 4A_612/2009[6] of February 10, 2010, at 6.3.1).

As to the principle of party disposition, the Appellant itself connects it with another letter of Art. 190 (2) PILA, so there is no reason here to call upon the alternative

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

guarantee of procedural public policy. Be this as it may, the Panel holds that Counsel for all parties to the settlement accepted that the arbitrators could assess the weight of the stipulated facts themselves by replacing them in the context of the statements of the parties and the evidence already adduced (see award nr 60 and 78). This is a finding as to the arbitral proceedings that binds the Federal Tribunal (judgment 4A_682/2011[7] of May 31, 2012, at 2.4 and the cases quoted) which the Appellant seeks to challenge in vain. Moreover it is established that the Respondent – which indisputably had standing to be a party in the appeal proceedings – opposed the idea that the Panel should consider itself bound by the stipulated facts. Under such conditions the arbitrators cannot be blamed for departing from the facts mentioned in the settlement when reviewing the soundness of the sport sanctions inflicted upon the Appellants.

As to the argument that the Panel did not apply Art. R55 of the Code in its wording of January 1, 2010, it cannot succeed. Indeed, no matter what the Appellant says, the Respondent did not submit a claim against the Appellant by merely inviting the CAS to reject the appeals and to confirm the decision under appeal. The Respondent therefore did not make a counterclaim.

Finally, according to the Appellant, it would create a shocking injustice to accept that the CAS could issue a decision against facts explicitly acknowledged in a settlement agreement by the party without which FIFA would never have proceeded against the player and the defending club. According to the Appellant, this is comparable to the withdrawal of a criminal complaint concerning a criminal offense not prosecuted *ex officio*, which binds the Court. However one does not see how this part of the Appellant's argument could be connected with the notion of procedural public policy as defined by federal case law. In any event, one should bear in mind the specificity of Art. R17 RSTP which, on the one hand, establishes the right of the aggrieved club to seek compensation from the player breaching the contract without just cause as well as from its new club and to do so against them jointly and severally and, on the other hand, the power of FIFA to inflict sport sanctions not only upon the player and the club concerned, but also, as the case may be, upon all individuals falling under the Statutes and Regulations enacted by FIFA (officials, players' agents, etc.) acting in such a way as to provoke the breach of contract with a view to facilitating the transfer of the player (see Art. 17 (5) RSTP). The aforesaid regulation therefore has a two-fold aspect, involving both compensation and disciplinary measures. Yet if the former falls within the free disposition of the claiming club and the defendants (*i.e.* the defending player and his new club), this does not apply to the latter, in which a third party intervenes, namely FIFA, in its quality as a legal entity with the disciplinary power and jurisdiction to issue the sport sanctions contemplated by Art. 17 RSTP. From this

[7] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/claim-of-violation-of-due-process-rejected-by-the-federal-tribun/

point of view the Appellant's comparison with an offense requiring a complaint by the victim is out of place. In this respect, one of the statutory goals given to the association – seeing to compliance with its own rules – would be jeopardized if one were to tolerate that, without FIFA consenting, the parties to the dispute could arrogate to themselves the power to create that which had not been, namely to construct a new set of facts excluding the existence, previously established, of a non-justified breach of the employment contract. The hypothesis considered by the CAS is still preserved, namely when the circumstances justifying the penalties inflicted upon the player and his new club would subsequently prove to be erroneous in the unanimous view of the parties and FIFA. In such a case, nothing would prevent the latter from endorsing an agreement of the parties stating so and agreeing to the annulment of the penalties imposed. However, this is not the case here. This shows that the injustice expressed by the Appellant has no place here. To the contrary, what is somewhat baffling in this case is the surprising backtracking by Z._____ at the end of the appeal proceedings, for whatever reason, when the circumstances, duly established, showed that it was right. Under such conditions the CAS could not have violated Art. 190 (2) (e) PILA by endorsing the sanctions in dispute regardless of the settlement.

5.
Even more in the alternative, the Appellant argues that the Panel breached the rule of *ne eat iudex ultra petita partium* by departing from the settlement to award something else than what was claimed, namely the entire annulment of the operative part of the DRC decision.

According to the first hypothesis contained in Art. 190 (2) (c) PILA the award may be appealed when the arbitral tribunal pronounced beyond the claims of which it was seized. The argument the Appellant raises against the CAS on the basis of this provision has no basis at all. The Panel was seized of submissions by FIFA that the appeal should be rejected and the decision under appeal entirely confirmed. Consequently, by admitting the appeals only in part and annulling only certain paragraphs of the operative part of the decision, the Panel acted within the framework of the submissions of both sides.

6.
In its final argument, the Appellant claims that its right to be heard was violated within the meaning of Art. 190 (2) (d) PILA because the Panel decided its appeal without taking into account the stipulated facts admitted in the settlement.

However this last argument is only a repetition of the arguments presented by the Appellant to substantiate its claim that procedural public policy was violated. It may therefore be rejected by mere reference to the reasons developed above in this respect.

7.
The rejection of the appeal renders moot the request for a stay of enforcement.

8.
The Appellant loses and shall pay the costs of the federal proceedings (Art. 66 (1) LTF). It shall pay costs to the Respondent (Art. 68 (1) and (2) LTF but not to Z._____ as the other Respondent did not submit an answer. The compensation granted to the Respondent shall be taken from the security for costs given by the Appellant.

Therefore the Federal Tribunal pronounces:

1.
The appeal is rejected.

2.
The judicial costs, set at CHF 6'000, shall be borne by the Appellant.

3.
The Appellant shall pay to the Fédération International de Football Association (FIFA) an amount of CHF 7'000 for the federal judicial proceedings; this amount shall be taken from the security for costs deposited with the Office of the Federal Tribunal.

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

Lausanne December 6, 2012.

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

The Presiding Judge: The Clerk:

Klett (Mrs.) Carruzzo