

4A 40/2017<sup>1</sup>

Judgment of March 8, 2017

First Civil Law Court

Composition

Federal Judge Kiss (Mrs), Presiding,

Federal Judge Klett (Mrs)

Federal Judge Niquille (Mrs)

Clerk of the Court: Mr. Carruzzo.

Parties to the proceedings

Club X. \_\_\_\_\_,

Represented by Mr Jorge Ibarrola and Mr. Yvan Henzer

Appellant,

v.

Z. \_\_\_\_\_,

Represented by Mr. Eduardo Carlezso and Mr. Olivier Ducrey,

Respondent

Facts:

**A.**

By a final award of November 17, 2016, the Court of Arbitration for Sport (CAS) rejected the appeal filed by professional footballer Z. \_\_\_\_\_ (hereafter: the Player) against the decision taken on September 25, 2015, by the Dispute Resolution Chamber (CRL) of the International Federation of Football Association (FIFA) in the case opposing the Player to the professional football club X. \_\_\_\_\_.

Partially admitting the club's appeal, it ordered the club to pay the Player a total of USD 366'166, plus interest, as salary arrears. On the other hand, it found that the compensation for breach of contract without cause, due to the Player by Club X. \_\_\_\_\_ pursuant to Art. 17(1) of the Regulations for the Status and Transfer of Players (RSTP), was equal to zero.

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<sup>1</sup> Translator's Note: Quote as Club X. \_\_\_\_\_ v. Z. \_\_\_\_\_, 4A 40/2017. The original decision was issued in French. The full text is available on the website of the Federal Tribunal, [www.bger.ch](http://www.bger.ch)

B.

On January 27, 2017, the Club X.\_\_\_\_\_ (hereafter: the Appellant) submitted a Civil law appeal to the Federal Tribunal with a view to obtaining the annulment of that award.

The Player, Respondent in the appeal, was not invited to submit an answer.

Reasons:

1.

According to Art. 54(1) LTF<sup>2</sup>, the Federal Tribunal issues its decision in one of the official languages<sup>3</sup>, as a rule in the language of the award under appeal. When the decision was issued in another language (here English), the Federal Tribunal uses the official language chosen by the parties. Before the CAS they used English, while, in the appeal briefs sent to the Federal Tribunal, the Appellant used French, pursuant to the requirements of Art. 42(1) LTF in connection with Art. 70(1) Cst<sup>4</sup>. (ATF 142 III 521 at 1). According to its practice, the Federal Tribunal shall resort to the language of the appeal and so issue its judgment in French.

2.

In the field of international arbitration, a Civil law appeal is admitted against the decisions of arbitral tribunals pursuant to the requirements of Art.190 to 192 PILA<sup>5</sup> (Art.77(1) LTF). Whether as to the object of the appeal, the standing to appeal, the time limit to do so, the Appellant's submissions or the grounds for appeal raised in the appeal brief, none of these admissibility requirements raises any problems in this case. The matter is therefore capable of appeal. The examination of the admissibility of the grievances raised remains reserved.

3.

In a first argument, the Appellant reproaches the Panel, from the point of view of Art.190(2)(b) PILA, to have decided *extra potestatem* using equitable criteria without being authorized by the parties instead of relying on the applicable rules of law, especially Art. 82, 91, 324 and 324(a) CO<sup>6</sup>.

The usurpation of the power to decide *ex aequo* is an irregularity that does not affect the jurisdiction of the arbitral tribunal but raises the question of the legal principles or the method by which the dispute between the parties must be settled. In other words, knowing which rules of procedure and substantive law the arbitral tribunal must apply is not a jurisdictional problem. The corresponding grievance is

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<sup>2</sup> Translator's Note: LTF is the Italian and French abbreviation for the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173.110

<sup>3</sup> Translator's Note: The official languages of Switzerland are German, French and Italian.

<sup>4</sup> Translator's Note: CST is the French abbreviation for the Swiss Federal Constitution.

<sup>5</sup> Translator's Note: PILA is the most frequently used abbreviation for the Swiss Private International Law Act of December 18, 1987

<sup>6</sup> Translator's Note: CO is the French abbreviation for Swiss Code of Obligations.

therefore not the one referred to in Art. 190(2)(b) PILA (at 3.2.2, unpublished, ATF 138 III 270 and references).

It follows that the argument based on the breach of Art.190(2)(b) PILA is inadmissible.

4.

In a second argument, the Appellant argues a violation of its right to be heard.

4.1.

The right to be heard, as guaranteed by Art. 182(3) and 190(2)(d) PILA, does not differ in substance from that which is enshrined in constitutional law. Thus, it was held in the field of arbitration that each party has the right to state its views on the essential facts to the award to be issued, to present its legal arguments, to propose evidence on pertinent facts, and to participate in the hearings of the arbitral tribunal. On the other hand, the right to be heard does not include the right to oral pleading. Similarly, it does not require that an international arbitral award be reasoned. However, case law has also deduced a minimum duty for the arbitral tribunal to consider and deal with the relevant issues. This duty is violated when, inadvertently or with misunderstanding, the arbitral tribunal does not take into consideration the allegations, arguments, evidence submitted or tendered by one of the parties and important to the award to be issued (ATF 142 III 360 at 4.1.1 and the above mentioned).

4.2.

According to the Appellant, the Panel violated the guarantee thus defined by refraining from stating in its award which law it applied and why the Panel did not apply the one it, the Appellant, had pleaded, a law which nevertheless corresponded to that provided by the applicable FIFA and CAS regulations and an agreement between it and the parties. According to it, the Panel did not seek to know and apply the relevant legal provisions to the question of whether the Player had cause for terminating the employment relationship. Had it done so, it should have rejected the Respondent's claims.

The argument is deprived of merit. It suffices to read the award to find that the Panel devoted a whole chapter to the applicable law (No. 6, pp. 12-14), in which it expressly reserved the right to apply Swiss law in the alternative, in accordance with the topical rules of the CAS and FIFA (n.6.9 p.14). Turning next to an examination of the facts of the case, it analyzed in detail the behavior adopted by each of the parties to draw the interim conclusion that the Player was entitled to terminate the contract for cause on June 19, 2011, (judgment, Nos.8.6 to 8.28, pp. 26 to 30).

On this basis, it held that the Appellant was to pay the Respondent the non-prescribed portion of the overdue wages (Judgment, Nos. 8.29 to 8.43). Lastly, applying the calculation criteria set out in Art.17(1) RSTP, the Panel indicated the reasons, such as the specificity of the sport, for which it

considered it necessary to reduce to zero the claim raised by the Player of the termination of the contract by the Appellant without cause (Judgment, No. 8.49).

Whatever the Appellant says by arguing in this way, the Panel, has not in any way infringed its right to be heard. What it is actually accusing the Panel of, in the guise of the grievance relating to this guarantee, is that it has not applied such or such a legal provision deemed by it to apply, or, more simply, to have applied it incorrectly. Such a grievance, however, does not fall within the scope of the grievances enumerated exhaustively in Art.190(2) PILA.

5.

At paragraph 6 of its appeal brief, the Appellant has again stated its intention to invoke the incompatibility of the award with public policy (Art.190(2)(e) PILA). However, it must be noted that it does not develop this argument subsequently, which results in its inadmissibility (Art.77(3) LTF).

6.

The Appellant, who is unsuccessful, shall pay the costs of the federal proceedings (Art. 66 (1) LTF). On the other hand, it will not have to pay costs to the Respondent, who was not asked to submit an answer.

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 7'000.- shall be borne by the Appellant.

3.

This judgment shall be notified to the Representatives of the Parties and to the Court of Arbitration for Sport (CAS).

Lausanne, March 8, 2017

On behalf of the First Civil Law Court of the Swiss Federal Tribunal

The Presiding Judge:

Kiss

The Clerk of the Court:

Carruzzo