4A_690/2016[1]

Judgment of February 9, 2017

First Civil Law Court

Federal Judge Kiss (Mrs), Presiding
Federal Judge Niquille (Mrs)
Federal Judge May Canellas (Mrs).
Clerk of Court: Mr Carruzzo

X._____, represented by Mr. Jean-Marc Reymond,
Appellant,

v.

1. A._____,
represented by Mr. Sergio Antonio Sánchez Fernández,

2. B._____,
represented by Mr. Jale Demir,

3. C._____,
represented by Mr. Ali Topuz,

4. Fédération Internationale de Football Associations (FIFA),
represented by Mr. Christian Jenny,
Respondents

Facts:

A.
By its decision of October 4, 2016, the Court of Arbitration for Sport (CAS) declared inadmissible the appeal filed by the professional football player X._____ (hereinafter: the football player) against the decision of April 10, 2015, rendered by the Dispute Resolution Chamber (DRC) of the Fédération Internationale de Football Association (FIFA) in the case between the football player and the professional football club of [name of country omitted] A._____, alongside two other football clubs [name of country omitted] B._____ and C._____, as well as FIFA (CAS 2015/A/4262). The CAS also rejected the appeal lodged by A._____ against this same decision (CAS 2015/A/4264), which it confirmed. In the dispositive part of the DRC's decision, the football player and C._____ were jointly and severally ordered to pay A._____ the sum of EUR 3'100'000, including interest, as compensation for having terminated the contract without just cause, in accordance with Art. 17(1) of the Regulations on the Status and Transfer of Players (RSTP).

[1] Translator's note: Quote as X._____ *v.* A._____, B._____, C._____, *and* FIFA, 4A_690/2016. The decision was issued in French. The original text is available on the website of the Federal Tribunal, www.bger.ch.

To conclude that the appeal was inadmissible, the CAS Panel ruled that the football player's notice of appeal had been submitted too late and therefore failed to fulfil the formal requirements under Art. R31(3) of the Code of Sports-Related Arbitration (hereinafter: the Code).

B.
On December 5, 2016, the football player (hereafter: the Respondent) filed a civil law appeal before the Federal Tribunal with a view to getting said decision annulled. He also made an application for legal aid, subsequently providing the ordered documents detailing his financial situation to the Federal Tribunal. The Respondents were not asked to submit their answer.

Reasons:

1.
In accordance with Art. 54(1) LTF,[2] the Federal Tribunal renders its judgment 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 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[4] (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[5] (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.

3.
In a first argument, the Appellant submitted that, by admitting FIFA as party to the proceedings when he himself had withdrawn his appeal concerning this Respondent, alongside declaring his appeal inadmissible based on the sole objection of this party, the CAS Panel violated the principle of equality of parties along with his right to be heard (Art. 190(2)(d) PILA). The CAS had, in effect, allowed the Federation to intervene in support of one of the litigants namely the former employer of the Appellant in an employment contract dispute – and this when it had no right to intervene in the appeal proceedings for having been the first instance body – thus tilting the balance of equities between the parties and without having FIFA justify an interest worthy of protection in the appeal proceedings as may have been the case in a disciplinary hearing.

3.1. According to jurisprudence, the party claiming a violation of the right to be heard or of another procedural error, must invoke it immediately in the arbitral proceedings under penalty of forfeiture. Indeed, it runs counter to good faith to invoke a procedural error only upon appealing an arbitral decision when the error could have been raised during the ongoing proceedings (Judgment 4A_616/2015 of September 20, 2016, at 4.2).

3.2. Under n.15 of his brief, the Respondent alleges that if he did formally name FIFA as a responding party in his notice of appeal, it was done inadvertently and that he immediately withdrew his claim against FIFA; that ground of appeal was only articulated against the FIFA's decision. According to him,

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[2] Translator's Note: LTF is the French abbreviation of 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: CST is the French abbreviation for the Swiss Federal Constitution
[5] 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.

in any event, formally naming FIFA cannot justify FIFA's presence at the hearing of June 9, 2016, as he had withdrawn his appeal in this respect.

However, far from what the Appellant is alleging, the proceedings before the CAS were conducted quite differently.

First, the Appellant did actually name FIFA under "1.1 THE RESPONDENTS" and "D-" in his notice of appeal of October 21, 2015. He again named FIFA as one of the four "Respondents" in his Appeal Brief of October 28, 2015.
In a letter of November 5, 2015, FIFA communicated to CAS that it considered the Appellant's appeal was filed late, with reasons. On November 6, 2015, CAS confirmed receipt of this registered letter and gave the Appellant until November 10, 2015 to make observations on this matter. On November 9, 2015, the Appellant produced a 12-page brief in which he failed to question FIFA's standing as a Respondent.

On November 12, 2015, CAS informed the parties, FIFA included, of the President of the Appeals Arbitration Chamber's decision, in accordance with Art. 52 of the Code, to join the two aforementioned cases with CAS 2015/A/4263 C._____ c. A._____. The President of the Appeals Arbitration Chamber, in compliance with Art. R55 of the Code, granted each party a 20-day period in which to submit their answers to the parts of the appeal brief concerning each of them. In another letter dated November 17, 2015, the President of the Appeals Arbitration Chamber decided to leave to the soon-to-be constituted Panel the ability to rule on FIFA's objection regarding the Appellant's late appeal. The President subsequently also declared that the company, U._____ Ltd, who appealed jointly with the Appellant, was no longer party to the proceedings, for failing to pay the required deposit and, for the same reason, that the appeal of C._____ corresponding to CAS 2015/A/4263 was deemed withdrawn by virtue of Art. R 64.2 of the Code.

On December 1, 2015, the Appellant filed his response in his Statement of Defence relative to the case CAS 2015/A/4264. This document contained a preliminary remark entitled "Withdrawal of Appeal Against FIFA" and noted under 4 is the following passage:

> But it turns out that X._____ and **U._____ Ltd** have no claim against FIFA whatsoever. As a consequence, they withdraw their appeal against FIFA and they request the CAS Court office, if not the Panel, to acknowledge receipt of the present statement and of the withdrawal of their appeal against FIFA.[6]

This sentence seems at the very least cryptic, given that the Appellant never made any submissions against FIFA in his notice of appeal nor did he do so in his brief. It does not reveal any clearly expressed desire of the Appellant to exclude FIFA from participating in the appeal proceedings, not least because FIFA was still the subject of an appeal lodged by A._____, the case joined to that of the Appellant for examination. Yet it is this sole element of proof that the Appellant is using as argument that he sought the exclusion of FIFA from the ongoing proceedings before CAS.

On March 2, 2016, FIFA submitted its reply brief to the appeals of the Appellant and that of A._____. Around half of the brief's 24 pages were devoted to demonstrating the inadmissibility and groundlessness of the appeal. This brief was notified by CAS to the other parties, including to the Appellant, on March 14, 2016. Via an e-mail on the following day, the Appellant's counsel confirmed receipt of the notification letter without raising any objection regarding the filing of the brief in question.

During the month of April 2016, the CAS and all parties, among whom was FIFA, sought to arrange a convenient date for a hearing. All parties concerned agreed on June 9, 2016. Correspondingly, CAS summoned the parties to its headquarters in Lausanne, whilst giving them until May 13, 2016, to submit

[6] Translator's Note: In English in the original text. Emphasis original.

the names of the participants at the hearing. FIFA subsequently complied in their letter of May 4, 2016, and despite the Appellant's counsel receiving a corresponding copy, said counsel did not raise any objection upon receiving this letter, nor in any earlier correspondence.

On May 11, 2016, CAS sent to all parties, including to FIFA, a copy of the Order of Procedure, asking them to return a signed copy, which the Appellant's counsel did on May 17, 2016. Under Ch. 1, this Order of Procedure documents the withdrawal of the appeal lodged by the Appellant against FIFA, whilst noting "FIFA has thus far not expressed its position on this request."

On June 7, 2016, CAS submitted a provisional schedule to all parties for the June 9, 2016 hearing, stating the three different time slots when FIFA was to plead its case (FIFA's opening statement, FIFA's closing pleadings, and if necessary, FIFA's rebuttal). The Appellant yet again did not raise any concern upon receiving this document.

The hearing was thus held on June 9, 2016 at the CAS headquarters. The Appellant and his counsel, attended the hearing, along with two FIFA representatives, amongst other participants. At the start of the hearing FIFA, through its representatives, confirmed its intention of preserving its standing as a Respondent in the appeal lodged by the Appellant in case CAS 2015/A/4262, whilst maintaining their motion for inadmissibility of the appeal. Consequently, the CAS Panel held that it should rule on the admissibility of the appeal lodged by the Appellant (Award, n. 92). There is no record or so much as an allegation that the Appellant ever raised a formal objection to the presence of the two FIFA representatives in attendance. At the end of the hearing, all parties acknowledged that the CAS Panel had respected their right to be heard (Award, n. 57).

3.3. This account of the proceedings that took place before the CAS, notwithstanding the Appellant's withdrawal of his formal initial appeal against FIFA, shows that far from him arguing against the inequity of treatment because of FIFA participating in said proceedings – as he is now asserting through the intervention of his new counsel – it is instead that he did not seize upon the numerous occasions available to him to do so during those proceedings. He has notably never requested that FIFA's reply, filed on March 2, 2016 and relating to his appeal, be withdrawn from the arbitration documents, nor for the arguments of FIFA's representatives at the June 9, 2016, hearing to be limited to simply refuting those put forward by A._____, regarding the latter's separate appeal. The Appellant's passivity can only be construed as tacit acceptance of FIFA's involvement in the appeal proceedings.

Consequently, the Appellant is precluded from raising the issue of a violation of equality of parties and its merits cannot therefore be examined.

4.
In a second argument, split into two parts and invoking Art. 190(2)(e) of PILA, the Appellant criticises the CAS for having rendered a decision incompatible with public policy.

4.1. A decision is considered incompatible with public policy if it disregards the generally accepted core values that, according to the prevalent views in Switzerland, should form the basis of any legal order (ATF 132 III 389 at 2.2.3). There is procedural public policy and substantive public policy.

Procedural public policy, as defined by Art. 190(2)(e) of PILA, is a subsidiary guarantee no more (ATF 138 III 270[7] at 2.3), protects the right of parties to an independent hearing of the conclusions and facts submitted before the Arbitral Tribunal in a manner that complies with applicable procedure; procedural public policy is said to be violated when the generally accepted basic tenets are breached, thus leading

[7] 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

to an intolerable contradiction with the sense of justice and in such a manner that the decision appears incompatible with accepted core values in a state of laws (ATF 132 III 389[8] at 2.2.1).

A decision contradicts substantive public policy when it fundamentally violates the law applicable to the merits to the point that it becomes irreconcilable with the legal order and core value system; these principles encompass, notably, the sanctity of contracts, respect of the rules of good faith, prohibition of abuse of rights, prohibition of discriminatory and spoliation measures, as well as the protection of incapable persons (same judgement, *ibid*).

4.2. In the first part of his second argument, the Appellant criticises the excessive formalism of the CAS Panel to his detriment. He does acknowledge that the formal requirements relative to the filing of legal documents are justifiably in need of protection. However, according to him, the timely payment of court fees and the filing of the notice of appeal, along with the documentary evidence, is enough as it is to mitigate the formal irregularity of submitting the notice of appeal by fax alone. Furthermore, the inadmissibility ruling was particularly severe for such a case, insofar as the Code does not prescribe a time limit for the Appellant to rectify his error and become compliant, notwithstanding the fact that the fax was already before CAS.

The reasons in support of the appeal on this point seem too narrow for this Court to address them. It must be noted that the Panel devoted three pages to the interpretation of the pertinent provisions of the Code in seeking to substantiate its ruling of inadmissibility of the appeal (Award, nn. 92-107) and that it expressed its views on the issue of excessive formalism under the relevant paragraph, giving its various reasons, one of which emanates from the context of sports disputes before CAS, justifying a strict application of the provisions of the Code relative to the modalities of filing appeals (Award, n. 106). The Appellant has, however, ignored these reasons.

Regardless, procedural rules are necessary for implementing legal remedies that guarantee proceedings can take place under the principle of equal treatment. In respect of this principle and legal certainty, strict adherence to the provisions governing the time limit for filing an appeal is thus obvious, without this requirement standing in contradiction with the prohibition of excessive formalism (Judgement 5A_741/2016 of December 6, 2016, at 6.1.2 and previous citations).

4.3. In the second part of the same argument, the Appellant maintains that in implementing the arbitral procedure, by accepting the deposit payment of CHF 35'000 and upon confirming receipt of the Appellant's appeal brief, and this when the original notice of appeal had not been sent within the 21-day period as prescribed by the Code, CAS violated the principle of good faith by adopting a position that misled the Appellant into believing that his appeal was deemed admissible.

This is simply baseless criticism. The account of the proceedings before CAS, as it is described above (cf. 3.2), does not show any position on the part of CAS that could have misled the Appellant. Rather, it is clear that the Appellant, after filing his appeal brief on October 28, 2015, was invited by the CAS in a letter dated November 6, 2015, to respond to FIFA's letter of November 5, 2015, which formally contested the admissibility *ratione temporis* of the appeal. He was, therefore, already aware of the issue in dispute. Additionally, in a new letter of November 17, 2015, sent to all parties, CAS informed them about the decision of the President of the Appeals Arbitration Chamber to let the soon-to-be-constituted Panel rule on FIFA's objection as to the admissibility of the Appellant's appeal. Finally, on March 2, 2016, FIFA filed its reply brief to the appeals of both the Appellant and A._____, a brief which expressly considered the issue in dispute. It follows that, contrary to what he is alleging now, the Appellant was never misled by the CAS into falsely believing that his appeal was admissible, since the

[8] 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-

response to this issue just as much depended on the controversial interpretation of the topical provision of the Code, namely Art. R31(3).

This being so, this appeal can only be rejected to the extent that the matter is capable of appeal.

5.

Invoking Art. 64(1)(2) LTF, the Appellant applies for legal aid and his counsel's appointment as his lawyer.

5.1. In a decision rendered in the seventies (ATF 99 IA 325 at 3b, p. 329), the Federal Tribunal wrote this phrase, regularly quoted since:

> ... the exclusion of legal aid in arbitration proceedings is aligned with the nature of the institution: the State cannot grant access to tribunals that it does not hold sway over.

Some 35 years later and in echo of this principle now finally codified, Art. 380 of the Code of Civil Procedure of December 19, 2008, (CPC; RS 272), listed under 'Title (v)' (Arbitral Procedure) of 'Part 3' (Arbitration), states that "*legal aid is excluded*" (on the constitutionality of such an exclusion, cf. PHILIPP HABEGGER, in *Commentaire balois*, Schweizerische Zivilprozessordnung, 2nd Ed. 2013, 5-13 ad Art. 380 CPC). This provision, applicable to domestic arbitration, has no equivalence in the Federal Private International Law of December 18, 1987, (PILA; RS 291); Chapter 12 of which (Art. 176 to 194) is devoted to international arbitration though silent on this matter. It is accepted anyhow that another solution is not conceivable for this type of arbitration (Judgement 4A_178/2014[9] of June 11, 2014 (at 4 and mentioned authors). Art. 380 of the CPC is a mandatory provision, in the sense that it prohibits the parties and the arbitral tribunal from agreeing to let the State bear the costs of the arbitral procedure under the pretext of legal aid. However, it does not prevent the parties from finding other solutions, such as seeking to pass on these costs onto an arbitral institution (MARCO STACHER, in *Commentaire Bernois*, Schweizerische Zivilprozessordnung, Vol. III, 2014(4) *ad*Art. 380 CPC). It is exactly what the CAS did, to cite but one example, by enacting directives on legal aid based on Art. S6 § 9 of the Code authorising the International Council of Arbitration for Sport (CIAS) to establish legal aid funding to help individuals deprived of the financial means in seeking CAS arbitration, alongside CAS legal aid guidelines framing how these funds are to be used (cf. MAVROMATI/REEB, *The Code of the Court of Arbitration for Sport, Commentary, Cases and Material*s, 2015, p. 97 ss).

That legal aid is outside of the arbitration proceedings is one thing, but that it is also outside the bounds of an appeal process against an arbitral award filed with the Federal Tribunal (art. 389 CPC et art. 191 PILA) or a Cantonal Tribunal (art. 390 CPC) is another. An appeal is a process of public law and as such falling under Art. 29(3) CST (RS 101), by virtue of which any person without sufficient financial means, unless that person's chance of winning his case seems completely hopeless, is entitled to free legal aid. Art. 64 LTF, concretizing this constitutional guarantee for cases heard by the Federal Tribunal that do not fall under the exclusion clause of Art. 77(2) LTF, does not distinguish between proceedings successfully brought before the Federal Tribunal. There is nothing, therefore, to prevent it from applying to a civil law appeal lodged against a decision rendered a domestic or international arbitration. The Federal Tribunal has in fact already decided in this favour, however implicitly, when it examined the applicable conditions of Art. 64(1) LTF in the context of appeals against arbitral awards (cf., *e.g.*.: Judgement 4A_178/2014, *Op. Cit.*, at 6; Order of January 16, 2013, for case 4A_730/2012; Judgement 4A_631/2011[10] of December 9, 2011, at 4; cf., nonetheless, Order of February 10, 2009, for case 4A_44/2009 which infers – wrongly – the impossibility of applying for free legal aid in arbitral procedure

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[9] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/no-substantive-review-assessment-evidence

[10] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/the-federal-tribunal-rejects-a-motion-to-set-aside-because-the-m

and similarly thus for the appeal process against the award). This is also the prevailing opinion in the doctrine (BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd Ed. 2014, n. 1823; KAUFMANN-KOHLER/RIGOZZI, International Arbitration, 2015, n. 8.106; TARKAN GÖKSU, *Schiedsgerichtsbarkeit,* 2014, n. 1887; THOMAS GEISER, in *Commentaire Balois, Bundesgerichtsgesetz*, 2nd Ed. 2011, n. 5b ad art. 64 LTF; ROLAND KÖCHLI, in Schweizerische Zivilprozessordnung (ZPO), Baker & McKenzie [Ed.], 2010, n.5 *ad*Art. 117 CPC; ALFRED BÜHLER, in *Commentaire Bernois, Schweizerische* Zivilprozessordnung, vol. I, 2012, n. 8c in the Preliminary Remarks under Art. 117-123 CPC; MARCO STACHER, in Commentaire Bernois, *Schweizerische Zivilprozessordnung*, vol. III, 2014, n. 6 *ad* Art. 380 CPC; LUKAS HUBER, in *Schweizerische Zivilprozessordnung* (ZPO), Brunner/Gasser/ Schwander [Ed.], 2nd Ed. 2016, n.6 ad Art. 117 CPC p. 822; *contra*: FELIX DASSER, in *ZPO Kurzkommentar*, 2nd Ed. 2014, n.5 ad Art. 380 CPC; HABEGGER, op. cit., n.3 ad Art. 380 CPC).

5.2. By virtue of Art. 64(1) LTF, a party can only be exempted from paying the judicial costs if it does not have sufficient resources and then only if its submissions do not seem bound to fail. In this case, the second cumulative condition is clearly not fulfilled if looking at the disposition of the issues examined above. Consequently, the Appellant cannot seek legal aid, regardless of his financial situation. It follows, therefore, that the costs of the Federal proceedings, slightly reduced for taking into account the nature of this inadmissibility ruling, shall be borne by the Appellant (Art. 66(1) LTF), whilst clarifying that the amount in dispute in the case at hand is EUR 3'100'000.

The Respondents, having not been invited to submit an answer, are not entitled to costs.

Therefore, the Federal Tribunal pronounces:

1.
The application for legal aid is rejected.

2.
The appeal is dismissed insofar as the matter is capable of appeal.

3.
The judicial costs amounting to CHF 10'000 shall be borne by the Appellant.

4.
This judgement shall be communicated to the parties and to the Court of Arbitration for Sport (CAS).

Lausanne, February 9, 2017

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

The Presiding Judge:	The Clerk:
Kiss	Caruzzo