4A_568/2015[1]

Judgment of December 10, 2015

First Civil Law Court

Federal Judge Kiss (Mrs.), Presiding
Federal Judge Klett (Mrs.)
Federal Judge Hohl (Mrs.)
Clerk of the Court: Leemann

A._____,
Represented by Mrs. Melanie Schärer,
Appellant

v.

1. B._____,
Represented by Mr. Alexis Schoeb,
2. C._____,
Represented by Mr. Sergio Sánchez Fernández and Mr. Alberto Hernández Martínez,
Respondents

Facts:

A.

A.a. A._____ (the Appellant) is an Argentinean football player and plays presently with the football club, D._____.

B._____ and C._____ (Respondents), both domiciled in Argentina, are active as players' agents and have an agent license from the Argentinean Football Federation.

[1] Translator's Note: Quote as A._____ *v.* B._____ and C._____, 4A_568/2015. The original text of the decision is in German. The full text is available on the website of the Federal Tribunal, www.bger.ch.

A.b. On March 1, 2012, the Appellant entered into an agency contract with the Respondents for a duration of 24 months. On March 1, 2014, the parties entered into a second agency contract for an additional 24 months. This provides for the exclusive agency of the Respondents against compensation of 10% of the gross yearly income of the player. At paragraph 4, the contract provides for a contractual penalty of EUR 1 million in favor of the agent if the player terminates the contract unilaterally. Moreover, the contract contained an arbitration clause in favor of the Court of Arbitration for Sport (CAS). Barely three months after signing the second agency contract, the Appellant terminated it unilaterally on May 27, 2014. At that point in time, he was under contract with Club E._____, which lent him to Club F._____. The latter had an option for the definitive transfer of the Appellant and it exercised this unilateral right at the end of May 2014.

On July 16, 2014, the Appellant signed a new employment contract with Football Club D._____.

B.

The Respondents then initiated arbitration proceedings against the Appellant in the CAS and submitted that he should be ordered to pay EUR 3 million. The Appellant opposed the arbitration request.

On April 28, 2015, a hearing took place in Buenos Aires, Argentina. In an arbitral award of August 12, 2015, the CAS upheld the claim in part and ordered the Appellant to pay EUR 1 million to the Respondents.

C.

In a civil law appeal, the Appellant submits that the Federal Tribunal should annul the arbitral award of August 12, 2015. In the alternative, the award should be annulled and the matter sent back to the Arbitral Tribunal for a new decision. No answers were requested. The file of the proceedings was produced.

Reasons:

1.

According to Art. 54(1) BGG,[2] the judgment of the Federal Tribunal is issued in an official language,[3] as a rule in the language of the decision under appeal. When this is in another language, the Federal Tribunal resorts to the official language used by the parties. The decision under appeal is in Spanish. As this is not an official language, the Federal Tribunal shall issue its judgment in the language of the appeal, in accordance with its practice.

[2] Translator's Note: BGG is the German 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.

2.

In the field of international arbitration, a civil law appeal is permitted pursuant to the requirements of Art. 190 – 192 PILA[4] (SR 291) (Art. 77(1)(a) BGG).

2.1. The seat of the Arbitral Tribunal is in Lausanne in this case. At the determining time, both parties were domiciled outside Switzerland (Art. 176(1) PILA). As they did not expressly waive the applicability of Chapter 12 PILA, the provisions of this chapter are therefore applicable (Art. 176(2) PILA). The Appellant does submit that in the agency contract of March 1, 2014, the parties "*chose to apply the FIFA regulations and the Swiss Civil Code* […]"; contrary to this view, however, one does not see how an explicit waiver of the applicability of Art. 176 *ff*. PILA in favor of applying Art. 353 *ff*. ZPO[5] (SR 272) could result from this choice of law. His arguments based on Art. 393 ZPO are therefore not to be heard.

2.2. Only the grievances listed at Art. 190(2) PILA are admissible (BGE 134 III 186[6] at 5, p. 187; 128 III 50 at 1a, p. 53; 127 III 279 at 1a, p. 282). According to Art. 77(3), the Federal Tribunal reviews only the grievances raised and reasoned in the appeal brief; this corresponds to the duty to provide reasons stated at Art. 106(2) BGG as to the violation of constitutional rights and of cantonal and intercantonal law (BGE 134 III 186[7] at 5, p. 187 with reference). Criticism of an appellate nature is not admissible (BGE 134 III 565[8] at 3.1, p. 567; 119 II 380 at 3b, p. 382).

2.3. The Federal Tribunal bases its judgment on the factual findings of the arbitral tribunal (Art. 105(1) BGG). These involve both the findings as to the facts forming the basis of the dispute, and those concerning the course of the proceedings, thus the findings as to the facts of the case, which include the submissions of the parties, their factual allegations, legal arguments, statements in the case, evidence and offers of evidence, the content of a witness statement or an expert report, or the findings on the occasion of a visual inspection (BGE 140 III 16 at 1.3.1 with references). The Federal Tribunal may not rectify or supplement the factual findings of the arbitral tribunal, even when they are blatantly inaccurate or based on a violation of the law within the meaning of Art. 95 BGG (see Art. 77(2) BGG, ruling out the applicability of Art. 97 BGG and that of Art. 105(2) BGG). However, the Federal Tribunal may review the factual findings of the award under appeal when some admissible grievances within the meaning of Art. 190(2) PILA are raised against such factual findings or when new evidence is exceptionally taken into account (BGE 138 III 29[9] at 2.2.1, p. 34; 134 III

[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.
[5] Translator's Note: ZPO Is the German abbreviation for the Swiss Federal Code of Civil Procedure.
[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
[7] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties
[8] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/extension-of-arbitration-clause-to-non-signatories-case-of-a-gua
[9] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s

565[10] at 3.1, p. 567; 133 II 139 at 5, p. 141, each with references). The party claiming an exception to the rule that the Federal Tribunal is bound by the factual findings of the arbitral tribunal and wishes to rectify or supplement the facts must show, with reference to the record, that the corresponding factual allegations were raised in the arbitral proceedings in accordance with the procedural rules (see BGE 115 II 484 at 2a, p. 486; 111 II 471 at 1c, p. 473; each with references).

3.

The Appellant argues that the Arbitral Tribunal violated the right to be heard (Art. 190(2)(d) PILA).

3.1. Art. 190(2)(d) PILA allows an appeal only for the violation of mandatory procedural rules according to Art. 182(3) PILA. According to this, the arbitral tribunal must, in particular, guarantee the right of the parties to be heard. With the exception of the duty to provide reasons, this corresponds to the constitutional right guaranteed by Art. 29(2) BV[11] (BGE 130 III 35 at 5, p. 37 *f.*; 128 III 234 at 4b, p. 243; 127 III 576 at 2c, p. 578 *f.*). Case law infers from this the right of the parties to express their views as to all facts important to the judgment, to present their legal arguments, to prove the factual allegations important to the decision with pertinent evidence submitted in a timely manner and in the proper format, to participate in the hearings, and to access the record (BGE130 III 35 at 5, p. 38; 127 III 576 at 2c, p. 578 *f.*; each with references).

Whilst the right to be heard in contradictory proceedings according to Art. 182(3) and Art. 190(2)(d) PILA does not include an right to reasons of an international arbitral award, according to well-established case law (BGE 134 III 186[12] at 6.1 with references), it does impose upon the arbitrators a minimal duty to review and handle the issues important to the judgment. This duty is violated when the arbitral tribunal, inadvertently or due to a misunderstanding, does not take into account some legally relevant allegations, arguments, evidence or offers of evidence made by a party. Yet, this does not mean that the arbitral tribunal must explicitly address each individual submission of the parties (BGE 133 III 235 at 5.2 with references).

3.2. The Appellant shows no violation of the right to be heard by drawing a list in his appeal brief of various allegations of the other parties and submitting that in the arbitral proceedings he "*had demanded explicit evidence in detail for these adversarial allegations.*" Neither does he show a violation of the right to be heard by submitting that he had "*moreover shown in the arbitration (and that is on the record) that several of the Respondents' allegations were false, such as, for instance,* […]". Furthermore, the Appellant disregards that the right to be heard does not encompass an right to an award accurate in substance when he claims that the Arbitral Tribunal disregarded his motives for termination of the contract, as it is not for the Federal Tribunal to examine whether or not the arbitral tribunal has taken into account and correctly understood the entire record (BGE 127 III 576 at 2b, p. 578).

[10] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/extension-of-arbitration-clause-to-non-signatories-case-of-a-gua
[11] Translator's Note: BV is the German abbreviation for the Swiss Federal Constitution.
[12] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties

The Appellant is unable to show to what extent the Arbitral Tribunal made it impossible for him to defend his point of view in the proceedings. The argument of a violation of the right to be heard is therefore unfounded.

4.

The Appellant argues a violation of public policy by the Arbitral Tribunal (Art. 190(2)(e) PILA).

4.1. The substantive review of an international award by the Federal Tribunal is limited to the issue as to whether or not the arbitral award is consistent with public policy (BGE 121 III 331 at 3a, p. 333). The substantive adjudication of a claim violates public policy only when it breaches fundamental legal principles and thus becomes incompatible with the essential, broadly recognized system of values which, according to prevailing Swiss views, should form the basis of a legal order. Among these principles are the sanctity of contracts (*pacta sunt servanda*), the prohibition of abuse of rights, the duty to act in good faith, the prohibition of expropriation without compensation, the prohibition of discrimination, the protection of incapables, and the prohibition of beyond-measure commitments (see Art. 27(2) ZGB[13]), when they constitute a blatant and grievous infringement of privacy. The arbitral award shall be annulled only when it violates public policy in its result and not merely in its reasons (BGE 138 III 322 at 4.1, as at 4.3.1/4.3.2; 132 III 389[14] at 2.2, p. 392 *ff*.; each with references).

4.2. The Appellant questions the reasons of the Arbitral Tribunal, which did not share his opinion, according to which, the arbitration clause contained in the agency contract of March 1, 2014, violates Art. 404 OR.[15] His submissions are merely inadmissible criticism of the reasons of the Arbitral Tribunal as to the applicable provisions of contract law and claims that the law was wrongly applied. He shows no violation of public policy when he submits that the Arbitral Tribunal, which upheld the contractual penalty contained at paragraph 4 of the March 1, 2014, contract, was not only wrong and in violation of the principle of legality in its reasoning but, "s*imply untenable*". The same applies to the argument based upon the invocation of the principle of legal certainty that the Arbitral Tribunal should not have referred to Art. 158 *ff*. OR when assessing the reduction of the contractual penalty.

Neither can the Appellant be followed when he refers to the constitutional guarantee of economic freedom (Art. 27 BV) to deduce from public policy an entitlement to the termination at any time of a contract limited in time. Without further reasons, he claims an impairment of his economic advancement; he is unable to show to any extent that the contractual penalty – which, in his view, corresponds to the Respondents' profit – would entail a blatant and grievous infringement of privacy, which would cause the corresponding award to be in contradiction to public policy (BGE 138 III 322 at 4.3.1 and 4.3.2). His submissions as to what he regards as the excessive and disproportionate size of the contractual penalty agreed upon and imposed by the Arbitral

[13] Translator's Note: ZGB is the German abbreviation for the Swiss Civil Code.
[14] 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-
[15] Translator's Note: OR is the German abbreviation for the Swiss Code of Obligations (the law of contracts).

Tribunal are merely inadmissible criticism of the arbitral award by the Appellant. Contrary to what the Appellant seems to assume, there can be no claim of a violation of the duty to act in good faith, which is part of public policy. The argument that the award under appeal would be incompatible with public policy (Art. 190(2)(e) PILA) is unfounded.

5.

The appeal proves to be unfounded and must be rejected insofar as the matter is capable of appeal. The disposition of the case renders moot the Appellant's application for a stay of enforcement.

Therefore the Federal Tribunal Pronounces:

1.
The appeal is rejected insofar as the matter is capable of appeal.

2.
The judicial costs of CHF 12'000 shall be paid by the Appellant.

3.
No costs are awarded.

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

Lausanne, December 10, 2015

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

Presiding Judge:	Clerk:
Kiss (Mrs.)	Leemann