4A_392/2010[1]

Judgment of January 12, 2011

First Civil Law Court

Federal Judge KLETT (Mrs.), Presiding
Federal Judge CORBOZ,
Federal Judge ROTTENBERG LIATOWITSCH (Mrs),
Federal judge KOLLY,
Federal Judge KISS (Mrs.),
Clerk of the Court: CARRUZZO.

FC Sion Association
Appellant,

Represented by Mr. Dominique Dreyer and by Mr. Alexandre Zen-Ruffinen

v.

1. Fédération Internationale de Football Association (FIFA), represented by Mr. Christian Jenny.
2. Al-Ahly Sporting Club,
Respondents,

Facts:

A.

A.a Essam El Hadary is an Egyptian professional football player born on January 15, 1973. Goal keeper, he conducted most of his professional carrier with the Egyptian team Al-Ahly Sporting Club and played for the Egyptian national team more than one hundred times.

Al-Ahly Sporting Club is a professional football club belonging to the Egyptian Football Association, which is affiliated to the Fédération Internationale de Football Association (FIFA).

[1] Translator's note : Quote as FC Sion Association *v.* Fifa and Al-Ahly Sporting Club, 4A_392/2010. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch.

A.b On January 1st, 2007, Essam El Hadary and Al-Ahly Sporting Club entered into an employment contract expiring at the end of the 2009-2010 season.

On February 15, 2008, the player entered into an employment contract with FC Sion, a Swiss professional football club, until the end of the 2010-2011 season.

A.c On June 12, 2008 Al-Ahly Sporting Club brought Essam El Hadary and FC Sion in front of the Dispute Resolution Chamber (DRC) of FIFA with a view to obtaining payment of Euro 2 Million from them severally for breach of contract or for inciting to such a breach in addition to sport sanctions.

In a decision of April 16, 2009, the DRC ordered the Defendants severally to pay to the Claimant an amount of Euro 900'000. It also banned the player for four months from the beginning of the next season and enjoined FC Sion from recruiting any new players during the two registration periods following the notification of its decision.

B.

On June 18, 2009, FC Sion Association filed an appeal with the Court of Arbitration for Sport (CAS) against the aforesaid decision (CAS/2009/A/1880). Essam El Hadary too appealed that decision (CAS 2009/A/1881) on the same day. The two cases were joined to be dealt with on the merits.

Composed of Mr. Massimo Coccia, chairman, Olivier Carrard and Ulrich Haas, arbitrators, the CAS issued its final award on June 1st, 2010. Partially admitting Essam El Hadary's appeal, it ordered the latter to pay USD 796'500 with interest to Al-Ahly Sporting Club and banned him from any official game for four months from the beginning of the 2010-2011 season. However the Panel held that the matter was not capable of appeal by FC Sion Association for reasons which will be explained later to the extent necessary.

C.

On July 1st, 2010, FC Sion Association filed a Civil law appeal with a view to obtaining the annulment of the CAS award. It supplemented its appeal in a brief filed on July 15, 2010.

FIFA and CAS submit that the appeal should be rejected, the former also casting doubt as to whether or not the matter is capable of appeal. Al-Ahly Sporting Club did not file an answer within the time limit it had been given for that purpose.

The presiding Judge of the First Civil law Court rejected the Appellant's request for a stay *ex parte* and until a decision on the merits on July 14 and October 11, 2010.

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 that decision is in another language (here English), the Federal Tribunal resorts to the official language chosen by the parties. In front of the CAS they used English and French. In the brief sent to the Federal Tribunal, the Appellant used French. Respondent FIFA's answer was in German. According to its practice the Federal Tribunal shall resort to the language of the appeal and consequently issue its decision in French.

2.

2.1 In the field of international arbitration, a Civil law appeal is allowed against the decisions of arbitral tribunals pursuant to the requirements of Art. 190 to 192 PILA[4] (art. 77 al. 1 LTF).

The seat of the CAS is in Lausanne. At least one of the parties – in this case the Respondent Football Club – did not have its domicile in Switzerland at the decisive time. The provisions of chapter 12 PILA are accordingly applicable (Art. 176 (1) PILA).

2.2 The Appellant wonders whether the award under appeal is a partial award because it merely indicates the party which shall bear the costs of the arbitral proceedings (Nr. 5 of the award) and in accordance with Art. R64.4 *in fine* of the Code of sport – related arbitration (hereafter: the Code) leaves it to the Court Office of the CAS to communicate to the parties separately the final amount of the arbitration costs that it will have set. It is not necessary to address this issue in depth. Indeed even if it were a partial award only the June 1st, 2010, award was nonetheless immediately appealable in front of the Federal Tribunal on all the grounds provided at Art. 190 (2) PILA (ATF 130 III 755 at 1.2.2).

There is no need to examine the disputed issue here as to whether or not a Civil law appeal is subject to the requirement of a minimal amount in dispute when it is aimed at an international arbitral award. Should it be so that requirement would be met in this case. However, contrary to what the Appellant

---

[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.

claims, the amount in dispute would not be tantamount to the presumed amount of the arbitration costs (CHF 44'000 at least according to the Appellant considering the deposit requested by the CAS) and to the costs awarded to the Respondents (CHF 10'000 in total according to Nr. 6 of the award), but to the amount awarded by the DRC to the Respondent club (Euro 900'000) because the Appellant argued in the appeal proceedings in front of the CAS that the monetary award issued in the first instance was against it.

The Appellant took part in the proceedings in front of the CAS (see Art. 76 (1) (a) LTF) and it is directly affected by the award under appeal because the Panel held that the matter was not capable of appeal by the Appellant against that monetary award and the sport sanction going with it. It argues that the two measures are aimed at it personally and accordingly has a personal, present and legally protected interest to ensure that the matter was not held incapable of appeal in violation of the guarantees arising from Art. 190 (2) PILA, which gives it standing to appeal (Art. 76 (1) (b) LTF).

2.3 The Appellant received a full copy of the award by telecopy on June 1st, 2010 and by registered mail on June 15, 2010. The appeal was filed on July 1st, 2010. On July 15, 2010, the Appellant sent an additional brief to the Federal Tribunal. The appeal brief meets the formal requirements (Art. 42 (1) LTF) and was doubtlessly filed in due course. So was the additional brief also if one starts from the notification of the award by mail but not if the communication by telecopy is considered the *dies a quo*.

2.3.1 According to Art. 100 (1) LTF, the appeal must be filed with the Federal Tribunal within 30 days after the full decision is notified. That time limit cannot be extended (Art. 47 (1) LTF) and also applies to the filing of one or several additional briefs.

Provided the date of receipt can be determined Art. 112 (1) LTF does not impose any specific type of communication (BERNARD CORBOZ, in Commentaire de la LTF, 2009, nr. 12 ad Art. 112). PILA does not regulate how the arbitral award should be notified. Consequently the issue depends mainly on the agreement between the parties or on the rules they chose (Judgment 4P. 273/1999 of June 20, 2000 at 5a).

According to case law of the Federal Tribunal filing a brief by telecopy is not in compliance with the time limit to appeal (ATF121 II 252 at 4; Judgment 4A_258/2008 of October 7th, 2008 at 2). Indeed a filing made in this manner does not give any assurances as to the origin or the integrity of the document received (see February 28, 2001 Message on the total revision of the organization of federal courts, FF 2001 4064 *in limine*). Similarly notifying by telecopy also appears problematic except in case of urgency (YVES DONZALLAZ, Loi sur le Tribunal fédéral, 2008, n° 708), even though it may not be excluded as

a matter of principle (CORBOZ, ibid.). The first of the two commentators recommends that the time limit to appeal should run from the notification of the decision through the mails when that follows the transmission of a copy of the decision by fax (DONZALLAZ, ibid.).

2.3.2 In the first edition of their work two specialists of international arbitration wrote that notification by fax was sufficient to start the time limit to appeal (KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, 2006, n° 733). In support of that opinion however, they quoted a precedent – judgment 4P.88/2006 of July 10, 2006 at 2.3 – which did not decide the issue (judgment 4A_628/2009 of February 17, 2010 at 2[5]). In the second edition of the same work published in 2010 the authors are less affirmative and reserve the possibility that the parties or the arbitration rules may provide for specific modalities of notification (op. cit., n° 733). They add that the same should apply when the CAS notifies an award by fax whilst indicating that "the original shall be notified by registered letter subsequently". They add that as long as the issue is not decided by the Federal Tribunal a prudent appellant will nonetheless calculate the time limit from the notification by fax (op. cit., p. 465, footnote n° 524).

The Federal Tribunal recently addressed a case comparable to the present one. As to Art. 55 of the Expedited Arbitration Rules of the World Intellectual Property Organization (WIPO; hereafter: the Rules) which provide for formal notification to the parties of an original of the award signed by the arbitrator, this Court ruled out that the time limit to appeal could run from the communication of the award as an annex to an e-mail because such communication did not have the official character required by the Rules (judgment 4A_582/2009 of April 13, 2010[6] at 2.1.2 not published in ATF 136 III 200). Art. R31 (2) of the Code provides that the CAS awards are notified "by any means permitting proof of receipt". As to Art. R59 (1) of the Code it requires the awards to be signed at least by the Chairman of the Panel. Following the precedent quoted and even though these two provisions are less categorical than Art. R55 of the Rules it must be admitted that notifying a CAS international arbitral award by fax does not cause the time limit of Art. 100 (1) LTF to start running: on the one hand a signature by hand cannot be substituted by the signature of the original with a copy faxed to the addressees of the award (see *mutatis mutandis* ATF 121 II 252 at 3); on the other hand a fax is generally not a mean allowing proof of notification.

2.3.3 These principles applied to this case lead this Court to hold that the supplementary appeal too was timely filed, namely within thirty days from receipt of the registered letter containing the June 1st, 2010 award. This is the same situation as the one described by the two aforesaid authors to the extent that, on that date, the CAS Court Office faxed to the Parties a copy of the aforesaid award, which was

[5] Translator's note : Translation in English at www.praetor.ch
[6] Translator's note : Translation in English at www.praetor.ch

signed only by the Chairman of the Panel and informed them that they would subsequently receive the original of the award signed by all members of the Panel.

3.

3.1 The Federal Tribunal issues its decision on the basis of the facts established by the arbitral tribunal (Art. 105 (1) LTF). It may neither rectify or supplement *ex officio* the factual findings of the arbitrators even if the facts were established in a manifestly inaccurate way or in violation of the law (see Art. 77 (2) LTF ruling out the application of Art. 105 (2) LTF). However, as was the case already under the aegis of the old statute organizing federal courts (ATF 129 III 727 at 5.2.2; 128 III 50 at 2a and cases quoted), the Federal Tribunal retains the faculty to review the factual findings on which the award under appeal is based if one of the grievances at Art. 190 (2) PILA is raised against the factual findings or when new facts or evidence are exceptionally taken into consideration in the framework of the Civil law appeal (see Art. 99 (1) LTF).

3.2 The Appellant describes the organization of football in Switzerland and its own in a long preamble (appeal pp. 2 to 7). Such a description is not contained in the award under appeal. To the extent that it goes beyond the explanations given by the Panel in this respect (award nr. 1, 2 and 148) it cannot be taken into consideration.

To understand the essentials of the case at hand it is sufficient to hold, as the Panel did, that "FC Sion Association" (the Appellant) is a football club organized as a non-profit corporation according to Swiss law (Art. 60 ff CC[7]), which is affiliated to the Swiss Football Association (SFA) (nr. 8040) with its principal team playing in the amateur championship; that "FC Sion" is the name generally used by a professional football club organized as a Swiss common stock corporation (Art. 620 ff CO[8]) called Olympique des Alpes SA (hereafter: OLA) incorporated in Martigny-Combe and playing the Swiss Super League Championship; that in 2005-2006 pursuant to a reorganization of Swiss football, OLA became a member of the Swiss Football League and therefore of the SFA (nr. 8700), taking the place of FC Sion Association for the entire professional sector; finally OLA continued to appear towards third parties (SFA, SFL, media, fans, public) in current usage under the name "FC Sion" which it regularly uses it its own documents.

4.

The Appellant had raised a first grievance based on Art. 190 (2) (a) PILA in connection with the presence of arbitrator Ulrich Haas within the Panel issuing the award under appeal. It had also sought

[7] Translator's note : CC is the French abbreviation for the Swiss Civil Code.
[8] Translator's note : CO is the French abbreviation for the Swiss Code of Obligations.

the introduction of evidence to substantiate its arguments. However it withdrew that argument completely in a letter of November 23, 2010. There is accordingly no need to review the argument or to decide on the admissibility of the evidence proposed.

5.
Secondly the Appellant argues that the Panel based its award on a legal ground unpredictable for the parties in violation of its right to be heard (Art. 190 (2) (d) PILA).

5.1 In Switzerland the right to be heard relates mainly to the finding of facts. The right of the parties to be asked for their views on legal issues is recognized only restrictively. As a rule, according to the saying *jura novit curia*, state courts or arbitral tribunals freely assess the legal bearing of the facts and they may also decide on the basis of rules of law other than those invoked by the parties. Consequently the parties do not have to be heard specifically on the scope of the rules of law unless the arbitration clause limits the task of the arbitral tribunal to the legal arguments raised by the parties. As an exception they need to be asked when the court or the arbitral tribunal considers basing its decision on a rule or a legal consideration which was not mentioned during the proceedings and of which the parties could not anticipate the pertinence (ATF 130 II 35 at 5 and references). Knowing what is unpredictable is moreover a matter of appreciation. Thus the Federal Tribunal restrictively applies the aforesaid rule for that reason and because the specificities of this type of procedure must be taken into account with a view to avoiding that the argument of surprise should be used to obtain substantive review of the award by the appeal body (judgments 4A_254/2010 of August 3, 2010 at 3.1, 4A_464/2009 of February 15, 2010 at 6.1 and 4A_400/2008 of February 9, 2009 at 3.1).

5.2 In a “preliminary remark” the Appellant refers to the Panel’s point of view as “astonishing”, “ludicrous” or “surreal”, arguing that the latter fell into “total absolutism” (appeal nr. 28 and 29). Further it claims to have been the victim of an “unpredictable intellectual incongruity” by the Arbitrators (appeal nr. 34). The argument verges on impropriety. Be this as it may, it cannot substitute for intelligible criticism of the reasons on which the award under appeal rests.

In any event the Appellant itself concedes that “it is probably not possible to argue here that the issue of the Appellant’s standing to act (in the lower arbitral proceedings) was not discussed in front of the CAS” (appeal nr. 34). This means that the Appellant itself concedes that the argument based on the aforementioned case is unfounded. There is accordingly no need to analyze the argument any further.

6.

Finally the Appellant argues that the Panel violated procedural and substantive public policy within the meaning of Art. 190 (2) (e) PILA.

6.1 Procedural public policy guarantees that the parties have a right to an independent judgment on the submissions and the facts presented to the arbitral tribunal in conformity with applicable procedural law; procedural public policy is violated when some fundamental and generally acknowledged principles were breached, thus leading to an untenable contradiction with the sentiment of justice, so that the decision appears inconsistent with the values recognized in a state of laws (ATF 132 III 389 at 2.2.1).

An award is contrary to substantive public policy when it violates some fundamental principles of material law to such an extent that it is no longer consistent with the determining legal order and system of values; among such principles are in particular the observance of contracts, compliance with the rules of good faith, the prohibition of abusing one's rights, the prohibition of discriminatory and confiscatory measures as well as the protection of incapables (case quoted *ibid*.).

6.2

6.2.1 As to the violation of procedural public policy the Appellant repeats in a different perspective the arguments in support of the previous grievance and claims that the CAS would have deprived it from access to state courts when it affirmed by way of a decision that the matter was not capable of appeal by the Appellant, a decision ordering it severally to pay EUR 900'000.- to the Egyptian club. According to the Appellant the Arbitrators would have thereby blatantly disregarded the minimal procedural guarantees, in particular *res judicata* which the DRC decision of April 16, 2009 had acquired. The argument is unfounded. An arbitral tribunal doubtlessly violates procedural public policy if it decides a case in disregard of *res judicata* of a previous decision (ATF 128 III 191 at 4a p. 194). However that requirement must be actually met. This was manifestly not the case here because the DRC decision supposedly constituting *res judicata* was the object of two appeals to the CAS, one by the Appellant, the other by the Egyptian player. The Panel cannot therefore be blamed for not considering itself bound by the decision of first instance appealed to the CAS.

Furthermore the entire Appellant's argument relies on the assumption that it would have been ordered to pay EUR 900'000.- to the Respondent club by the DRC. That assumption is mistaken because it is clear from the detailed explanations given in this respect by the Panel that the Appellant was not a party to the first proceedings and that the decision issued on April 16, 2009 was aimed at another legal entity, namely OLA, *i.e.* the common stock corporation which is the legal structure of the professional football club from Valais playing the Swiss First Division Championship. In this regard the conclusion reached by the Panel under nr. 178 of the award under appeal is categorical as to the identity of the Defendant in

front of the DRC: "On the basis of the above elements, the Panel is persuaded that the Swiss "club" which actually took part in the FIFA proceedings, and against which the Appealed Decision directed its ruling, has been the professional club FC Sion/Olympique des Alpes SA. The Panel holds that, contrary to the allegations set forth by its counsel, FC Sion Association was never a party to the FIFA proceedings and, anyway, it was never affected by the Appealed Decision."[9]

Neither does the Appellant sufficiently demonstrate how that conclusion, based on several clues and carefully reasoned, would be erroneous. To support its argument it relies on the following wording excerpted from nr. 4 of the DRC decision (p. 6):

"... the Dispute Resolution Chamber found it uncontested that the club for which the player has been registred with the Swiss Football Association (upon the latter's explicit request to be able to register the player for its affiliated club "FC Sion") and for which he has been participating in organised football ever since is the club FC Sion and not the entity Olympique des Alpes SA."[10]

Yet the Panel did explain at nr. 180 of the award why the language quoted, admittedly somewhat obscure, could not have the meaning that the Appellant tries to give it today when placed in context. It reached the following conclusion:

"The Panel has no hesitation in finding that the DRC [i.e. la Dispute Resolution Chamber] meant to consider as party to its proceedings, and as addressee of its ruling, the professional club and not the amateur club."[11]

The Appellant submits no acceptable criticism of that conclusion when it argues that the CAS would have deliberately distorted the DRC decision by inviting: “the concerned party to read the reasons upside down in order to give them an interpretation contrary to what they have when properly read” (appeal nr. 37; supplementary appeal nr. 37*ter*). Hence it does not matter that it criticizes, perhaps accurately, the alternate reasons by which the Panel pointed out that it would reach the same conclusion if it had to decide the case *de novo* (award nr. 180 *in fine* supplementary appeal nr. 37*quater*).

Similarly it is in vain that the Appellant gives weight to the fact that the Deputy President of the CAS Appeals Arbitration Division ordered a stay of enforcement in his decision of July 7, 2009 which referred

---

[9] Translator’s note : In English in the original text.
[10] Translator’s note : In English in the original text.
[11] Translator’s note : In English in the original text.

in the first paragraph of its holding to the decision issued on April 16, 2009 by the DRC "condemning FC Sion Association". This was indeed a decision issued after summary proceedings which did not deal with the issue of the standing to act in front of the CAS and could in no way bind the – still to be constituted – Panel that would decide if the matter was capable of appeal by the Appellant.

Finally it is not decisive that FIFA would not have specifically submitted that the matter was not capable of appeal by the Appellant as the latter emphasizes with references (appeal nr. 32). On the one hand the CAS had to decide *ex officio* whether the matter was capable of appeal or not. On the other hand FIFA's submission that the appeal should be rejected did not exclude a finding that the matter was not capable of appeal.

6.2.2 As to the incompatibility of the award with substantive public policy the Appellant argues that the CAS violated the rules of good faith (appeal nr. 38; supplementary appeal nr. 37*ter* and 37*quater*). Its arguments in this respect have already been rejected with regard to the alleged violation of procedural public policy (see above 6.2.1). There is accordingly no reason to do so again.

7.

The appeal must be rejected to the extent that the matter is capable of appeal. The Appellant shall pay the judicial costs (Art. 66 (1) LTF) and also compensate FIFA for the federal judicial proceedings (Art. 68 (1) and (2) LTF). The Respondent club did not file an answer and is accordingly 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 5'000.-, shall be borne by the Appellant.

3. The Appellant shall pay to Fédération Internationale de Football Association (FIFA) an amount of CHF 6'000.- for the federal judicial proceedings.

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

Lausanne, January 12, 2011

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

The Presiding Judge:	The Clerk:
KLETT (Mrs)	CARRUZZO