4A_490/2009[1]

Judgement of April 13, 2010

First Civil Law Court

Federal Judge KLETT (Mrs), Presiding,

Federal Judge CORBOZ,

Federal Judge ROTTENBERG LIATOWITSCH,

Federal Judge KOLLY,

Federal Judge KISS (Mrs),

Clerk of the Court: LEEMANN.

Club Atlético de Madrid SAD

Appellant,

Represented by Mr Philipp J. DICKENMANN

v.

1. Sport Lisboa E Benfica - Futebol SAD

Respondent,

Represented by Mr Ettore MAZZILLI

2. Fédération Internationale de Football Association (FIFA)

Participant in the proceedings,

Represented by Mr Christian JENNY

[1] Translator's note: Quote as Club Atlético de Madrid SAD *v.* Sport Lisboa E Benfica - Futebol SAD and Fédération Internationale de Football Association (FIFA), 4A_490/2009. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch.

Facts:

A.

A.a Club Atlético de Madrid SAD (Appellant) is a Spanish football club based in Madrid.

Sport Lisboa E Benfica - Futebol SAD (Respondent) is a Portuguese football club based in Lisbon.

Both are members of their respective National Federations, which in their turn belong to the Fédération Internationale de Football Association (FIFA; Participant in the proceedings), an Association under Swiss law having its seat in Zurich.

A.b In the beginning of September 2000 the Respondent hired the Portuguese player X._____ from the Dutch football club AFC Ajax NV. The corresponding employment contract was executed on September 13, 2000 and anticipated a duration of four seasons. The parties had a dispute shortly afterwards and player X._____ terminated the contract for cause on December 6, 2000.

On December 19, 2000 X._____ entered into a new employment contract with the Appellant. The claims and counterclaims between X._____ and the Respondent in front of the Lisbon Labour Court were settled on January 9, 2003.

B.

B.a on June 1st, 2001 the Respondent claimed compensation for training and promotion within the meaning of Art. 14.1 of the then in force FIFA Regulations for the Status and Transfer of Players[2], October 1997 edition (hereafter 1997 FIFA Transfer Regulation) against the Appellant.

[2] Translator's note: In English in the original German text.

On April 26, 2002 the FIFA Special Committee granted compensation to the Respondent in the amount of USD 2.5 million for training and promotion of player X._____.

In June 2002, the Appellant challenged the decision of the FIFA Special Committee of April 26, 2002 in front of the Commercial Court of the Canton of Zurich. In a judgement of June 21, 2004 the Commercial Court held that the decision of the FIFA Special Committee was void. It held that the 1997 FIFA Transfer Regulation violated European and Swiss Competition laws among other things and was therefore invalid, as well as the decision of the FIFA Special Committee which was based on it. No appeal was made against the judgment of the Commercial Court. The Respondent was not involved in the proceedings.

Further to the judgment of the Commercial Court, the Appellant and FIFA entered into an agreement on August 25, 2004 by which FIFA undertook to take into consideration the judgment of the Zurich Commercial Court of June 21, 2004 should the Respondent make any new claims with FIFA against the Appellant in the same matter.

B.b On October 21, 2004 the Respondent again sought a decision from FIFA as to compensation for the training and/or promotion of player X._____ and submitted that the Appellant should pay EUR 3'165'928.-. The FIFA Special Committee rejected the Respondent's claim in a decision of February 14, 2008 (notified on December 23, 2008).

B.c On January 13, 2009 the Respondent appealed the decision of the FIFA Special Committee of February 14, 2008to the Court of Arbitration for Sport (CAS) and demanded its reversal as well as EUR 3'165'928.93 plus interest or a higher amount to

be determined by the arbitral tribunal, alternatively the remanding to the FIFA Special Committee for a new decision.

The Appellant opposed the appeal and among other things relied on the *res iudicata* effect of the judgment of the Zurich Commercial Court of June 21, 2004.

In an award of August 31, 2009, the CAS upheld the Respondent's appeal in part and ordered the Appellant to pay EUR 400'000.- to the Respondent based on the 1997 FIFA Transfer Regulation.

C.
In a Civil law appeal the Appellant submits principally that the Federal Tribunal should set aside the CAS arbitral award of August 31, 2009.

The Respondent and the CAS submit that the appeal should be rejected. FIFA did not participate actively in the proceedings.

D.
On February 24, 2010 the Federal Tribunal rejected the Appellant's request for an interlocutory decision as to the timeliness of the answer to the appeal and the request for a time limit to file a brief in rebuttal. (The Court) also indicated to the Appellant that it would be deemed to renounce a brief in rebuttal if the brief was not filed within a few days after the decision. Consequently, the Appellant did not file a brief in rebuttal.

Reasons:

1.

A Civil law appeal is allowed against arbitral awards under the requirements of Art. 190-192 PILA[3] (Art. 77 (1) BGG[4]).

1.1 The seat of the Arbitral Tribunal is in Lausanne in this case. The Appellant and the Respondent both had their seat outside Switzerland at the relevant point in time. Since the Parties did not rule out in writing the provisions of Chapter 12 PILA, they apply (Art. 176 (1) and (2) PILA).

The CAS held that Swiss law was applicable along with the provisions of the FIFA Regulations. The Parties do not challenge the applicability of Swiss law. In the arbitral proceedings they also agreed that the 1997 FIFA Transfer Regulation applies to the issue at hand.

1.2 Only the grievances limitatively enumerated in Art. 190 (2) PILA are allowed. (BGE 134 III 186 E. 5 p. 187; 128 III 50 E. 1a p. 53; 127 III 279 E. 1a p. 282). According to Art. 77 (3) BGG the Federal Tribunal reviews only the grievances which are brought forward and reasoned in the appeal. This corresponds to the duty to provide reasons contained in Art. 106 (2) BGG with regard to the violation of constitutional rights and of cantonal and inter-cantonal law (BGE 134 III 186 E. 5 p. 187 with references). Criticism of an appellate nature is not allowed (BGE 119 II 380 E. 3b p. 382).

1.3 The issue as to whether the Respondent timely submitted its request to extend the time limit for its answer and thus timely submitted its brief to the Federal Tribunal needs not be explored in depth as the appeal is to be granted even in consideration of the answer.

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[3] 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.

[4] Translator's note: BBG is the German abbreviation for the Federal Statute of June 17, 2005 organising the Federal Tribunal, RS 173.110.

2.
The Appellant claims that the CAS violated public policy (Art. 190 (2) (e) PILA) as it did not heed the material legal validity of the judgment of the Commercial Court of the Canton of Zurich of June 21, 2004 in the same case.

2.1 Public policy (Art. 190 (2) (e) PILA) has material and procedural contents.

Procedural public policy is breached in case of violation of fundamental and generally recognised procedural principles, the disregard of which contradicts the sense of justice in an intolerable way, so that the decision appears absolutely incompatible with the values and legal order of a state ruled by laws (BGE 132 III 389 E. 2.2.1 p. 392; 128 III 191 E. 4a p. 194; 126 III 249 E. 3b p. 253 with references).

The arbitral tribunal violates procedural public policy when it leaves unheeded in its award the material legal force of an earlier judgment or when it deviates in the final award from the opinion expressed in a preliminary award as to a material preliminary issue (BGE 128 III 191 E. 4a p. 194 with references; see also BGE 127 III 279 E. 2b p. 283). *Res iudicata* is limited to the holding of the judgment. It does not extend to its reasons. The reasons of a judgment have no binding effect as to another disputed issue, but they may have to be relied upon to clarify the scope of the holding of the judgment (BGE 128 III 191 E. 4a p. 195; 125 III 8 E. 3b p. 13; 123 III 16 E. 2a p. 18 f.).

The scope of the specific holding of the case is accordingly to be assessed in each case on the basis of the entire reasons in the judgment.

2.2 The CAS was wrong to reject the defence of *res iudicata* in the arbitral proceedings.

2.2.1 The CAS wrongly overlooked that the proceedings in front of the Commercial Court of the Canton of Zurich did not involve an appeal against a FIFA decision, as

was the case in front of the CAS, but the impugnment of the decision of an association according to Art. 75 ZGB[5]. Contrary to the award under review, it is irrelevant to the assessment of the legal effect of the Commercial Court judgement of June 21, 2004 that the proceedings involved were not arbitral proceedings but an "independent Swiss domestic procedure aiming to contest a decision rendered by a Swiss law association"[6] according to Art. 75 ZGB (see BGE 127 III 279 at 2c/bb p. 284). As the Appellant rightly argues and as the Respondent does not deny, upon receiving the original decision of the FIFA Special Committee of April 26, 2002, it was not for lack of arbitrability that an arbitral tribunal could not be seized to impugn the decision, but because at the time the review of the decisions of the association by the CAS was not contemplated by the FIFA Statutes. Accordingly the FIFA decision had to be appealed to a State Court according to Art. 75 ZGB.

Contrary to the Respondent's view, the fact that the second decision of the FIFA Special Committee of February 14, 2008 could be appealed to the CAS due to the arbitration clause in the FIFA Statutes, does not change anything to the fact that these proceedings once more involved the decision of the association as to the Respondent's claim against the Appellant for the award of compensation for training and promoting player X._____.

Ultimately, the proceedings in front of the CAS, in which the Respondent challenged the denial by FIFA of the compensation sought, are nothing else than the arbitral adjudication of the impugnment of a decision of a Swiss association (see Urs Scherrer, Aktuelle Rechtsfragen bei Sportvereinen, in: Riemer [Hrsg.], Aktuelle Fragen aus dem Vereinsrecht, 2005, p. 60 f.; Heini/Portmann, Das Schweizerische Vereinsrecht, in: Schweizerisches Privatrecht, Bd. II/5, 3. edition 2005, Rz. 285). With regard to jurisdiction, the CAS refers to Art. R47 of the CAS Code, which among other things provides for an appeal against the decisions of an association (see the caption "Special

[5] Translator's note: ZGB is the German abbreviation for the Swiss Civil Code.
[6] Translator's note: In English in the original German text.

Provisions Applicable to the Appeal Arbitration Procedure"[7]) and not to Art. R38 ff of the CAS Code concerning Ordinary Arbitration Procedure[8], based on Art. R38 ff of the CAS Code, which concerns a dispute irrespective of a decision by an association (see Art. R27 CAS Code).

2.2.2 In the two proceedings in front of the Zurich Commercial Court and in front of the CAS the legality of the decision of the FIFA Special Committee as to the Respondent's claim against the Appellant as to formation and promotion of player X._____ had to be adjudicated. In a decision of June 21, 2004, the Commercial Court held that the FIFA Transfer Regulation of 1997 on which the first decision of the FIFA Special Committee relied was void because the decision was based on a transfer regulation which, among other things, was void due to a violation of European and Swiss Competition Rules. Whilst the impugnment allowed by Art. 75 ZGB may as a matter of principle only overturn a decision, the competent body of the association is bound by the judgment with which the decision of the association under review is set aside (BGE 118 II 12 at 1c p. 14 with reference to Riemer, Berner Kommentar, 3rd edition 1990, N. 82 at Art. 75 ZGB). The FIFA Special Committee had all the more to abide by the judgment of the Commercial Court that its decision was not merely rescinded due to an invalid legal basis but held to be void (see Riemer at N 129 f. at Art. 75 ZGB) and it could not proceed to award the Respondent compensation for training and promotion of player X._____ in a new decision based on the same 1997 FIFA Transfer Regulation. Accordingly, the FIFA Special Committee rejected the Respondent's renewed claim for compensation for training and promotion of player X._____ in a decision of February 14, 2008 which is correct in its result. On appeal, the CAS imposed on the Appellant compensation in the amount of EUR 400'000.- based on Art. 14 of the 1997 FIFA Transfer Regulation and set its quantum by applying Art. 42 (2) OR[9] alternatively. In doing so it ignored the judgment of the Commercial Court of the Canton of Zurich of June 21, 2004, which held as void the Appellant's

[7] Translator's note: In English in the original German text.
[8] Translator's note: In English in the original German text.
[9] Translator's note: OR is the German abbreviation for the Swiss Code of Obligations.

obligation to pay compensation for the formation and promotion as per the FIFA Special Committee based on the 1997 FIFA Transfer Regulation. The Respondent's argument, based on the right to be heard, that it was not a party to the proceedings in front of the Commercial Court and did not participate in them in any other way does not change the situation. The parties in front of the Commercial Court were logically determined by Art. 75 ZGB which, in an action for impugnment, always gives standing to be sued to the association and not to some other member interested in the decision (Riemer, ad N. 60 at Art. 75 ZGB; see also BGE 132 III 503 E. 3.1 p. 507). Apart from this, when the impugnment of the decision of an association or a challenge is upheld, this, as opposed to its rejection, has an effect not only as to the parties to the proceedings but *erga omnes* (Riemer, Anfechtungs- und Nichtigkeitsklage im schweizerischen Gesellschaftsrecht [AG, GmbH, Genossenschaft, Verein, Stockwerkeigentümergemeinschaft], 1998, Rz. 304, 218; derselbe, at N. 81 at Art. 75 ZGB; Heini/Scherrer, in: Basler Kommentar, Zivilgesetzbuch I, 3rd edition 2006, N. 31 and 38 at Art. 75 ZGB; see also Henk Fenners, Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport, 2006, p 75 Rz. 253; BGE 122 III 279 E. 3c/bb p 284 f. as well as Art. 706 Abs. 5 OR).

The fact that FIFA subsequently introduced an arbitral procedure to impugn its decisions, to which the Respondent is now a party and which makes it possible for the CAS to decide the case anew (Art. R57 of the CAS Code) does not change the fact that the issue in front of the CAS as to the legality of the decision by which the FIFA Special Committee granted or refused compensation between the Respondent and the Appellant as to the training and/or promotion of player X._____ had already been decided in a decision of the Commercial Court of June 21, 2004, which is enforceable. The subsequent introduction of an arbitral review of the decisions of the association remained without influence on the enforceability of the State Court decisions on impugnments previously issued. In relation to the new impugnment possibilities as well, contradictory decisions on the same issue in different proceedings had to be prevented (see Max Guldener, Schweizerisches Zivilprozessrecht, 3rd edition 1979, p.

364). Whether or not the Commercial Court of the Canton of Zurich would have been bound by its earlier decision in which it held that the compensation awarded by FIFA was void due to the invalidity of the FIFA Transfer Regulation of 1997 had a second impugnment be made against a new FIFA decision as to compensation for player X._____'s formation and promotion, the Arbitral Tribunal obtaining jurisdiction later could not examine anew an issue which had already been decided.

2.2.3 Moreover the Arbitral Tribunal may not be followed when it holds that the Appellant and FIFA, in connection with the issue of *res iudicata*, would have provided in their agreement of August 25, 2004 following the judgment of the Zurich Commercial Court that a new claim could be made in the same matter. When FIFA undertook towards the Appellant that it would take into consideration the judgment of the Commercial Court should the Respondent make new claims against the Appellant in the same matter, this reinforced its validity for later proceedings, contrary to the view of the CAS. That (FIFA) reckoned with further claims in no way means that they would have agreed with a new adjudication of the same claims.

2.2.4 The CAS award as to compensation for training and promotion of player X._____ is barred by *res iudicata*. The arbitral award by which the CAS awarded compensation for training and promotion of the player X._____ in the amount of EUR 400'000.- on the basis of the 1997 FIFA Transfer Regulation to the Appellant in disregard of the material legal effect of the judgment of the Zurich Commercial Court of June 21, 2004 accordingly violates procedural public policy.

3.

The appeal is to be granted and the CAS Award of August 31st 2009 set aside.

In view of the outcome of the proceedings the Respondent shall pay costs and compensate the other Party (Art. 66 (1) and Art. 68 (2) BGG).

Therefore, the Federal Tribunal pronounces:

1. The appeal is upheld and the award of August 21, 2009 is set aside.

2. The judicial costs, set at CHF 8'500.- shall be paid by the Respondent.

3. The Respondent shall pay to the Appellant an amount of CHF 9'500.- for the federal judicial proceedings.

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

Lausanne, April 13, 2009

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

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