4A.234/2008[1]

Judgement of August 14, 2008

First Civil Law Court

Federal Judge CORBOZ, Presiding

Federal Judges KOLLY and KISS (Mrs)

Clerk of the Court: CARRUZZO

X._____,

Petitioner,

Represented by Mr Marc HENZELIN

v.

Y._____,

Respondent,

Represented by Mr Cédric AGUET

Facts:

A.

On November 30, 2005, X._____, a sports agent and Y._____, a professional player, at the time playing with Club A._____ signed a contract entitled "mediation contract". According to that contract, valid for two years, Y._____ entrusted X._____ to act on an exclusive basis with a view to negotiating, concluding and renewing contracts with football clubs affiliated to FIFA, including in the framework of transfer operations. The Agent was entitled to a fee of 10 % of the compensation the Principal would be making in his quality as a professional football player. According to Art. 10 of the contract, any dispute in relation thereto would be submitted to a sole arbitrator appointed by the Chairman of the Ordinary

[1] Translator's note: Quote as X._____ *v.* Y._____, 4A.234/2008. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch.

Arbitration Division of the Court of Arbitration for Sport (CAS), which is based in Lausanne, the language of arbitration being French.

The aforesaid provision also stated the following: "the award issued by the arbitral jurisdiction shall be final and enforceable and subject to no appeal".

Pursuant to the contract, Y._____ paid X._____ an amount of Euros 200'000 and a further amount of Euros 600'000 in 2006.

In a registered letter of May 2, 2007, the player terminated the mediation contract.

B.
On June 20, 2007, X._____ filed a request for arbitration with the CAS seeking payment of a total amount in excess of six million Euros pursuant to the mediation contract. Y._____, for his part, submitted a counterclaim seeking a finding that the contract was void and reimbursement of Euros 800'000 paid to the Agent.

The Parties agreed to appoint Mr T._____, an attorney, as sole arbitrator. The CAS ratified the choice.

In an award of April 16, 2008, sent to the representatives of the Parties in a fax of the same day, the sole arbitrator found that the mediation contract was void as a consequence of a violation of the rules relating to the activity of sports agents. It ordered X._____ to pay back the amount of Euros 600'000, found that Y._____ owed the Agent an amount of Euros 259'400 on the basis of a previous agreement, the validity of which had not been challenged by the Parties, ordered a set off between the two claims and stated that the difference would bear interest at the statutory rate from the date of the award. All other and further submissions were rejected by the arbitrator, who also decided that each party would bear his own expenses and half the costs of the arbitration.

C.
On May 16, 2008, X._____ filed a request for revision in which he invited the Federal Tribunal to void the aforesaid award and to send the matter back to the CAS for new

arguments and a new decision. According to him, the award would have been issued by a biased arbitrator and on the basis of forged documents. The Petitioner sought a stay of the enforcement during the proceedings. In his answer, Y._____ submitted that the matter was not capable of revision and subsidiarily that the petition should be rejected.

In its submissions, the CAS concluded that the petition should be rejected.

The request for a stay of enforcement was provisionally granted by decision of the Presiding Judge of May 21, 2008.

Reasons:

1.

The Federal Statute on Private International Law (PILA[2], RS 291) contains no provision with regard to the revision of arbitral awards within the meaning of Art. 176 ff PILA. The Federal Tribunal filled that lacuna in its case law. The grounds for revision of such awards were the ones set forth at Art. 137 OJ. They are now encompassed by Art. 123 LTF[3]. The Federal Tribunal has jurisdiction to entertain the request for revision of any international arbitral award, whether final, partial or interlocutory; its jurisdiction in this area encompasses only the awards binding the Arbitral Tribunal from which they originate, to the exclusion of mere procedural orders, which may be modified or cancelled during the proceedings. When granting a petition for revision, the Federal Tribunal does not decide the merits but it sends the matter back to the original Arbitral Tribunal or to a new Arbitral Tribunal to be constituted (ATF 134 III 286 at 2 and cases quoted).

2.

In a first group of arguments, the Petitioner claims that a few hours after receiving the award of April 16, 2008, he would have discovered some circumstances, which could cast serious doubt on the independence of the arbitrator who issued the award. Thus he considers that as

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[2] Translator's note: PILA is the most frequently used English abbreviation for the Federal Statute on Private International Law of December 18, 1987.

[3] Translator's note: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organising the Federal Tribunal, RS 173.110, which substituted the previous statute known as "OJ" in its French abbreviation.

to those circumstances, he is entitled to claim both the specific ground contained in the law (Art. 121 (a) LTF) and the broader one arising from Art. 123 (2) (a) LTF.

2.1 Whether the matter is capable of revision or not, as the Respondent argues, is indeed debatable. There is no issue here as to the Petitioner's compliance with the time-limit within which a petition for revision must be filed, since the Petitioner acted within both the 30 days limit after discovering the ground for challenge (Art. 124 (1) (a) LTF) and within the 90 days from the notification of the full award (Art. 124 (1) (d) LTF). What is problematic, however, is the very admissibility of the grounds for revision relied upon by the Petitioner.

In a recent decision, the Federal Tribunal found that a ground for challenge similar to the one involved here came within the purview of both Art. 121 (a) LTF (discovery of a ground for challenge) and within those of Art. 123 (2) (a) LTF (discovery of a new pertinent fact) and it wondered whether the previous jurisprudence, created under the aegis of the Federal Statute organising courts, should be maintained, according to which it was impossible to base a petition for revision on circumstances which could have been invoked within the framework of an appeal based on Art. 190 (2) PILA (ATF 129 III 727 at 1, p. 729 and cases quoted) or if the road to revision should be opened when the ground for revision is discovered only after the time limit to appeal has expired[4]. However, the issue was left open (decision 4A.528/2007 from April 4, 2008 at 2.5[5]). It may also remain undecided in this case. Indeed, the condition precedent just stated for such an extension of the purview of revision, bearing in mind the subsidiarity of that legal recourse compared to the appeal (ATF 129 III 727 at 1, p. 729) is not met in this case anyway, considering that, according to the Petitioner, the ground for revision was discovered much before the time to appeal had expired.

Yet, the Petitioner relies on the renunciation to appeal stated at Art. 10 of the mediation contract, the validity of which he expressly acknowledges, to conclude that revision was the only possibility he had to challenge the arbitrator's partiality. Whether such a renunciation also ruled out revision or not will be left open here (see decision 4P.265/1996 of July 2, 1997,

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[4] Translator's note: The German quote of a short sentence of the decision quoted has been omitted: for a full translation of the decision quoted, which is the April 4, 2008 decision 4A.528/2007, see www.praetor.ch.

[5] Translator's note: See the full English translation at www.praetor.ch.

at 1a; where the Federal Tribunal doubted that revision could fall within Art. 192 PILA. On that question, see also: Bernhard Berger/Franz Kellerhals, Internationale und interne Schiedsgerichtsbarkeit in der Schweiz, n.1812 ff; Gabrielle Kaufmann-Kohler/Antonio Rigozzi, Arbitrage international, Droit et pratique à la lumière de la LDIP, n.861 and note 422; Paolo Michele Patocchi/Cesare Jermini, in Commentaire bâlois, Internationales Privatrecht, 2nd ed., n.22 ad Art. 192 LDIP). This being said, it appears difficult to admit that a Party which expressly renounced an appeal, including therefore the right to avail itself of the ground for appeal at Art. 190 (2) (a) LDIP, could still seize the Federal Tribunal sideways by relying on the same ground, discovered before the time to appeal had expired, within the framework of a petition for revision, failing which Art. 192 PILA would become meaningless.

Be this as it may, another reason, which is not subject to discussion, prevents the admissibility of the ground for revision invoked by the Petitioner, as will be demonstrated hereafter.

2.2

2.2.1 A Party intending to challenge an arbitrator must invoke the ground for challenge as soon as it becomes aware of it. This rule, established by case law, applies to the grounds for challenge which the interested Party effectively knew and to those which it could have known by applying appropriate attention, and choosing to remain in ignorance may be considered, depending on the case, as an unacceptable manoeuvre comparable to deferring the filing of a challenge. The aforesaid rule applies the principle of good faith to arbitral proceedings. According to that principle, the right to rely upon an irregular composition of the arbitral tribunal is forfeited if a party does not invoke it immediately, because it could not keep it in reserve in order to invoke it only in case of an unfavourable outcome of the arbitral procedure (decision 4A.506/2007 of March 20, 2008, at 3.1.2 and the cases quoted). A petition for revision based on Art. 121 (a) LTF could therefore be considered only with regard to a ground for challenge which the Petitioner could not have discovered during the arbitral proceedings by applying the attention required under the circumstances (Decision 4A.528/2007, quoted above, at 2.5.1).

The same would apply if the subsequent discovery of a ground for challenge were to be considered as a new pertinent fact within the meaning of Art. 123 (2) (a) LTF (decision 4A.528/2007, quoted above, at 2.5.2).

2.2.2 To substantiate his petition for revision, the Petitioner alleges that in a phone conversation he had on the very day of the notification of the award, he would have heard from his interlocutor, that sole arbitrator T._____ is counsel to W._____. That federation would not only support the cause of the players, but be against sports agents. Again according to the Petitioner, he would have discovered that Mr T._____ had been counsel to several players, particularly a player of club C._____ at the time when the lawyer appearing on behalf of the Respondent in the arbitral proceedings was President of that club. The agents for the player in question were none others than the present agents of Respondent, let alone the agents of a former client of Mr T._____'s. The Petitioner also points out that the sole arbitrator acted as counsel to the Respondent in an arbitral proceeding in which the latter was opposed to the football club of B._____ in front of the CAS in 2007, but he recognises having known that when the arbitrator was appointed. According to the Petitioner, the facts he relies upon would cast serious doubt on the arbitrator's independence and on the legality of certain of his acts in the proceedings. Accordingly, these would constitute ground for revision.

The concomittance between the notification of the award and the discovery of the ground for challenge by the Petitioner appears quite peculiar. Be this as it may, supposing that he would not have been aware of the alleged ground for challenge in due course, the Petitioner could have acquired that information by applying proper care. It must be pointed out that this a dispute with all the characteristics of those which are the object of ordinary commercial arbitrations, except for the sports context involved and that the case relates to an amount in excess of six million Euros. The arbitration clause inserted into the mediation contract gave jurisdiction to a sole arbitrator to decide such a dispute and it excluded any appeal against the award which would be issued. Therefore, the importance of the choice of the sole arbitrator could not reasonably have escaped the Petitioner. The most elementary prudence behooved him to investigate and ensure that the arbitrator entrusted with deciding a dispute of such magnitude gave sufficient guarantees of independence and impartiality. In this respect, he could not rely on the general statement of independence made by each arbitrator on the *ad hoc form*. Moreover, as the CAS points out in its answer to the petition for revision, the data on its internet site which relates to T._____, accessible at any time, shows that he is counsel to several unions (of players or trainers) and that he represents W._____. It is also established that in 1999, he published a book with Me U._____, i.e. the lawyer who

represented the Petitioner in front of the CAS. It is consistent with the experience of life that such a situation would make it possible for the attorney for the Petitioner to know the sole arbitrator's professional activities. Also, the Petitioner himself recognises that he knew that the Respondent had appointed T._____ as arbitrator to the panel entrusted with deciding the dispute between him and the football club B._____. Under such conditions, it is hardly imaginable that the Petitioner, as a professional football agent, would have ignored at the time the facts that he puts forward today as to the sole arbitrator's person to substantiate his petition for revision. If he ignored them it cannot but be due to an inexcusable lack of curiosity under the circumstances (see, *mutatis mutandis*, the decision, quoted above, 4A.528/2007, at 2.5.3 and 4A.506/2007, at 3.2).

Accordingly, the Petitioner's right to base his request for revision on the discovery of a ground for challenge has been forfeited, whether he knew at the time the ground of challenge that he invokes today, or he should have known it by applying the attention required under the circumstances. The matter is therefore not capable of revision on that point.

3.
Secondly, the Petitioner claims that the award would have been influenced by fraudulent behaviour, which led him to file a criminal complaint for forgery and fraud against the arbitrator, the Respondent and a third Party on May 9, 2008.

3.1 On the basis of Art. 123 (1) LTF, revision may be sought when a criminal investigation establishes that the decision for which revision is sought was influenced by a crime to the Petitioner's detriment even if no sentence was issued.

The use of the verb "to establish" in the aforesaid provision clearly shows that as a matter of principle, it supposes that the criminal investigation would have been pursued to its end (decision B 25/96 of August 14, 1996; ATF 86 II198 p.200; see also: Jean-François Poudret, COJ, n. 1.2 ad Art. 137). Moreover, the crime or the offense must have led to an unfavourable result for the Petitioner (Elisabeth Escher, in Commentaire bâlois, Bundesgerichtsgesetz, n. 3 in fine ad Art. 123 LTF).

3.2 In the case at hand, none of these two cumulative conditions is met and it is therefore not necessary to examine more closely the delicate question of whether or not the matter would be capable of revision on this ground with regard to both Art. 192 and the rule of subsidiarity of revision as compared to the appeal (see 2.1 above; also see Berger/Kellerhals, op. cit., n. 1815, for whom the ground of revision stated at Art. 123 (1) LTF is within the purview of Art. 190 (2) (e) PILA as to the violation of public policy).

3.2.1 With regard to the first condition, the Petitioner himself indicates in his petition for revision that he relies on Art. 123 (1) only in order to protect his rights, as the ongoing criminal investigation has not yet established the existence of a crime or of an ofense which would have influenced the award under review to his detriment.

3.2.2 As to the second condition, one cannot but find that it is not proved at all that the facts alleged by the Petitioner, assuming they would constitute a criminal ofense, would have influenced the arbitrator's decision to the Petitioner's detriment.

In this respect, the Petitioner claims forgery with regard to a statement by a third party, according to which the parties to the mediation contract would have agreed on the payment of Euros 600'000 by the Petitioner to the Respondent in full and final settlement. Relying upon that document, he claims not to know that the sole arbitrator in no way relied upon that document to dismiss the claims, but that he justified his decision by the fact that the contract at hand was void.

The Petitioner also claims that the professional player contract concluded on June 15, 2005 by the Respondent with A._____ contains some wrong indications, presenting him as that club's agent when he was the player's. According to him, on that basis the sole arbitrator would have denied the right for him to claim from the Respondent because he was not the latter's agent. In reality, the arbitrator relied upon the aforesaid contract only in a subsidiary reasoning in order to demonstrate that the nullity of the mediation contract, already found in his principal reasoning, would also have to be admitted on the basis of a provision outlawing "double agency". Thus, since the principal reasons on which the award under review relies may no longer be challenged and justify the solution to which the arbitrator came, it is excluded that the award could have been influenced to the Petitioner's detriment by the

allegedly false document being taken into consideration, since this, assuming it were true, would only impact the subsidiary reasoning set forth by the arbitrator in addition to the main one.

4.
The petition for revision cannot but be rejected to the extent that the matter is capable of revision. The Petitioner will accordingly bear the expenses related thereto (Art. 66 (1) LTF) and compensate the Respondent (Art. 68 (2) LTF).

Therefore, the Federal Tribunal pronounces:

1. The petition for revision is rejected to the extent that the matter is capable of revision.
2. The judicial costs, set at CHF 8'000 shall be borne by the Petitioner.
3. The Petitioner shall pay to the Respondent an amount of CHF 9'000 for the Federal judicial proceedings.
4. This judgment shall be notified to the representatives of the Parties and to the Court of Arbitration for Sport (CAS).

Lausanne, August 14, 2008

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

The presiding Judge: The Clerk:

CORBOZ CARRUZZO