4A_10/2010[1]

Judgment of December 10, 2010

First Civil Law Court

Federal Judge KLETT (Mrs), Presiding,

Federal Judge CORBOZ,

Federal Judge KOLLY,

Clerk of the Court: Mr. CARRUZZO.

X.________

Appellant,

Represented by Mr Antonio RIGOZZI

v.

FC Y.________

Respondent

Facts:

A.

X.________ a professional football player of [omitted citizenship] played for FC Y.________, a football club at the time in the First League of [name of country omitted] from September 2004 until the end of July 2005.

In a decision of October 31, 2008 the Dispute Resolution Chamber (DRC) of Fédération Internationale de Football Association (FIFA) ordered Club [name omitted] to pay to player [name omitted] an amount of EUR 83'587.- as salary in arrear (EUR 13'587.-) and as compensation for breach of contract without cause (EUR 70'000.-) within the meaning of the FIFA Regulations on the Status and Transfer of Players (2005 edition). The aforesaid amount was to be paid within 30 days from the date of notification of the award. Failing that it would carry interest at 5 % per annum from the expiry of that time limit.

B.

[1] Translator's note : Quote as X.________ *v.* FC Y.________ 4A_10/2010. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch.

FC Y.________ appealed the aforesaid decision to the Court of Arbitration for Sport (CAS). In its last submissions, FC Y.________ claimed compensation of EUR 300'000.- from the player and denied owing him anything.

X.________ submitted that the matter was not capable of appeal or that it should be rejected. On the merits he submitted that FC Y.________ should be ordered to pay him EUR 83'587.- at least with interest at 5 % from August 2, 2005.

Mr. A.________, a Geneva lawyer, acting as CAS arbitrator, issued an award on November 26, 2009 which partially granted the appeal, reduced the compensation for breach of contract awarded to the [nationality omitted] player by EUR 30'000.- and rejected all further submissions. Consequently the [nationality omitted] Club was ordered to pay EUR 13'587.- and EUR 40'000.- to its former player. According to paragraph 5 of the award these two amounts would yield interest at 5 % yearly if they were not paid within 30 days from the notification of the award.

C.

On January 7, 2010 X.________ filed a Civil law appeal with the Federal Tribunal with a view to obtaining the annulment of the November 26, 2009 award. At his request the appeal proceedings were stayed by decision of the Presiding Judge of January 12, 2010 until adjudication of the request for interpretation of the award he submitted to the CAS on December 23, 2009. The proceedings were continued after the President of the Appeals Arbitration Division of the CAS refused to consider the request.

In its answer of October 21, 2010 the CAS submits that the appeal should be rejected. The Respondent did not file an answer within the time limit it was given for that purpose.

The Appellant filed a reply on November 23, 2010.

Reasons:

1.

In the field of international arbitration a Civil law appeal is allowed against awards of arbitral tribunals under the requirements of Art. 190-192 PILA[2] (Art. 77 (1) LTF[3]). Whether as to the object

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[2] Translator's note: PILA is the most frequently used English abbreviation for the Federal Statute of December 18, 1987, on Private International Law, RS 291.

of the appeal, the standing to appeal, the time limit to appeal, the Appellant's submissions or the grievances raised in the appeal brief, none of the requirements for admissibility raise any problems in this case. The matter is accordingly capable of appeal.

2.

The Appellant argues that the Arbitrator based his award on a legal reason unforeseeable for the Parties in violation of his right to be heard (Art. 190 (2) (d) PILA). He also argues that he disregarded his minimum duty to address the issues pertinent to the outcome of the dispute.

2.1 In Switzerland the right to be heard principally relates to the finding of facts. The right of the parties to be questioned on legal issues is recognized only limitatively. As a rule, according to the saying *jura novit curia*, state courts or arbitral tribunals freely assess the legal significance of the facts and they may also decide on the basis of rules of law other than those relied upon by the parties. Consequently, to the extent that the arbitration agreement does not limit the task of the arbitral tribunal only to the legal grounds raised by the parties, they do not have to be heard specifically as to the scope to be recognized to rules of law. As an exception they have to be asked when the court or the arbitral tribunal considers basing its decision on a rule or on a legal consideration which was not discussed during the proceedings and of which the parties could not anticipate the relevance (ATF 130 III 35 at 5 and references). Moreover knowing what is unforeseeable is a matter of appreciation. Thus for this reason the Federal Tribunal shows restrain in applying the aforesaid rule and because the specificities of this type of procedure must be taken into account whilst avoiding that the argument of surprise could be used with a view to obtaining substantive review of the award by this Court (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).

Moreover the right to be heard in contradictory proceedings within the meaning of Art. 190 (2) (d) PILA does not require an international arbitral award to be reasoned (ATF 124 III 186 at 6.1 and references). However it imposes on the arbitrators a minimal duty to examine and address the pertinent issues (ATF 133 III 235 at 5.2 p. 248 and cases quoted). That duty is breached when inadvertently or due to a misunderstanding the arbitral tribunal does not take into account some factual allegations, arguments, evidence and offers of evidence submitted by one of the parties that are important to the decision to be issued. If the award totally fails to discuss some elements apparently important to the resolution of the dispute, it behooves the arbitrators or the Respondent

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[3] Translator's note: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173 110.

to justify the omission in their briefs in the appeal. They have to show that contrary to the Appellant's allegations, the items omitted were not pertinent to decide the case at hand or, if they were, that they were implicitly refuted by the arbitral tribunal. However the arbitrators are not obliged to discuss all arguments raised by the parties so that they cannot be found to have violated the right to be heard in contradictory proceedings if they do not refute, even implicitly, an argument objectively lacking any pertinence (ATF 133 II I 235 at 5.2 and the cases quoted).

2.2

2.2.1 In a first part of his argument the Appellant claims that he submitted to the CAS that the Respondent should be ordered to pay an amount of at least EUR 83'587.- with interest at the statutory rate of 5 % from August 2, 2005, adding that this was the "termination date". He adds that the Respondent did not deny that interest should run from the aforesaid date, which is why none of the Parties subsequently developed any legal arguments on the issue of the day from which interest should run. Yet according to the Appellant the arbitrator, without even asking the Parties in advance as to that issue, decided against all expectations that interest would run as from 30 days after the notification of the award. He would thus have deprived him of the possibility to demonstrate that the amount he was owed by the Respondent was due immediately after the employment relationship was terminated.

2.2.2 The Appellant argues in vain that there was a surprise.

It is first of all appropriate to quote here verbatim the two sequences in his brief in answer of July 9, 2009:

"74. In view of the foregoing, the Respondent [i.e. the Appellant here] submits that the decision under appeal should be confirmed to the extent that it orders the Appellant [i.e. the Respondent here] to pay him total compensation equal to or above EUR 83'587.- with interest at the statutory rate of 5 % from August 2, 2005 (date of termination)."

(…)

"III. Submission

78.

(…)

As to the merits

- Reject the appeal made by FC Y.________;
- Order FC Y.________ to pay to Mr. X.________ at least EUR 83'587.- with interest at the statutory rate of 5 % from August 2, 2005."

As rightly pointed out by the Arbitrator in his observations and no matter what the Appellant says in his reply, the sequences quoted above, particularly the first one, are not of the greatest clarity. Indeed the DRC award of October 31, 2008 did not set a specific date, such as August 2, 2005, to decide when interest should start running. There was accordingly some inconsistency on the Appellant's part to seek both the confirmation of the decision and the award of interest from the aforesaid date. The submission made in this respect, supposedly seeking confirmation only, actually departed from that which had been decided in the first instance, since interest should run from a date – August 2, 2005 – much prior to that resulting from the DRC decision (30 days after notification of the October 31, 2008 decision). It was a "counterclaim" within the meaning of Art. R55 of the Sport Arbitration Code, which went beyond the Appellant's mere submission that the appeal should be rejected (see the second excerpt quoted) and which resembled what could be called a joint appeal. Moreover the argument in support of the submission was very meager, being phrased as follows: "date of termination". Therefore if there was a misunderstanding as to the real scope of submissions very much lacking clarity or even contradictory, the Appellant may only blame himself and should not blame the Arbitrator.

Claiming that the Respondent "did not deny that interest should run from August 2, 2005" (appeal at 24) as the Appellant does is too simplistic if not erroneous. Indeed the Respondent denied owing anything to the Appellant. Logically such a defense could not be limited to the capital in dispute, it had to cover interest as well. At least it would be inappropriate to deduct, as the Appellant does, that the Respondent would have agreed with the date of August 2, 2005 should the Arbitrator find that the amount claimed was legally due.

Finally and more generally speaking, the date from which interest should run is a recurrent issue in monetary matters and in particular in employment contract cases. Thus the Appellant could not exclude that with regard to this issue the Arbitrator may choose another solution than that which he would have wished. This was even less implausible because his own solution departed from that which had been chosen by the DRC. Under such conditions prudence would have required the Appellant to show to the Arbitrator in a legal reasoning worthy of the name why interest should start from August 2, 2005. Therefore the first part of the Appellant's argument is unfounded.

2.3 In the second part of his argument the Appellant claims that the Arbitrator said absolutely nothing as to the reasons leading him to choose “a solution not argued by the Parties as to interest” (appeal at 32). He is wrong. Indeed as the Arbitrator explained in his observations the solution he reached corresponds to that chosen by the DRC in its decision of October 31, 2008, which the Appellant submitted should be confirmed in his answer to the appeal. The issue in dispute was accordingly addressed by the Arbitrator and the fact that he did not state any reasons in his award in this respect is of no consequence in view of federal case law as to the reasons of international arbitral awards. Moreover, as was already mentioned above, if the Arbitrator did not give to the Appellant’s particular submission the meaning that he meant, this was because the aforesaid submission and the arguments in its support lacked precision. This is a circumstance for which the Appellant is liable.

This being so, the argument is unfounded in both its parts. Accordingly the appeal shall be rejected.

3.
The Appellant shall pay the judicial costs (Art. 66 (1) LTF). However he shall not compensate the Respondent as the latter did not file an answer.

Therefore the Federal Tribunal pronounces:

1. The appeal is rejected.

2. The judicial costs, set at CHF 1’000.- shall be borne by the Appellant.

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

Lausanne, December 20, 2010

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

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