4A_18/2008[1]

Judgement of June 20, 2008

First Civil Law Division

Federal Judge CORBOZ, Presiding
Federal Judge ROTTENBERG LIATOWITSCH (Mrs)
Federal Judge KISS (Mrs)
Clerk of the Court: LUCZAK

X._____ ,
Appellant,
Represented by Mr Daniel ORDÀS

v.

Y._____ SAD,
Respondent,
Represented by Mr Philippe DICKENMANN

Facts:

A.

X._____ is a football club (hereafter "the Appellant") based in Argentina and is a member of the Asociación del Fútbol Argentino (hereafter "AFA"). Y._____ SAD is a "Sport common stock company" (Sociedad Anónima Deportiva) according to Spanish law and a football club based in Spain (hereafter "the Respondent") and is a member of the Real Federación Española de Fútbol ("RFEF"). AFA and RFEF are members of FIFA. The dispute is connected to the transfer of an Argentinean star player, who played for the

[1] Translator's note: Quote as X._____ *v.* Y._____ SAD, 4A_18/2008. The original of the decision is in German. The text is available on the web-site of the Federal Tribunal www.bger.ch.

Appellant with an AFA license from 1990 until 1996 at the age of 12 until aged 18. In August 2005, he was transferred from Club Z._____ to the Respondent for a total transfer amount of EUR 7'400'000 according to the Appellant. Accordingly, the Appellant, based on the 2005 version of the FIFA Regulations for the Status and Transfer of Players, made a claim to FIFA for a solidarity contribution for the training of the player according to the Solidarity Mechanism.

B.

The FIFA took the view that the regulations concerning the Solidarity Mechanism would not apply to a transfer within the same national association. The Appellant held a different view and claimed EUR 185'000.- from the Respondent. The Dispute Resolution Chamber ("DRC") of the FIFA held that it had jurisdiction to decide disputes as to the Solidarity Mechanism between parties belonging to different national associations and rejected the claim mainly with the same reasons as FIFA, namely that for transfers within the association, the regulations of the national association should apply. However, to the extent that the national association adopted the provision relating to the Solidarity Mechanism in its national Regulations, that system should also be applied to other national associations, which trained the player transferred.

C.

Pursuant to an appeal by the Appellant, the Court of Arbitration for Sport ("CAS") confirmed that decision in an award of December 4, 2007. In the appeal, it was mainly claimed that the decision of the DRC was to be overturned and the Respondent ordered to pay EUR 184'000.- with interest or 2,5% of the actual transfer amount.

D.

In a Civil law appeal, the Appellant mainly submits that the Federal Tribunal should overturn the award of the CAS and order the Respondent to pay CHF 314'500.- (EUR 185'000.-) within the meaning of the solidarity contributions according to FIFA Regulations with interest at 5% since September 30, 2005. The Respondent submits that the appeal should be rejected to the extent that the matter is capable of appeal at all.

Reasons:

1.

The decision under appeal is in Spanish. Since this is not an official language, the Federal Tribunal issues its decision in German, which both parties used in front of the Federal Tribunal (Art. 54 (1) BGG[2]). According to Art. 54 (3) BGG, it is possible with the agreement of the other party to renounce the translation of documents filed by a party when they are not in an official language. The Respondent participated in the proceedings without requiring a translation and it must accordingly be assumed that a translation was renounced. According to Art. 54 (4) BGG, the Federal Tribunal orders a translation when that is necessary. Since it appears from the grievances raised and their inappropriate reasoning that the matter is not capable of appeal irrespective of the contents of the decision under appeal, the translation of the decision is not necessary.

2.

The Appellant concedes that the CAS is an international arbitral tribunal, the decisions of which may be appealed only under the conditions of Art. 190 (2) PILA[3] and Art. 77 BGG. Only those grievances limitatively set forth in Art. 190 (2) PILA are admissible. According to Art. 77 (3) BGG, the Federal Tribunal reviews only the grievances made in the appeal and reasoned; this corresponds to the duty to present reasoned grievances contained in Art. 106 (2) BGG for the violation of fundamental rights and for that of cantonal and inter-cantonal law (BGE 134 III 186 E. 5, p. 187 with references).

2.1 The Appellant claims that the decision under appeal violates the right to be heard and Swiss public policy. Yet, it merely explains essentially that the competent authorities would have given a wrong interpretation of the FIFA Regulations, to the extent that they took the view that the Solidarity Mechanism contained there would apply only to transfers between clubs belonging to different national associations. The position held by the CAS would lead to impracticable and therefore arbitrary results.

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[2] Translator's note: BGG is the German abbreviation for the Federal Statute of June 17, 2005 organising the Federal Tribunal, RS 173 110.

[3] 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.

2.2 Even an obviously wrong application of the law is not sufficient ground as such to overturn an arbitral award. The material judicial review by the Federal Tribunal is limited to the question as to whether the arbitral award is consistent with public policy or not. According to case law, the adjudication of an arbitral dispute on the merits violates public policy only when it breaches some fundamental principles of law and therefore becomes absolutely incompatible with Swiss legal and value orders. In order for a complaint based on Art. 190 (2) (e) PILA to succeed, the Appellant should demonstrate that in the specifics of the case (BGE 117 II 604 E. 3, p. 606). The Appellant's explanations satisfy those requirements in no way, which makes the matter not capable of appeal. For instance, it is merely claimed that when FIFA extends the application of national regulations to foreign associations, this would violate elementary legal principles, but not explained how some fundamental legal principles would be violated when FIFA prescribes to its members to treat the clubs of other national associations as their own in certain areas.

2.3 The Appellant claims that the DRC shared the Appellant's view with regard to the solidarity contribution until the year 2004 and that eventually it moved from that practice to the one in force now for inexplicable and unfounded legal reasons as from July 2004. That change of practice would violate the principle of equality and the principle of legal certainty.

2.3.1 In this regard as well, the Appellant does not bring forward any admissible and sufficiently reasoned grievance according to Art. 190 PILA, but it merely submits to the Federal Tribunal the question as to whether the change of practice took place rightly or not. That is not capable of appeal.

2.3.2 To the extent that the Appellant may wish to claim that a groundless change in practice would violate its protected rights under Art. 190 PILA, its grievance is not sufficiently reasoned. The Appellant does not discuss the decision under appeal but it limits itself to submit its different opinion to the Federal Tribunal. By doing so, it disregards the requirements for reasons, irrespective of the admissibility of the grievance raised. Moreover, the decision under appeal may rely on the wording of the Regulations, whereby it contains some provisions as to the transfers between clubs belonging to different associations (Art. 1 (1)) and instructs the national associations to regulate the transfer of players in the same association with regulations germane to the association. That internal regulation must provide

for a compensation system for clubs which invested in the training and furtherance of young players (Art. 1 (2)). The Solidarity Mechanism according to FIFA Regulations, however, is not among the provisions which need to be included without modification in the national rules (see Art. 1 (3)(a) and Art. 21 of the Regulations).

2.4 To the extent that the Appellant claims that its right to be heard would have been violated because the CAS failed to assess its arguments, it must be pointed out that according to established case law, no right to a reasoned decision can be deducted from the right to be heard within the meaning of Art. 190 (2)(d) PILA (BGE 134 III 186 E. 6.1, p. 187 with reference). The Appellant does not demonstrate that it would not have been able to present its point of view in the proceedings; it actually limits itself to deploring that the CAS did not follow its argument. A violation of the right to be heard or of public policy is not explained in this respect as well, so that the grievance is not admissible.

2.5 Besides grievances as to the wrong or arbitrary application of the law, which are not admissible in the framework of international arbitration (Art. 77 BGG and Art. 190 (2) PILA), the Appellant relies on other grievances, admissible in principle, such as the violation of public policy and that of the right to be heard. The reasoning of these grievances is however limited to an appellate criticism of the decision under review. Such complaints are not capable of appeal.

3.
The Appellant also submits that the Federal Tribunal should review the case at hand freely in order to protect the right to an independent judge as protected by the ECHR[4]. In view of the factual coercion to enter the association, which is a member of FIFA by necessity, the arbitration clause would not be binding on the Appellant.

3.1 The Appellant's complaints are incomprehensible. If a valid arbitration clause were missing, this could be appealed to the Federal Tribunal according to Art. 190 (2)(b) PILA, but under no circumstances would it cause the Federal Tribunal to exercise a materially free review of the decision under appeal. If the Arbitral Tribunal would appear to lack

[4] Translator's note: European Convention on Human Rights.

jurisdiction, its decision would rather be overturned by the Federal Tribunal. Then, the matter could be submitted to the State court having jurisdiction.

3.2 However, the Appellant is not to be heard either with regard to the complaint that the arbitration clause would not be binding on him. According to the principle of good faith and to the prohibition of abuse of rights, it is not admissible to wait for the unfavourable outcome to bring forward some belated complaints which could have been made at an earlier stage in the proceedings (BGE 132 II 485 E. 4.3, p. 496; 124 I 121 E. 2, p. 123). That principle has specifically been incorporated in Art. 186 (2) PILA and applies even more to the Appellant, which had itself introduced the proceedings in front of the corresponding decision making authorities. Moreover, the decision under appeal expressly holds that the jurisdiction of the CAS was not the object of any argument by the parties (decision under appeal at 40, p. 10).

3.3 The Appellant's reference to the judgment of the Federal Tribunal 4P.170/2006 (BGE 133 III 235) changes nothing to the inadmissibility of its grievances. That decision concerns the renunciation to appeal an arbitral award according to Art. 192 PILA in connection with the sanctions pronounced against a sportsman by the association, which require no *exequatur,* and not the question of the Arbitral Tribunal's jurisdiction. Also, the Federal Tribunal expressly holds that as to the validity of an arbitration clause (and thereby as to the renunciation to the State courts and the corresponding judicial review of the Federal Tribunal), there is no need to apply the same strict requirements as with regard to a renunciation to appeal according to Art. 192 PILA (BGE 133 III 235 E. 4.3.2.3, p. 245). To that extent, the complaints of the Appellant miss the point.

4.
With its appellate criticism of the decision under appeal, the Appellant raises no admissible and sufficiently reasoned complaints. The whole matter is therefore not capable of appeal, with no need to review the admissibility of each one of the Appellant's submissions. In view of the outcome of the proceedings, the Appellant must pay the costs and compensate the Respondent.

Therefore, the Federal Tribunal pronounces:

1. The matter is not capable of appeal.
2. The judicial costs, set at CHF 6'500.-, shall be borne by the Appellant.
3. The Appellant shall pay to the Respondent an amount of CHF 7'500.- 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, June 20, 2008

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

The presiding Judge:	The Clerk:
CORBOZ	LUCZAK