4A_222/2011[1]

Judgment of August 22, 2011

First Civil Law Court

Federal Judge Klett (Mrs), Presiding
Federal Judge Rottenberg Liatowitsch (Mrs),
Federal Judge Kolly,
Clerk of the Court: Carruzzo.

Petitioner,

X._____ (formerly W._____),
Represented by Mr Antonio Rigozzi

v.

Respondent,
Club Y._____
Represented by Mr Cyrille Bugnon

Facts:

A.

A.a A._____ (hereafter: A._____ or the Player) is a football player and a citizen of [name omitted] born in 1985. In 1998 he started is carrier with Club Y._____ (hereafter: Y._____), a football team in the [name of country omitted] National League. After eight seasons he played for V._____ Club (hereafter: V._____) another football club of the National League of [name of country omitted] as from the 2006/2007 season.

[1] Translator's note: Quote as X._____ *v.* Club Y. _____; 4A_222/2011. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch.

Pursuant to a transfer contract concluded on June 14, 2007, W._____ (presently X._____) acquired the [citizenship omitted] Player against payment of Euro 400'000 to V._____ it had him sign a professional player contract.

A.b Having heard of this transfer, Y._____ claimed the payment of training compensation in an unspecified amount corresponding to eight seasons. This was refused because A._____ was already a professional player when he was playing with V._____.

The dispute could not be settled amicably and it was submitted to the Dispute Resolution Chamber of FIFA (hereafter: DRC of FIFA). In a decision of March 12, 2009 the DRC ordered W._____ to pay the amount of Euro 480'000 to Y._____ as training compensation.

A.c Club [name omitted] appealed that decision to the Court of Arbitration for Sport (CAS). A Geneva lawyer was appointed as a sole Arbitrator. In a partial award issued on February 15, 2010 it rejected W._____'s request to join V._____ in the appeal proceedings, so that club [name omitted] would not be deprived of access to the first jurisdiction[2].

After hearing the case, the sole Arbitrator issued his final award on May 6, 2010. He confirmed the decision of the DRC and held that the amount of Euro 480'000 would bear interest at 5% a year from the thirtieth day after notification of the award and rejected Y._____'s counterclaim. The only issue dealt with by the Arbitrator was as to whether or not at the time of his transfer from V._____ to Club [name omitted], A._____ was already a professional player, in which case Y._____ could not have claimed training compensation pursuant to the *ad hoc* sport rules. The issue was resolved in the negative.

B.

On April 4, 2011, W._____ (hereafter: the Petitioner) seized the Federal Tribunal of a request for revision with a view to obtaining the annulment of the aforesaid award and a remand of the case to the Arbitrator or to a new arbitral tribunal to be constituted by the CAS. In support of his petition, the Petitioner argues in substance that the evidence attached would establish that during the 1998/1999 and 1999/2000 seasons, the Player was not playing with Y._____ but with U._____ another football club of [name of country omitted]. It would thus have been established that, contrary to what the Arbitrator held, A._____ did not spend eight years with Y._____.

[2] Translator's note: This means that the Arbitrator did not want to join the club because it had not been participated in the initial proceedings in front of the DRC.

Hence the training compensation sought by that club should at the very least be reduced in proportion. The Petitioner adds that he does not rule out that within the revision proceedings, other evidence may appear to be false, to the extent that the very award of training compensation could be questioned.

In a letter of July 4, 2011 the CAS stated that it would not issue a position on the petition for revision as depending of the outcome of the case it could be led to issue a new decision in this case. Nonetheless the CAS confirmed that the three documents relied upon by the Petitioner are not in its file.

In its answer of July 25, 2011, Y._____ (hereafter: the Respondent) submits principally that the matter is not capable of revision and alternatively that the request should be rejected. He seeks production of the original of the three documents in question, among other evidentiary requests.

On August 11, 2011 the Petitioner filed a reply pursuant to which he confirmed the submissions in his request for revision.

Reasons:

1.

The Private International Law (PILA[3]; RS 291) contains no provision as to the revision of arbitral awards within the meaning of Art. 176 ff PILA. Case law of the Federal Tribunal filled the lacuna. The grounds for revision of the awards were those set forth at Art. 137 OJ[4]. They are now contained at Art. 123 LTF[5]. The Federal Tribunal is the judicial body that has jurisdiction to address the request for revision of any international arbitral award, whether it is final, partial or interlocutory. Its jurisdiction in this field concerns only the awards which bind the arbitral tribunal from which they originate, to the exclusion of mere procedural orders or directives which can be modified or rescinded in the proceedings. If it grants the petition for revision, the Federal Tribunal does not

[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: OJ is the French abbreviation for the previously existing Federal Statute organizing Federal Courts.

[5] Translator's note: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.

address the merits itself but refers the case back to the arbitral tribunal which issued the decision or to a new arbitral tribunal to be constituted (ATF 134 III 286 at 2 and references).

2.

The Respondent disputes that the matter is capable of revision and argues that the petition was filed late and that its author has no real and present interest to its admission. These two independent defenses must be reviewed successively and the analysis of the second could become moot should the first be admitted.

2.1

Pursuant to Art. 123 (2) (a) LTF revision may be sought in civil matters if the petitioner subsequently discovers significant facts or decisive evidence which he could not adduce in the previous proceedings, to the exclusion of facts and evidence which emerged after the award.

For the reason stated in the provision quoted, the request for revision must be filed with the Federal Tribunal within ninety days after the ground for revision is discovered, under penalty of forfeiture (Art. 124 (1) (d) LTF). This is an issue of admissibility and not one of merits, contrary to that as to whether or not the petitioner was late in discovering the ground for revision invoked. The discovery of the ground for revision implies that the petitioner has sufficiently certain knowledge of the new fact to be able to invoke it, even if he is not in a position to prove it with certainty; a mere supposition is not sufficient. As far as new evidence is concerned, the petitioner must have a document establishing it or sufficient awareness to be able to seek its admission into evidence (see judgment 4C.111/2006 of November 7, 2006 at 1.2 and references). It behooves the petitioner to establish the circumstances decisive as to the verification that the aforesaid time limit has been complied with (see judgment 4P.265/1996 of July 2, 1997 at 2a and the precedent quoted).

2.2

At paragraph 10 of its request for revision, the Petitioner states that during the month of November 2010 he was approached by a certain B._____, who claimed to be the president of U._____ and claimed that the documents produced by the Respondent to obtain training compensation were false as A._____ had essentially be trained by U._____. The legal and administrative manager of club [name omitted] immediately informed FIFA of his doubts as to the identity of the training club in a letter of November 23, 2010 worded as follows (exhibit nr 5):

"Dear Director,

I wanted to inform you that pursuant to my previous letter dated October 27, 2010 we received from player A._____'s training club some information strongly suggesting that the passport relied upon to determine the training compensation we must pay to Club Y._____ is erroneous.

I believe that you have been informed by Mr [name omitted] of the elements we have to establish the erroneous character of the FIFA passport and hence of the FIFA and CAS decisions taken on the basis of that document.

We are presently working to find an "amiable" solution to the dispute with Club Y._____, in order to avoid having to introduce a petition for revision of the FIFA judgment and of the CAS award, which might create bad publicity for football.

I wanted you to be informed of these elements which lead us not to hurry to pay Club Y._____.

In any event I thank you for your attention and beg you to believe, dear Director, in the expression of my most respectful sentiments".

On the basis of that letter it must be admitted with the Respondent that on November 23, 2010 at the latest, the Petitioner was sufficiently aware of the new fact invoked as ground for revision. Indeed, the Petitioner specifically concedes in this letter that he already had some elements which could "prove true" the erroneous nature of the main evidence on which the CAS, following FIFA, relied to issue the award in dispute. Moreover, it justifies its not filing a petition for revision immediately by its desire to find an amicable solution and not to tarnish the image of football.

The Petitioner objects that its request for revision relies on the discovery of new evidence of which he became aware at the earliest in the second week of January 2011 and not on new facts. The argument does not withstand scrutiny. The decisive circumstance for the computation of the amount of training compensation was the number of seasons which A._____ had spent with the Respondent club, namely eight according to the findings of the Arbitrator. Yet the Petitioner argues in his request for revision that [name omitted] played with U._____ during two of these eight seasons, in other words that he would have been with the Respondent only during six seasons. It does not claim that it would have already stated that fact in the arbitral proceedings but would have been unable to prove it. Thus, irrespective of what it says, its request for revision is indeed based on a new fact, the new evidence attached to its request for revision being only there to prove the new fact.

Therefore the time limit of forfeiture as stated at Art. 124 (1) (d) LTF started on November 24, 2010 (Art. 44 (1) second hypothesis LTF). Stayed from December 18, 2010 until January 2, 2011 pursuant to Art. 46 (1) (c) LTF, it expired on March 9, 2011.

Filed on April 4, 2011, namely more than a month after the aforesaid time limit elapsed, the request for revision is consequently not admissible.

2.3

The inadmissibility of the request for revision renders moot the review of the merits of the second defense relied upon by the Respondent. In the alternative the following remarks shall nonetheless be made in this respect.

The Petitioner attached a "protocol of agreement" dated November 23, 2007 to its request for revision. The authenticity of that document is dubious. It is indeed quite surprising to notice that the two nationals of [name of country omitted] who signed it in 2007 used twice the name "X._____" although the Petitioner, whose name was then "W._____" shortened in [acronym omitted] adopted that new name only at the end of the 2009/2010 season as its internet site (http://www.[name omitted]) states.

Assuming the document not to be false, it appears from its text, in particular from its Art. 1 to 3, that U._____ entrusted Y._____ with obtaining from club [name omitted] its share of two sixths of the training compensation, then to make it available to it after deduction of all the legal costs paid to obtain it. Applying Swiss law as an alternative in view of the lack of any choice of law in the protocol of agreement (see award p. 23 nr 20), the aforesaid deed could be construed as an assignment to obtain payment with regard to this share of two sixths (see ATF 123 III 60 at 4c p. 63). The consequence would be that the assignee, in this case the Respondent, had standing to claim in court the entire amount of the training compensation, including the assignor's share. Hence granting the request for revision and finding that the player had played only six seasons as opposed to eight with Y._____ would change nothing to the outcome of the arbitral proceedings as the Respondent was the only one entitled to seek payment of the entire training compensation from the Petitioner. It must therefore be admitted with the Respondent that in the aforesaid scenario, the Petitioner could not claim a present and real interest to obtain revision. This would be another cause justifying a finding that the matter is not capable of revision.

3.

The Petitioner succumbs and shall accordingly pay the costs of the federal proceedings (Art. 66 (1) LTF) and compensate the Respondent (Art. 68 (1) and (2) LTF).

Therefore the Federal Tribunal pronounces:

1.

The matter is not 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 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 22, 2011.

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

The Presiding Judge:	The Clerk:
Klett (Mrs)	Caruzzo