4A_176/2008[1]

Judgement of September 23rd, 2008

First Civil Law Court

Federal Judge CORBOZ, Presiding
Federal Judges KLETT (Mrs) and ROTTENBERGER LIATOWITSCH (Mrs)
Clerk of the Court: LEEMANN

X._____ and Y._____,
Appellants,
Represented by Mr Daniel ORDAS

v.

A._____,
Respondent,
Represented by Mr Jorge IBARROLA

Facts:

A.
X._____ and Y._____, both domiciled in Buenos Aires/Argentina (Appellants) are players' brokers. In a contract of June 30, 2003, the two Appellants were entrusted by Club B._____, a football association in Argentina, to negotiate and organise the transfer of player Z._____ to the football club A._____. According to the contract, the Appellants had exclusive representation of the football association B._____ until August 30, 2003. As a counterpart, B._____ committed to pay 10 % of the transfer price as a fee to the Appellants. Should B._____ fail to perform, an amount of twice the fee (i.e. 20 % of the amount of the transfer) was agreed as contractual penalty. On July 8, 2003,

[1] Translator's note: Quote as A._____ *v.* X._____ and Y._____, 4A_176/2008. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch.

B._____, the Respondent and a company which was involved in the player's transfer rights, entered into a contract for the transfer of Z._____ from B._____ to the Respondent for an amount of EUR 3'500'000.- (the Transfer Contract). The Transfer Contract was concluded under condition precedent that Z._____ would conclude an employment contract with the Respondent after a successful medical investigation. Pursuant to the medical investigation of July 21, 2003, the Respondent's doctor considered that the player's bodily constitution was insufficient. Accordingly, the Respondent declared that the condition precedent was not fulfilled and renounced the execution of an employment contract with the player. A few days later Z._____ was transferred to another football club.

B.

Subsequently, the Appellants claimed more than EUR 700'000.- in front of the Fédération Internationale de Football Association (FIFA), on the basis of the FIFA Regulations and Art. 41 OR[2]. The competent DRC judge rejected the claim.

That decision was confirmed by the Court of Arbitration for Sport (CAS) in an arbitral award of February 29, 2008 upon an appeal by the Appellants.

C.

In a Civil law appeal the Appellants submit that the Federal Tribunal should overturn the CAS decision of February 29, 2008. In addition, the Respondent should be ordered to pay EUR 700'000.- with interests at 5 % since July 8, 2003. Finally, the Appellants require the production of various documents and drawings. The Respondent and the CAS submit that the appeal should be rejected to the extent that the matter is capable of appeal at all.

D.

The Respondent's request for security for costs was rejected by decision of June 24, 2008.

[2] Translator's note: OR is the German abbreviation for the Swiss Code of Obligations. Article 41 OR is the basic provision for claims in torts.

Reasons:

1.

1.1 According to Art. 54 BGG[3] the decision of the Federal Tribunal is to be issued in an official language, generally that of the decision under review. When the decision was issued in another language, the Federal Tribunal uses the language to which the parties resorted. The award under appeal is in Spanish. Spanish is not an official language and the Parties used various languages in front of the Federal Tribunal. Thus the decision of the Federal Tribunal will be in the language of the appeal, as is consistent with practice (decision 4A_506/2007 of September 2008, E. 1).

1.2 With the approval of the opposing party, it may not be necessary to produce a translation of a document filed by a party in a language that is not official (Art. 54 (3) BGG). The Respondent submitted its answer without demanding a translation of the appeal under review and is accordingly deemed to have renounced a translation.

2.

2.1 The Appellants concede that the CAS is an International Arbitral Tribunal, the decisions of which may be challenged only under the conditions of Art. 190 (2) PILA[4] and 77 BGG. Only the means of appeal limitatively set forth at Art. 190 (2) PILA are admissible (BGE 134 III 186 E. 5; 128 III 50 E. 1a S. 53; 127 III 279 E. 1a S. 282). According to Art. 77 (3) BGG, the Federal Tribunal reviews only those means of appeal which are brought up and reasoned in the appeal; this corresponds to the duty to raise grounds for appeals at Art. 106 (2) BGG for the violation of fundamental rights or of cantonal or inter-cantonal law (BGE 134 III 186 E. 5 with references). In appeals within the meaning of Art. 190 (2) (e) PILA the incompatibility of the award under review with public policy must be established in each case (BGE 117 II 604 E. 3 S.606). Criticism of an appellate nature is not allowed (BGE 119 II 380 E. 3b).

2.2 The appeal against international arbitral awards is limited to the annulment of the decision (Art. 77 (2) BGG which rules out the application of Art. 107 (2) BGG, to the extent that the

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

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

latter authorises the Federal Tribunal to decide the matter itself). The Appellants disregard that rule when they seek a decision from the Federal Tribunal allowing their claim and they wrongly rely on a full power of judicial review by the Federal Tribunal. The Appellants themselves chose to appeal to the CAS and did not challenge its jurisdiction in front of the Federal Tribunal (Art. 190 (2) (b) PILA). Accordingly, they have to assume that the award thus obtained may only be appealed in a limited way (Art. 77 BGG in connection with Art. 190 PILA).

2.3 The Federal Tribunal relies on the facts as found by the Arbitral Tribunal (Art. 105 (1) BGG). It may neither correct nor supplement the factual findings of the Arbitral Tribunal, even when they are obviously inaccurate or based on a violation of the law within the meaning of Art. 95 BGG (see Art. 77 (2) BGG which rules out the application of Art. 105 (2) and Art. 97 BGG). However, the Federal Tribunal may review the factual findings of the award under appeal when some admissible grounds for appeal within the meaning of Art. 190 (2) PILA are brought against such factual findings or, exceptionally, it may also consider new facts (BGE 133 III 139 E. 5 S. 141; 129 III 727 E. 5.2.2 S. 733 with references). He who wishes to avail himself of an exception to the rule that the Federal Tribunal is bound by the factual findings of the lower court and wishes to rectify or supplement the facts on that basis, must demonstrate with documents that corresponding factual allegations were made in the proceedings in a procedurally correct manner (BGE 115 II 484 E. 2a S. 486; 111 II 471 E. 1c S. 473 with references).

3.
Based on Art. 190 (2) (a) PILA, the Appellants then claim that the CAS which issued the decision would have been illegally composed.

3.1 To substantiate that claim, the Appellants argue that the Respondent was represented by Mr IBARROLA already in the proceedings in front of the CAS. Between 2003 and 2007 he would have been a higher ranking employee of the CAS and according to his own indications he would have conducted more than 400 cases. During his activity with the CAS he would have acted as clerk at each hearing and participated in countless training-sessions, in which the arbitrators would intervene as speakers and he would have been in constant contact with each CAS arbitrator. His long-lasting activity with the CAS would have resulted in a relationship with CAS arbitrators going way beyond normal professional contacts. According

to the Appellants, the Respondent's counsel would in particular have a strong personal relationship to the arbitrators, so that before and after the hearings he would have discussed the matter with them between colleagues. This would have led to a lack of independence of the arbitrators participating in the arbitration, something which counsel acting for the Appellants at the time would have raised at the beginning of the hearing; the objection would have been disregarded by the arbitrators and the hearing went on.

3.2 By claiming that they would have challenged the arbitrators for lack of independence at the beginning of the hearing, the Appellants depart from the factual findings of the award under review (Art. 105 (1) BGG). The CAS indeed held with regard to the proceedings that no party had raised any procedural objections. To the extent that the Appellants raise a violation of their right to be heard with regard to that factual finding (Art. 190 (2) (d) PILA) by claiming that their corresponding argument would not have been heard, they disregard the requirement for reasons when a factual finding is appealed, because they do not show on the basis of documents in the file that the corresponding factual allegations were already made in accordance with procedural rules in front of the lower court. In this respect, the matter is not capable of appeal.

3.3 Should an Arbitral Tribunal lack independence or objectivity, it must be considered as illegally constituted within the meaning of Art. 190 (2) (a) PILA (BGE 129 III 445 E. 3.1 S. 449). The party seeking to challenge an arbitrator must raise the ground for challenge as soon as she becomes aware of it. This principle, which is specifically spelled out in R34 of the CAS Code[5], refers both to the grounds for challenge that were actually known to the party and to those which it could have become aware of by applying appropriate attention (BGE 129 III 445 E. 4.2.2.1 S. 465 with references). According to the principle of trust, a party looses its right to rely on a ground for challenge when it does not raise it immediately; it is not acceptable to hold a ground for challenge in "reserve" just to raise it if and when the case does not go well and appears to be lost (BGE 129 III 445 E. 3.1 S. 449 with references). In this case, the Appellants do not claim that they would not have been aware of the grounds for challenge at the beginning of the arbitral proceedings or that they could not have been. Rather, they rely on the fact that already at the beginning of the hearing they demanded the substitution of the arbitrators, although this was done without meeting the requirements of a challenge to a factual finding, and accordingly they concede that the facts they are now

[5] Translator's note: English text at www.tas-cas.org/statutes.

relying on to raise an alleged illegal composition of the CAS in front of the Federal Tribunal were already known to them at the time. Since a challenge to the arbitrators was not made in front of the Arbitral Tribunal in a procedurally appropriate way according to the factual findings of the lower court which bind the Federal Tribunal (Art. 105 (1) BGG) and the illegal composition (Art. 190 (2) (a) PILA) was raised in front of the Federal Tribunal for the first time, the Appellants have forfeited that argument. A claim that Art. 190 (2) (a) PILA was violated is therefore not acceptable, irrespective of whether or not such criticism would have been of a nature which would have justified a removal of the arbitrators, which is questionable in this case.

4.

The Appellants claim a violation of the right to be heard from a double perspective (Art. 190 (2) (d) PILA). According to Art. 190 (2) (d) PILA, an arbitral award may be appealed, among other reasons, when the right to be heard (Art. 182 (3) PILA) was violated. With the exception of the right to reasons, this corresponds to the constitutionally protected right at Art. 29 (2) BV[6] (BGE 130 III 35 E. 5 S. 37 f.; 127 III 576 E. 2c). Case law deducts from that in particular the right of the parties to state the position on all facts important for the decision, to argue their legal point of view, to prove their factual allegations important for the decision by appropriate means timely and accurately proposed, to participate in the hearing and to access the documents of the case (BGE 133 III 139 E. 6.1 S. 143; 130 III 35 E. S. 38; 127 III 576 E. 2c). The right to be heard causes the authority to have a duty to review and assess the legally pertinent elements. To do that, it may limit itself to the elements which are important for the decision (BGE 126 I 97 E. 2b S. 102 f.; 121 III 331 E. 3b).

4.1 The Appellants further claim that the CAS would have used the statement of Mr W._____, the President of B._____ only to a small extent and described it both wrongly and arbitrarily. This would have eventually led to the CAS holding various allegations of the Appellants for not proven. From what the witness said it would be clear that without the Appellants the Transfer Contract would never have been entered into. That statement notwithstanding, the CAS would have questioned the Appellants' right to a fee and found that their participation in the Transfer Contract was not proved. The Appellants even claim to have proved the player's agreement to a transfer and the entering into an (oral) employment contract with the Respondent through the statements of W._____.

[6] Translator's note: BV is the German abbreviation for the Swiss Constitution.

Finally, the Arbitral Tribunal would not have taken into account the statement of the witness according to which player Z._____ would have been found of perfect bodily constitution and that both B._____ and player Z._____ would have rejected the Respondent's decision. The Appellants deduct from these statements that "a proper evaluation would have led to another procedural outcome".

4.1.1 According to case law, a factual finding that is obviously wrong or contrary to the file does not suffice to annul an international arbitral award. The right to be heard contains no right to a materially accurate decision. It is not for the Federal Tribunal to review whether the Arbitral Tribunal took into account all documents and rightly understood them or not. What is required is a denial of justice within the meaning that the right to be heard of the parties was factually made meaningless by the obvious mistake and that as a result the party finds itself not better off than if the right to be heard had been completely denied with regard to an issue important for the decision. He who wishes to deduct a violation of the right to be heard from an obvious disregard of facts must demonstrate that the judicial omission made it impossible for him to bring forward and to prove its point of view as to a theme that was procedurally relevant in the case (BGE 133 III 235 E. 5.2; 127 III 576 E. 2b-f).

4.1.2 The Appellants did not succeed in this respect. They actually limit themselves to quoting various statements of witness W._____, incidentally without reference, which the Arbitral Tribunal would have overlooked or inaccurately assessed and which according to their own view would have influenced the assessment of the evidence to their disadvantage. In doing so they actually submit the assessment of the evidence by the Arbitral Tribunal to criticism of an appellate nature. They merely set forth their own point of view and allege that it would have been confirmed by the witness. This is not admissible in an appeal against an arbitral award.

4.2 Also in their developments under the title "violation of the Appellants' right to be heard in the judgement of an illicit act by the Respondent" the Appellants merely set forth their point of view as they would have done in an appeal and cast doubt on the material accuracy of the award, yet without demonstrating a formal denial of justice. They claim a violation of Art. 30 of the FIFA Regulations and of the rules on the burden of proof (Art. 8 ZGB[7]) and

[7] Translator's note: ZGB is the German abbreviation for the Swiss Civil Code.

explain why the requirements of Art. 41 OR would have been met according to their own view. This does not substantiate a violation of the right to be heard.

5.
Finally, the Appellants claim a violation of public policy according to Art. 190 (2) (e) PILA.

5.1 The review of an international arbitral award by the Federal Tribunal as to material law is limited to the issue of whether the arbitral award is consistent with public policy or not (BGE 121 III 331 E. 3a S. 333). The material adjudication of a claim is in violation of public policy only when it ignores some fundamental legal principles and thus becomes inconsistent with the essential and widely recognised values, which according to the dominant opinion in Switzerland should be the basis of any legal order. Contractual trust (*pacta sunt servanda*), the prohibition of abuse of rights, the principle of trust, the prohibition of expropriation without compensation, the prohibition to discriminate and the protection of incapables belong to such principles. An annulment of the arbitral award under review takes place only if its result, and not only its reasons, contradict public policy (BGE 132 III 389 E. 2.2; 128 III 191 E. 6b; 120 II 155 E. 6a S. 166 f.).

5.2 The Appellants see a violation of the principle of contractual trust and of the prohibition of abuse of rights because the CAS, whilst assuming the conclusion of a valid Transfer Contract between B._____ and the Respondent, still gave the Respondent the right to rely without reasons on the lack of fulfilment of the condition precedent. The argument is unfounded. The principle *pacta sunt servanda* is violated only when an Arbitral Tribunal acknowledges the existence of a contract but disregards the consequences therefrom or, conversely, denies the existence of a contract but finds that there is a contractual obligation (BGE 120 II 155 E. 6c S. 171; 116 II 634 E. 4b S. 638; Decision 4A_370/2007 of February 21, 2008, E. 5.5). When a contract is concluded with a condition precedent, the Arbitral Tribunal does not violate the principle of trust when it finds that the contract is not binding in the absence of the condition. The CAS interpreted the Transfer Contract and evaluated the factual findings in a way different from that of the Appellants. This is not a violation of the principle of *pacta sunt servanda* or of the prohibition against abuse of rights. Indeed, on the basis of Art. 190 (2) (e) PILA, it may not be submitted that the Arbitral Tribunal would not have applied the pertinent contractual provisions or that it would have interpreted or applied them wrongly (BGE 120 II 155 E. 6c/cc in fine S. 171; 116 II 634 E. 4b S. 638).

5.3 Finally, the extent that the Appellants raise a violation of public policy because the principle of trust was disregarded and argue in this respect that the Respondent would have hired some other players, not involved in the proceedings, irrespective of their injuries, their arguments are insufficiently reasoned and disregard the binding factual findings of the lower court (Art. 105 (1) BGG). To that extent, the matter is not capable of appeal.

6.
The appeal is unfounded and must be rejected to the extent that the matter is capable of appeal. In view of the outcome of the proceedings, the Appellants must pay the costs and compensate the Respondent (Art. 66 (1) and Art. 68 (2) BGG).

Therefore, the Federal Tribunal pronounces:

1. The appeal is rejected, to the extent that the matter is capable of appeal.
2. The judicial costs of CHF 15'000.- shall be borne by the Appellants severally and internally by half for each of them.
3. The Appellants, severally and internally by half each, shall compensate the Respondent for the costs of the Federal proceedings by a payment of CHF 17'000.-.
4. This decision shall be notified in writing to the Parties and to the Court of Arbitration for Sport (CAS).

Lausanne, September 23, 2008

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

The presiding Judge: The Clerk:

CORBOZ LEEMANN