4A_6/2014[1]

Judgment of August 28, 2014

First Civil Law Court

Federal Judge Klett (Mrs.), Presiding
Federal Judge Kolly
Federal Judge Hohl (Mrs.)
Federal Judge Kiss (Mrs.)
Federal Judge Niquille (Mrs.)
Clerk of the Court: Mr. Carruzzo

A._____,
Represented by Mr. Sébastien Besson,
Appellant

v.

Club B._____,
Represented by Mr. Laurent Maire,
Respondent

Facts:

A.
On January 17, 2008, A._____, [name of country omitted] a professional football club, took C._____ (hereafter: the Player), a [nationality omitted] professional football player and Club B._____, a [name of country omitted] professional football club jointly to the Dispute Resolution Chamber of the Fédération International de Football Association (FIFA) with a view to obtaining payment of an amount of £1'647'639.18. Based on Art. 17 of the Regulations for the Status and Transfer of Players adopted by FIFA in 2008 (RSTP), the [nationality omitted] club argued that the Player was in breach of the employment contract it entered into with the club in December 2007 as he was hired by the other [nationality omitted] club.

[1] Translator's Note: Quote as A._____ *v.* Club B._____, 4A_6/2014.
The original decision is in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

In a decision of June 15, 2011, the DRC ordered the Player to pay £400'000 to A._____ and found Club B._____ jointly liable for the payment.

B.
On August 31, 2012, the Player seized the Court of Arbitration for Sport (CAS) of an appeal against the DRC decision (case CAS/2012/A/2916). Club B._____ did the same on the same date (case CAS/2012/A/2915). The two procedures were consolidated.

On January 22, 2013, the Deputy President of the Arbitration Appeals Division of the CAS issued a termination order, by which case CAS/2012/A/2916 was struck off of the list and the Player's appeal deemed withdrawn pursuant to Art. 64.2(2) of the Code of Sport Arbitration (hereafter: the Code) due to the Appellant's failure to pay the advance of costs in a timely manner.

A._____, arguing that C._____ had withdrawn his appeal, submitted that the CAS had no jurisdiction to address the appeal of Club B._____ or, in the alternative, only insofar as the appeal concerned the amount and not the principle of the compensation jointly due by the player and the [name of country omitted] club.

A three-member Panel was constituted to handle the appeal of Club B._____. FIFA did not participate in the arbitral proceedings.

In an award of November 20, 2013, the CAS upheld the appeal, annulled the decision under appeal and sent the case back to the DRC for a new decision complying with the rules of procedure. In substance, the Panel found first that it had the jurisdiction to address the Appellant's argument that the procedure in the DRC was invalid because its right to be heard had not been abided by, irrespective of whether or not it had the power to review the merits of the decision under appeal. Holding then that A._____'s claim had not be communicated to Club B._____, it concluded that the right to be heard of the [nationality omitted] club had been disregarded by the DRC. In its view, the importance of the guarantee that had been disregarded caused the first instance proceeding to be null in respect of all parties, irrespective of the withdrawal of the Player's appeal, so that the decision under appeal should be annulled purely and simply, the DRC being in charge of issuing a new decision respecting the rights of the parties entirely. Under such circumstances, there was no need to examine whether Club B._____ had standing to challenge some of the aspects of the decision under appeal insofar as it concerned the dispute between A._____ and the Player.

C.
On January 6, 2014, A._____ (hereafter: the Appellant) filed a civil law appeal, submitting that the Federal Tribunal should annul the award under appeal and hold that the CAS "has no jurisdiction to annul the FIFA decision of June 15, 2011, (…) between the Appellant and the Player…".

Pursuant to an *ad hoc* request submitted by Club B._____ (hereafter: the Respondent), the Presiding Judge of the First Civil Law Court invited the Appellant to provide security for costs in a decision of March 31, 2014, which it did.

In its answer of May 19, 2014, the Respondent submitted that the appeal should be rejected if the matter is capable of appeal. As to the CAS, it submitted that the appeal should be rejected in its answer of May 30, 2014. The Appellant submitted some additional observations in a brief of June 19, 2014, as to which the Respondent stated its views in a brief of July 9, 2014.

Reasons:

1.
According to Art. 54(1) LTF,[2] the Federal Tribunal issues its decision in an official language,[3] as a rule in the language of the decision under appeal. When the decision is in another language (here, English), the Federal Tribunal uses the official language chosen by the parties. In the CAS they used English. In the briefs submitted to the Federal Tribunal they used French. In accordance with its practice, the Federal Tribunal shall consequently issue this judgment in French.

2.
2.1. In the field of international arbitration, a civil law appeal is admissible against the decisions of arbitral tribunals pursuant to the requirements of Art. 190 to 192 PILA[4] (Art. 77(1)(a) LTF).

The seat of the CAS is in Lausanne. At least one of the parties (in this case, both) did not have its domicile in Switzerland at the decisive time. The provisions of Chapter 12 PILA are accordingly applicable (Art. 176(1) PILA).

The Appellant was a party in the CAS proceedings and is particularly affected by the award under appeal as it annulled a decision ordering the Respondent and the Player jointly to pay an important amount of money to it. It therefore has a personal and present interest worthy of protection to ensure that the award was not issued in violation of the guarantees arising from Art. 190(2) PILA, which gives it standing to appeal (Art. 76(1) LTF).

Duly reasoned (Art. 42(1) and (2) LTF), the appeal was filed in a timely manner (Art. 100(1) LTF). It invokes only the grievances exhaustively listed at Art. 190(2) PILA.

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[2] Translator's Note: LTF is the French abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173. 110.
[3] Translator's Note: The official languages of Switzerland are German, French, and Italian.
[4] 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.

In these respects, the admissibility of the appeal needs not be discussed. However, such a finding does not exhaust the matter.

2.2. The Appellant argues emphatically that "the award under appeal is a final award that can be appealed." Yet, the nature of the award, as to which neither the CAS nor the Respondent state their views, requires further examination. This Court shall do so *ex officio* as it is an issue concerning the admissibility of the appeal (ATF 138 III 542[5] at 1).

2.2.1. A civil law appeal within the meaning of Art. 77 LTF in connection with Art. 190 to 192 PILA is admissible only against an *award*. The appealable decision may be a *final* award, putting an end to the arbitral procedure on meritorious or procedural grounds; a *partial* award, disposing of part of a claim in dispute or of one of the various claims at hand or putting an end to the procedure as to some of the joint parties (see ATF 116 II 80 at 2b, p. 83); or an *interlocutory* award deciding one or several preliminary issues of merit or procedure (on these notions, see ATF 130 III 755 at 1.2.1, p. 757). In order to decide if the matter is capable of appeal, the labeling of the decision under appeal is not decisive but its contents (ATF 136 III 200[6] at 2.3.3, p. 205, 597 at 4).

The Federal Tribunal stated this definition of the various types of appealable awards with a view to the international disputes arising from commercial relations between the parties to a contract. It fits such disputes quite well as they oppose two or several parties entrusting the arbitral tribunal they appointed to dispose of their dispute as a single body, subject to a possible appeal to a state court. In this context, the final award does indeed put an end to "the arbitral proceedings."

However, the same definition does not appear sufficiently suitable to the specificities of sport arbitration (see ATF 133 III 235 at 4.3.2.2, p. 243), in particular to the recourse to the CAS by way of an appeal against a decision of a sport federation. As an appeal jurisdiction indeed, the CAS Panel will issue a final award within the meaning of the definition recalled above – *i.e.* an award putting an end to the arbitral proceedings at hand. However, the proceedings between the parties on the merits will not necessarily be terminated by the award. They will continue if the Panel annuls the decision under appeal and sends the matter back to the sport federation involved with an invitation to resume the proceedings and issue a new decision. Considered in this prospective, the proceedings initiated in the sport federation and then continued in the CAS on appeal are similar to an ordinary state procedure subject to the requirement of double instance (see Art. 75(2), 80(2) and 86(2) LTF). However, as emphasized in a passage of the February 28, 2001, Message Concerning the Complete Revision of the Law Organizing Federal Courts (FF 2001 4129 *f.*, ch. 4.1.4.1), quoted by Bernard Corboz (*Commentaire de la LTF*, 2nd ed., 2014, n. 9 ad Art.

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[5] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/decision-did-not-concern-international-arbitration-domestic-arbitration-and-was-consequently-not-22

[6] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/decision-on-provisional-measures-characterized-as-interlocutory-

90 LTF), whether the proceedings are terminated or not does not only depend on the proceedings conducted in the body before the Federal Tribunal but also on the proceedings before the body whose decision was challenged in the first place; the decision under appeal must therefore be examined to determine if it closes the proceedings of first instance. According to this principle, the decision by which an appeal body annuls the decision under appeal and sends it back to the first instance body for investigation and a new decision on the merits is considered interlocutory by federal case law, although it puts an end to the appeal proceedings (ATF 137 V 314 at 1, p. 315; 135 V 141 at 1.1; 135 III 329 at 1.2).

The same principle must be applied by analogy to the appeal proceedings in the CAS, the idea here being to ensure that the Federal Tribunal will also deal with the matter only once, subject to the exceptions admitted by case law in this field (ATF 130 III 755 at 1.2). This is what the First Civil Law Court did in its judgment of February 14, 2007, in case 4P.298/2006, published in the Swiss Arbitration Bulletin (ASA), 2008, p. 313 *ff.* and quoted by Kaufmann-Kohler and Rigozzi (*Arbitrage International*, 2nd ed., 2010, p. 429, footnote 452). The court held as a *Zwischenentscheid* the award by which the CAS, contrary to the FIFA Players' Status Committee found the professional football player involved in breach of his employment contract with his club and annulled the decision of this sport body and invited it to pronounce as to the consequences of this unjustified breach.

2.2.2. The case at hand concerns the same situation. The CAS annulled the decision under appeal after highlighting a major deficiency in the proceedings; then it sent the matter back to the DRC pursuant to Art. R57(1) of the Code for a new decision. In doing so, it put an end to its own appeal proceedings but it did not issue a final award in the specific meaning adopted here but an interlocutory decision concerning a procedural issue, namely compliance with the Respondent's right to be heard.

2.2.3. According to Art. 190(3) PILA, an interlocutory award may be appealed only on the grounds stated at Art. 190(2)(a) and (b) PILA (ATF 130 III 76 at 4). The vast majority of legal writers consider that the grievances based on Art. 190(2)(c) to (e) PILA should also be available against interlocutory decisions within the meaning of Art. 190(3) PILA in the framework of an appeal based on Art. 190(2)(a) or (b) PILA. After leaving the issue open (judgment 4A_414/2012[7] of December 11, 2012, at 3.2 and the cases quoted), the Federal Tribunal to that effect and clarified its own case law in this field. However, this Court emphasized that the grievances based on Art. 190(2)(c) to (e) PILA will henceforth be available against the decisions mentioned at Art. 190(3) PILA only insofar as they are strictly limited to arguments concerning the composition or the jurisdiction of the arbitral tribunal (4A_74/2014 of August 28, 2014, *publication forthcoming*, at 3.1 and the references).

The limitation thus expressed in this precedent is applicable *in casu*. Indeed, while the Appellant does rely on the grievances contained at Art. 190(2)(b) PILA (lack of jurisdiction of the arbitral tribunal), which is admissible pursuant to Art. 190(3) PILA, it also argues that the CAS decided *ultra petita* (Art. 190(2)(c)

[7] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/alleged-inexistence-other-party-justifies-plea-lack-jurisdiction

PILA) and issued an award incompatible with public policy (Art. 190(2)(e) PILA). Yet, the two arguments are not raised in the framework of Art. 190(2)(b) PILA, but separately for themselves. They are therefore inadmissible.

Accordingly, this Court shall limit its review to the argument based on Art. 190(2)(b) PILA. As to the rest, the matter is not capable of appeal.

3.
Invoking Art. 190(2)(b) PILA, the Appellant argues that the CAS exceeded the limits of its jurisdiction by also annulling the operative part of the DRC decision of June 15, 2011, dealing with the financial consequences of the breach of the employment contract between the Appellant and the Player. In its view, the latter's withdrawal of the appeal against that decision extinguished the arbitration agreement between the Player and the Appellant. Therefore, the CAS would no longer have jurisdiction to annul the DRC decision to the extent that it ordered the Player to compensate the Appellant.

3.1. Seized for lack of jurisdiction, the Federal Tribunal freely reviews the legal issues, including preliminary issues, determining the jurisdiction or the lack of jurisdiction of the arbitral tribunal (ATF 134 III 565[8] at 3.1 and the cases quoted). However, it reviews the factual findings only within the usual limits, even when addressing this grievance (judgment 4A_682/2012[9] of June 20, 2013 at 3.1 and 4.2).

3.2.
3.2.1. Pursuant to Art. R47(1) of the Code, an appeal against a decision of a sport federation or another sport body may be made to the CAS if the statues or the regulations of the aforesaid sport body so provide or if the parties entered into a specific arbitration agreement and the appellant has exhausted the legal remedies prior to the appeal available pursuant to the statues or the regulations of the aforesaid sport body. FIFA specifically designates the CAS as appeal jurisdiction against the decisions of last instance of its jurisdictional bodies (Art. 66 to 68 of the FIFA Statues). As to the decision of the DRC, Art. 24 *in fine* RSTP provides that they may be appealed to the CAS.

3.2.2. The combination of these provisions undeniably shows that the CAS had jurisdiction to address the Respondent's appeal against the DRC decision of June 15, 2011, (case CAS/2012/A/2915). It would also have had jurisdiction as to the Player's appeal against the same decision (case CAS/2012/A/2916) if that appeal had not been withdrawn, or at least eventually deemed to have been. Yet, it was, which caused the case to be struck out by a termination order of January 22, 2013, (see B, 2nd par., above). The issue of the possible impact of this on the CAS jurisdiction must therefore be addressed.

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[8] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/extension-of-arbitration-clause-to-non-signatories-case-of-a-gua

[9] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/no-requirement-exhaust-extraordinary-legal-remedies-seizing-court-arbitration-sport

On January 17, 2008, the Appellant took the Player and the Respondent jointly to the DRC. The decision of June 15, 2011, ordered the Defendants jointly to pay an amount of £400'000 to it. In this procedure of first instance, the Respondent and the Player were necessary joint defendants on the merits (on this concept, *see*, among others, Fabienne Hohl, *Procedure civile I*, vol. 1, 2001, n. 521*ff.*; Marie-Françoise Schaad, *La consorité en procédure civile*, 1993, p. 40 *f.*; Gross and Zuber, *in Commentaire bernois, Schweizerische Zivilprozessordnung*, vol. I, 2012, n. 4 *f.,* ad Art. 71 CPC[10]; Nicolas Jeandin, *in CPC Code de procédure civile commenté,* 2011, n. 6 *f.*, ad Art. 71 CPC). According to case law and legal writing, the presence of joint defendants does not affect the plurality of the cases and the parties. The joint defendants remain independent from each other. The behavior of one of them, and in particular his withdrawal, failure to appear or appeal, is without influence upon the legal position of the others (judgment 4P.226/2002 of January 21, 2003 at 2.1; Hohl, *op. cit.*, n. 525; Schaad, *op. cit.*, p. 76 *f.*; Gross and Zuber, *op. cit.*, n. 19 ad Art. 71 CPC). As to the judgment to be issued, it may be different as to one of the joint defendants or the other (Jeandin, *op. cit.*, n. 11 ad Art. 71 CPC). The independence of joint defendants will continue before the appeal body: a joint defendant may independently appeal the decision affecting him regardless of another's renouncing his right to appeal the same decision; similarly, he will not have to worry about the appeals of the other joint defendants being maintained if he intends to withdraw his own (Schaad, *op. cit.*, p. 281 *ff.*). Among other consequences, this means that the *res judicata* effect of the judgment concerning joint defendants must be examined separately for each joint defendant in connection with the opponent of the joint defendants because there are as many *res judicata* effects as couples of claimant/defendant (Schaad, *op. cit.*, p. 317 *ff.*)

In the light of these principles, the Appellant was blatantly wrong to deny that the CAS had any jurisdiction to address the Respondent's appeal against the DRC decision of June 15, 2011, on the basis of the Player's appeal against the same decision. Indeed, the withdrawal had no impact on the appeal proceedings between the Respondent and the Appellant. In other words, the Respondent could argue before the CAS, among other things, that the DRC was wrong to find the Player in breach of his contract with the Appellant by demonstrating, for instance, that the contract had not become enforceable between these two parties, with a view to establish the extinction of the Player's obligation which had been jointly imposed upon the Respondent by Art. 17(2) RSTP (judgment 4A_304/2013 of March 3, 2014 at 3). It is immaterial that this may result in an award incompatible with the enforceable decision of the DRC as to the fate of the Player sued by the Appellant.

However, the CAS made the same mistake by annulling §2 of the operative part of the DRC award, which exclusively concerned the dispute between the Appellant and the Player. In so doing, it overlooked that the withdrawal of the Player's appeal, followed by the appeal proceedings CAS/2012/A/2916 being struck out, put an end to this appeal procedure so that the decision of first instance was henceforth *res judicata* as to the Player and the Appellant. In other words, the CAS arrogated to itself a jurisdiction *ratione personae* that it no longer had as a consequence of the withdrawal of the appeal when it annulled a decision already

[10] Translator's Note: CPC is the English abbreviation for the Swiss Code of Civil Procedure.

enforceable as to one of the joint Defendants and henceforth untouchable, irrespective of the fate of the appeal of the other joint Defendant and of the risk of contradictory awards. It actually acted as though it were still seized of the appeal made and then withdrawn by the Player. The Appellant is therefore right to challenge its jurisdiction in this respect. Therefore, its submission that the Federal Tribunal should hold that the CAS had no jurisdiction as to the decision ordering the Player to compensate it is admissible and consistent with case law as to this issue (ATF 136 III 605[11] at 3.3.4, p. 616; 128 III 50 at 1b).

Otherwise, *i.e.*, in the appeal case between the Appellant and the Respondent, the CAS was right to accept its jurisdiction *ratione personae*.

4.
It was emphasized above that an interlocutory decision may be challenged only on the grounds stated at Art. 190(2)(a) and (b) PILA (see above 2.2.3). Thus, the matter is not capable of appeal as to the two aforesaid grievances argued by the Appellant on the basis of Art. 190(2)(c) and (e) PILA. This being so, this appeal will be upheld insofar as the matter is capable of appeal, that is only as to the issue of the jurisdiction of the CAS in the case between the Appellant and the Player.

The Appellant's submission that the award under appeal should be entirely annulled does not correspond to the outcome of its appeal. Indeed, the submission goes beyond what is necessary as there is nothing to say – at least from the point of view of jurisdiction, the only one that can be reviewed here – as to the decision of the CAS to annul the DRC decision insofar as it concerned the dispute between the Appellant and the Respondent and to send the matter back to this body for a new review of the case and a new decision. The operative part of this judgment will accordingly be worded in a manner taking this into account.

5.
The Appellant succeeds only in part insofar as only one of the three grievances raised in its brief has been upheld, the matter being incapable of appeal as to the other two and the submission as to the annulment of the entire award under appeal being rejected. The costs of the Federal Proceedings must therefore be shared by the Appellant and the Respondent (Art. 66(1) LTF) and no costs will be awarded (Art. 68(1) LTF). Therefore, the security for costs given by the Appellant must be released.

Therefore the Federal Tribunal pronounces:

1.
The appeal is admitted in part insofar as the matter is capable of appeal.

[11] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/independence-and-impartiality-of-a-party-appointed-arbitrator-in

2.
It is held that the CAS had no jurisdiction to annul the decision rendered by the Dispute Resolution Chamber of the Fédération International de Football Association on June 15, 2011, insofar as this decision concerned the case between A._____ and C._____.

The award under appeal is annulled to this extent. As to the rest, it is upheld.

3.
The judicial costs set at CHF 8'000 shall be borne by the Appellant and the Respondent in half.

4.
No costs are awarded.

5.
The security for costs given by the Appellant in the Respondent's favor is released.

6.
This judgment shall be notified in writing to the representatives of the parties and to the chairman of the Court of Arbitration for Sport (CAS).

Lausanne, August 28, 2014

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

Presiding Judge:	Clerk:
Klett (Mrs.)	Carruzzo