4A_260/2009[1]

Judgement of January 6, 2010

First Civil Law Court

Federal Judge KLETT (Mrs), Presiding,
Federal Judge CORBOZ,
Federal Judge KOLLY,
Clerk of the Court: CARRUZZO.

X._____,
Appellant,
Represented by Mr Jorge IBARROLA

v.

Y._____,
Respondent,
Represented by Mr Lucien W. VALLONI and Mr Thilo PACHMANN

Facts:

A.
On August 1, 2007, X _____, a football club, and Y _____, a professional football player, concluded an Employment Contract for a duration of three years.
In May 2008, the club ceased paying the player's salary. On July 28, 2008 they notified him of the termination of his Employment Contract.

[1] Translator's note: Quote as X._____ *v.* Y. _____, 4A_260/2009. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch.

On August 27, 2008 Y _____ submitted a pecuniary claim against X _____ to the [name omitted] Football Federation's Dispute Resolution Commission, which was partially granted.

B.
Both the player and the club appealed the decision of October 2, 2008 given by this sports tribunal, the first seeking his submissions in full, the second seeking to be completely released from the claim.

In an award of April 24, 2009, written in Spanish, the Court of Arbitration for Sport (CAS), partially granting the appeal of the player and rejecting that of the club, ordered in particular X _____ to pay Y _____ an amount of USD 1'516'666.64, representing the salaries due to the player as per May 1, 2008 and which he would have received if the Employment Contract had been performed to term (July 31, 2010), as well as USD 12'500 as a contribution to the football player's accommodation costs.

In interpreting clause 11 of the Employment Contract, the CAS held that the dispute should be resolved according to the specific regulations of the Fédération Internationale de Football Association (FIFA) and the law [country omitted]. It decided that the disputed termination was unjustified. The player was accordingly awarded compensation calculated using the criteria stated in Art. 17 (1) of the FIFA Regulations on the Status and Transfer of Players (hereafter "FIFA Regulations").

C.
On May 25, 2009, X _____ (hereafter "the Appellant") filed a Civil Law Appeal with the Federal Tribunal seeking the annulment of the award of April 24, 2009.

By decision of September 8, 2009, the Presiding Judge of the First Civil Law Court granting Y's _____ (hereafter "the Respondent") *ad hoc* request, ordered the Appellant to produce a French translation of the award under appeal, and of the Employment Contract in question, which were filed on November 3, 2009. However, she rejected a request by the Respondent that the appeal proceedings before the Federal Tribunal be conducted in German.

The Respondent submits that the appeal should be rejected insofar as the matter is capable of appeal. The CAS also proposes that the appeal be rejected.

Reasons:

1.

According to Art. 54 (1) LTF[2], the Federal Tribunal issues its decision in one of the official languages[3], as a rule in the language of the decision under appeal. When the decision was issued in another language (here Spanish), the Federal Tribunal uses the official language chosen by the parties. In front of the Arbitral Tribunal, they opted for Spanish, whilst in the Federal proceedings they used French (for the Appellant) and German (for the Respondent). According to its practice, referred to in the aforementioned decision of the Presiding Judge, the Federal Tribunal will adopt the language of the appeal and issue its decision in French.

2.

In international arbitration, a Civil Law Appeal is allowed against the decisions of arbitral tribunals under the conditions set forth at Art. 190 to 192 PILA[4] (Art. 77 (1) LTF). As far as the object of appeal, the standing to appeal, the time limit to appeal, the submissions made by the Appellant or even the grounds raised are concerned, they do not pose any problems concerning the pre-condition for allowing the appeal. There is therefore no reason not to accept this appeal.

3.

In a sole ground for appeal, based on Art. 190 (2) (e) PILA the Appellant claims that CAS issued an award which is inconsistent with public policy. More precisely, it claims that the principles of *pacta sunt servanda* and the rules of good faith have been violated.

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[2] Translator's note: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organising 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.

3.1 A material examination of an international arbitral award by the Federal Tribunal is limited to the question of incompatibility of the award with public policy (ATF 121 III 331 at 3a).

An award is inconsistent with public policy if it disregards the essential and broadly recognized values which, according to Swiss concepts, should be the basis of any legal order (ATF 132 III 389 at 2.2.3). An award is contrary to material public policy when it violates some fundamental principles of material law to such an extent that it is no longer consistent with the determining legal order and value system; among such principles are in particular contractual trust and compliance with the rules of good faith. For an award to be contrary to material public policy, a narrower concept than arbitrariness, it is not sufficient for the legal rule to have been clearly violated (Decision 4P_71/2002 of October 22, 2002 at 3.2 and cases quoted).

The principle of *pacta sunt servanda*, in the restrictive meaning it has according to case law based on Art. 190 (2) (e) PILA, is violated only if the arbitral tribunal refuses to apply a contractual clause whilst admitting that it binds the parties or, conversely, if it imposes on them to comply with a clause which it considers as not binding. In other words, the arbitral tribunal must have applied or refused to apply a contractual provision in a way that contradicts its own interpretation as to the existence or the contents of the legal instrument in dispute. However, the process of interpretation itself and the legal consequences logically derived from it are not governed by the principle of contractual trust and they are not capable of appeal for violation of public policy. The Federal Tribunal has repeatedly emphasized that almost the entire realm of contractual breaches is excluded from the area protected by the principle of *pacta sunt servanda* (Decision 4A_370/2007 of February 21, 2008 at 5.5). Such exclusion also refers to the interpretation made by an arbitral tribunal concerning statutory provisions of a private law organisation (Decision 4A_370/2007, quoted above, at 5.6).

The rules of good faith must be understood within the meaning they have according to case law with regard to Art. 2 CC[5] (Decision 4A_600/2008 of February 20, 2009 at 4.1).

[5] Translator's note: CC is the French abbreviation for the Swiss Civil Code of December 10, 1907, RS 210.

3.2

3.2.1 The Appellant argues, in substance, that the award under appeal contains an indomitable contradiction due to the fact that the CAS, after having appropriately assumed that the compensation for breach of contract should be calculated in accordance with the law of [name omitted] and FIFA Regulations, did not take this law into account, which is nevertheless applicable by virtue of the Regulations, when it established the amount of the compensation due to the Respondent. The award would also violate both the principles of *pacta sunt servanda* and the rules of good faith.

3.2.2 As clearly emerges from the summary of its argument, the Appellant evidently disregards these principles as under the disguise of an alleged violation of public policy, it seeks to obtain a review of the application of material law, which is not admissible.

Specifically, it is not for this Court to determine whether the CAS has chosen in the correct manner, amongst the rules of law applicable to the pertinent clause of the Employment Contract, the rule that applied in the case to calculate the compensation due to the Respondent, nor to examine the application of the rule of law it upheld, namely Art. 17 (1) of the FIFA Regulations.

Moreover, at n. 96 to 98 of its award the CAS set forth the reasons why it applied these rules of law, rather than the employment law of [name omitted]. As to the "law of the country concerned" mentioned, among others, in Art. 17 (1) of the FIFA Regulations, it took into consideration and indicated, at n. 100 (h) of the award under appeal, "that the national legislation of [name omitted] does not forbid that compensation for termination of the Employment Contract to be collected by the Employee is higher than that set by the Federal Act on Employment[6]" (French translation provided by the Appellant). It is therefore simplistic and incorrect to argue as the Appellant does at n. 7 of his brief, that the CAS refused to apply the provisions of [name omitted] law to the dispute between the parties, whilst admitting that they were bound by the rules of law. There is indeed no internal contradiction between the reasons given in the award as to the rules of law applicable when calculating the compensation awarded to the Respondent and the solution adopted by the CAS in the award.

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[6] Translator's note: in French : loi fédérale sur le travail. RS.822.11

The Appellant does not claim, finally, that it would be contrary to public policy as defined above, to allocate to a professional football player whose contract has been terminated prematurely and in an unjustified manner, the amount which he would have earned, should the employment relationship have been extinguished at the expiration of the agreed term.

Consequently, the alleged material violation of public policy, whether relating to the principle of *pacta sunt servanda* or the compliance with the rules of good faith, is not substantiated.

4.
The Appellant does not succeed and shall pay the judicial costs relating to the Federal proceedings (Art. 66 (1) LTF) and pay the Respondent's costs (Art. 68 (1) and (2) LTF).

Therefore, the Federal Tribunal pronounces:

1. The appeal is rejected.
2. The judicial costs of CHF 13'000.- shall be borne by the Appellant.
3. The Appellant shall pay to the Respondent an amount of CHF 15'000.- 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, January 6, 2010

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

The Presiding Judge (Mrs): The Clerk:

KLETT CARRUZZO