4A_426/2014[1]

Judgment of May 6, 2015

First Civil Law Court

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

Club A._____,
Represented by Mr. Laurent Maire,
Appellant

v.

Club B._____,
Represented by Mr. Philippe Schweizer and Mr. Alexandre Zen-Ruffienen,
Respondent

Facts:

A.
A.a. On November 24, 2004, Club B._____ (hereafter: B._____), a professional football club of [name of country X. omitted] and C._____ Ltd (hereafter: C._____), a company registered in London, entered into a joint venture agreement (hereafter: the JVA) by which the former granted the latter a license on its rights and entrusted it with managing its professional and amateur football departments.

By contract of December 17, 2004, Club A._____ (hereafter: A._____), a professional football club of [name of country Y. omitted] transferred to B._____ the professional football player D._____ (hereafter: the Player) for a price of USD 16'000'000. Clause 7 of the aforesaid contract states the following:

[1] Translator's Note: Quote as Club A._____ *v.* Club B._____, 4A_426/2014.
The original decision is in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

> In case of a future transfer of the Player by B._____ to another club or sporting company, A._____ will have the right to obtain the 20% of the exceeding amount which is over the sum of USD 35'000'000. In case that transfer is closed for an amount below USD 35'000'000, A._____ will have no right to receive any other sum.[2]

Pursuant to Clause 8 of the transfer contract, in order to make it possible for the proceeding clause to be applied, B._____ must advise A._____ in writing as to the terms and conditions of the subsequent transfer before carrying it out.

On January 13, 2005, B._____ and the Player entered into an employment agreement valid until January 13, 2007. A contractual clause provided for a contractual penalty of USD 100'000'000 to be paid to the [name of country X. omitted] club, should the player be transferred before the contract expired.

On August 28, 2006, the parties to the employment contract terminated it by mutual agreement.

Two days later, namely on August 30, 2006, the professional football club E._____ signed an employment contract with the Player and with companies C._____ and D._____ Inc. for four years.

A.b. On October 25, 2007, A._____ took B._____ to the Players' Status Committee of the Fédération International de Football Associations (hereafter: the PSC) with a view to having the [name of country X. omitted] club ordered to pay USD 4'000'000 for breach of the transfer contract.

On March 26, 2012, the single judge of the PSC rejected the claim.

B.
B.a. On November 26, 2012, A._____ sent a statement of appeal to the Court of Arbitration for Sport (CAS) before filing his written submission on December 26, 2012. The [name of country Y. omitted] club submitted that the decision of the single judge of the PSC should be annulled and consequently the amount sought in the claim awarded an amount set in accordance with Art. 42(2) CO.[3] By way of investigative measures, he sought production of any agreement concluded between B._____ and C._____ and any other company as to the Player on December 17, 2004, or subsequently.

In its answer of February 8, 2013, B._____ submitted that the decision under appeal should be confirmed. A Panel of three arbitrators was constituted. On May 23, 2014, it invited B._____ to produce the documents sought by the Appellant. However, the Respondent did not comply with this invitation, stating that it had already produced all of the contracts to which it was a party.

A hearing was held in Lausanne on July 12, 2013.

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[2] Translator's Note: In English in the original text; French translation omitted.
[3] Translator's Note: CO is the French abbreviation for Swiss Code of Obligations.

B.b. The Panel issued its award on May 8, 2014. It rejected the appeal, confirmed the March 26, 2012, decisions and ordered the Appellant to pay 85% of the costs of the arbitral proceedings and the Respondent 15%, with each party bearing its own legal costs.

After summarizing at length the respective positions of the parties and deciding on its jurisdiction, on the admissibility of the appeal and on applicable law – the FIFA rules principally and Swiss law alternatively – the Panel examined the merits of the appeal. Its reasons as to the merits may be summarized as follows.

The first issue is whether the termination of the employment contract with the Player by the Respondent prevented performance of the transfer contract, particularly its Clause 7. First, as to the role played by C._____, it is undisputed that this company became the owner of the economic rights concerning the Player from the signature of the JVA. However, the investigation of the matter did not demonstrate whether or not the Appellant knew this at the time the transfer contract was executed. However, the answer to this question is not decisive. Indeed, a possible liability of C._____ in connection with the performance of the transfer contract would not be inconsistent with a finding that the Respondent shares in the liability.

This being so, the Panel must emphasize that it is not very usual indeed for a world class player, having an ongoing employment contract, to be freed by his club and that a new club hires him immediately afterwards without paying the slightest transfer fee. The Panel must however remain with the facts established in the proceedings and with the applicable rules of law to the exclusion of statements that are mere speculation. In this respect, it must be determined whether, in breach of the rules of good faith, the Respondent prevented the occurrence of the condition to which Clause 7 of the transfer contract subjected the Appellant's right to ask the Respondent for a price supplement. Should the question be answered in the affirmative, the aforesaid condition would be deemed fulfilled pursuant to Art. 156 CO.

In the case at hand, the following facts may be considered as established:

- the Respondent and the Player agreed to terminate the employment contract between them prematurely and this is not unlawful at all;
- the Player signed a new contract with E._____, which he was entitled to do in his capacity as a "free agent,"[4] *i.e.* not bound to an employer;
- there is no evidence that the Respondent or C._____ would have received directly or indirectly any payment when the Player signed with the [name of country Z. omitted] club;
- evidence is also missing of the alleged manifest deception that the Respondent apparently orchestrated with C._____ to escape its obligations to the Appellant and neither is the existence established of a possible agreement between the Respondent and C._____ in this context;
- finally, despite the extraordinary performance of the Player in 2005 and the singularity of the transfer of such a player without *quid pro quo*, the Panel considers that the release of the Player

[4] Translator's Note: In English in the original text.

could be likened to a *business decision*;[5] yet, researching the reasons that may justify taking such a decision would go beyond its mission.

On the basis of these findings, it must be admitted that Clause 7 of the transfer contract is conditional. However, the Respondent did not prevent the occurrence of the condition by prematurely terminating the employment contract it had with the player because by doing so, he merely exercised the right recognized by the parties to such a contract to terminate their relationship by mutual consent. Therefore, it does not appear that the Respondent behaved reprehensibly or that he breached the rules of good faith. In the Panel's view, there is no sufficient evidence to find, on the one hand, that the behavior, namely the release of the Player, was taken with a view to preventing the performance of the clause of the transfer contract in dispute and on the other hand that the Respondent acted in bad faith. Art. 156 CO is therefore not applicable to the case at hand. Ultimately, the Respondent's liability is not shown as he did not violate the transfer contract or prevent the fulfillment of the condition contained in Clause 7 of this agreement. Therefore the Appellant's claim cannot but be rejected.

On the basis of Art. R64.5 of the Code for Sport Arbitration (hereafter: the Code), the Panel, taking into account the outcome of the arbitration proceedings, in particular the rejection of the appeal, holds that it is fair and reasonable for the Appellant to pay 85% of the costs of the proceedings and the balance to be paid by the Respondent, each party having moreover to pay its own legal costs.

C.
On July 7, 2014, A._____ (hereafter: the Appellant) filed a civil law appeal to the Federal Tribunal with a view to obtaining the annulment of the May 8, 2014, award. It argues a violation of its right to be heard (Art. 190(2)(d) PILA[6]) and submits that the award under appeal is incompatible with substantive public policy (Art. 190(2)(e) PILA).

On October 30, 2014, B._____ (hereafter: the Respondent) applied for a security for costs, which was rejected by decision of the presiding judge on November 27, 2014.

In its answer of January 5, 2015, the Respondent submitted that the appeal should be rejected.

The CAS submitted the file of the case and waived the right to an answer.

The Appellant reiterated its submissions in its reply of January 29, 2015.

Reasons:

[5] Translator's Note: In English in the original text.
[6] 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.

1.
According to Art. 54(1) LTF,[7] the Federal Tribunal issues its judgment in an official language,[8] as a rule in the language of the decision under appeal. When the decision is in another language (here English) the Federal Tribunal resorts to the official language chosen by the parties. Before the CAS, they used English. In the briefs sent to the Federal Tribunal, the Appellant used French. The Respondent did the same. In accordance with its practice, the Federal Tribunal shall adopt the language of the appeal brief and consequently issue its judgment in French.

2.
In the field of international arbitration, a civil law appeal is admissible against international arbitral awards pursuant to the requirements of Art. 190 to 192 PILA (Art. 77(1)(a) LTF). Whether as to the object of the appeal, the standing to appeal, the time limit to appeal, the appellant's submission, or the grievances raised in the appeal brief, none of these admissibility requirements raises any problem in the case at hand. The appeal may therefore be examined as to its merits.

3.
In a first argument, the Appellant submits that the CAS violated its right to be heard because it did not take into account the alternate legal argument submitted in its appeal brief.

3.1. The right to be heard in contradictory proceedings pursuant to Art. 190(2)(d) PILA does not indeed require an international arbitral award to be reasoned (ATF 134 III 186 at 6.1 and the references). However, it imposes upon the arbitrators a minimal duty to examine and handle the pertinent issues (ATF 133 III 235 at 5.2, p. 248 and the cases quoted). This duty is violated when, inadvertently or due to a misunderstanding, the arbitral tribunal does not take into consideration some submissions, arguments, evidence and offers of evidence submitted by one of the parties and important to the decision to be issued. If the award totally overlooks some apparently important elements to decide the dispute, it behooves the arbitrators or the respondent to justify the omission in their observations as to the appeal. It behooves them to demonstrate that, contrary to the appellant's claims, the items omitted were not pertinent to decide the case at hand or, if they were, that they were refuted by the arbitral tribunal implicitly. However, the arbitrators are not obliged to discuss all arguments raised by the parties, so that they cannot be held in violation of the right to be heard in contradictory proceedings for failing to refute, albeit implicitly, an argument objectively devoid of any pertinence (ATF 133 III 235 at 5.2 and the cases quoted).

3.2.
3.2.1. On the basis of these principles, the Appellant sets forth that at §52 to 67 of its appeal brief, it had developed an alternate argument by which it sought to demonstrate that, from the execution of the transfer agreement in December 2004, the Respondent – due to its ties with C._____ as a consequence of the recent execution of the JVA – had no intention or possibility respectively to honor the conditional

[7] Translator's Note: LTF is the French abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173. 110.

[8] Translator's Note: The official languages of Switzerland are German, French, and Italian.

commitment corresponding to Clause 7 of the aforesaid contract and to pay additional compensation in case of a subsequent transfer of the Player. By this alternate argument, it sought accordingly to establish that the Respondent entered the transfer agreement in bad faith by concealing that it already knew that it would not be able to perform it when the time came and draw the legal consequences, which had nothing to do with the Respondent's subsequent good or bad faith when it freed the Player of its contractual obligations prematurely in August 2006. Yet, whilst the Panel mentioned the alternate argument in its award, it did not address it in its reasons, thereby violating the Appellant's right to be heard.

3.2.2. It is not obvious in the case at hand that what is an "alternate" argument according to the Appellant would deserve to be so qualified. By looking at the structure of the appeal brief of December 26, 2002, – written by a [nationality omitted] lawyer and a [nationality omitted] lawyer, whilst the appeal comes from a Swiss lawyer – some serious doubts may be raised in this respect. Indeed, under the caption *C. Legal Analysis* of the brief, the Appellant submits its legal argument in the framework of a first subchapter entitled "*a) Prevention by the Respondent of the Fulfillment of Clause 7 of the Agreement*"[9] (n. 24 to 35), limiting its analysis to the applicability of Art. 156 CO as to Clause 7 of the transfer contract. Then, in a second subchapter entitled "*b) Compensation in Favor of A._____*"[10] (n. 36 to 69), it seeks to demonstrate the amount of the loss attributable to the Respondent in its view. This demonstration is twofold. First, the Appellant explains that the value of the Player on the transfer market reached USD 55'000'000 in 2006, so that the application of Clause 7 of the transfer contract entitles it to a supplement of USD 4'000'000 (*i.e.* [USD 55'000'000 – USD 35'000'000] x 20%; n. 36 to 51). Secondly, the Appellant seeks to establish that the same result can be reached by analyzing the case from a different perspective. This is where it develops what its new counsel calls "an alternate argument." It states that the real value of the Player in 2004 was above USD 20'000'000; that therefore, it accepted the Respondent's offer only because the latter agreed to return to it part of the amount it would receive in a subsequent transfer of the Player; but however it was deceived by the Respondent as to the possibility of performance of Clause 7 of the transfer contract and considered it was entitled to seek the difference between the aforesaid amount and the selling price of the player (USD 16'000'000), namely USD 4'000'000 (n. 52 to 67). Finally, and in the alternative, the Appellant invited the Panel to apply Art. 42 CO (n. 68 to 69). This shows that the alleged alternate legal argument was, in its mind, merely a different way to calculate the loss the Respondent caused. This is indeed how the Panel understood the Appellant's explanations: going back to the organization of the appeal brief, it summarizes the "alternate" argument of the Appellant (award n. 46 to 52), not in the chapter devoted to the legal basis of the claim in dispute (award n. 28 to 36) but in that dealing with the amount of the loss (award n. 37 to 52). Yet, it did not at all address the issue of the amount of the loss it raised itself (award n. 92(2)) because it held that the Respondent could not be found in breach of the transfer contract (award n. 121). Therefore, the Appellant is wrong to argue that it did not address as a specific legal ground the legal argument that it would somehow have concealed, albeit unconsciously, in its argument concerning the computation of damages. The minimal duty to examine and to handle the pertinent issues, which case law concerning the right to be heard imposes upon the arbitrators, does not require them to interpret the

[9] Translator's Note: In English in the original text.
[10] Translator's Note: In English in the original text.

contents of the brief to try to discover an underlying legal argument there. It behooves the author of the brief to write it in a sufficiently clear manner for the Arbitral Tribunal to be able to identify immediately the legal ground(s) invoked in support of the claim. If the Panel did not manage to separate out its "alternate" argument, the Appellant has only itself to blame for that.

Its first legal argument is therefore unfounded.

4.
4.1. Still, from the point of view of the violation of the right to be heard (Art. 190(2)(d) PILA), or from the point of view of procedural public policy (Art. 190(2)(e) PILA), the Appellant argues that the Panel unduly limited its review when Art. 57(1) of the Code states that the Panel has full power to review the facts and the law. Referring to the federal judgment published at ATF 115 Ia 5 at 2, p. 6, it argues that it failed to decide the issue as to whether or not it was aware, at the time the transfer contract was executed, of the role played by C._____ (award n. 99) and, above all, to have considered that it did not have to determine the reasons for which the Respondent entered into a contract with the Player prematurely terminating the employment relationship (award n. 114(e)). In this respect, the Appellant points out that it timely applied for several witnesses to be heard but the Arbitrators failed to decide as to this application, although the issue of the Respondent's internal motivation when it released the Player was the decisive factual element to determine the applicability of Art. 156 CO to the circumstances of the case at hand.

4.2.
4.2.1. As the Appellant itself emphasizes, procedural public policy – the violation of which falls within the scope of Art. 190(2)(e) PILA – is merely an alternate guarantee (ATF 138 III 270 at 2.3). It is therefore solely in light of the argument of a violation of the right to be heard that the grievance must be examined as the Appellant claims to be the victim of a formal denial of justice.

4.2.2. The aforesaid judgment on which the Appellant bases its argument is not pertinent. It concerns a case in which a cantonal administrative court limited its review to arbitrariness when it had full power of judicial review as to the issue in dispute.

This does not apply to the Panel in the case at hand. Reviewing the issues it was submitted with full power of review, it found that the agreement by which the employment relationship between the Respondent and the Player was terminated was not unlawful at all, that there was no evidence of any payment to the Respondent or to C._____ in connection with the execution of a new employment contract between the Player and the aforesaid [nationality omitted] club and that neither was it established that C._____ and the Respondent entered into an agreement to the Appellant's detriment. In other words, it found that from the point of view of Swiss law and more specifically in light of the provisions governing contractual duties, the Respondent's behavior towards the Appellant was not reprehensible. This is why it found it could dispense with examining the reasons which lead the Respondent to release the Player from the existing employment agreement, whilst speculating that this may have been a business decision. In doing so, it

carried out a legal assessment of the situation, the soundness of which is beyond the scope of the judicial review of the Federal Tribunal.

Be this as it may, the Appellant's explanations implicitly show that the Panel was not in a position to determine the reason which lead the Respondent to release the Player, since it claims in the same argument that the Panel failed to adduce the evidence requested, namely the hearing of witnesses principally. Yet, the Respondent's unchallenged submissions show that the Appellant raised no objection in this respect before the case was closed and that at the hearing of July 12, 2013, one of its lawyers answered in the negative the question of the chairman of the Panel as to whether counsel had other evidence to submit (answer p. 4, § before last). It must be recalled that a party claiming to be the victim of a violation of its right to be heard or of any other procedural deficiency must invoke it immediately in the arbitral proceedings under penalty of foreclosure (judgment 4A_198/2012 of December 14, 2012, at 3.2.1). Therefore in the case at hand, the Appellant must, in any event, face the fact that the arbitration file does not contain the evidence necessary for a finding as to the reason for which the Respondent and the Player agreed to part before the Employment Contract between them expired. Assuming its legal pertinence, contrary to the Panel's opinion, this circumstance would remain unproved in the arbitration file without enabling the Appellant to raise the issue at this stage in the proceedings.

The argument of a violation of the right to be heard is therefore doomed in this respect as well.

5.
According to the Appellant, the award under appeal is also incompatible with substantive public policy from a double point of view because it would violate both the principle of sanctity of contracts and the principle of god faith.

An award is contrary to substantive public policy when it violates some fundamental principles of substantive law to such an extent that it is no longer consistent with the determining legal order and system of values; among such principles are in particular the sanctity of contract, the compliance with the rules of good faith, the prohibition of abusing one's rights, the prohibition of discriminatory or confiscatory measures, and the protection of incapable people (ATF 132 III 389 at 2.2.1).

5.1.
5.1.1. The principle of sanctity of contracts expressed by the adage *pacta sunt servanda*, in the restrictive meaning it was given by case law concerning Art. 190(2)(e) PILA, is violated only if the arbitral tribunal refuses to apply a contractual provision while admitting that it binds the parties or, conversely, if it imposes upon them compliance with a clause that it considers not binding for them. In other words, the arbitral tribunal must have applied or refused to apply a contractual provision in contradiction with the result of its own interpretation as to the existence or the contents of the legal deed in dispute. However, the process of interpretation and the legal consequences logically drawn there from are not governed by the principle of sanctity of contracts, so that they cannot be argued from the point of view of public policy. The Federal Tribunal has repeatedly emphasized that almost the entire scope of litigation concerning breach of contract

is beyond the protection of the principle of *pacta sunt servanda* (judgment 4A_232/2013 of September 30, 2013, at 5.1.2).

5.1.2. According to the Appellant, the Panel would have violated the principle of sanctity of contracts by admitting that the Respondent was bound by Clause 7 of the transfer contract and that it had used a method it considered "somewhat unusual", whilst denying the alleged violation of the rules of good faith by the Respondent and contradicting itself by leaving part of the arbitration costs to the latter.

In its argument, the Appellant totally disregards the specific concept of sanctity of contracts as specified by the aforesaid case law. It actually uses it as a device to try to circumvent the prohibition to criticize the application of substantive law in a civil law appeal against an international arbitral award. The only important issue in this respect, which the Respondent claims to ignore, is that the Panel rejected the claim after denying that the requirements of Art. 156 CO, necessary to its admission, were met in the case at hand.

Moreover, it is irrelevant that the Panel would have left a small share of the costs of the arbitration to the Respondent, despite the fact that it entirely prevailed. Besides the fact that the Appellant has no legally protected interest in this Court annulling the award under appeal and sending the matter back to the Panel to put all arbitration costs upon the Appellant, one must bear in mind that the decision as to the costs of any procedure, whether in state court or arbitration, is an issue governed by its own rules, very frequently resorting to the judges' or the arbitrators' latitude or even on *ex aequo et bono* considerations. This is the case of Art. R64.5 of the Code, which invites the Panel to take into account the complexity and the outcome of the proceedings, as well as the conduct and the financial resources of the parties, when determining the arbitration costs and a contribution to the legal fees. Therefore, the Appellant seeks in vain to establish a contradiction between its loss of the case and its partial release of the costs of the arbitration. Moreover, even if there should be an intrinsic incoherence between the reasons of the award on the merits and that which relates to the costs of the arbitration, such a deficiency would not fall within the scope of substantive public policy (judgment 4A_150/2012 of July 12, 2012, at 5.2.1).

5.1.3. According to case law, the rules of good faith and the prohibition of abuse of rights must be understood in the light of the case law concerning Art. 2 CC[11] (judgment 4A_600/2008 of February 20, 2009, at 4.1).

Under the cover of the aforesaid argument, the Appellant seeks to challenge the manner in which the Panel applied Art. 156 CO to the circumstances of the case at hand and its rejection of the argument that the Respondent acted in violation of the rules of good faith. Yet, the violation of the principle of good faith, argued to establish incompatibility of the award with substantive public policy – which appears never to have been admitted by the Federal Tribunal to this day – should not be used to supplement the absence of a demonstration of behavior contrary to the rules of good faith by the Respondent from the point of view of

[11] Translator's Note: CC is the French abbreviation for the Swiss Civil Code.

a legal provision which is part and parcel of the principle of good faith, except if one were to turn the international arbitration appeal process into a legal recourse similar to an ordinary appeal.

Yet, this is what the Appellant seeks to obtain when trying to demonstrate that, even in the absence of evidence of the Respondent's alleged behavior contrary to the rules of good faith, the bad faith of the Respondent should be deduced from the sequence of the circumstances. It cannot be followed in this respect.

Therefore, the argument of a violation of substantive public policy appears unfounded as well in its two parts, which leads to the rejection of the appeal.

6.
The Appellant loses and shall 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 appeal is rejected.

2.
The judicial costs set at CHF 20'000 shall be borne by the Appellant.

3.
The Appellant shall pay CHF 22'000 to the Respondent 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, May 6, 2015

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

Presiding Judge:	Clerk:
Kiss (Mrs.)	Carruzzo