4A_492/2016[1]

Judgment of February 7, 2017

First Civil Law Court

Federal Judge Kiss, Presiding
Federal Judge Niquille
Federal Judge May
Federal Judge Canellas
Clerk of the Court: Mr Leemann.

Participant in the proceedings

FC A._____,
Represented by Mr. Thomas Sprecher,
Appellant,

v.

B._____,
Represented by Dr. Vitus Derungs,
Respondent,

Fédération Internationale de Football Associations (FIFA),
Represented by Mr. Christian Jenny,
Participant in the proceedings.

Facts:

A.
A.a. FC A._____ (Defendant, Appellant) is a football club based in [name of country omitted]. It is a football association member of [name of country omitted], which, on its part, belongs to the Fédération Internationale de Football Associations (FIFA, participant in the proceedings), an association under Swiss law, based in Zürich.

B._____ (Claimant, Respondent) is a football player based in [name of country omitted].

A.b. On August 28, 2008, B._____ concluded an employment contract ("First Standard Employment Contract") with FC A._____. This was registered with the Professional Football League of [name of

[1] Translator's Note: Quote as A._____ v. B._____, 4A_492/2016.
The decision was issued is in German. The full text is available on the website of the Federal Tribunal, www.bger.ch.

country omitted] and does not contain any precise information as to the agreed upon salary. The contract stipulates the following, amongst other things:

> 7.1 All disputes and disagreements which may arise during performance of obligations under the present contract, coordinate the parties by negotiations. The parties are obliged to abstain from the decision of disputes among themselves in courts of the general jurisdiction, for this purpose it is necessary to use the appropriate bodies of Professional football league of X_____, X_____ Football Federation, AFC FIFA, and the Court of Arbitration for Sport.[2]

Also on August 28, 2008, B._____ signed a Contract ("First Private Employment Contract") with FC A._____ and C._____ GmbH, a club based in Zug. This agreement contains, among other things, the following provisions:

> 2. REMUNERATION AND ENTITLEMENTS
>
> 2.1 For the Period of 28, August, 2008 until the end of the season 2009, and in consideration of the Athlete observing and performing the covenants and obligations of this Contract, the Company shall pay the Athlete a basic salary of EUR 6'500'000,00 (six million five hundred thousand Euros), plus EUR 1'000'000,00 (one million Euros) regarding the transferring compensation of the athlete, to be paid as follows:
>
> a) EUR 3'500'000,00 (three million five hundred thousand Euros) free taxes to be paid on the signing date of the Contract, in a bank account to be indicated in writing by the Athlete, plus:
> b) EUR 2'000'000,00 (two million Euros) free taxes, to be paid on September 25, 2008.
> c) EUR 2'000'000,00 (two million Euros) free taxes, to be paid on October 25, 2008.
>
> [...]
>
> 5. JURISDICTION AND CHOICE OF LAW
>
> 5.1 Any dispute arising from or related to the present contract will be submitted exclusively to an arbitration procedure before the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, and resolved definitely in accordance with the Code of sports-related arbitration.[3]

On November 17, 2008, B._____, FC A._____, and C._____ GmbH signed a further contract, which was entitled "Term of Employment Contract Extension" (hereinafter: "Second Private Employment Contract"). This contains the following provisions, amongst others:

> 2. For the contractual however extending period the parts establish the values and dates of payment below mentioned, remaining for the season of 2009 the waked up values and dates already in clause 2 and 2.1 of the originary Employment contract:
>
> a) For the season of 2010 the Employer will pay Contracted to the importance net (liquid) of six Million Euros (6'000'000,00), divided in two (2) equal parcels of three Million Euros (3'000'000,00), being the first one on day 25 of august of 2010 and the second one on day 25 of September of 2009.
> b) For the season of 2011 the Employer will pay Contracted to the importance net

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

(liquid) of six Million Euros (6'000'000,00), divided in two (2) equal parcels of three Million Euros (3'000'000,00), being the first one on day 25 of August 2010 and the second one on day 25 of September 2010.

3. To be continue being valid for the contractual however extending period, all the rest clauses of the Employment contract firmed between Employer and Contracted in 28 of August 2008 and that they had not damaged no modification with the present instrument from Extension.[4]

On April 1, 2009, B._____, FC A._____, and C._____ GmbH entered into a contract designated as "Service Contract," according to which B._____ was to become an advisor to FC A._____ football club.

On January 20, 2010, B._____ and FC A._____ closed a further contract ("Second Standard Employment Contract"), which they again registered with the Professional Football League of X._____ [name of country omitted]. The contractual clauses are similar to those of the First Standard Employment Contract, except for the fact that the Court of Arbitration for Sport (CAS) is not mentioned in section 7.1 of the Second Standard Employment Contract.

A.c. By letter of July 26, 2010, pursuant to the Second Private Employment Contract, B._____ demanded the payment of EUR 6'000'000 from FC A._____ and C._____ GmbH, within 10 days, otherwise he would cancel the contract.

On August 1, 2010, B._____ played for the last time for FC A._____. By letter of August 9, 2010, the player stated that, due to the lack of payment, he considered he was no longer bound by the contract.

B.
B.a. On August 19, 2010, B._____ requested the Dispute Resolution Chamber of the FIFA to order FC A._____ to pay EUR 15'919'013.-- (EUR 8'269'013.-- outstanding wage entitlements and EUR 7'650'000.-- in damages) and sanctions to be imposed upon it. FC A._____ did not file an opinion with on the claim.

By its decision of November 6, 2014, the Dispute Resolution Chamber of the FIFA upheld the claim in part and ordered the defendant to pay the outstanding wage entitlements, amounting to EUR 6'000'000, as well EUR 5'664'000 in damages, each with interest.

B.b. FC A._____ appealed the decision of the FIFA Dispute Resolution Chamber of November 6, 2014 to the Court of Arbitration for Sport (CAS) and submitted that the decision should be annulled, or, in the alternative, overturned, or, in the further alternative, the matter should be sent back to the Dispute Resolution Chamber, to conduct the proceedings again, with full attention to due process. It especially argued that the FIFA Chamber did not have jurisdiction.

On December 22, 2015, a hearing took place in Lausanne. In an Award of July 4, 2016, the CAS upheld the defendant's appeal in part; it declared the Dispute Resolution Chamber of the FIFA to be competent

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

to decide in the case, it annulled the decision under appeal of November 6, 2014 and sent the matter back to the FIFA Chamber for a new decision.

C.
In a civil law appeal, submitted to the Federal Tribunal, FC A._____ submits that the CAS Award of July 4, 2016, should be annulled and the FIFA Dispute Resolution Chamber should be denied jurisdiction in the case at hand. In the alternative, the award under appeal of July 4, 2016, should be annulled and the matter sent back to the CAS for a new decision, taking into account the lack of jurisdiction of the FIFA Chamber. In the further alternative, the decision under appeal should be overturned and the matter sent back to the CAS, for a new assessment of the jurisdiction of the FIFA Chamber.

The Respondent submits that the appeal be rejected. The CAS waived the right to make a submission. FIFA waived the right to actively take part in the proceedings.

The Appellant has submitted an answer to the Federal Tribunal.

D.
By order of October 14, 2016, the Federal Tribunal issued a stay of enforcement pending appeal.

Reasons:

1.
According to Art. 54(1) BGG,[5] the Federal Tribunal issues its judgment in an official language,[6] as a general rule in the language of the decision under appeal. If this decision was issued in another language, the Federal Tribunal uses the official language chosen by the parties. The decision under appeal is in English. As this is not an official language and the parties used German before the Federal Tribunal, the judgment will be issued in German.

2.
In the field of international arbitration, a civil law appeal is admissible pursuant to the requirements of Art. 190-192 PILA[7] (SR 291) (Art. 77 (1)(a) BGG).

2.1. In the case at hand, the arbitral tribunal has its seat in Lausanne. At the relevant moment, both parties had their domicile and their seat, respectively, outside Switzerland (Art. 176(1) PILA). As the

[5] Translator's Note: BGG is the German abbreviation for the Federal Statute of June 17, 2005, organizing the Federal Tribunal RS 173.190.
[6] Translator's Note: The official languages of Switzerland are German, French and Italian.
[7] Translator's Note: PILA is the more commonly used abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.

parties did not expressly exclude the provisions of Chapter 12 PILA, these provisions are accordingly applicable (Art. 176(2) PILA).

2.2. The Award under appeal is an interim award (BGE 140 III 520[8] at 2.2). According to Art. 190(3) PILA, interim awards may be appealed in civil matters (BGE 130 III 76 at 3.1.3, at 3.2.1, p. 80).

2.3. A civil law appeal within the meaning of Art. 77(1) BGG may, in principle, only seek the annulment of the award under appeal (see Art. 77(2) BGG, ruling out the application of Art. 107(2) BGG, to the extent that that provision empowers the Federal Tribunal to decide the matter itself). Insofar as the dispute concerns the jurisdiction of the arbitral tribunal or its composition, there is an exception that the Federal Tribunal may itself determine the jurisdiction or the lack of jurisdiction of the arbitral tribunal or may rule upon the exclusion of an arbitrator in question (BGE 136 III 605[9] at 3.3.4, p. 616, with references).

Thus, the Appellant's submissions are admissible.

2.4. The appeal must be fully reasoned in the correct form and filed within the time limit to appeal (Art. 42(1) BGG). If there is a second round of pleadings, the Appellant may not use the reply to supplement or improve its appeal (see BGE 132 I 42 at 3.3.4). The reply can only be used to comment upon the statements made in the answer of another participant in the proceedings (see BGE 135 I 19 at 2.2).

Insofar as the Appellant goes further in its reply, those submissions cannot be taken into account.

2.5. The Federal Tribunal bases its judgment on the factual findings of the Arbitral Tribunal (Art. 105(1) BGG). The Federal Tribunal may not rectify or supplement the factual findings of the Arbitral Tribunal, even when they are blatantly inaccurate or based on a violation of the law within the meaning of Art. 95 BGG (see Art. 77(2) BGG, ruling out the applicability of Art. 97 BGG and that of Art. 105(2) BGG). However, the Federal Tribunal may review the factual findings of the award under appeal when some admissible grievances within the meaning of Art. 190(2) PILA are raised against such factual findings or when new evidence is exceptionally taken into account (BGE 138 III 29[10] at 2.2.1, p. 34; 134 III 565[11] 3.1, p. 567; 133 III 139 at 5, p. 141, each with references). The party claiming an exception to the rule that the Federal Tribunal is bound by the factual findings of the arbitral tribunal and wishes to rectify or supplement the facts must show, with reference to the record, that the corresponding factual allegations were raised in the arbitral proceedings in accordance with the procedural rules (see BGE 115 II 484 at 2a, p. 486; 111 II 471 at 1c, p. 473; each with references; see also BGE 140 III 86 at 2, p. 90).

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[8] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/res-judicata-can-be-different-each-joint-defendant

[9] 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

[10] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s

[11] 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

2.6. The Appellant largely disregards these principles. It describes the background to the concluded contracts from its point of view and on various occasions its submissions go beyond the binding factual findings of the Arbitral Tribunal, without submitting any substantiated exceptions from the binding character of the factual findings. Using references to various pieces of evidence, it makes claims about the persons who drafted, negotiated, and translated the contracts, or about which of the signatories did not correctly understand them for linguistic reasons. These submissions must be disregarded, along with its references to the signatory entitlements of the involved persons, references to the calculation of the Respondent's "total value" and the practical authorisation conditions of different transactions, references to the factual payments between the involved persons, and references to the reasons for the termination of the agreement, the enforcement, and the bankruptcy claims of the Respondent in the bankruptcy procedure concerning C._____ GmbH. Apart from those references, the Appellant's statements as to the alleged true intent of the parties, which are not supported by the factual findings of the decision under appeal, shall also go unheeded.

3.
The Appellant argues that the CAS has violated the provisions concerning jurisdiction (Art. 190(2)(b) PILA).

3.1. The Federal Tribunal examines the jurisdiction complaint freely in law, according to Art. 190(2)(b) PILA, including the preliminary issues whose clarification the jurisdiction depends upon. In contrast, it examines the effective findings of the appealed arbitration award within the framework of the jurisdiction complaint only if, concerning these factual findings, admissible complaints, according to Art. 190(2)(b) PILA are submitted or if some new evidence (Art. 99 BGG) is exceptionally taken into consideration (BGE 142 III 220 at 3.1, 239 at 3.1; 140 III 477[12] at 3.1, p. 477, 520 at 3.1; 138 III 29[13] at 2.2.1; each with references).

An arbitration clause must be understood as an agreement in which two or more determined or determinable parties agree and bind themselves to submit one or several existing or future disputes to an arbitral tribunal to the exclusion of the original jurisdiction of the state, pursuant to a directly or indirectly determined legal order (BGE 130 III 66 at 3.1, p. 70). The conclusive intent of the parties to remit some specific disputes to an arbitral tribunal and not to a state court must be shown (BGE 140 III 134[14] at 3.1, p. 138; 138 III 29 at 2.2.3, p. 35; 129 III 675 at 2.3, p. 679 f.).

3.2. The Appellant does not deny the fact that the parties have validly bound themselves to have any kind of disputes arising from the First Private Employment Contract and from the Second Private Employment Contract settled by an arbitral tribunal. Yet, it claims that the Dispute Resolution Chamber of FIFA has no jurisdiction and that instead jurisdiction lies solely with the CAS. Thus, its complaint

[12] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/arbitration-clause-not-rescinded-subsequent-%E2%80%9Cshowpiece%E2%80%9D-contract

[13] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s

[14] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/arbitration-clause-survives-termination-its-scope-be-interpreted-liberally

argues that the CAS is the only court that can decide a dispute, and not that it sits as an appeal court after an internal federation procedure before the Dispute Resolution Chamber of FIFA (see for the jurisdiction of the CAS as an ordinary court or as an appeal court, for instance, Judgment 4A_392/2008[15] of December 22, 2008).

3.3.
3.3.1. The Appellant rightly does not question the fact that the parties are bound by FIFA regulations. His argument in the current matter is that in this specific case, which is about a dispute between the Respondent and the C._____ GmbH, the relevant FIFA rules do not apply, because it has not become a valid party to the First and to the Second Private Employment Contracts. This argument cannot stand. The Appellant and the Respondent are the sole participants in the present matter. Who owes how much to whom as a result of the First and Second Private Employment Contracts is a material question, not a question of jurisdiction, and as such will have to be decided by the competent body. The same applies to the claim that a payment obligation of an amount in Euros, deriving from the Second Private Employment Contract, would violate mandatory rules and would thus not be legally effective.

Apart from this, its argumentation is contradictory, particularly due to the fact that the Appellant itself relies upon the arbitration clause, agreed upon in the First and Second Private Employment Contract, and wants to derive from it the fact that this would exclude an initial ruling of the Dispute Resolution Chamber of FIFA in the case, prior to an award of the CAS.

3.3.2. The Arbitral Tribunal has relevantly referred to Art. 22 ("FIFA Jurisdiction") of the FIFA Regulations for the Status and Transfer of Players, 2009 edition, which says the following:

> Without prejudice to the right of any player or club to seek redress before a civil court for employment-related disputes, FIFA is competent to hear:
> [...]
>
> b) employment-related disputes between a club and a player of an international dimension, unless an independent arbitral tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs has been established at national level within the framework of the association and/or a collective bargaining agreement;
> [...]

The Arbitral Tribunal considered that the case at hand involves an international employment-related dispute, according to Art. 22(b) of the FIFA Regulations for the Status and Transfer of Players. This is quite clear: the Respondent has worked as a professional football player for the Appellant in X._____ [name of country omitted] and claims outstanding wage entitlements, as well as contractual damages, as a result of the employment contract.

International employment-related disputes between a club and a player must be brought, according to Art. 22(b), in conjunction with Art. 24(1) of the Regulations, before the Dispute Regulation Chamber of

[15] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/review-by-the-federal-tribunal-of-an-award-upholding-jurisdictio

FIFA. According to Art. 24(3), decisions of the Chamber can be appealed to the CAS. Apart from the right to redress in a civil court, which remains untouched by the Regulation, Art. 22(b) stipulates, as an exception from the FIFA jurisdiction, that at the national level, within the club and/or within a collective bargaining agreement, there is the possibility one may seize an independent arbitral tribunal, which guarantees a fair procedure and which is based on an equal representation of players and clubs. The Appellant does not argue, for instance, that there is an equally representative arbitral tribunal on national level, which would comply with these requirements. As relevantly stated in the decision under appeal, the CAS does not represent such a national arbitral tribunal, which is why it correctly assumed that, in the present case, there was no jurisdictional exception to the FIFA Chamber, as foreseen by Art. 22. The argument that the FIFA Regulations for the Status and Transfer of Players do not limit the rights of the parties bound by them to appoint an arbitral tribunal themselves is not convincing, in view of the clearly defined exceptions in Art. 22. To what extent the right reserved in this provision, that of addressing a civil court, would also include, "in concordance with Art. 30 BV" the possibility of choosing a national tribunal instead of an arbitral tribunal, is not thoroughly explained by the Appellant and he fails to clarify, as this exception was written – according to the commentary quoted in the appeal brief – with a view to the binding jurisdiction of state courts in different systems, which rules out an arbitration agreement.

3.3.3. Against this background, the Appellant's argument that the parties, by the arbitration clause in the First Private Employment Contract (supplemented by the Second Private Employment Contract), excluded the jurisdiction of the Dispute Resolution Chamber of the FIFA, in favour of the CAS, is not persuasive. One must consider here the fact that, in the case of internal club decision-making bodies, we are not talking about arbitral tribunals and that their decisions represent mere wishes of the participating clubs and not, for instance, acts of jurisdiction (BGE 119 II 271 at 3, p. 275 f.; Judgments 4A_222/2015[16] of January 28, 2016 at 3.2.3.1; 4A_374/2014[17] of February 26, 2015 at 4.3.2.1). This also applies for the FIFA Chamber (see BGE 136 III 345[18] at 2.2.1, p. 349), as, it should be noted, the Appellant also acknowledges. This also speaks to the context of the interpretation of the arbitration clause (contained by the First Private Employment Contract) as to the understanding that the parties, by the chosen wording, sought to to exclude the jurisdiction of other adjudicative tribunals besides the CAS – and not any potential internal club procedures.

The isolated interpretation according to the wording of the arbitration clause, as argued in the appeal brief, also falls short due to other reasons: the Arbitral Tribunal correctly considered the further circumstances of the conclusion of contract, thus especially the fact that in the First Private Employment Contract, three contracting parties are mentioned and that these intended to subject C._____ GmbH, to which the relevant FIFA Regulations – especially Art. 22(b) of the FIFA Regulations for the Status and Transfer of Players – uncontestably do not apply, to the arbitral jurisdiction of the CAS as well. By considering the First Standard Employment Contract, agreed between the Appellant and the

[16] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/provisional-determination-jurisdiction-not-capable-appeal

[17] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/public-policy-defense-under-new-york-convention

[18] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/setting-aside-of-award-for-violation-of-public-policy-principle-

Respondent on August 28, 2008 as well, a contract in whose arbitration clause the jurisdiction of the FIFA bodies is expressly mentioned, the Arbitral Tribunal could conclude, free of legal errors, that the arbitration clause in the First Private Employment Contract is to be understood in good faith that, in case of labour-law disputes between the Appellant and the Respondent, the internal club procedures, before an arbitration decision of the CAS is rendered, should not be excluded.

Thus, the CAS rightly considered that it did not have to directly decide in the dispute between the parties, but rather as an appeal court, after an internal club procedure before the Dispute Regulation Chamber of the FIFA. The decision under appeal, from the perspective of Art. 190(2)(b) PILA, is not objectionable.

4.
The appeal is to be rejected, insofar the matter is capable of appeal. According to the result of the procedure, the Appellant shall bear the costs of the federal judicial proceedings and the Respondent's costs (Art. 66(1) as well as Art. 68(2) BGG).

Therefore, the Federal Tribunal pronounces:

1.
The Appeal is rejected, insofar as the matter is capable of appeal.

2.
The judicial costs, set at CHF 40'000, shall be borne by the Appellant.

3.
The Appellant shall pay the Respondent an amount of CHF 50'000 for the federal judicial proceedings.

4.
This judgment shall be communicated to the Parties, to the Fédération Internationale de Football Associations (FIFA) and to the Court of Arbitration for Sport (CAS).

Lausanne, February 7, 2017

On behalf of the First Civil Law Court of the Swiss Federal Tribunal

The Presiding judge:	The Clerk:
Kiss	Leemann