4A_246/2011[1]

Judgment of November 7, 2011

First Civil Law Court

Federal Judge Klett (Mrs), Presiding
Federal Judge Corboz,
Federal Judge Rottenberg Liatowitsch (Mrs),
Federal Judge Kolly,
Federal Judge Kiss (Mrs),
Clerk of the Court: Leemann.

Appellant,

X._____,

v.

Respondent,
Y._____ Sàrl,
Represented by Mr Antonio Rigozzi,

Facts:

A.
A.a X._____ (the Appellant) is a football club based in Z._____. It belongs to the football federation of Q._____ which in its turn is a member of the Fédération Internationale de Football Association (FIFA) with headquarters in Zurich. Y._____ Sàrl (the Respondent) is a football agent based in R._____.

A.b On February 19, 2003 the Appellant and the Respondent entered into an agreement concerning the transfer of player A._____. According to that agreement the parties would jointly bear the transfer fee for the future transfer of player A._____ to a foreign club. Article 4 of the Agreement provides the following (according to the undisputed English translation): "the competent instance in case of a dispute concerning this Agreement is the FIFA Commission, or the UEFA Commission, which will have to decide the dispute that could arise between the club and the agent[2]". In connection with A._____'s transfer and that of two other players some disputes arose between the Parties with regard to the transfer fees.

[1] Translator's note: Quote as X._____ *v.* Y._____ Sàrl, 4A_246/2011. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch

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

B.

B.a On September 10, 2008 the Respondent initiated arbitral proceedings based on paragraph 4 of the February 19, 2003 agreement in front of the FIFA Players Status Committee and submitted that the Appellant should be ordered to pay € 534'186 and USD 100'000. In a letter of December 10, 2008 the FIFA Players Status Committee took the view that it had no jurisdiction based on article 6.1 of its Rules as the Claimant was a company and not a natural person. When the Respondent questioned that decision FIFA maintained that its Players Status Committee had no jurisdiction in a letter of January 15, 2009.

B.b On February 25, 2009 the Respondent applied to the High Court of the canton of Zurich for the appointment of an arbitrator. On October 20, 2009 the High Court of the canton of Zurich decided that there were enough clues to the existence of an arbitration clause and that the Appellant had not succeeded to produce summary evidence that there was no arbitration clause, whereupon the Court appointed Urs Scherrer as arbitrator.

B.c In an award of April 10, 2010 the arbitrator found that he did not have jurisdiction. He held that the parties had obviously intended to submit the existing dispute to an arbitral tribunal specializing in sport law as the Appellant even took the view that the dispute should be submitted to a sport arbitral tribunal constituted according to the rules of a sport arbitration organization. Therefore the arbitrator considered that it was not justified to let the arbitration clause become ineffective; however there was no direct or indirect intent of the parties to submit their dispute to a sole arbitrator, which is why he found that he had no jurisdiction. The Respondent appealed the arbitral award of April 13, 2010 to the Federal Tribunal by way of a Civil law appeal (case 4A_280/2010). The proceedings were subsequently stayed until a decision in this case.

B.d On May 14, 2010 the Respondent filed a claim against the Appellant in front of the Court of Arbitration for Sport (CAS) essentially submitting that the Appellant should be ordered to pay USD 100'000 with interest at 6% from February 9, 2006 and € 534'186 with interest at 8% since February 1st, 2008. The Appellant disputed the CAS jurisdiction. In an interim award of March 17, 2011 the CAS held that it had jurisdiction on the basis of the arbitration clause contained in the agreement of February 19, 2003, with regard to the dispute between the Parties in connection with the transfer of player A._____ (award paragraph 1). Simultaneously, the Arbitral tribunal found that it had no jurisdiction as to the Respondent's other submissions (award paragraph 2). Furthermore it decided the costs of the proceedings and those of the parties (award paragraph 3 and 4).

C.

In a Civil law appeal the Appellant submits to the Federal Tribunal that paragraphs 1, 3 and 4 of the CAS interim award of March 17, 2011 should be annulled and asks for a finding that the CAS has no jurisdiction. The Respondent submits that the appeal should be rejected. The Arbitral tribunal did not express a position. The Appellant submitted a reply and the Respondent a rebuttal.

Reasons:

1.
In the field of international arbitration a Civil law appeal is allowed under the requirements of Art. 190-192 PILA[3] (SR 291) (Art. 77 (1) (a) BGG[4]).

1.1
The seat of the Arbitral tribunal is in Lausanne in this case. Both the Appellant and the Respondent had their domicile or their seat outside Switzerland at the decisive time. As the Parties did not rule out in writing the provisions of chapter 12 PILA they are applicable (Art. 176 (1) and (2) PILA).

1.2
A Civil law appeal within the meaning of Art. 77 (1) BGG may in principle seek only the annulment of the decision under appeal (see Art. 77 (2) BGG ruling out the applicability of Art. 107 (2) BGG to the extent that it allows the Federal Tribunal to decide the matter itself). To the extent that the dispute involves the jurisdiction of the arbitral tribunal there is however an exception to that effect, namely that the Federal Tribunal itself can decide the jurisdiction or lack of jurisdiction of the arbitral tribunal (BGE 136 III 605 at 3.3.4 p. 616 with references). The Appellant's submission is admissible to that extent.

2.
The Appellant argues that the Arbitral tribunal wrongly accepted jurisdiction (Art. 190 (2) (b) PILA).

2.1
Based on Art. 178 (2) PILA the Arbitral tribunal examined whether or not the Parties had entered into a valid arbitration clause according to Swiss law. According to Art. 1 (1) and Art. 2 (1) OR[5] a contract is entered into when the parties agreed on all the essential points. The materially essential points of an arbitration clause include the intent of the parties to bind themselves to submit their dispute to decision by an arbitral tribunal and furthermore the determination of the object of the dispute, which is to be submitted to the arbitrators. Additional items, such as the seat of the arbitral tribunal, the rules as to the composition of the arbitral tribunal, the designation of an arbitral institution, the choice of the language of the proceedings and the determination of the applicable procedural rules, do not belong to the essential contractual points unless a party would have seen them as *conditio sine qua non* for the conclusion of the agreement in a way that was recognizable for the other party. Should the interpretation of the arbitration clause show that the parties wanted to submit their dispute to an arbitral tribunal but that there was no agreement as to the course of the arbitral proceedings, an understanding of the contract must in principle be sought which will be in favour of the arbitration clause. Article 4 of the February 19, 2003 agreement clearly shows the intention of the Parties to exclude state courts and to let possible disputes be decided in arbitral proceedings instead. The Parties had initially designated an organization, namely FIFA or UEFA which should decide the dispute. To the extent that they anticipated that a committee of FIFA or UEFA would have to decide a possible dispute in connection with their agreement, the Parties had clearly agreed on an institution, which was not a state court and

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[3] 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.

[4] Translator's note: BGG is the German abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173 110.

[5] Translator's note: OR is the German abbreviation for the Swiss Code of obligations.

that was not based in the state of one of the Parties, yet which would be particularly familiar with the possible object of the dispute. An interpretation of article 4 according to the principle of trust shows that the Parties wanted to submit the dispute originating from the agreement to an arbitral tribunal. Except in extraordinary cases the designation of an arbitral institution or an arbitral body should be considered as not subjectively essential to the parties. There were no indications that the Appellant would have considered the institution designated in the arbitration clause as so important that it would not have decided in favour of arbitration had it known of the FIFA refusal to adjudicate the dispute. The CAS saw another indication that the "FIFA Commission" mentioned in article 4 was not an essential point in the fact that the clause provided for the alternative jurisdiction of UEFA besides FIFA. This was an important indication that the Parties wanted an institution specialized in sport, which was familiar with disputes involving the transfer of players but that they were not set on a specific organization. Moreover it was to be taken into account that the FIFA Statutes provide for a general right of appeal to the CAS of a decision of the FIFA Committee for the Status of Players. Had the FIFA Committee not declined jurisdiction to decide the dispute between the Parties, the CAS would thus have had jurisdiction on appeal. For these reasons the validity of the arbitration clause should be upheld. Yet it was unclear and needed to be interpreted and supplemented as to the specifically competent arbitral tribunal. In this respect the Parties had wanted to submit their dispute to an arbitral tribunal with several arbitrators. The Parties had clearly wanted to submit the dispute to an arbitral tribunal sitting in Switzerland, whereupon they let the specific seat open by choosing alternatively FIFA (based in Zurich) and UEFA (based in Nyon, VD). Therefore a finding of jurisdiction for the CAS, which is based in Lausanne – and therefore also in the canton of Vaud – corresponded to the choice of venue according to the arbitration clause. Further interpretation of the clause showed that the Parties intended to entrust the decision to an institution specialized in sport law (in particular in the field of football). In this respect it was generally known that since 2003 the CAS has jurisdiction to decide appeals against FIFA decisions. Thus the CAS had been able to develop comprehensive case law in the field of football, in particular as to the FIFA Rules. For these reasons the CAS was in the best position to decide the dispute between the Parties once FIFA denied jurisdiction and the Appellant had not argued that UEFA would actually decide the matter. Accordingly the CAS found that it had jurisdiction as to the Respondent's claims in connection with player A._____'s transfer on the basis of article 4 of the February 19, 2003 agreement.

2.2

2.2.1 The Federal Tribunal exercises free judicial review according to Art. 190 (2) (b) PILA as to jurisdiction, including the substantive preliminary issues from which the determination of jurisdiction depends. However even in the framework of an appeal on jurisdiction the Court reviews the factual findings of the award under appeal only when some admissible grievances within the meaning of Art. 190 (2) PILA are brought against such factual findings or exceptionally when new evidence is taken into account (BGE 134 III 565 at 3.1 p. 567; 133 III 139 at 5 p. 141; 129 III 727 at 5.2.2 p. 733).

2.2.2 The arbitration clause must meet the requirements of Art. 178 PILA as to form (Art. 178 (1) PILA). In sport cases the Federal Tribunal reviews with a certain "benevolence" the agreement of the parties to call upon an arbitral tribunal; this is with a view to promoting quick disposition of the dispute by specialized courts which, as the CAS, offer comprehensive guarantees of independence and objectivity (BGE 133 235 at 4.3.2.3 p. 244 ff with references). The generosity of federal case law in this respect appears in the assessment of the validity of arbitration clauses by reference

(judgement 4A__460/2010 of April 18, 2011 at 3.2.2; 4A_548/2009 of January 20, 2010 at 4.1; 4A_460/2008 of January 9, 2009 at 6.2 with references). According to Art. 178 (2) PILA the validity of an arbitration clause is assessed as to its contents according to the law chosen by the parties and applicable to the dispute, in particularly as to the principal agreement, or according to Swiss law. In the arbitral proceedings none of the Parties took the view that as to the validity of the arbitration clause the law applicable to the February 19, 2003 agreement had to be determined first; in particular, the Respondent did not claim that another law would be more advantageous than Swiss law as to the material validity of the arbitration clause. The CAS reviewed the existence of the arbitration clause in dispute on the basis of Swiss law according to Art. 178 (2) PILA, which is not disputed by any of the Parties in front of the Federal Tribunal.

2.2.3 An arbitration clause is an agreement by which two determined or determinable parties agree to submit one or several existing or future disputes to the binding jurisdiction of an arbitral tribunal to the exclusion of the original state jurisdiction, on the basis of a legal order determined directly or indirectly (BGE 130 III 66 at 3.1 p. 70). It is decisive that the intention of the parties should be expressed to have an arbitral tribunal, *i. e.* not a state court, decide certain disputes (BGE 129 III 675 at 2.3 p. 679 ff). The arbitral tribunal called upon to decide must be either determined or in any case determinable. The appointment of the arbitral tribunal may take place according to the rules chosen by the parties (Art. 179 (1) PILA) or by decision of the court at the seat of the arbitral tribunal (Art. 179 (2) PILA) (BGE 130 III 66 at 3.1 p. 70 ff; 129 III 675 at 2.3 p. 680). Incomplete, unclear or contradictory provisions in arbitration clauses create pathological clauses. To the extent that they do not concern mandatory elements of the arbitral agreement, namely the binding submission of the dispute to a private arbitral tribunal, they do not necessarily lead to invalidity. Instead, a solution must be sought by interpretation and if necessary by supplementing the contract with reference to general contract law, which respects the fundamental intent of the parties to submit to arbitral jurisdiction (BGE 130 III 66 at 3.1 p. 71). Should no mutual intent of the parties be factually certain as to the arbitration clause, it must be interpreted according to the principle of trust, *i. e.* the putative intent is to be ascertained as it could and should have been understood by the respective parties according to the rules of good faith (BGE 130 III 66 at 3.2 p. 71; 129 III 675 at 2.3 p. 680). When interpretation shows that the parties intended to submit the dispute to an arbitral tribunal and to exclude state jurisdiction, but with differences as to how the arbitral proceedings should be carried out, the rule that a contract should be given effect applies and an understating of the contract must be sought which will uphold the arbitration clause. Imprecise or flawed designation of the arbitral tribunal does not necessarily lead to invalidity of the arbitral agreement (BGE 130 III 66 at 3.2 p. 71 ff; 129 III 675 at 2.3 p. 681).

2.3

2.3.1 The Appellant firstly challenges that an arbitral agreement would have come into force. In this respect it wrongly denies that the expressions of intent in the contractual clause in dispute, once interpreted according to the rules of good faith, shows that the Parties wanted to have possible disputes as to their contractual relationship decided by committees of the football bodies FIFA or UEFA instead of going to their respective state courts. The Appellant merely claims generally that the finding of the CAS that state jurisdiction was renounced would violate the recognized principle of federal case law according to which such renunciation could not be accepted lightly but instead should be interpreted restrictively in case of doubt (see BGE 129 III 675 at 2.3 p. 680 ff). However

he does not explain to what extent the contractual clause would have to be understood in this respect as meaning that state jurisdiction should be upheld and concedes that according to Art. 4 of the agreement "the respective Commission of the football bodies FIFA or UEFA should have jurisdiction to decide the dispute" and also sees in another place the clear intent of the Parties "to submit their dispute to an arbitral institution, namely to the FIFA Committee". Article 4 does not expressly mention "arbitral jurisdiction" "arbitral tribunal" "arbitrator" "arbitration clause" or similar wording (see WERNER WENGER/CHRISTOPH MÜLLER, in: Basler Kommentar, Internationales Privatrecht, 2 Aufl. 2007, N. 32 to Art. 178 PILA) but provides for alternate jurisdiction of two international football bodies to decide a possible dispute under the contract. Contrary to what the Appellant appears to claim, the wording "competent instance"[6] as well as "decide the dispute"[7] cannot be understood as meaning that the two private sport bodies mentioned, both familiar with the world of professional football, would merely mediate or advise in case of disputes under the contract. It is instead to be concluded according to good faith that the Appellant as an internationally known football club and the Respondent as a broker of professional football players, wanted the binding jurisdiction of one of the two international football organizations as to a possible dispute based on their transfer agreement, yet without reserving at the same time the possibility to go to the state courts of their respective states. The Appellant itself takes the view moreover that a decision of the FIFA Committee for the Status of Players could have been appealed to the CAS. Under such circumstances the renunciation of state jurisdiction is not doubtful, which would call for restrictive interpretation. The Appellant's argument that the interpretation of the statements of intention of the Parties according to the principle of trust would not lead to the exclusion of state jurisdiction is unfounded. The CAS assumed the existence of an arbitration clause without violating federal law.

2.3.2 The Appellant further argues that the designation of the competent "UEFA Committee" would be obviously flawed as it is generally known that no UEFA body accepts to decide disputes between brokers and football clubs. Such disputes are within the exclusive jurisdiction of the FIFA Committee for the Status of Players which, however, found that it had no jurisdiction in this case as according to its practice it decides only disputes between player agents and football clubs when the broker is a natural person. As the aforesaid FIFA Committee did not accept the dispute, the arbitration clause must be considered extinguished according to the Appellant or impossible to begin with. The Appellant rightly points out that the designation of both FIFA and UEFA Committees proved to be impossible to begin with (Art. 20 (1) OR) as both bodies could not address the dispute due to their internal rules. However this does not lead to the nullity of the arbitration clause; instead the CAS rightly analysed whether or not the bodies designated at article 4 of the February 19, 2003 agreement were of such importance that the Parties would have decided against arbitral jurisdiction had they known these could not decide a dispute (see also Jean-François POUDRET/Sébastien BESSON, Comparative law of international arbitration, 2 ed. 2007, Rz. 161, mentioned in the appeal, according to whom the designation of an inexisting arbitral institution does not lead in all cases to the nullity of the arbitration clause but only under specific circumstances). Thus the CAS examined what the Parties would have agreed according to their hypothetical intent (see BGE 131 III 467 at 1.2 p. 470) if they had been aware of the nullity of the flawed language already at the time

[6] Translator's note: In English in the original text.
[7] Translator's note: In English in the original text.

the contract was concluded (see Art. 20 (2) OR). Contrary to what the Appellant seems to argue, the CAS did not merely proceed from a general premise in its conclusion that an arbitration clause would also have been entered into if the Parties had been aware that none of the bodies designated would decide a dispute as to a transfer agreement. Instead it recognized specific indications in support of that view by considering the individual relationships: thus the alternative reference to two football bodies suggests that the Parties were not set upon one specific institution but principally wanted an arbitral tribunal familiar with issues as to the transfer of professional football players. Moreover the CAS convincingly rejected the Appellant's argument that it would not have entered into an arbitral agreement if it had known the lack of jurisdiction of the FIFA Committee for the Status of Players by stating that a decision of this FIFA Committee could have been appealed to the CAS according to the applicable FIFA Rules, which is also accepted by the Appellant. It is actually not apparent that the Parties would have anticipated the possibility to appeal a decision of the FIFA Committee for the Status of Players to the CAS whilst maintaining the jurisdiction of the respective national courts merely in view of a possibility to seize the CAS or another arbitral tribunal directly. Why this should be so is not explained by the Appellant. Moreover it disregards that according to the general rules of contract, partial nullity must be given preference in case of doubt as to the existence of complete nullity arising from the hypothetical intent of the Parties (judgment 4C.156/2006 of August 17, 2006 at 3.2). The CAS did not violate federal law when despite the invalid designation of the bodies mentioned in article 4 of the February 19, 2003 agreement it upheld the arbitration clause.

2.3.3 When the parties excluded state jurisdiction in favour of an arbitral tribunal, as they did in this case, it is possible – contrary to the opinion advanced in the appeal – to seek a solution which takes into account the fundamental intent of the parties to submit to arbitral jurisdiction (see BGE 130 III 66 at 3.2 p. 71 ff). For that purpose the contract may not only be interpreted but also supplemented (BGE130 III 66 at 3.1 p. 71; see WENGER/MÜLLER, a.a.O., n. 53 ff to Art. 178 PILA). Partial nullity (Art. 20 (2) OR) of the arbitration clause concluded on February 19, 2003 is to be remedied to the extent possible by supplementing the contract on the basis of the hypothetical intent of the parties (see BGE 120 II 35 at 4a p. 40 ff; 114 II 159 at 2c p. 163; 107 II 216 at 3a and b p. 318 ff). One must enquire as to what the parties would have agreed had the partial flaw be known to them already at the time the contract was concluded (see as to the ascertainment of the hypothetical intention of the Parties BGE 107 II 216 at 3a p. 218; judgement 4C. 156/2006 of August, 17 2006 at 3.3; 4C.9/1998 of May, 14 1998 at 4b). Without breaching federal law the CAS found that the Parties wanted to submit their dispute to an arbitral tribunal sitting in Switzerland, which would know sport law particularly well. The designation of FIFA as well as UEFA suggests that the Parties wanted to have a sport body decide their possible disputes under the transfer contract, which would be familiar with transfers in the business of international football. It must be noticed in particular that the CAS can review FIFA decisions concerning the transfer of players on appeal and the Appellant itself acknowledges that an appeal to the CAS would have been allowed against the decision of the FIFA Committee for the Status of Players if it had accepted jurisdiction in the case at hand. On the basis of these circumstances it must be assumed that the Parties would have submitted the possible disputes arising from their transfer agreement of February 19, 2003 to the CAS, which regularly addresses transfers of football players, had they known that the bodies mentioned in article 4 would not have jurisdiction. The Appellant's objection that direct jurisdiction of the CAS would cause it to lose some of its rights as a possibility to appeal pursuant to the pertinent FIFA

Rules would not be available, is not convincing because the alleged disadvantage arises directly from the lack of jurisdiction of the aforesaid FIFA Committee. Moreover the Appellant disputes the jurisdiction of the CAS merely in general, yet without showing to what extent the Parties in the case at hand would have insisted on a double degree of jurisdiction. The reference in the appeal to two decisions of the CAS in which a refusal to accept jurisdiction by FIFA was upheld is equally unconvincing as in these cases the jurisdiction of FIFA was to be decided and a direct claim in front of the CAS was not at issue. The CAS therefore did not break federal law when it found that it had jurisdiction to decide the dispute between the Parties in connection with the transfer of player A._____.

3.
The appeal proves unfounded and is to be rejected to the extent that the matter is capable of appeal. In view of the outcome of the proceedings the Appellant must pay the judicial costs and compensate the other party (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 set at CHF 10'000 shall be borne by the Appellant.

3. The Appellant shall pay to the Respondent an amount of CHF 12'000 for the federal judicial proceedings.

4. This judgment shall be notified in writing to the Parties and to the Court of Arbitration for Sport (CAS).

Lausanne, November 7, 2011.

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

The Presiding Judge: The Clerk:

KLETT (Mrs) Leemann