4A_400/2008[1]

Judgement of February 9, 2009

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: CARRUZZO.

X._____,
Appellant,
Represented by Mr Jorge IBARROLA,

v.

Y._____,
Respondent,
Represented by Mr Christian JENNY.

Facts:

A.

A.a X._____ is a Spanish football players' agent domiciled in Spain who is in possession of a licence.

Y._____ is a professional Brazilian football player domiciled in Portugal.

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

In a written and signed document of April 28, 2003 by hand, Y._____ authorized X._____ and two other persons to negotiate, on an exclusive basis, his federative rights on the European market until August 31, 2003.

On August 27, 2003, Z._____, a Portuguese football club, and Y._____ signed an employment agreement valid until June 30, 2006.
A.b At the of end of May 2005, X._____ contacted the Fédération Internationale de Football Association (FIFA) to report that as a result of signing this employment agreement and on the basis of the power of attorney of April 28, 2003, he was claiming from Y._____ payment of a commission corresponding to 5% of the annual salary as per the employment agreement, plus interest.

The footballer denied owing anything whatsoever to the players' agent.

In a decision of May 27, 2007, the single judge of the Players' Status Committee rejected X._____'s request. He held, in substance, that the Claimant had not succeeded in establishing that he had participated in any way whatsoever in the negotiations which led to the conclusion of the aforesaid employment agreement.

B.
Seized of an appeal by X._____, the Court of Arbitration for Sport (CAS), composed of three members, rejected the appeal in its award of August 8, 2008. It considered that the parties had validly entered into a brokerage agreement[2]giving the broker authority to negotiate that was governed, firstly, by the pertinent FIFA regulations and, subsidiarily, by Swiss law, in particular the provisions of Art. 412 ff. CO[3]. It reckoned, as the single judge did, that the players' agent had not provided evidence of having performed any activity whatsoever, in the context of the employment agreement negotiations. Taking into account an argument submitted by the Appellant, the CAS then considered the hypothesis in which, according to Swiss case law, a valid exclusivity clause may, depending on the circumstances, imply a waiver of the requirement of a nexus between the agent's activity and the conclusion of the contract (ATF 100 II 361 at 3d p. 365). However, it did not apply that principle of case

[2] Translator's note: "Contrat de courtage de négociation" in French.
[3] Translator's note: CO is the French abbreviation for the Swiss contract law, the Code of Obligations.

law because a mandatory provision of Swiss law – Art. 8 (2) (a) of the Federal Act of October, 6 1989 on Employment Services and the Leasing of Services (LSE[4]; RS 823.11) – declares void agreements that prohibit the job seeker from retaining another broker. Finally, the CAS also excluded the possibility that the footballer had violated the brokerage contract by concluding the employment agreement with Z._____ without being assisted by his agent.

C.
In a Civil law appeal, X._____ requests that the Federal Tribunal annul the award of August 8, 2008 and send the matter back to the CAS to be decided in accordance with the federal decision. He claims that the CAS of violated his right to be heard.

The Respondent submits that the appeal should be rejected.

The CAS, which submitted its file, waives its right to file an answer, whilst drawing the Federal Tribunal's attention to the fact that the parties had formally accepted the application of Swiss law to this case.

Reasons:

1.
According to Art. 54 (1) LTF[5], the Federal Tribunal issues its decisions in one of the official languages[6], as a rule in the language of the decision under appeal. When the decision under appeal was issued in another language (in this case, English), the Federal Tribunal uses the official language chosen by the parties. In front of the CAS, they used English, whilst in their briefs submitted to the Federal Tribunal, the Appellant used French and the Respondent German. In accordance with its practice, the Federal Tribunal will use the language of the appeal and consequently issue its decision in French.

2.

[4] Translator's note: LSE is the French abbreviation of Loi sur le service de l'emploi et la location de services.
[5] Translator's note: This is the French abbreviation for the Federal Act of 17 June 2005 on the organization of the Federal Tribunal, SR 173.110.
[6] Translator's note: The official languages of Switzerland are German, French and Italian.

2.1 In the field of 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[7] (Art. 77 (1) LTF).

2.2 The seat of the CAS is in Lausanne. At least one of the parties (actually both) did not have its domicile in Switzerland at the pertinent time. The provisions of chapter 12 PILA are accordingly applicable (Art. 176 (1) PILA).

2.3 The Appellant is directly affected by the award under appeal, as it confirms the rejection of the claim he submitted to the single judge. Thus he has a personal, present and legally protected interest to ensure that the award was not issued in violation of Art. 190 (2) (d) PILA, witch gives it standing to appeal (Art. 76 (1) LTF).

Filed within 30 days after the notification of the award under appeal (Art. 100 (1) LTF), the appeal satisfies the formal requirements at Art. 42 (1) LTF and is to be allowed.

3.
As his sole grievance, the Appellant blames the CAS for having based its award on a legal reasoning which the Parties could not have foreseen, thus violating his right to be heard.

3.1 In Switzerland, the right to be heard concerns particularly factual findings. The parties' right to be invited to express their position on legal issues is recognized only to a limited extent. Generally, according to the principle *jura novit curia*, state or arbitral tribunals are free to assess the legal relevance of factual findings and they may adjudicate based on different legal grounds from those submitted by the parties. Consequently, providing the arbitration agreement does not restrict the mission of the arbitral tribunal solely to the legal submissions made by the parties, these need not be heard specifically on the recognisable scope of legal provisions. Exceptionally, the parties must be invited to express their position if the court or the arbitral tribunal considers basing its decision on a provision or legal consideration, which has not been discussed during the proceedings and which the parties could not have suspected relevant (ATF 130 III 35 at 5 and references). Moreover, unpredictability is a matter of interpretation. Thus the Federal Tribunal is restrictive in the application of this rule

[7] Translator's note: PILA is the most frequently used English abbreviation for the Swiss Federal Statute of December 18, 1987, on International Private Law, RS 291.

and because regard must be given to the specific features of this type of proceedings, whilst preventing the argument of unpredictability from being used to obtain a material review of the award in the appeal.

3.2 In this case, the Appellant claims, with reason, to have been taken by surprise.
The fact that Swiss law was applicable as a supplementary law to the present dispute is not challenged, nor is it challengeable. This results from the combined application of Art. R58 of the Code of Sports-related Arbitration (2004 edition), and Art. 59 (2) of the FIFA Statutes, in their version applicable at the time of the facts under dispute. Indeed the Appellant based his argumentation to the CAS on this law. It is equally correct, as specified by the arbitrators under Sections 6.26 and 6.27 of their award, that the contractual freedom of the Parties could only be exercised within the limits set out by the public law provisions relating to job placement agents specific to the country concerned, and in compliance with the other mandatory legal provisions of the legislation of the nation concerned, of international law and of applicable international treaties (see Art. 12 (9) of the FIFA regulations governing the activity of players' agents [2001 edition] and Section 5 of the standard representation contract included in Appendix C of said regulations).

It does not follow for as much that the Appellant should have reasonably expected to have the relevant provisions of the LSE applied to him. Thus, as specified in Art. 2 (1), that law governs amongst other activities those of the job placement agent, which include putting job seekers and employers into contact with one another so that they may conclude employment agreements, however subject to the condition that the activity is exercised "in Switzerland". Equally within the scope of the law, in accordance with its Art. 3, is a person who regularly handles the placement of foreign staff or of staff abroad (placement involving a foreign country); in such case, the placement agent must have received authorisation from the (Swiss) State Secretariat for Economic Affairs (SECO) in addition to cantonal authorisation. This double requirement demonstrates, where necessary, that the LSE concerns only placement activities exercised from Switzerland even if the activity involves a foreign country. The same therefore applies, as is the case here, to the placement abroad of a person seeking employment abroad. This is demonstrated by the wording of Art. 5 (a) of the Ordinance of

January 16, 1991 on Employment Services and Leasing of Services (OSE[8]; RS 823.111), which concerns this type of case: "Equally considered a placement abroad is the activity of a placement agent who, from Switzerland, places job seekers domiciled abroad in a third country, providing at least one part of the placement activities is carried out in Switzerland or that the contractual relations between the placement agent and the job seekers or the employers are governed by Swiss law" (emphasis added by the Federal Tribunal). In other words, even if the placement activity is exercised abroad, it is necessary for the placement agent to have a base in Switzerland for the LSE to apply (on this question, see *Directives et commentaires du SECO relatifs à la LSE*, 2003, p. 20 and p. 46 ff. (chapter devoted to the standard representation contract of FIFA for the placement of football players), "http://www.espace-emploi.ch" under the item "*Placement privé, location de services*" and under the item "*Documents utiles*"; see also: Manfred Rehbinder, *AVG Arbeitsvermittlungsgesetz, Kommentar*, ch. 10 ad Art. 2 LSE; Andreas Ritter, *Das revidierte Arbeitsvermittlungsgesetz*, thesis, Zurich 1993, p. 94 ff.).

This case concerns a Spanish players' agent domiciled in Spain claiming a brokerage commission from a Brazilian football player domiciled in Portugal, based on the fact this player entered into an employment agreement with a Portuguese football club as a result of his alleged involvement. Besides the application of Swiss material law as a supplementary law provided for in the FIFA regulations, the case has no connection to Switzerland. Thus, the Appellant could not have foreseen that the CAS would base its reasoning on a manifestly inapplicable provision of the LSE, to reach a finding of nullity of the exclusivity clause agreed by the parties and thereby maintain the requirement of an (unproven) nexus between the activity alleged by the broker and the conclusion of the employment contract by the Respondent with the Portuguese club. Especially as none of the Parties invoked the LSE in the arbitration proceedings, the CAS should have at least questioned the Parties on this issue and invited them to make submissions. The Appellant would have then been able argue against the application of the LSE. By omitting to do so, the CAS violated the Appellant's right to be heard. The violation had a tangible impact on the legal situation of the Appellant, because he has no means of asking the Federal Tribunal to sanction the erroneous or even arbitrary application of the LSE which led to the rejection of his claim.

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[8] Translator's note : OSE is the French abbreviation of Ordonnance sur le service de l'emploi et la location de services.

This being said, there are sufficient grounds to grant the appeal and annul the award under appeal. However, given that a Civil law appeal against an international arbitration award is limited to annulment (Art. 77 (2)), the Appellant's request to have the matter sent back to the CAS together with an injunction will not be followed.

4.

The Respondent shall bear the federal judicial costs (Art. 66 (1) LTF) and pay the judicial costs of the Appellant (Art. 68 (2) LTF).

Therefore, the Federal Tribunal pronounces:

1. The appeal is granted and the award under appeal is annulled.
2. The judicial costs, set at CHF 4'000, shall be borne by the Respondent.
3. The Respondent shall pay to the Appellant an amount of CHF 5'000 as costs.
4. This decision shall be notified to the representatives of the Parties and to the Court of Arbitration for Sport (CAS).

Lausanne, February 9, 2009

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

The presiding Judge: The Clerk:

KLETT CARRUZZO