4A_90/2014[1]

Judgment of July 9, 2014

First Civil Law Court

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

Club A._____,
Represented by Mr. Jorge Ibarrola,
Appellant

v.

B._____,
Represented by Mr. Hugo López and Emilce Ruiz Diaz,
Respondent

Facts:
A.
A.a. B._____ (hereafter: the Player) is a professional football player of [name of country omitted]. Club A._____ (hereafter: A._____) is a professional football club affiliated with the [name of country omitted] Football Association (hereafter: C._____), which plays in the first league of the national championship.

In a sport employment contract of December 29, 2010 (hereafter: the Contract), written in Spanish, A._____ hired B._____ as a player. Art. 8 of the Contract contains the following arbitration clause (French translation provided by A._____'s counsel):

> "*In case of a dispute as to the performance or the interpretation of this contract, the parties shall submit to an arbitral tribunal which they will appoint for this purpose according to*

[1] Translator's Note: Quote as Club A._____ *v.* B._____, 4A_90/2014.
The original decision is in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

applicable law and the award issued by this Tribunal shall only and exclusively be subject to an appeal to the Court of Arbitration for Sport seated in Lausanne (Switzerland). If the dispute arises from the Player's intent or actual transfer to a foreign club, jurisdiction will be with the FIFA Dispute Resolution Chamber or the Players' Status Committee, whichever may apply, to decide as a first instance and to the Court of Arbitration for Sport (the "CAS") to decide on appeal."

A.b. On June 15, 2012, the Player was transferred to Club D._____ against payment of a transfer fee of USD 3'500'000 to Club A._____.

A dispute arose as to the part of the transfer fee owed by A._____ to the Player pursuant to their internal agreements.

On August 24, 2012, the Player took A._____ to the Players' Status Committee of C._____ (hereafter: the C._____ Committee) with a view to obtaining payment of USD 2'100'000 in this respect. The Respondent Club raised a jurisdictional defense.

In a decision of October 9, 2012, the C._____ Committee declined jurisdiction to resolve the dispute.

B.
B.a. On November 1, 2012, the Player appealed to the Court of Arbitration for Sport (CAS). He submitted that the decision of the C._____ Committee should be annulled and A._____ ordered to pay the aforesaid USD 2'100'000.

In its defense, A._____ invoked first the lack of jurisdiction of the CAS to decide the dispute on the merits because the first instance had not been exhausted. It therefore submitted that the CAS should tell the Appellant to submit its claim to an arbitral tribunal unconnected to C._____ according to the [name of country omitted] law on arbitration. In the alternative, A._____ submitted on the merits that the amount due to the player should be set at USD 500'000.

A [name of country omitted] lawyer and professor of law as appointed as sole arbitrator (hereafter: the Arbitrator). Spanish was chosen as the language of the proceedings.

B.b. After establishing the facts of the case, the Arbitrator issued his award on December 31, 2013. Partially upholding the Player's appeal, he annulled the October 9, 2012, decision of the C._____ Committee and ordered A._____ to pay USD 1'750'000 to the Player with interest at 5% annually from June 15, 2012. In about 11 pages of the award, he set forth the reasons for rejecting the jurisdictional defense.

The arbitration clause inserted at Art. 8 of the Contract is divided into two well-separated parts: The first sentence establishes a general framework for the resolution of disputes concerning the performance or the

interpretation of the Contract between the parties and that such disputes shall be submitted to an arbitral tribunal they will appoint according to applicable law, the award issued by this arbitral tribunal being then subject to an appeal to the CAS; the second sentence, in the alternative, concerns the specific situation of a dispute connected to the Player's intent to be transferred to a foreign club or to his actual transfer and such a dispute would be taken to the Dispute Resolution Chamber of the Fédération Internationale de Football Association (FIFA) in first instance or to the Players' Status Committee, as the case may be, and then to the CAS on appeal.

In the case at hand, the second part of the arbitration clause applies because the dispute arose from the transfer of the Player from Club A._____ to Club D._____.

The mechanism contained in the latter part of the arbitration clause raises a number of issues of interpretation and which must be disposed of as follows: First, the Players' Status Committee to which reference is made at Art. 8 of the Contract is not FIFA's but that of C._____. Then it is this commission and not the Dispute Resolution Chamber of FIFA which has jurisdiction *in casu* because the dispute has no international dimension within the meaning of the *ad hoc* FIFA regulation as it concerns the performance of a contract between a [name of country omitted] club and player. Finally, such a dispute falls within the scope of Art. 55 of the statutes of C._____ in force at the decisive time so that the jurisdiction of the C._____ Committee *ration materiae* cannot be challenged. This conclusion is indirectly confirmed because in a similar case decided by the CAS (the *Bobadilla* case, CAS 2011/A/2532), the dispute resolution clause in the contract between A._____ and another player specifically anticipated the jurisdiction of the C._____ Committee. In any event, A._____'s arguments and the Committee's reasons for justifying a denial of jurisdiction, which are not consistent with each other, are devoid of pertinence.

Moreover, A._____'s proposed interpretation would ultimately result in the Player being unable to submit his claim to any tribunal, in violation of this fundamental rights. Therefore, it cannot be upheld, also because the rule *in dubio contra proferentem*, embodied in the [name of country omitted] requires interpreting against the club the ambiguities its text may contain as the latter was more actively involved in the drafting of the Contract.

C.
On February 6, 2014, A._____ (hereafter: the Appellant) filed a civil law appeal with a request for a stay of enforcement. Arguing a violation of Art. 190(2)(b) PILA,[2] it submits that the Federal Tribunal should annul the award under appeal and find that the CAS had no jurisdiction to decide the Player's appeal against the decision issued by the C._____ Committee on October 9, 2012.

[2] 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.

The Player (hereafter: the Respondent) and the CAS, which produced its file, were not asked to file an answer or to state their view on the request for a stay of enforcement.

Upon request from the Federal Tribunal, the counsel for the Appellant submitted a French translation of the award under appeal.

Reasons:

1.
According to Art. 54(1) LTF,[3] the Federal Tribunal issues its decision in an official language,[4] as a rule in the language of the decision under appeal. When the decision is in another language (here, Spanish), the Federal Tribunal resorts to the official language chosen by the parties. Before the CAS the parties used Spanish. In the appeal sent to the Federal Tribunal, the Appellant used French. As to the Respondent, he was not invited to submit an answer. In accordance with its practice, the Federal Tribunal will adopt the language of the appeal and consequently issue its decision in French.

2.
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 do so, the appellant's submissions, or the grievance raised in the appeal brief, none of the admissibility requirements raises any problem in the case at hand. There is therefore no reason not to address the merits.

3.
In a sole argument divided into two parts, the Appellant invokes Art. 190(2)(b) PILA and argues that the CAS was wrong to accept jurisdiction in the appeal. It principally argues that the arbitration clause at Art. 8 of the Contract opens the way to an appeal to the CAS only against an award issued by a national arbitral tribunal or by FIFA but not against a decision issued by the C._____ Committee. In the alternative, the Appellant argues that the CAS decided *extra potestatem* by deciding the merits when the decision under appeal concerned only the jurisdiction of the aforesaid Committee.

3.1. Seized of a jurisdictional defense, the Federal Tribunal freely reviews the legal issues, including preliminary issues, which determine the jurisdiction of the arbitral tribunal, or the lack thereof. Yet, this does not turn it into a court of appeal. Thus, it does not behoove the Federal Tribunal to itself read the award under appeal for legal arguments that may justify upholding the argument based on Art. 190(2)(b) PILA.

[3] Translator's Note: LTF is the French abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173.110.

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

Instead, it behooves the Appellant to draw the Court's attention to them, in order to comply with the requirements of Art. 77(3) LTF (ATF 134 III 565[5] at 3.1 and the cases quoted).

However, the Federal Tribunal reviews the factual findings only within the usual limits, even when it addresses the issue of the jurisdiction of the arbitral tribunal (judgment 4A_682/2012[6] of June 20, 2013, at 3.1 and 4.2).

3.2.
3.2.1. The arbitration agreement must meet the requirements of Art. 178 PILA. It is not argued and it could not be argued that Art. 8 of the Contract is not a formally valid arbitration agreement (Art. 178(1) PILA).

Pursuant to Art. 178(2) PILA, the arbitration agreement is valid on the merits if it meets the requirements of either the law chosen by the parties or the law governing the dispute and in particular the law applicable to the main contract or, indeed, Swiss law. The provision quoted therefore institutes three alternate connections *in favorem validitatis*, without any hierarchy between them, namely: the law chosen by the parties, the law governing the dispute (*lex causae*), and Swiss law as the law of the seat of the arbitration (ATF 129 III 727 at 5.3.2, p. 736). The award under appeal does not specify according to which of these laws the Arbitrator reviewed the substantive validity of the arbitration agreement in dispute; it merely refers to the law of [name of country omitted], which governs the dispute to apply the rule *in dubio contra proferentem*. As it is not established or even argued that [name of country omitted] law or the law of a third country, chosen by the parties, would be more favorable than Swiss law, the issue must be decided according to the latter law. This is indeed the law on which the Appellant bases its argument.

3.2.2. The arbitration agreement is an agreement by which two or several determined or determinable parties agree to entrust to an arbitral tribunal or a sole arbitrator – instead of the state court that otherwise would have jurisdiction – with the mission of issuing a binding award as to one or several disputes in existence (arbitration agreement) or arising in the future (arbitration clause) pursuant to a specific relationship (judgment 4A_515/2012[7] of April 17, 2013, at 5.2 and the references). The will of the parties to waive the jurisdiction of the state court normally having jurisdiction in favor of the private jurisdiction of an arbitral tribunal must appear clearly. As to the arbitral tribunal to be called upon to address the dispute, it must be determined or at least determinable (ATF 138 III 29[8] at 2.2.3, p. 35).

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[5] 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

[6] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/no-requirement-exhaust-extraordinary-legal-remedies-seizing-court-arbitration-sport

[7] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/domestic-case-or-appeal-withdrawn-or-manifestly-inadmissible-4

[8] 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

The provision of arbitration agreements that are incomplete, unclear, or contradictory are considered as pathological clauses (as to the various types of pathological clauses see among others Lucas Wyss, *Aktuelle Zuständigkeitsfragen im Zusammenhang mit internationalen kommerziellen Schiedsgerichten mit Sitz in der Schweiz*, *Jusletter* of June 25, 2012, n. 96 to 107). Insofar as they do not concern the elements which are mandatory in an arbitration agreement, in particular the duty to submit the dispute to a private arbitral tribunal, such clauses do not necessarily cause the arbitration agreements in which they are expressed to be null. Instead, one must resort to interpretation and, as the case may be, supplement the contract according to the general rules of contract laws to seek a solution respectful of the fundamental will of the parties to submit to an arbitral jurisdiction (last case quoted, *ibid.*)

In Swiss law, the interpretation of an arbitration agreement takes place according to the general rules of contract interpretation. The Court shall first attempt to bring to light the real and common intent of the parties, empirically as the case may be, on the basis of clues, without bothering with the inaccurate expressions or denominations they may have used. If it does not succeed in this, the Court shall then apply the principle of reliance and seek the meaning that the parties could and should give in good faith to their reciprocal manifestations of will under all the circumstances (ATF 140 III 134 at 3.2; 135 III 295 at 5.2, p. 302 and the cases quoted). Should the application of this principle fail to bring to a conclusive result, alternate means of interpretation may be resorted to, such as the so-called rule of ambiguous clauses, pursuant to which in case of doubt, the contract must be interpreted against the drafter (*Unklarheitsrege* 1*, in dubio contra stipulatorem* or *proferentem*; ATF 124 III 155 at 1b, p. 158 and the cases quoted). Moreover, if the interpretation leads to the conclusion that the parties wanted to waive the jurisdiction of the state court as to their dispute in order to submit to an arbitral tribunal but some differences remain as to how the arbitration proceedings should be conducted, the principle of utility (*Utilitätsgedanke*) must be applied, namely the pathological clause must be given a meaning which allows upholding the arbitration agreement (ATF 138 III 29[9] at 2.3.3 [condition met]; judgments 4A_388/2012[10] of March 18, 2013, at 3.4.3 and 4A_244/2012[11] of January 17, 2013, at 4.4 [condition not realized]). Thus, an erroneous or imprecise designation of arbitral tribunal does not necessarily cause the arbitration agreement to be invalid (ATF 138 III 29[12] at 2.2.3, p. 36 and the cases quoted).

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[9] 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

[10] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/jurisdiction-arbitral-tribunal-decision-lausanne-court-arbitration-sport

[11] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/jurisdiction-clause-and-arbitration-clause-contradicting-each-other-must-be-interpreted-according

[12] 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

3.2.3.

3.2.3.1. In the case at hand, the common will of the parties to waive the [name of country omitted] courts as to the possible disputes related to the contract governing their employment relationship appears clearly from the mere reading of the arbitration agreement inserted at Art. 8 of the Contract. The Appellant does not dispute this. Moreover, it is agreed that, in any event, the last word would go to the specialized private jurisdiction, of which the CAS is one. The only issue in dispute concerns the identity of the non-state jurisdiction enabled to handle the dispute in first instance. In the CAS Arbitrator's view, it was the C._____ Committee; in the Appellant's, the FIFA Players' Status Committee. The ambiguity in the arbitration agreement in this respect is not a major defect that could cause it to be void. It is a deficiency that can be repaired through interpretation with a view to giving the pathological clause a meaning that will make it effective.

3.2.3.2. In support of its jurisdictional defense, the Appellant sates that the parties had opted for the following system in the arbitration clause in dispute: In the first instance, if the dispute was unrelated to the Player's international transfer, an impartial tribunal chosen by the parties would be selected, to the exclusion of the C._____ Committee (first sentence of the arbitration clause); in the opposite case, it would be for FIFA – through its Dispute Resolution Chamber or its Players' Status Committee – to decide (second sentence of the arbitration clause). As to the CAS, it would have jurisdiction in the appeals against the decisions issued either by the national arbitral tribunal or by FIFA. According to the Appellant, only this interpretation of the will of the parties to separate purely domestic disputes from those containing some international elements would make it possible to harmonize the two parts of the arbitration clause. In its view, it does not matter that FIFA may decline jurisdiction because the parties could then accept its decision and turn to the national arbitral tribunal mentioned in the first sentence of the aforesaid clause or appeal to the CAS. Be this as it may, still according to the Appellant, the parties were not authorized to act before the C._____ Committee and the CAS could not decide an appeal against a decision issued by this body for lack of a legal basis and of any agreement of the parties in this respect. Moreover, according to the Appellant, the result would have been the same if the CAS had simply annulled the second part of the arbitration clause because its performance was impossible due to the alleged lack of jurisdiction of FIFA. In this situation, the CAS would have had to find that there was no arbitration clause pursuant to which it could decide an appeal against the decision of the C._____ Committee.

3.2.3.3. The only issue in dispute as to the arbitration clause at hand concerns the identity of the Players' Status Committee mentioned there: is it the C._____ Committee as the Arbitrator holds in the award under appeal or the FIFA Committee as the Appellant argues before the Federal Tribunal? The answer depends on the interpretation of the words "Player's Status Committee" used in the aforesaid clause. Unable to discover the real and common intent of the parties in this respect, the Arbitrator resorted to objective interpretation of the wording (see let. B.b, above). He did so very thoroughly on the basis of an interpretation of the pertinent provisions of the FIFA Regulation on the Status and Transfer of Players (June 7, 2010, version in force at the time the Contract was concluded) and stated that the reasons for which the FIFA Players' Status Committee could not have jurisdiction in the case at hand as well as the FIFA Dispute Resolution Chamber. The Arbitrator then analyzed Art. 55 of the statues of C._____ and reached the

conclusion that the dispute between Club A._____ and the [name of country omitted] Player in connection with the Player's transfer fell within the limits of this provision. He stated that historical interpretation would confirm the result of this analysis because, in another case between the Appellant and a [name of country omitted] player adjudicated by the CAS, the arbitration clause specifically gave jurisdiction to the C._____ Committee. Finally, the Arbitrator rejected one after the other all arguments put forward by the Player and the reasons given by the C._____ Committee.

Upon reading the Appellant's brief, one must find that it raises no criticism against these reasons and merely states its own interpretation of the words in dispute. Yet, even when addressing an argument that the Arbitral Tribunal lacked jurisdiction, the Federal Tribunal does not become a court of appeal so that it does not have to examine on its own the relevance of grounds in the award under appeal which remain unchallenged (see 3.1, 1st §, above). Moreover, the interpretation proposed by the Appellant could create a negative conflict of jurisdiction to the Player's detriment as he would no longer find a tribunal to which his claim could be submitted, as the Arbitrator demonstrates (award n. 133 to 138); to do so disregards the principle of utility pursuant to which pathological clauses must be interpreted.

Be this as it may, the matter is ultimately not capable of appeal as to the Appellant's entire argument for another reason. Indeed, the Arbitrator also rejected the jurisdictional defense for another reason, namely he applied the rule of interpretation *in dubio contrat* [*sic*.] *proferentem* (award n. 139). Yet, the Appellant leaves this unchallenged. In doing so, he forgets that when the decision under appeal contains several independent reasons, whether alternate or in the alternative, as is the case here, which are all sufficient to end the argument, the Appellant must show that each violates the law, and failing that, the matter is not capable of appeal (ATF 138 I 97 at 4.1.4 and the cases quoted).

3.3.
3.3.1. In an alternate argument, the Appellant claims that the CAS Arbitrator went beyond his jurisdiction by deciding the merits when the C._____ Committee had merely declined jurisdiction. In its view, the Arbitrator could only annul the decision under appeal and send the case back to the committee for a new decision upholding its jurisdiction *ratione materiae* and deciding the merits or find himself that there was jurisdiction and send the case back to the C._____ Committee with an invitation to address the merits.

3.3.2. An appeal based on Art. 190(2)(b) PILA is open when the arbitral tribunal decided claims on which it had no jurisdiction, whether because there was no arbitration agreement or because it was limited to some issues not including the ones addressed (*extra potestatem*). An arbitral tribunal indeed has jurisdiction only if, among other conditions, the dispute falls within the scope of the arbitration agreement and it does not go beyond the limits set by the request for arbitration and, as the case may be, the terms of reference (judgment 4A_488/2011[13] of June 18, 2012, at 4.3.1 and the case quoted).

[13] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/the-federal-tribunal-leaves-undecided-the-issue-as-to-whether-an

In the case at hand, it is admitted that the dispute between the parties was covered by the arbitration clause inserted into the Contract they concluded. Moreover, this very clause shows that the parties did not limit the jurisdiction of the CAS as an appeal body in connection with that of the C._____ Committee as a first instance body. Therefore, the Arbitrator did not at all disregard the aforesaid case law by deciding the merits.

The only issue is whether he could do so despite the fact that the C._____ Committee had declined jurisdiction and therefore did not decide the merits of the claims submitted by the Respondent. The answer must be affirmative.

The Federal Tribunal had to address a similar argument in the past. The Court rejected it for the following reasons (judgment 4A_386/2010[14] of January 3, 2011, at 5.3.4):

> "*In this case, it is true that the CNCDD decision not to initiate disciplinary proceedings against the Appellant was a decision to refuse to address the issue similar to the identical decision issued on the same day by the president of … . Yet, this did not at all prevent the CAF from itself issuing a decision on the merits if it considered that decision unjustified and from imposing a disciplinary sanction on the Spanish cyclist for violation of the Anti- Doping Rules. Jurisdiction was based on Art. R57(1) of the Code [of Sport Arbitration] (on that issue see Rigozzi, op. cit. [L'arbitrage international en matière de sport, 2005], n. 1079 ff.). That provision states that "the panel shall have full power to review the facts and the law" and that "it may issue a new decision which replaces the decision challenged or annul the decision and refer to the case to the pervious instance." The CAS chose the former solution. One does not see why this could be wrong. Contrary to what the Appellant argues, such a solution is not at all inconsistent with the nature of appeal proceedings. It is rather a characteristic of an appeal that the higher body may decide the merits itself. Neither does the solution chosen by the CAS go against the mission of that arbitral jurisdiction, no matter what the Appellant claims: It is apt to facilitate quick disposition of disputes and may be an adequate way to remedy the categorical refusal of a National Sports Federation to open disciplinary proceedings against an athlete who is a citizen of a country in which it is based*."

Despite what the Appellant says, this case law is applicable here *mutatis mutandis*, namely, irrespective of the disciplinary nature of the dispute that resulted in the case quoted. Thus, the general principle set forth by the Federal Tribunal as to the interpretation of Art. R57(1) of the Code is general in nature and therefore not bound to the specific nature of the decision that is the object of the appeal. Moreover, it must be recalled along the same lines that the requirement of a second instance or a second degree of jurisdiction

[14] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/award-allegedly-issued-by-a-truncated-tribunal-claim-that-cas-de

does not either fall within procedural public policy within the meaning of Art. 190(2)(e) PILA (judgment 4A_530/2011[15] of October 3, 2011, at 3.3.2).

Moreover, the Appellant does not demonstrate and he does not even argue that some essential procedural guarantees, such as his right to evidence, were disregarded by the CAS Arbitrator. Finally, and in any event, the alternate argument in the appeal proves incompatible with the Appellant's position in the proceedings before the CAS. Indeed, it appears from the answer he sent to the CAS on December 19, 2012, that should his main submission concerning the lack of jurisdiction of the CAS to address the Respondent's appeal be rejected, the Appellant made an alternate submission, which did not seek the return of the case to the C._____ Committee for a new decision on the merits, but which invited the CAS to grant only USD 500'000 to the Respondent. In other words, the Appellant cannot today challenge the right of the CAS to adjudicate the substantive claim of the Respondent without contradicting itself.

4.
This appeal cannot but be rejected insofar as the matter is capable of appeal. The request for a stay of enforcement becomes therefore moot. The Appellant loses and he shall pay the judicial costs according to Art. 66(1) LTF.

The Respondent was not invited to submit an answer and he is not entitled to costs.

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 16'000 shall be borne by the Appellant.

3.
This judgment shall be notified to the parties and to the Court of Arbitration for Sport (CAS).

Lausanne, July 9, 2014

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

Presiding Judge: Clerk:

[15] Translator's Note: The English translation if this decision is available here: http://www.swissarbitrationdecisions.com/failure-to-raise-a-violation-of-the-right-to-be-heard-immediatel

Klett (Mrs.)	Carruzzo