

4A\_268/2019<sup>1</sup>

Judgment of October 17, 2019

First Civil Law Court

Federal Judge Kiss, Presiding,  
Federal Judge Klett,  
Federal Judge Hohl  
Clerk of the Court: Mr. Curchod

A.\_\_\_\_\_,  
Represented by Dr. Lucien W. Valloni and Mr. Yannik Hässig,  
*Appellant*,

v.

1. B.\_\_\_\_\_,  
Represented by Mr. Djemai Zoughlache Daoud,

2. The Fédération Algérienne de Football,  
*Respondents*,

Facts:

A.

A.a. A.\_\_\_\_\_ (hereinafter, the player, the Appellant) is a professional football player of Algerian nationality.

B.\_\_\_\_\_ (hereinafter, the club or Respondent 1) is a football club based in [name of city omitted] and affiliated to the Algerian Football Federation (hereinafter, the Federation, Respondent 2), an association under private law, whose purpose is the management and organization of football in Algeria, and which is affiliated to the Fédération Internationale de Football Association (hereinafter, FIFA).

A.b. By contract from 1 July 2015, the player was hired by the club for a period of two sports seasons, that is, from July 1, 2015, to June 30, 2017. By an amendment dated August 2, 2016, the parties agreed to extend the duration of this contract until June 30, 2018, and to increase the player's gross monthly remuneration to 2'300'833.33 Algerian dinars.

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<sup>1</sup> Translator's Note:

Quote as A.\_\_\_\_\_ v. B.\_\_\_\_\_, 4A\_268/2019.

The decision was issued in French. The full text is available on the website of the Federal Tribunal, [www.bger.ch](http://www.bger.ch).

According to Art. 7 of this contract,

[...] any disputes or contestations that may arise in connection with the execution of this contract shall be resolved amicably between the two parties. Failing this, the dispute shall be submitted by either party to the dispute resolution chamber at the FAF.

B.

B.a. Complaining about the cessation of payment of his salary as of April 2017, his assignment to the reserve team as of August 2017, as well as his withdrawal from the list of participants in official competitions and the cancellation of his license for the 2017/2018 season, the player referred the matter to the National Dispute Resolution Chamber of the Federation.

By decision of January 3, 2018, the National Dispute Resolution Chamber ordered the club to pay the player a net amount of 5'153'980 Algerian dinars representing 4 months' salary as well as 400'000 Algerian dinars in compensation.

B.b. Following an appeal submitted by the player against the decision of the National Dispute Resolution Chamber, the Algerian Court of Sports Dispute Resolution, by decision of April 30, 2018, annulled the decision and ordered the club to pay the player the amount of 9'618'564.64 Algerian dinars.

B.c. On August 6, 2018, the player submitted a statement for appeal to the Court of Arbitration for Sport (hereinafter, CAS) against the club and the Federation concerning the aforementioned arbitral decision.

After the CAS Court office questioned him in particular on the question of the jurisdiction of the tribunal, requesting him to submit a copy of the statutory or regulatory provisions or of the special agreement providing for the appeal to the CAS, the player submitted an additional brief. His arguments were that the club should be ordered to pay him the salary corresponding to several months' salary as well as damages.

By an Award of April 9, 2019, the CAS declared that it did not have jurisdiction to decide on the appeal submitted on August 6, 2018, by the player against the arbitral decision issued on April 30, 2018, by the Algerian Court for the Settlement of Sports Disputes.

C. On May 31, 2019, the player submitted a civil law appeal arguing that the Federal Tribunal should annul the CAS award, declare that the CAS indeed had jurisdiction and refer the case back to the CAS for a decision on the merits.

The procedural order inviting the Respondents to comment on the appeal could not be delivered to them by post. In view of the outcome of the dispute, no international legal assistance was sought. The Arbitral Tribunal referred to the award under appeal.

Reasons:

1.

According to Art. 54(3)(1) LTF<sup>2</sup> the Federal Tribunal issues its judgment in an official language,<sup>3</sup> as a rule, in the language of the award under appeal. Thus, although the Appellant used German in his brief, the Federal Tribunal will deliver its judgment in French.

2.

According to Art. 77(1)(a) LTF, a civil law appeal is admitted against the decisions of arbitral tribunals pursuant to the requirements of Art. 190-192 PILA.<sup>4</sup> It is not disputed that the present claim falls within the scope of international arbitration (see Art. 176(1) PILA), and pursuant to Chapter 12 of the PILA. The use of Art. 77 LTF is generally purely for the purposes of annulment, in the sense that the Federal Tribunal, if it accepts the said appeal, has no alternative than to annul the award (see Art. 77(2) LTF which restricts the scope of Art. 107(2) LTF). However, by way of exception, the court may itself declare the jurisdiction of the arbitral tribunal or the lack thereof ATF 136 III 605<sup>5</sup> at 3.3.4 p 616; 117 II 94 at 4; Judgment 4A\_394/2017 of December 19, 2018, at 2.2).

In addition, the appeal meets the formal requirements of Art. 42 LTF and was submitted in a timely manner (Art. 100(1) LTF, in conjunction with Art. 46(1)(b) LTF). In principle, therefore, the matter is capable of appeal.

3.

Invoking Art. 190(2)(b) PILA, the Appellant argues that the CAS panel wrongly declared that it did not have jurisdiction to decide on the appeal submitted by him on August 6, 2018.

3.1. First, the Appellant challenges the points made by the lower court concerning whether the Federation was the proper party to be sued. He considers that the latter is a party to the arbitration agreement, this agreement having its basis ("*Grundlage*") in the statutes of the Federation. Moreover, he maintains that the National Chamber for Dispute Resolution is an organ of the Federation and that its decision to declare the breach of the contract must therefore be attributed to the Federation. He deduces from this that the Federation itself was a party to the proceedings before the Algerian Court of Sports Dispute Resolution and the CAS. He further states that Art. 70(2) of those statutes authorized the Federation to appeal to the CAS in the present case.

The Appellant then argued that the Arbitral Tribunal had wrongly interpreted the arbitration clause, submitting that it should be interpreted in light of Art. 2(u), 10.3(d), and 13.1(a) of the Federation's statutes. He was of the opinion that the numerous references to the FIFA Statutes contained in the Federation's statutes, in particular Art. 13.1(a), according to which the members of the Federation must abide by the FIFA Statutes,

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<sup>2</sup> Translator's Note: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.

<sup>3</sup> Translator's Note: The official languages of Switzerland are German, French, and Italian.

<sup>4</sup> Translator's Note: PILA is the most frequently used abbreviation for the Swiss Private International Law Act of December 18, 1987

<sup>5</sup> 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>

allowed him to rely on Art. 58(1) of the latter in order to appeal to the CAS. Referring to a CAS decision cited in the award, he considered that Art. 70(2) of the Federation's statutes allows each party, and not only the Federation, to appeal to the CAS against a decision of the Algerian Court for the Settlement of Sports Disputes. In this connection, he pointed out that both the Federation's and FIFA's Statutes prohibit players from appealing to state courts, from which he deduced that appealing to an independent arbitral tribunal must be possible. However, the Algerian Court for the Settlement of Sports Disputes does not constitute an independent arbitral tribunal in his view because of the lack of representation and participation of player associations in the election process of arbitrators.

3.2. Seized of a jurisdictional defense, the Federal Tribunal freely reviews the legal issues determining the jurisdiction of the arbitral tribunal (or the lack thereof), including preliminary issues. Yet the Federal Tribunal is not a court of appeal. Thus, in the award under appeal, it is not incumbent upon the Court to research which legal arguments could justify upholding the grievance based on Art. 190(2)(b) PILA. Instead, the Appellant should draw the Court's attention to them in order to comply with the requirements of Art. 77(3) LTF (ATF 142 III 239<sup>6</sup> at 3.1). This provision, which introduces the same requirements of reasoning as Art. 106(2) LTF, presupposes that the Appellant, after having indicated which hypothesis of Art. 190(2) PILA is, in his view, met, must still endeavor to demonstrate in detail, starting from the award under appeal, what the violation of the principle invoked consists of (Judgments 4A\_7/2019 of March 21, 2019, 2; 4A\_378/2015 of September 22, 2015, at (3.1); see (ATF 128 III 50 at (1)(c)).

3.3. With regard to whether the Federation was the proper party to be sued, the arbitral tribunal considered that its jurisdiction *ratione personae* could not extend to the Federation, as the latter was not bound by the arbitration agreement contained in Art. 7 of the contract. It stated that the fact that the Appellant had assigned the Federation as Respondent in the appeal proceedings did not change this. The argument developed by the Appellant against this reasoning falls wide of the mark. First of all, nothing can be inferred as to the standing of the sports association itself as a party to the appeal proceedings subsequent to the decision of the body in question (ATF 119 II 217 at 3; Judgment 4A\_490/2017 of February 2, 2018, at 3.3.4 and the references cited) from the fact that the adjudicative bodies of sports associations do not constitute genuine courts and that their decisions are merely expressions of contractual intention by the associations concerned. In the present case, the standing to be sued of the Federation cannot be inferred from the mere fact that the National Chamber for Dispute Resolution was called upon to rule on the dispute and, in that context, declared that the contractual links between the parties had been severed. Furthermore, the fact that the arbitration agreement has its origin in the Federation's statutes does not in any way mean that the Federation has the standing of a party to proceedings between a player and his (former) club.

3.4.

3.4.1. With regard to the possibility for the player to appeal to the CAS against the decision of the Algerian Court of Sports Dispute Resolution, the CAS' arguments are twofold. The Tribunal first considered the possibility of submitting an appeal to the CAS on the basis of the FIFA Statutes, and then looked at the issue from the perspective of the Federation's statutes. Referring to its own case law, the Arbitral Tribunal considered that the Appellant could not rely directly on the provisions of the FIFA Statutes, as these only

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<sup>6</sup> Translator's Note:

The English translation of this decision is available here:

<http://www.swissarbitrationdecisions.com/unsigned-arbitration-clause-upheld>

constitute instructions to the member associations on how to appeal against their decisions and do not confer any immediate right to submit an appeal against a decision with the CAS. Turning next to the Federation's statutes, it endorsed the opinion expressed in a 2008 CAS decision that Art. 70 of these statutes cannot be interpreted as meaning that the decision issued by the Algerian Court of Sports Dispute Resolution can only be appealed against by the Federation and not by the club concerned. However, it refused to infer from this interpretation a general jurisdiction of the CAS to hear appeals against all the decisions of the Algerian Court of Sports Dispute Resolution. In its opinion, Art. 70 of the Federation's statutes must be interpreted as meaning that, according to the principle set out in paragraph (1) of that provision, the decisions of the Algerian Court for the Settlement of Sporting Disputes concerning a dispute between a club and a player are, in principle, final, and that, by virtue of the exception provided for in Art. 70(2), an appeal to CAS is only open when a dispute arises between a club or a player and the Federation.

3.4.2. The Arbitral Tribunal reiterated that, according to Art. R47 of the CAS Code of Sports Arbitration

...[an] appeal against a decision of a sports federation, association or other sports body may be submitted with the CAS if the statutes or regulations of the said sports body so provide or if the parties have concluded a specific arbitration agreement and also to the extent that the appellant has exhausted the legal remedies prior to the appeal available to him under the statutes or regulations of the said sports body.

The Appellant does not refer to this provision, but nevertheless wishes to depart from it insofar as he bases the jurisdiction of CAS directly on the FIFA Statutes. However, his argument, contrary to the letter of the aforementioned article and based solely on the references contained in the Federation's statutes to the FIFA Statutes, is unconvincing. In particular, it should be noted that the Federation's statutes do not specifically refer to the provisions of the FIFA Statutes relating to the possibility of appeal to the CAS but, on the contrary, contain a provision of their own relating to this issue. It should be recalled in this respect that, under Swiss law, the statutes of an association are only binding on the association itself and its members and only exceptionally produce effects with regard to third parties ("*Drittwirkung*") (Riemer, in: *Berner Kommentar*, pp. 136-138, nn. 320-328). Thus, there is nothing to add to the assessment of the Arbitral Tribunal that the relevant provisions of the FIFA Statutes do not constitute a basis for arbitration on which the Appellant, as a third party, could directly rely in order to appeal to the CAS (see on this point Mavromati/Reeb, *The Code of the Court of Arbitration for Sport*, p. 390 No. 30).

3.4.3. Just as he did before the Arbitral Tribunal, the Appellant also bases the CAS jurisdiction on the Federation statutes. In this respect, it should be noted first of all that he does not argue before the Arbitral Tribunal, which referred in a general recital only to Swiss law regarding the interpretation of the statutes, that it did not apply Algerian law when interpreting the Federation statutes. Therefore, there is no need to deal with this issue (see above, at 3.2).

The Federation statutes expressly deal with the question of appeal to the CAS in Art. 70. This article reads as follows:

The decisions of the Arbitral Tribunal of Algiers concerning clubs and players shall be final and not subject to appeal before any foreign arbitration body. Nevertheless, the FAF reserves the right to appeal against the decisions of the Arbitral Tribunal of Algiers to the CAS in Lausanne.

The Appellant relies on a decision of the CAS to argue that any party to proceedings before the Algerian Court for the Settlement of Sports Disputes may appeal to the CAS on the basis of Art. 70(2) of the statutes. In this case between the Federation and a club, on which the Court of Appeal did not have to decide, the CAS declared that it had the jurisdiction to decide on the appeal submitted by the club, considering that a literal interpretation of this Article would lead to an asymmetry contrary to the equality of treatment between the parties to a dispute. In attempting to infer from that decision his right to appeal to the CAS, the Appellant disregards the fact that the situation which gave rise to that decision cannot be compared with the situation which is the subject of the award sought. Indeed, as the Arbitral Tribunal rightly affirmed, the said decision was taken in the context of a procedure between a club and the Federation and the CAS recital relating to the asymmetry between the parties which would result from a literal interpretation of Art. 70(2) only makes sense in the context of the Federation's participation in the proceedings. However, as previously established (see above, at 3.3), the Federation did not have standing as a party in the present case. There can thus be no question of a right of the Appellant to appeal to the CAS in order to guarantee equal treatment between the parties, Art. 70 2 of the statutes does not confer on the club as an opposing party the right to appeal to the CAS. Moreover, the Appellant ignores the rule laid down in Art. 70(1), according to which the decisions of the Arbitral Tribunal of Algiers concerning clubs and players shall be final and not subject to appeal before any foreign arbitration body.

The Appellant further alleges a lack of independence of the Algerian Court for the Settlement of Sports Disputes, citing Art. 6(1) of the European Convention on Human Rights (ECHR). It should be noted first of all that this issue is not the subject of the award sought, which is why it cannot be raised before this Court. For the rest, it should be noted that a party to an arbitration agreement cannot argue directly, before the Federal Tribunal in a Civil appeal against an award, that the arbitrators have breached the ECHR, even though the principles of the ECHR can be used, if necessary, to give concrete form to the guarantees invoked under Art. 190(2) PILA (ATF 142 III 360<sup>7</sup> at 4.1.2). Moreover, the Appellant fails to recognize that by agreeing to an arbitration clause the parties voluntarily waive certain rights guaranteed by the ECHR and that such a waiver is not contrary to the Convention in so far as it is free, lawful and unequivocal (Judgment of the European Court of Human Rights in *Mutu et Pechstein v. Switzerland* of October 2, 2018, note 96). As the Appellant does not claim that this would be a forced arbitration, there is no need to rule on the independence of the Algerian Court for the Settlement of Sports Disputes.

4.

In a final grievance, the Appellant claims that there was a violation of his right to be heard (Art.190(2)(d) PILA). Noting that the dispute could not be submitted to any independent tribunal, he considered that the CAS could not declare itself lacking jurisdiction without breaching his right to be heard under the Constitution and the ECHR.

It is not clear what the Appellant wishes to achieve in the present case from his grievance based on Art. 190(2)(d) PILA, formulated at the end of the appeal after having presented in detail his arguments in favor of the CAS' jurisdiction under Art. 190(2)(b) PILA. Regarding the grievance of deprivation of access to a court in Switzerland, the European Court of Human Rights also considers that the grievance under Art. 13

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<sup>7</sup> Translator's Note:

The English translation of this decision is available here:

<http://www.swissarbitrationdecisions.com/agreed-upon-rules-procedure-do-bind-parties>

ECHR is absorbed by Art. 6(1) of the European Convention on Human Rights (ECHR), *Tabbane v. Switzerland* of March 1, 2016, note 28). In the present case, the Arbitral Tribunal declared that it did have jurisdiction after having examined the arguments developed by the Appellant and dealt with the relevant issues in accordance with the minimum duty imposed on it by case law (see ATF 142 III 360 at 4.1.2). The grievance is not well-founded.

5.

Under these circumstances, the appeal, in so far as it is admissible, must be rejected. Consequently, the Appellant shall pay the costs of the federal proceedings (Art. 66(1) LTF). There is no need to award costs to the Respondents, as they were not invited to reply.

For these reasons, the Federal Tribunal pronounces:

1.

The appeal is rejected.

2.

The judicial costs, set at CHF 5'500, are to be borne by the Appellant.

3.

No costs are awarded.

4.

This judgment shall be communicated to the Arbitration Tribunal and to the Court of Arbitration for Sport (CAS).

Lausanne, October 17, 2019.

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

The Presiding Judge:  
Kiss

The Clerk of the Court:  
Curchod (Mr.)