

4A\_438/2020<sup>1</sup>

Judgment of March 15, 2021

First Civil Law Court

Federal Judge Kiss, Presiding

Federal Judge Rüedi,

Federal Judge May Canellas,

Clerk of the Court: Brugger

A.\_\_\_\_\_ FC,  
represented by Dr. Vitus Derungs,  
*Appellant*

v.

B.\_\_\_\_\_,  
represented by Mr. Alexandre Zen-Ruffinen,  
*Respondent*

Facts:

A.

B.\_\_\_\_\_ (Respondent) is a professional football player from U.\_\_\_\_\_.

A.\_\_\_\_\_ FC (Appellant) is a professional 1st division football club based in V.\_\_\_\_\_, W.\_\_\_\_\_. It is a member of the Football Association in W.\_\_\_\_\_, which in turn is a member of the Fédération Internationale de Football Association (FIFA), an association under Swiss law with its registered office in Zurich.

The parties entered into an employment dispute regarding the employment contract concluded between them dated June 1, 2016 and expiring on May 31, 2018. The Respondent unilaterally terminated the contract on August 3, 2016 with immediate effect. Subsequently, he concluded an employment contract with Club C.\_\_\_\_\_ from X.\_\_\_\_\_ and then with Football Club D.\_\_\_\_\_ Sport Club from Y.\_\_\_\_\_.

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

Quote as A.\_\_\_\_\_ v. B.\_\_\_\_\_, 4A\_438/2020.

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

B.

By decision of 1 February 2019, the Dispute Resolution Chamber of FIFA partially approved the claim filed by the Respondent against his former employer A. \_\_\_\_\_ FC and ordered the latter to pay EUR 976'666, plus interest at 5%, from February 1, 2019. In all other respects, it dismissed the Respondent's claim.

Both the Appellant and the Respondent appealed to the Court of Arbitration for Sport (CAS). The then legal representative of the Appellant made the following reservation to the "Order of Procedure of consolidated proceedings" dated February 4, 2020:

A. \_\_\_\_\_ FC reserves all its rights in connection with the decision of the Panel notified on 6 January 2020 whereby it rejected A. \_\_\_\_\_ FC's requests for production of documents made in its Appeal Brief dated 4 November 2019 and its Answer to the Appeal of B. \_\_\_\_\_ dated 18 December 2019.

An oral hearing was held in Lausanne on February 14, 2020. At the end, both parties and their legal representatives stated that they had no objections to the CAS Panel's conduct of the proceedings and that their right to be heard had been respected throughout. By an award dated July 2, 2020, the CAS dismissed the Appellant's appeal, partially upheld the Respondent's appeal, and ordered the Appellant to pay EUR 2'939'131, plus interest at 5%, from August 3, 2016.

C.

The Appellant made a civil law appeal to the Federal Tribunal, requesting (1) the Court set aside the Award of July 2, 2020, and refer the case back to the CAS Panel for re-adjudication, and (2) the CAS be instructed to take into account the Appellant's right to be heard in the re-adjudication and, in particular, to address the procedural requests made in the Appellant's Appeal Brief of November 4, 2019 in the CAS 2019/A/6478 proceedings.

The Respondent and the CAS requested that the appeal be dismissed.

D.

By order dated October 22, 2020, the request for security for costs in the amount of CHF 22'000 was approved. Subsequently, the Appellant paid the security to the registry of the Federal Tribunal.

On January 29, 2021, the presiding judge rejected the request for suspensive effect.

Reasons:

1.

Pursuant to Art. 54(1) LTF<sup>2</sup>, the decision of the Federal Tribunal is issued in an official language, as a rule in that of the contested decision. If the latter has been drafted in another language, the Federal

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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.

Tribunal shall use the official language used by the parties. The contested decision was issued in English. As this is not an official language and the parties drafted their legal documents submitted to the Swiss Federal Tribunal in German (Appellant) and in French (Respondent), the decision of the Swiss Federal Tribunal is issued in the language of the complaint in accordance with practice (BGE 142 III 521<sup>3</sup> at 1).

2.

In the area of international arbitration, the appeal in civil matters is admissible under the conditions of Art. 190-192 PILA (SR 291)<sup>4</sup> (Art. 77(1)(a) LTF). The seat of the arbitral tribunal in the present case is in Lausanne. Both the Appellant and the Respondent were domiciled outside Switzerland at the relevant time (Art. 176(1) PILA).

The appeal within the meaning of Art. 77(1) LTF is in principle of a purely cassatory nature, *i.e.* it can only lead to the annulment of the contested decision (cf. Art. 77(2) LTF, which excludes the applicability of Art. 107(2) LTF to the extent that the latter allows the Swiss Federal Tribunal to decide on the merits of the case). However, it is not excluded that the Swiss Federal Tribunal may refer the case back to the arbitral tribunal (judgments 4A\_660/2020 of February 15, 2021 at 2.2; 4A\_476/2020 of January 5, 2021 at 2.2; 4A\_563/2020<sup>5</sup> of November 25, 2020 at 2.1). Accordingly, Appellant's request (1) is admissible, but not request (2), by which he demands that the Federal Tribunal issue instructions for the arbitral tribunal in its re-adjudication. Apart from that, the requirements for the judgment on the merits do not give rise to any further comments.

Accordingly, the appeal is admissible in this respect.

3.

Only the objections that are exhaustively listed in Art. 190(2) PILA are admissible (BGE 134 III 186<sup>6</sup> at 5 p. 187; 128 III 50 at 1a p. 53; 127 III 279 at 1a p. 282). Pursuant to Art. 77(3) LTF, the Federal Tribunal only hears the complaints that have been raised and substantiated in the appeal; this corresponds to the obligation to complain provided for in Art. 106 para. 2 LTF for the violation of fundamental rights and of cantonal and intercantonal law (BGE 134 III 186 at 5 p. 187 with reference). Criticism of appellatory nature is inadmissible (BGE 134 III 565<sup>7</sup> at 3.1 p. 567; 119 II 380 at 3b p. 382).

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<sup>3</sup> Translator's Note: The English translation of this decision is available here: <http://www.swissarbitrationdecisions.com/federal-tribunal-upholds-independence-members-cms-network>

<sup>4</sup> Translator's Note: PILA is the most frequently used English abbreviation for the Federal Statute on International Private Law of December 18, 1987.

<sup>5</sup> Translator's Note: The English translation of this decision is available here: <https://www.swissarbitrationdecisions.com/atf-4a-563-2020>

<sup>6</sup> Translator's Note: The English translation of this decision is available here: <http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties>

<sup>7</sup> 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>

4.

The Appellant complains of a violation of the right to be heard because the CAS did not evaluate his requests for evidence.

4.1 According to Art. 190(2)(d) PILA, the arbitral tribunal must respect the right of the parties to be heard. This corresponds - with the exception of the right to a statement of reasons - to the constitutional right guaranteed in Art. 29(2) BV.<sup>8</sup> The case law derives from this, in particular, the right of the parties to express themselves on all facts essential for the judgment, to represent their legal position, to prove their factual arguments essential for the decision with suitable means offered in due time and form, to participate in the negotiations and to inspect the files (BGE 142 III 360<sup>9</sup> at 4.1.1; 130 III 35 at 5 p. 37 f.; 127 III 576 at 2c; each with references).

4.2 Specifically, the Appellant complains that the CAS did not accept or assess his requests for evidence submitted in the Appeal Brief of November 4, 2019. There, in connection with the Respondent's duty to mitigate damages, he requested the release of the following documents:

In relation to D. \_\_\_\_\_ FC

- Employment contract(s) signed with D. \_\_\_\_\_ FC in January 2018 as well as any and all annexes to said contract and/or side-agreements;
- Any and all emails exchanged between the Player, his agent and D. \_\_\_\_\_ FC leading up to the conclusion of the employment contract with D. \_\_\_\_\_ FC;
- Copy of any and all pre-contractual documents, offers, memorandum of understanding exchanged and/or signed with D. \_\_\_\_\_ FC;

In relation to C. \_\_\_\_\_:

- Employment contract(s) signed with C. \_\_\_\_\_ in August 2018 as well as any and all annexes to said contract and/or side-agreements;
- Any and all emails exchanged between the Player, his agent and C. \_\_\_\_\_ leading up to the conclusion of the employment contract in August 2016;
- Copy of any and all pre-contractual documents, offers, memorandum of understanding exchanged and/or signed with C. \_\_\_\_\_ as of July to August 2016;

In relation to his agent E. \_\_\_\_\_

- Representation Agreement (s) signed with Mr. E. \_\_\_\_\_ and any other third agent in relation to his agency activities with regards to him signing an employment contract with A. \_\_\_\_\_ and/or in force during said time period."

On January 6, 2020, the CAS accepted the first request for evidence and ordered FIFA to hand over the complete dossier, in particular including the contracts signed by the Player with D. \_\_\_\_\_ Sport Club and C. \_\_\_\_\_. However, it rejected the other requests: "All other requests for productions of documents are rejected."

After the Appellant subsequently inquired by e-mail of January 6, 2020, about the status of the handling of the further requests for production, which he quoted verbatim, the CAS confirmed on January 7, 2020, that these had been rejected by letter of January 6, 2020, and pointed to the sentence contained therein: "All other requests for productions of documents are rejected."

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<sup>8</sup> Translator's Note:

BV is the German abbreviation of the Swiss Federal Constitution (*Bundesverfassung*).

<sup>9</sup> Translator's Note:

The English translation of this decision is available here:

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

It follows clearly from this that the CAS did not overlook these requests for production of documents at all, but on the contrary, consciously evaluated and expressly rejected them. It also provided the reasons for the rejection of these requests for disclosure: as the Appellant itself states in the complaint, the President of the Panel stated, at the hearing of February 14, 2020, that this was a kind of "fishing expedition".

In view of the vague and overly-broad wording ("any and all") of the further requests for disclosure, without any concretization of the existence of documents relevant to the decision that are to be disclosed, no further explanation was required. After this explanation by the President of the Panel, the then-representatives of the Appellant at the hearing no longer insisted on these requests and did not raise any reservation regarding a violation of their right to be heard.

The CAS therefore respected the Appellant's right to be heard according to Art. 190(2)(d) PILA and its complaint is dismissed.

5.

Thus, the appeal is found to be unfounded. It is to be dismissed insofar as it is admissible. In accordance with the outcome of the proceedings, the Appellant must pay for costs and compensation (Art. 66(1) and Art. 68(2) of the Federal Tribunal Act). The party compensation is to be paid to the Respondent from the amount deposited for this purpose with the Swiss Federal Tribunal treasury.

Accordingly, the Federal Tribunal pronounces:

1.

The appeal is dismissed insofar as it is admissible.

2.

The court costs of CHF 20'000 shall be paid by the Appellant.

3.

The Appellant shall compensate the Respondent for the Swiss Federal Tribunal proceedings with CHF 22'000. The court registry is instructed to pay the Respondent this amount from the sum deposited with the Swiss Federal Tribunal as security for costs.

4.

This judgment will be communicated in writing to the parties and to the Court of Arbitration for Sport.

Lausanne, March 15, 2021

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

Presiding Judge:

Kiss

Clerk of the Court:

Brugger