4A_536/2018[1]

Judgment of March 16, 2020

1st Civil Law Court

Federal Judge Kiss, presiding,
Federal Judge Rüedi, and
Federal Judge May Canellas.
Clerk: Ms. Monti.

Club A._____, represented by Mr. Jorge Ibarrola, lawyer,
Appellant

v.

Z._____, represented by Mr. Antonio Rigozzi, lawyer,
Respondent

Facts:

A.
A.a. Club A._____ ("the Club") is a football club located in [name of country omitted]. It is affiliated with the Fédération Internationale de Football Association (FIFA).

The Club concluded a first employment contract with the young Player J._____, born on [date omitted] 1996 (hereinafter: the Player), which was valid from January 1, 2013 to June 30, 2015.

In 2014, the Club sought to secure the Player's services until 2020. The interests of the Player – still a minor – were at the time protected by K._____; the latter approached the German Agent Z._____ (and/or the company [name omitted]) with a view to renewing the contract between the Player and the Club.

The FIFA Regulations on the Status and Transfer of Players preclude a Player under the age of eighteen from signing a professional Player contract of more than three years; they specify that any clause referring to a longer duration shall not be recognized. Consequently, it was decided to prepare two employment contracts: the first for the period from July 1, 2015 to June 30, 2017, the second for a period starting on July 1, 2017, and extending until at least 2020.

[1] Translator's Note: Quote as Club A._____ *v.* Z._____, 4A_536/2018.
The decision was issued in French. The original text is available on the website of the Federal Tribunal, www.bger.ch.

On April 24, 2014, the Player, represented by his father P._____, signed a new employment contract with the Club, valid from July 1, 2015 to June 30, 2017. It was stated that this contract was concluded with the intervention of Agent Z._____, in the interest and representation of the Club.

On April 28, 2014, the Club and Z._____ signed an agent contract. Z._____ had prepared a first draft on April 11, 2014, but multiple amendments were subsequently negotiated with the Club's financial director (Q._____). This agreement could not be concluded at the same time as the employment contract on April 24, 2014, as certain aspects still had to be finalized.

Art. 1 of the agent contract - set out in English in the Award mentioned below (let. B) - was entitled "subject and duration."

In essence, the Agent was responsible for assisting the Club in order to obtain the extension of the Player's engagement, by any agreement whatsoever as to the continuation of the employment relationship ("Renewal"). The Agent's assistance consisted of, in particular, coordinating negotiations between the Player and the Club in order to find a solution that suited the parties involved. The contract was to end on April 30, 2014, but all obligations, including the obligation on remuneration provided for in Art. 2, would stay valid until its full execution.

Art. 2 was devoted to the Agent's "remuneration", which was as follows:

> 2. (a): for having rendered the services as defined in Art.1 of the Agent contract leading to the conclusion of a renewed contract between the Club and the Player ("Players' [*sic!*] Contract"), the Agent would receive a commission of up to EUR 800,000 net, under the following conditions:
>
> (aa) EUR 400,000 payable within five working days of the signing of the Player's Contract with a contractual period extending from 1.7.2015 to 30.6.2017;
>
> (bb) EUR 400,000 payable within five working days of the signing of a further contract extending, replacing or amending the Player's contract or any other agreement establishing the working relationship between the Club and the Player as an adult, on condition that this contract was signed during the 2014/2015 season and that its expiry reached at least June 30, 2020. The parties expected this contract to be signed on November 29, 2014 or around this date, that of the Player's 18th birthday.
>
> 2.(b) As additional remuneration for rendering the services as defined in Art. 1, leading to the conclusion of a contract with the Player ("a Players' [*sic!*] Contract"), the Agent would participate financially in any future transfer of the Player. In all cases where the Player is transferred from Club A._____ to a third Club, A._____ should pay the Agent a net amount representing 10% of the amount payable or paid to A._____ as compensation in connection with the future transfer of the Player.

According to Art. 5, the Agent contract was subject to Swiss law and the relevant FIFA and UEFA regulations. It contained an arbitration clause empowering the parties to bring their claims before the competent FIFA body or the CAS for any dispute arising from or in connection with said contract.

A.b. The Club paid EUR 400'000 to Z._____ in accordance with Art. 2(a)-(aa) of the Agent contract. The latter admitted not having provided a service after April 30, 2014.

A.c. On November 28, 2014, the Player sent the Club a letter co-signed by his father, in which he claimed to be bound to the Club only by the new employment contract ("New Employment Contract"), and by no other agreement. He added that K._____ was no longer his Agent beyond November 26, 2014, and that he felt free from any commitment to the Club as of June 30, 2017.

A.d. On December 1, 2014, Agent Z._____ requested the Club to pay EUR 400'000 in accordance with Art. 2(a)-(bb) of their contract. The Club refused to do so.

A.e. On April 8, 2015, the Player and the Club signed a third employment contract valid from July 1, 2017 to June 30, 2021.

A.f. On June 10, 2015, the Agent filed a statement of appeal with the CAS against the Club, in which he requested the payment of EUR 400'000 plus interest as remuneration provided by Art. 2(a)-(bb) of the contract. He also requested a declaratory judgment on his claim to a financial contribution in the event of a future transfer of the Player, according to Art. 2(b) of the contract.

Ruling on September 28, 2016, the CAS rejected the claim for payment of EUR 400'000 on the grounds that the payment of the commission provided for by Art. 2(a)-(bb) assumed a causal link between the services provided by the Agent and the employment contract concluded on April 8, 2015. However, such a link was interrupted after the Player had terminated the collaboration with his Agent Z._____ on November 24, 2014 and sent the Club the letter of November 28, 2014 (let. A.c, *supra*). Concerning the second request, the CAS considered that the conditions for rendering a declaratory judgment were not met; therefore the Panel refused to rule on the remuneration provided for by Art. 2(b).

A.g. In January 2017, the Club transferred the Player to Club B ._____ for the sum of EUR 29'015'323, payable in two installments.

B.
On July 10, 2017, the Agent filed with the CAS a new request for arbitration against the Player. Relying on Art. 2(b) of the agent contract, he requested the payment of EUR 2'960'000, plus interest.

The CAS held a hearing bringing together the parties and their counsel. It heard as witnesses the Club's legal director (Q._____), the Player's father (P._____) and the Player's family lawyer (R._____).

By Award of July 30, 2018, the CAS ordered the Club to pay the Agent the sum of EUR 2,861,532.30 plus interest.

C.
The Club filed a motion to set aside the arbitral award before the Federal Tribunal.

The Agent requested that the appeal be deemed inadmissible, or, in the alternative, requested that the appeal should be dismissed.

The CAS stated that it had no specific comments except that the appeal essentially criticized the assessment of the evidence and did not invoke a violation of the right to be heard, referring to the last point of para. 38 of its Award (*cf*. at 4.2 below).

The Club filed its reply, prompting a rebuttal by the Agent.

Reasons:

1.
The Award under appeal was drafted in English, the language of the arbitration proceedings. As English is not an official language within the meaning of Art. 54(1) LTF, it cannot be used in the present proceedings. The parties have used French in their submissions before the Federal Tribunal, in particular in the appeal, so this judgment is consequently issued French (ATF 142 III 521[2] at 1; judgment 4A_54/2019 of April 11, 2019 at 1).

2.
Appeals in civil matters in the field of international arbitration are admissible against the decisions of arbitral tribunals under the conditions provided for in Art. 190-192 of the Federal Act on Private International Law of December 18, 1987 (PILA; RS 291), in accordance with Art. 77(1)(a) LTF.

The headquarters of the CAS is in Lausanne and the Appellant is a football Club located in [name of country omitted], which is sufficient for the application of Chapter 12 PILA (*cf*. Art.176(1) PILA). The admissibility conditions with respect to the subject of the appeal, the standing to appeal, the time limit for appeal, the requests filed by the Appellant, or even the complaints raised in his appeal are met in this case. The appeal is therefore admissible.

3.
In the first of its two pleas, the Appellant complained of a violation of procedural public policy (Art. 190(2)(e) PILA). The Appellant alleges the CAS breached the principle of *res judicata* resulting from the first Award rendered on September 28, 2016.

3.1. It is important to recall some case law on this matter, to the extent that the application of Swiss law is not disputed in the current case.

3.1.1. The principle of *res judicata* prohibits an identical claim that has already been decided in a final manner being reheard in a new procedure between the same parties. The judge in a new trial is bound

[2] Translator's Note: The English Translation of this decision is available here: http://www.swissarbitrationdecisions.com/federal-tribunal-upholds-independence-members-cms-network

by everything that has been decided in the operative part of the previous judgment; this is the prejudicial or binding effect (ATF 142 III 210 at 2 p. 212). Identity is understood in the substantive sense; it is not necessary or even decisive that the requests be formulated in the same way in the two trials. It suffices that the newly raised claim is included in what has already been decided; respectively, the main litigious issue decided in the first trial can have the features of a preliminary question in the new trial (ATF 123 III 16 at 2a p. 19; 139 III 126 at 3.2.3 p. 131).

Only the operative part of the judgment is vested with *res judicata*. It is sometimes necessary to refer to the grounds to determine its precise scope, in particular when the operative part merely indicates that the request is rejected (ATF 136 III 345[3] at 2.1 p. 348; 121 III 474 at 4a p. 478 ; 116 II 738 at 2a); insofar as the factual findings and the legal grounds do not form part of *res judicata*, the grounds do not bind the judge (Françoise Bastons Bulletti, in *CPC Online*, note of October 5, 2016, in Judgment 4A_696/2015). Thus, the factual findings and the legal grounds do not form part of *res judicata* and as such do not bind the judge in a new procedure (ATF 123 III 16 rec. 2a; 121 III 474 at 4a p. 478) .

It follows that in matters of partial claims, the grounds of the first judgment have no binding effect on subsequent trials, even if the questions which arise are typically the same (Judgment 4C.233/2000 of November 15, 2000 at 3a; judgment C.214/1987 of June 21, 1988 at 1d, in SJ 1988 p. 609, and judgments 4A_352/2014 of February 9, 2015 at 3.1 and 4A_101/2016 of October 6, 2016 at 3.2; see also ATF 125 III 8 at 3b p. 13 in fine; on these questions, see Curchod/Gonczy, *Action partielle*, in PJA 2019 spec. p.812 ff). This apparent paradox is explained by the fact that that *res judicata* is a consequence of the jurisdiction of the judge to decide a certain dispute, jurisdiction which is delimited by the requests brought before it. *Res judicata* cannot have any effect beyond this framework (Andreas Edelmann, in *Kommentar zur aargauischen Zivilprozessordnun*g, 2nd ed. 1998, nos. 12, 22 and 25 ad Art. 284 ZPO, cited in the abovementioned Judgment 4C.233/2000).

3.1.2. In principle, only a final judgment to the merits has the force of *res judicata*. When a procedure ends with a judgment declaring a claim inadmissible, the *res judicata* effect of this judgment is limited to the condition of admissibility that had been discussed and found to be defective (ATF 134 III 467 at 3.2 p. 469; 127 I 133 at 7a p.139; judgments 4A_394/2017 of December 19, 2018 at 4.2.2; 4D_88/2014 of March 25, 2015 at 3).

3.1.3. In matters of international arbitration, it is settled case-law that an arbitral tribunal violates procedural public policy within the meaning of Art. 190(2)(e) PILA when it rules without taking account of the *res judicata* effect of a previous decision, or when it deviates, in its final Award, from the opinion expressed in a preliminary ruling on a preliminary substantive question (ATF 141 III 229[4] at 3.2.1; 140 III 278[5] at 3.1 at p.279). Thus, an arbitral tribunal that has ruled, by means of a preliminary ruling, on the

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[3] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/setting-aside-of-award-for-violation-of-public-policy-principle-

[4] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/res-judicata-revisited

[5] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/res-judicata-effect-foreign-judgment

principle of the liability of the defendant is bound by its decision on this point when it rules on the monetary claims of the plaintiff in its final award, (ATF 128 III 191 at 4a p. 195). It is possible that a court renders a decision having simultaneously the features of a partial award and a preliminary ruling on a preliminary question to the merits, binding it for the rest of the arbitral proceedings (*cf*. Judgment 4A_606/2013[6] of September 2, 2014 at 3).

Lastly, it must be recalled that the Federal Tribunal freely examines the questions of law that might arise when it must determine if an arbitral tribunal breached the principle of *res judicata* (Judgment 4A_374/2014[7] of February 26, 2015, at 4.2.3). However, this analysis is carried out in the context of the pleas duly raised by the Appellant, which is subject to strict reasoning requirements, identical to those applying to a plea of violation of constitutional rights (*cf*. Art.77(3) LTF ; ATF 134 III 186[8] at 5; Judgment 4A_268/2019[9] of 17 October 2019 at 3.2).

3.2. In this case, the Appellant criticizes the Arbitral Tribunal for having violated the *res judicata* effect of the Award of September 28, 2016. In this first decision, the CAS inferred from Art. 1 of the contract that the Agent should promote both the conclusion of a first extension contract with the Player (2015-2017) and that of a second extension contract (2017-2020). The Appellant quotes in this regard an extract from paragraph 192 of this Award, an extract which is partially reproduced below:

> The fact that Clause 2 of the Agent contract refers to commission, which falls only due if the Further Contract is signed, is a further strong indication that the Renewal and the Further Contract have to be treated consolidated regarding the necessity of the causal link. (...) Because the Agent contract refers to the 'Players' Contract' which includes the renewal agreement of 24 April 2014 and the Further Contract ('up to net EUR 800'000') (...) the causal link must refer to both the renewal agreement of 24 April 2014 (for the commission in clause 2 lit. a – aa of EUR 400'000) and the Further Contract (for the commission in clause 2 lit. a - bb of EUR 400'000).

According to the Appellant, this 2016 Award had "all the characteristics of a preliminary ruling [...] at least as regards the Agent's mission and the conditions for the remuneration arising therefrom". However, the Appellant argues the 2018 Award developed a contradictory analysis, in particular with regard to Art. 1 of the contract, from which the Arbitrators inferred that it only required the Agent to foster the conclusion of the first extension contract (2015-2017).

3.3.
3.3.1. As presented by the Award under appeal, the circumstances are as follows:

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[6] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/challenge-expert-forfeited-if-not-filed-immediately

[7] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/public-policy-defense-under-new-york-convention

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

[9] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-268-2019

- In 2015, the Agent entered the CAS with a first request concluding on the one hand the payment of EUR 400'000 on the basis of Art. 2(a)-(bb) of the Agent contract, and on the other hand the recognition of his right to financial participation in the event of future transfer(s) of the Player, under Art. 2(b) (Award under appeal, para. 17).

- In its Award of September 28, 2016, the CAS rejected the claim for payment based on Art. 2(a)-(bb) and held that the conditions for rendering a declaratory judgment were not fulfilled, so that it did not rule on the claim provided for in Art. 2(b) of the contract (Award under appeal, para. 18).

- On July 10, 2017, the Agent filed a new request before the CAS, claiming payment of EUR 2'960'000 under Art. 2(b) of the contract. The Agent claimed to be entitled, under this contractual clause, to 10% of the amount received by the Club following the transfer of the Player operated in January 2017 for the benefit of Club B._____ (Award under appeal, para. 19, para. 39 f. and para. 49).

- The Club objected that the 2016 Award had decided this question by finding that the Agent had not influenced the conclusion of the second extension contract (2017-2021) which occurred on April 8, 2015 and had not entitled the Agent to the commission of EUR 400'000 provided for in Art. 2(a)-(bb).

- The CAS replied that the 2016 Award did not rule on the "additional remuneration" provided for in Art. 2(b), nor on the causal link with the remuneration provided for in Art. 2(a)-(bb). On the contrary, it had denied the plaintiff the right to obtain a declaratory judgment on this point, noting that such a judgment would not allow any uncertainty to be removed, as at this stage it was not clear when there would be a transfer of the Player - if there was one (contested Award, para. 55).

3.3.2. The first Award of 2016 is a final decision to the merits in so far as it definitively rejects the claim for payment of the commission of EUR 400'000 provided for in Art. 2(a)-(bb) of the contract. It also constitutes a procedural judgment in so far as it refuses to enter into the merits of the claim based on Art. 2(b), for lack of sufficient interest. The use of the verb "dismiss" (reject; no. 1 of the operative part of the 2016 Award; *cf*. also para. 55 of the Award under appeal) to define the overall fate of the first request filed on June 10, 2015, cannot be misleading with respect to the nature of the decision relating to the declaratory conclusion. The reasons that led to the refusal to rule on the conclusion here – as presented in the Award under appeal, which the Appellant does not dispute on this point – leave no room for doubt (cf. ATF 115 II 187 at 3b in fine p. 191). However, such an inadmissibility decision did not preclude a new claim requesting the payment of a sum of money.

The Appellant believes that it can see a preclusive effect in the 2016 Award. This is not the case. On the one hand, these are two very distinct trials. We are therefore not in the very specific case of judgment 4A_606/2013 (at 3.1.3 above). On the other hand, we do not discern a similarity between the newly made claim and the claim decided in the 2016 Award. To benefit from a preliminary ruling, it is not enough to establish that the judge or the arbitrator is brought to rule on questions that have already arisen in the first trial. That the CAS, in the first trial, was led to interpret Art. 2(a)-(bb) in the light of other clauses of the contract, in particular Art.1, does not mean that it is bound by the interpretation relating to it in the second trial. It should additionally be noted that in both procedures, the CAS preserved, in accordance

with the clear letter of Art.1, the finding that the Agent's main obligation ended on April 30, 2014 (Award, para. 57 and the reference to para. 176 and 180 of the 2016 Award).

It follows that the Appellant's complaint based on *res judicata* is unfounded.

4.
In his second plea, the Appellant complains of a violation of its right to be heard.

4.2. The Appellant criticizes the Arbitral Tribunal for not having examined or discussed the arguments presented by its counsel at the hearing, namely, the statements made by its three witnesses.

At the outset, the Federal Tribunal agrees with the Appellant that an arbitral tribunal cannot protect itself from such a plea by the simple insertion of standard clauses ensuring that the allegations, arguments and means of evidence presented by the parties have all been taken into account (Award, para. 3), respectively that the right to be heard has been fully respected by the parties' own admission at the end of the hearing (Award, para. 38; cf. judgments 4A_668/2016[10] of July 24, 2017 at 3.2.2; 4A_730/2012[11] of April 29, 2013 at 3.3.2). However, this plea should be rejected if we take into account the circumstances of the specific case, for the reasons set out below.

The Club quotes on a number of pages a series of comments essentially made by its lawyer and its legal director (Q._____), as well as, to a lesser extent, the Player's father (P._____), the lawyer for the family of the Player (R._____) and even the Respondent Agent (Z._____).

Reviewing the Award under appeal, however, it seems that the Arbitral Tribunal took into account, in their essence, the elements highlighted in the appeal. It is therefore clearly stated that the Club wanted to secure the Player's services until 2020, but ran up against FIFA regulations excluding a minor entering into a contract of more than three years; it was thus decided to prepare two contracts, the first until 2017, the second until at least 2020 (Award, para. 5 and 57).

The Award also summarizes the Club's defense, highlighting the following elements: the aim pursued by the parties was to conclude a contract until 2020; the duties described in Arts. 1 and 2 of the contract formed an indivisible whole; to claim the "additional remuneration" of Art. 2(b), the Agent had to establish a causal link between his activities and the signing of contract(s) valid until at least 2020; however, the first sentence held that the Agent had played no role in the conclusion of the second extension contract (2017-2021); as a result, the Agent could not request payment of "additional remuneration"; anyone active in the football industry could understand in good faith that there was no point in considering that the Agent's mission ended only with the conclusion of the first extension contract (2015-2017); it did not matter that the Player had been transferred at a time when the first extension contract was still in force;

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[10] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-668-2016

[11] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/modification-operative-part-award-admitted-if-appellant's-favor

this transfer was obviously due to the fact that the second extension contract (2017-2021) had been agreed; finally, the contractual clauses were not clear, so that they had to be interpreted against their author (*contra stipulatorem*), that is the Agent (Award, para. 42). Furthermore, the CAS did not fail to recognize that it was first necessary to establish the parties' real and common will, but held that such a will could not be detected in the present case (Award, para 52 f.).

Subsequently, the Panel explained why it refuted the Club's arguments, in particular on the question of the link between services and remuneration of Art. 2(b) (para. 54 ff. And 57), on the way in which a person in the football industry would understand the disputed clause in good faith (para. 64) and on the lesson that could be drawn from the example of calculation cited in the contract (para. 59).

In the light of the foregoing, the CAS cannot be criticized for having violated the right of the Appellant to have its allegations, arguments, evidence and offers of evidence important for the Award to be rendered and presented in accordance with the rules of procedure applicable are taken into account. Rather, it appears that the Appellant actually criticizes the Panel for not properly assessing the evidence or for not following its position and its interpretation of the Agent contract, respectively. However, these questions fall outside the scope of the power of review of the Federal Tribunal, which cannot review them under the disguise of an alleged violation of the right to be heard.

The Federal Tribunal therefore dismisses this plea, and along with it the appeal as a whole.

5.
The unsuccessful Appellant shall bear the costs of the proceedings (Art. 66(1) LTF). He will also pay compensation to the Respondent for his attorney's fees (Art. 68(1) and (2) LTF).

For these reasons, the Federal Tribunal pronounces:

1.
The appeal is dismissed.

2.
Legal costs, fixed at CHF 21’000, shall be borne by the Appellant.

3.
The Appellant will pay the Respondent CHF 23’000 for his legal costs.

4.
This judgment will be communicated to the parties and to the CAS.

Lausanne, March 16, 2020

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

Presiding Judge:	Clerk:
Kiss	Monti