4A_510/2015[1]

Judgment of March 8, 2016

First Civil Law Court

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

X._____,
Represented by Mr. Yannick Steinmann,
Appellant

v.

Y._____,
Represented by Mr. Laurent Maire,
Respondent

Facts:

A.

On January 26, 2010, Y._____, a professional football club of [name of country omitted], and X._____, a [name of country omitted] professional football club, entered into a contract (hereafter: the Contract) concerning the transfer by the former to the latter of A._____ (hereafter: the Player), a [citizenship omitted] professional player who was also a signatory of the aforesaid contract. As a counterpart, X._____ paid the amount of USD 500'000 to Y._____ and undertook to pay half the income of a future transfer of the Player to a third club, which would take place before December 31, 2011, (Art. 3 of the Contract). Art. 8 of the Contract prevented X._____ from lending or transferring the Player before that date without the written agreement of Y._____. Should this prohibition be breached,

[1] Translator's Note: Quote as X._____ *v.* Y._____ SA, 4A_510/2015.
The decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

X._____ should pay an amount of USD 2'000'000 as a penalty to Y._____. According to Art. 9 of the Contract, the employment contract to be concluded between X._____ and the Player should include a clause stating that in case of breach of the Contract by the Player without cause, the latter would be bound to pay compensation of USD 2'000'000 to be divided between the two clubs. Finally, should the anticipated termination of the employment relationship be attributable to X._____, it would pay an amount of USD 1'500'000 to Y._____ to compensate the loss of the indemnity that Y._____ could have hoped to receive in case of a future transfer of the Player (Art. 10 of the contract).

On January 19, 2011, X._____ asked Y._____ to authorize early termination of the Player's employment contract or his temporary transfer to Z._____, a [nationality omitted] professional club, due to the Player's personal situation. The following day, Y._____ categorically rejected this request and indicated to X._____ that it would invoke the penalty clause should the Player be transferred.

At the end of January 2011, X._____ loaned the Player to Z._____, whereupon Y._____ enquired of Z._____ the reasons for doing so and filed a complaint with the Players' Status Committee of the Fédération Internationale de Football Association (FIFA).

In a decision of December 10, 2013, the Single Judge of the Committee rejected the claim, holding that Y._____ did not prove undergoing any real, specific damage, despite the breach of the contract attributable to X._____.

B.

Seized of an appeal by Y._____, the Court of Arbitration for Sport (CAS) investigated the matter and held a hearing on July 16, 2015, whereupon a three-member Panel issued an award on August 24, 2015, pursuant to which the decision under appeal was annulled and X._____ was ordered to pay an amount of USD 1'500'000 to Y._____. In a nutshell, the Panel rejected each and every objection raised by X._____ to avoid the application of the penalty clause contained at Art. 8 of the contract. However, it held that the circumstances of the case at hand justified a reduction of 25% of the penalty set in the clause.

C.

On September 23, 2015, X._____ (hereafter: the Appellant) filed a civil law appeal with the Federal Tribunal with a view to obtaining the annulment of the award at issue. It supplemented its appeal brief by an additional writing submitted on November 2, 2015.

The Respondent submitted that the appeal should be rejected insofar as the matter is capable of appeal, pursuant to its answer of November 30, 2015.

In its answer of December 18, 2015, the CAS produced its file and submitted that the appeal should be rejected.

The Appellant did not file a reply.

Reasons:

1.
According to Art. 54(1) LTF,[2] the Federal Tribunal issues its judgment in an official language,[3] as a rule in the language of the decision under appeal. When the decision was issued in another language (here in English), the Federal Tribunal resorts to the official language chosen by the parties. Before this Court, both used French. Therefore, the judgment shall be issued in French.

2.
In the field of international arbitration, a civil law appeal is admissible against the decisions of arbitral tribunals pursuant to the requirements set at Art. 190-192 PILA[4] (Art. 77(1) LTF). Whether as to the subject of the appeal, the standing to appeal, the Appellant's submissions, or the grievances invoked, none of these admissibility requirements raises any problem in the case at hand. The admissibility of the additional appeal is not disputable because the brief was filed before the expiry of the time limit running from the notification of the full award with the signature of the President of the Panel (judgment 4A_392/2010 of January 12, 2011, at 2.3). That the main appeal was filed before the formal notification, when the aforesaid award had only been provided to the parties by fax, is of no consequence either; indeed, although premature, the appeal was nonetheless admissible (judgment 4A_304/2013[5] of March 3, 2014, at 2.1; see also ATF 117 Ia 328 at 1a and the cases quoted). The matter is therefore capable of appeal.

3.
The Federal Tribunal issues its decision on the basis of the facts established by the arbitral tribunal (Art. 105(1) LTF). It may not rectify or supplement *ex officio* the factual findings of the arbitrators, even if the facts were established in a blatantly inaccurate manner or in violation of the law (see Art. 77(2) LTF, ruling out the applicability of Art. 105(2) LTF). However, as was already the case under the aegis of the federal law organizing the courts (see ATF 129 III 727 at 5.2.2; 128 III 50 at 2a and the cases quoted), the Federal Tribunal retains the capacity to review the factual findings on which the award under appeal is based if one or more of the grievances mentioned at Art. 190(2) PILA is raised against them, or when some new facts or

[2] Translator's Note: LTF is the French abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173. 110.
[3] Translator's Note: The official languages of Switzerland are German, French and Italian.
[4] 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.
[5] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/definition-public-policy-reaffirmed

evidence are exceptionally taken into consideration, in the framework of the civil law appeal (see Art. 99(1) LTF).

4.
4.1. In a first argument based on Art. 190(2)(a) PILA, the Appellant argues that the CAS issued the award under appeal in violation of the rules concerning the impartiality and the independence of the Arbitrators. It relies in this respect on some facts that took place between the hearing held by the Panel on July 16, 2015, and the transmission of the award to the parties by fax on August 24, 2015. It claims, with supporting exhibits, that on August 13, 2015, the [name omitted] newspaper published an article on its website indicating that the CAS had ordered the Appellant to pay to the Respondent the amount of USD 2'000'000, in the framework of the arbitral proceedings between the two clubs. The Appellant adds that the next day, it sent an email to various officials of the CAS to inform them, express its surprise, and ask them to take every necessary step to ensure that the award be communicated to the parties as a priority, as the CAS Secretariat stated that it had not yet been issued, as opposed to being sent to the press, failing which the right of the parties to a fair trial would be seriously breached. The Appellant also mentions a first email sent by the Secretary General of the CAS on August 14, 2015, indicating that he had immediately ordered an internal investigation and then a second email, dated August 24, 2015, in which the same person assured it that he had concluded that any rumor or leak concerning this case came neither from the CAS, nor from the Arbitrators.

On the strength of these facts, the Appellant argues that more than 10 days before the award was communicated, only a member of the Panel could inform the press that the Respondent's appeal was or was not going to be admitted. According to the Appellant, it could be that an arbitrator first informed the Respondent of the outcome of the dispute and that the information was communicated to the press in a second step. According to the Appellant, the circumstance he alleges would be in legal terms a particularly important breach of the duty of confidentiality and reserve imposed upon the Arbitrators by Art. S19(1) of the Code of Sport Arbitration and such a violation would strongly suggest that the award was issued by an irregularly composed arbitral tribunal within the meaning of Art. 190(2)(a) PILA. In its view, one cannot exclude that the Panel, which had not issued a formal decision at the time, could have been influenced by the publications in the [name omitted] newspaper or consequently that the award would have been different if the Panel had not been aware of such publications. Still according to the Appellant, one could even suppose, in order to explain the difference between the amount of USD 2'000'000 mentioned by the paper and the USD 1'500'000 in the dispositive part of the award, that the Panel wanted to ensure that the amounts would not be identical to avoid any additional suspicion as to the leaks originating with one of its members.

4.2. It has to be emphasized immediately that the Appellant's argument relies on a factual premise that is not established, so the entire legal construction, laid on this hypothetical basis, collapses like a house of cards. Indeed, the Appellant assumes a mere hypothesis, namely that a member of the Panel informed the press or the other party of the outcome of the dispute. The CAS and the Respondent demonstrate convincingly in this respect in their respective answers, why the alleged fact cannot be considered as

established. Their explanations show in particular that the information published in the article in dispute was wrong on several points, that no official source was mentioned and no reporter contacted the CAS to verify its accuracy. Moreover, as the CAS publishes a list of upcoming hearings on its website, any reporter could have heard of the dispute between the parties and their names, and then carried out his or her own investigation with various unofficial sources on the basis of this information with a view to obtaining some more specific information on any aspect of the case. This could also explain the mistake as to the amount that would be awarded to the Respondent. Moreover, to remain in the realm of speculation, it would not be unimaginable for the 'leak' to have originated not from the Respondent as the Appellant suggests, but from the latter itself, seeing its case going badly after the hearing on July 16, 2015, and taking the necessary steps to allow itself the opportunity to obtain the annulment of the future award because the Panel could be seen to have breached its duty of confidentiality. In any event, nothing in the case at hand refutes the allegation of the Secretary General of the CAS, according to which on the one hand, the members of the Panel stated that they never communicated with anyone outside the CAS as to the case and on the other hand, the Secretariat of the CAS also abided by the confidentiality of the arbitral proceedings at all times. Finally, one must note that the Appellant's first reaction when it heard of the press article was not to question the impartiality or the independence of the Panel, as it merely invited the CAS to ensure that the future award should be communicated to the parties as a priority, before any information to the press.

Be this as it may, it is acknowledged that the breach of the duty of confidentiality imposed upon the Arbitrators does not constitute, as a rule, a ground for appeal against an international arbitral award (Philip Ritz, *Die Geheimhaltung im Schiedsverfahren nach schweizerischem Recht*, 2007, p. 188 *f.*; Chistoph Müller, *La confidentialité en arbitrage commercial international: un trompe-l'oeil?*, Bulletin ASA 2005, p. 216 *ff*, 233; Markus Wirth, *Commentaire bâlois, Internationales Privatrecht*, 3rd ed. 2013, n. 30 ad Art 189 PILA; Jolles, Stark-Traber and Canals de Cediel, *Confidentiality, International Arbitration in Switzerland*, Geinsinger and Voser (editors), 2nd ed. 2013, p. 131 *ff.*, 142). However, some authors reserve the possibility of an appeal with a view to invoking a violation of the principle of equal treatment of the parties within the meaning of Art. 190(2)(d) PILA if, due to an arbitrator's unilateral indiscretion during the proceedings, a party obtains information to its advantage in the evidentiary phase of the arbitration (*Wissensvorteile*; see Wirth, *ibid.*; Ritz, *op. cit.*, p. 189). The latter hypothesis is not to be considered in the case at hand. As to the one built up by the Appellant, which could be likened to the previous one as an *ultima ratio*, namely to claim that the Panel could have been tempted to adapt its award so that the amount awarded to the Respondent would not correspond to the amount announced in the press article, it is totally gratuitous and does not deserve any further consideration.

The Appellant's first argument is therefore unfounded.

5.
Secondly, the Appellant invokes Art. 190(2)(e) PILA, and argues that the CAS violated procedural public policy due to the same facts stated in support of the previous argument. The argument based on a violation of procedural public policy manifestly duplicates the argument on the alleged lack of impartiality and

independence of the Arbitrators because procedural public policy is only a subsidiary guarantee (ATF 138 III 270[6] at 2.3). To this extent, it shares the fate of the first argument.

6.
6.1. In its supplementary appeal brief, the Appellant argues that the CAS violated substantive public policy by ordering it to pay an amount of USD 1'500'000 to the Respondent as a contractual penalty. In its view, the Panel disregarded Art. 163(3) CO,[7] which requires the court to reduce the penalties that they deem excessive, and the case law on this issue (ATF 133 III 201 at 5.2 and references). Specifically, in the Appellant's view, as the Panel held that it was not established that the fault he committed was serious or that the breach of contract caused any damage to the Respondent, it should have waived any penalty as the judge who issued the first instance decision did, or reduce the contractual penalty to its very minimum. Instead, it set the penalty at three times the transfer fee and thus issued an award without precedent in the CAS case law, which is deeply harmful to the notion of justice and fairness.

6.2.
6.2.1. An award is contrary to substantive public policy pursuant to Art. 190(2)(e) PILA when it violates some fundamental principles of substantive law to such an extent that it is no longer consistent with the governing legal order and system of values; among such principles are in particular contractual trust, compliance with the rules of good faith, the prohibition of the abuse of rights, the prohibition of discriminatory or confiscatory measures, as well as the protection of incapable persons (ATF 132 III 389 at 2.2.1).

6.2.2. This case law applied to the circumstances of the case at hand calls for the following remarks.

First, it may be worth pointing out that the argument does not appear in the main appeal brief, even impliedly, which is somewhat surprising.

Then, it must be recalled that according to case law, Art. 163(3) CO is indeed a public law provision, namely a mandatory provision that the court must apply even if the debtor of the contractual penalty did not specifically ask for a reduction of its amount. However, that notion of public policy has nothing to do with the public policy of Art. 190(2)(e) PILA. The Federal Tribunal emphasized this a long time ago by pointing out with regard to the mandatory rules, such as Art. 163(3) CO, that it does not behoove this Court to review the arbitral award as a court of appeal would do but only to sanction a violation of the prohibition of discriminatory or confiscatory measures ordered or covered by an arbitral tribunal (judgment 4A_634/2014[8] of May 21, 2015, at 5.2.2 and the precedent quoted). The Appellant obviously disregards these principles of

[6] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/an-international-arbitral-tribunal-seating-in-switzerland-is-gen

[7] Translator's Note: CO is the French abbreviation for Swiss Code of Obligations.

[8] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/domestic-public-policy-not-pertinent-international-arbitration

case law when simply seeking to demonstrate that the Panel wrongly applied, or even applied arbitrarily, the provision drawn from the Swiss Code of Obligations.

Moreover, as the Respondent demonstrates at n. 33 *ff* of its answer, the Appellant's summary of the Panel's reasons is biased and does not reflect its true meaning. Indeed, the Appellant outlines merely part of the reasons of the Arbitrators when emphasizing two points – the alleged absence of any damage to the Respondent and the fact that the fault it committed was not the most serious possible act – which it takes out of context, whilst omitting others, such as the intentional nature of the breach of contract by the Appellant, the preventive purpose of the penalty clause, or the fact that the bargaining power of both parties was not imbalanced as both were major professional clubs.

Finally and above all, the Appellant passes over in silence the fact that both clubs defined in clause 10 of the contract their interest in its performance because they agreed that, in case of a breach of the Player's employment contract by the Appellant, the latter owed compensation up to USD 1'500'000. Yet, this is number that the Panel applied as the contractual penalty. This sheds a different light upon the Appellant's repeated assertion that the amount of the reduced contractual penalty represented three times the transfer fee.

Be this as it may, there is no sign of a violation of substantive public policy in the case at hand, within the restrictive meaning given to this concept at Art. 190(2)(e) PILA.

This being so, the appeal at hand cannot but be rejected entirely.

7.
The Appellant loses and it shall pay the costs of the federal judicial proceedings (Art. 66(1) LTF) and compensate the Respondent for the federal judicial proceedings (Art. 68(1) and (2) LTF).

Therefore, the Federal Tribunal pronounces:

1.
The appeal is rejected.

2.
The judicial costs set at CHF 12'000 shall be borne by the Appellant.

3.
The Appellant shall pay to the Respondent an amount of CHF 14'000 for the federal judicial proceedings.

4.

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

Lausanne, March 8, 2016

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

Presiding Judge:	Clerk:
Kiss (Mrs.)	Carruzzo