

4A_635/2012¹

Judgment of December 10, 2012

First Civil Law Court

Federal Judge Klett (Mrs), Presiding
 Federal Judge Rottenberg Liatowitsch (Mrs.),
 Federal Judge Kiss (Mrs),
 Clerk of the Court: Piatti

A. _____ SpA,
 Represented by Mr. Vittorio Rigo and Mr. Pekka Albert Aho,
 Appellant,

v.

B. _____,
 Respondent,

Facts:

A.

A.a On August 20, 2010 B. _____ and A. _____ SpA entered into a transfer agreement of the player C. _____ from the former to the latter for a total amount of € 2'200'000 payable in three installments. The transfer contract provides at Art. 5 that the financial arrangements are strictly confidential and cannot be disclosed to third parties without the prior consent of the parties but for a number of exceptions irrelevant to the case at hand. At the end of the football season 2010/2011 A. _____ SpA was downgraded to Second League.

On July 8, 2011 B. _____ posted on its internet site a release in which it mentioned among other things the amount agreed in the aforesaid transfer contract, the missed payment of one installment and that it had requested the Italian Football Federation to immediately suspend the registration of the aforesaid player. On August 2, 2011 A. _____ SpA assigned the 50% of C. _____ to D. _____.

After initially seizing the High Court of Justice in London B. _____ successfully resorted to the single judge of the FIFA Players Status Committee who ordered A. _____ SpA on November 21, 2011 to pay € 1'700'000 for the transfer of the aforesaid Player while rejecting the latter's claim for damages.

B.

In an award of August 21, 2012 the Court of Arbitration for Sport (CAS) upheld an appeal by A. _____ SpA in part, ordered it to pay € 1'700'000 and CHF 5'000 of costs to B. _____ while ordering B. _____ to pay damages of € 22'169.06 to A. _____ SpA. All other submissions were

¹ Translator's note: Quote as A. _____ SpA v. B. _____, 4A_635/2012. The original of the decision is in Italian. The text is available on the website of the Federal Tribunal www.bger.ch

rejected. The CAS held that A._____ SpA did not suffer any damage as a consequence of the breach of the duty of confidentiality.

C.

In a Civil law appeal of October 18, 2012 A._____ SpA seeks a stay of enforcement and the annulment of the aforesaid award with costs. It argues that the Arbitral tribunal would have decided "*infra petita*" and violated its right to be heard.

An exchange of briefs was not ordered.

Reasons:

1.

According to Art. 54 (1) LTF² the proceedings in the Federal Tribunal are conducted in one of the official languages³, as a rule in the language of the decision under appeal. When it is in another language (here English), the Federal Tribunal resorts to the official language chosen by the parties. The Civil law appeal was submitted in Italian and the judgment will consequently be issued in this language.

2.

An international arbitral award may be appealed to the Federal Tribunal by way of a Civil law appeal pursuant to the requirements of Art. 190-192 PILA⁴ (Art. 77 (1) (a) LTF).

The seat of the CAS is in Lausanne and neither party had its headquarters in Switzerland at the time the arbitration clause was entered into. Hence the provisions of chapter 12 PILA are applicable (Art. 21 (1) (e) and 176 (e) PILA combined). The award is final and may consequently be appealed on the grounds exhaustively listed at Art. 190 (2) PILA.

The Appellant participated in the proceedings in the CAS and is particularly affected by the award under appeal, which rejected its submissions that the amount of € 1'700'000 due to its opponent should be set off against its claim for damages. It consequently has a personal and present interest worthy of protection in seeking the annulment of the arbitral award, which it considers issued in violation of the guarantees contained at Art. 190 (2) PILA and accordingly it has standing to submit the appeal at hand (Art. 76 (1) LTF).

3.

The Federal Tribunal issues its judgment on the basis of the facts found by the arbitral tribunal (Art. 105 (1) LTF). This Court may not rectify or supplement *ex officio* the findings of the arbitrators even when the facts were established in a blatantly inaccurate manner or in violation of the law (Art. 77 (2) LTF

² Translator's note: LTF is the Italian and French abbreviation for 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.

ruling out the applicability of Art. 105 (2) LTF). Art. 77 (3) LTF imposes upon the parties a duty to submit reasons corresponding to the one embodied at Art. 106 (2) LTF (DTF⁵ 134 III 186 at 5).

4.

4.1

The Appellant argues that the Arbitral tribunal decided *infra petita* because it would not have addressed the submissions that interest should be awarded at 5%, that the amount owed by the Respondent should be set off against the one contained in the contract for the transfer of the Player and that the duty of confidentiality had been breached. It adds that in any event the CAS would have committed a formal denial of justice by such omissions.

4.2

According to Art. 190 (2) (c) PILA an arbitral award may be appealed if the arbitral tribunal decided issues in dispute which were not submitted to it or failed to adjudicate some specific submissions. The omission contemplated by the second hypothesis concerns a case of formal denial of justice. It refers to a situation in which the award is incomplete because the arbitral tribunal did not address some of the submissions made to it. When it issues a decision in which it rejects any – other – submission by the parties, this grievance is excluded (DTF 128 III 234 at 4a).

In the case at hand the Arbitral tribunal specifically rejected all other claims by the Parties (“all other claims are dismissed”⁶) at § 7 of the operative part of the award. Neither does it help the Appellant to argue that the aforesaid case law would not apply to cases, such as the one at hand, in which it would be “obvious from reading the award that the Arbitral tribunal did not address the issue”. In such a submission the Appellant appears to forget that in the framework of international arbitral jurisdiction there is no duty to issue reasons for the decision (DTF 128 III 234 at 4b), which makes it irrelevant that the way the allegedly ignored request was handled would not appear from the reasons of the award. The argument is consequently unfounded.

5.

5.1

The Appellant then argues a violation of the right to be heard (Art. 190 (2) (d) PILA) because the Arbitral tribunal would have ignored its principal argument concerning the negative consequences for its assets (loss of value of the player and increase of the costs to obtain credit from banks) resulting from the release in which its opponent presented as a possibility that the aforesaid Player’s registration would be suspended.

5.2

The right to be heard in contradictory proceedings within the meaning of Art. 190 (2) (d) PILA does not require an arbitral award to contain reasons (DTF 134 III 186 at 6.1 and references). However it imposes upon the arbitrators a minimal duty to review and handle the pertinent issues (DTF 133 III 235 at 5.2 and references). This duty is breached when due to oversight or by mistake the arbitral tribunal does not take into consideration some statements, arguments, evidence and offers of evidence submitted by the parties and relevant to the decision. However the arbitrators are not obliged to discuss

⁵ Translator’s note: DTF is the Italian abbreviation equivalent to ATF or BGE and it means *Decreto del Tribunale Federale*.

⁶ Translator’s note: In English in the original text.

all arguments raised by the parties, so they cannot be held to have violated the right to be heard for failing to reject – at least implicitly – an argument deprived of any relevance to the decision (DTF 133 III 235 at 5.2).

5.3

It is appropriate to point out above all in the case at hand that the award specifically mentions that the Appellant claimed that the Respondent's release had a negative impact on its ability to negotiate, whether with other teams potentially interested in acquiring the Player or as to the obtention of lines of credit. Addressing then the attempts to sell the aforesaid Player, the Arbitral tribunal firstly stated that the Appellant relied on the statement of a witness who claimed that after the aforesaid release appeared the interest shown by other teams in the acquisition simply disappeared, but did not produce any documents confirming this statement and failed to quantify any alleged consequent damage. Moreover it added that in any event the Appellant did not lose any money in the transaction as it succeeded in selling the Player with a significant profit. The Arbitral tribunal also pointed out that the banks and the teams interested in acquiring the aforesaid Player knew that the Appellant – as a consequence of its being downgraded into Second League – would have a lower income (particularly due to lower television rights and to reduced attractivity for the sponsors compared to a team in First League) and would have had to comply with the salary cap applying to Second League club and to sell its best players.

In other words the Arbitral tribunal held for the aforesaid reasons that the release quoted did not impact the Appellant's situation, which did not even sustain any damage for selling the aforesaid Player: in such circumstances the issue as to whether the threat of a suspension of the latter's registration could – in abstract – entail a loss of his value or "harm to the commercial capacity" of the Appellant appears completely irrelevant. Admittedly the Appellant claims to have sustained damage from the sale of the first 50% of the player and claims to have produced documents demonstrating this. However in doing so it criticizes in an inadmissible manner the facts on which the award under appeal is based. Even the fact that the award specifically states that "difficulties surrounding the Player's sale"⁷ were mentioned in cross-examination rules out a failure to take into consideration the Appellant's argument. Finally it must be pointed out that the criticism made to the award under appeal as to the failure to quantify the alleged damage appears unfounded, as the Appellant itself acknowledges in this appeal "that it always admitted to need the Arbitral tribunal to determine the precise *quantum* of the damage and therefore asks the Arbitral tribunal to determine the amount equitably on the basis of articles 42 and 99 of the Swiss Code of Obligations".

6.

The foregoing shows that the appeal is unfounded and must be rejected. The costs shall follow (Art. 66 (1) LTF) but there is no reason to award costs to the Respondent, which has not been invited to state its position on the appeal and underwent no expenses for the proceedings in the Federal Tribunal. The rejection of the appeal renders moot the request for a stay of enforcement.

Therefore the Federal Tribunal pronounces:

⁷ Translator's note: In English in the original text.

1.
The appeal is rejected.
2.
The judicial costs set at CHF 17'000 shall be borne by the Appellant.
3.
Notification to the Parties and to the Court of Arbitration for Sport (CAS).

Lausanne, December 10, 2012.

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

The Presiding Judge:

The Clerk:

Klett (Mrs.)

Piatti

Keywords: *Violation of due process (right to be heard), award infra or ultra petita.*

Title: *No award ultra petita when all further claims are rejected.*

Stars: *