4A_272/2019[1]

Judgment of September 4, 2019

First Civil Law Court

Federal Judge Kiss, Presiding
Clerk: Mr. Carruzzo.

Parties to the procedure:

A._____,
represented by Mr. Claude Ramoni,
Appellant,

v.

B._____, represented by Mr. Josep Francesco Vandellos Alamilla,
Respondent,

Fédération Internationale de Football Association (FIFA), interested party.

Facts:

A.
A.a. A._____ (hereinafter: the club) is a Kazakh football club, member of the Kazakh Football Federation, which is affiliated with the Federation Internationale de Football Association (FIFA).

B._____ (hereinafter: the Player or the player) is a professional football player of Ghanaian nationality.

By employment contract of January 16, 2016, the club hired the Player until November 30, 2016. The club subsequently terminated the contract of employment, which was not accepted by the Player.

A.b. On 22 July 2016, the Player filed a claim with the FIFA Dispute Resolution Chamber (DRC), filing various claims based on the aforementioned contract.

[1] Translator's Note: Quote as A._____ v. B._____, 4A_272/2019.
The decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

By decision of September 21, 2017, of which only the operative part was notified to the parties on September 27, 2017, the DRC ordered the club to pay the player USD 18'000, with interest, for salary and USD 166'000, plus interest, as compensation for breach of contract without just cause.

On October 11, 2017, the club requested the grounds of the decision. On October 23, 2017, FIFA refused to grant this request, stating in particular the following:

> [...] we kindly ask you to take note that in accordance with art. 15 para. 1 of the Rules Governing the Procedures of the Player's Status Committee and the Dispute Resolution Chamber as well as the note relating to the findings of the decision concerned, the motivated decision will be communicated to the parties, if a request for the grounds of the decision is received by the FIFA general secretariat in writing within ten days as from receipt of the findings of the decision. in the decision becoming final and binding and the parties being deemed to have waived their rights to file an appeal.
>
> In view of the above, we would like to emphasize that the findings of the relevant decision passed on September 21, 2017 were received by you on October 3, 2017, yet the request to receive the grounds of said decision was received by FIFA on October 19, 2017 only, *i.e*. sixteen days after the receipt of the findings of the decision by you.
>
> As a result, and considering all the above, particularly that the grounds of the decision have not been requested within the stipulated ten day time limit, we regret to inform you that we are not in a position to provide you with the motivated decision and that, consequently, the decision has become final and binding.[2]

The club renewed its request for the grounds of the decision, which was rejected on November 13, 2017, by FIFA for identical reasons to those mentioned in its correspondence of October 23, 2017.

A.c. On December 15, 2017, the club sent to the Court of Arbitration for Sport (CAS) a statement of appeal, directed exclusively against the player, in order to force FIFA to communicate to the parties the grounds of the decision rendered by the DRC .

On August 7, 2018, the CAS issued its reasoned award, the operative part of which reads as follows:

> […] 3. The appeal filed by A._____ on 15 December 2017 with respect to the decision taken by the Dispute Resolution Chamber of the Fédération Internationale de Football Association on 21 September 2017 is dismissed. […] [3]

In short, the Sole Arbitrator considered that the Player lacked standing to be sued, since the choice not to communicate to the parties the reasoned decision belonged exclusively to FIFA. The Appellant should therefore have directed its appeal against FIFA. The CAS nevertheless noted, under n. 118, that FIFA's refusal to state the reasons for the decision was unjustified.

A.d. By letter sent on August 9, 2018 to FIFA, the club, referring to n.118 of the CAS Award, again requested the reasons for the decision rendered by the DRC. FIFA forwarded to the parties the reasoned

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[2] Translator's Note: In English in the original text.
[3] Translator's Note: In English in the original text.

decision rendered by the DRC as well as a copy of the CAS directives concerning the appeal procedure. The decision mentioned in the end that it was subject to appeal to the CAS within 21 days.

B.
On September 8, 2018, the Club appealed to the CAS against the reasoned decision rendered by the DRC.

In an award rendered on April 15, 2019, the CAS Panel declared the appeal inadmissible.

C.
On June 4, 2019, the Club (hereinafter: the Appellant) filed a civil law appeal to the Federal Tribunal. Alleging a violation of Art. 190(2)(b) PILA, it requested the Federal Tribunal to set aside the award of April 15, 2019.

The Player (hereafter: the Respondent) and the CAS, which supplied the case file, were not asked to file a response.

Reasons:

1.
Pursuant to Art. 77(3) BGG,[4] the Federal Tribunal reviews only the grievances raised and reasoned in the Appeal Brief; this corresponds to the duty to provide reasons under Art. 106(2) BGG for the violation of constitutional rights and of cantonal and intercantonal law (BGE 134 III 186[5] at 5). Like the foregoing, this codifies the principle that grievances must be reasoned (*Rügeprinzip*). The appeal in international arbitration can only be brought for one of the reasons exhaustively listed in Art. 190(2) PILA.[6] The Appellant must therefore invoke one of the grievances set out exhaustively and provide precise arguments as to what constitutes a violation in the award under appeal (Judgment 4A_378/2015 of September 22, 2015 at 3.1).

2.2.
Criticism of an appellatory nature is not admissible (BGE 134 III 565[7] at 3.1, p.567; 119 II 380 at 3b, p. 382).

2.3. A complete appeal brief must be reasoned and filed within the time limit for appeal (Art. 42(I) BGG). If there is a second exchange of submissions, the appellant may not use its reply brief to supplement or improve its appeal brief (BGE 132 I 42 at 3.3.4). The reply brief must only be used to make points

[4] Translator's Note: BGG is the abbreviation of the Swiss Federal Law of the Federal Tribunal.
[5] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties
[6] Translator's Note: PILA is the most frequently used English abbreviation for the Federal Statute on International Private Law of December 18, 1987.
[7] 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

connected to the arguments in the briefs of another participant in the proceedings (see BGE 135 I 19 at 2.2).

2.
In the present case, the CAS considered that the FIFA decision not to issue the grounds had become final and enforceable. It is therefore wrong that FIFA had chosen to communicate the reasons for the decision dated August 31, 2018, to the parties. Indeed, the Sole Arbitrator's consideration that the refusal to transmit the reasoned decision to the parties was unjustified (Award of August 7, 2018, n.108) could not be likened to an order made to FIFA to send the reasons, all the more since the latter was not a party to the first CAS proceedings. The solution would have been different if the Appellant had directed its first appeal against FIFA and if the Arbitrator had ordered FIFA to notify the reasoned decision to the parties. Not having done so, the Club had to bear the consequences of its procedural choices. The communication of the reasons for the decision to the parties, made more than 11 months after it was rendered, could not revive the time limit for appeal to the CAS. Admitting the contrary would jeopardize the legal certainty which requires compliance with the rules concerning the time limits for appeal. Consequently, FIFA could not modify the time limits for appeal to the detriment of one of the parties. This would, in fact, prove to be particularly prejudicial to the Respondent, who could legitimately consider that the refusal to notify the reasons for the decision had become final and enforceable. Insofar as the Appellant had failed to obtain a reasoned decision, the parties were deemed to have excluded their right to appeal against the decision taken by the DRC, in accordance with Art. 15(1) of the Regulations of the Players' Status Committee and the Dispute Resolution Chamber.

3.
The Appellant bases his appeal exclusively on the violation of Art. 190(2)(b) PILA. It accuses the Panel of wrongly deciding that it lacked jurisdiction.

3.1. The case at issue, however, has nothing to do with the question of the jurisdiction of the CAS. By refusing to deal with the appeal, the Hearing Panel did not declare itself incompetent *rationae materiae* or *ratione personae*: it simply applied a procedural rule concerning the time limit for appeal. In reality, the present case raises the problem of *res judicata*, which the Appellant itself recognizes since it notes that *res judicata* is the cardinal and decisive principle invoked by the Panel in the inadmissibility decision (appeal, n. 33). However, according to the settled case law of the Federal Tribunal, the problem of *res judicata* is part of procedural public policy within the meaning of art. 190(2)(e) PILA (ATF 141 III 229[8] at 3.2.1; 140 III 278[9] at 3.1; 136 III 345[10] at 2.1; 128 III 191 at 4a; judgments 4A_247/2017 of April 18, 2018 at 4.1.1; 4A_374/2014[11] of February 26, 2015 at 4.2.1). Therefore, the present appeal does not comply with the strict motivation requirements mentioned above, since the Appellant wrongly alleges the violation

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

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

[10] 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-

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

of Art. 190(2)(b) PILA. It is not for the Federal Tribunal to seek, in the Award under appeal, the legal arguments which could justify the admission of the grievance – incidentally, not raised – based on Art. 190(2)(e) PILA and that the Appellant did not present to it, contrary to the requirements of Art. 77(3) LTF.

3.2. For the rest, it should be noted that the Appellant limits its criticisms to the interpretation of the regulations of a sports association, which has nothing to do with the jurisdiction of the CAS. Moreover, the question of the application of regulatory standards enacted by a sports organization under private law does not, as such, constitute a remedy within the meaning of Art. 190(2) PILA.

3.3. Finally, the Appellant is on the wrong track when it claims that the issuance of the reasoned decision by FIFA constituted an offer to arbitrate that it accepted, by conclusive acts, by filing an appeal to the CAS directed against FIFA and the Respondent. One should not forget that this alleged arbitration agreement does not bind one of the parties to the employment contract, that is to say the Respondent, a claimant before the DRC.

4.
The appeal is therefore manifestly inadmissible and must be dismissed in application of the simplified procedure provided for in Art. 108(1)(a) LTF.

The unsuccessful Appellant will have to pay the judicial costs of the federal proceedings (Art. 66(1) LTF). The Respondent, who was not asked to reply, is not entitled to a compensation (Art. 68(1) LTF).

For these reasons, the President of the First Civil Law Court pronounces:

1.
The Appeal is inadmissible.

2.
The judicial costs of CHF 2'000 shall be borne by the Appellant.

3.
This judgment will be notified to the parties' representatives, the CAS and FIFA.

Lausanne, September 4, 2019

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

The President:	Clerk of the Court:
Kiss	Carruzzo