4A_4/2010[1]

Judgement of March 10, 2010

First Civil Law Court

Federal Judge KLETT (Mrs), Presiding,
Federal Judge ROTTENBERG LIATOWITSCH (Mrs),
Federal Judge KOLLY,
Clerk of the Court: GIANINAZZI.

A._____,
Appellant,
Represented by Mr Rocco TAMINELLI

v.

B._____,
Respondent,
Represented by Mr Jaime LLOPIS

Facts:

A.

A.a Pursuant to a June 14, 2005 contract the Brazilian football player C._____ was transferred from B._____ a football club in Uruguay, to A._____ a football club in Mexico. The Parties agreed a transfer fee of USD 945'000.- payable in three instalments on July 4th, 2005, on January 4th, 2006 and on June 4th, 2006. They also agreed that should the Player be transferred from A._____ to another club during the contract, B._____ would be entitled to 20 % of the amount paid by the buyer. A._____ paid the first instalment of USD 315'000.-.

[1] Translator's note: Quote as A._____ *v.* B. _____, 4A_4/2010. The original of the decision is in Italian. The text is available on the website of the Federal Tribunal www.bger.ch

A.b As the Brazilian football player apparently did not adapt to life in Mexico, the two clubs discussed a possible termination of the transfer and a possible return of C._____ to the Uruguayan club.

On October 26, 2005 B._____ wrote to A._____ to express its agreement in principle with the verbal proposal to terminate the transfer contract. Yet the Uruguayan club subjected its agreement to the following conditions: payment by the Mexican club of an amount of USD 150'000.-; reimbursement, still by the Mexican club, of the legal costs related to the early termination of the contract of another player, on loan by A._____; acceptance by the Player of the termination of the relationship with A._____ and of the conclusion of a new employment contract with B._____ with the Player's transfer to the Uruguayan club.

In a letter of November 2, 2005 A._____ refused to pay the amount of USD 150'000.-, claiming that the amount already paid of USD 315'000.- was sufficient compensation for the Uruguayan club. However the Mexican club would agree to take back the Player on loan to B._____, whilst not taking a position as to a possible sharing of the costs of the termination of the contract of that Player. Finally it indicated that the Brazilian player was interested in returning to B._____, so that the transfer would take place at the end of the season.

On November 27, 2005 C._____ and A._____ mutually agreed to terminate the employment contract biding them.

Taking notice that the October 26, 2005 proposal had not been accepted, B._____, in a fax of January 2, 2006, claimed from A._____ the payment of the balance of the transfer fee agreed on June 24, 2005, namely USD 630'000.-. The Mexican club did not react to that request.

A.c On January 11, 2006, the Uruguayan Football Federation, acting on behalf of B._____, asked the Mexican Football Federation to issue the International Transfer

Certificate (ITC) concerning C._____. The certificate was issued on February 16, 2006, with the wording "on loan until December 31st, 2006".

On February 18, 2006, the Brazilian player signed a new employment contract with B._____.

On July 26, 2007 C._____ was transferred to D._____, an Argentinian football club.

A.d On June 6, 2006 B._____ filed a claim against A._____ in front of the Fédération Internationale de Football Association (FIFA) with a view to obtaining the payment of USD 630'000.- with interest, equal to the balance of the transfer fee agreed on June 24, 2005. The Mexican club opposed the request.

In a decision of September 1st, 2008, the single judge of the Players' Status Committee (hereafter: the single judge) rejected the request. Substantially, the single judge held that with its letter of November 2, 2005 A._____ had accepted the October 26, 2005 offer by B._____ to terminate the transfer contract under certain conditions. Yet in the same letter the Mexican club made a counterproposal to the extent that it did not intend to pay the additional amount of USD 150'000.- asked by the Uruguayan club. According to the single judge, that counterproposal was tacitly accepted by B._____, evidence of that being the fact that the club, through its Federation, subsequently asked the Mexican Football Federation to issue the ITC concerning the Brazilian player and hired him again as in the meantime he had been freed from the contract with A._____.

In the light of such circumstances, the single judge went on, the wording on the ITC "on loan until December 31st, 2006" can only be the result of an administrative error. Indeed there is no indication that there ever were any discussions with a view to a hypothetical loan of the Brazilian player by A._____ to B._____.

In synthesis, in the single judge's view, the final transfer of the Player from the Uruguayan club to the Mexican club was converted by the parties, by mutual agreement, into a loan until December 31st, 2005. Hence the rejection of B._____'s request for the payment of the last two instalments of the transfer fee agreed upon in the June 24, 2005 contract.

B.
In an award of November 6, 2009, the Court of Arbitration for Sport upheld the appeal by B._____, annulled the decision of the single judge and ordered A._____ to pay USD 630'000.- with interest to the Uruguayan club.

On the basis of the FIFA Regulations and subsidiarily on the basis of Swiss law, the CAS held in substance that B._____ had subjected its agreement to the termination of the transfer contract of the Brazilian player to a condition – the payment of USD 150'000.- in addition to the amount of USD 315'000.- already paid by the Mexican club – which was not accepted tacitly by A._____. In fact, the CAS ruled out that in the case at hand A._____'s silence could be qualified as tacit acceptance within the meaning of Art. 6 CO[2] as it was rather the general principle of Swiss legal writing that should be applied, according to which "he who says nothing does not consent[3]" (François DESSEMONTET, in Commentaire romand, Code des Obligations I, 2003, p. 41, n° 1 ad Art. 6 CO). Neither could it be claimed that acceptance by concluding acts would have taken place. In the award under review the CAS set forth the reasons for which the circumstances relied upon by A._____ - such as the termination of the employment contract binding the Mexican club to the Brazilian player, the request for an ITC made by the Uruguayan Association, the conclusion of a new contract between B._____ and the aforesaid Player, the latter's subsequent transfer to an Argentinian club – did not demonstrate that as a consequence of a new contract (Art. 116 CO) the obligations undertaken in the transfer contract of the Brazilian player signed on June 24, 2005 would be extinct. Hence A._____ was to be ordered to comply with such obligations, specifically with the payment of the remaining instalments of the transfer fee.

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[2] Translator's note: CO is the Italian and French abbreviation for the Swiss Code of Obligations.
[3] Translator's note: In French in the original text.

C.

On June 4, 2010 A._____ filed a Civil law appeal with the Federal Tribunal with a view to obtaining the annulment of the CAS award.

Neither B._____ nor the CAS were asked to answer the appeal.

Reasons:

1.

According to Art. 54(1) LTF[4] the decision of the Federal Tribunal is written in an official language[5], as a rule in the language of the decision under appeal. Should that decision be in another language, the Federal Tribunal resorts to the official language chosen by the parties. In this case they chose Spanish in front of the CAS, whilst the Civil law appeal is in Italian. According to its practice in such a case, the Federal Tribunal resorts to the language of the appeal and issues its decision in Italian.

2.

In the field of international arbitration, a Civil law appeal against arbitral awards is allowed pursuant to the requirements of Art. 190-192 PILA[6] (Art. 77 (1) LTF). The admissibility of the appeal at hand raises no issues, whether with regard to the nature of the decision under appeal or as to the standing to appeal, the time limit to do so, the submissions of the appeal or as to the reasons as well. There is accordingly no obstacle to a review of the merits.

3.

In a sole grievance based on Art. 190 (2) (e) PILA, the Appellant argues that the CAS issued an award inconsistent with public policy; he claims in particular that the rule of *pacta sunt servanda* and the rules of good faith were violated.

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[4] 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.

[5] Translator's note: The official languages of Switzerland are German, French and Italian.

[6] 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.

3.1 The review of the merits of an international arbitral award by the Federal Tribunal is limited to the issue of its compatibility with public policy (DTF[7] 121 III 331 at 3a).

A decision is incompatible with public policy when both its reasons and its results disregard the essential and broadly recognised values which, according to prevailing concepts in Switzerland, should be the basis of any legal order (DTF 132 III 389 at 2.2.3 p. 395). The concept of public policy is more restrictive than that of arbitrariness (DTF quoted at 2.2.2 p. 393). In order to find that a decision is incompatible with public policy a mistaken assessment of the evidence is not sufficient, neither an obviously erroneous finding of facts or a clear violation of an applicable legal provision (decision 4P.253/2004 of April 8, 2005 at 3.1). A decision is contrary to material public policy when it violates some fundamental principles of the law applicable to the merits so that it is no longer consistent with the legal order and the determining system of values; among the principles within public policy are the contractual trust (*pacta sunt servanda*) and compliance with the rules of good faith (4P.71/2002 of October 22, 2002 at 3.2 with references).

The principle of *pacta sunt servanda*, within the restrictive meaning it has in the case law relative to Art. 190 (2) (e) PILA is violated only when the arbitrator refuses to apply a contractual clause after finding that it is binding or, conversely, when he orders the party to abide by a clause which he found inapplicable. In other words, the arbitral tribunal must have applied or refused to apply a contractual provision in a way that contradicts the results of its own interpretation as to the existence and/or the contents of the legal act in dispute. However neither the process of interpreting the contractual agreements nor its results fall within the scope of application of the principle of contractual trust – and, accordingly, within Art. 190 (2) (e) PILA – so that they escape the review of the Federal Tribunal. It has also been stated several times that almost all legal issues relating to a breach of contract are outside the scope of protection of the principle of *pacta sunt servanda* (judgment 4A_370/2007 of February 21, 2008 at 5.5).

[7] Translator's note: DTF is the Italian abbreviation indicating a decision of the Federal Tribunal, the equivalent of ATF in French or BGE in German.

The rules of good faith must be understood in the same meaning they have in case law relating to Art. 2 CC[8] (decision 4A_600/2008 of February 20, 2009 at 4.1).

3.2 In this case, the Appellant essentially relies on the principle of good faith contained at Art. 6 CO. He argues that the CAS summarily ruled out the application of that provision, whilst quoting it in the decision under appeal, without reviewing the conditions for its application. According to the Appellant, such a review would necessarily have led the CAS to conclude that the rules of good faith required the Respondent to refuse its offer of November 2, 2005 explicitly if that was its intent. Having failed to do so the CAS would have upheld the abuse of rights committed by the Uruguayan club, which made it possible for the latter not only to demand payment of the total transfer fee but also to hire the Brazilian Player again without spending anything.

Yet, whilst claiming the opposite, the Appellant does nothing else than criticize the application of a legal provision, in this case Art. 6 CO. As already explained, within the framework of an appeal against an arbitral award such a grievance must fail. In any event it appears from the award under review that the CAS dealt with all the arguments submitted by the parties in this respect; the Arbitral Tribunal merely drew other legal conclusions from the circumstances alleged by the Appellant than those which it argued and the single judge upheld.

This being said, considering that the CAS– on the basis of a legal reasoning which escapes review by the Federal Tribunal – held that the Parties remained bound by the initial contract entered into on June 27, 2005, one does not see how it could have violated the rules of good faith by allowing one of the parties to the contract to make claims against the other on the basis of a contract in force.

To the extent that it is capable of appeal, the grievance therefore proves to be unfounded.

[8] Translator's note: CC is the Italian and French abbreviation for the Swiss Civil Code.

3.3 The same applies with regard to the alleged violation of the principle of *pacta sunt servanda*. Indeed, for the purposes of deciding the issues at hand, the CAS, holding that the Respondent could still legitimately make claims against the Appellant on the basis of the transfer contract, ordered the debtor to comply with the contractual obligations. By doing so it issued a decision consistent with its interpretation, without disregarding in any way the principle of contractual trust.

4.
In conclusion, the appeal must be rejected.

In such an outcome the judicial costs follow (Art. 66 (1) LTF). As the Respondent was not asked to file an answer no compensation will be allowed for the judicial costs of the federal proceedings.

Therefore the Federal Tribunal pronounces:

1. The appeal is rejected.

2. The judicial costs set at CHF 8'500.- shall be borne by the Appellant.

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

Lausanne, March 10, 2010

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

The Presiding Judge (Mrs): The Clerk (Mrs):

KLETT GIANINAZZI