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FRENCH REPUBLIC
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PARIS COURT OF APPEAL
Division 5 - Chamber 16

International Commercial Chamber

JUDGMENT OF JUNE 8, 2021

APPEAL TO SET ASIDE AN ARBITRATION AWARD
(No. /2021, 8 pages)

General Directory Entry Number: **RG no. 19/02245 - Portalis no. 35L7-V-B7D-B7LMV**

Decision referred to the Court:

Award rendered on [...] in PARIS by the Arbitration Chamber for Sport (ACS) of the French National Olympic and Sports Committee by the arbitral tribunal composed of Mr. [P.J], president and Messrs. [C.D] and [F.L], co-arbitrators, under number XXX.

CLAIMANT TO THE APPEAL:
SA SPORTS MANAGEMENT INTERNATIONAL

Company under Swiss law,

With its registered office at: 15 rue du Jeu-de-l'Arc, 1207 Geneva (SWITZERLAND) represented by its legal representatives,

Represented by F.I., a lawyer at the Bar Council of PARIS with litigator A.B., a lawyer at the Bar Council of Paris, litigator F.I.

DEFENDANTS TO THE APPEAL:

[Mr. X]

Born on [...] in XXX

Domiciled: XXX

Occupation: professional football player

Represented by P. M, a lawyer at the Bar Council of Paris,

COMPOSITION OF THE COURT:

Pursuant to the provisions of articles 805 and 907 of the Code of Civil Procedure, the case was debated on March 30, 2021, in public hearing, the lawyers not having opposed it before Mr. F. A, President, and Ms. F. S., Judge in charge of the report.

These judges gave an account of the pleadings in the deliberation of the Court, which is composed of:

Mr. F.A., President

Ms. F.S., Judge

Ms. L. A., Judge

The Court Clerk at the hearing: Ms. C. G.

JUDGEMENT:

- ADVERSARIAL
- By making the judgement available at the Clerk's Office of the Court, the parties having been informed in advance under the conditions provided for in the second paragraph of Article 450 of the Code of Civil Procedure.
- Signed by F.A., President and by I.V., Court Clerk to whom the original was handed by the signing magistrate.

I. FACTS AND PROCEDURE

1. [Mr. X] is a professional football player, of Ivorian nationality, who was employed by RC Lens, Toulouse Football Club (TFC), Paris Saint Germain Football Club and Tottenham Hotspur Club.
2. He signed a sports agent contract on June 15, 2013 with SC Sport Management International LTD, a company incorporated under English law, represented by Mr. [S. C], and then on November 25, 2015, with Sport Management International SA (hereinafter "SMI"), a company under Swiss law represented by Mr. C., that holds a sports agent license from the French Football Federation, with each of the contracts being signed for a period of two years.
3. Both contracts contained an arbitration clause for the benefit of Arbitration Chamber for Sport (hereinafter referred to as "ACS"¹) and referred to French law.
4. Difficulties arising between the parties during 2016 and early 2017, [Mr. X] has, by registered letter with acknowledgement of receipt dated August 19, 2017, terminated the sports agent contract signed with the company SMI.

¹ Chambre Arbitrale du Sport (« CAS »)

5. On August 30, 2017, [Mr. X] signed an employment contract with the English club Tottenham Hotspur Football Club.

6. By registered letter with acknowledgement of receipt dated September 13, 2017, the company SMI gave notice to [Mr X] to pay him the commission provided for in the sports agent contract.

7. On February 12, 2018, the company SMI filed a request for arbitration with the Secretariat of the Arbitration Chamber for Sport.

8. By decision of January 21, 2019, the arbitration panel of the ACS, composed of Mr. [P. J], as chairman, and Messrs. [C.D] and [F.L] as co-arbitrators, has :

- Dismissed all of the company SMI's claims except for the one invoking damage to reputation;
- Ordered [Mr. X] to pay the company SMI the sum of 30,000 euros for this loss;
- Dismissed [Mr. X]'s counterclaim;
- Declared that the costs of the proceedings shall be shared equally;
- Dismissed the respective claims based on Article 700 of the Code of Civil Procedure.

14. By a document dated February 18, 2019, the company SMI brought an action for annulment of this award.

II- CLAIMS OF THE PARTIES

15. Pursuant to its final submissions served on [...], the company Sport Management International (SMI) has requested the Court to:

Pursuant to article 6 of the ECHR

Pursuant to articles 538, 1498, 1491, and 1493 and also articles 1518, 1519, and 1520 of the Code of Civil Procedure,

TO JUDGE the company SMI's requests, claims and conclusions as admissible and to declare it well founded,

Accordingly:

TO DECLARE the action for annulment brought by the company SMI admissible,

TO DISMISS [Mr. X] of all his requests, claims and conclusions,

TO ANNUL the arbitration award declared by the Arbitration Chamber of Sport (ACS) on January 21, 2019

Ruling anew:

TO JUDGE that [Mr. X] has breached his contractual obligations,

Accordingly:

TO ORDER [Mr. X] to pay the company SMI a sum equivalent to 10% of all his gross annual fixed salary for the entire duration of the employment contract signed with Tottenham, and a possible signing bonus, by way of damages as compensation for his economic loss,

TO ORDER [Mr. X] to pay the company SMI the sum of 300,000 euros as compensation for the reputational damage,

TO ORDER [Mr. X] to pay the company SMI the sum of 150,000 euros as compensation for his moral damage,

TO DISMISS all of [Mr. X]'s claims and submissions.

In any case:

TO ORDER [Mr. X] to pay the company SMI the sum of 30,000 euros under Article 700 of the Code of Civil Procedure,

TO ORDER [Mr. X] to pay all the costs.

16. In his final submissions served on [...], [Mr. X] has requested the Court to:

Pursuant to Articles 1504 et seq. and 1518 et seq. of the Code of Civil Procedure on International Arbitration,

Pursuant to Article 1492 on Domestic Arbitration,

Pursuant to the Rules of the ACS,

Pursuant to the provisions of Articles L.222-7 et seq. of the Sporting Code,

I - *In limine litis*, after having considered that the dispute concerns an international arbitration: Declare inadmissible in bringing the action for annulment based on the provisions of Articles 1492 et seq. Articles 1492 et seq. of the Code of Civil Procedure relating to domestic arbitration;

Declare the application to set aside the award inadmissible since the company SMI has waived to challenge the impartial and independent nature of the arbitration panel in the proceedings before the Arbitration Chamber of Sport;

II - Primarily:

Reject the application to set aside the arbitral award made by the ACS;

III - Alternatively, in the event that the Court annuls the arbitral award made by the ACS on December 7, 2018 (sic):

Declare inadmissible the request of the company SMI inviting the Court of Appeal to rule again on the merits of the dispute since it relates to an international arbitration.

In any event, dismiss all of the company SMI's claims and demands.

III - In any event:

Order the company SMI to pay [Mr. X] the sum of €30,000 pursuant to Article 700 of the Code of Civil Procedure;

Order the company SMI to pay all the costs of the present proceedings.

17. The proceedings were closed on March 30, 2021.

18. The Court refers, for a complete statement of the facts, claims and pleas of the parties, to the aforementioned pleadings, pursuant to the provisions of article 455 of the Code of Civil Procedure.

III- GROUNDS OF THE DECISION

On the admissibility of the action;

19. [Mr. X] claims that the appeal based on Article 1492, 2° of the Code of Civil Procedure is inadmissible because of the international nature of the arbitration, due to the foreign elements concerning him, including his Ivorian nationality and his domicile in England, as well as the company SMI, which is a company under Swiss law with a registered office in Switzerland. He has argued that, as a result, the contract that the company SMI sought to enforce was intended to result in a financial flow to Switzerland regardless of [Mr X] 's place of residence.

20. **The company SMI** disputes the international nature of the arbitration. It argues that nationality and place of residence of [Mr. X] are irrelevant to the determining the international character of the arbitration proceedings, as well as the signing of a contract between him and the English club TOTTENHAM. It states that no cross-border economic transfer has been made in the case, so that the interests of international trade are not at stake.

21. It adds that, in any event, the action for annulment is available both in domestic and international arbitration and that the plea in law invoked in the present case, alleging irregularity in the constitution of the arbitral tribunal, constitutes a ground for setting aside the arbitral award, whether the award was made in an international or a domestic arbitration process.

Thereupon,

22. According to Article 1504 of the Code of Civil Procedure, "arbitration is international if it treats the interests of international trade".

23. It follows from this exclusively economic definition that arbitration is of an international character when the dispute submitted to the arbitrator concerns a transaction which does not economically take place in a single State, regardless of the status or nationality of the parties, the law applicable to the substance of the dispute or to the procedure, and the seat of the arbitral tribunal. This characterization does not depend on the will of the parties.

24. In the present case, the economic transaction which gave rise to the dispute was formalised by the sports agent contract signed between [Mr. X] and the company SMI on November 25, 2015, the purpose of which was for the agent, in consideration of commissions on the player's gross salary, to negotiate with a club all the provisions relating to an employment contract for a professional football player approved by the Professional Football League, with the agent's contract itself to be duly filed with the French Football Federation, this condition being decisive for the commitment of the parties, the player having been hired successively by Toulouse Football Club on January 26, 2012, renewed on June 28, 2013, and then by PSG on July 23, 2014.

25. Notwithstanding the foreign nationality of the parties, which has no effect on the internationality of the dispute, it is clear from the evidence presented in the proceedings that the dispute arose from

the termination of the contract by [Mr. X] while he was a PSG player, the early termination of the contract as well as its wrongful nature constituting the object of the dispute, giving rise to a claim for compensation from the company SMI for financial loss linked to the loss of commissions and damage to its image with regard to supporters and its reputation with regard to the FFF, as **a consequence of** the break-up between the said player and his agent, without the dispute to involve any transfer of goods or persons or cross-border financial flows, the sole location in Switzerland of the company SMI's bank account and the fact that [Mr. X] signed a new employment contract with a foreign club when leaving PSG is insufficient to characterize the internationality of the dispute.

26. [Mr. X] furthermore argued before the arbitral tribunal that the agent's contract was only intended to cover the French territory and that the exclusivity was limited to France, with the agent being entitled to a commission only in the event of the signing of an employment contract with a French club.

27. Moreover, there is no other evidence that the dispute was intended to be settled economically in a country other than France at the time of the termination, the agent's contract having been duly governed by French law and having been duly registered with the French Football Federation, which [Mr. X] himself asked the arbitral tribunal to verify, and the player being under PSG, a French football club, after having been with Racing Club de Lens since 2009 and Toulouse Football Club since 2012.

28. The rules on domestic arbitration should therefore be applied and the objection raised by [Mr. X] in this respect should be rejected.

On the admissibility of the plea for annulment alleging irregularity in the composition of the arbitral tribunal due to the disregard of the principles of impartiality and independence (Article 1492(2) of the Code of Civil Procedure and Article 6(1) ECHR),

29. [Mr. X] argues that the company SMI is inadmissible in its plea for annulment on the grounds that it accepted the composition of the arbitral panel and the absence of any challenge to its impartiality and independence in the arbitral proceedings. He adds that the company SMI has necessarily and unequivocally waived its rights guaranteed under Article 6§1 of the ECHR by choosing to submit this dispute to arbitration.

30. The company **SMI** states in reply that its acceptance of the arbitration clause and its choice to refer the case to the ACS cannot be interpreted as a waiver of its right to rely on Article 6§1 of the ECHR and to challenge the independence and impartiality of the ACS.

31. In addition, it states that, in a letter dated 2 May 2018, it also highlighted a risk of infringement of the principles of fairness, impartiality and independence, taking into consideration that [Ms.], [Mr. X]'s lawyer, was on the ACS list of arbitrators. It requested that [Ms.] be dismissed as a respondent for [Mr. X], and therefore did not waive this plea.

On this point,

On the plea of no contest during the arbitral proceedings

32. According to Article 1466 of the Code of Civil Procedure, a party which, knowingly and without legitimate reason, fails to raise an irregularity before the arbitral tribunal in due time is deemed to have waived its right to rely thereon.

33. In the present case, it follows from the arbitral award, and in particular paragraphs 25 and 26 thereof, that the question of [Ms.] withdrawal was raised before this Tribunal, which took cognisance of the decision of the Appointments Committee of the ACS refusing to process this request, so that it cannot be inferred that the company SMI had waived that plea.

34. This grievance will consequently be rejected.

On the plea of inadmissibility based on the waiver of the right to rely on Article 6-1 of the ECHR;

35. Where the European Convention on Human Rights is binding on States and is not directly binding on arbitrators, it is for the judge to be responsible for annulment, within the scope of their review, to ensure that the award made by an arbitral tribunal does not infringe any of the guarantees protected by Article 6 (1) of that Convention, those which the parties have not validly waived.

36. In this respect, the mere fact of submitting the dispute to an arbitral tribunal under an arbitration clause and to refer the matter to the ACS cannot be regarded as a waiver of the right to challenge the impartiality or independence of an arbitrator.

37. This grievance will also be rejected.

38. The pleas of inadmissibility raised should therefore be rejected.

On the merits of the plea for annulment relating to the composition of the Tribunal

39. The Company SMI maintains that the fact that the defence of one of the parties before the ACS was provided by a lawyer who is herself an arbitrator in the same court irremediably affects the independence and impartiality of the arbitral panel and taints its constitution, thereby violating the principle of the right to a fair trial within the meaning of Article 6 of the ECHR. It argues that this may have affected the three members of the arbitration panel, especially as the members of the ACS are selected by the board of directors of the French National Olympic and Sports Committee, on the proposal of its ethics committee, which may give them an apparent additional source of legitimacy. It recalls that the mere appearance in the eyes of one of the parties is sufficient to characterize, in their mind, an objective and reasonable doubt as to the independence of the tribunal. It points out that some arbitral tribunals prohibit for these reasons the combination of the functions of counsel and arbitrator in the same arbitral body and refers to the IBA Guidelines to characterize the seriousness of the potential impairment of the impartiality of arbitrators as well as the new arbitration rules of the Chamber of Arbitration for Sport, which came into force on December 10, 2020 and which states that “*The arbitrators of the Chamber of Arbitration for Sport may not act as counsel for a party before the Chamber of Arbitration for Sport*”.

40. It concludes that there are thus sufficient objective evidence that allow one to doubt the impartiality and/or independence of the arbitrators and that annulment is therefore incurred.

41. **In response**, [Mr. X] maintains that the mere fact that [Ms.] is on the ACS list of arbitrators is not sufficient to create a link of dependence, subordination or service relationship of the other arbitrators with regard to her and even less to [Mr. X].

42. He adds that there is no regulatory provision applicable to the ACS providing for an incompatibility between being on the ACS list of arbitrators and being counsel for a party in proceedings before the ACS and that the mere presence of [Mr. X.'s] lawyer on the closed list of arbitrators of the ACS does not per se constitute objective evidence that could give rise to a legitimate doubt as to the impartiality of the appointed arbitrators.

On this point,

43. In the present case, the question is whether the mere fact that [Ms.], counsel for one of the parties, is on the list of ACS arbitrators constitutes a circumstance which is such as to create a reasonable doubt in the minds of the parties as to the independence or impartiality of the arbitral tribunal.

44. It should be recalled that the assessment of a lack of independence of an arbitrator is based on an objective approach consisting of identifying specific and verifiable factors external to the arbitrator that are likely to affect their freedom of judgment, such as personal, professional and/or economic ties with one of the parties.

45. The impartiality of the arbitrator implies the absence of prejudices or biases that could affect the arbitrator's judgement, which may result from a variety of factors such as the arbitrator's nationality, their social, cultural or legal environment.

46. In the present case, it should be noted, on the one hand, that the arbitration rules to which the company SMI agreed did not provide for rules prohibiting a counsel from being included on the list of arbitrators of the Chamber of Arbitration for Sport and that this is the reason why the company SMI's request to prohibit [Ms.] from acting as counsel to assist [Mr. X] in the present arbitration proceedings was rejected. In addition, it is necessary to mention another fact that such a decision also affected the right of a party to choose its lawyer.

47. On the other hand, the arbitral tribunal was, at the request of [Mr. X], composed of three arbitrators and not one, as requested by the company SMI.

48. Furthermore, relying solely on this circumstance, the company SMI does not provide any additional evidence that could substantiate the existence of a bond of dependence between the members of the arbitral tribunal and [Ms.].

49. Similarly, no evidence is given that this circumstance alone would have led to any prejudice or bias that might affect the judgment of the arbitrators.

50. It should therefore be considered that this circumstance alone is not per se liable to cause reasonable doubt on the part of the parties as to the impartiality and/or independence of the arbitral tribunal.

This plea will consequently be rejected.

51. As the company SMI does not support any other plea for annulment, its action must be declared unfounded in its appeal and all its claims dismissed.

On costs and expenses

52. The company SMI, which cannot claim the benefit of the provisions of Article 700 of the Code of Civil Procedure must be ordered on the same basis to pay [Mr. X] the sum of 30,000 euros in this respect, as well as the costs.

IV-OPERATIVE PART

On these grounds, the Court hereby:

1. Declares the company SMI admissible in its pleas, but declares it unfounded,
2. Dismisses the appeal for annulment of the ACS award dated December 7, 2018,
3. Dismisses all the claims of the company SMI,
4. Orders the company SMI to pay [Mr. X] the sum of 30,000 euros under Article 700 of the Code of Civil Procedure, and order the company SMI to pay all the costs.

The Court Clerk
I. V.

The President
F. A