4A_282/2013[1]

Judgment of November 13, 2013

First Civil Law Court

Federal Judge Klett (Mrs.), Presiding
Federal Judge Kolly
Federal Judge Hohl (Mrs.)
Federal Judge Niquille (Mrs.)
Substitute Federal Judge Ch. Geiser
Clerk of the Court: M. Carruzzo

Club X._____ SA,
Represented by Mr. Paolo Michele Patocchi,
Appellant

v.

Z._____,
Represented by Mr. Philippe Schweizer and Mr. Alexandre Zen-Ruffinen,
Respondent

Facts:

A.
In a contract of January 17, 2011, entitled Consultancy Agreement, the Spanish law company Z._____ (hereafter: Z._____) undertook to provide services to the football club X._____ SA (hereafter: X._____) with a view to a Brazilian professional football player renewing his contract with the club. Pursuant to Clause V of the contract, disputes concerning its performance would be decided by a panel composed of three arbitrators of the Court of Arbitration for Sport (CAS) with the proceedings conducted in English.

[1] Translator's Note: Quote as X._____ SA *v.* Z._____, 4A_282/2013. The original decision is in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

B.
On December 9, 2011, Z._____ filed a request for arbitration against X._____ with the CAS with a view to obtaining payment for the EUR 100'000 fee it was entitled to under the aforesaid contract.

In circumstances which will be explained hereunder, as they are at the heart of the dispute, a sole arbitrator was appointed, namely an Irish lawyer.

In an award of April 12, 2013, the Sole Arbitrator ordered X._____ to pay an amount of EUR 100'000 with interest to Z._____.

C.
On May 24, 2013, X._____ (hereafter: the Appellant) filed a civil law appeal against the aforesaid award. Arguing that the Arbitral Tribunal was irregularly composed (Art. 190(2)(a) PILA[2]), it submits that the Federal Tribunal should annul the award under appeal.

In their answers of July 29, and August 26, 2013, the CAS and Z._____ (hereafter: the Respondent) both submit that the appeal should be rejected.

On September 11, 2013, the Appellant filed a reply in which it states its views on the arguments submitted by the CAS and by the Respondent. The latter confirmed its views in a rejoinder of September 27, 2013.

Reasons:

1.
According to Art. 54(1) LTF,[3] the Federal Tribunal issues its decision in an official language,[4] as a rule in the language of the decision under appeal. When the decision is in another language (here, English), the Federal Tribunal resorts to the official language chosen by the parties. The arbitral proceedings were conducted in English. In the briefs sent to the Federal Tribunal, the parties used French. In accordance with its practice, the Federal Tribunal will adopt the language of the appeal and consequently issue its decision 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 to 192 PILA (Art. 77(1) LTF). None of the admissibility requirements, whether they be the subject of the appeal, the standing to appeal, the time limit to appeal,

[2] 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] Translator's Note: LTF is the French abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173. 110.
[4] Translator's Note: The official languages of Switzerland are German, French and Italian.

the Appellant's submissions, or the grounds invoked in the appeal brief, raises any problems in the case at hand. Hence, there is no reason not to address the appeal.

3.
The Appellant argues that the April 12, 2013, award was issued in violation of Art. 190(2)(a) PILA because it was issued by a sole arbitrator when the arbitration agreement in the contract in dispute provided for an arbitral tribunal composed of three members. However, the independence and impartiality of the Arbitrator who dealt with the case are not – or at least, no longer – questioned as such.

In its answer, the CAS denies that an award could be appealed on the basis of the provision quoted when the composition of the Arbitral Tribunal deciding the case was not in conformity with the agreement of the parties or with the rules they chose. According to the CAS, the argument that the Arbitral Tribunal was irregularly composed would only address a situation where the award under appeal was issued by an arbitral tribunal failing to meet the requirements of independence and impartiality.

This is a critical objection, which must be handled up front; indeed, upholding it would render the Appellant's substantive arguments meaningless.

4.
Pursuant to Art. 190(2)(a) PILA, an award issued in an international arbitration may be appealed when the sole arbitrator was irregularly appointed or the arbitral tribunal irregularly composed. Art. 393(a) CPC[5] took over the text of this provision *verbatim* in the list of grounds which can be invoked in a civil law appeal against a domestic arbitral award.

Legal writing considers in part that the provisions quoted and in particular the first one, only seek to ensure the independence and impartiality requested from a sole arbitrator or the members of an arbitral tribunal and consequently that they would not allow sanctioning the breach of the rules adopted by the parties as to the appointment of the sole arbitrator or the constitution of the arbitral tribunal (Daniel Girsberger and Nathalie Voser, *International Arbitration in Switzerland*, 2nd ed., 2012, p. 334; Elliott Geisinger and Nathalie Voser, *International Arbitration in Switzerland*, 2nd ed., 2013, p. 238 *f.*; Antonio Rigozzi, *L'arbitrage international en matière de sport*, 2005, n. 1356). However, contrary to what Girsberger and Voser claim (*ibid.*), this is not the prevailing opinion. The majority view, to which the latter scholar above apparently also subscribes now, considers to the contrary that the grievance based on irregular composition of the arbitral tribunal also includes the hypothesis that the Arbitral Tribunal was constituted in violation of the agreement of the parties (Gabrielle Kaufmann-Kohler and Antonio Rigozzi, *Arbitrage International - Droit et Pratique à la Lumière de la LDIP*, 2nd ed., 2010, n. 799; Pierre-Yves Tschanz, *Commentaire Romand - Loi sur le droit international privé - Convention de Lugano*, n. 48, ad Art. 190 LDIP; Bernard Corboz, *Commentaire de la LTF*, 2009, n. 89, ad Art. 77 LTF; Stephen V. Berti and Anton K. Schnyder, *Commentaire bâlois, Internationales Privatrecht*, 2nd ed., 2007, n. 27, ad Art. 190 LDIP; Bernhard Berger and Franz Kellerhals,

[5] Translator's Note: CPC is the French abbreviation for the Swiss Code of Civil Procedure.

International and Domestic Arbitration in Switzerland, 2nd ed., 2011, n. 1546; Pierre Lalive, Jean-François Poudret and Claude Reymond, *Le droit de l'arbitrage interne et international en Suisse*, 1989, n. 5a ad Art. 190 PILA; Gerhard Walter, Wolfgang Bosch and Jürgen Brönnimann, *Internationale Schiedsgerichtsbarkeit in der Schweiz*, 1991, p. 216; for domestic arbitration, see among others: Philippe Schweizer, *Code de procédure civile commenté*, 2011, n. 11, ad Art. 393 CPC; Michael Mráz, *Commentaire bâlois, Schweizerische Zivilprozessordnung*, 2nd ed., 2013, n. 9, ad Art. 393 CPC; Markus Schott, *Kommentar zur Schweizerischen Zivilprozessordnung*, Sutter-Somm, Hasenböhler and Leuenberger [editors], 2nd ed., 2013, n. 11, ad Art. 393 CPC; Stefan Grundmann, in last *op. cit*., n. 4, ad Art. 360 CPC; Joachim Frick, *Schweizerische Zivilprozessordnung (ZPO)*, Baker & McKenzie [editors], 2010, n. 2, ad Art. 393 CPC; Michael Kramer and Matthias Wiget, *Schweizerische Zivilprozessordnung (ZPO)*, Brunner, Gasser and Schwander [editors], 2011, n. 5, ad art. 393 CPC; Felix Dasser, *ZPO Kurzkommentar, Oberhammer* [editor], 2010, n. 4, ad Art. 393 CPC).

The minority writers, which the CAS follow, essentially rely on two old precedents. In the first case, which concerned a challenge of an arbitrator, the Federal Tribunal stated as *obiter dictum* that a violation of the requirements adopted by the parties as to the Arbitrator's qualifications (Art. 180(1)(a) PILA) – a set of requirements going beyond the constitutional guarantees – is not sufficient to justify the annulment of the award (judgment 4P.292/1993 of June 30, 1994, at 4, published in Swiss Arbitration Association Bulletin [ASA], 1997, p. 99 *ff.*, 103 *f.*). In the second case, the Court doubted that, should the parties adopt some grounds for challenge more strict than the constitutional guarantees, this could be sufficient for the ground for annulment contained at Art. 190(2)(a) PILA (judgment 4P.188/2001 of October 15, 2001, at 2e, published in Swiss Arbitration Association Bulletin [ASA], 2002, p. 321 *ff.*). These two precedents were obviously not sufficient to finally settle case law on this issue once and for all. Moreover, in an older case enjoying the weight of having been published in the official reporter, the Federal Tribunal agreed to address a public law appeal against a cantonal judgment concerning a recourse for annulment within the meaning of Art. 36(a) of the Arbitration Concordat on arbitration of March 27, 1969 (CA), a provision sanctioning the irregular composition of an arbitral tribunal. In its public law appeal, the Appellant claimed that the Arbitral Tribunal had not been regularly constituted due to the arbitrary application of a provision of the arbitration rules concerning the number of arbitrators and their appointment by the parties (judgment of March 17, 1976, in the *Bucher-Guyer A. G. case* v. *Court of Justice of the Canton of Geneva and Meikli Co. Ltd*., published in ATF 102 IA 493 at 5). In other words, the Federal Tribunal did not decide at the time that applying the private law rules adopted by the parties as to the composition of the Arbitral Tribunal was outside its judicial review because it would not question the independence and impartiality of the members of the Arbitral Tribunal. It must be added that the cases to which Girsberger and Voser refer in their work quoted above (p. 238 *f.*, footnotes 80 and 81), in addition to the two precedents just mentioned, are not pertinent. The same applies to the case published at ATF 117 II 346 at 1, quoted by the CAS because it concerns the violation of the right to be heard within the meaning of Art. 190(2)(d) PILA.

Case law on this issue has since adopted the opinion of the majority of legal writing. Thus, in a judgment of January 10, 2013, in case 4A_146/2012[6], the Federal Tribunal referred to Tschanz (*ibid.*), and stated that Art. 190(2)(a) PILA covers two grievances: the violation of the contractual (Art. 179(1) PILA) or legal (Art. 179(2) PILA) rules as to the appointment of the arbitrators on the one hand; the failure to comply with the rules concerning impartiality and independence of the arbitrators (Art. 180(1)(b) and (c) PILA), on the other (at 3.2). At 4.3.2 of another judgment dated January 17, 2013, in case 4A_538/2012[7], the Court stated that on the basis of the note to section IV of Chapter 12 PILA refers to the regularity of the constitution of the arbitral tribunal within the meaning of Art. 190(2)(a) PILA, meaning the manner in which the arbitrators were appointed or replaced (Art. 179 PILA) and the issues concerning their independence (Art. 180 PILA). There is no need to revisit this case law, which is now well established. The regular constitution of the arbitral tribunal is an essential guarantee to the parties and it is logical that its violation could lead to the annulment of the award (Jean-François Poudret and Sébastien Besson, *Comparative law of international arbitration*, 2nd ed., 2007, n. 790, p. 727; Kaufmann-Kohler and Rigozzi, *op. cit.*, n. 797). Whoever enters into an arbitration agreement and renounces in advance the constitutional right (Art. 30(1) CST[8] as to Switzerland) and the ECHR (Art. 6(1) ECHR) to have the case heard by a tribunal established by law (ATF 128 III 50 at 2c/aa, p. 58 and the writers quoted) may reasonably expect that the members of the arbitral tribunal or the sole arbitrator will not only offer sufficient guarantees of independence and impartiality but also meet the requirements that the parties mutually agreed upon (number, qualifications, appointment procedure) or which result from the arbitration rules they adopted or even the legal provisions applicable in the alternative (see Art. 179(2) PILA). He also needs the means to act should his expectations in this respect not be met, without the opportunity to rectify the situation *pendente lite*. Then, he can be expected to comply with an award that he will not really be in a position to appeal on the merits, except from the very perspective of incompatibility with substantive public policy within the meaning of Art. 190(2)(e) PILA and relative case law (judgment 4A_150/2012[9] of July 12, 2012, at 5.1). Moreover, the solution adopted by case law and the majority of legal writing has the advantage of being in accordance with the June 10, 1958, New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (RS 0.277.12; in this way, see Geisinger and Voser, *ibid.*). Art. V(1)(d) of the Convention provides indeed that the recognition and enforcement of the award may be refused in particular if the respondent in the enforcement proceedings proves that the constitution of the arbitral tribunal was not in conformity with the agreement of the parties. Be this as it may, the practical importance of disputes concerning the violation of the provisions of an arbitration agreement concerning the constitution of the arbitral tribunal should not be overestimated. Schweizer considers it as a mere 'epiphenomenon' (*ibid.*). It is indeed true that almost the entire realm of

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[6] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/federal-tribunal-will-not-review-decision-foreign-court-appointing-arbitrator-when-party-failed-do

[7] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/alleged-lack-authority-representatives-creates-jurisdictional-issue

[8] Translator's Note: CST is the French abbreviation for the Swiss Federal Constitution.

[9] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/federal-tribunal-reiterates-principle-pacta-sunt-servanda-violated-only-when-arbitral-tribunal

disputes concerning the constitution of the arbitral tribunal – at least as far as the Federal Tribunal is concerned – concerns independence and impartiality of the arbitrators.

There is no need to decide here if the principle set by case law should suffer no exception at all, so that even some peccadilloes could lead to the annulment of an arbitral award for violation of Art. 190(2)(a) PILA or if derogating from it should be possible when the deficiencies found do not really impact the constitution of the arbitral tribunal. However, the number of arbitrators is not in this category of deficiencies. To the contrary, it is an important element to which the law devotes a specific provision – Art. 360 CPC – applicable to international arbitration by analogy pursuant to the reference at Art. 179(2) PILA (Philipp Habegger, *Basel Commentary*, Schweizerische Zivilprozessordnung, 2nd ed., 2013, n. 1 ad Art. 360 CPC). Indeed, the system of a three-member arbitral tribunal, while certainly more expensive than a sole arbitrator, does provide some undeniable advantages in comparison: it allows for a broader scope of opinions as to the arguments submitted than when the outcome of the dispute is left to the wisdom of an individual, which in principle should reduce the risk of error; moreover, it enables each party to have its point of view indirectly represented in the arbitral tribunal through the opportunity each party has to appoint its own arbitrator, even if the latter must not turn into an advocate for "its" party (ATF 136 III 605[10] at 3.3.1, p. 612 *f.*), which should automatically increase the trust of the parties in the arbitral tribunal; finally, it is the best way to take into account that the parties often come from some very different perspectives from the point of view of law, religion, culture, language, politics, and economy (Habegger, *op. cit.*, n. 5, ad Art. 360 CPC).

The foregoing remarks therefore lead to the rejection of the objection raised by the CAS and to address the merits of the Appellant's arguments.

5.
5.1.
The review of the argument based on Art. 190(2)(a) PILA requires a recital of the pertinent procedural facts in this respect.

5.1.1. Upon receipt of the arbitration request filed by the Respondent against the Appellant on December 9, 2011, the CAS invited the latter in a letter of December 14, 2011, to state its view on the Respondent's proposal that a sole arbitrator should be appointed – *viz* a London lawyer – to decide the dispute notwithstanding the arbitration agreement.

On December 21, 2011, the Appellant rejected the proposal and stated that the Arbitral Tribunal should be composed of three members.

[10] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/independence-and-impartiality-of-a-party-appointed-arbitrator-in

On January 3, 2012, the CAS informed the parties that the President of the Ordinary Arbitration Division had decided to appoint a sole arbitrator pursuant to Art. R40.2 of the Code of Sport Arbitration then in force (hereafter: the Code). Then, it advised them of them of the name of the Arbitrator on February 21, 2012, namely the Irish barrister Ercus Stewart.

On March 9, 2012, Mr. A._____, an attorney in [name of place omitted] advised the CAS that his firm had been appointed to represent the Appellant in the arbitration proceedings.

On April 2, 2012, the Appellant, represented by this lawyer, submitted its statement of defense pursuant to which it asked "the Sole Arbitrator" to reject the Respondent's submissions.

In a letter sent to the CAS on April 5, 2012, the same lawyer wrote the following in particular: "Please note that the preference of the Respondent is for the Sole Arbitrator to issue an Award on the basis of the written submissions of the parties."[11]

On May 9, 2012, the CAS sent a procedural order to the representatives of the parties asking them to sign the order and return it. This four-page order contained 12 items dealing with the arrangements to investigate the case. On its first page, it had the following with regards to the mission and the composition of the Arbitral Tribunal:

> *2. Mission*
> *… the appointed Sole Arbitrator shall decide this matter as an Arbitral Tribunal and render an award in compliance with the Code and with the terms and conditions set out in this document.*
>
> *3. Arbitration Panel*
> *The Arbitration Panel will sit in the following composition:*
> *Sole Arbitrator: Mr. Ercus Stewart SC, Barrister in Dublin, Ireland*
> *…*[12]

On May 15, 2012, Mr. A._____ returned a duly signed copy of the aforesaid order to the CAS, signed the same day under the caption "read and agreed upon by."[13] He made no reservation or remark at the time.

5.1.2. On June 8, 2012, a Romanian lawyer appointed by the Appellant submitted a request for replacement of the Irish Arbitrator based on Art. R35 and R36 of the Code. He argued in support that the arbitration at hand was a domestic matter, so that it was mandatory to appoint an arbitrator with Romanian citizenship pursuant to the rules of Romanian public law.

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[11] Translator's Note: In English in the original text. Emphasis original.
[12] Translator's Note: In English in the original text.
[13] Translator's Note: In English in the original text.

At the first hearing of June 12, 2012, and in a written submission of June 26, 2012, the Appellant repeated the argument and added a second grievance, namely that the Panel asked to adjudicate the Respondent's claim should consist of three arbitrators in conformity with the text of the arbitration agreement and Art. 40.1 of the Code.

The request for replacement of Arbitrator Stewart was submitted to the International Council of Arbitration for Sport (ICAS), which rejected it in a decision of August 30, 2012. At §62 of the decision, the ICAS pointed out that the Appellant had raised no objection as to the appointment of a sole arbitrator when both parties signed the aforesaid procedural order.

5.1.3. On September 14, 2012, after a second hearing on the 5th of the same month held by the Sole Arbitrator, the Appellant, acting through its Romanian lawyer, submitted a request challenging the Irish Arbitrator due to some allegedly close personal connections between him and counsel for the Respondent and a colleague of his. It requested the replacement of Arbitrator Stewart by an arbitrator who would remain independent of the parties in accordance with Art. R33 of the Code.

The ICAS rejected the request in a decision of March 22, 2013.

The Award under appeal was then issued by Arbitrator Stewart on April 12, 2013.

5.2. Pursuant to Art. 179(1) PILA, the arbitrators are appointed in accordance with the agreement of the parties. Pursuant to its Art. R27, 1st sentence, the Code applies also when the parties agree to submit a dispute concerning sport to the CAS. This is the case here.

Art. 40(1) of the Code (2010 version) states that if the arbitration agreement does not specify the number of arbitrators, the President of the Division shall determine it. Art. R40.2 sets the manner to appoint the arbitrator(s). In the case at hand, the arbitration agreement inserted into the January 17, 2011, Contract between the parties states that the CAS Panel called upon to adjudicate any dispute that may arise between them would be composed of three arbitrators. The very text of Art. R40.1 of the Code shows that the intervention of the President of the Division is only an alternative and that it should not take place when the parties agreed upon the number of arbitrators. Therefore, it cannot be denied that the President of the Division disregarded the principle of autonomy when he appointed the Sole Arbitrator against the will of the parties stated in the arbitration agreement. Therefore, the final award, which is the subject of the present appeal proceedings, was issued by a Sole Arbitrator irregularly appointed because it should have been issued by a three-arbitrator Panel. This is a deficiency falling within Art. 190(2)(a) PILA, as the Appellant rightly points out.

Consequently, the only issue to be addressed is whether or not the Appellant had forfeited the right to invoke the grievance.

5.3.

5.3.1. The principle of good faith applies to arbitral procedure as well. Pursuant to the principle, the right to invoke the grievance based on an irregular composition of the arbitral tribunal is forfeited if the party does not invoke it immediately because it may not keep it in reserve only to invoke later should the outcome of the arbitral proceedings be unfavorable (ATF 136 III 605[14] at 3.2.2 and the case quoted).

On the basis of the facts recalled above, it must be determined whether the Appellant may invoke the grievance of Art. 190(2)(a) PILA without breaching the rules of good faith.

5.3.2. At first – and specifically on December 21, 2011, – the Appellant did oppose the appointment of a sole arbitrator. However, it was informed by the CAS Court Office on January 3, 2012, that the President of the Ordinary Arbitration Division had decided to appoint a sole arbitrator notwithstanding its opposition. This information provoked no reaction by the Appellant. It can reasonably be asked if the Appellant's failure to act did not lead to the argument being forfeited even then.

It must be recalled here that the interlocutory decision in which an arbitral tribunal decides as to its jurisdiction or composition must be appealed to the Federal Tribunal immediately pursuant to Art. 190(3) PILA under penalty of forfeiting the right to appeal it later on (ATF 130 III 66 at 4.3, p. 75 and the cases quoted). The aforesaid decision concerning the number of arbitrators is not at all similar to a mere procedural order that could be modified or revoked during the proceedings and therefore outside the scope of review by the Federal Tribunal (see ATF 122 III 492 at 1b/bb). It decided finally a dispute as to the composition of the Panel called upon to adjudicate the dispute between the parties. As such, it could have and indeed it should have been referred to the Federal Tribunal. That it was issued by the President of the Ordinary Arbitral Division instead of an arbitration panel was not unusual as there was no panel yet; this did not prevent the decision from being open to an appeal to the Federal Tribunal (judgment 4A_600/2008[15] of February 20, 2009, at 2.3 and the case quoted). Yet, according to case law, the decisions taken by the ICAS as to challenges cannot be appealed to the Federal Tribunal directly in a civil law appeal based on Art. 190(2)(a) PILA (judgment 4A_644/2009[16] of April 13, 2010, at 1 and references). It may therefore be somewhat incoherent to allow an appeal against a decision taken by another body of the arbitral institution during the proceedings – in the case at hand, the President of the Ordinary Arbitration Division which also concerns the composition of the arbitration Panel, except if one wishes to revisit the aforesaid case law, as part of the legal writing suggests, on grounds of procedural efficiency and to preserve the logic of the

[14] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/independence-and-impartiality-of-a-party-appointed-arbitrator-in

[15] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/case-struck-by-cas-because-of-late-payment-of-advance-on-fees

[16] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/decision-merely-rejects-appeal-filed-too-late-takes-note-withdrawal-appeal-or-reflects-failure-pa-14

system created by the legislature (see Berti and Schnyder, *op. cit.*, n. 29, ad Art. 190 PILA; Anton Heini, *Züricher Kommentar zum IPRG*, 2nd ed., 2004, n. 20a, ad Art. 190 PILA).

On the grounds explained hereunder, however, it is not necessary to decide the issue as in part it is not germane to the case at hand.

5.3.3. Once advised in early January 2012, that the case would be adjudicated by a sole arbitrator, not only did the Appellant take no stand against the decision on this issue but, moreover, it behaved in a manner suggesting that it was submitting to the decision. This reduces to naught its remark, albeit accurate, that federal case law does not require constant renewal of the objection concerning the irregularity of the composition of the arbitral tribunal.

Indeed, in the answer its counsel recorded in the arbitration file on April 2, 2012, the issue of the composition of the Panel is no longer current and the submissions taken are made to *the Sole Arbitrator*. There is further reference to a sole arbitrator in the letter that the same counsel sent to the CAS on April 5, 2012.

Moreover and above all, the Swiss lawyer representing the Appellant in the CAS – Mr. A._____, about whom the Respondent points out without being contradicted, that he is a great connoisseur of football law and of sport arbitration – signed and approved the contents of the procedural order of May 9, 2012, which he sent back to the CAS on May 15, 2012, without the slightest reservation as to the various items included there. Yet, it was seen that one of them concerned the appointment of a sole arbitrator, namely the Irish lawyer, Ercus Stewart. The Appellant vainly seeks to alleviate the importance of this conclusive expression of will. First, it argues that the document contains no wording stating any renunciation on its part of a challenge to the regularity of the composition of the Arbitral Tribunal. The argument is akin to sophistry as the procedural order contains a positive statement that its contents were accepted ("*read and agreed upon by*"). Similarly, when the Appellant compares the paragraph in the procedural order concerning jurisdiction – where it is stated that the parties confirmed jurisdiction by signing the procedural order – and the paragraph concerning the composition of the Panel – in which there is no such statement – by pointing out that the former was not in dispute as opposed to the latter, one does not see where it seeks to go. Be this as it may, the Appellant cannot invoke the rules of good faith and argue that it was surprised, as the passage of the procedural order concerning the composition of the Panel is perfectly clear and the statement of acceptance signed by its counsel is at the bottom of the procedural order, which it obviously covers entirely. Finally, no matter what the Appellant says, the fact that the procedural order had a relatively broad scope and addressed issues of varying importance could not deceive an experienced lawyer to the extent that unbeknownst to him, he signed his agreement to the composition of the Panel contained in the document.

In its answer, the CAS draws an analogy between the procedural order and the terms of reference as stated at Art. 23 of the Rules of Arbitration of the International Chamber of Commerce (ICC). The Appellant disputes the analogy and invokes the contractual nature of the terms of reference as opposed to a

unilaterally issued procedural order. There is no need to open a debate in this respect. The legal characterization of the procedural order of May 9, 2012, is indeed not decisive in the case at hand. It does not matter if it is an actual agreement derogating from or amending the arbitration clause or, more simply, the agreement given by the parties to the proposal submitted by the Sole Arbitrator to deviate from the Arbitration Agreement as to the issue of the number of arbitrators. The point is that, through the signature of its lawyer at the bottom of the procedural order, the Appellant validly accepted, in full awareness, that the dispute with the Respondent would be submitted to the Sole Arbitrator mentioned in the document.

5.3.4. The somewhat timid attempt by the Appellant to now somehow amend its signature with a view to challenging the regularity of the appointment of the Sole Arbitrator deserves no protection from the point of view of the rules of good faith. Moreover, it came with the appointment of new counsel, a Romanian citizen, who moved the discussion in the direction of Romanian public law and took over the argument based on the number of arbitrators only as an alternative as the Respondent demonstrates at letter B of its answer (p.2 to 4). The Appellant's flip-flop is not based on any new fact, which could explain it and therefore appears abusive. Moreover, when it eventually challenged Arbitrator Stewart, the Appellant asked that he be substituted by another sole arbitrator. This may be seen to express a final renunciation of having the case adjudicated by a three-member Panel.

5.4. This being so, it must be found that the Appellant forfeited the argument of the irregular composition of the Arbitral Tribunal. The appeal is based on this single grievance and must therefore be rejected.

6.
In such an outcome, the Appellant shall pay the judicial costs (Art. 66(1) LTF) and compensate its opponent (Art. 68(1) and (2) LTF).

Therefore the Federal Tribunal pronounces:

1.
The appeal is rejected.

2.
The judicial costs, set at CHF 5'000, shall be borne by the Appellant.

3.
The Appellant shall pay to the Respondent an amount of CHF 6'000 for the federal judicial proceedings.

4.
This judgment shall be notified in writing to the representatives of the parties and to the Court of Arbitration for Sport (CAS).

Lausanne, November 13, 2013

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

Presiding Judge:	Clerk:
Klett (Mrs.)	Carruzzo