4A_134/2012[1]

Judgment of July 16, 2012

First Civil Law Court

Federal Judge Klett (Mrs), Presiding
Federal Judge Kolly,
Federal Judge Kiss (Mrs),
Clerk of the Court: Godat Zimmermann (Mrs).

Olympique des Alpes SA,
Represented by Mr.Philippe Schweizer,
Defendant and Appellant,

v.

1. Union des Associations Européennes de Football (UEFA), represented by Mr. Saverio Lembo and Mr. Vincent Guignet,
Claimant and Respondent,
2. Atletico de Madrid SAD,
3. Stade Rennais Football Club, both represented by Mr.Juan de Dios Crespo Pérez,
4. Celtic PLC, represented by Mr. Matthew Bennett and Mr. Chris Anderson,
5. Udinese Calcio SpA, represented by Mr. Gianpaolo Monteneri,
Interveners and Respondents.

Facts:

A.

A.a The Union des Associations Européennes de Football (UEFA) is an association under Swiss law, registered with the Registry of Commerce; it is based in Nyon[2]. It is one of the six continental confederations of Fédération Internationale de Football Association (FIFA).The goal of UEFA is to address all issues concerning European football. It organizes international football competitions and tournaments, among which is the UEFA Europa League (UEL), a competition open to professional football teams on the European continent.

Olympique des Alpes SA (OLA) is a professional football club constituted as a limited-liability company under Swiss law; it is incorporated in Martigny-Combe[3]. This club is usually known as “FC Sion”. It participates in the Swiss first division championship (“Super League”). It is a member of the Swiss

[1] Translator’s note: Quote as Olympique de Alpes SA *v.* UEFA *et al*., 4A_134/2012. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch

[2] Translator’s note: Nyon is in the Swiss canton of Vaud.

[3] Translator’s note: Martigny-Combe is in the Swiss canton of Valais.

Football League (SFL) and consequently of the Swiss Football Association. The latter is a member of UEFA.

A.b On February 15, 2008 OLA entered into an employment contract with an Egyptian player bound to an Egyptian club until 2010. The latter took the player and OLA to the FIFA Dispute Resolution Chamber (DRC-FIFA) for breach of contract and incitement to such. In a decision of April 16, 2009 the DRC-FIFA forbade OLA as a sanction to recruit any new players during the two registration periods following the notification of its decision. OLA appealed to the Court of Arbitration for Sport (CAS) in Lausanne; the latter held that the matter was not capable of appeal. In a judgment of January 12, 2011, the Federal Tribunal rejected the appeal made by OLA against the CAS award to the extent that the matter was capable of appeal (case nr. 4A_392/2010[4]).

A.c On May 9, 2011 the Chairman of the board of OLA, Christian Constantin, signed the registration form to UEL 2011/2012 on behalf of the club without reservation.

The form states among other things that the signatory undertakes to comply with the statutes, regulations, directives and decisions of UEFA and to recognize the jurisdiction of the CAS as set forth in the UEFA Statutes. Art. 61 of the Statutes states that the CAS has exclusive jurisdiction as an ordinary arbitral tribunal – to the exclusion of any state court or any arbitral tribunal – to resolve the disputes between UEFA and the associations, the leagues, clubs, players or officials, as well as the disputes at the European level between associations, leagues, clubs, players or officials. Art. 62 of the Statutes states that any decision taken by a UEFA body may be challenged exclusively in front of the CAS as arbitral appeal jurisdiction, to the exclusion of any state court or of any order arbitral tribunal.

A.d On July 5 and 6, 2011, OLA asked SFL to qualify six new players. Referring to the DRC-FIFA decision of April 16, 2009, the SFL refused to do so. OLA and the six players seized the Appeal Tribunal of the SFL, which rejected the appeal on July 29, 2011. On August 2, 2011 OLA appealed this decision to the CAS and applied for provisional measures.

On August 3, 2011 the six players filed a request for provisional measures with the District Court of Martigny and St-Maurice against SFL and FIFA, arguing that the decision of the SFL Appeal Tribunal harmed their rights relating to the personality. In a decision issued *ex parte* on the same day, the District judge held that the six players should be considered by SFL and FIFA as qualified as OLA players, that the latter could validly make them play and that FIFA was enjoined from interfering with the delivery of the international transfer certificate until a further decision could be issued as to the provisional measures after a hearing.

Complying with the District judge's injunction, SFL advised OLA that it could validly have the six players play until the request for provisional measures was adjudicated. FIFA did the same eventually. Also on August 5, 2011 OLA withdrew the request for provisional measures submitted to the CAS three days earlier.

[4] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/notification-of-an-award-by-fax-time-limit-to-appeal-does-not-ru/

A.e On August 8, 2011 OLA submitted its list of players for the UEL 2011/2012 to FIFA; five of the six new players were on the list. The list was confirmed by the SFL and approved by the UEFA administration.

On August 18 and 25, 2011 OLA played two UEL 2011/2012 play-off games against the Scottish club Celtic. The games were played under protest by Celtic. The latter claimed that OLA fielded players who were not entitled to play. The first game ended in a draw, the second was won by OLA.

In a decision of September 2, 2011 the UEFA Control and Disciplinary Body (CDD-UEFA) held that the five new OLA players were not qualified pursuant to the SFL and FIFA regulations. It upheld the protest by Celtic and declared that OLA had forfeited the two games. OLA was thus eliminated from the 2011/2012 UEL.

A.f Also on September 2, 2011 the District Court of Martigny-St-Maurice rejected a request for provisional measures by the new players who claimed a violation of their rights relating to the personality and had filed a request against UEFA the previous day. The players submitted a new request on September 5, 2011; it would also be rejected a few days later.

On September 6, 2011 OLA applied for provisional measures against UEFA in front of the Cantonal Court of Valais, claiming that UEFA was in breach of Swiss competition law. The following day the Cantonal Court found the request inadmissible for lack of territorial jurisdiction.

A.g On September 9, 2011 OLA applied for provisional measures against the UEFA in front of the Cantonal Court of Vaud. It argued that it was the victim of an unlawful restraint of competition as a consequence of the CDD-UEFA decision of September 2, 2011, which in its view was an abuse of a dominant position (see Art. 7 (1) of the Federal Law on Cartels and Other Restrains of Competition).

In an *ex parte* order of September 13, 2011, the delegated judge of the Civil Court of the Cantonal Court of Vaud ordered UEFA to admit the Valais Club as a participant in UEL 2011/2012, to take all necessary steps to integrate it into the competition and to consider the six new players as qualified OLA players and to admit them into the UEL 2011/2012 competition until a further decision would be issued on the request for provisional measures, under penalty of contempt as stated at Art. 292 CP[5]. In a decision on provisional measures of October 5, 2011 after a hearing, the delegated judge confirmed the *ex parte* order until a decision would be issued on the merits; moreover it enjoined UEFA from declaring any OLA game forfeited as a consequence of the participation of the new players, also until a decision could be issued on the merits.

A.h On September 13, 2011, the UEFA Appeal Body rejected the appeal made by OLA against the decision of the CDD-UEFA of September 2, 2011, confirmed that OLA was forfeited for the two games against Celtic and refused to issue the provisional measures requested by the Valais Club. Eventually, OLA would challenge this decision of the Appeal Body and start litigation against UEFA for violating the rights of its members (Art. 75 CC[6]) in front of the District Court of Nyon.

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[5] Translator's note: CP is the French abbreviation for the Swiss Criminal Code.

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

B.
On September 26, 2011 UEFA sent a request for arbitration to the CAS. It sought a finding that the UEFA regulations, in particular the one concerning the 2011/2012 UEL and the disciplinary measures taken by UEFA and its bodies against OLA were not contrary to Swiss competition law, that OLA was not entitled to be reincluded into UEL 2011/2012, that UEFA did not violate Swiss law or the rights relating to the personality of OLA or of the new players, that the players were not entitled to participate in UEL 2011/2012, that the provisional measures issued by the Cantonal Court of Vaud were terminated, that any right to seek damages from UEFA was denied and that any other appropriate submission by UEFA should be granted.

OLA submitted that the CAS has no jurisdiction and that the UEFA request should be found inadmissible.

The four football clubs Atlético de Madrid, Udinese, Celtic and Stade Rennais were admitted as interveners. As such they could not make independent submissions but only support those of the principal parties.

In an award of January 31st, 2012 the CAS Panel constituted to resolve the dispute (hereafter: the Panel) firstly found that it had jurisdiction to adjudicate the matter by way of ordinary arbitration and rejected the defense of lack of jurisdiction raised by OLA. On the merits it granted the request in part, confirming that OLA did not have the right to be reinstated into the 2011/2012 UEL and terminated the provisional measures issued by the Cantonal Court of Vaud on October 5, 2011. Moreover it held that the submissions by UEFA on the merits were inadmissible: those as to a finding that the rules or regulations of UEFA were consistent with Swiss competition law for lack of a legal interest; those for a finding as to the alleged violation of the rights relating to the personality of the OLA players because the latter were not parties to the proceedings; those seeking a finding that the players were excluded from the 2011/2012 UEL because they related to an abstract legal issue; those seeking to deny any right to damages against UEFA for lack of supportive reasons; those concerning other possible appropriate submissions for lack of a specified submission; the Panel ordered OLA to pay two thirds of the costs of the arbitration; moreover it ordered the Valais club to pay CHF 40'000 to UEFA for its costs.

C.
By way of an undated brief mailed on March 7, 2011 OLA (hereafter: the Appellant) submits a Civil law appeal seeking the annulment of the January 31st, 2012 award.

UEFA (hereafter: the Respondent) and the interveners Udinese, Atletico de Madrid and Celtic mainly submit that the matter is not capable of appeal and alternatively that the appeal should be rejected. The interveners Stade Rennais made no submissions.

Invited to submit its observations as the body having issued the decision, the CAS retained counsel through its Secretary General and confirmed the award, proposing that the appeal should be rejected.

The Appellant filed some observations on these briefs.

Subsequently the Respondent submitted some additional observations.

Reasons:

1.
The principal parties to the arbitral proceedings, namely the Respondent and the Appellant, have their seat in Switzerland, so this matter is a national arbitration (Art. 353 (1) CPC[7]); Art. 176 (1) PILA[8]). The fact that the interveners, which are not entitled to their own submissions, have their seat abroad, is of no consequence in this respect.

In national arbitrations a Civil law appeal is allowed pursuant to the requirements of Art. 389 to 395 CPC (Art. 77 (1) (b) LTF[9]). Failing a specific statement by the principal parties in favor of an appeal to the competent Cantonal Court pursuant to Art. 356 (1) CPC (Art. 390 (1) CPC), the award, against which no arbitral appeal is possible (Art. 391 CPC), may be appealed to the Federal Tribunal (Art. 389 (1) CPC). The proceedings are governed by the LTF except for any provisions to the contrary contained at Art. 389 to 395 CPC (Art. 389 (2) CPC).

But for some exceptions that do not apply here (see Art. 395 (4) CPC) a Civil law appeal against a national arbitral award may only seek the annulment of the award (see Art. 77 (2) LTF); Art. 395 (1) CPC judgment 4A_424/2011 of November 2, 2011 at 1.2). The Appellant is aware of this and submits that the award under appeal should be annulled and the Respondent is mistaken in arguing that this submission is inadmissible.

At issue is the finding that the Appellant was not entitled to be reinstated into the 2011/2012 UEL and the termination of the provisional measures issued by the Cantonal Court of Vaud on October 5, 2011, as well as the ancillary issue of costs. However the Appellant suffers no harm as a consequence of the other parts of the award declaring inadmissible the Respondent's other submissions.

2.
The Federal Tribunal reviews freely and *ex officio* whether the matters in front of this Court are capable of appeal (ATF 137 III 417at 1 and the cases quoted), which calls in particular for a review of the standing to appeal.

2.1
According to Art. 76 (1) (b) LTF the appellant must in particular have a legally protected interest to the annulment of the decision under appeal. This requirement is identical to the one stated at Art. 89 (1) (c) LTF for public law appeals (see June 28, 2006 Message concerning the Swiss Civil Code of Procedure, FF 2006 6890 ch. 5.3.2). A legally protected interest consists in the practical use that admitting the appeal would have for the Appellant, by preventing him from undergoing some damage of an economic, ideal, substantive or other nature that would be caused by the decision under appeal (ATF 137 II 40 at 2.3 p. 43). The interest must be present, that is it must exists not only at the time the appeal is made but also when the decision is issued (ATF 137 I 296 at 4.2 p. 299; 137 II 40 at. 2.1 p. 41). The Federal Tribunal finds the matter incapable of appeal when the legally protected interest is lacking at the time

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[7] Translator's note: CPC is the French abbreviation for the Swiss Civil Code of Procedure which came into force on January 1st, 2011.

[8] 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.

[9] Translator's note: TF is the French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173 110.

the appeal is made. However, if the interest disappears during the proceedings, the appeal becomes moot (ATF 137 I 23 at 1.3.1 p. 24 ff and the cases quoted). As a matter of exception it can be derogated from the requirement of a present interest when the dispute on which the decision under appeal is based may arise again at any time under identical or analogous circumstances, when its nature makes it impossible to adjudicate it before it loses its topicality if, as a matter of principle, there is a sufficiently important public interest to resolve the issue in dispute (ATF 137 I 23 at 1.3.1 p. 25; 136 II 101 at 1.1 p. 103; 135 I 79 at 1.1 p. 81).

2.2
In its brief of March 2012 the Appellant argues that the UEL 2011/2012 competition was still going on at the time, whilst pointing out that should the appeal be upheld, its reintegration "appears difficult, if not impossible". Yet it sees an interest to the appeal because it could challenge the regularity of the competition and obtain damages if its ban turned out to be unfounded. In its observations the CAS casts serious doubt as to the Appellant's present interest to obtain the annulment of the January 31st, 2012 award, while the Appellant itself acknowledges that being reinstated into the competition would be difficult, if not impossible should the appeal be admitted. The Appellant submits in its June 2012 observations that if the annulment of the award does not make it possible to reinstate it into a competition that is now finished, it is because the CAS was late in deciding the matter and that by doing the same in future, the CAS could "avoid any sanction" each time that a comparable situation would arise.

In front of the Federal Tribunal the issue is the confirmation that the Appellant is not entitled to be reinstated into the 2011/2012 UEL and the termination of the provisional measures ordered by the Cantonal Court of Vaud.

It is well-known that the 2011/2012 UEL is over. Under such circumstances one does not see any interest for the Appellant to obtain the annulment of an award holding that it does not have the right to be reinstated into this competition and terminating provisional measures ordering that it should be able to participate. Should the lack of interest to obtain a decision be the consequence of the CAS being late to decide the issue, as the Appellant claims, this would not change the fact that at the present time there is no longer any interest to a decision on the merits. The Appellant's intention to eventually seek compensation for the damage that would have been caused by its allegedly illicit exclusion from the competition does not in itself create an interest worthy of protection. The decision under appeal could not be invoked against the Appellant in a subsequent damage claim (ATF 126 I 144 at 2a p. 148; 125 I 394 at. 4a p. 397). Moreover the Appellant does not argue – and nothing would lead to that conclusion – that the situation that led to its exclusion from the 2011/2012 UEL could repeat itself in future. There is accordingly no justification to deviate from the requirement of a present interest.

Consequently the appeal is moot as to the principal issue.

3.
The award under appeal orders the Appellant to pay costs. It certainly has a present and legitimate interest to obtain the annulment of the costs award (see ATF 117 Ia 251 at 1b p. 255). Yet this does not mean that by way of a challenge of the costs it can obtain indirect review of the moot or inadmissible grounds for appeal against the decision on the merits (see ATF 129 II 297 at 2.2 p. 300; 100 Ia 298 at 4 p. 299). When the grounds for appeal invoked against the decision on the merits are inadmissible, the Appellant may only claim that the costs award must be annulled or amended for other reasons than

those invoked as to the main issue (see ATF 109 Ia 90; more recently, ATF 4A_637/2010 of February 2, 2011 at 4).

In this case the appeal contains no specific arguments against the costs award (see Art. 393 (f) CPC) that would differ from those formulated against the decision on the merits. The arguments against the costs award are merged with those concerning the merits. The matter is therefore not capable of appeal as to the award of costs (see Art. 77 (3) LTF).

4.
In view of the foregoing the matter is not capable of appeal to the extent that it has not become moot.

As a rule the costs of the proceedings and those of the winning party must be borne by the losing party (Art. 66 (1) and Art. 68 (1) LTF). To the extent that the appeal has become moot, Art. 72 PCF must be applied as to the costs by reference to Art. 71 LTF. The Federal Tribunal then issues a decision with brief reasons taking into account the state of the matter before the event putting an end to the dispute. This Court firstly relies on the probable outcome of the proceedings. If that cannot be determined in the case at hand without further examination, the general rules of civil procedure are to be applied: the costs must be borne by the party that caused the proceedings that became moot or caused them to become moot (see ATF 118 Ia 488 at 4a p. 494; more recently, ATF 4A_636/2011[10] of June 18, 2012 at 4).

In this case, the Appellant initiated the appeal that has become moot and it is not obvious that the grounds for appeal raised in the appeal would have been upheld. Consequently the Appellant shall pay the costs of the proceedings and compensate the Respondent and the three interveners that filed some very short answers.

Therefore the Federal Tribunal pronounces:

1.
The matter is not capable of appeal to the extent that it is not moot.

2.
The judicial costs set at CHF 15'000 shall be borne by the Appellant.

3.
The Appellant shall pay an amount of CHF 17'000 to the Respondent for the federal proceedings and an amount of CHF 2'000 to each intervener Atletico de Madrid SAD, Celtic PLC and Udinese Calcio SpA.

4.
This judgment shall be notified to the Representatives of the Parties and to the Court of Arbitration for Sport (CAS)

[10] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/the-federal-tribunal-leaves-undecided-the-issue-as-to-whether-an/

Lausanne July 16, 2012

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

The Presiding Judge:	The Clerk:
Klett (Mrs.)	Godat Zimmermann (Mrs)