4A_324/2014[1]

Judgment of October 16, 2014

First Civil Law Court

Federal Judge Klett (Mrs.), Presiding
Federal Judge Kolly
Federal Judge Hohl (Mrs.)
Federal Judge Kiss (Mrs.)
Federal Judge Niquille (Mrs.)
Clerk of the Court: Leemann

Fenerbahçe Spor Kulübü,
Represented by Dr. Bernhard Berger and Dr. Andreas Güngerich,
Appellants

v.

Union des Associations Européennes de Football (UEFA)
Represented by Dr. Jean-Marc Reymond and Mrs. Delphine Rochat,
Respondent

Facts:

A.
A.a.
Fenerbahçe Spor Kulübü (the Appellant) is a professional football club based in Istanbul, Turkey. It is a member of the Turkish Football Federation (TFF).

The Union des Associations Européennes de Football (UEFA, Respondent), based in Nyon, is the European Football Federation to which the Turkish Football Federation belongs. It organizes the UAEFA Champions League, among others.

[1] Translator's Note: Quote as X._____ GmbH *v.* Y._____ Ltd., 4A_577/2013.
The original decision is in German. The full text is available on the website of the Federal Tribunal, www.bger.ch.

A.b.

On February 21 and 26, March 6, 7, and 20 and on April 9, 2011, various football games took place in the framework of the Turkish "Süper Lig," during which various people around Fenerbahçe Spor Kulübü were paid bribes to lose the game. On April 14, 2011, a new Turkish law (n. 6222) came into force, which made it a criminal offence to manipulate the outcome of games.

On April 17 and 22 and on May 1, 2011, more games of the "Süper Lig" took place, during which people around Fenerbahçe Spor Kulübü paid money to influence the games.

On May 5, 2011, Fenerbahçe Spor Kulübü submitted to UEFA the document "UEFA Club Competitions 2011/2012 Admissions Criteria Form," in which the club affirmed that it had not been involved, directly or indirectly, in any manipulation of games since April 27, 2007.

On May 8, 15, and 22, 2011, additional games of the Turkish Süper Lig took place, during which some people connected to Fenerbahçe Spor Kulübü paid bribes to the opposing team to lose the game.

On May 22, 2011, Fenerbahçe Spor Kulübü won the championship of the "Süper Lig" and therefore qualified for the group matches of the UEFA Champions League of the 2011/2012 season.

A.c.

On July 3, 2011, the Turkish police arrested 61 people in the context of a broad criminal investigation concerning match-fixing in Turkish football. The president and the vice president, among others, were suspected of manipulating games, along with two management board members, the coach, and the finance director of Fenerbahçe Spor Kulübü, in connection with various football games of the 2010/2011 season.

On July 11, 2011, the TFF Executive Committee asked the ethics commission to initiate an investigation of match-fixing in Turkish football.

On July 20, 2011, the Turkish prosecution office provided the TFF Ethics Committee with information and evidence in connection with the ongoing criminal proceedings.

A.d.

On August 24, 2011, the TFF Executive Committee informed UEFA of its decision to not allow Fenerbahçe Spor Kulübü football club to participate in the upcoming season of the Champions League.

On August 25, 2011, the TFF arbitration committee rejected an appeal by Fenerbahçe Spor Kulübü against the decision of the TFF executive committee.

In its decisions of September 9 and November 3, 2011, pursuant to an appeal by Fenerbahçe Spor Kulübü against the decision of the TFF arbitration commission of August 25, 2011, the Court of Arbitration for Sport (CAS) rejected the applications for provisional remedies.

On December 2, 2011, the Turkish prosecutor arraigned various individuals, including officials of Fenerbahçe Spor Kulübü.

On January 3, 2012, the TFF Disciplinary Committee initiated disciplinary proceedings against Fenerbahçe Spor Kulübü and other Turkish football clubs and numerous individuals in connection with match-fixing.

On April 25, 2012, Fenerbahçe Spor Kulübü withdrew its appeal to the CAS and the decision of the Turkish federation to not allow Fenerbahçe Spor Kulübü to enter the 2011/2012 season of the Champions League became enforceable.

A.e.
On April 26, 2012, the TFF Ethics Committee released the report of an investigation into the charges that various football games had been manipulated, among others, those in which Fenerbahçe Spor Kulübü participated.

In a decision of May 6, 2012, the TFF Disciplinary Committee banned a member of the management board of Fenerbahçe Spor Kulübü from any activities related to football for three years and the vice president and the coach for one year.

B.
B.a.
On June 4, 2012, UEFA received the report of the TFF Ethics Committee of April 26, 2012. In a letter of June 7, 2012, the Secretary General of UEFA asked the chairman of the Control and Disciplinary Body to initiate disciplinary proceedings against Fenerbahçe Spor Kulübü.

On July 2, 2012, the High Criminal Court in Istanbul held that a criminal organization had been created under the leadership of B._____, the president of Fenerbahçe Spor Kulübü and that officials of Fenerbahçe Spor Kulübü had participated in manipulating 13 games of the 2010/2011 season. 48 of the 93 accused were found guilty and among them:

- B._____, the president of Fenerbahçe Spor Kulübü (two and a half years imprisonment for building a criminal organization, three years and nine months and a fine of TRY 1'312'500 for match-fixing);
- C._____, the vice president of Fenerbahçe Spor Kulübü (one year and three months imprisonment for participating in a criminal organization; one year and 10 months and 14 days for match-fixing);
- D._____, a member of the management board of Fenerbahçe Spor Kulübü (one year and six months imprisonment for participating in a criminal organization; one year and 25 [*sic*] months and 15 days and a fine of TRY 900'000 for match-fixing);

- E._____, a member of the management board of Fenerbahçe Spor Kulübü (one year and six months imprisonment for participating in a criminal organization; one year, one month and 15 days and a fine of TRY 135'000 for match-fixing);
- F._____, the coach of Fenerbahçe Spor Kulübü (one year and three months imprisonment for participating in a criminal organization; 11 months and seven days and a fine of TRY 15'626 for match-fixing);
- G._____, the finance director of Fenerbahçe Spor Kulübü (one year and three months imprisonment for participating in a criminal organization; one year and three months and a fine of TRY 49'980 for match-fixing).

On May 31, 2013, the UEFA Disciplinary Inspector submitted his report concerning the previous disciplinary proceedings. On June 20, 2013, Fenerbahçe Spor Kulübü stated its position in this respect.

In a decision of June 22, 2013, the Control and Disciplinary Body of UEFA excluded Fenerbahçe Spor Kulübü from the next three UEFA competitions for which the club could qualify, with the third year of the ban suspended for probation.

B.b.
In a decision of June 10, 2013, the UEFA Appeals Body overturned the decision of the Control and Disciplinary Body of June 20, 2013, in part pursuant to an appeal by Fenerbahçe Spor Kulübü and limited the ban to just the next two UEFA competitions.

B.c.
In a submission of July 16, 2013, Fenerbahçe Spor Kulübü appealed the decision of the UEFA Appeals Body of June 10, 2013, to the CAS and applied for a stay of enforcement. UEFA did not oppose a stay of enforcement.

On July 18, 2013, Fenerbahçe Spor Kulübü advised the CAS that the parties had reached an agreement about the timing of the proceedings, among others.

Also on July 18, 2013, the CAS confirmed the stay of enforcement, in view of the agreement of the parties. Moreover, it took notice of the agreement of the parties to an accelerated procedure pursuant to which the reasons in support of the appeal were to be submitted by July 26, 2013, and the answer to the appeal by August 9, 2013, with the hearing taking place between August 21 and 23, 2013, and a decision issued by August 28, 2013.

On July 26, 2013, Fenerbahçe Spor Kulübü submitted its appeal brief, essentially with a submission that the ban issued by the UEFA Appeals Body in its decision of July 10, 2013, should be overturned; and that, in the alternative, the July 10, 2013, decision should be annulled and the matter sent back to the UEFA Appeals Body.

On August 9, 2013, the UEFA submitted its answer to the appeal in which it asked that the appeal be rejected and the decision of the UEFA appeals body confirmed.

On August 21 and 22, 2013, the hearing took place in Lausanne. 20 people designated by the parties were heard all together; Fenerbahçe Spor Kulübü waived the deposition of 13 additional witnesses during the hearing.

B.d.
In an arbitral award of August 28, 2013, (the reasons being submitted on April 11, 2014) the CAS rejected the appeal and upheld the decision of the UEFA Appeals Body of July 10, 2013.

C.
In a civil law appeal Fenerbahçe Spor Kulübü submits that the Federal Tribunal should annul the CAS arbitral award of August 28, 2013.

The Respondent submits that the appeal should be rejected insofar as the matter is capable of appeal.

The CAS submits in its observations that the appeal should be rejected.

The Appellant submitted a reply to the Federal Tribunal on August 5, 2014, and the Respondent a rejoinder on August 26, 2014.

D.
In a decision of July 22, 2014, the Federal Tribunal rejected the Appellant's application for a stay of enforcement.

In a decision of September 1, 2014, the Court rejected the application to reconsider the stay of enforcement previously refused and confirmed the decision of July 22, 2014.

Reasons:

1.
According to Art. 54(1) BGG,[2] the judgment of the Federal Tribunal is issued in an official language,[3] as a rule in the language of the decision under appeal. When the decision was issued in another language, the Federal Tribunal resorts to the official language chosen by the parties. The decision under appeal is in English. As this is not an official language and the parties used German before the Federal Tribunal, the decision of the Federal Tribunal shall be issued in German.

[2] Translator's Note: BGG is the German abbreviation for the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173.110.

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

2.
In the field of international arbitration, a civil law appeal is permitted, pursuant to the requirements of Art. 190-192 PILA[4] (SR 291)(Art. 77(1)(a) BGG).

2.1. The seat of the Arbitral Tribunal is in Lausanne in this case. The Appellant had its seat outside Switzerland at the relevant time (Art. 176(1) PILA). As the parties did not expressly waive Chapter 12 PILA, the provisions of that chapter apply (Art. 176(2) PILA).

2.2. Only the grievances exhaustively listed in Art. 190(2) PILA are admissible (BGE 134 III 186[5] at 5, p. 187; 128 III 50 at 1a, p. 53; 127 III 279 at 1a p. 282). According to Art. 77(3) BGG, the Federal Tribunal reviews only the grievances that are raised and reasoned in the appeal brief; this corresponds to the duty to provide reasons embodied at Art. 106(2) BGG for the violation of constitutional rights and of cantonal and intercantonal law (BGE 134 III 186[6] at 5, p. 187 with references). Criticism of an appellate nature is not admissible (BGE 134 III 565[7] at 3.1, p. 567; 119 II 380 at 3b, p. 382).

2.3. The Federal Tribunal bases its decision on the factual findings of the arbitral tribunal (Art. 105(1) BGG). These encompass both the findings as to the essential facts on which the dispute is based and that which concerns the course of the proceedings and the findings as to the circumstances of the case, which include the submission of the parties, their factual allegations, legal arguments, statements in the case and offers of evidence, the contents of a witness statement or of an expert report or the findings during an inspection (BGE 140 III 16 at 1.3.1 with references). The Federal Tribunal may not rectify or supplement the factual findings of the arbitral tribunal even when they are blatantly inaccurate or based on a violation of the law within the meaning of Art. 95 BGG (see Art. 77(2) BGG, which rules out the applicability of Art. 97 BGG and Art. 105(2) BGG). However, the Federal Tribunal may review the factual findings of the award under appeal when some admissible grievances within the meaning of Art. 190(2) PILA are raised against such factual findings or when new evidence is exceptionally taken into account (BGE 138 III 29[8] at 2.2.1, p. 34; 134 III 565[9] at 3.1, p. 567; 133 III 139 at 5, p. 141; each with references). Whoever claims an exception to the rule that the Federal Tribunal is bound by the factual findings of the arbitral tribunal and wishes to rectify or

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[4] 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.

[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: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties

[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

[8] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s

[9] 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

supplement the factual findings on this basis must show, with reference to the record, that the corresponding factual allegations were raised in the arbitral proceedings in accordance with the relevant procedural rules (BGE 115 II 484 at 2a, p. 486; 111 II 471 at 1c, p. 473; each with references).

2.4. The Appellant disregards that the Federal Tribunal is bound by the factual finding in the award under appeal, as it submits a detailed statement of facts before its legal arguments, in which it presents the background of the disputes and of the proceedings from its own point of view and departs in part from the factual findings of the Arbitral Tribunal in this respect or broadens them without justifying any exception to the aforesaid rule. Therefore, the corresponding allegations shall not be considered.

The new facts raised are also irrelevant (Art. 99(1) BGG). The Appellant submits that the Turkish Court of Cassation, in the meantime, overturned four judgments against members of the management board and sent them back to the first instance for a new hearing.

2.5. The appeal must be fully reasoned in the appeal brief within the time limit to appeal (Art. 42(1) BGG). If there is a second round of briefs, the appellant may not use the reply to supplement or expand the appeal brief (BGE 132 I 42 at 3.3.4). The reply is only meant for submissions connected with the statements in the observations of another party to the proceedings (BGE 135 I 19 at 2.2).

Insofar as the appellant goes beyond this in its reply, its submissions may not be taken into account.

3.
The Appellant submits that the CAS violated the principle of equal treatment of the parties (Art. 190(2)(d) PILA).

3.1. It submits that the CAS essentially emphasized speed in adjudicating the appeal despite the extensive materials of the case and decided only six weeks after the appeal was introduced and less than six days after the conclusion of a hearing lasting several days, pursuant to an accelerated procedure, instead of sending the matter back to UEFA. In doing so, the CAS perpetuated the unequal treatment of the parties, finding its origin in the procedure in the UEFA bodies.

From the summer of 2011, the UEFA took almost two years before it finally submitted its report as to the investigation conducted to the Appellant on June 10, 2013, and initiated disciplinary proceedings. Then, it went “thick and fast” until the decision was issued. In the UEFA Control and Disciplinary Body, it was given 10 days to state its position, despite the fact that the report involved and the other records of the case were extensive. The subsequent procedure before the UEFA Appeal Body was nothing but a farce as it lasted only five days from the filing of the appeal to the decision on June 10, 2013, even though the Appeal Body also admitted considerable additional evidence from the Respondent, despite the Appellant’s protest.

The Appellant could not obtain comprehensive review and real legal protection in the CAS either; the large dispute was handled and rejected within just six weeks from its appeal; the hearing was limited to two days

with correspondingly few opportunities for the parties to interrogate witnesses. The Appellant did not willingly consent to accelerated proceedings in the CAS. The reason for the accelerated procedure was that the UEFA admission form had to be signed by a football club wanting to participate in UEFA competitions. The Appellant would not have agreed to accelerated proceedings in the CAS if it had the opportunity to participate in UEFA competitions without signing the corresponding form; the corresponding statement could therefore not be invoked against it. The unequal treatment that took place before the UEFA bodies continued in the arbitral proceedings in the CAS. The Respondent wanted to force a determination of the issue as to who could participate in the 2013/2014 Champions League before the draw. In the end, the Appellant had no other choice but to submit to the Respondent's dictate to preserve the possibility that it may still have been able to participate in this competition. There was no serious interest justifying the accelerated proceedings in the UEFA bodies or in the CAS; The Respondent could have readily conducted an ordinary appeal procedure and also consented to an ordinary course of the arbitral proceedings in the CAS. With its unilateral and unnecessary insistence upon an accelerated procedure in the CAS, the Respondent intended to continue the unequal treatment of the parties and thus the unlawful limitation of procedural rights in the CAS. The CAS could have respected the right to equal treatment only if it had sent the case back to the Respondent as submitted.

3.2.

3.2.1. Art. 190(2)(d) PILA allows a challenge only on the basis of the mandatory rules of procedure, according to Art. 182(3) PILA. In this respect, the arbitral tribunal must safeguard in particular the right of the parties to be heard. With the exception of the right to a reasoned decision, this corresponds to the constitutional guarantee in Art. 29(2) BV[10] (BGE 130 III 35 at 5, p. 37 *f.*; 128 III 234 at 4b, p. 243; 127 III 576 at 2c, p. 578 *f.*). Case law infers from this in particular the right of the parties to state their position as to the facts important to the judgment, to submit their legal arguments, to prove their factual allegations important for the decision with timely and appropriate means submitted in the appropriate format, to participate in the hearings, and to access the record (BGE 130 III 35 at 5, p. 38; 127 III 576 at 2c, p. 578 *f.*; each with references). Furthermore, the principle of equal treatment demands that the parties be treated equally during the entire arbitral proceedings (BGE 133 III 139 at 6.1, p. 143).

3.2.2. The party claiming to be harmed by a denial of the right to be heard or any other relevant procedural deficiency according to Art. 190(2) PILA forfeits its right if it does not raise the issue in the arbitral procedure in a timely manner and does not take all the appropriate steps to remedy the deficiency to the extent possible (BGE 130 III 66 at 4.3, p. 75; 126 III 249 at 3c, p. 253 *f.*; 119 II 386 at 1a, p. 388; each with references). The review of the arbitral award by the Federal Tribunal as to the procedural violations is therefore subsidiary because the parties must have raised the issue before the arbitral tribunal immediately so it may be remedied during the arbitral proceedings. It is incompatible with good faith to raise a procedural violation only in appeal proceedings, even though the opportunity to rectify the alleged violation could have been given to the tribunal during the arbitral proceedings (BGE 119 II 386 at 1a, p. 388). In particular, a party acts against good faith and abuses its right when it keeps the grievance in reserve to use

[10] Translator's Note: BV is the German abbreviation for the Swiss Federal Constitution.

in case of unfavorable development of the case and probable defeat (BGE 136 III 605[11] at 3.2.2, p. 609; 129 III 445 at 3.1, p. 445 at 3.1, p. 449; 126 III 249 at 3c, p. 254).

3.3.
3.3.1. Insofar as the Appellant raises a procedural violation before the Federal Tribunal because it claims not have been given sufficient opportunity to interrogate the parties and the witnesses during the two-day hearing, its argument will not be heard. One does not see that it raised this alleged violation during the arbitral proceedings; to the contrary, the factual findings in the award under appeal show that on its own initiative the Appellant reduced the number of witnesses it planned to call from 53 to 35 two days before the hearing and to 32 a day before, while also waiving 13 additional witnesses during the hearing. The grievance has thus been forfeited.

In its further argument, the Appellant also does not show that it raised an alleged unequal treatment of the parties by the Arbitral Tribunal during the arbitral proceedings. Contrary to its submissions before the Federal Tribunal, it did not strive to remedy the alleged violation during the arbitral proceedings, in the appeal brief or at the hearing. Instead, in the reasons in support of the appeal, it relied merely on various irregularities in the proceedings of the UEFA bodies and asked the CAS to send the case back to the UEFA Appeals Body for a new assessment should the CAS not follow its main submission that the sanctions should be annulled. Shortly before the conclusion of the hearing, the Appellant stated it had not freely consented to the accelerated procedure, so that the case should be sent back to the bodies of UEFA. The Appellant does not show that it applied to the CAS for more time for additional submissions or evidence or for the repetition or supplementation of certain procedural steps, let alone that he had already complained of unequal treatment in the arbitral proceedings.

Therefore, the Appellant did not undertake all appropriate effort to seek correction of the alleged violations in the arbitral proceedings. Thus, it forfeited the right to argue an alleged unequal treatment within the meaning of Art. 190(2)(d) PILA in the recourse proceedings in the Federal Tribunal. The corresponding argument is not capable of appeal as well.

3.3.2. In any event, the Appellant does not show how the CAS treated it unequally in the arbitral procedure (BGE 133 II 139 at 6.1, p. 143). Instead before the Federal Tribunal it essentially criticizes the proceedings of the UEFA bodies or the Respondent's behavior and does not show how, from the alleged coerced consent to the accelerated procedure, the CAS should have conducted an ordinary procedure; but it sees unequal treatment instead in the rejection of its appeal submissions by the Arbitral Tribunal. In so doing, it does not actually argue that in the arbitral proceedings, either factually and legally, the other party was granted something procedurally that was refused to the Appellant but instead criticizes, in an impermissible manner, the contents of the award under appeal.

[11] 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

4.
The Appellant argues that the Arbitral Tribunal violated its right to be heard by applying the law in an unforeseeable manner (Art. 90(2)(d) PILA).

4.1. According to the case law of the Federal Tribunal, there is no constitutional right for the parties to be heard specifically as to the legal assessment of the facts they introduce. Neither does the right to be heard mean that the parties would have to be heard in advance as to the factual findings important to the case. There is, however, an exception when a court intends to base its decision on a legal consideration that was not relied upon by the parties and the relevance of which they could not have reasonably anticipated (BGE 130 III 35 at 5, p. 39; 126 I 19 at 2c/aa, p. 22 and at d/bb, p. 24; 124 I 49 at 3c, p. 52).

4.2. The UEFA Appeals Body banned the Appellant from European competitions for two years for fixing a total of eight games and giving false data on the admission form. The CAS waived the sanction concerning false data in the form used and, moreover, found that the Appellant merely attempted to manipulate four games. However, this did not lead to a reduced sentence; the CAS confirmed the two-year ban instead. The Appellant describes this result as an "*eye-catching operational glitch*" in sentencing, which occurred due to the failure in the previous proceedings to address the analogical inference with the sentencing rules of the World Anti-Doping Code (WADA Code). The CAS failed to give the parties and opportunity to state their views as to this "*totally surprising analogy*."

4.3. Contrary to what the Appellant seems to assume, the CAS did not disregard the sentencing criteria of Art. 17 UEFA Disciplinary Regulations (2008 edition) in favor of the WADA Code but rather relied on the former provision instead. Moreover, the Arbitral Tribunal specifically explained why it did not reduce the sanction, although it differed from the federation bodies and found "only" four cases of match-fixing established. In particular, the CAS held on the basis of Art. 17 of the UEFA Disciplinary Regulations that a two-year ban was clearly justified in the case at hand.

The Arbitral Tribunal considered that a sanction at the higher end of the range was appropriate in view of its own case law, according to which bans of between one and eight years have been imposed for match-fixing and also in view of the gravity of the case in comparison with match-fixing previously adjudicated. Yet it remained with a two-year ban in view of the principle of *ultra petita* – the Respondent had waived an appeal. Contrary to the view adopted in the appeal brief, the CAS reference to the fact that comparable sanctions are imposed in doping cases, which would basically justify a two-year ban, which could be higher in particularly serious cases and reduced in the presence of mitigating circumstances, was not at all "*the paramount consideration for setting the sanction*." Under the circumstances, the CAS was not obliged to give the Appellant the opportunity to state its views as to the sentencing rules of the WADA Code.

There has not been an application of the law by surprise, which would violate the right to be heard.

5.
The Appellant argues that, in violation of the right to be heard, the CAS did not examine several of its submissions important to the decision.

5.1. The right to be heard in contradictory proceedings according to Art. 182(3) and Art. 190(2)(d) PILA does not encompass the right to reasons in an international arbitral award, according to well-established case law (BGE 134 III 186[12] at 6.1 with references). However, there is a duty of the arbitrators to examine and deal with the issues important for the decision. The arbitral tribunal violates this duty when, due to oversight or misunderstanding, some legally relevant submissions, arguments, evidence, or evidentiary submissions of a party are not considered. This does not mean, however, that the arbitral tribunal must address each submission of the parties explicitly (BGE 133 III 235 at 5.2 with references).

5.2.
5.2.1. The Appellant argues initially that, in assessing the powers of UEFA to impose sanctions for match-fixing, the Arbitral Tribunal completely disregarded some of its submissions. Thus, it submitted that at the time some of the games in dispute took place, it would not at all have recognized Art. 2.06 of the UEFA Champions League Regulations (UCLR) as binding. The Arbitral Tribunal disregarded this, just like its argument that according to the case law of the CAS, the disciplinary regulations of UEFA are to be interpreted objectively according to their wording and context. Its argument that federation regulations – in particular, disciplinary regulations – should be interpreted to the detriment of the user in case of doubt, was not addressed by the CAS at all. Moreover, its submissions as to the interpretation and meaning of the Circular no. 24/2013, introduced at the hearing, were not examined and assessed. According to the Appellant, had the Arbitral Tribunal examined its arguments important to the decision as to the lack of disciplinary power of UEFA, the Appeal would have been upheld.

5.2.2. The Arbitral Tribunal presents the competence of UEFA to conduct disciplinary proceedings as one of the main issues in the case under appeal. It summarized the Appellant's point of view that the grievances in dispute concerned manipulation of championship games in the 2010/2011 season and therefore could not fall within the disciplinary jurisdiction of UEFA, according to the relevant federation regulations.

The Arbitral Tribunal then thoroughly examined the jurisdiction of UEFA to punish match-fixing. In this respect, it referred expressly to the Appellant's argument that UEFA did not have disciplinary jurisdiction at the time of the alleged behavior, according to the regulations applicable at the time; according to the Appellant, this was only introduced later, which is why the jurisdiction to adopt the sanction could not be based on Art. 50(3) of the UEFA statues, nor on Art. 2.05 or 2.06 UCLR or Art. 5 of the Disciplinary Regulation. The Arbitral Tribunal thoroughly addressed the issue of the legal basis on which the match-fixing in dispute could be sanctioned by UEFA when it interpreted the aforesaid provisions and also

[12] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties

assessed their application temporally. In this respect, it expressed its particular view as to the interpretation and meaning of Circular no. 24/2013.

Under such circumstances, it cannot be claimed that the Arbitral Tribunal violated its minimal duty to examine the issues important to the decision and to address them (see BGE 133 III 235 at 5.2, p. 248, with references). Considering the thorough reasoning in the award under appeal, it must be assumed that the arguments submitted by the Appellant were at least implicitly rejected. The Arbitral Tribunal did not violate the Appellant's right to be heard when it did not specifically address each and all of its submissions as to the applicability of Art. 2.06 UCLR, as to the allegedly decisive method of interpretation of federation regulations, or as to the interpretation and meaning of Circular no. 24/2013.

5.3. The Appellant argues furthermore that it submitted in the arbitral proceedings that the sanction imposed by the Respondent violated the criminal law principle *nulla poena sine lege*. Yet, the Arbitral Tribunal did not address this argument at all in the award. Certain headings ("*[…] and where the sanctions imposed on accordance with the legality principle?*" or "*Is there a sufficient legal basis for the disciplinary measure?*")[13] suggest in and of themselves that the issue was to be materially addressed but this was not the case.

The argument raised in the appeal brief – without any further development – that the aforesaid headings emerged as "*mere changes of labels*" is not comprehensible. The Appellant itself does not dispute that in the reasons of the award, the Arbitral Tribunal expressly addressed its argument that the Federation regulations relied upon for the imposition of the sanction do not meet the requirements of the principle of legality. It introduces its remarks as to the principle of legality under the heading "*Is there a sufficient legal basis for the disciplinary measure?*"[14] and states that Swiss law and the consistent case law of the CAS require a clear and unambiguous legal basis for the sanction. Legal certainty requires that the applicable provision – in the case at hand, Art. 2.06 UCLR – should be sufficiently precise, which the Arbitral Tribunal subsequently reviewed and held as to match-fixing but not as to the charge concerning false data in the admission form.

There is no oversight or misunderstanding on the basis of which the Arbitral Tribunal could be said to have disregarded a legally relevant argument of the Appellant in this respect.

5.4. No violation of the right to be heard is made out as to the Appellant's argument concerning the assessment of the disciplinary sanction. The Arbitral Tribunal set forth the corresponding arguments thoroughly in the award under appeal and examined the level of the sanction in detail. Where the Appellant describes the reasons of the Arbitral Tribunal as "*not comprehensible*," it constitutes mere inadmissible criticism of the award under appeal, without any showing of a violation of the right to be heard.

[13] Translator's Note: In English in the original text.
[14] Translator's Note: In English in the original text.

6.
The Appellant argues that the CAS violated public policy.

6.1. It argues that the award under appeal violates the principle *ne bis in idem* (prohibition of double jeopardy) which belongs to public policy according to Art. 190(2)(e) PILA, as two sanctions were issued for the same act. The sanction imposed or confirmed by the CAS in the award under appeal violated the aforesaid principle and is accordingly incompatible with public policy.

6.2.
6.2.1. Procedural public policy is breached where there is the violation of fundamental and generally recognized procedural principles and where the disregard of such principles contradicts the sense of justice in an intolerable way, rendering the decision absolutely incompatible with the values and legal order of a state ruled by law (BGE 140 III 278 at 3.1; 136 III 345[15] at 2.1, p. 347 *f.*; 132 III 389 at 2.2.1, p. 392; 128 III 191 at 4a, p. 194).

The arbitral tribunal violates public policy when it leaves unheeded in its award the material legal force of an earlier judgment or when it deviates in the final award from the opinion expressed in a preliminary award as to a material preliminary issue (BGE 140 III 278 at 3.1; 136 III 345[16] at 2.1, p. 348; each with references).

The principle of *ne bis in idem* belongs, in principle, to public policy within the meaning of Art. 190(2)(e) PILA. However, the Federal Tribunal left open the extent to which this principle of criminal law would also have to be taken into account in disciplinary sport law (judgment 4A_386/2010[17] of January 3, 2011, at 9.3.1). The issue needs not be examined in depth in the case at hand, as the CAS itself assumed its applicability and examined the compatibility of the sanction with this principle in detail. The Federal Tribunal limits itself therefore to the review of the specific application of the aforesaid principle by the Arbitral Tribunal (see judgment 4A_386/2010,[18] *ibid*., at 9.3.1 a.e.).

6.2.2. In the arbitral proceedings, the Appellant saw a violation of the principle *ne bis in idem* because it had already been excluded from the Champion League's 2011/2012 season, pursuant to the decision of the Turkish Football Federation of August 24, 2011; therefore, it could not be banned a second time from

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[15] 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-

[16] 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-

[17] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/award-allegedly-issued-by-a-truncated-tribunal-claim-that-cas-de

[18] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/award-allegedly-issued-by-a-truncated-tribunal-claim-that-cas-de

the competition by UEFA. The Arbitral Tribunal stated that the ban issued by the Turkish TFF Federation for the 2011/2012 season at the time did not exclude a subsequent ban for further seasons in the framework of disciplinary proceedings. In this respect, it relied upon Article 50(3) of the UEFA Statues (2010 edition) and on Article 2.05 and Article 2.06 UCLR (2011/2012) which read as follows:

> Article 50(3) of the UEFA Statues (2010):
>
> The admission to a UEFA competition of a Member Association or club directly or indirectly involved in any activity aimed at arranging or influencing the outcome of a match at national or international level can be refused with immediate effect, without prejudice to any possible disciplinary measures.[19]
>
> Article 2.05 UCLR (2011/2012):
>
> If, on the basis of all the factual circumstances and information available to UEFA, UEFA concludes to its comfortable satisfaction that a club has been directly and/or indirectly involved, since the entry into force of Article 50(3) of the UEFA Statutes, i.e. 27 April 2007, in any activity aimed at arranging or influencing the outcome of a match at national or international level, UEFA will declare such club ineligible to participate in the competition. Such ineligibility is effective only for one football season. When taking its decision, UEFA can rely on, but is not bound by, a decision of a national or international sporting body, arbitral tribunal or state court. UEFA can refrain from declaring a club ineligible to participate in the competition if UEFA is comfortably satisfied that the impact of a decision taken in connection with the same factual circumstances by a national or international sporting body, arbitral tribunal or state court has already had the effect to prevent that club from participating in a UEFA club competition.[20]
>
> Article 2.06 UCLR (2011/2012):
>
> In addition to the administrative measure of declaring a club ineligible, as provided for in paragraph 2.05, the UEFA Organs for the Administration of Justice can, if the circumstances so justify, also take disciplinary measures in accordance with the UEFA Disciplinary Regulations.[21]

The Arbitral Tribunal held that Article 50(3) of the UEFA Statutes in connection with Article 2.05 and 2.06 UCLR anticipates a two-stage procedure: in the first stage, an administrative measure would be issued on the basis of Article 2.05 UCLR, namely a one-year ban from European competitions. In a second stage, a disciplinary measure would be issued which has no maximum duration and could be issued "*in addition to the administrative measure*." The two types of bans would have to be clearly separated pursuant to the purpose of the aforesaid provisions, insofar as a ban from the competition could be issued immediately at first, before UEFA would review the alleged transgressions in detail. UEFA would have an interest worthy of protection to exclude a club from the competition immediately without first initiating comprehensive disciplinary proceedings against it. According to the CAS, the administrative measure is therefore not the

[19] Translator's Note: In English in the original text.
[20] Translator's Note: In English in the original text.
[21] Translator's Note: In English in the original text.

final but merely a provisional minimal sanction, which seeks to protect the integrity of the specific competition.

6.2.3. The application of the principle *ne bis in idem* requires in particular that, in the first proceedings, the court should have had the opportunity to assess the facts in all respects (BGE 135 IV 6 at 3.3; 119 Ib 311 at 3c, with references). There is no apparent reason why this should apply when, in the first proceedings, the Turkish Football Federation merely issued an administrative measure to protect the integrity of the competition for a limited time in provisional proceedings and not in the context of a comprehensive disciplinary procedure to assess the alleged violations in a definitive way. As the Federal Tribunal held in a previous case concerning the jurisdiction of sports arbitration, the application of the prohibition of double jeopardy requires in particular that the legal values protected should be identical; moreover, the Court pointed out that the prohibition does not exclude that the same proceedings could carry civil, administrative or disciplinary consequences besides the criminal ones (judgment 4A_386/2010[22] of January 3, 2011, at 9.3.2).

However, the Appellant does not address the fact that the different proceedings according to Article 2.05 and Article 2.06 UCLR pursue different goals and protect different legal values. It merely limits itself to a reference to the fact that the Arbitral Tribunal spoke of "sanctions" in both proceedings but in doing so, it does not show that the one-year ban imposed pursuant to Article 2.05 would be a decision having the same objective as the subsequent disciplinary measure imposed pursuant to Article 2.06. In view of the two-stage procedure described, each with a different regulatory purpose, one does not see either to what extent the Turkish TFF Federation already had the opportunity in the first proceedings to assess the facts conclusively from all factual points of view.

There is no violation of the principle *ne bis in idem* by the CAS. The argument that public policy was violated is therefore unfounded.

7.
The appeal appears unfounded and must be rejected insofar as the matter is capable of appeal. In view of the outcome of the proceedings, the Appellant must pay the costs and compensate the other party (Art. 66(1) and Art. 68(2) BGG).

Therefore the Federal Tribunal Pronounces:

1.
The appeal is rejected insofar as the matter is capable of appeal.

[22] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/award-allegedly-issued-by-a-truncated-tribunal-claim-that-cas-de.

2.
The judicial costs set at CHF 30’000 shall be borne by the Appellant.

3.
The Appellant shall pay to the Respondent an amount of CHF 35’000 for the federal judicial proceedings.

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

Lausanne, October 16, 2014

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

Presiding Judge:	Clerk:
Klett (Mrs.)	Leemann