

4A_506/2007¹

Judgement of March 20, 2008

First Civil Law Division

Federal Judge CORBOZ, Presiding

Federal Judge ROTTENBERG LIATOWITSCH (Mrs.)

Federal Judge KOLLY

Clerk of the Court: M. CARRUZZO

X. _____,

Appellant,

Represented by Mr Ralph OSWALD ISENEGGER

vs.

Y. _____ Association,

Respondent

Facts:

A.

On April 17, 2006, X. _____ and Y. _____ Association (“the Association”) entered into a contract whereby the former, as representative of A. _____ Sport, an entity without legal personality which he controls entirely, was entrusted by the Association to organise five friendly games, during which the national team of [name omitted] would be playing against other national teams in Germany a few days before the beginning of the 2006 Football World Cup, which took place in that country. X. _____ undertook to bear all expenses relating to the organisation of the games (travel, local transportation, accommodation, etc.) and to pay an amount of USD 250'000.- to the Association in three instalments, as well as some additional lump sums if

¹ Translator's note: Quote as X. _____ v. Y. _____ Association, 4A_506/2007. The original of the decision is in French. The text is available on the web-site of the Federal Tribunal www.bger.ch.

the number of spectators was in excess of the thresholds set in the contract. As a counter part, the Association assigned to him, amongst others, the worldwide television broadcasting rights of the games involved, to the exception of [name of a country]. The contract was governed by the Rules of the International Federation of Football Association (“FIFA”) and those of the Union of European Football Associations (“UEFA”). According to Art. 12 of the contract, the disputes arising from its violation would be liquidated by way of arbitration and submitted to FIFA or to the Court of Arbitration for Sport (“CAS”) if the former were to decline jurisdiction.

The five games which were the object of the contract took place at the dates foreseen. Disappointed by the economic result of the games, X._____ complained in a letter sent to the Association on June 9, 2006. Among others, he deplored the fact that four of the five games had been broadcast live in the very country where they took place, in violation of the contract, which caused the number of spectators in attendance of these games to be far lower than anticipated. According to him, the damage undergone, including damages to his reputation as an organiser, estimated at EUR 200’000.- could be calculated at EUR 1’122’000.-.

In its answer of July 6, 2006, the Association informed X._____ that his complaint had been transmitted to the companies which had broadcast the games without rights and that it expected them to contact him with a view to amicably resolving the dispute. A letter sent by the Association to the company B._____ Ltd was attached. On January 4, 2006, the Association had entered into a contract assigning the television broadcast rights of certain games of the national team of [name of the team]. In the letter, the Association indicated that only the friendly games taking place in [name of the country] were covered by that contract.

The Parties failed to reach an agreement and the dispute was submitted to the UEFA, than to FIFA, which both declined jurisdiction.

B.

B.a On March 16, 2007, X._____ filed a request for arbitration with the CAS and appointed Mr _____ as arbitrator. He asked that the Association should be ordered to pay him EUR 1’122’000.- plus interest.

In a letter of March 29, 2007, the Association advised the CAS that it had appointed Mr _____ as arbitrator. On April 12, 2007, C._____, a partner and manager of the limited liability

company D._____, informed the CAS that henceforth he would represent the Association. In its name, he asked that the request be entirely rejected and submitted a counterclaim asking X._____ to pay USD 200'000.- corresponding to the last two instalments due under the contract, in addition to EUR 35'750.- for the expenses undergone by the return trip of the [name of a country] delegation from Germany and EUR 100'000.- corresponding to an invoice sent by the German Football Association to the Association for the organisation of the games and which had been paid by the latter. Interest was also claimed.

In a letter of April 23, 2007, the CAS advised Mr T._____ that the two Party appointed arbitrators had selected him as President. The three arbitrators signed the form confirming the acceptance of the appointment and stating their independence towards the Parties.

On May 21, 2007, the CAS brought the composition of the Arbitral Tribunal to the attention of the Parties. A copy of the forms signed by the arbitrators was attached to the letter, as well as a document entitled "Notice of formation of a panel" on which the arbitrators' names were mentioned as well as those of the Parties and their representatives.

After an additional exchange of briefs, the Parties were heard by the Arbitral Tribunal² in a hearing, which took place in Lausanne on September 11, 2007. No particular objection was raised by the Parties during the hearings with regard to the composition of the Arbitral Tribunal.

B.b On October 30, 2007, the CAS issued its award. It rejected the main claim and granted the counterclaim of the Association.

Based on Art. R45 of the Sport Arbitration Code , on Art. 9.i.x of the contract and Art. 60(2) of the FIFA Statutes, the arbitrators held that the dispute was to be adjudicated in accordance with the specific FIFA and UEFA rules and on the basis of Swiss law subsidiarily.

Upon finding that the Parties agreed on the existence of damage inducing behaviour affecting the rights granted to the Claimant by the contract, the CAS examined whether or not that breach could be blamed on the Respondent. On the basis of the evidence introduced, it held that this was not the case. Indeed, the agreements entered into by the Respondent with other companies, such as B._____ Ltd, were not inconsistent with the contract, because the rights thus granted

² Translator's note: The French text uses the word « *Formation* », which is translated here as "Arbitral Tribunal" for the sake of clarity.

and those assigned to the Claimant were not for the same territories. Also, the Respondent had done nothing which would jeopardize such rights. It had learned of the existence of damage inducing behaviour of third parties only after the games organised by the Claimant. Finally, it could not have been expected from the Respondent that it would control whether or not third parties respected the rights assigned to its contractual counterpart. Thus, in the arbitrators' view, the Respondent was not liable and the Claimant's submissions could not but be rejected, without prejudice to his right to invoke the non-contractual liability of third parties, if any.

With regard to the counterclaim, the CAS found that the amounts claimed by the Respondent had not been challenged as such by the Claimant. He raised a set-off defence for additional expenses which, in his view, he should not bear, but the arbitrators found that the legal requirements of Art. 120(1) of the Swiss Code of obligations ("CO") for a set-off were not met with regard to the Claimant's claim against the Respondent. Thus, they granted the submissions by the latter and set the amount of interest on the basis of Art. 102 and 104 CO.

C.

On November 29, 2007, X._____ filed a civil law appeal with the Federal Tribunal, with a view to obtaining the annulment of the aforesaid award. The Appellant also submitted that the CAS should be instructed to remove T._____ and S._____ from the Arbitral Tribunal on the basis of the applicable procedural rules and to substitute them with two arbitrators whose impartiality and independence would be guaranteed.

The Association submitted that the matter is not capable of appeal and that it should be rejected. The CAS submitted that the appeal should be rejected.

On January 10, 2008, the Presiding Judge granted a stay of enforcement.

Noticing that the answer was signed by C._____, who did not appear to meet the requirements of Art. 40(1) LTF³ to appear as a representative in front of the Federal Tribunal, he was asked to state his position in this respect and to take appropriate steps if necessary. The Respondent timely filed a new copy of its answer, signed by the Secretary General of the Association.

³ Translator's note: French abbreviation for the Federal Statute of June 17, 2005 organising the Federal Tribunal, RS 173.110.

Reasons:

1.

According to Art. 54(1) LTF, the Federal Tribunal issues its decision in one of the official languages, as a rule in the language of the decision under appeal. If the decision was written in an other language (in this case English), the Federal Tribunal uses the official language chosen by the Parties. In front of the Arbitral Tribunal, they used English, whilst in the briefs submitted to the Federal Tribunal, the Appellant used French and the Respondent used German. In accordance with its practice, the Federal Tribunal will use the language of the appeal and consequently issue its decision in French.

2.

In the field of international arbitration, a civil law appeal is allowed against the decisions of arbitral tribunals at the conditions set forth at Art. 190 to 192 PILA⁴ (Art. 77(1) LTF).

2.1 The seat of the CAS is in Lausanne. At least one of the Parties, in this case the Respondent, did not have its domicile in Switzerland at the pertinent time. The provisions of chap. 12 PILA are accordingly applicable (Art. 176(1) PILA).

2.2 The Appellant is directly concerned by the award under appeal, which orders him to pay an important amount of money to the Respondent. He therefore has a personal, present and legally protected interest to ensure that the award was not issued in violation of the guarantees arising from Art. 190(2) PILA, which gives him standing to appeal (Art. 76(1) LTF).

Filed within 30 days after the notification of the award under appeal (Art. 100(1) LTF), the appeal meets the formal requirements of Art. 42(1) LTF and is to be allowed. The Respondent claims that the time to appeal would have expired on June 21, 2007, namely 30 days after the Parties had been informed by the CAS secretariat of the composition of the Arbitral Tribunal. The Respondent is wrong. Indeed, that information did not constitute a decision, which could be appealed to the Federal Tribunal through a civil law appeal but a mere circumstance which could have some importance to determine the time-limit for a challenge set at Art. R34 of the Code.

⁴ Translator's note: PILA is the generally used abbreviation for the Swiss Federal statute on international private law of December 18, 1987, RS 291.

2.3 The appeal may only be made for one of the reasons exhaustively listed at Art. 190(2) PILA (ATF 128 III 50 at 1a p.53; 127 III 279 at 1a p. 282; 119 II 380 at 3c p. 383). The Federal Tribunal reviews only those grounds for appeal which were invoked and developed by the Appellant (Art. 77(3) LTF). Accordingly, the Appellant must state its grounds for appeal in conformity with the strict requirements set by case law under Art. 90(1)(b) OJ⁵ (see ATF 128 III 50 at 1c), which remain in force under the aegis of the new Federal Law of Procedure.

The appeal is limited to annulment (Art. 77(2) LTF ruling out Art. 107(2) LTF). The Federal Tribunal issues its decision on the basis of the facts established by the Arbitral Tribunal (Art. 105(1) LTF). Factual findings of the arbitrators may not be rectified or supplemented *ex officio* even when the facts were established in a manifestly inaccurate way or in violation of the law (see Art. 77(2) LTF ruling out the application of Art. 105(2) LTF). However, as was the case under the previous law (see ATF 129 III 727 at 5.2.2; 128 III 50 at 2a and the cases quoted), the Federal Tribunal retains the possibility to review the facts on which the award under appeal was based if one of the grounds for appeal at Art. 190(2) PILA is raised against the factual findings or when new facts or new evidence are exceptionally taken into consideration within the framework of the civil law appeal (see Art. 99(1) LTF; Bernard Corboz, Introduction à la nouvelle loi sur le Tribunal fédéral, in SJ 2006, p. 320 ff, 345; as to the powers of review of the Federal Tribunal with regard to the facts in a civil law appeal, see Sébastien Besson, Le recours contre la sentence arbitrale internationale selon la nouvelle LTF (aspects procéduraux), in Bulletin ASA 2007, p. 2 ff, 24-26, n° 55 to 59).

3.

In a first ground for appeal based on Art. 190 (2)(a) PILA, the Appellant claims that the CAS which issued the award had been irregularly composed.

3.1

3.1.1 Like a State court, an Arbitral Tribunal must present sufficient guaranties of independence and impartiality (ATF 125 I 389 at 4a; 119 II 271 at 3b and the cases quoted). The violation of that rule leads to an irregular composition within the meaning of the aforesaid provision (ATF 118 II 359 at 3b). To decide whether or not an Arbitral Tribunal presents such guaranties, one should refer to the constitutional principles developed with regard to State courts (ATF 125 I 389 at 4a; 118 II 359 at 3c p. 361). However, the specificities of arbitration, specially those of

⁵ Translator's note: « *Organisation judiciaire* » was the name of the previous statute organising Federal courts.

international arbitration, should be taken into account when reviewing the circumstances of the case (ATF 129 III 445 at 3.3.3 p. 454). In this respect, the sport arbitration instituted by the CAS presents some characteristics which have already been described (ATF 129 III 445 at 4.2.2.2), such as a closed list of arbitrators, which cannot be overlooked, even though they do not justify as such to apply less demanding standards to sport arbitration than in commercial arbitration (see Antonio Rigozzi, *L'arbitrage international en matière de sport*, n° 950; Gabrielle Kaufmann-Kohler/Antonio Rigozzi, *Arbitrage international*, n° 368).

According to Art. 30(1) Cst.⁶, anyone involved in judicial proceedings has a right to a tribunal established by law, having jurisdiction, independent and impartial. The aforesaid guarantee makes it possible to demand the removal of a judge whose situation or behaviour is such as to give rise to a doubt as to his impartiality (ATF 126 I 68 at 3a p. 73); it particularly aims at avoiding the circumstances external to the case that could influence the judgement in favour of a party or to its detriment. The provision does not impose the removal only when an actual prevention of the judge is established, as an internal disposition on his part may hardly be proved; it is enough for the circumstances to give the appearance of prevention and that they may suggest partiality of the magistrate. Only such circumstances as can be found objectively must be taken into consideration; the mere individual impressions of one party are not decisive (ATF 128 V 82 at 2a p. 84 and the cases quoted).

Subjective impartiality – which is presumed until disproved – ensures to anyone that a case will be adjudicated without taking any personal factors into consideration. A mere allegation of partiality is not sufficient and objective facts are required, yet it is not necessary for the judge to be effectively partial. A suspicion is legitimate even if it is based only on appearances, provided they arise from circumstances examined objectively (ATF 129 III 445 at 3.3.3 p. 454; 128 V 82 at 2a p. 83 and the cases quoted).

3.1.2 The party seeking to challenge an arbitrator must raise the grounds for challenge as soon as it becomes aware of them. This rule, established by case law, specifically stated at Art. R34 of the Code, refers to the grounds for challenge that the party effectively knew and to those which it may have known by displaying appropriate attention (ATF 129 III 445 at 4.2.2.1 p. 465 and references), for choosing to remain in ignorance may in certain cases be considered as an unacceptable manoeuvre, comparable to differing the announcement of a challenge (Decision

⁶ Translator's note: Cst. is the French abbreviation for the Swiss Federal Constitution.

4P_188/2001 of October 15, 2001 at 2c). The aforesaid rule is an application of the principle of good faith to the arbitral procedure. On the basis of that principle, the right to invoke an alleged irregular composition of the Arbitral Tribunal falls if the party does not raise it immediately, as it cannot be allowed to store it to be invoked only in case of an unfavourable issue of the arbitral proceedings (ATF 129 III 445 at 3.1 p. 449 and the cases quoted).

3.2 According to the Appellant, “during a phone conversation taking place within the time to appeal, the existence of particularly close relationships between certain magistrates and advocates frequently representing parties in front of the CAS was learned, specifically within an entity E._____” (Appeal, §38). The Appellant would thus have made enquiries revealing that two of the three arbitrators – the Chairman T._____ and Respondent’s arbitrator Mr S._____ are members of E._____ Association, as well as C._____ who represented the Respondent in front of the CAS.

The Appellant’s claim with regard to its alleged discovery appears quite singular and at least subject to caution. It is indeed more than vague, mentioning neither the Respondent’s counterparty’s name, nor the circumstances in which the phone conversation would have taken place.

Be this as it may, and supposing that the Appellant had not been aware of the alleged ground for challenge, he could have become aware by using the required attention. It must be pointed out that this is a case involving ordinary arbitral proceedings, within the meaning of Art. R38 ff of the Code as opposed to the vast majority of CAS cases reviewed by the Federal Tribunal, which involve the arbitral appeal procedure following the challenge of a decision issued by the organs of a sport federation having accepted the CAS jurisdiction (see Art. R47 ff of the Code). To that extent, the dispute submitted to the CAS with regard to the international contract involved had all the characteristics of an ordinary commercial arbitration, except for the sport framework involved. The dispute opposed two parties on equal footing, which sought to have it adjudicated in arbitration and were fully aware of the financial issues involved; from that point of view, their situation was quite different from that of the simple professional sportsman opposed to a powerful international federation (see ATF 133 III 235 at 4.3.2.2). Under such circumstances, the importance of the choice of the arbitrators could not reasonably have escaped the Appellant’s attention as he was claiming damages in excess of one million Euros. The most elementary prudence required him to investigate and ensure that the arbitrators in charge of his request

would present sufficient guaranties of independence and impartiality. He could not simply rely on the general statement of independence made by each arbitrator on the *ad hoc* form. As the CAS points out in its answer, the data available on its Internet site with regard to T._____ specifically indicate that the arbitrator is a member of the E._____ Association. On the basis of that indication, the Appellant should at least have wondered what the Association consisted in and whether or not the other arbitrators, or even the Respondent's attorney may also be members. Such steps would not have required considerable time. Indeed, the Respondent was able to do so within less than thirty days after the receipt of the arbitral award. The password protecting the Association's website did not prevent the Appellant from entering the site. In any event, he could have enquired directly from the arbitrators as to their possible membership of E._____. Also, other unprotected sources were accessible to the Appellant, beginning with the website of the W._____ law firm of which T._____ is a partner. As exhibit 13, the Appellant filed an information bulletin coming from that site and published in May 2007, relating to the ordinary general meeting of E._____ on April 28, 2007, chaired by T._____ and with C._____ in attendance among other people.

Accordingly, the Appellant's right to raise the irregular composition of the Arbitral Tribunal expired, be it because he knew the ground for challenge at the time, be it because he should have known it by applying the attention required under the circumstances.

Had it not been time-barred, the ground for appeal would have been rejected in any event for the following reasons.

3.3

3.3.1 The Appellant claims that T._____ and S._____ were not independent and that accordingly the Arbitral Tribunal of which they were members as Chairman and arbitrator was composed irregularly. To substantiate the argument, the Appellant points out that the two arbitrators belong to an Association E._____ to which C._____, the Respondent's representative, is also affiliated, resulting in a close relationship, none of them having stated that privileged relationship in his statement of independence. According to the Appellant, E._____ Association, whilst pretending to devote itself to academic pursuits, would in fact be a closed network exchanging information within which the members would use the privileged contacts made in that framework to develop their activity and client basis in the field of sport. The secret character of the Association would also be shown by the fact that access to the Internet site

would be reserved to members. The Appellant further states that E._____ has only 26 members coming from all parts of the world, 8 of which are on the list of CAS judges and 20 are practicing attorneys or representatives of the parties in front of that arbitral jurisdiction. He claims to have noticed “with incredulity, that in the arbitral proceedings conducted by the CAS since more than one year of which he has knowledge, the representatives of a party affiliated to E._____ would have systematically chosen to appoint as arbitrator a member of the Association. To sum up, the Appellant considers as illegal the frequent practice of counsel who is a member of E._____ to systematically appoint an arbitrator belonging to the same Association. It would be just as illegal to choose as Chairman a member of E._____ whenever a party representative or an other arbitrator member of the Association would be functioning in the same arbitral proceeding. Still according to the Appellant, T._____ is also a founding shareholder of company E._____ constituted on March 11, 2002, which would be engaged in activities directly competing with his own and the director of which is also the managing partner of the law firm he presides. There would thus be a manifest connection, if not an identity, between the members and the leaders of that commercial company and the “beneficiaries” of E._____, such a circumstance causing a final loss of trust in the impartiality of the Arbitral Tribunal.

3.3.2

3.3.2.1 The Appellant does not claim that arbitrators T._____ and S._____ would not be independent from the Parties as he merely relies on the alleged privileged connection between these two arbitrators and the Respondent’s representative in front of the CAS. Admittedly, the Respondent also seeks to demonstrate that arbitrator T._____’s lack of independence would also result from competition between that arbitrator, through commercial company E._____ and himself. However, the documents provided are manifestly insufficient to establish the alleged competition. From the award under appeal it appears merely that the Appellant is an agent organising games duly licensed by FIFA and UEFA. As to the company, its purpose, among others, is to provide advice with regard to the organisation of sport events, the commercialisation of services and products relating to sport and the management of TV-rights. However, besides the fact that nothing is known as to where it carries out its activity, it is not possible to establish competition between that company and the Appellant on the mere basis of its corporate goal. In this respect, the Appellant provides no objective element from which it may be inferred that there would be an actual risk that the activities of the company may interfere with his own.

3.3.2.2 It remains to be seen if the fact that two of the three arbitrators and the Respondent's counsel belong to the same Association would give rise to an objective doubt as to the impartiality of the Arbitral Tribunal.

In order to verify the independence of the arbitrators, the Parties may also refer to the IBA Guidelines on Conflicts of Interest in International Arbitration approved on May 22, 2004 (www.ibanet.org/publications/Publications_home.cfm; about these guidelines, see Bernhard Berger/Franz Kellerhals, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz*, n° 734; Gabrielle Kaufmann-Kohler/Antonio Rigozzi, *op. cit.*, n° 373 ff; Wolfgang Peter/Sébastien Besson, *Commentaire bâlois, Internationales Privatrecht*, 2nd Ed., n° 15 *in fine* at Art. 180 PILA; Jean-Philippe Rochat/Sophie Cuendet, *Ce que les parties devraient savoir lorsqu'elles procèdent devant le TAS: questions pratiques choisies*, in *The Proceedings before the Court of Arbitration for Sport* [Ed. A. Rigozzi/M. Bernasconi], Lausanne 2006, p. 45 ff and 57 ff). Such guidelines admittedly have no statutory value (Peter/Besson, *ibid.*); yet they are a precious instrument, capable of contributing to harmonization and unification of the standards applied in the field of international arbitration to dispose of conflict of interests (Berger/Kellerhals, *op. cit.*, n°734 *in fine*) and such an instrument should not fail to influence the practice of arbitral institutions and tribunals (Kaufmann-Kohler/Rigozzi, *op. cit.*, n°374). The guidelines do not state any general principles. They contain an enumeration, in the format of non-exhaustive lists, of particular circumstances: a red list divided in two parts (situations in which there is a legitimate doubt as to the independence and impartiality, with the parties being unable to renounce the most serious of them); an orange list (intermediary situations which must be disclosed but do not necessarily justify removal); a green list (specific situations which do not create an objective conflict of interest and which the arbitrators are not bound to disclose). It goes without saying that notwithstanding the existence of such lists, the circumstances of the specific case will always remain decisive to dispose of the issue of a conflict of interest (Kaufmann-Kohler/Rigozzi, *op. cit.*, n°374 *in fine*).

That an arbitrator is related to another arbitrator or to counsel for one of the parties within the framework of a professional or social association was classified in the green list of the aforesaid guidelines (Nr. 4.4.1 of the green list). This is what is involved here. As such, this was not sufficient to justify a challenge of the Arbitral Tribunal, neither did it oblige the arbitrators who are members of E._____ to disclose that affiliation in their statements of independence. In this respect, the guidelines merely express in other terms the principles set forth by case law of the

Federal Tribunal in considering the specificities of International Arbitration in the field of sport (see ATF 129 III 445 at 3.3.3 and at 4.2.2.2 p. 467, confirmed by the Decision 4P.105/2006 of August 4, 2006 at 4).

Only additional circumstances could therefore justify a different assessment of the case. In this regard, the Appellant relies on the opacity and the secret of the Association, which would only aim at enhancing the personal interests of its few members in the field of sport arbitration and specifically in the proceedings in front of the CAS. However, these are mere allegations. Thus, one does not see on what basis the Appellant disregards the purpose of E._____ – which is essentially an academic one – attributing to the Association some intentions differing from those resulting from its by-laws. Furthermore, it appears difficult to blame an association, whatever it may be, to seek to defend the interests of its members, at least to the extent that such pursuit would not take place to the detriment of the legitimate interests of third parties. Associations such as E._____ are frequent in the field of sport law, as the Respondent pointed out with references. The statistical data given by the Appellant to demonstrate that the representatives of a party affiliated to E._____ would systematically choose as arbitrator a member of the Association are not sufficient quantitatively to establish the fact. Also, as the CAS appropriately pointed out in its answer, the Respondent appointed its arbitrator – S._____ – before it retained C._____ in the arbitral proceedings. Moreover, the demonstration attempted by the Appellant relates to a circumstance, which is not necessarily pertinent as to the impartiality and independence of the arbitrators. As has been stated for a long time, the capacity of the members of an arbitral tribunal to rise above contingencies relating to their appointment when they are called upon to issue a decision in the exercise of their function must be presumed (ATF 129 III 445 at 4.2.2.2 p. 467 *in fine* and the cases quoted). In other words, even if the statistical elements submitted by the Appellant would correspond to reality, this would still not mean that the circumstance thus established would be such as to give rise to an objective doubt as to the independence of the arbitrator belonging to E._____ appointed by the representative of a party affiliated to the same Association. The opposite conclusion could only be drawn if it were statistically proved that, in such a case, the Arbitral Tribunal including an arbitrator thus appointed would systematically find for the Party represented by counsel affiliated to E._____, and such a demonstration was not even attempted in this case. As to the alleged secret character of the Association, arising from the use of a password to access the website, this is an untenable argument. Explanations given by the Respondent and by arbitrator T._____, substantiated by multiple documents, rule out the alleged intent of E._____ to hide its existence from the public

at any cost. Indeed, the Appellant was soon able to pierce the secret and to penetrate the website of the Association, notwithstanding the password, although neither he nor his counsel were members. The restrictions to the access of a website are not at all limited to E._____. Other organisations do similarly, such as the Swiss Arbitration Association, without deserving to be called secret as a consequence.

Furthermore, the Appellant provides no indication from which it could be inferred objectively that arbitrators T._____ and S._____, or one of them, would have been partial against him. Under the circumstances, the ground for appeal derived from an alleged irregular composition of the Arbitral Tribunal would have been rejected even if the Appellant had been entitled to raise it at this stage in the proceedings.

4.

Secondly, the Appellant relies on Art. 190(2)(e) PILA to claim that the Arbitral Tribunal issued an award inconsistent with public policy.

4.1 An award is inconsistent with public policy if it disregards the essential and broadly recognized values which, according to Swiss concepts, should be the basis of any legal order (ATF 132 III 389 at 2.2.3).

An award is contrary to material public policy when it violates some fundamental rules of material law to the point of no longer being consistent with the determining legal order and system of values; among such principles are contractual trust, respecting the rules of good faith, the prohibition of abuse of rights, the prohibition of discriminatory or confiscatory measures and the protection of incapable persons. As the Federal Tribunal ceaselessly repeats, the interpretation process of the disputed legal act and the consequences logically derived at law are not governed by the principle of contractual trust, which means that almost the entire scope of disputes deriving from the violation of the contract is excluded from the scope of protection under the principle *pacta sunt servanda* (Decision 4A_370/2007 of February 21, 2008 at 5.5).

4.2 In this case, the Appellant claims that the CAS would not have applied the specific provisions of Swiss law to the disputed legal act and therefore it would have failed to bring to light the Respondent's faulty behaviour, which would have caused the damage for which compensation was claimed. According to him, the legal act would be a mixed contract, essentially a licence

agreement, which would have obliged the licensor – *i.e.* the Respondent – to take all necessary steps to ensure that the licensee – that is the Appellant – would be able to retain the use and the value of the rights granted. A similar duty would also arise from a specific clause in the contract. Thus, the Arbitral Tribunal, had it interpreted the contractual clause on the basis of the principle of trust, could not have failed to conclude that it behoved the Respondent to assist its contractual counterpart to obtain the best possible results from the commercial and TV rights assigned, something which that party had neglected.

From such a summary of the arguments in support of a violation of material public policy, it clearly appears that, under cover of that ground for appeal, the Appellant is in reality merely challenging the way in which the CAS interpreted the respective obligations of the Parties to the contract. Such arguments, coming close to what would be raised in an ordinary appeal, would not be able to substantiate that ground for appeal and no further examination is therefore required.

5.

The appeal must be rejected under the circumstances. Accordingly, the Appellant shall pay the judicial costs for the Federal judicial proceedings (Art. 66(1) LTF) and pay the costs of its opponent (Art. 68(2) LTF).

Therefore, the Federal Tribunal pronounces:

1.

The appeal is rejected.

2.

The judicial costs, set at CHF 17'000.-, shall be borne by the Appellant.

3.

The Appellant shall pay to the Respondent an amount of CHF 19'000.- as costs.

4.

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

Lausanne, March 20, 2008

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

The presiding Judge:

The Clerk:

CORBOZ

CARRUZZO