4A_544/2014[1]

Judgment of February 24, 2015

First Civil Law Court

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

Claimant
A._____,
Represented by Mr. Zlatko Prtenjaca,
Appellant

v.

Fédération International de Football Association (FIFA)
Represented by Mr. Christian Jenny,
Respondent

Facts:

A.
A.a. A._____ (the Appellant) is domiciled in U._____, Croatia and is a professional Croatian football player and an Australian national. He played regularly for the national Croatian team.

The Fédération International de Football Association (FIFA; Respondent) is an association under Swiss law, headquartered in Zürich.

A.b. On November 19, 2013, in the framework of the qualification for the 2014 FIFA World Cup, the return game took place between the national teams of Croatia and Iceland in Zagreb. Croatia won 2:0 and thus qualified for the 2014 World Cup in Brazil.

[1] Translator's Note: Quote as A._____ *v.* Fédération International de Football Association (FIFA), 4A_544/2014. The original decision is in German. The full text is available on the website of the Federal Tribunal, www.bger.ch.

About 40 minutes after the end of the game, A._____ took a microphone and went alone to the middle of the field. While raising his shirt in the left hand and making regular movements upwards, he shouted at least twice "*u boj, u boj*" ("into the breach"), which the Croat supporters answered with shouts of "*za narod svoj*" ("for our people"). Then, he shouted about four times "*za dom*" ("for the homeland") and the crowd shouted "*spremni*" ("we are ready").

On November 20, 2013, the FARE Network, an umbrella organization campaigning against discrimination in football sent a report to FIFA about the aforesaid incident. It was emphasized there that the expression "*za dom spremni!*" is a Croatian salute which, during the Second World War, was used by the fascist Ustascha movement.

A.c. On November 22, 2013, the FIFA Disciplinary Committee opened proceedings against A._____.

In a decision of December 12, 2013, the FIFA Disciplinary Committee found a violation of Art. 58(1)(a) of the FIFA Disciplinary Code (2011 Edition) for the international match of November 19, 2013, as it punishes degrading, discriminating, or disparaging expressions or acts.

The Disciplinary Committee banned A._____ for the next ten international games, banned him from the stadium for the matches concerned and imposed a fine of CHF 30'000.

A.d. In a decision of February 21, 2014, the FIFA Appeal Committee rejected A._____'s appeal against the decision of the FIFA Disciplinary Committee of December 12, 2013, and confirmed the sanctions ordered.

B.
In a submission of April 9, 2014, A._____ challenged the decision of the FIFA Appeal Committee of February 21, 2014, in the Court of Arbitration for Sport (CAS) by way of an appeal.

On April 15 and 17, 2014, the parties agreed on an expedited procedure, according to R52 of the CAS Code.

The hearing took place in Lausanne on May 8, 2014. Among others, A._____'s expert witnesses, Professor B._____ and Professor C._____ were heard, as well as Professor D._____, called by FIFA.

In an award of May 12, 2014, (notified with reasons on July 29, 2014), the CAS rejected the appeal and confirmed the decision of the FIFA Appeal Committee of February 21, 2014. The CAS held that it was established that the chanted words "*za dom – spremni!*" were connected to the fascist regime of the Ustasches and their expression constituted a punishable discrimination according to Art. 58(1)(a) of the FIFA Disciplinary Code. The Arbitral Tribunal took into account, among other things, that on the video recording submitted in the arbitration, the onlookers raised their right arms in the manner of the so-called

Hitler salute as they shouted, "*spremni*". A._____'s argument that he himself merely shouted "*za dom*" and not "*spremni*" as his fans was rejected by the Arbitral Tribunal; he clearly communicated with his fans so that he was accountable for all the words, irrespective for whether or not he shouted them himself.

C.
In a civil law appeal, A._____ submits to the Federal Tribunal that the CAS award of May 12, 2014, should be annulled.

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

The Appellant submitted a reply to the Federal Tribunal and the Respondent a rejoinder.

D.
In a decision of November 20, 2014, the Federal Tribunal rejected the Appellant's request for a stay of enforcement.

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 this is 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 judgment of the Federal Tribunal shall be issued in German.

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. At the decisive time, the Appellant had his domicile outside Switzerland (Art. 176(1) PILA). As the parties did not specifically opt out of the provisions of Chapter 12 PILA, they are applicable (Art. 176(2) PILA).

2.2 Only the grievances listed exhaustively at 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

[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.
[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.

reviews only the grievances which are raised and reasoned in the appeal brief; this corresponds to the duty to provide reasons contained at Art. 106(2) BGG as to the violation of constitutional rights and of cantonal and intercantonal law (BGE 134 III 186[6] at 5, p. 187 with reference). Criticism of an appellate nature is not permitted (BGE 134 III 565[7] at 3.1, p. 567; 119 II 380 at 3b, p. 382).

2.3. The Federal Tribunal bases its judgment on the factual findings of the Arbitral Tribunal (Art. 105(1) BGG). This includes the findings as to the life circumstances which are the basis of the dispute and those as to the course of the previous proceedings, *i.e.* the findings as to the subject of the case, to which belong, in particular, the submissions of the parties, their factual allegations, legal arguments, procedural statements and offers of evidence, the content of a witness statement, an expert report, or the findings as to a visual 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, ruling out the applicability of Art. 97 BGG and Art. 105(2) BGG). However, the Federal Tribunal may review the factual findings of the arbitral award under appeal when some admissible grievances within the meaning of Art. 190(2) PILA are raised against them or exceptionally when new evidence is taken into consideration (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 wishes to claim an exception to the rule that the Federal Tribunal is bound by the factual findings of the arbitral tribunal and seeks to rectify or supplement the factual findings on this basis must show with reference to the record that the corresponding factual allegations were already made in the arbitral proceedings in accordance with procedural rules (see BGE 115 II 484 at 2a, p. 486; 111 II 471 at 1c, p. 473; each with references).

2.4. The appeal brief must be filed with developed arguments within the time limit to appeal (Art. 42(1) BGG). If there is a second exchange of briefs, the appellant may not use the reply to supplement or improve its appeal brief (see BGE 132 I 42 at 3.3.4). The reply may only be used to make points connected to the arguments in the briefs of another participant in the proceedings (BGE 135 I 19 at 2.2).

Insofar as the Appellant goes beyond this in his reply, his statements will not be taken into consideration.

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[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

3.
The Appellant argues two violations of the principle of equal treatment of the parties and of the right to be heard (Art. 190(2)(d) PILA).

3.1.
3.1.1. He submits that the first violation of these procedural principles was that the chairman of the Arbitral Tribunal excluded further questions as to the credibility of the expert, Professor D._____, called by FIFA.

The second violation was that, later in the hearing, the chairman prevented questions about his expertise being put to Professor D._____ and even refused to authorize any further questions.

3.2.
3.2.1. Art. 190(2)(d) PILA allows recourse only in connection with mandatory procedural rules according to Art. 182(3) PILA. According to this, the arbitral tribunal must, in particular, heed the right of the parties to be heard. With the exception of the right to a reasoned decision, this corresponds to the constitutional law guarantee of 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 the right of the parties to state their views as to all important facts for the judgment, to submit their legal arguments; to prove their factual allegations important for the decision by relevant means, submitted in a timely manner and in the proper format; to participate in the hearings and to access the record (130 III 35 at 5, p. 38; 127 III 576 at 2c, p. 578 *f.*; each with references). The principle of equal treatment further requires that the parties be treated equally throughout the arbitration (see BGE 133 III 139 at 6.1, p. 143).

The right to be heard is not unlimited in arbitral proceedings. Thus, the arbitral tribunal is not barred from finding the facts only on the basis of relevant and pertinent evidence (BGE 119 II 386 at 1b, p. 389; 116 II 639 at 4c, p. 644). The arbitral tribunal may forego hearing evidence when the evidence offered does not concern a legally relevant fact, when the evidence proposed is obviously unfit, or when, on the basis of the evidence already collected, the tribunal has decided and by assessing the evidence in advance, may hold that its conviction would not be changed by further evidence (see BGE 134 I 140 at 5.3; 130 II 425 at 2.1, p. 429; 124 I 208 at 4a). The advance assessment of evidence by an international arbitral tribunal may be reviewed only from the limited point of view of a violation of public policy in the recourse proceedings (judgment 4A_178/2014[11] of June 11, 2014, at 5.1; 4A_526/2011[12] of January 23, 2012, at 2.1; 4P.23/2006 of March 27, 2006, at 3.1).

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[10] Translator's Note: BV is the German abbreviation for the Swiss Federal Constitution.
[11] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/no-substantive-review-assessment-evidence
[12] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/claim-of-violation-of-the-right-to-heard-denied-the-parties-do-n

3.2.2. The party considering that they are to be disadvantaged by a violation of the right to be heard or another procedural violation relevant under Art. 190(2) PILA forfeits the argument when it does not raise it in a timely manner in the arbitration and fails to undertake all reasonable efforts to remedy the violation 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 procedural violations is therefore subsidiary, to the extent that the parties must raise the corresponding violations before the arbitral tribunal so they may be corrected during the arbitral procedure. It is contrary to good faith to raise a procedural violation only in the framework of a recourse, when the opportunity to give the arbitral tribunal an opportunity to correct the alleged violation existed in the arbitration (BGE 119 II 386 at 1a, p. 388). A party acts contrary to good faith and abuses its rights in particular when it keeps the argument in reserve only to raise it in case of a disadvantageous outcome of the proceedings and a foreseeable loss of the case (BGE 136 III 605[13] at 3.2.2, p. 609; 129 III 445 at 3.1, p. 449; 126 III 249 at 3c, p. 254).

3.3 During the course of the arbitration, the Appellant did not claim to be treated unequally or that his right to be heard was violated. His submissions do not in any way show to what extent he attempted to remedy the alleged procedural violations during the proceedings. The objection raised in the appeal brief that his counsel would have, "*manifested his displeasure about the unusual management of the hearing through an ironic final remark*" is unpersuasive. Contrary to his view, the following answer of counsel to the Chairman's question as to whether the parties had any objections concerning the handling of the procedure cannot be seen as a complaint about the way the chairman of the Arbitral Tribunal directed the proceedings:

> "Mr. President, due to the fact that we acted in front of the ICTY [*International Criminal Tribunal for the former Yugoslavia*] as well in some important proceedings and we are used to extense (*sic*) examination and cross-examination I would say [...] during every point [...]".[14]

It is unclear to what extent the Arbitral Tribunal could be criticized for violating the principle of equality or the right to be heard in this respect. As the CAS correctly points out in its brief, the Appellant must face the fact that immediately after the statement quoted, his counsel stated:

> "We are very satisfied with the fact how we were treated by the Panel here; thank you very much, Mr. President!".[15]

Therefore, contrary to his view, the Appellant did not undertake all reasonable efforts to obtain a correction of the alleged violations during the arbitration. In doing so, he forfeited the right to rely on the corresponding violations in the proceedings before the Federal Tribunal.

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[13] 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

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

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

3.4. In any event, the Appellant shows no violation of the principle of equal treatment or the right to be heard in his submissions.

He merely sweepingly alleges a violation of the principle of equal treatment of the parties, yet without specifically showing to what extent the Arbitral Tribunal treated the parties unequally in the arbitration (see BGE 133 III 139 at 6.1, p. 143). In doing so, he fails to meet the substantiation requirements of the corresponding grievance.

Moreover, the Appellant shows no violation of the right to be heard by the mere reproduction of two passages of the recording of the questioning of the expert during the hearing (File 3 of the tape recording, minute 24:10 until minute 25:13 and minute 36:36 until minute 38:15). He disregards in particular that the right to be heard does not encompass an unlimited right (in time and substance) to interrogate an expert called by the other party. The interrogation of witnesses and experts requires management of the proceedings and the arbitral tribunal is not prevented, in principle, from putting time limits on the interrogation by the parties or from refusing certain questions, for instance because they are not legally relevant, were already asked, or because the arbitral tribunal considers the facts to which the question relates as already established (see Bernhard Berger and Franz Kellerhals, *International and Domestic Arbitration in Switzerland, 3rd ed.* 2015, n. 1334, 1342).

From the first passage quoted by the Appellant, it appears, moreover, that the issue of Professor D._____'s credibility was already addressed during his cross-examination "*Now then, relevant questions to Mr. D._____ on his expertise and no more questions like his credibility*"[16]), which is why any corresponding questions were no longer authorized in the quoted section of the interrogation. In the second passage, the Chairman pointed out that the evidence collected as to the expert's qualification ([…] *I will stop this examination because we know enough as Panel about the quality and references of Mr. D._____* […][17]), or concerning the expert's statements already made ("*No, I know enough, the Panel knows enough, so I stop the examination of this expert*."[18]), were sufficient for the factual findings.

Before the Federal Tribunal, the Appellant also does not show, moreover, which questions relevant to the judgment he still wanted to ask Professor D._____, but instead challenges once again his qualifications and credibility and criticizes the award under appeal as though in an appellate procedure. The Appellant rightly refrains from arguing that in the framework of the arbitration, he was prevented from expressing his views to the credibility or qualifications of the expert called by the other party, or to the content of his statements. His submissions do not show that, in violation of the right to be heard, it was impossible for him to present his point of view in the arbitral proceedings.

4.
The appeal proves to be unfounded and must be rejected to the extent that the matter is capable of appeal. In such an outcome, the Appellant is bound to pay the costs and to compensate the other party (Art. 66(1) and Art. 68(2) BGG).

[16] Translator's Note: In English in the original text.
[17] Translator's Note: In English in the original text.
[18] Translator's Note: In English in the original text.

Therefore the Federal Tribunal Pronounces:

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

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

3.
The Appellant shall pay an amount CHF 6'000 to the Respondent 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, February 24, 2015

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

Presiding Judge:	Clerk:
Kiss (Mrs.)	Leemann