4A_620/2012[1]

Judgment of May 29, 2013

First Civil Law Court

Federal Judge Klett (Mrs.), Presiding
Federal Judge Corboz
Federal Judge Kolly
Clerk of the Court: Hurni

X. _____ S.A.D.,
Represented by Mr. Philipp J. Dickenmann and Dr. Axel Buhr,
Appellant

v.

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

Facts:

A.
A.a
X._____ S.A.D. (The Appellant) seated in K._____ (Spain), operates a football team in the highest Spanish football league. It is a member of the Spanish Football Federation, Real Federación Española de Fútbol (RFEF).

The Fédération Internationale de Football Association (FIFA; the Respondent) is an association under Swiss law (Art. 60 ff. ZGB[2]), seated in Zürich.

A.b
On July 18, 2004, the Appellant entered into an agreement with the Uruguayan Football Club Y._____ as to the transfer of a player.

On March 3, 2009, Y._____ turned to the FIFA Players' Status Committee, a body of the Respondent, claiming that the Appellant did not pay the agreed upon transfer price of EUR 537'190. In January 2010, Y._____ demanded before the same body the transfer compensation due for the time between January 2008 and January 2010, amounting to EUR 959'596, with interest.

---

[1] Translator's Note: Quote as X._____ S. A. D. *v.* Fédération Internationale de Football Association (FIFA), 4A_620/2012. The original decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch .

[2] Translator's Note: ZGB is the German abbreviation for the Swiss Civil Code.

In a decision of August 10, 2010, the FIFA Players' Status Committee ordered the Appellant to pay the transfer compensation of EUR 959'596 to Y._____. Furthermore, the decision held that Y._____ could seek sanctions against the Appellant in the FIFA Disciplinary Committee, another body of the Respondent, should the transfer compensation fail to be paid.

On October 10, 2011, Y._____ informed the Respondent that the Appellant had not fulfilled its claimant obligations according to the decision of the FIFA Players' Status Committee.

On October 13, 2011, the FIFA Players' Status Committee informed the Appellant that the matter was referred to the FIFA Disciplinary Committee.

A.c
On October 31, 2011, the FIFA Disciplinary Committee opened disciplinary proceedings against the Appellant.

In a decision of November 30, 2012, the FIFA Disciplinary Committee held that the Appellant was at fault for failing to comply with the decision of the FIFA Players' Status Committee and had therefore violated Article 64 of the FIFA 2011 Disciplinary Code. The FIFA Disciplinary Committee ordered the Appellant to pay a fine to the Respondent in the amount of CHF 30'000 and demanded that the Appellant comply within 30 days with the payment obligation contained in the decision of the FIFA Players' Status Committee.

B
B.a.
On February 3, 2012, the Appellant appealed the decision of the FIFA Disciplinary Committee to the Court of Arbitration for Sport (CAS).

On March 7, 2012, the Respondent appointed Margarita Echeverria as arbitrator. By letter of March 8, 2012, the CAS invited the Appellant to state its position as to the March 7, 2012, submission of the Respondent.

In a letter of May 7, 2012, the CAS informed the parties that Mrs. Echeverria had accepted her appointment and made the following disclosure: "I am an external consultant of FIFA in America regarding statutes governance and management of the federations."[3]

In the same letter of May 7, 2012, the CAS advised the parties, with reference to Article R34 of the CAS Code, that they could challenge Mrs. Echeverria within seven days from becoming aware of the ground for challenge, should they have any objections to her appointment. In a letter of May 22, 2012, the CAS informed the parties that the three-member Panel was constituted with Mrs. Echeverria as party-appointed arbitrator for the Respondent.

In a submission of May 28, 2012, the Appellant challenged the appointment of Mrs. Echeverria on the basis of the disclosure that she is an external consultant of the Respondent in America.

In a letter of June 6, 2012, the Respondent advised the CAS that there were no valid reasons to challenge the appointment of Mrs. Echeverria and that the Appellant had submitted no argument that could question the independence and impartiality of Mrs. Echeverria.

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

In a letter of June 7, 2012, Mrs. Echeverria advised the CAS that she considered herself independent and impartial. She stated that her role as an external consultant for the Respondent in America was of purely academic and strategic nature in connection with the statutes of the federations in America. She has been conducting this activity for years while accepting appointments as a CAS arbitrator.

In a letter of June 8, 2012, the CAS advised the parties that the Appellant's challenge was referred to the Board of International Council of Arbitration for Sport (ICAS).

In a decision of July 3, 2012, the Board of ICAS rejected the challenge with the following reasons:

> "a) Article R34 of the CAS Code provides that '[a]n arbitrator may be challenged if the circumstances give rise to legitimate doubts over his independence. The challenge shall be brought within 7 days after the ground for the challenge has become known.'
> b) Ms. Margarita Echeverria disclosed the information related to her impartiality and independence to the Parties on May 7, 2012.
> c) The Appellant raised its objection to Ms. Margarita Echeverria's nomination on May 28, 2012. This was 21 days after the grounds for challenging had become known to the Parties.
> d) The Appellant's challenge was hence filed out of the time limit set in Article R34 of the CAS Code and was inadmissible."[4]

Thereafter, Mrs Echeverria was part of the Panel.

B.b
In a decision of August 20, 2012, the CAS rejected the Appellant's appeal and confirmed the decision of the FIFA Disciplinary Committee of November 30, 2011.

C.
In a civil law appeal of October 17, 2012, the Appellant made the following submissions to the Federal Tribunal:

> "1. The arbitral award of August 20, 2012, in case CAS 2012/A/2730 must be annulled and it must be held that the Arbitral Tribunal was constituted in violation of the rules in case CAS 2012/A/2730.
> 2. In the alternative, the arbitral award of August 20, 2012, in case CAS 2012/A/2730 must be annulled and the matter sent back to the CAS, or in the alternative to the Arbitral Tribunal for a finding that the Arbitral Tribunal was constituted in violation of the rules.
> 3. Even more in the alternative, the arbitral award of August 20, 2012, in case CAS 2012/A/2730 must be annulled and the matter sent back to the Arbitral Tribunal for a new decision."

The Respondent submits in its brief that the appeal should be rejected to the extent that the matter is capable of appeal. The CAS submits that it should be rejected.

The Appellant submitted a reply and the Respondent and the CAS submitted rejoinders.

---

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

D.
By decision of the Presiding Judge of November 15, 2012, the Appellant's request for a stay of enforcement was rejected.

Reasons:

1.
According to Art. 54(1) BGG[5] the judgment of the Federal Tribunal is issued in an official language,[6] as a rule in the language of the decision under appeal. When the decision is in another language, the Federal Tribunal resorts to the official language used by the parties. The award 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 will be issued in German.

2.
In the field of international arbitration, a civil law appeal is allowed pursuant to the requirements of Art. 190-192 PILA[7] (SR291) (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. Since the Parties did not exclude in writing the provisions of Chapter 12 PILA, they are applicable (Art. 176(1) and (2) PILA).

2.2
Only the grievances listed in Art. 190(2) PILA are admissible (BGE 134 III 186[8] 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 submit reasons contained in Art. 106(2) BGG for the violation of constitutional rights and of cantonal and intercantonal law (BGE 134 III 186 at 5, p. 187 with references). Criticism of an appellate nature is not permitted (BGE 134 III 565 at 3.I, p. 567;[9] 119 II 380 at 3b, p. 382).

3.
The Appellant argues that the Arbitral Tribunal was composed in violation of the rules (Art. 190(2)(a) PILA). According to the Appellant, the consulting activity of Mrs. Echeverria for the Respondent raises justified doubt as to her independence (Art. 180(1)(c) PILA).

---

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

[6] The official languages of Switzerland are German, French, and Italian.

[7] 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.

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

[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

3.1
Like a state judge, an arbitrator must present sufficient guarantees of independence and impartiality (BGG 136 III 605[10] at 3.2.1, p. 608; BGE 125 I 389 at 4a; 119 II 271 at 3b). The violation of this rule leads to an appointment or a composition in violation of the rules within the meaning of Art. 190(2)(a) PILA (BGE 118 II 359 at 3b). In order to determine whether an arbitrator presents such guarantees or not, the constitutional principles developed as to the State Courts are applicable (BGE 125 I 389 at 4a; 118 II 359 at 3c p. 361). However, the specificities of arbitration and, in particular, of international arbitration must be considered when reviewing the circumstances of the case at hand (BGE 136 III 605 at 3.2.1 p. 608;[11] 129 III 445 at 3.3.3 p. 454).

3.2
According to the case law of the Federal Tribunal, objections to the composition of the arbitral tribunal must be raised at the earliest possible time. The party wishing to challenge an arbitrator must therefore raise the ground for challenge as soon as it becomes aware of it (BGE 136 III 605[12] at 3.2.2 p. 609). This rule derives from the general principle of good faith and it was incorporated into R34 of the CAS Code as well as in many other arbitration rules (See Garry B. Born, *International Arbitration: Law and Practice*, 2012, p. 141) and it applies to the grounds for challenge that a party was actually aware of, as well as to those which it should have been aware of by exercising proper attention (BGE 136 III 605 at 3.2.2 p. 609; 129 III 445 at 4.2.2 p. 465). The argument that the arbitral tribunal was irregularly composed is forfeited when it is not immediately raised (BGE 136 III 605 at 3.2.2 p. 609).

3.3
The parties may determine the challenge procedure themselves (Art. 180(3) PILA; BGE 128 III 330 at 2.2 p. 332). When the parties resort to a private body – as they did here – to decide the challenge, they may not appeal its decision directly to the Federal Tribunal, but possible grievances according to Art. 190(2)(a) PILA may be raised in an appeal against the arbitral award within the meaning of Art. 190 PILA (BGE 118 II 359 at 3b p. 360 f.).

3.4
3.4.1 The system of appointment of a CAS Panel is regulated in R40.2 and R40.3 of the CAS Code. There is a distinction there between the appointment (German "*Benenunng*," French "*nomination*") and the confirmation (German "*Bestätigung*," French "*confirmation*") of an arbitrator. While the parties are basically competent for the appointment – and the arbitrators as to the Chairman – the "confirmation" is done by the CAS as an arbitral institution. It is only with the "confirmation" of the arbitrators that the Panel is constituted (R40.3(1) first sentence, CAS Code). The confirmation may only take place when the CAS is satisfied that the arbitrators appointed are independent (R33(1) of the CAS Code) and that they meet the other requirements of R33(2) of the CAS Code (R40.3(1), second sentence, CAS Code).

3.4.2 According to R34(2) of the CAS Code, the grounds for challenge must be presented to the Board of the International Council of Arbitration for Sport (ICAS). This body or the Council itself decides the matter after hearing all parties to the proceedings. According to R34(1), the grounds for challenge must be raised within seven days from becoming aware of it.

---

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

[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

[12] 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

3.4.3 In the case at hand, the ICAS board reached the conclusion that the Appellant challenged Mrs. Echeverria only 21 days after becoming aware of the possible grounds for challenge and therefore too late.

3.5
The Appellant argues in the Federal Tribunal that it raised the challenge in a timely manner. The time limit of seven days, according to R34(1) of the CAS Code does not begin with the appointment of an arbitrator by a party, but only with the confirmation by the CAS. Mrs. Echeverria was in this case confirmed as arbitrator by the CAS on May 22, 2012. As the Appellant was confident that the CAS would find Mrs. Echeverria biased due to her consulting activity for the Respondent and refuse to confirm her as arbitrator, the Appellant did not have to react to the communication of May 7, 2012. A "preventive challenge" was not necessary. The challenge was rather to be made, as provided by the case law of the Federal Tribunal, without delay when the aforesaid person was confirmed by the CAS.

3.6
The Appellant's argument is not convincing. The Federal Tribunal clearly stated in BGE 130 III 66 at 4.2.f. p. 74 ff. that the grounds for challenge that a party becomes aware of must be raised immediately, not only against fully appointed arbitrators but also against potential arbitrators proposed by the parties or by an appointing authority. When the parties are asked specifically and with a time limit to express their views to the proposed composition of the arbitral tribunal and, if necessary, to oppose it, the corresponding objections must be raised in a timely manner according to the general principle of good faith, pursuant to the case law of the Federal Tribunal. Otherwise, the silence of the parties can be held as an agreement or the corresponding exceptions may be rejected as constituting contradictory behavior (BGE 130 III 66 at 4.3, p. 75 f.).

As the Respondent rightly points out in its rejoinder this is exactly the case here, as the CAS stated the following in the May 7, 2012, letter sent to the parties:

> "Furthermore, please find enclosed the 'Arbitrator's Acceptance and Statement of Independence' filed by the arbitrator Mrs. Margarita Echeverria, arbitrator nominated by the Respondent.
>
> You will note that Mrs. Echeverria has accepted her nomination in the Panel but wishes to disclose the following information: 'I am an external consultant of FIFA in America regarding statutes governance and management of the federations'.
>
> In the event that the parties have an objection to the appointment of Mrs. Echeverria, they may request her challenge within a deadline of seven days after the grounds for the challenge has become known, in accordance with the requirements set at Article R34 of the Code of Sports-related Arbitration."[13]

According to the general principle of good faith, the Appellant had to assume that this letter would cause the time limit to start. In any case, the Appellant cannot deduce the contrary from the rule R40.3(1), second sentence, of the CAS Code, whereby the confirmation of a party-appointed arbitrator takes place when the former has ensured his independence. The Appellant must instead be confronted with the following rule: as the Appellant undertook no action within seven days after becoming aware of the possible ground for challenging Mrs. Echeverria, the CAS could assume that there were no

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

objections to the arbitrator appointed by the Respondent and proceed with the confirmation according to R40.3(1), second sentence, of the CAS Code. The CAS was entitled to conclude from the Appellant's silence that it agreed or to consider the corresponding exceptions forfeited due to contradictory behavior. The Appellant is therefore barred from raising the grievance of improper constitution of the Arbitral Tribunal before the Federal Tribunal (Art. 190(2)(a) PILA).

4.
The Appellant further argues a violation of its right to be heard by the Arbitral Tribunal (Art. 190(2)(d) PILA) because its request that two documents from the FIFA Players' Status Committee be produced was rejected.

4.1
At the arbitration hearing of July 9, 2012, the Appellant advised the Arbitral Tribunal of its request for the production of documents of the proceedings before the FIFA Players' Status Committee. The Appellant argued in this respect that the Arbitral Tribunal would violate its right to be heard if it did not obtain the corresponding documents. The Arbitral Tribunal rejected the request to adduce the documents of the FIFA Players' Status Committee and found no violation of the Appellant's right to be heard. The documents concerned had no relation to the disciplinary proceedings that were the object of the arbitration; moreover, the Appellant itself was in possession of the aforesaid documents. It was free to adduce into the record any important documents for the arbitration during the hearing.

Thereafter the Appellant submitted that two documents from the proceedings in the FIFA Players' Status Committee should become part of the record. The Arbitral Tribunal rejected the request as unauthorized pursuant to R56 of the CAS Code.

The Appellant raised no further objections against this decision. Instead, it confirmed expressly at the end of the arbitration hearing that it had no objections as to the manner in which the proceedings had been conducted, in particular as to the right to be heard and equal treatment in the arbitral proceedings.

4.2
The party considering itself placed at a disadvantage by a denial of the right to be heard or some other procedural violation relevant under Art. 190(2) PILA forfeits its grievance when it does not raise it in a timely manner in the arbitral proceedings and does not undertake all appropriate efforts to remedy the violation (Judgment 4A_617/2010[14] of June 14, 2011, at 3.1, published in ASA Bulletin 1/2012, p. 138 ff., 141f.; BGE 119 II 386 at 1a p. 388; see also Art. 373(6) ZPO[15] in domestic arbitration and in comparative law Art. 1466 of the French Code of Civil Procedure). The federal judicial review of the arbitral award as to procedural violations is a subsidiary one to the extent that the parties must raise the alleged violations first before the arbitral tribunal in such a way that they can be remedied in the arbitral proceedings (Judgment 4A_407/2012 of February 20, 2013, at 3.1[16]). Indeed, it is contrary to the general principle of good faith to raise a procedural violation only in an appeal when there would have been a possibility in the arbitral proceedings to give the arbitral tribunal the opportunity to remedy the violation (BGE 119 II 386 at 1a p. 388; Judgment 4P 72/2001 from September 10, 2001 at 4c).

---

[14] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/the-right-to-the-appointment-of-an-expert-by-the-arbitral-tribun

[15] Translator's Note: ZPO is the German abbreviation for the Swiss Code of Civil Procedure

[16] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/objections-arbitral-proceedings-must-be-raised-clearly-and-forcefully

Finally, a party acts especially against good faith because it contradicts itself when, upon request from the arbitral tribunal, it expressly professes to have no objections as to the conduct of the proceedings with regard to its right to be heard, only to raise such an argument in the appeal proceedings (Judgment 4A_348/2009 of January 6, 2010, at 4, published in the ASA Bulletin 4/201, p. 772 ff., 777[17]). Such *venire contra factum proprium* deserves no legal protection (Art. 2(2) ZGB; see also Berger/Kellerhals, *International and Domestic Arbitration in Switzerland*, Second Edition 2010 no. 1047).

4.3
The Appellant contradicts itself by arguing a violation of the right to be heard in the Federal Tribunal after expressly confirming at the end of the arbitral hearing of July 9, 2012, that with regard to its right to be heard, it had no objections as to way the proceedings had been conducted. The assertion in the appeal to the Federal Tribunal that the Appellant "obviously" did not intend to withdraw the previously expressed objections when it made this statement to the Arbitral Tribunal, does not change this at all, as it is only a self-serving argument. The Arbitral Tribunal was entitled to assume, on the basis of the Appellant's statement without reservation that it had no objections, that the Appellant no longer had any objections, specifically with regard to the rejected request to include the two documents from the proceedings in the FIFA Players' Status Committee. The Appellant has therefore forfeited the right to make this argument based on Art. 190(2) d PILA in the Federal Tribunal.

5.
The appeal must be rejected.

In such an outcome of the proceedings, the Appellant must pay the costs and compensate the other party (Art. 66(1) BGG and Art. 68(2) BGG).

Therefore the Federal Tribunal pronounces:

1.
The Appeal is rejected.

2.
The judicial costs, set at CHF10'000 shall be borne by the Appellant.

3.
The Appellant shall pay to the respondent and amount of CHF 12'000 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).

---

[17] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/no-bias-of-arbitral-tribunal-based-on-premature-notification-of-

Lausanne, May 29, 2013

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

Presiding Judge:	The Clerk:
Klett (Mrs.)	Hurni