

4A\_274/2013<sup>1</sup>

Judgment of August 5, 2013

First Civil Law Court

Federal Judge Klett (Mrs.), Presiding

Federal Judge Kolly

Federal Judge Niquille (Mrs.)

Clerk of the Court: Leemann

FC X. \_\_\_\_\_,

Appellant

v.

FC Z. \_\_\_\_\_,

Respondent

*Fédération Internationale de Football Association (FIFA)*, FIFA-Strasse 20, 8044 Zürich,

Represented by Mr. Christian Jenny,

Participant in the proceedings

Facts:

A.

A.a

The FC Z. \_\_\_\_\_ (Claimant, Respondent) is a Slovakian football club; it is a member of the Slovakian Football Federation which, in turn, belongs to the Fédération Internationale de Football Association (FIFA; Participant in the proceedings) based in Zürich.

The FC X. \_\_\_\_\_ (Defendant, Appellant) is a Czech football club; it belongs to the Football Federation of the Czech Republic, which is also a member of FIFA.

---

<sup>1</sup> Translator's Note:

Quote as FC X. \_\_\_\_\_ v. FC Z. \_\_\_\_\_ and FIFA. 4A\_274/2013. The original decision is in German. The full text is available on the website of the Federal Tribunal, [www.bger.ch](http://www.bger.ch).

A.b

A.\_\_\_\_\_, a football player of the 1991 age group, trained with FC Z.\_\_\_\_\_ since he was six and was registered as an amateur player with this club for the 2002/2003 to 2008/2009 playing seasons.

In June 2009, A.\_\_\_\_\_ trained with the first team of FC Z.\_\_\_\_\_ before the beginning of the game season and took part in some friendly games.

On July 8, 2009, the Czech Football Federation asked the Slovakian Federation to issue an international transfer certificate for the transfer of the player to FC X.\_\_\_\_\_. On July 15, 2009, A.\_\_\_\_\_ was registered as a player of FC X.\_\_\_\_\_ with the Czech Football Federation.

The FC Z.\_\_\_\_\_ eventually took the view that according to the applicable FIFA rules, it had a claim of EUR 220'000 against FC X.\_\_\_\_\_ for training compensation. At first, the FC X.\_\_\_\_\_ acknowledged in a letter of August 27, 2011, that an amount of EUR 130'000 was due for A.\_\_\_\_\_’s training compensation, however the club subsequently denied any duty to pay compensation to the FC Z.\_\_\_\_\_.

B.

B.a

In a decision of March 1, 2012, (communicated on July 19, 2012) the FIFA Dispute Resolution Chamber rejected the claim filed against FC X.\_\_\_\_\_ by FC Z.\_\_\_\_\_.

B.b

On August 7, 2012, the FC Z.\_\_\_\_\_ appealed to the Court of Arbitration for Sport (CAS) against the decision of the FIFA Dispute Resolution Chamber of March 1, 2012.

On September 20, 2012, the CAS took notice that the Defendant FC X.\_\_\_\_\_ had not appointed an arbitrator within the time limit given. The President of the Appeals Arbitration Division accordingly would appoint an arbitrator. At the same time, the CAS took notice that the Defendant had submitted no answer to the appeal within the time limit and that the arbitration proceedings would continue in accordance with the applicable procedural rules.

On November 21, 2012, the FC Z.\_\_\_\_\_ submitted additional evidence and applied for its admission, claiming exceptional circumstances. The FC X.\_\_\_\_\_ challenged the petition in a letter of January 17, 2013.

On January 30, 2013, the CAS communicated to the parties its decision to take the submitted documents into account, pursuant to F56 of the CAS Code.

On March 11, 2013, the CAS issued the Order of Procedure as to the next steps in the proceedings, which was signed by both parties.

In a letter of March 13, 2013, the Defendant claimed that during the hearing, B.A.\_\_\_\_\_, the player at issue's father, should be heard as a witness and indicated, without further reasons, that producing this witness earlier would not have been possible. The Claimant challenged the petition.

On March 4, 2013, the Defendant also submitted some written statements by the player, his father, and C.\_\_\_\_\_, with the request that they should be taken into consideration in the proceedings; this again with the general indication that the document in dispute was not available earlier.

In a letter of March 15, 2013, the CAS advised the parties that the witnesses now called by the Defendant were not mentioned in any of its prior submissions and that the Defendant had shown no exceptional circumstances in accordance with R56 of the CAS Code which would have prevented it from introducing this evidence within the time limit according to R55 of the CAS Code.

Also on March 15, 2013, the CAS rejected a request for reconsideration submitted by the Defendant on the same day. It again pointed out that the Defendant had advanced no exceptional circumstances in accordance with R56 of the CAS Code as to why it submitted its evidence only after the expiry of the procedurally mandated time limit (R55 of the CAS Code); the CAS accordingly rejected the request, which had been submitted only three days before the hearing set for March 18, 2013. During the hearing, the CAS maintained its decision and among other things, did not permit testimony from the father of the player involved.

In an award of April 26, 2013, the CAS annulled the decision of the FIFA Dispute Resolution Chamber of March 1, 2012, upholding the Claimant's appeal in part and ordered the Defendant to pay EUR 130'000, with interest at 5% from July 15, 2009.

C.

In a civil law appeal, the Defendant asks the Federal Tribunal to annul the CAS award of April 26, 2013.

No exchange of briefs was ordered.

Reasons:

1.

According to Art. 54(1) BGG,<sup>2</sup> the decision of the Federal Tribunal is issued in an official language,<sup>3</sup> as a rule in the language of the decision under appeal. Should this be 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

---

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

<sup>3</sup> Translator's Note: The official languages of Switzerland are German, French, and Italian.

an official language, the decision of the Federal Tribunal will be issued in the language of the appeal, in accordance with its practice.

2.

In the field of international arbitration, a civil law appeal is allowed pursuant to the requirements of Art. 190-192 PILA<sup>4</sup> (SR 291) (Art. 77(1)(a) BGG).

2.1

The seat of the Arbitral Tribunal is in Lausanne in this case. At the relevant point in time, both parties had their seat outside Switzerland. As the parties did not exclude the provisions of Chapter 12 PILA in writing, they are accordingly applicable (Art. 176(1) and (2) PILA).

2.2

Only the grievances listed in Art. 190(2) PILA are admissible (BGG 134 III 186 at 5, p. 187;<sup>5</sup> 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 raised and reasoned in the appeal brief. This corresponds to the duty to submit reasons at Art. 106(2) BGG for the violation of fundamental rights and of cantonal and intercantonal law (BGE 134 III 186 at 5, p. 187, with reference). Criticism of an appellate nature is not permitted (BGE 134 III 565 at 3.1, p. 567;<sup>6</sup> 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 Court may neither rectify nor 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 of 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 such factual findings or when new evidence is exceptionally taken into consideration (BGE 138 III 29 at 2.2.1, p. 34;<sup>7</sup> 134 III 565 at 3.1, p. 567;<sup>8</sup> 133 III 139 at 5, p. 141; each with references). Whoever claims an exception to the rule on factual findings of the arbitral tribunal before the Federal Tribunal and wishes to rectify or supplement the factual findings on this

---

<sup>4</sup> 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.

<sup>5</sup> Translator's Note: The English translation of this decision is available here:  
<http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties>

<sup>6</sup> 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>

<sup>7</sup> 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>

<sup>8</sup> 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>

basis must show, with reference to the record, that the corresponding factual allegations had been raised during in the arbitral proceedings in conformity with the procedural rules (BGE 115 II 484 at 2a, p. 486; 111 II 471 at 1c, p. 473; each with references).

3.

The Appellant argues that the Arbitral Tribunal violated the right to be heard and the principle of equal treatment of the parties (Art. 190(2)(d) PILA).

3.1

Art. 190(2)(d) PILA allows an appeal based on the mandatory procedural rules according to Art. 182(3) PILA. According to this, the arbitral tribunal must, in particular, guarantee the right of the parties to be heard. With the exception of the right to obtain reasons, this corresponds to the constitutional guarantee at Art. 29(2) BV<sup>9</sup> (BGE 130 III 35 at 5 p. 37 f.; 128 III 234 at 4b p. 243; 127 III 576 at 2c p. 587 f.). Case law deduces from this, in particular, the right of the parties to state their views as to all facts important for the judgment, to submit their legal arguments, to prove their factual allegations important for the decision with appropriate means submitted in a timely manner and in the proper format, to participate in the hearing, and to access the record (BGE 130 III at 5 p. 38; 127 III 576 at 2c p. 578 f.; each with references).

3.2

The Appellant's arguments disregard that the right to adduce evidence included in the right to be heard is not violated when the arbitral tribunal rejects the introduction of evidence because it is not submitted at the appropriate time in the proceedings. As the CAS already found in its letter of September 20, 2012, the Appellant filed no answer in the arbitral proceedings and introduced no witnesses within the time limit contained at R55 of the CAS Code. Only on March 13, 2013 – *i.e.* about half a year later – did it ask that the father of the football player involved be heard; and only on March 15, 2013, did it submit some additional documents to the Arbitral Tribunal, yet without submitting any reasonable explanation for the delay.

Contrary to what it claims before the Federal Tribunal, the Appellant did not at all show specifically why it was not in a position to submit the disputed evidence in a timely manner. Under such circumstances, it cannot be claimed that the CAS violated the right to be heard when it found the evidence proposed – among other things, the request to hear the player's father – to be late, according to the determining procedural rules (R55 f. of the CAS Code) and hence refused to admit it.

It is equally unjustified to claim that the Arbitral Tribunal violated the principle of equal treatment of the parties because it allowed the Respondent's request to adduce additional evidence of November 21, 2012. Contrary to the claim in the appeal brief, the Respondent showed in the aforesaid submission why it had been impossible to submit the documents in dispute earlier. Therefore, there can be no claim that the

---

<sup>9</sup> Translator's Note:

BV is the German abbreviation for the Swiss Federal Constitution.

principle of equal treatment was disregarded when on January 30, 2013, the CAS decided to take into account the Respondent's documents due to exceptional circumstances according to R56 of the CAS Code.

4.

The appeal proves unfounded and must be rejected to the extent that the matter is capable of appeal. In view of the outcome of the proceedings, the Appellant must pay the costs (Art. 66(1) BGG). The Respondent has no right to be awarded costs as the proceedings in the Federal Tribunal did not require its involvement (Art. 68(1) BGG).

Therefore the Federal Tribunal Pronounces:

1.

The appeal is rejected to the extent that the matter is capable of appeal.

2.

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

3.

No costs are awarded.

4.

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

Lausanne, August 5, 2013

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

The Presiding Judge:

The Clerk:

Klett (Mrs.)

Leemann