

120039-266/PON/fba

4A_314/2012¹

Judgment of October 16, 2012

First Civil Law Court

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

Federation X._____,
Represented by Mr. Patrick Mbaya and Mr. Seri Zokou,
Appellant,

v.

1. Club A._____,
Represented by Mr. Jean-Louis Dupont,
2. Club B._____,
Represented by Mr. Greg Griffin,
3. Confederation C._____,
Respondents,

Facts:

A.

A.a In a decision of December 2, 2012 following a decision taken on November 29, 2011 by the [name omitted] football federation (hereafter: X._____), the [name omitted] football confederation (hereafter: C._____) excluded the A._____ football club from the play-offs of the Champions League it organized in 2012.

A.b On December 19, 2011 A._____ filed a statement of appeal with the CAS against this decision and designated X._____, C._____ and B._____, a football club of [name of country omitted] as respondents, the latter being the club that it was supposed to play in the aforesaid competition beginning in February 2012.

On December 31, 2011, A._____ filed its appeal brief with a request for provisional measures. None of the Respondents expressed their position on the request in the time limit there were given to do so. However, C._____ and B._____ both filed an answer on the merits, as opposed to X._____, which filed its answer after the time limit had expired.

¹ Translator's note: Quote as Federation X._____ v. Club A._____, Club B._____ and Confederation C._____, 4A_314/2012. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch

On February 1, 2012 the Panel of the Court of Arbitration for Sport (CAS) informed the Parties that it was granting the provisional measures and decided that club [name omitted] had the right to participate in the play-offs of the 2012 Champions League organized by C._____. The reasons of the order contained a chapter devoted to the jurisdiction of the CAS and were communicated to the parties on February 14, 2012.

On March 2, 2012 A._____ – having lost the game against B._____ – formally withdrew its appeal subject to a decision of the CAS on the costs of the arbitral proceedings.

B.

In a letter of March 7, 2012, X._____ submitted that club [name omitted] should be ordered to pay the entire costs of the arbitration and an amount of € 25'000 for its costs.

The CAS issued an award on costs on April 27, 2012. After striking the case from the list, it held that X._____ and C._____ would each pay 40% of the costs of the arbitration, the remaining 20% being shared equally by A._____ and B._____. Moreover X._____ and C._____ were ordered to pay CHF 5'000 each to A._____ and the same amount to club [name omitted] for their costs. However the Panel held that it had no jurisdiction as to B._____’s claim for the payment of an amount in connection with the additional costs exceeding USD 100'000 it claimed to have undergone as a consequence of the decision concerning the provisional relief requested by A._____.

C.

On May 25, 2012 X._____ filed a Civil law appeal to the Federal Tribunal with a view to obtaining the annulment of the award. It argues a violation of Art. 190 (2) (b), (c) and (e) PILA².

The Respondents were not asked to submit an answer. The CAS submitted that the appeal should be rejected in a brief of August 29, 2012, within the time limit it had been given for this purpose. The brief was communicated to Counsel for the Appellant on September 6, 2012. They were given an opportunity to submit their observations by the 21st of the same month but did not avail themselves of this faculty.

Reasons:

1.

According to Art. 54 (1) LTF³ the Federal Tribunal issues its decision in an official language⁴, as a rule in the language of the decision under appeal. When the decision is in another language (here English) the Federal Tribunal resorts to the official language chosen by the parties. In front of the CAS they used English. In the brief sent to the Federal Tribunal the Appellant used French. According to its practice, the Federal Tribunal will adopt the language of the appeal and consequently issue its judgment in French.

² 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.

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

⁴ Translator's note: The official languages of Switzerland are German, French and Italian.

2.

In the award under appeal, the CAS took note of the discontinuance by the Appellant, closed the arbitral proceedings, set the costs of the arbitration and awarded costs. In doing so and bringing the arbitration to an end on procedural grounds it issued a final award (judgment 4P.280/2005 of January 9, 2006 at 1). The aforesaid award is consequently subject to a Civil law appeal within the meaning of Art. 77 (1) (a) LTF on all the grounds stated at Art. 190 (2) PILA (ATF 130 III 755 at 1.2.2 p. 762).

Timely filed (Art. 100 (1) LTF) in the legally prescribed format (Art. 42 (1) and (2) LTF), against this final award issued in an international arbitration (Art. 176 ff PILA), the appeal at hand raises only the grievances limitatively listed in Art. 190 (2) PILA and is admissible under these various requirements. The appealing party has standing to appeal (Art. 76 (1) LTF) because it has a personal, present and legally protected interest to ensure that the CAS did not issue an award falling within Art. 190 (2) PILA when it ordered the Appellant to pay part of the costs of the arbitration and to compensate the two clubs implicated in the arbitral proceedings.

3.

The Federal Tribunal issues its judgment on the basis of the facts found in the award under appeal (see Art. 105 (1) LTF). It may not rectify or supplement *ex officio* the factual findings of the arbitrators even if the facts were established in a blatantly inaccurate manner or in violation of the law (see Art. 77 (2) LTF ruling out the applicability of Art. 105 (2) LTF). However the factual findings on which the award under appeal is based may be reviewed if one of the grievances mentioned at Art. 190 (2) PILA is raised against them or when some new facts or evidence are exceptionally taken into consideration in the framework of the Civil law appeal (judgment 4A_428/2011⁵ of February 13, 2012 at 1.6 and the precedents quoted).

The Appellant in this case, although quoting these principles of case law, deviates from them in their actual application when in a topical part of its brief it merely formulates some legal criticisms against the award under appeal and asks that the award “be supplemented... by associating the facts described in the two decisions of the Court of Arbitration for Sport” (appeal nr 11 p. 5). Its *ad hoc* request thus appears manifestly inadmissible.

4.

In a first argument the Appellant invokes Art. 190 (2) (b) PILA and argues that the CAS was wrong to accept jurisdiction to issue the award under appeal.

Recalling in detail the various steps of the arbitral proceedings in its answer to the appeal, the CAS demonstrates – without being contradicted by the Appellant, which did not submit a reply – that the Appellant never challenged its jurisdiction in due course during the arbitral proceedings. It rightly deducts from that on the basis of Art. 186 (2) PILA and relative case law (ATF 118 III 50 at 2c/aa p. 58) that the argument raised by the Appellant today is time barred.

5.

According to the Appellant the CAS would have failed to rule on one of the claims in violation of Art. 190 (2) (c) PILA because it did not decide “the jurisdictional issues” (appeal nr 33).

⁵ Translator's note: Full English translation at <http://www.praetor.ch/arbitrage/dismissal-of-an-appeal-to-set-aside-a-cas-award-on-the-grounds-of>

According to the second hypothesis of Art. 190 (2) (c) PILA, the award may be appealed when the arbitral tribunal failed to rule on one of the heads of claim. The failure to rule related to a formal denial of justice. By "heads of claim" one means the claims or submissions of the parties. What is meant here is an incomplete award, namely the case in which the arbitral tribunal did not decide one of the submissions made by the parties. When the award rejects any other and further submissions, the argument is excluded. Neither does it provide the possibility to argue that the arbitral tribunal failed to decide an issue important to the resolution of the dispute (ATF 128 III 234 at 4a and references).

The criticism made in the argument under review seeks to demonstrate that the CAS would not have examined the issues relating to its jurisdiction and has nothing to do with the formal ground of appeal as interpreted by the aforesaid case law.

6.

Finally, the Appellant argues that the award under appeal is manifestly incompatible with public policy without being more specific. The latter argument, contained in this mere statement, is obviously inadmissible for lack of any substantiating argument (Art. 77 (3) LTF).

7.

Consequently this appeal may only be rejected to the limited extent that it is admissible. The Appellant shall pay the costs of the federal proceedings (Art. 66 (1) LTF). However there is no need to grant costs to the Respondents as they were not invited to submit an answer.

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 2'000, shall be borne by the Appellant.

3.

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

Lausanne October 16, 2012.

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

The Presiding Judge:

The Clerk:

Klett (Mrs.)

Carruzzo