4A_600/2010[1]

Judgment of March 17, 2011

First Civil Law Court

Federal Judge Klett (Mrs), presiding,
Federal Judge Corboz,
Federal Judge Rottenberg Liatowitsch (Mrs),
Federal Judge Kolly and
Federal Judge Kiss (Mrs).
Clerk of the Court: Carruzzo.

Federation X._____,
Appellant
represented by Mr. Jean-Marc Reymond and Mr. Sébastien Besson

v.

1. Federation A._____,
2. Federation B._____,
3. Federation C._____,
4. Federation D._____,
5. Federation E._____,
6. F. _____ Inc.,
Respondents,
all represented by Mr. Antonio Rigozzi and Ms. Ank Santens.

Facts:

[1] Translator's note : Quote as Federation X._____ *v.* Federation A._____, B._____, C._____, D._____, E._____ and F._____ Inc 4A 600/2010 the original of the decision is in French. It is available on the website of the Federal Tribunal www.bger.ch

A.

Federation X._____ (hereafter: X._____) is a Swiss law association with its seat in Lausanne. It groups the national federations of [name omitted], among which are the French, German, Swiss, Ukrainian and American federations, Respondents in these proceedings.

F. _____ Inc., other Respondent, is an entity subject to American law created in order to support the campaign of R._____ in the election of the chairman of X._____, which took place during the general meeting of the association held on September 29, 2010. He intended to replace the outgoing chairman, S._____, who was running for a new term in office.

B.

On July 9, 2010, the five aforesaid national federations and F._____ Inc. (hereafter: the Respondents) filed a request for arbitration against X._____ before the Court of Arbitration for Sport (CAS). The request sought a decision declaring that the candidacies of S._____ and his running mate had not been presented in accordance with the regulatory requirements applicable, so that they had to be rejected.

Principally, X._____ challenged the jurisdiction of the CAS. Alternatively, it submitted that the request should be dismissed on the merits.

A Panel of three arbitrators was constituted on August 3, 2010. The Parties filed a significant number of documents and exhibits within a short time, as they wished the CAS to decide the issue before the general meeting of X._____.

The Panel issued its award on September 27, 2010. It accepted jurisdiction on the Respondents, except for F._____ Inc. (nr. 1 and 2 of the award), dismissed the submissions of the Respondent Federations (nr. 3 of the award) and decided that 65% of the arbitration costs, to be set later, would be borne by the Respondents and 35% by X._____ (nr. 4 of the award). Under nr. 5 of the award, the Panel ordered the Respondents to pay an amount of CHF 35'000 to X._____ as a contribution towards its legal fees and other expenses related to the arbitration.
Regarding the costs, the Arbitrators considered that they could decide the issue without preliminarily inviting the Parties to file additional briefs.

C.

On October 27, 2010, X._____ filed a Civil law appeal with the Federal Tribunal seeking the annulment of nr. 5 of the award. It argues that the CAS violated its right to be heard within the meaning of Art. 190 (2) (d) PILA, by ruling on the legal fees and other expenses incurred for the proceedings without preliminarily giving the Parties the possibility of expressing their position in this regard, although it had invited them to file written statements on these costs and had been requested by them to grant them a time limit to that effect. Relying on Art. 190 (2) (e) PILA, the Appellant also alleges a violation of procedural public policy based on the same facts.

In their answer of January 5, 2011, the Respondents submitted that the appeal should be rejected. The CAS made the same submission in its answer dated January 14, 2011, to which it attached a memorandum issued on that same date by the Chairman of the Panel on its behalf.

Reasons:

1.

According to Art. 54 (1) LTF[2], the Federal Tribunal issues its decision in one of the official languages[3], as a rule in the language of the decision under appeal. When the decision was issued in another language (here English), the Federal Tribunal uses the official language chosen by the parties. Before the CAS, they resorted to English. In the briefs filed with the Federal Tribunal, they used French. According to its practice, the Federal Tribunal will adopt the language of the appeal and consequently issue its decision in French.

2.

In the field of international arbitration, the decisions of arbitral tribunals are capable of Civil law appeal under the requirements of articles 190 to 192 PILA[4] (art. 77 (1) LTF). As far as the object of appeal, the standing to appeal, the time-limit for appeal, the submissions made by the Appellant or even the grounds raised in the brief are concerned, they do not pose any admissibility problems. Therefore, the matter is capable of appeal.

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[2] Translator's note : LTF is the French 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.

3.

The Panel based no. 5 of the award on Art. R64.5 of the Code of Sports Arbitration (hereafter: the Code; text in force as of December 31, 2009, replaced on January 1, 2010 by a new edition) which reads as follows (English version):

"*The arbitral award shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the award shall grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the outcome of the proceedings, as well as the conduct and the financial resources of the parties*."

The Respondents and the Panel which rendered the award under appeal, seek mainly to demonstrate to the Federal Tribunal that the Arbitrators correctly applied the above mentioned regulatory provision by granting the Appellant the amount of CHF 35'000. By doing so, they do not focus on the right issue.

On the one hand, it should not be necessary to recall that the Federal Tribunal, when seized of a Civil law appeal against an international arbitral award, does not review the way in which the arbitral tribunal applied the relevant legal provisions, except within the very restrictive framework of the grievances based on Art. 190 (2) PILA, provided they are correctly submitted. On the other hand and above all, considering the formal nature of the right to be heard (ATF 133 III 235 at 5.3 p. 250, bottom of page), if it were to find a violation of this guarantee, this Court could only annul the award under appeal.

4.

4.1 The right to be heard, as guaranteed by Art. 182 (3) and 190 (2) (d) PILA, is not different in principle from that contained in constitutional law (ATF 127 III 576 at 2c; 119 II 386 at 1b; 117 II 346 at 1a p. 347). Thus in the field of international arbitration it was held that each party has the right to express its views on the facts essential for the decision, to submit its legal arguments, to propose evidence on pertinent facts and to participate in the arbitral hearings (ATF 127 III 576 at 2c; 116 II 639 at 4c p. 643).

With regard to the right to produce evidence, it must have been exercised timely and according to the applicable formal rules (ATF 119 II 386 at 1b p. 389). The arbitral tribunal can refuse to examine evidence, without violating the right to be heard, if the evidence is unfit to create conviction, if the fact to be proven is already established, if it is irrelevant or lastly, if the tribunal, pursuant to its assessment of the evidence in advance, reaches the conclusion that it is already convinced and that the result of the evidentiary measure requested cannot modify its conviction (judgment 4A_440/2010 dated January 7, 2011 at 4.1). The Federal Tribunal may not review an assessment of the evidence by anticipation, except under the extremely restrictive angle of public policy. The right to be heard does not include the right to demand an evidentiary measure which is unfit to prove a fact (judgment 4P.114/2003 dated July 14, 2003 at 2.2.).

4.2 In their Statement of claim dated August 20, 2010, the Respondents expressly requested the CAS to authorize them to submit to the Panel a summary of their expenses within a five-day time-limit from the closing of the hearing scheduled on September 15 and 16, 2010 in Lausanne (end of § 276). As for the Appellant, it requested, in its answer dated September 2, 2010, the authorization to submit a breakdown of expenses in due time, at a later stage of the arbitral proceedings (§382). On Friday September 24, 2010, since the CAS had not received any written statements on the issue of costs, it spontaneously reminded the Parties to proceed at their earliest convenience. Reacting immediately to this invitation, the Parties requested the Panel - the Respondents on that same date, the Appellant the following day - to rule on the merits first, on Monday September 27, 2010, and to postpone the ruling on the costs with a time limit to produce their statements of costs (the week following the election of September 29, 2010 for the Respondents, on October 11, 2010 at the latest for the Appellant); they reasoned their request. Besides, the CAS expressly took note of the Respondents' request on September 24, 2010, without further explanation and without reserving a potential decision of the Panel on this request. Subsequently, the Arbitrators rendered, on September 27, 2010, a final award which also decided the issue of costs. In the reasons of the award, they merely indicated that it was not necessary for the Parties to file additional briefs in this regard; the CAS confirmed this, without comment, in a fax issued on that same date attached to the notification of the award.

From this description of the last phase of the arbitral proceedings it appears that the Appellant rightly argues that it was unable to express its position on the issue of costs and other expenses incurred for the defense of its interests. The Respondents would also be entitled to a similar argument, as they were the first to insist to be given the opportunity to present, with evidence, the

expenses that they had incurred in connection with the arbitral proceedings; since they do not, one can assume that they are satisfied with the contribution that they were ordered to pay as costs, which they consider "obviously modest" (answer, no. 46). Be this as it may, that puts into perspective their support of the Arbitrators' decision not to hear the Parties on the issue of costs.

The decisive issue for the outcome of the appeal is not whether, generally speaking, the CAS has the obligation to specifically invite the parties to express their position on the costs before rendering its final award. Such an obligation is unlikely to exist. From the point of view of the right to be heard, it should suffice, indeed, that the parties had the opportunity, during the proceedings, to present their arguments and produce their evidence in this respect (bills, statement of fees, breakdown of expenses, etc.), whether or not they took that opportunity. Besides, as the Panel points out in its memorandum, there is no special provision of the Code that establishes a specific procedure for the filing of briefs and evidence related to costs.

The issue is different in this case, since the Panel, on its own initiative, asked the Parties to express their positions in this regard and received requests from them, if not filed jointly, at least similar in their contents, aimed at obtaining a time limit to do so, but the Panel did not act on these requests. To then argue, as does the Panel, that the Parties "willingly chose not to file briefs, although they had the possibility to act quite promptly..." (memorandum, no. 23) does not comply with the rules of good faith which apply to procedural matters too (ATF 111 II 62 at 3 p. 67), including in international arbitration (judgment 4P.196/2003 dated January 7, 2004 at 5.2). In fact, the Parties did react without delay, when the CAS sent them a reminder; they explained why they could not do as requested immediately and asked for some time to be given to them to proceed, so that they could expect in good faith that the Panel would respond to their requests before it ruled on the merits. From a more general point of view it must be kept in mind that the arbitral proceedings had only started two and a half months before the reminder, so that it would be unrealistic to consider that the Parties had had, in the meantime, all the time necessary to draft a statement of costs, considering the numerous actions they had taken during that period. Moreover, it must be noted, there was not a single working day between when the Parties were invited to file written statements on the allocation of costs and they asked for a time limit to do so, and the moment when the Panel rendered its final award. From that point of view, the situation here is different from the one, mentioned by the Respondents, where the arbitrators, *pendente lite*, renounce a procedural measure already taken earlier.

Moreover, the Respondents are wrong to question the relevance of the facts on which the Appellant wished to express its position. Indeed, the facts at issue concern two elements mentioned expressly in Art. R64.5 of the Code, that is, firstly, the "[other party's] legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters"; secondly, the "financial resources of the parties". True, regarding the first element, the Respondents insist, as does the Panel, on the fact that the indemnity granted pursuant to that provision is only a "contribution" towards the costs of the opposing party. However, that does not appear to render irrelevant the issue as to legal fees and other expenses related to the proceedings; otherwise it would be sufficient to rely on the rule that costs are only a contribution to justify granting the same amount to two parties, although one would have spent ten times more than the other. In this regard and to guarantee some equal treatment, it would be desirable for the CAS to specify the concept of "contribution" within the meaning of Art. R64.5 of the Code, in order to give a framework to the discretionary power of the arbitrators in these matters. As for the second element, knowing whether, as the Appellant alleges, the amounts spent for its defense in the proceedings initiated by the Respondents "burden its budget in a worrying way and cause a considerable financial loss" (appeal, no. 56), is doubtlessly relevant. It is not necessary, to verify this fact, to proceed with an extensive audit of this party's financial situation.
Lastly, the arguments brought forward by the Respondents and the Panel in an attempt to justify *ex post* the part of the award under appeal cannot be accepted for the above mentioned reasons (see at 3).

4.3. One must therefore conclude that the Panel violated the Appellant's right to be heard. As a consequence, number 5 of the award dated September 27, 2010 must be annulled.
There is no need, therefore, to examine the argument as to a violation of procedural public policy (Art. 190 (2) (e) PILA), which is anyway of a subsidiary nature (judgment 4P.105/2006 dated August 4, 2006 at 5.3 and the references).

5.
The Respondents shall severally pay the costs of the federal proceedings (Art. 66 (1) and (5) LTF) and compensate the Appellant (Art. 68 (1) and (4) LTF).

Therefore, the Federal Tribunal pronounces:

1.
The appeal is granted and number 5 of the award issued on September 27, 2010 by the CAS in this matter is annulled.

2.
The judicial costs, set at CHF 4'000.- shall be borne by the Respondents severally.

3.
The Respondents shall pay to the Appellant severally an amount of CHF 5'000.- for the federal judicial proceedings.

4.
This judgment shall be notified to the representatives of the Parties and to the Court of Arbitration for Sport (CAS).

Lausanne, March 17, 2011

On behalf of the First Civil Law Court of the Swiss Federal Tribunal

The Presiding Judge:	The Clerk:
Klett (Mrs)	Carruzzo