4A_362/2013[1]

Judgment of March 27, 2014

First Civil Law Court

Federal Judge Klett (Mrs.), Presiding
Federal Judge Kolly
Federal Judge Niquille (Mrs.)
Clerk of the Court: Leemann

X._____,
Represented by Dr. Thomas Sprecher and Mr. Tamir Livschitz,
Appellant

v.

The Football Federation of Ukraine (FFU),
Represented by Dr. Andreas Rüd,
Respondent

Facts:

A.
A.a.
X._____ (Appellant), domiciled in M._____, Ukraine, is the sports director of FC Metalist, a football club in Kharkiv. He had held this position during the 2007/2008 season of the Ukrainian Championship. The Ukraine Football Federation (FFU; Respondent), is the national football league of Ukraine and as such, a member of Fédération Internationale de Football Association (FIFA) and of Union des Associations Européennes de Football (UEFA).

[1] Translator's Note: Quote as X._____ *v.* The Football Federation of Ukraine, 4A_362/2013.
The original decision is in German. The full text is available on the website of the Federal Tribunal, www.bger.ch.

A.b.

On April 19, 2008, FC Karpaty, a football club from Lviv, played against FC Metalist – which at the time was in the third place – in the 26th Championship Round. The game took place in Kharkiv and FC Metalist won 4:0. During the game, A._____, an experienced player of FC Karpaty, both scored an own goal and received a red card.

On April 21, 2008, B._____, the president of FFU, met C._____, the honorary president of FC Karpaty, in Lviv to discuss the organization of the 2012 European Championship. Among other topics discussed was the April 19, 2008, game and the rumors that the players of FC Karpaty lost the game intentionally.

Shortly after this meeting, C._____ started an internal investigation in FC Karpaty to clarify if the game had indeed been manipulated.

On May 15, 2008, C._____ had a conversation in his home with A._____ with regard to the background to the April 19, 2008, game. The following day, he met him again in Lviv; this time in the office of C._____ and that conversation was recorded on video (hereafter referred to as "the Lviv-Video"). A._____ stated that the evening before the game, his acquaintance, X._____ from Club FC Metalist, had called him and offered money to lose the game while mentioning that the referees would otherwise, in any event, "fix" the FC Karpaty game. X._____ had suggested that he should discuss the offer with the team captain. A._____ further stated that he had talked about this with D._____, then the team captain, and the core team. They agreed to accept the money. Together with the experienced players, D._____, E._____, and F._____, he called all other members of the team to discuss the offer. A._____ also stated that while he was at his hotel, he was handed a total of USD 110'000 from a car. All members of the team – the substitute players as well – received money. He divided the money among the players with the team captain, D._____, which they got in the hotel room in the presence of D._____, E._____, and G._____. Each up player in the original lineup received USD 10'000 and USD 1'000 was withheld from the younger players in favor of the substitute players.

B.

B.a.

In a decision of August 9, 2010, the FFU Control and Disciplinary Committee pronounced fines and other sanctions against various players, officials, and the FC Metalist. X._____ was barred for life from any activities connected to football. The Committee held on the basis of testimony of the witnesses and of the evidence available that it was proved that the April 19, 2008, football game had been manipulated.

B.b.

On October 19, 2010, upon appeal by X._____, the FFU Appeal Committee reduced the ban to 5 years in its decision on appeal; moreover, a fine of USD 10'000 was pronounced, payable in Ukranian Hrywnja.

B.c.
In an arbitral award of August 2, 2013, the Court of Arbitration for Sport (CAS) rejected an appeal against the October 19, 2010, decision of the FFU Appeal Committee and confirmed the decision under appeal. The CAS held that the Lviv-Video had been recorded without A._____'s agreement and therefore examined its admissibility, among other things. The Arbitral Tribunal held that after balancing the interests at hand the Lviv-Video should be admitted while also holding that the transcription of a telephone conversation illegally recorded with one of the football players involved could not be admitted and finally admitted another video tape only because X._____ and other Appellants themselves had used it in support of their position. The CAS concluded, based on the Lviv-Video and other clues, that it was proved that X._____ had offered and paid money to fix the April 19, 2008, game, thereby violating the rules of the league involved.

C.
In a civil law appeal, X._____ asks the Federal Tribunal to annul the CAS award of August 2, 2013, insofar as it concerns him.

The Respondent and the CAS did not submit an answer.

D.
In its decision of August 15, 2013, the Federal Tribunal rejected an application to stay the enforcement of the award *ex parte*.

In a decision of August 16, 2013, the Federal Tribunal ordered a stay of enforcement after the Respondent expressed its agreement in submissions of August 15 and 16, 2013.

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 the decision is in another language, the Federal Tribunal resorts to the official language chosen by the parties. The award under appeal is in English. In the briefs sent to the Federal Tribunal, the parties used German. In accordance with its practice, the Federal Tribunal will adopt the language of the appeal and consequently issue its decision in German.

[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.

2.
In the field of international arbitration, a civil law appeal is permitted pursuant to 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 relevant time, the parties had their domicile or seat outside Switzerland (Art. 176(1) PILA). As the parties did not expressly opt out of the provisions of Chapter 12 PILA, they are applicable (Art. 176(2) PILA).

2.2. Only the grievances listed in 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 reviews only the grievances that are raised and reasoned in the appeal brief; this corresponds to the duty to provide reasons in Art. 106(2) BGG for the violation of constitutional rights and of cantonal and intercantonal law (BGE 134 III 186[6] at 5, p. 187, with references). 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 Court may not rectify or substitute the factual findings of the arbitral tribunal, even when they are blatantly inaccurate or rely 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 these factual findings or when new evidence is exceptionally taken into account (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 raises an exception to the rule that the Federal Tribunal is bound by the factual findings of the arbitral tribunal and seeks to have the factual findings rectified or supplemented on this basis must show, with reference to the record, that the corresponding factual allegations were made during the arbitral proceedings in accordance with procedural rules (BGE 115 II 484 at 2a, p. 486; 111 II 471 at 1c, p. 473; each with references).

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[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.

[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 that the Arbitral Tribunal violated public policy (Art. 190(2)(e) PILA) in many respects.

3.1.
3.1.1. According to Art. 190(2)(e) PILA, an arbitral award is incompatible with public policy when it disregards some fundamental and widely acknowledged values which, according to the prevailing opinion in Switzerland, should be the basis of any legal order (BGE 132 III 389 at 2.2.3, p. 395). Public policy has both substantive and procedure contents (BGE 138 III 322[10] at 4.1, p. 327; 136 III 345[11] at 2.1, p. 347; 132 III 389 at 2.2.1, p. 392).

3.1.2. The substantive adjudication of a claim violates public policy only when it violates some fundamental principles of substantive law and is therefore no longer consistent with the determining and broadly recognized value system. Among such principles are the sanctity of contracts (*pacta sunt servanda*), the prohibition of the abuse of rights, the general principle of good faith, the prohibition of expropriation without compensation, the prohibition of discrimination, the protection of incapables, and the prohibition of beyond-measure commitments (Art. 27(2) ZGB[12]), when the latter represents an obvious and severe infringement of privacy. However, this list is not exhaustive; the promise of bribes also violates public policy if it is established and so would a decision disregarding the prohibition of bribery (BGE 138 III 322 at 4.1, p. 327 with references).

The award under appeal is annulled only when its result – and not merely its reasons – is contrary to public policy (BGE 138 III 322[13] at 4.1, see also 4.3.1/4.3.2; 132 III 389 at 2.2, p. 392 *ff*.; each with references).

3.1.3. The formal procedural guarantees expressed in the grounds for appeal at Art. 190(2)(a-d) PILA and the procedural aspect of public policy according to Art. 190(2)(e) PILA guarantee the parties the right to an independent judgment on the submissions and the facts presented to the arbitral tribunal in conformity with applicable procedural rules (BGE 132 III 389 at 2.2.1, p. 392; 126 III 249 at 3b, p. 253). Procedural public policy is violated when some fundamental and generally recognized principles are disregarded, thus leading to an intolerable contradiction to justice, so that the decision appears inconsistent with the values

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[10] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/landmark-decision-of-the-swiss-supreme-court-international-arbit

[11] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/setting-aside-of-award-for-violation-of-public-policy-principle-

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

[13] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/landmark-decision-of-the-swiss-supreme-court-international-arbit

acknowledged in a state governed by laws (BGE 136 III 345[14] at 2.1, p. 347 *f.*; 132 III 389 at 2.2.1, p. 392; 128 III 191 at 4a, p. 194).

Procedural public policy is an alternative guarantee; the specific grounds for appeal under Art. 190(2)(a)-(d) PILA have priority over Art. 190(2)(e) PILA (BGE 138 III 270[15] at 2.3, p. 276).

3.2.
3.2.1. The Appellant argues that the Arbitral Tribunal violated public policy by relying on the Lviv-Video. The principle that illicitly obtained evidence is inadmissible is generally recognized in Swiss legal writing, corresponds with the case law of the Federal Tribunal, and is found in both Art. 140 f. of the Swiss Code of Criminal Procedure (CCrP; SR 312.0) and in Art. 152(2) of the Swiss Code of Civil Procedure (CCP; SR 272). The principle is also recognized in other legal orders; it may only be derogated from exceptionally and in a very limited way, particularly in an adversarial system.

The Arbitral Tribunal apparently balanced the interests before it only in appearance; the result was actually preordained: While there is *per se* a major public interest in fair football and considering that the investigative tools of the state failed to enforce it, any illegally gathered evidence would always be admissible. The reasoning of the Arbitral Tribunal is contradictory and directly contradicts the principles established by the Federal Tribunal to derogate from the principle that illegally gathered evidence is inadmissible.

3.2.2. The Appellant rightly refrains from arguing that illegally obtained evidence would be excluded in all cases according to the Swiss view; the interests at hand must instead be balanced; they are, on the one hand, the interest in finding the truth and, on the other hand, the interest in protecting the legal protection infringed upon by the gathering of the evidence (see BGE 140 III 6 at 3.1, p. 8; 139 II 7 at 6.4.1, p. 25; 136 V 117 at 4.2.2, p. 125; 131 I 272 at 4.1.2, p. 279). The Arbitral Tribunal did not disregard this at all but to the contrary, reviewed the admissibility of the Lviv-Video – and of other evidence – in the light of the prevailing procedural principles, according to Swiss law. Contrary to the view presented in the appeal, the Arbitral Tribunal did not assume that, in view of the significant interest in fair football and the absence of an investigation by the state to enforce these principles, any evidence illegally obtained would always be admissible. The Arbitral Tribunal definitely undertook a review of each interest involved individually and did not admit all evidence but instead held that, after balancing the interests at hand, that the transcription of an illegally recorded phone conversation with a player involved was not admissible but admitted an additional video because the Appellant and other Appellants had relied upon it as exculpatory evidence. In doing so, the Arbitral Tribunal reviewed, among other reasons, whether the admission of game fixing by A._____

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[14] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/setting-aside-of-award-for-violation-of-public-policy-principle-

[15] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/an-international-arbitral-tribunal-seating-in-switzerland-is-gen

on the record may have been the consequence of coercion or undue pressure by the honorary president of FC Karpaty.

Furthermore, the Appellant rightly refrains from arguing that it would not have been possible for him to challenge the accuracy and the admissibility of the disputed video in the arbitral proceedings and to submit his own evidence; to the contrary, during more than two years in the arbitral proceedings, he decided not to argue the inadmissibility of the Lviv-Video and challenged the admissibility of this evidence only in a submission of February 26, 2013, therefore too late, according to the applicable procedural rules. In his argument concerning Swiss procedural law and in his references to case law and legal writing, the Appellant disregards that free judicial review of the applicable procedural provisions are excluded in an action against an arbitral award according to Art. 190(2) PILA and that the wrong or even arbitrary application of a specific procedural rule does not, by itself, constitute a violation of public policy (see BGE 129 III 445 at 4.2.1, p. 464; 126 III 249 at 3b, p. 253). In his argument that the reasons of the Arbitral Tribunal were contradictory, the Appellant fails to show any incompatibility of the arbitral award with public policy (see judgment 4A_654/2011[16] of May 23, 2012, at 4.2; 4A_320/2009[17] of June 2, 2010, at 4.3; 4A_464/2009[18] of February 15, 2010, at 5.1). Moreover, the Appellant rightly does not dispute that the sport federations – the Respondent, among others – have a strong interest in fighting game fixing (as to combating manipulations in sport, see the Recommendation of the Committee of Ministers of the Council of Europe to member states on promotion of the integrity of sport to fight against manipulation of results, notably match-fixing of September 28, 2011; EU Council Decision of June 10, 2013, Authorizing the European Commission to participate on behalf of the EU in the negotiations for an international Convention of the Council of Europe to combat the manipulation of sport results […] [2013/304/EU]).

Moreover, the Appellant merely submits some inadmissible criticism of the assessment of the evidence by the Arbitral Tribunal when he now tries to cast doubt before the Federal Tribunal as to the validity of the evidence or the truthfulness and the scope of the statements made by A._____. He does not show the violation of any fundamental and broadly recognized procedural principles in the argument that the latter later withdrew his statement, or when the Appellant submits that the Ukrainian prosecutor's office eventually dropped its investigation.

The Appellant's argument shows no violation of procedural public policy.

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[16] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/motion-to-set-aside-a-tas-award-dismissed-by-the-federal-tribuna

[17] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/facts-not-reviewed-by-federal-tribunal-claims-of-violation-of-du

[18] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/no-waiver-of-the-right-to-appeal-to-the-federal-tribunal-in-the-

3.3. The Appellant argues, furthermore, that the Arbitral Tribunal violated public policy (Art. 190(2)(e) PILA) by unduly restricting the standards of evidence.

Relying on the evidentiary provisions of the Swiss civil and criminal procedural laws and on the presumption of innocence according to Art. 10 CCrP and Art. 6(2) ECHR, he argued that the standard of evidence applied in the arbitral proceedings to determine the existence of a manipulation of the game was inaccurate. In this respect he argues – inaccurately – that the Arbitral Tribunal disregarded the significance of the legal consequences for the people involved. The Arbitral Tribunal reasoned in an understandable way as to why it applied the principle used in doping cases to the assessment of a game manipulation as to the burden and the scope of evidence and pointed out, among other points, that the seriousness of the allegation was to be taken into consideration as well, which the Appellant does not address. Contrary to the view taken in the appeal brief, the reasoning of the CAS that the Respondent would have to show the existence of a manipulated game "to the comfortable satisfaction of the Panel"[19] does not violate public policy. In doing so, the Arbitral Tribunal established the burden of proof and the scope of the evidence needed, by reference to the pertinent rules of the federation and its case law, which in private law – even when disciplinary measures of private sport federations are to be assessed – cannot be determined from the point of view of criminal concepts such as the presumption of innocence or the principle of "*in dubio pro reo*," or on the basis of the guarantees arising from the ECHR, as the Federal Tribunal mentioned several times in particular in cases involving doping violations (judgment 4A_488/2011[20] of June 18, 2012, at 6.2; 4A_612/2009[21] of February 10, 2010, at 6.3.2; 5P.83/1999 of March 31, 1999, at 3d; 4P.217/1992 of March 15, 1993, at 8b, not published in BGE 119 II 271 *ff*.).

In this respect as well, the Appellant did not succeed in showing a violation of fundamental and generally recognized procedural principles, the disregard of which would lead to the award being incompatible with public policy.

3.4. On the basis of Art. 27 ZGB, the Appellant argues that the professional ban "in combination with the reduced evidentiary standard" violates public policy.

His argument ignores that a violation of Art. 27 ZGB does not necessarily mean a violation of public policy; the sanction levied against him can lead to a violation of public policy in the award under appeal only if it represents an obvious and severe infringement of privacy (BGE 138 III 322[22] at 4.3.1 and 4.3.2). The ban

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

[20] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/the-federal-tribunal-leaves-undecided-the-issue-as-to-whether-an

[21] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/limited-judicial-review-of-awards-independence-of-cas-reaffirmed

[22] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/landmark-decision-of-the-swiss-supreme-court-international-arbit

confirmed by the Arbitral Tribunal from any activities connected to football for five years may indeed be severe for a football executive. However, the Appellant cannot use anything from the judgment he quotes (BGE 138 III 322[23] *ff.*) to his advantage. In that judgment, the Federal Tribunal held that the sanction issued by a federation was inconsistent with public policy when a football player was faced with an unlimited ban as long as he did not pay the amount imposed on him. Contrary to the case quoted, the ban against the Appellant is limited in time and does not remain in force merely due to the failure of making a payment and rather is the consequence of a violation of the applicable provisions covering sanctions against manipulations of games or bribery in sport.

The ban seeks to enforce the obviously important interest of the Respondent in ensuring sporting and fair football games, which the Appellant also acknowledges. He cannot be followed in his argument that such an infringement of economic freedom would be inappropriate to the goal sought (BGE 138 III 322[24] at 4.3.4, p. 331); contrary to his view (which he does not develop any further), it cannot be argued that as a consequence of the standard of evidence applied to prove the manipulation, the members of the federation would be exposed to the arbitrariness of the federation. Besides the fact that the Appellant does not substantiate his argument at all, it is wrong to say that the interest in football games being played without corrupt influence – that the Appellant seeks to enforce with the sanction at issue – clearly has less weight and could not justify the infringement of the Appellant's privacy (BGE 138 III 322[25] at 4.3.4, p. 331).

The argument that the award under appeal would be inconsistent with public policy as to the professional ban it confirmed is unfounded.

4.
The appeal appears unfounded and must be rejected insofar that the matter is capable of appeal. In such an outcome of the proceedings, the judicial costs shall be borne by the Appellant (Art. 66(1) BGG). The Respondent is not entitled to costs, as no burden was imposed upon it as a consequence of the federal proceedings (Art. 68(1) BGG).

Therefore the Federal Tribunal Pronounces:

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

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[23] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/landmark-decision-of-the-swiss-supreme-court-international-arbit

[24] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/landmark-decision-of-the-swiss-supreme-court-international-arbit

[25] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/landmark-decision-of-the-swiss-supreme-court-international-arbit

2.
The judicial costs set at CHF 4’000 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, March 27, 2014

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

Presiding Judge:	Clerk:
Klett (Mrs.)	Leemann