4A_448/2013[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

A._____,
Represented by Sr. Stephan Netzle,
Appellant

v.

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

Facts:

A.
A.a. A._____ (the Appellant), domiciled in N._____, Ukraine, played for the Karpaty FC, a football club in Lviv, during the 2007/2008 season in the framework of the Ukrainian Championship.

The Football Federation of Ukraine (FFU; Respondent) is the national football federation of Ukraine and as such a member of Fédération Internationale de Football Association (FIFA) and the Union des Associations Européennes de Football (UEFA).

A.b. On April 19, 2008, Karpaty FC played the 26th game of the championship against Metalist FC, a football club in Kharkiv, which at that time had achieved third place. The game was played in Kharkiv and

[1] Translator's Note: Quote as A._____ *v.* The Football Federation of Ukraine, 4A_448/2013.
The original decision is in German. The full text is available on the website of the Federal Tribunal, www.bger.ch

finished 4:0 for Metalist FC. During the game, A._____ scored an own-goal and also received a red card.

On April 21, 2008, Mr. B._____, the president of FFU met C._____, the honorary president of Karpaty FC, in a restaurant in Lviv to discuss the organization of the 2012 European Championship. The game of April 19, 2008, and the rumors that the loss had been intentionally caused by the players of Karpaty FC were discussed, among other things.

Shortly after this meeting, C._____ initiated an internal investigation in Karpaty FC to determine if the game had really been manipulated.

On May 15, 2008, C._____ had a conversation in his home with A._____ concerning the background of the April 19, 2008, game. The following day, he met him again in Lviv, this time in the office of C._____, where the conversation was recorded on video (hereafter described as the Lviv-Video). A._____ informed him that X._____, with whom he was acquainted though Metalist FC club, had called him the evening before the game and offered him money to lose the game while mentioning that otherwise the referees would in any event "deal" with Karpaty FC. X._____ proposed that he discuss the offer with the captain of the team. A._____ stated furthermore that he had spoken to the captain at the time and with the core team; they agreed to accept the money. With the experienced players D._____, E._____ and F._____ he called all other members of the team to discuss the offer. A._____ stated furthermore that a car delivered a total of USD 110'000 to his hotel. All members of the team, including the substitute players, received money. He himself divided the money with the team captain among the various players who received it in the hotel room in the presence of D._____, E._____ and G._____. Each initially listed player received USD 10'000 and the younger players got USD 1'000 less each to be given to the substitute players.

On May 30, 2008, A._____ and Karpaty FC terminated their employment relationship by mutual agreement as of May 31, 2008, with all claims settled. A._____ was then transferred to the Ukrainian Shakhtar FC Club.

B.

B.a. In a decision of August 9, 2010, the FFU Control and Disciplinary Committee imposed fines and other sanctions on various players, officers and the Metalist FC. A life-long ban from any activities connected to football was pronounced against player A._____. On the basis of testimony and the evidence available, the Committee held that it was established that the game of April 19, 2008, had been manipulated.

B.b. The prohibition issued against A._____ was reduced to 5 years by decision of the FFU Appeal Committee of October 19, 2010, with a fine of USD 10'000 payable in Ukrainian Hrywnja.

B.c. In an arbitral award of August 2, 2013, the Court of Arbitration for Sport (CAS) rejected an appeal against the decision of the Appeal Committee of October 19, 2010, and upheld the decision under appeal.

The CAS stated that the Lviv-Video had been recorded without A._____'s consent and therefore examined its admissibility, among other things. The Arbitral Tribunal declared the Lviv-Video admissible after balancing the interests involved but it declared the transmission of an illegally recorded phone conversation with one of the players involved inadmissible. It also admitted an additional video recording in evidence only because A._____ and other appellants had themselves relied upon it to fight the charges. The CAS held that the Lviv-Video and other evidence established that A._____ played an important role in manipulating the April 19, 2008, game and was paid, which violated the applicable rules of the federation.

C.
In a civil law appeal, A._____ submits that the Federal Tribunal should annul the CAS arbitral award of August 2, 2013, insofar as it concerns him.

The Respondent and the CAS did not submit an answer.

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 it 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 in the Federal Tribunal, the decision of the Federal Tribunal will be issued in German.

2.
In the field of international arbitration, a civil law appeal is admissible pursuant to the requirements of 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 point in time, the parties had their domicile or their 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. The admissible grievances are only those listed at Art. 190(2) PILA (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

[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.
[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.

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 admissible (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 correct 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 Art. 105(2) BGG). However, the Federal Tribunal may review the factual findings of the 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 consideration (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 claims an exception to the rule that the Federal Tribunal is bound by the factual findings of the arbitral tribunal and wishes to rectify or supplement them on this basis must show, with reference to the record, that the corresponding factual allegations were raised 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).

3.
The Appellant argues that the Arbitral Tribunal violated public policy in various respects (Art. 190(2)(e) PILA).

3.1.
3.1.1. An arbitral award is incompatible with public policy within the meaning of Art. 190(2)(e) PILA when it disregards some fundamental and widely recognized values which, according to the prevailing views in Switzerland, should be the basis of any legal order (BGE 132 III 389 at 2.2.3, p. 395). Public policy has 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).

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[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

[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

3.1.2. The substantive adjudication of a claim violates public policy only when it disregards some fundamental principles of substantive law and therefore becomes no longer consistent with the essential and generally acknowledged system of values. Among such principles are the sanctity of contracts (*pacta sunt servanda*), the prohibition of abuse of rights, compliance with the rules of good faith, the prohibition of expropriation without compensation, the prohibition of discrimination, the protection of incapables, and the prohibition of excessive or beyond-measure commitment (Art. 27(2) ZGB[12]), when it constitutes a blatant and grievous violation of personality rights. However, the list is not limitative; promising bribes is also against public policy to the extent that it can be proved or a decision that would disregard the prohibition of forced labor (BGE 138 III 322 at 4.1, p. 327 with references).

The award under appeal will be annulled only if its outcome – and not merely its reasons – contradict 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 must guarantee to the parties an independent assessment of the submissions and the factual allegations made in the arbitral tribunal in accordance with 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 procedural principles are violated, the disregard of which leads to an insufferable contradiction to justice, so the decision appears completely incompatible with the values recognized in a state under the rule of law (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 remedy; the specific grounds for appeal at Art. 190(2)(a-d) PILA take precedence 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 illegally acquired evidence should not be used is recognized in Swiss legal writing generally, corresponds to consistent case law of the Federal Tribunal and is embodied in Art. 140 *f.* of the Swiss Code

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[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

[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

of Criminal Procedure (CPP; SR 312.0) as well as in Art. 152(2) of the Swiss Code of Civil Procedure (CCP; SR 272). This principle is recognized in other legal orders as well; deviations would be matters of exception only and – in particular when the rule of explanation of positions applies – only very narrowly admissible.

The Arbitral Tribunal balanced the interests at hand in appearance only; the result was instead determined in advance: as there is an overriding public interest in maintaining fair football and since the state means of investigation to enforce it were lacking, any illegally acquired evidence would be admissible. Despite the fact that the Respondent is in pursuit of private and not public interests, the reasons of the Arbitral Tribunal are internally contradictory and are directly contradicted the principles established by the Federal Tribunal for deviating from the principle that illegally acquired evidence is inadmissible.

3.2.2. The Appellant rightly does not dispute that illegally obtained evidence is not always inadmissible, according to the Swiss view; instead there is a balancing of interests in which the interest in discovering the truth is balanced against that of protecting the legal interest harmed by the acquisition 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 quite to the contrary, it examined thoroughly the admissibility of the Lviv-Videos – and that of other evidence – from the point of view of the determining procedural principles of Swiss Law. Contrary to the view expressed in the appeal brief, the Arbitral Tribunal did not assume that all illegally acquired evidence would be admissible due to the overriding interest in fair football and the lack of state investigation tools to enforce these principles. The Arbitral Tribunal did individually assess the various interests concerned and did not admit all evidence but rather declared (pursuant to a balance of interests) the transcription of an illegally recorded phone conversation with a player involved inadmissible and admitted an additional video recording only because the Appellant and other defendants relied on it themselves as exculpatory evidence. In doing so, the Arbitral Tribunal reviewed whether the recorded admission of game manipulation by the Appellant may have taken place as a consequence of coercion or because undue pressure was applied by the honorary president of the Karpaty FC.

The Appellant rightly does not argue that he could not have disputed the authenticity of the video in dispute and challenged his admissibility in the arbitral proceedings while submitting evidence on his behalf; to the contrary, he did not dispute the authenticity or the admissibility of the Lviv-Videos in the Arbitral Tribunal. The Appellant's argument as to Swiss procedural law and his references to case law and legal writing disregard that, in the framework of an arbitral recourse according to Art. 190(2) PILA, there is no judicial review of the applicable provisions and even wrongly or even arbitrarily applying a pertinent rule of procedure does not violate public policy *per se* (see BGE 129 III 445 at 4.2.1, p. 464; 126 III 249 at 3b, p. 253). The Appellant does not show any incompatibility of the award with public policy in his argument that the reasons of the Arbitral Tribunal were contradictory *per se* or when he claims that the "interest in fair football" would be merely the interest of the respondent federation as opposed to public interest (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). That sport federations – including the Respondent – have a vested interest in fighting game manipulation is rightly not questioned by the Appellant (as to combating manipulation in sport, see the Recommendation of the Committee of Ministers of the Council of Europe of September 28, 2011, on promotion of the integrity of sport against manipulation of results, notably match fixing; 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]).

Besides the fact that, contrary to what the Appellant seems to assume, the Arbitral Tribunal did not reach its factual conclusions as to the background of the game of April 19, 2008, and as to the Appellant's role in its manipulation on the basis of the Lviv-Video only but also based on the statement of Player G._____, the Appellant merely submits undue criticism of the assessment of the evidence by the Arbitral Tribunal when casting doubt before the Federal Tribunal on the adequacy of the evidence or the truthfulness of his statements at the time. He does not show a violation of fundamental and generally recognized procedural principles by pointing out that he later recanted his statement or that the Ukrainian prosecution office discontinued its investigations.

The Appellant's arguments thus fail to show a violation of procedural public policy.

3.3. The Appellant argues, furthermore, that the Arbitral Tribunal violated public policy (Art. 190(2)(e) PILA) by applying too narrow a standard of evidence.

With reference to the evidentiary requirements of the Swiss Civil and Criminal Codes of Procedure and invoking the presumption of innocence according to Art. 10 CPP or Art. 6(2) ECHR, he argues that the standard of evidence applied in the arbitration as to the existence of a game manipulation was inaccurate. He wrongly submits in this respect that the Arbitral Tribunal disregarded the importance of the legal consequences for the people involved. The Arbitral Tribunal comprehensively explained why it applied the same principles as to the burden of proof and the standard of evidence in assessing game manipulations as in doping cases and pointed out, among other things, that the seriousness of the complaint had to be taken into account, something the Appellant does not mention. The statement of the Arbitral Tribunal that the Respondent would have to prove game manipulation "to the comfortable satisfaction of the Panel"[19]

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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-

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

does not violate public policy, contrary to the view expressed in the appeal brief. In doing so, the Arbitral Tribunal assessed the burden of proof and the standard of evidence with reference to the applicable rules of the federation and its own case law, which are not determined from the point of view of criminal law concepts such as the presumption of innocence or the principe "*in dubio pro reo*" or pursuant to the guarantees arising from the ECHR, as this is in the field of application of private law – even when the disciplinary measures of private sport federations have to be assessed – as the Federal Tribunal repeatedly confirmed, in particular in cases of 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 context as well, the Appellant fails to show a violation of any fundamental and generally recognized procedural principles, the violation of which would cause the award to be incompatible with public policy.

3.4. Relying on Art. 27 ZGB,[22] the Appellant argues that "in combination with the reduced standard of evidence," the imposed prohibition violates public policy.

His argument disregards that a violation of Art. 27 ZGB does not in itself mean a violation of public policy; the sanction pronounced against him will breach public policy only if the award under appeal represents a blatant and grievous violation of personal rights (BGE 138 III 322[23] at 4.3.1 and 4.3.2). The prohibition of any activities related to football for five years, which the Arbitral Tribunal confirmed, is doubtlessly harsh for a professional football player. However, the Appellant may not invoke in his favor the case he quotes (BGE 138 III 322[24] *ff.*), in which the Federal Tribunal held that a federation sanction was incompatible with public policy because a football player was threatened with unlimited prohibition from playing football if he failed to make the payment ordered. Contrary to the case quoted, the prohibition against the Appellant is limited in time and does not merely arise as a consequence of failure to pay but due to a violation of the applicable rules concerning the sanctioning of game manipulations or corruption in sport.

The imposed prohibition seeks to enforce the Respondent's obviously important interest in the sporting and fair conduct of football games, which the Appellant also recognizes in principle. He cannot be followed in his argument that such infringement in economic freedom would not be appropriate to reach that goal (see

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[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: ZGB is the German abbreviation for the Swiss Civil Code.

[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

BGE 138 III 322[25] at 4.3.4, p. 331); contrary to his view, which is not reasoned any further, it cannot be claimed that the members of the federation were victims of the arbitrariness of the federation as a consequence of the standard of evidence applied to proving the manipulation. The appeal brief rightly does not claim that the interest in a fair course of football games without corrupting influence, which the Respondent seeks to enforce through the sanctions ordered, would be clearly less important and would not justify infringing upon the personal rights of the Appellant (BGE 138 III 322[26] at 4.3.4, p. 331).

The argument that the arbitral award is incompatible with public policy in view of the practice prohibition it confirmed is therefore unfounded.

4.
The appeal is unfounded and must be rejected insofar that the matter is capable of appeal. In such an outcome, the Appellant must pay the costs (Art. 66(1) BGG). The Respondent has no claim for costs, as it did not participate in 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.

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

[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

[26] 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

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

Presiding Judge:	Clerk:
Klett (Mrs.)	Leemann