

4A_564/2013¹

Judgment of April 7, 2014

First Civil Law Court

Federal Judge Klett (Mrs.), Presiding
Federal Judge Niquille (Mrs.)
Substitute Federal Judge Ch. Geiser
Clerk of the Court: Mr. Carruzzo

X. _____ SA,
Represented by Lionel Halpérin,
Appellant

v.

1. Y. _____ SA,
Represented by Mr. Jorge Ibarrola,
Respondent

2. Fédération Z. _____, in the name of which its General Secretary, Mr. A. _____, is acting,
Respondent

Facts:

A.

X. _____ SA (hereafter: X. _____ or the Appellant) and Y. _____ (hereafter: Y. _____ or the Respondent) are two professional football clubs, members of Fédération Z. _____ (hereafter: Z. _____).

On April 26, 2013, Z. _____ refused to grant X. _____ a license allowing it to play in the first division championship of [name of country omitted] due to bankruptcy proceedings pending against this club. This decision was confirmed by the appeal body of Z. _____ on May 10, 2013, and became final and irrevocable.

¹ Translator's Note:

Quote as X. _____ SA v. Y. _____ SA and Fédération Z. _____, 4A_564/2013.
The original decision is in French. The full text is available on the website of the Federal Tribunal,
www.bger.ch.

During the 2012/2013 season, Y._____ finished in 15th place of the first division championship, thus being the best of the teams demoted to the second division.

In its meeting of July 6, 2013, the Executive Committee of Z._____ approved several changes to the Regulation for the Organization of the Football Activity (hereafter: ROAF). It decided in particular that any places left vacant in the first division would be attributed to the first teams demoted to the lower division. Moreover, it decided that the first division would comprise 18 teams for the 2013/2014 season, even though only 17 clubs met the financial and sporting requirements to participate. Finally, it decided that the 18th spot would be given to the winner of a qualifying playoff game between Y._____ and X._____ on July 13, 2013.

X._____ won the playoff.

B.

On July 11, 2013, Y._____ filed a statement of appeal with the Court of Arbitration for Sport (CAS) seeking the annulment of the decision by Z._____ to organize this qualifying playoff game. The statement of appeal contained a request for a stay of enforcement of the decision until the matter was decided on the merits.

On July 16, 2013, X._____ asked to be authorized to intervene in the proceedings. Y._____ and Z._____ accepted.

In a decision of July 17, 2013, the Deputy President of the CAS Appeals Arbitration Division refused to stay the enforcement of the decision under appeal. Pursuant to the agreement of the parties to expedite the procedure, the sole arbitrator appointed to handle the case issued his award on August 2, 2013. Upholding the appeal, he annulled the decision of Z._____ to organize the qualifying playoff game at issue and invited Z._____ to qualify and register Y._____ in the first league championship of [name of country omitted] for the 2013/2014 season instead of X._____.

The reasons in the full award dated October 10, 2013, may be summarized as follows:

- Pursuant to Art. 13(3) ROAF, a football club may not participate in the first championship of [name of country omitted] unless it has a license issued by Z._____. X._____ was refused a license for the 2013/2014 season pursuant to an enforceable decision issued on appeal due to the bankruptcy proceedings pending. For this reason and because the Executive Committee of Z._____ had decided that the first division would comprise 18 teams instead of 17 there was a slot to be attributed in this division.
- The changes to the ROAF decided by the Executive Committee of Z._____ on July 6, 2013, were immediately applicable in this respect for lack of a transitional rule pursuant to Art. 34(3) of the statutes of Z._____. Moreover, the latter expressly acknowledged in its answer to the

appeal what the aforesaid changes would be applicable during the 2013/2014 season. However, Z._____ and X._____ take the view that the dispute with Y._____ concerns the previous season (2012/2013). It is not so. Indeed, the vacancy due to the refusal to grant X._____ a license for the 2013/2014 season did not concern the previous season, which ended at the end of May 2013. Therefore, the vacant slot should be given to Y._____, which was the highest ranked club among the relegated teams. Therefore, the appeal filed by that club must be upheld.

- Assuming that, contrary to what was held, the changes to the ROAF were not applicable to the circumstances of the case at hand, one would then have to find that Y._____ successfully established both the existence of a standard practice preventing a club denied a license from playing in the first division and that in recent years a vacant slot in the first division was attributed to the best team relegated during the previous season. For their part, the Respondents in the appeal could not put forward any reason which would justify abandoning this practice nor could they explain why X._____ should be authorized to participate in the first division championship for the 2013/2014 season despite the fact that it had not obtained a license for this purpose.
- In any event, the decision to hold a qualifying playoff game clearly contradicts the rules adopted by Z._____, violates the rule of equal treatment between the football clubs of [name of country omitted], and disregards that the appeal decision of May 10, 2013, upholding the refusal to issue X._____ with a license for the coming season was in force.

C.

On November 11, 2013, X._____ filed a civil law appeal to the Federal Tribunal with a view to obtaining the annulment of the October 10, 2013, award. It argues that the Arbitrator violated its right to be heard (Art. 190(2)(d) PILA).²

In its answer of January 14, 2014, Y._____ submitted that the appeal should be rejected to the extent that the matter is capable of appeal.

The CAS also submitted that the appeal should be rejected in its answer of January 31, 2014.

Z._____ did not submit an answer in the time limit it had been given for this purpose.

The Appellant and the Respondent maintained their previous submissions in a reply dated February 19, 2014, and a rejoinder of March 5, 2014.

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.

Reasons:

1.

According to Art. 54(1) LTF,³ the Federal Tribunal issues its judgment in an official language,⁴ 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. Before the CAS they used English. In the appeal proceedings they both used French. In accordance with its practice, the Federal Tribunal will adopt the language of the appeal and consequently issue its judgment in French.

2.

In the field of international arbitration, a civil law appeal is admitted against the decisions of arbitral tribunals pursuant to the requirements of Art. 190 to 192 PILA (Art. 77(1) LTF). Whether as to the object of the appeal, the standing to appeal, the time limit to do so, the Appellant's submission or the ground for appeal raised in the appeal brief, none of these admissibility requirements raises any problems in this case. The matter is therefore capable of appeal.

3.

Relying on Art. 190(2)(d) PILA, the Appellant argues that the Arbitrator failed to take into account some essential arguments it had raised in the arbitral proceedings concerning the various decisions of July 6, 2013, and the issue as to its license.

3.1. The right to be heard in contradictory proceedings, pursuant to Art. 190(2)(d) PILA, certainly does not require an international arbitral award to be reasoned (ATF 134 III 186⁵ at 6.1 and the references). However, it imposes upon the arbitrators a minimal duty to examine and handle the pertinent issues (ATF 133 III 235 at 5.2, p. 248, and the cases quoted). This duty is violated when, inadvertently or due to a misunderstanding, the arbitral tribunal does not take into consideration some factual allegations, arguments, evidence, or offers of evidence submitted by one of the parties and important for the decision to be issued (judgment 4A_304/2013 of March 3, 2014, at 4.2).

3.2.

3.2.1. First, the Appellant argues that the Arbitrator did not take into account the chronological sequence of the three decisions taken by the Executive Committee of Z._____ on July 6, 2013, when addressing the issue of the applicability of the changes to the ROAF. In its view, the Executive Committee had decided, as a first step, to keep 18 teams in the first division championship of [name of country omitted], as a second step, to organize a qualifying playoff game between X._____ and Y._____ to attribute the 18th slot in the championship, and as a third step, to amend the ROAF. According to the Appellant, if the Arbitrator

³ Translator's Note: LTF is the French abbreviation of 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.

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>

had taken this chronological sequence into consideration, which it had outlined to in its answer to the appeal of Y._____, he would have reached the conclusion that the only possible interpretation of the decisions in dispute was to hold that the Executive Committee had individually solved the problem for the 2013/2014 season by organizing a qualifying playoff game and that, in parallel, it had adopted the measures applicable for the following season.

3.2.2. One hardly sees where the Appellant wants to go with this argument, in particular because, as was indicated above, Z._____ expressly acknowledged in its answer to the appeal that the changes to the ROAF decided on July 6, 2013, were applicable in the 2013/2014 season. There was therefore no uncertainty as to the applicability *ratione temporis* of the amended rules and no reason to develop the off-topic issue of the 'chronological sequence' of the decisions taken on the aforesaid date.

Upon closer inspection, the Appellant's argument actually boils down to criticizing the interpretation of the July 6, 2013, decisions by the Arbitrator. Hence, the argument concerns the merits of the award, which are beyond the scope of review by the Federal Tribunal in an appeal concerning an international arbitration.

In any event, the Arbitrator considered the fact that X._____ did not obtain a license to play the first division championship of [name of country omitted] during the 2013/2014 season determinative. In his view, this rendered the decision to order a qualifying playoff game arbitrary, no matter when the changes to the ROAF, adopted on July 6, 2013, would come into force. It must be recalled that an arbitrator is not under a duty to discuss all arguments invoked by the parties. An arbitrator cannot be held in breach of the right to be heard in contradictory proceedings for not refuting, explicitly or implicitly, an argument objectively devoid of any pertinence (ATF 133 III 235 at 5.2 and the cases quoted). This is the case here as to the argument concerning the chronological sequence of the decisions taken on July 6, 2013.

3.3.

3.3.1. Secondly, the Appellant argues that the Arbitrator overlooked an award issued by the CAS on July 5, 2013, in a case concerning another club (V._____ SA), the existence of which had been pointed out in its answer to the appeal. In its view, that award was of crucial importance as it embodied a shift in jurisprudence by stating the principle that the bankruptcy of a football club could no longer justify the refusal to issue a license. Still according to the Appellant, this new jurisprudence adopted the day before its meeting led the Executive Committee of Z._____ to authorize X._____ to play a qualifying playoff game with a view to avoid unequal treatment between this club and the aforesaid club.

Furthermore, the Appellant argues that the CAS should not have rejected, without even referring to it, its argument concerning the broad powers that the Executive Committee had in this field, including the organization of a qualifying playoff game.

3.3.2. The award to which the Appellant refers was not published by the CAS, contrary to what the press release of July 5, 2013, from this body implies. It is not in the CAS file and the Appellant does not claim to have specifically required the production of the award before the arbitral proceedings were closed and does

not do so either in its briefs to the Federal Tribunal, assuming such a request would have been admissible (see Art. 99(1) LTF). The evidence on which its second argument is based is therefore lacking, which, as a matter of principle, prevents the Federal Tribunal from reviewing its accuracy.

Be this as it may, the aforesaid press release shows that in the case of V._____ SA, the CAS annulled the refusal to grant that club a license because its financial situation at the decisive date did not justify the refusal. Thus, the award quoted by the Appellant, which apparently concerns the financial criteria for granting a license, did not have the same subject matter as in the case at hand, which concerns the temporal applicability of the new provisions of the ROAF. It could therefore not be considered precedential, no matter what the Appellant says, thus it cannot be claimed that the Arbitrator was wrong not to dwell on an argument that had no impact on the resolution of the dispute before him.

The same conclusion can be drawn as to the Appellant's final argument. As the Arbitrator held that the decision to organize a qualifying playoff game was incompatible with the final refusal to grant X._____ a license for the 2013/2014 season, he did not have to examine any further if the allegedly broad powers of the Executive Committee of Z._____ in this field were sufficient to justify the decision to attribute the 18th slot in the first division championship of [name of country omitted] to the winner of a playoff game.

4.

The foregoing shows that the appeal before the Federal Tribunal must be rejected. The Appellant loses and it shall pay the costs of the federal proceedings (Art. 66(1) LTF) and compensate its opponent (Art. 68(1) and (2) LTF). Z._____ did not participate in the proceedings and is accordingly not entitled to costs.

Therefore the Federal Tribunal pronounces:

1.

The appeal is rejected.

2.

The judicial costs set at CHF 6'000 shall be borne by the Appellant.

3.

The Appellant shall pay to Y._____ an amount of CHF 7'000 for the federal judicial proceedings.

4.

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

Lausanne, April 7, 2014

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

Presiding Judge:

Clerk:

Klett (Mrs.)

Carruzzo