4A_548/2019 and 4A_550/2019[1]

Judgment of April 29, 2020

First Civil Law Court

Federal Judge Kiss, Presiding
Federal Judge Hohl,
Federal Judge Niquille,
Clerk: Mr. Stähle

1. Federation A._____,
2. B._____,
3. C._____,
all three represented by Xavier Favre-Bulle and Marc-Anthony de Boccard,
Appellants,

v.

Confederation D._____,
represented by Marc Cavaliero,
Respondent

Facts:

A.
A.a. The A._____ Federation (Appellant 1) is the national football federation of the Republic of M._____, whose registered office is at [address omitted]. It is a member of the D._____ Confederation (D._____; Respondent). D._____ is the umbrella organization of the national football federations on the African continent, with its headquarters in [name of country omitted] (Egypt). It is also the organizer of the African Cup of Nations U17 (CAN U17).

The CAN U17 is an African football tournament organized at continental level for players under the age of 17, the final phase of which is the qualifying tournament for the U17 World Cup (U17 WC) organised by the Fédération Internationale de Football Association (FIFA).

Translator's Note: Quote as 1. Federation A._____, 2. B._____, and 3. C._____, v. Confederation D._____, 4A_548/2019 and 4A_550/2019. The decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

A.b. The final phase of the CAN U17 took place in April 2019 in Tanzania, with eight teams competing in two groups of four. The first and second-placed teams from the two groups qualified for the semi-finals of the CAF U-17 Championship and, at the same time, for the FIFA U-17 World Cup.
The M._____ U17 national football team finished second in Group B and thus qualified for the 2019 FIFA U17 World Cup. The N._____ team finished third in the same group. B._____ and C._____ (runners-up 2 and 3) are two football players of M._____ nationality. As members of the M._____ U17 national football team, they participated in the said CAN U17 in Tanzania.

The group match between the M._____ and N._____ teams was played on April 18, 2019. On April 19, 2019, the E._____ Federation made a "claim" to D._____ regarding the participation of B._____ and C._____, arguing that they were not eligible to play in this U17 CAN because of their age. Subsequently, D._____ initiated an investigation to determine if the dates of birth on the passports of the two players had been falsified.

B.
B.a. By decision dated May 12, 2019, the Disciplinary Jury of D._____ decided:

1. THAT players B._____ and C._____ were not eligible to participate with M._____ in the CAN U17 Final Tournament played in Tanzania. As a result of their participation, the team is excluded from the competition and all results and completions during the competition must be cancelled.
2. THAT the A._____ Federation, as a result of its disqualification, is prevented from representing D._____ at the FIFA U17 World Cup to be held in 2019.
3. THAT in accordance with the regulations of the CAN U17, the A._____ Federation be banned from the next two (2) editions of the CAN U17 of D._____.
4. THAT players B._____ and C._____ be banned from all football related activities for a period of two (2) years.
5. THAT all medals [received] as "finalists" must be returned to D._____ within twenty-one (21) days, failing which a financial penalty of 20,000 USD (twenty thousand dollars [US]) will be imposed.
6. THAT the Organizing Committee restore N._____ and request the Executive Committee approve the participation of N._____ as the 4th representative of D._____ at the FIFA U17 World Cup to be played in 2019.
7. THAT the person responsible for entering the date of birth of the players concerned in the final tournament of the CAN U17 be sanctioned in accordance with article 135.2 and banned from all football related activities for a period of two (2) years.
8. THAT the Federation A._____ shall be sanctioned with a fine of 100,000 USD (one hundred thousand US dollars) for falsifying communicated information concerning the participation of players in the [CAN U17] tournament organized in Tanzania. Half of this fine, in particular 50,000 USD (fifty thousand US dollars), shall be suspended for a period of four (4) years provided that the A._____ Association is not guilty of a similar offence during this period.

After having examined the file relating to the disqualification of the M._____ U 17 national football team from the 2019 edition of the CAN U 17 in Tanzania, the Executive Committee of D._____, by decision of June 20, 2019, "confirmed" the above-mentioned decision of the Disciplinary Jury of

D._____, with the exception of point 6. Furthermore, the Executive Committee of D._____ decided the following:

> Consequently, we hereby inform you that the Executive Committee has approved the reinstatement of N._____, the team ranked 3rd in Group B after the M._____, which becomes the 4th team to represent D._____ at the FIFA U17 World Cup to be played in Brazil in 2019.

By decision of June 23, 2019, the D._____ Appeal Jury confirmed the decision of the Disciplinary Jury of May 12, 2019.

B.b. The A._____, B._____ and C._____ Federations challenged the decision of the Executive Committee of June 20, 2019 as well as the decision of the Appeals Jury of June 23, 2019, before the Court of Arbitration for Sport (CAS), with appeals against D._____.

A hearing was held on September 6, 2019, at the CAS headquarters.

By arbitral awards of October 4, 2019, the CAS dismissed both appeals on the grounds that they should have been directed not only against D._____, but also against the E._____ Federation.

C.
Federations A._____, B._____ and C._____ filed civil law appeals against the two CAS awards before the Federal Tribunal. They request a consolidation of the two cases and that the annulment of the arbitral awards.

In case 4A_548/2019 (concerning the decision of the Executive Committee), the Respondent concludes that the appeal is inadmissible. In case 4A_550/2019 (concerning the decision of the Appeals Jury), it concludes that the appeal is partially inadmissible. For the remainder and in the alternative, it concludes in both proceedings that the appeals are dismissed.

In its position papers, the CAS concludes that the appeals are dismissed. The Appellants replied, following which the Respondent communicated that it persisted "in full" in the conclusions of its answer briefs.

Reasons:

1.
If – as in the present case – the proceedings involve the same parties and the appeals are based on the same set of facts, the Federal Tribunal generally decides on the merits of both appeals in a single judgment. Consequently, it is appropriate to join proceedings 4A_548/2019 and 4A_550/2019.

2.

2.1. The Federal Tribunal only considers an appeal when the appellant is particularly affected by the contested decision and has a legitimate interest in its annulment or amendment (Art. 76(1)(b) LTF).

2.2. The Respondent denies that the Appellants have an interest worthy of protection, insofar as the appeals aim to annul the exclusion of Appellant 1 from the CAN U17 and the WC U17 of the year 2019, while it is established that these tournaments have already taken place.
For this reason, the appeal in procedure 4A_548/2019 (concerning the decision of the Executive Committee) should be inadmissible. Even if the decision of the Disciplinary Jury to sanction them was "confirmed" expressly by the decision of the Executive Committee, the latter is not competent, within the association, to examine the disciplinary sanctions imposed on the Appellants. The Executive Committee could only have validly decided on the admission of the E._____ Federation to the U17 WC in 2019. As this tournament has already been played, the challenge of the arbitral award confirming the decision of the Executive Committee, would thus be devoid of any interest.

2.3 It is true that, according to the jurisprudence of the Federal Tribunal, there is in principle no interest worthy of protection in the examination of an arbitral award in which a decision has been taken on the non-admission of an athlete or sports team to a competition which has already been played in the meantime (Judgment 4A_134/2012 of July 16, 2012, at 2.2; cf. also decision 4A_110/2012[2] of 9 October 2012, at 3.3.1). The situation is different if – and to the extent that – the disputed arbitral awards confirm financial and (other) disciplinary sanctions, the effects of which continue (*cf.* judgment 4A_470/2016 of April 3, 2017, at 2.2).

2.4. The parties disagree about the meaning of the decision of the Executive Committee of June 20, 2019, in particular as it "confirms" the decision of the Disciplinary Board. The Respondent itself admits that the Executive Committee may have expressed itself in an unfortunate manner *("[m]uch as the choice of certain terms used in the letters was not the most appropriate one [...]"*). On this point, the Arbitral Tribunal considered that the decision of the Executive Committee gave at least the impression that it was a disciplinary decision. Indeed, assuming that the Appellants are successful in the parallel proceedings to overturn the decision of the Appeals Jury confirming the initial decision of the Disciplinary Jury, they cannot be certain that the disciplinary sanctions contained in the decision of the Executive Committee will be lifted. In view of this uncertainty, the Arbitral Tribunal has recognized that the Appellants have an interest worthy of protection also in contesting the decision of the Executive Committee. Whether these considerations are also relevant to the proceedings before the Federal Tribunal may remain undecided, since the appeals – for the reasons that will be set out below – must in any case be dismissed, insofar as they are admissible.

3.

[2] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/grounds-challenge-arbitrator-must-be-raised-immediately-after-one-becomes-aware-them

The seat of the Arbitral Tribunal whose awards are challenged before the Federal Tribunal is in Lausanne. The parties did not have their domicile or seat in Switzerland at the relevant time. Since the parties have not, by an express declaration, excluded the application of Chapter 12 of the PILA (RS 291),[3] these provisions are therefore applicable (cf. Art. 176(1) and (2) PILA).

Appeals in civil matters are thus admissible under the conditions laid down in Articles 190-192 PILA (Article 77(1)(a) LTF).

4.
Appeals may only be lodged on one of the grounds exhaustively listed in Article 190(2) PILA. The Federal Tribunal shall examine only those grievances that have been raised and substantiated by the Appellants (art. 77(3) LTF), the requirements in this regard correspond to those laid down in Art. 106(2) LTF for complaints relating to the violation of fundamental rights and of cantonal and intercantonal law (ATF 134 III 186,[4] at 5, and the references cited).

5.
The Arbitral Tribunal considered that there was an issue of standing to be sued that had to be resolved on the basis of Swiss law, applicable on a subsidiary basis.

The Panel stated that it was clear from the CAS case law that in appeal proceedings before the CAS, seeking the annulment of a disciplinary decision of a sports federation, only the latter would have standing to be sued, and not the third party who was at the origin of the initiation of the disciplinary proceedings. However, the situation would be different when the decision called for not only rules on the rights of the appellant but also assigns rights to another (third) person. In such a case, the appeal should also imperatively be directed against this third party as co-respondent alongside the sports federation from which the decision emanates, so that the arbitral tribunal can ensure that its right to be heard is respected.

This would apply in particular when – as in the present case – a party requests the allocation of a place in a competition at the expense of a third party *(in casu*: at the expense of the E._____ Federation). Admittedly, some of the measures pronounced in the disputed decisions are of a purely disciplinary nature and would in this respect only concern the Appellants (such as financial penalties). However, as it would appear from the hearing, they ruled out the dissociation of the disciplinary aspects, concerning only the appellants, from the other aspects which also concern, directly or indirectly, the E._____ Federation (exclusion and admission to competitions). In this respect, they stated that their appeals were aimed at challenging the decisions in their "entirety", including, in particular, those aspects in respect of which the right to be heard should be granted to the E._____ Federation. The fact that the appeals were directed exclusively against the Respondent, and not also against the E._____ Federation, would thus preclude CAS from upholding the Appellants' findings. Accordingly, the appeals were dismissed.

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[3] Translator's Note: PILA is the English abbreviation of the Swiss Private International Law Act
[4] 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.
6.1. The Appellants claim a violation of their right to be heard within the meaning of Art. 190(2)(d) PILA.

6.1.1. First, in accordance with sections A.2 and A.3 of their appeal briefs, the Appellants complain that the Arbitral Tribunal limited itself to the question of standing to be sued, without dealing with their numerous grievances. In particular, they argued that the Disciplinary Jury and the Executive Committee had allegedly disregarded procedural rights, exceeded their powers and imposed sanctions without any regulatory basis. However, the Arbitral Tribunal had "in no way" examined these aspects, having "ignored" the Appellants' arguments, which were aimed at calling into question the decision of the Appeals Jury, confirming the decision of the Disciplinary Jury.

6.1.2. Then, in section A.4 of their briefs, the Appellants essentially refer to the recitals of the Arbitral Tribunal, in which the various measures – disciplinary sanctions on the one hand, allocation of a competition place to the E._____ Federation on the other – could not, in the opinion of the Appellants, be dissociated.

In their opinion, this conclusion was the result of a misunderstanding. On the basis of excerpts from the hearings, they consider that the exchanges "are singularly unclear". There was "some confusion" during the hearing as to the nature of the non-disciplinary measures in the decision, their scope and how to "remedy the situation". At these hearings, the Appellants merely stated their position, emphasizing the disciplinary nature of the decisions, and could not in any event expect the Arbitral Tribunal to dismiss the appeals in their entirety on the basis of the questions and answers at this hearing alone, especially since the question of standing was examined *ex officio*. Other approximations and oversights contained in the arbitral awards led to the conclusion that the recital in question, which would have proved decisive on the merits, had been hastily drafted without being aware of the inconsistencies therein.

6.1.3. Finally, in section A.5 of their pleadings, the Appellants criticize the arbitral tribunal for an additional "inadvertence". They argue that the Arbitral Tribunal overlooked the fact that the issue of standing to be sued would, in any event, only arise if the E._____ Federation was directly affected by the Appellants' findings. That was the case here. In the view of the Appellants, the Arbitral Tribunal could have set aside the contested decisions and remitted them to the lower court by ordering that the E._____ Federation take part in the proceedings. In this way, their procedural rights could have been safeguarded. The contrary approach of the Arbitral Tribunal would have had the effect of "sacrificing" the right to be heard of the Appellants in favor of the right to be heard of a third party, even though it would have been impossible to preserve the rights of both parties.

In so far as they contested the decision of the Jury of Appeal (procedure 4A_550/2019), the Appellants underline the fact that the Disciplinary Jury and, by extension, the Jury of Appeal, were not competent to award a place in the U17 WC to the E._____ Federation. Therefore, the latter could not be affected by a possible arbitral award, referring the case back to the Appeals Jury for a new decision, and should therefore not have taken part in the proceedings before the CAS.

6.2.

6.2.1. The ground for appeal under Article 190(2)(d) PILA sanctions only the mandatory procedural principles reserved by Article 182(3) PILA, in particular the right to be heard proper, the content of which is, with the exception of the right to a reasoned decision, no different from that enshrined in Article 29(2) of the Constitution. According to the case law, this provision confers on each party, among other rights, the right to express its views on the facts essential to the judgment, to present its legal arguments, to offer, provided he does so in due time and in the prescribed manner, evidence on relevant facts, to take part in the hearings and to have access to the documents in the file (ATF 142 III 360[5], at 4.1.1; 130 III 35, at 5, pp. 37 et seq.; 127 III 576, at 2c; all with the references cited).

According to settled case law, the right to be heard in adversarial proceedings, as enshrined in Art. 182(3) and 190(2)(d) PILA, does not require that reasons be given for an international arbitral award (ATF 142 III 360 at 4.1.2 p. 361 et seq.; 134 III 186, para. 6.1 and the references cited). The case law, however, infers from this a minimum duty of the arbitral tribunal to examine and deal with the relevant issues. This duty is breached when, by oversight or misunderstanding, the arbitral tribunal fails to take into consideration allegations, arguments, evidence and offers of evidence presented by one of the parties and relevant to the award to be made (ATF 142 III 360 at 4.1.1; 133 III 235 at 5.2 p. 248 and the references cited). It should be remembered that the right to be heard does not guarantee a materially accurate decision. In particular, it is excluded that the complaint of violation of the right to be heard may be used to obtain a material, appellate examination of the award (ATF 142 III 360 at 4.1.2 p. 362).

6.2.2. In disregard of these principles, the Appellants, by their complaints of violation of the right to be heard, raise inadmissible criticisms of the disputed awards. In this connection, the following observations should be made:

After having – rightly or wrongly – rejected the appeals because the Appellants had not also directed them against the E._____ Federation, it was not necessary for the Arbitral Tribunal to examine the additional grievances of the Appellants, by which they respectively attacked on the merits the decisions of the Appeals Jury and of the Executive Committee. Therefore, no violation of the right to be heard can be inferred from this way of proceeding, as the CAS rightly points out in its observations.

Even if the Appellants are of the opinion that the Arbitral Tribunal misinterpreted the statements made during the hearing and thus drew erroneous conclusions from them, a violation of the right to be heard has not been demonstrated (cf. in this respect judgment 4A_580/2017 of April 4, 2018 at 2.9 and 3.1). It is not for the Federal Tribunal to examine how the parties' pleadings are to be correctly understood and assessed (see also ATF 127 III 576 at 2b p. 578). The Appellants do not complain that the Arbitral Tribunal failed to take into account relevant legal arguments, but in fact aim at a review of the merits of the Awards and want to examine whether, in view of the factual circumstances of the case and in particular the statements made at the hearing (as taken into account by the arbitral tribunal), a complete dismissal of

[5] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/agreed-upon-rules-procedure-do-bind-parties

the appeals for lack of "passive legitimization" was justified. They disregard the fact that, in view of the applicable legal provisions, the material examination by the Federal Tribunal of an international arbitral award is limited to the question of its compatibility with public policy (Art. 190(2)(e); ATF 127 III 576 at 2b p. 578; 121 III 331 at 3a).

Finally, the same applies when the Appellants argue that the E._____ Federation was not directly affected by their requests, which the Panel “inadvertently” had not taken into account. The opposite is in fact true: the Panel expressly stated that the E._____ Federation was directly affected by point 6 and indirectly by points 1 and 2 of the decision of the Disciplinary Jury and the decision of the Executive Committee, by which the E._____ Federation was awarded a place at the U17 WC for the year 2019. Consequently, the Arbitral Tribunal came to the conclusion that it was imperative that the E._____ Federation have taken part in the procedure. Here too, the Appellants criticize, under the guise of a violation of the right to be heard, a misapplication of the law. Such criticism is inadmissible.

In the light of the foregoing, there is no reason to believe that the Appellants' right to be heard has been violated.

7.
The Appellants also claim that the Arbitral Tribunal violated procedural public policy within the meaning of Article 190(2)(e) PILA.

7.1 They argue that the arbitral tribunal “de facto” introduced a “necessary passive joinder” or proceedings, even though this was not based on any substantive or procedural rules.

In particular, they point out that neither the D._____ or FIFA rules nor the CAS Procedural Rules contain specific rules on the standing to be sued. In this respect, it should be taken into account that under Swiss law, the necessary passive joinder of proceedings within the meaning of Art. 70 CPC would be an exception. In principle, a plaintiff would have the choice, according to Art. 71 CPC, to bring an action against one or more consorts. It would be "aberrant" for the CAS to substitute itself for the Claimants in their choice by imposing on them an opposing party, for the sole reason that the Arbitral Tribunal considered it appropriate for the third party to take a position. Furthermore, it is important to note that the Appellants have not made any claim against the E._____ Federation. The various claims they have made would arise exclusively from their legal relationship with the Respondent. The Arbitral Tribunal allegedly confused two issues: on the one hand, that of preserving the right to be heard of a third party who is not a party to the proceedings but who would be affected by the forthcoming decision and, on the other hand, that of the duty of a claimant to jointly attract a plurality of consorts when the latter form a necessary joinder of proceedings.

With regard to the E._____ Federation's right to be heard, the Appellants point out that this right could also have been observed in the event of an expulsion decision. Moreover, they argue that both the Respondent (through an "appeal in issue") and the Panel had procedural means to bring the E._____ Federation into the CAS proceedings. The latter would also have had the opportunity to participate in the

proceedings by means of an "intervention". On the other hand, these different possibilities would not have been available to the Appellants: as they had not directed their claims against the E._____ Federation, it was not possible for them to bring the E._____ Federation into the proceedings. However, by dismissing the appeals in this way, the Arbitral Tribunal would have chosen precisely "the only solution that definitively penalized the Appellants."

The Arbitral Tribunal would thus have violated a fundamental procedural principle, namely the right to a fair hearing within the meaning of Art. 29 para. 1 Cst.

7.2. Public policy, within the meaning of Article 190(2)(e) of the PILA, contains two elements: substantive public policy and procedural public policy. Procedural public policy is breached when fundamental and generally recognized principles have been violated, leading to an unbearable contradiction with the sense of justice, such that the decision appears incompatible with the values recognized in a state governed by the rule of law (ATF 141 III 229[6] at 3.2.1 and the references cited).

7.3. In the light of the Appellants' explanations concerning joinder of proceedings, legal standing, and their procedural significance, they do not seem to discern that an erroneous or even arbitrary application of the applicable procedural provisions does not in itself constitute a breach of public policy (cf. ATF 129 III 445, at 4.2.1; 126 III 249, at 3b). Likewise, by claiming that the Arbitral Tribunal's arguments were contradictory in themselves, the Appellants do not establish any incompatibility of the disputed awards with public policy. The ground for appeal provided for in Art. 190(2)(e) PILA is not intended to sanction internal contradictions contained in the grounds of an arbitral award (cf. judgment 4A_362/2013[7] of March 27, 2014 at 3.2.2 and the cited references). In any event, the Appellants do not point to any violation of fundamental procedural principles when they refer to the provisions of Swiss procedural law, draw attention to alleged inconsistencies in the contested awards and refer to the procedural means offered by the applicable arbitration rules, which would have allowed the other parties to the proceedings to bring a third party to the CAS proceedings, concluding that it would be "unbearable" to "sanction" them for an omission (for not having directed their appeals also against the E._____ Federation), even though they could not be held responsible for it. Contrary to what the Appellants seem to believe, it is not for the Federal Tribunal to define rules concerning the standing to be sued or the possibility of bringing a third party before the CAS and to examine the conformity of the arbitration procedure in the light of these rules (cf. ATF 126 III 249 at 3b). This finding is in no way altered by the Appellants, when they repeatedly complain before the Federal Tribunal that the Respondent acted in bad faith by claiming that the E._____ Federation did not participate in the proceedings, even though it did not itself call it into question.

The grievance that the disputed awards are incompatible with public policy is thus unfounded.

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[6] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/res-judicata-revisited

[7] Translator's Note: The English translation of this decision is available here:]https://www.swissarbitrationdecisions.com/reasonable-standards-evidence-cannot-be-contrary-public-policy

8.
The appeals shall be dismissed, to the extent they are admissible. In the light of the outcome of the dispute, the unsuccessful Appellants must pay the legal costs of the federal proceedings and compensate their opposing party (cf. Art. 66(1) and Art. 68(1) and (2) LTF).

On these grounds, the Federal Tribunal rules as follows:

1.
The proceedings 4A_548/2019 and 4A_550/2019 are consolidated.

2.
The appeals shall be dismissed in so far as they are admissible.

3.
The legal costs, set at CHF 16'000, shall be borne by the Appellants, jointly and severally.

4.
The Appellants shall be ordered jointly and severally to pay the Respondent compensation of CHF 18’000 for its legal costs.

5.
This judgment shall be communicated to the parties and to the Court of Arbitration for Sport (CAS).

Lausanne, 29 April 2020

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

President:	The Clerk:
Kiss	Stähle