

4A_626/2020¹

Judgment of March 15, 2021

First Civil Law Court

Federal Judge Kiss, Presiding
Federal Judge Niquille,
Federal Judge May Canellas,
Clerk of the Court: Mr. O. Carruzzo

1. A. _____,
2. B. _____,
both represented by Antonio Rigozzi and Riccardo Coppa,
Appellant

v.

C. _____,
represented by Vitus Derungs,
Respondent

Facts:

A.
On June 18, 2020, the Dispute Resolution Chamber of the Fédération Internationale de Football Association (FIFA) rendered a decision in a contractual dispute between Claimant C. _____, a football club, Player A. _____ (hereinafter: the Player), and Club B. _____. The DRC ordered the defendants, jointly and severally, to pay the plaintiff the sum of USD 1'129'499, plus interest.

C. _____ filed a statement of appeal with the Court of Arbitration for Sport (CAS) against the FIFA decision (CAS 2020/A/7283). The other two parties to the proceedings as well as D. _____, the club for which the Player currently plays, have also filed an appeal with CAS.

The CAS joined the four arbitration proceedings. However, the appeal submitted to the Swiss Federal Supreme Court concerns only CAS 2020/A/7283.

¹ Translator's Note:

Quote as A. _____ and B. _____ v. C. _____, 4A_626/2020.

The decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

On August 14, 2020, CAS notified the parties that the deadline for filing their respective appeal briefs was extended to August 24, 2020.

On August 21, 2020, both Appellants requested a twenty-day extension of time to file their appeal briefs with CAS.

On the same day, CAS indicated that the deadline for the Player, D._____ and B._____ to file their appeal briefs was provisionally suspended.

On August 25, 2020, CAS clarified that the deadline for C._____ to submit its appeal brief was also suspended until further notice.

On August 31, 2020, CAS wrote to the parties, *inter alia*, as follows:

In view of the Parties' agreement, the Appellants' requests of extension of 20 days of their deadline to file the Appeal Brief are granted. In view of the above, the suspension of the Appellant's deadline is hereby lifted with immediate effect.

On September 14, 2020, the Player, D._____ and B._____ submitted their appeal briefs to CAS.

On September 18, 2020, C._____ requested a further extension of time of five days to file its appeal brief.

On the same day, CAS invited the parties to comment on the said request, but stated that the deadline for filing the appeal brief was suspended until further notice.

The Player, D._____ and B._____ objected to said motion as, according to them, the deadline for filing the appeal brief had expired on September 14, 2020.

On September 23, 2020, CAS indicated to the parties, *inter alia*, the following:

With respect to the admissibility and timeliness of the request of extension filed by C._____, the Parties are advised as follows:

- On 21 August 2020, C._____ requested an extension of its deadline to file the Appeal Brief which was to expire on 24 August 2020;
- Such request was filed before the expiration of the deadline to file the Appeal Brief;
- On 25 August 2020, the CAS Court Office acknowledged receipt of such request of extension and suspended the deadline;
- On 31 August 2020, the CAS Court Office granted a 20-day extension of the Appellants' deadline to file the Appeal Brief.
- The deadline of C._____ was suspended between the 25 and 31 August 2020.
- Accordingly, the deadline of C._____ to file its Appeal Brief did not expire on 14 September 2020, but on 21 September 2020.
- On 18 September 2020, C._____ requested an extension of five days of its deadline to file the Appeal Brief.
- In view of the above, the request of extension of C._____ is admissible.

In view of the fact that Mr A._____, B._____ and D._____ disagree with the requested extension, it is for the President of the CAS Appeals Arbitration Division, or her Deputy, to decide the issue in accordance with Article R32 of the Code.

The Parties are hereby informed that the Deputy of the President of the CAS Appeals Arbitration Division has decided to grant the requested extension in accordance with Article R32 of the Code. Accordingly, the suspension of the deadline of C._____ to file its Appeal Brief is lifted with immediate effect.

C._____ filed its appeal brief on September 28, 2020.

Once the Panel was constituted, the Player and B._____ requested that the Panel decide whether C._____ had filed his appeal brief in a timely manner.

On October 30, 2020, CAS informed the parties that the Panel had decided the following with respect to the admissibility of C._____ 's appeal brief:

The Panel notes that this issue has been submitted to the Deputy President of the CAS Appeals Division, who decided to grant the Appellant's extension request making the Appeal Brief eventually filed, admissible.

The Panel considers that the Deputy President of the CAS Appeals Division's decision is final and that the Panel cannot subsequently review and reconsider the decision taken.

Accordingly, the Appeal Brief submitted by C._____ is admissible.

C.

On November 30, 2020, the Player and B._____ (hereinafter: the Appellants) filed an appeal in civil law in which they request, in substance, that the Federal Tribunal annul the decision rendered on October 30, 2020, declare the Appeal Brief submitted by C._____ inadmissible and close the CAS 2020/A/7283 proceedings in accordance with Art. R51 of the Code of Sports-Related Arbitration. As a preliminary matter, they request the Federal Tribunal suspend the examination of the present appeal until the Panel makes its final award in the case CAS 2020/A/7283.

C._____ (hereinafter: the Respondent) and the CAS were not invited to file a response.

Reasons:

1.

The Appellants request, as a preliminary matter, that the present proceedings be suspended until the final award has been made. They indicate that they intend to ask the Panel to reconsider its decision with regard to the admissibility of the Respondent's appeal brief. The present appeal is therefore filed, in their words, "as a procedural precaution", in the event that the Panel were to confirm that the decision of October 30, 2020, was final.

In this case, the Panel considered that the decision of the Deputy President of the CAS Appeals Division regarding the extension of time requested by the Respondent and the admissibility of the appeal brief filed by the Respondent was final and could not be reconsidered. Based on this assessment, it confirmed that the appeal brief was admissible. In view of the foregoing, the Panel cannot be expected to reconsider the issue of the admissibility of the appeal brief in the final award. Therefore, it cannot have any influence on the decision to be made regarding the admissibility of the present appeal to the Federal Tribunal.

Therefore, the request for a stay is rejected.

2.

2.1. In the field of international arbitration, appeals in civil matters are admissible against decisions of arbitral tribunals under the conditions of Art. 190-192 PILA² (Art. 77(1)(a) LTF³).

2.2. The seat of the CAS is in Lausanne. None of the parties had their domicile or seat in Switzerland at the relevant time. Therefore, the provisions of Chapter 12 PILA are applicable (Art. 176(1) PILA).

3.

The Swiss Federal Supreme Court examines *ex officio* the admissibility of appeals submitted to it (ATF 138 III 542, para. 1.1).

3.1. The appeal in civil law referred to in Art. 77(1)(a) LTF in conjunction with Art. 190-192 PILA is only admissible against an award. The challengeable act can be a final award, which puts an end to the arbitration proceedings for a substantive or procedural reason, a partial award, which deals with a quantitatively limited part of a disputed claim, or with one of the various claims at issue, or which puts an end to the proceedings with regard to part of the parties (ATF 143 III 462⁴, para. 2.1; judgment 4A_222/2015⁵ of January 28, 2016, para. 3.1.1), or even a preliminary or interim award, which settles one or more preliminary questions of substance or procedure (on these concepts, see ATF 130 III 755, para. 1.2.1, p. 757). On the other hand, a simple procedural order that can be modified or revoked in the course of the proceedings is not subject to appeal (ATF 143 III 462, para. 2.1; 136 III 200⁶, para. 2.3.1, p. 203; 136 III 597⁷, para. 4.2; judgment 4A_596/2012⁸ of April 15, 2013, para. 3.3).

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- ² Translator's Note: PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987.
- ³ Translator's Note: LTF is the most commonly used French abbreviation for the Federal Law of June 6, 2005, organizing the Federal Tribunal (RS 173.110).
- ⁴ Translator's Note: The English translation of this decision is available here: <https://www.swissarbitrationdecisions.com/atf-4a-98-2017>
- ⁵ Translator's Note: The English translation of this decision is available here: <https://www.swissarbitrationdecisions.com/provisional-determination-jurisdiction-not-capable-appeal>
- ⁶ Translator's Note: The English translation of this decision is available here: <https://www.swissarbitrationdecisions.com/decision-on-provisional-measures-characterized-as-interlocutory->
- ⁷ Translator's Note: The English translation of this decision is available here: <https://www.swissarbitrationdecisions.com/procedural-order-of-the-arbitral-tribunal-directing-payment-of-t>
- ⁸ Translator's Note: The English translation of this decision is available here: <https://www.swissarbitrationdecisions.com/order-produce-document-not-appealable-award>

In order to determine the admissibility of the appeal, what is decisive is not the name of the decision, but the content of the decision (BGE 143 III 462, para. 2.1; 142 III 284, para. 1.1.1; judgment 4A_222/2015, cited above, para. 3.1.1).

It follows from Art. 190(2) and (3) PILA that a final or partial award can be challenged on all the grounds listed in Art. 190(2) PILA. According to Art. 190(3) PILA, however, an interim award may only be challenged before the Federal Tribunal on the grounds of irregular composition (Art. 190(2)(a) PILA) or lack of jurisdiction (Art. 190(2)(b) PILA) of the arbitral tribunal.

3.2. In a recent decision, the Federal Court, referring in particular to two doctrinal contributions (Stefanie Pfisterer, *Die Befristung der Schiedsvereinbarung und die Zuständigkeit eines Schiedsgerichts ratione temporis - eine Illusion?*, in *Mélanges en l'honneur de Anton K. Schnyder*, 2018, p. 275 ff; Antonio Rigozzi, *Le délai d'appel devant le Tribunal arbitral du sport: quelques considérations à la lumière de la pratique récente*, in *Le temps et le droit*, 2008, p. 255 ff), considered that the observance of the time limit for appealing to the CAS is a condition for the admissibility of the appeal, which does not relate to the jurisdiction of the arbitral tribunal (Judgment 4A_413/2019⁹ of October 28, 2019, at 3.3.2). Failure to comply with the time limit within which an appeal must be filed with the CAS does not in fact mean the arbitral tribunal lacks jurisdiction, it only impacts the (in)admissibility of the appeal. Consequently, the complaint based on the failure to comply with the time limit for filing an appeal to the CAS does not fall within the scope of Art. 190(2)(b) PILA. The Appellant cannot therefore immediately challenge the interim award by which the CAS found that the appeal was filed in due time, insofar as it does not challenge either the composition of the arbitral tribunal or its jurisdiction (Art. 190(3) PILA).

The Federal Court has confirmed its case law on several occasions since then (see judgments 4A_198/2020 of December 1, 2020, at 3.2; 4A_290/2020 of August 26, 2020; 4A_287/2019¹⁰ of January 6, 2020, at 4.2).

3.3. In their submissions, the Appellants challenge the solution adopted in Judgment 4A_413/2019 and consider that compliance with the time limit for appeal to the CAS is a question of jurisdiction in the broad sense of Art. 190(2)(b) PILA. According to them, the fact that the non-compliance with the time limits does not lead to the lack of jurisdiction does not prevent the Federal Tribunal from reviewing this decision from the point of view of Art. 190(2)(b) PILA. The Appellants further argue that the contribution by Stefanie Pfisterer, cited in Judgment 4A_413/2019, only examines the question of the jurisdiction *ratione temporis* of the arbitral tribunal in commercial arbitration and not in the field of sport. As for the other academic opinion cited, which is none other than that of their own counsel, the Appellants point out that the latter also argued, in a subsequent contribution, that the Federal Tribunal could examine the question of the time limit for appealing to the CAS from the point of view of Art. 190(2)(b) PILA (Rigozzi/Hasler, in *Arbitration in Switzerland, The Practitioner's Guide*, vol. II, 2nd ed. 2018, no 26 ad Art. R49 of the Code

⁹ Translator's Note: The English translation of this decision is available here:
<https://www.swissarbitrationdecisions.com/atf-4a-413-2019>

¹⁰ Translator's Note: The English translation of this decision is available here:
<https://www.swissarbitrationdecisions.com/atf-4a-287-2019>

and footnote 65). Finally, they note that recent doctrine has been critical of the solution adopted in 4A_413/2019.

3.4. The elements put forward by the Appellants, as they stand, do not justify calling into question the solution recently adopted by the Federal Tribunal. Although the Judgment 4A_413/2019 has given rise to some criticism in the doctrine (cf. in particular Sébastien Besson, note on the above-mentioned judgment, in *Revue de l'Arbitrage* 2020/3 p. 916), it should be noted that several authors have welcomed this new case law (cf. Marco Stacher, *Jurisdiction and Admissibility under Swiss Arbitration Law - the Relevance of the Distinction and a New Hope*, in *Bulletin ASA* 2020/1 p. 67 f. and 73; Stacher/Püschel-Arnold, *BGer 4A_413/2019: Schiedsgerichtsbarkeit: Fristgerechte Klage und Postulationsfähigkeit - (beschwerdefähige) Zuständigkeitsfragen?*, in *PJA* 2020/2 p. 250 f.; Mladen Stojiljkovic, *Swiss Federal Court Addresses Jurisdiction and Admissibility in CAS Arbitration*, in *dRSK*, December 17, 2019).

For the rest, the decision in ATF 142 III 296¹¹ cited by the Appellants, in which the Federal Tribunal examined the complaint of non-compliance with a contractual mechanism constituting a mandatory prerequisite for the implementation of a commercial arbitration from the point of view of Art. 190(2)(b) PILA, is of no help to them, as it concerns a different situation. The Appellants can therefore draw nothing from it in the present case. It should be noted, in passing, that some authors invite the Federal Tribunal to extend the scope of Judgment 4A_413/2019 to other situations in which the Federal Tribunal has, in the past, ruled on various appeals by broadly interpreting Art. 190(2)(b) PILA, in particular in the case that was the subject of ATF 142 III 296 (Stacher, *op. cit.*, p. 64 and 73; Stojiljkovic, *op. cit.*, n. 16 f.; Stacher/Püschel-Arnold, *op. cit.*) However, there is no need to examine here whether the solution adopted in Judgment 4A_413/2019 should be transposed to other cases.

In view of the foregoing, it is appropriate to adhere to the recent case law of the Federal Tribunal, according to which the plea of failure to comply with the time limit for appeal to the CAS does not fall within the scope of Art. 190(2)(b) PILA. Therefore, the present appeal must be declared inadmissible.

4.

The Appellants, who are unsuccessful in their appeal, shall jointly and severally pay the costs of the federal proceedings (Art. 66(1) and (5) LTF). The Respondent is not entitled to costs since it was not invited to file a reply.

For these reasons, the Federal Tribunal pronounces:

1.

The request for suspension is rejected.

2.

The appeal is inadmissible.

¹¹ Translator's Note:

The English translation of this decision is available here:

<https://www.swissarbitrationdecisions.com/mandatory-pre-arbitration-procedure-not-complied-results-annulment-award>

3.

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

4.

The present judgment is communicated to the parties' representatives, to the Court of Arbitration for Sport (CAS), and to the Fédération Internationale de Football Association (FIFA) in Zurich.

Lausanne, March 15, 2021

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

President:

Kiss

Clerk:

O. Carruzzo