Judgment of the Swiss Federal Tribunal 4A_324/2014
16 October 2014
Fenerbahçe Spor Kulübü (appellant) v. Union des Associations Européennes de Football (UEFA) (respondent)*

Appeal against the arbitral decision by the Court of Arbitration for Sport (CAS) of 11 April 2014

Extract of the facts

Fenerbahçe Spor Kulübü (the Appellant) is a professional football club based in Istanbul, Turkey. It is a member of the Turkish Football Federation (TFF). The Union des Associations Européennes de Football (UEFA, Respondent), based in Nyon, is the European Football Federation to which the Turkish Football Federation belongs. It organizes the UEFA Champions League, among others.

On February 21 and 26, March 6, 7, and 20 and on April 9, 2011, various football games took place in the framework of the Turkish *"Süper Lig,"* during which various people around Fenerbahçe Spor Kulübü were paid bribes to lose the game. On April 14, 2011, a new Turkish law (n. 6222) came into force, which made it a criminal offence to manipulate the outcome of games. On May 5, 2011, Fenerbahçe Spor Kulübü submitted to UEFA the document *"UEFA Club Competitions 2011/2012 Admissions Criteria Form,"* in which the club affirmed that it had not been involved, directly or indirectly, in any manipulation of games since April 27, 2007.

On July 3, 2011, the Turkish police arrested 61 people in the context of a broad criminal investigation concerning match-fixing in Turkish football. On April 26, 2012, the TFF Ethics Committee released the report of an investigation into the charges that various football games had been manipulated, among others, those in which Fenerbahçe Spor Kulübü participated. In a decision of May 6, 2012, the TFF Disciplinary Committee banned a member of the management board of Fenerbahçe Spor Kulübü from any activities related to football for three years and the vice president and the coach for one year. On June 4, 2012, UEFA received the report of the TFF Ethics Committee of April 26, 2012. In a letter of June 7, 2012, the Secretary General of UEFA asked the chairman of the Control and Disciplinary Body to initiate disciplinary proceedings against Fenerbahçe Spor Kulübü.

In a decision of June 22, 2013, the Control and Disciplinary Body of UEFA excluded Fenerbahçe Spor Kulübü from the next three UEFA competitions for which the club could qualify, with the third year of the ban suspended for probation. In a decision of June 10, 2013, the UEFA Appeals Body overturned the decision of the Control and Disciplinary Body of June 20, 2013, in part pursuant to an appeal by Fenerbahçe Spor Kulübü and limited the ban to just the next two UEFA competitions.

In a submission of July 16, 2013, Fenerbahçe Spor Kulübü appealed the decision of the UEFA Appeals Body of June 10, 2013, to the CAS and applied for a stay of enforcement. UEFA did not oppose a stay of enforcement. On July 18, 2013, Fenerbahçe Spor Kulübü advised the CAS that the parties had reached

* The original decision is in German.

an agreement about the timing of the proceedings, among others. Also on July 18, 2013, the CAS confirmed the stay of enforcement, in view of the agreement of the parties.

In an arbitral award of August 28, 2013, the CAS rejected the appeal and upheld the decision of the UEFA Appeals Body of July 10, 2013. Fenerbahçe Spor Kulübü filed a civil law appeal for annulment of the CAS arbitral award to the Federal Tribunal.

Extract of the legal considerations

1. The Appellant submits that the CAS violated the principle of equal treatment of the parties (Art. 190(2)(d) PILA) because CAS essentially emphasized speed in adjudicating the appeal and decided only six weeks after the appeal was introduced, instead of sending the matter back to UEFA. In doing so, the CAS perpetuated the unequal treatment of the parties, finding its origin in the procedure in the UEFA bodies.

Insofar as the Appellant raises a procedural violation before the Federal Tribunal because it claims not have been given sufficient opportunity to interrogate the parties and the witnesses during the two-day hearing, its argument will not be heard. One does not see that it raised this alleged violation during the arbitral proceedings; to the contrary, the factual findings in the award under appeal show that on its own initiative the Appellant reduced the number of witnesses it planned to call from 53 to 35 two days before the hearing and to 32 a day before, while also waiving 13 additional witnesses during the hearing. The grievance has thus been forfeited.

In its further argument, the Appellant also does not show that it raised an alleged unequal treatment of the parties by the Arbitral Tribunal during the arbitral proceedings. Contrary to its submissions before the Federal Tribunal, it did not strive to remedy the alleged violation during the arbitral proceedings, in the appeal brief or at the hearing. Instead, in the reasons in support of the appeal, it relied merely on various irregularities in the proceedings of the UEFA bodies and asked the CAS to send the case back to the UEFA Appeals Body for a new assessment should the CAS not follow its main submission that the sanctions should be annulled. Shortly before the conclusion of the hearing, the Appellant stated it had not freely consented to the accelerated procedure, so that the case should be sent back to the bodies of UEFA. The Appellant does not show that it applied to the CAS for more time for additional submissions or evidence or for the repetition or supplementation of certain procedural steps, let alone that he had already complained of unequal treatment in the arbitral proceedings.

Therefore, the Appellant did not undertake all appropriate effort to seek correction of the alleged violations in the arbitral proceedings. Thus, it forfeited the right to argue an alleged unequal treatment within the meaning of Art. 190(2)(d) PILA in the recourse proceedings in the Federal Tribunal. The corresponding argument is not capable of appeal as well.

2. The Appellant argues that the Arbitral Tribunal violated its right to be heard by applying the law in an unforeseeable manner (Art. 90(2)(d) PILA).

According to the case law of the Federal Tribunal, there is no constitutional right for the parties to be heard specifically as to the legal assessment of the facts they introduce. Neither does the right to be heard mean that the parties would have to be heard in advance as to the factual findings important to the case. There is, however, an exception when a court intends to base its decision on a legal consideration that

was not relied upon by the parties and the relevance of which they could not have reasonably anticipated.

Contrary to what the Appellant seems to assume, the CAS did not disregard the sentencing criteria of Art. 17 UEFA Disciplinary Regulations (2008 edition) in favour of the WADA Code but rather relied on the former provision instead. Moreover, the Arbitral Tribunal specifically explained why it did not reduce the sanction, although it differed from the federation bodies and found *"only"* four cases of match-fixing established. In particular, the CAS held on the basis of Art. 17 of the UEFA Disciplinary Regulations that a two-year ban was clearly justified in the case at hand.

The Arbitral Tribunal considered that a sanction at the higher end of the range was appropriate in view of its own case law, according to which bans of between one and eight years have been imposed for match-fixing and also in view of the gravity of the case in comparison with match-fixing previously adjudicated. Yet it remained with a two-year ban in view of the principle of *ultra petita* – the Respondent had waived an appeal. Contrary to the view adopted in the appeal brief, the CAS reference to the fact that comparable sanctions are imposed in doping cases, which would basically justify a two-year ban, which could be higher in particularly serious cases and reduced in the presence of mitigating circumstances, was not at all *"the paramount consideration for setting the sanction"*. Under the circumstances, the CAS was not obliged to give the Appellant the opportunity to state its views as to the sentencing rules of the WADA Code. There has not been an application of the law by surprise, which would violate the right to be heard.

3. The Appellant argues that the CAS violated public policy. It argues that the award under appeal violates the principle *ne bis in idem* (prohibition of double jeopardy) which belongs to public policy according to Art. 190(2)(e) PILA, as two sanctions were issued for the same act.

The principle of *ne bis in idem* belongs, in principle, to public policy within the meaning of Art. 190(2)(e) PILA. However, the Federal Tribunal left open the extent to which this principle of criminal law would also have to be taken into account in disciplinary sport law. The issue needs not be examined in depth in the case at hand, as the CAS itself assumed its applicability and examined the compatibility of the sanction with this principle in detail. The Federal Tribunal limits itself therefore to the review of the specific application of the aforesaid principle by the Arbitral Tribunal.

In the arbitral proceedings, the Appellant saw a violation of the principle *ne bis in idem* because it had already been excluded from the Champion League's 2011/2012 season, pursuant to the decision of the Turkish Football Federation of August 24, 2011; therefore, it could not be banned a second time from the competition by UEFA. The Arbitral Tribunal held that Article 50(3) of the UEFA Statutes in connection with Article 2.05 and 2.06 UCLR anticipates a two-stage procedure: in the first stage, an administrative measure would be issued on the basis of Article 2.05 UCLR, namely a one-year ban from European competitions. In a second stage, a disciplinary measure would be issued which has no maximum duration and could be issued *"in addition to the administrative measure"*. The two types of bans would have to be clearly separated pursuant to the purpose of the aforesaid provisions, insofar as a ban from the competition could be issued immediately at first, before UEFA would review the alleged transgressions in detail. UEFA would have an interest worthy of protection to exclude a club from the competition immediately without

first initiating comprehensive disciplinary proceedings against it. According to the CAS, the administrative measure is therefore not the final but merely a provisional minimal sanction, which seeks to protect the integrity of the specific competition.

The application of the principle *ne bis in idem* requires in particular that, in the first proceedings, the court should have had the opportunity to assess the facts in all respects. There is no apparent reason why this should apply when, in the first proceedings, the Turkish Football Federation merely issued an administrative measure to protect the integrity of the competition for a limited time in provisional proceedings and not in the context of a comprehensive disciplinary procedure to assess the alleged violations in a definitive way. As the Federal Tribunal held in a previous case concerning the jurisdiction of sports arbitration, the application of the prohibition of double jeopardy requires in particular that the legal values protected should be identical; moreover, the Court pointed out that the prohibition does not exclude that the same proceedings could carry civil, administrative or disciplinary consequences besides the criminal ones. There is no violation of the principle *ne bis in idem* by the CAS. The argument that public policy was violated is therefore unfounded.

The Federal Tribunal rejects the appeal as unfounded.