4A_522/2012[1]

Judgment of March 21, 2013

First Civil Law Court

Federal Judge Klett (Mrs.), Presiding
Federal Judge Corboz,
Federal Judge Niquille (Mrs.),
Clerk of the Court: Leemann.

1. A._____
Represented by Dr Michael Noth,
Appellant,

v.

Union des Associations Européennes de Football (UEFA)
Represented by Mr. Antonio Rigozzi,
Respondent,

Facts:

A.
A.a
A._____ (the Appellant) domiciled in I._____, Ukraine is a professional goal keeper of the football team of FCX._____.

The Union des Associations Européennes de football (UEFA), (Respondent) is an association under Swiss law seated in Nyon.

A.b
Doping control officers of the UEFA performed an unannounced out of competition doping control on A._____ on November 30, 2011. The urine sample was analyzed in a laboratory in Austria on December 19, 2011 and the presence of the agent Furosemide was established. Furosemide is an agent prohibited during as well as outside competitions according to § S5 of the List of Prohibited Substances of the World Anti-Doping Agency (WADA) in connection with article 4 of the Anti-Doping Regulations of UEFA (2011 edition).
On January 10, 2012 A._____, the Ukrainian Football Federation and FCX._____ were informed of the conclusions of the laboratory by the UEFA. The player was simultaneously advised of his right to request an analysis of the B-sample and he was given a time limit to explain the positive result of the

[1] Translator's note: Quote A._____ *v* UEFA, 4A_522/2012. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch

test. Also on January 10, 2012 the chairman of the Control and Disciplinary Body of the UEFA decided to suspend A._____ provisionally.
On January 11, 2012 A._____ advised the UEFA that he renounced an analysis of the B-sample and submitted his explanation for the positive test result. Upon the request of the UEFA A._____ filed an explanation with attached evidence.
In a decision of January 27, 2012 the Control and Disciplinary Body of UEFA imposed a two years period of ineligibility against A._____ on the basis of article 18.01 of the Anti-Doping Regulations. Upon request of the chairman of the UEFA Control and Disciplinary Body the ban was extended worldwide by the Federation Internationale de Football Association (FIFA) on February 8, 2012.

A.c
A._____ appealed the decision of the Control and Disciplinary Body of January 27, 2012 to the Appeals Body of the UEFA.
After a hearing the Appeals Body rejected the appeal in a decision of March 16, 2012 and confirmed the sanction pronounced.

B.
On March 28, 2012 A._____ filed an appeal with the Court of Arbitration for Sport (CAS) against the decision of the UEFA Appeals Body of March 16, 2012.
On May 11, 2012 a hearing took place in Lausanne, during which the player and his wife, as well as two directors of anti-doping laboratories were heard.
In a decision of May 18, 2012 (issued on July 11, 2012) the CAS rejected the appeal. The Arbitral tribunal considered that it was undisputed that the player's urine test showed the presence of Furosemide and that this agent was a prohibited substance during and outside competitions. As A._____ had renounced an analysis of the B-sample, a violation of anti-doping rules was established according to article 2.01 (a), which according to article 18.01 of the UEFA Anti-Doping Rules basically carries a two years suspension for a first offence. Furthermore it was undisputed that the player could not claim an exceptional authorization to use the prohibited substance for therapeutical purposes. An annulment or a reduction of the period of ineligibility was only possible according to article 19 of the Anti-Doping Rules when the player could show how the substance found its way in his body. The CAS held that A._____ had not succeeded in making an excusable reason appear very likely for the presence of the prohibited substance in his body; an annulment or a reduction of the two years ban could therefore not be considered. Accordingly the CAS confirmed the period of ineligibility.

C.
In a Civil law appeal A_____ asks the Federal Tribunal to annul the arbitral award of the CAS of May 18, 2012.
The Respondent submits that the appeal should be rejected to the extent that the matter is capable of appeal.
The Arbitral tribunal did not submit a brief.
The Appellant submitted a reply to the Federal Tribunal on November 27, 2012 and the Respondents submitted a rejoinder on December 14, 2012.

Reasons:

1.
This decision on the merits renders moot the Appellant's application for a stay of enforcement.

1.2
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 the decision is in another language, the Federal Tribunal resorts to the official language chosen by the parties. The decision under appeal is in English. As this is not an official language and the Parties used different languages in the Federal Tribunal, the judgment of the Federal Tribunal will be issued in the language of the appeal in accordance with practice.

2.
In the field of international arbitration a Civil law appeal is allowed under 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. The Appellant is domiciled outside Switzerland at the relevant time. As the Parties did not rule out in writing the provisions of chapter 12 PILA they are applicable (Art. 176 (1) and (2) PILA).

2.2
Only the grievances imitatively listed in Art. 190 (2) PILA are allowed (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 the arguments brought forward and reasoned in the appeal brief; this corresponds to the duty to submit reasons pursuant to Art. 106 (2) BGG as to the violation of constitutional rights or of cantonal or intercantonal law (BGE 134 III[6] 186 at 5 p 187 with references). Criticism of an appellate nature is not allowed (BGE 134 III 565 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 supplement 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. 197 BGG and of Art. 105 (2) BGG). However the Federal Tribunal may review the factual findings of the arbitral award under appeal when some admissible grievances within the meaning of Art. 190 (2) PILA are raised against such factual findings or when new evidence is exceptionally taken into account (BGE 138 III 29[7] at 2.2.1 p. 34; 134 III 565 at 3.1

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[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.

[5] Translator's note: Full English translation at http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties

[6] Translator's note: Full English translation at http://www.swissarbitrationdecisions.com/extension-of-arbitration-clause-to-non-signatories-case-of-a-gua

[7] Translator's note: Full English translation at http://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s

p. 567; 133 III 139 at 5 p. 141; each with references). Whoever wishes to claim an exception to the rule that the Federal Tribunal is bound by the factual findings of the Arbitral tribunal and seeks to rectify or supplement the factual findings on this basis must show with reference to the record that the corresponding factual allegations were already made in the arbitral proceedings in accordance with procedural rules (see 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 the right to be heard (Art. 190 (2) (d) PILA

3.1
Art. 190 (2) (d) PILA allows an appeal only on the basis of the mandatory procedural rules according to Art. 182 (3) PILA. According to this the Arbitral tribunal must in particular guarantee the right of the parties to be heard. With the exception of the right to obtain reasons, this corresponds to the constitutional right guaranteed by Art.29 (2) BV[8](BGE 130 III 35 at 5 p. 37 ff.; 128 III 234 at 4b p. 243; 127 III 576 at 2c p. 578 ff.). Case law derives from this in particular the right of the parties to express their views as to all facts important to the judgment, to present their legal arguments, to prove their factual allegations important for the decision with suitable means proposed in a timely manner and in the prescribed format, to participate in the hearing and to access the record (BGE 130 III 35 at 5 p. 38; 127 III 576 at 2c p. 578 ff.; with references).

3.2
3.2.1
The Appellant argues firstly that the Arbitral tribunal wrongly held that he used several different versions during the proceedings to explain how the prohibited substance found its way in his body. A careful and critical examination of the arguments of the Parties would have led directly to the opposite result and shown that he had explained invariably in the same manner during the entire proceedings how Furosemide found its way in his body, indeed because he drunk a glass of water presented to him by his wife in which the prohibited substance would have been dissolved unbeknownst to him.

3.2.2
The Appellant does not demonstrate in his argument that it would have been impossible for him to bring forward this point of view and to prove it in the arbitral proceedings; instead he submits some inadmissible criticism of the award under appeal, as he wants to see various statements he made in the proceedings assessed differently. His arguments as to the proceedings in the two UEFA-Bodies are purely appellatory and therefore irrelevant. In addition the Appellant argues that the Arbitral tribunal made repeated factual findings contrary to the record and therefore arbitrary, while describing the finding as to his "variety of versions" in the award under appeal as "exaggerated exorbitantly". In doing so he disregards that according to consistent case law of the Federal Tribunal, a factual finding blatantly inaccurate or contrary to the record is not sufficient in itself to annul an international arbitral award. The right to be heard does not encompass the right to an accurate decision on the merits (BGE 127 III 576 at 2b p. 577 ff.; 121 III 331 at 3a p. 333). Yet he does not argue that an obvious oversight of the Arbitral tribunal would have made it impossible for him to present and to prove his point of view in the proceedings (BGE 133 III 235 at 5.2 p. 248 ff.; 127 III 576 at 2b-ff p. 577 ff.).
Furthermore the Appellant himself concedes that at least two of his statements could be understood differently. He submits that his first statement "*Taking the advice of my wife I took the drug for swelling*

[8] Translator's note: BV is the German abbreviation for the Swiss Federal Constitution.

which was in liquid form and did not think about its content.[9]" should be understood as follows: "*Taking the advice of my wife to drink the offered glass of water, I unknowingly took the drug for swelling …[10]".* In doing so too he criticizes merely in an appellate manner the assessment of his statement by the Arbitral tribunal, yet without showing a violation of the right to be heard. Moreover the understanding that the Appellant wants to give to the aforesaid statement is refuted simply by the introductory sentence in the award under appeal, which is not mentioned in the appeal brief: "*I noticed a large swelling on my face. Taking the advice of my wife I took the drug for swelling ...[11]*". Contrary to what the Appellant seems to assume, the Arbitral tribunal did not fail to recognize that he gave several explanations in the proceedings as to why his first statement departed from the following ones. This objection was considered and specifically refuted in the award under appeal.
The argument as to a violation of the right to be heard is unfounded.

3.3
The Appellant wrongly argues a violation of the right to be heard in connection with a finding inconsistent with the record as to the consideration that the Arbitral tribunal was not persuaded that his wife would have had the Furosemide agent actually available at the time in question. The Arbitral tribunal did not at all oversee that the Appellant's wife had been prescribed a medicine containing the Furosemide but rather reproduced literally the corresponding annotation in the clinical history ("*Furosemide solution 2.0 intramuscularly 3 days[12]"*). Yet this was not a water solution but some injections which were to be administrated merely during three days. Therefore the Arbitral tribunal thoroughly noticed the prescription of the injections during this short time, mentioned it expressly in its award, yet held that the prescription of a water solution had not been proved. There cannot be any claim of a violation of the right to be heard.

In his further arguments the Appellant criticizes in an inadmissible manner the factual findings in the award under appeal. Moreover his argument that the Arbitral tribunal would have set excessive evidentiary requirements does not correspond to any ground for appeal prescribed by the law (Art.190 (2) PILA).

3.4
The Appellant does not convincingly show a violation of the right to be heard but once again merely criticizes in an inadmissible manner the factual findings in the award under appeal also in connection with the finding of the Arbitral tribunal that the two experts heard, Dr B._____ and Prof. C._____ considered Furosemide ineffective to treat swellings. Moreover he disregards in his argument that Dr B._____ had made different statements in the second UEFA-Body on March 16, 2012 and that Dr B._____ was heard by the Arbitral tribunal at the hearing of May 11, 2012. The Appellant does not argue that the latter's statement would have been misunderstood as a consequence of an obvious oversight of the Arbitral tribunal, thereby making it impossible for him to present and prove his point of view in the case.
The Appellant cannot be followed either when, to base his argument of a violation of the right to be heard, he submits that the expert opinion of Dr D._____ he filed would have been completely overlooked by the Arbitral tribunal. Contrary to this claim, the Arbitral tribunal thoroughly considered the expert opinion according to which Furosemide could be used for the treatment of facial swellings, yet

[9] Translator's note: In English in the original text.
[10] Translator's note: In English in the original text.
[11] Translator's note: In English in the original text.
[12] Translator's note: In English in the original text.

considered that the opposite statements by the experts during the hearing were more persuasive. There is no possible violation of the right to be heard in this assessment of the evidence.

3.5
The Appellant's arguments as to the reasons for which the Arbitral tribunal considered likely that the Appellant took Furosemide to lose weight are merely appellatory and therefore irrelevant. He does not show to what extent it would have been impossible for him to introduce into the proceedings some statement of facts important to the decision or some correctly presented evidence. The argument of a violation of the right to be heard comes to nothing in this respect as well.

3.6
With reference to Art. 19 of the UEFA Anti-Doping Regulation the Arbitral tribunal stated that an annulment or a reduction of the period of ineligibility due to doping could be considered only when the player convincingly shows why the substance found its way into his body. The CAS considered that the Appellant's explanation as to the presence of Furosemide in his body was not sufficiently likely. It stated furthermore that the Appellant's explanation would not lead to an annulment or to a reduction of the ban even if it were accurate.
It cannot be claimed that the Arbitral tribunal violated the right to be heard when under such circumstances it waived the examination of the Appellant's other submissions as to the additional (cumulative) requirements of an annulment or a reduction according to Art. 19 of the Anti-Doping Regulations. From the point of view of the procedural guarantee of the right to be heard the Arbitral tribunal was not obliged to examine more closely from a factual perspective the Appellant's submissions that it considered as legally irrelevant. Therefore he does not show a violation of the right to be heard with his submission as to the issue of the performance–enhancing effect of Furosemide or the masking of performance-enhancing agents.

4.
The Appellant argues a violation of public policy (Art. 190 (2) (e) PILA).

4.1
He argues firstly that the Arbitral tribunal violated some fundamental procedure rules.
However the Appellant does not show any disregard of a fundamental procedural rule with his argument that possible overweight would not have been an issue in the UEFA but was addressed only in the Respondent's answer to the appeal in the arbitral proceedings. Furthermore he merely criticizes the assessment of the evidence by the Arbitral tribunal to the extent that he argues that it would have been "totally surprising" to him that the CAS could come to the conclusion that he would have been occasionally overweight on the basis of the evidence introduced by the Respondent. He questions the actual assessment of the evidence and correspondingly argues that the Arbitral tribunal's fact finding was arbitrary – which, however, are not admissible grievances in an appeal against an arbitral award – when he takes the view that the media report taken into account and the announcement on the web page of his football club would be mere insinuations or rumors and no evidence of his overweight. Be this as it may, it is not instantly clear to what extent the announcement on the web page of his own club X._____ could be mere "insinuations of the Respondent or rumors in the Ukrainian media". The Appellant does not submit neither that he would have offered evidence in support of his point of view that would have been overlooked by the Arbitral tribunal but he merely claims generally that he would have disputed to have suffered from overweight.

Furthermore the Appellant cannot be followed when he claims that the Arbitral tribunal would have taken into account the Appellant's overweight "in completely decisive manner". The CAS held the Appellant's explanations for the intake of Furosemide as implausible on the basis of his statements and further circumstances, namely independently of the possible explanation of the absorption of the agent with a view to a loss of weight. The Appellant's arguments are unpersuasive for this reason as well.

4.2

4.2.1

To substantiate his argument of a violation of public policy the Appellant argues furthermore that it would indeed be right to punish an athlete who could not prove why and for what purpose he would have taken a prohibited substance and thus left unclear whether he took drugs or not. Yet when it would be shown that an athlete took a no performance-enhancing substance and also that he did not attempt to cover some other agents, the absence of a demonstration as to how the agent discovered would have found its way in his body, would not justify a two years ban; this constitutes a serious privacy infringement and as a matter of fact could even mean the end of his career.

4.2.2

The substantive review of an international arbitral award by the Federal Tribunal is limited to the issue as to whether or not the award is compatible with public policy (BGE 121 III 331 at 3a p. 333). The substantive assessment of a claim in dispute violates public policy only when it disregards some fundamental legal principles and therefore is plainly incompatible with the essential and broadly recognized value order which should be the basis of any legal order according to the dominating view in Switzerland. Among these principles are the sanctity of contract (*pacta sunt servanda*), the prohibition of abuse of rights, the general principle 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 commitments (see Art. 27 (2) ZGB[13]) when it constitutes a blatant and grievous infringement of privacy. The arbitral award will be annulled only when it violates public policy in its result and not merely in its reasons (BGE 138 III 322[14] at 4.1 and at 4.3.1/4.3.2; 132 III 389 at 2.2 p. 392 ff. with references).

The Appellant wrongly argues that he "demonstrably did not take any prohibited performance-enhancing substance". His argument does not rely on the factual findings in the award under appeal, which bind the Federal Tribunal (Art. 105 (1) BGG). On the contrary, the Arbitral tribunal left open whether the prohibited agent Furosemide was taken to lose weight in connection to a related enhancement of performance because the Appellant himself never claimed it had been taken to lose weight.

Furthermore the Federal Tribunal has already decided several times that the rule according to which a positive finding of a prohibited substance bases a presumption of doping and the athlete has the possibility to disprove it does not violate public policy (judgment 4P.105/2006 from August 4,2006 at 8.2; 5 p.83/1999 from March 31, 1999 at 3c/d; 4p.217/1992 from March 15, 1993 at 8, publ. in: ASA Bull. 1993 p. 409; see also BGE 134 III 193 at 4.6.3.2). The sanction issued against the Appellant refers to a violation of the determining Anti-Doping Regulations of the UEFA according to which when a prohibited substance is shown, the player must show the possible reasons speaking for a period of ineligibility shorter than two years (see Art. 18 (f) of the Anti-Doping Regulations).

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[13] Translator's note: ZGB is the German abbreviation for the Swiss Civil Code

[14] Translator's note: Full English translation at http://www.swissarbitrationdecisions.com/landmark-decision-of-the-swiss-supreme-court-international-arbit

The disputed proportionality of the sanction argued by the Appellant could lead to a violation of public policy in the award under appeal only if it constitutes a blatant and grievous infringement of privacy. A two years ban is a drastic sanction for a professional player, but it is not such a grievous infringement of privacy (see judgment 5P.83/1999 from March 31, 1999 at 3c). Contrary to the case on which the Appellant relies (BGE 138 III 322 ff.[15]), the period of ineligibility against him is limited in time and neither does it result from the mere failure to comply with an order of payment; instead it is based on the violation of the determining Anti-Doping Regulations, which provide the player with reasons to annul or reduce (the sanction) in case of a finding of a prohibited substance, which the Appellant did not succeed in establishing.
The argument that the award under appeal would be inconsistent with public policy (Art. 190 (2) (e) PILA) is unfounded.

5.
The appeal proves to be unfounded und must be rejected to the extent that the matter is capable of appeal. In such an outcome of the proceedings the Appellant must pay costs and compensate the other party (Art. 66 (1) and Art.68 (2) BGG).

Therefore the Federal Tribunal pronounces:

1.
The appeal is rejected, to the extent that the matter is capable of appeal.

2.
The judicial costs set at CHF 8'000.-- shall be borne by the Appellant.

3.
The Appellant shall pay to the Respondent an amount of CHF 9'000.-- for the federal judicial proceedings.

4.
This judgment shall be notified in writing to the Parties and to the Court of Arbitration for Sport (CAS).

Lausanne, March 21, 2013.

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

The Presiding Judge: The Clerk:

[15] Translator's note: Full English translation at http://www.swissarbitrationdecisions.com/landmark-decision-of-the-swiss-supreme-court-international-arbit