



Arbitration Newsletter Switzerland

The corrupt Fenerbahçe Spor Kulübü: does the principle *ne bis in idem* applying to the disciplinary aspects of sport form part of international public policy pursuant to Art. 190 (2)(e) PILA?

On October 24, 2014 the Federal Supreme Court published its decision in the case Fenerbahçe Spor Kulübü ("Fenerbahçe") vs Union des Associations Européennes de Football ("UEFA") on its website.¹

1. The Facts

The relevant facts of the present case date from spring 2011 when a number of Fenerbahçe officials allegedly manipulated the outcomes of various matches in the "Süper Lig" (top football league of Turkey). On April 14, 2011 a new Turkish law entered into force making the manipulation of the outcomes of sports matches a criminal offence.

On May 5, 2011 Fenerbahçe had to file a signed form with UEFA confirming that, as of April 27, 2007, the club was neither directly nor indirectly involved in any manipulation of matches. In the following weekends of May 2011 the club allegedly manipulated the outcome of additional matches. By end of May, Fenerbahçe had won the Süper Lig and had thereby qualified directly for the UEFA Champions League for 2011/2012.

On July 3, 2011 the Turkish police arrested 61 persons for manipulation of the outcomes of matches, including Fenerbahçe's President, Vice-President, two members of its board, the coach and the CFO.

On August 24, 2011 the Ethics Commission of the Turkish Football Federation ("TFF") informed UEFA of its decision to prohibit Fenerbahçe from participating in the 2011/2012 Champions League. Fenerbahçe appealed against that decision but the Arbitration Commission of the TFF rejected that appeal. Fenerbahçe then applied to the CAS for preliminary measures to permit it to participate in the 2011/2012 Champions League but that application was rejected.

On April 25, 2012 Fenerbahçe withdrew its CAS application and, consequently, the decision of TFF that Fenerbahçe could not participate in the 2011/2012 Champions League became final.

On May 6, 2012 the TFF's Disciplinary Commission imposed bans on members of Fenerbahçe's board, one director (3 years) and the Vice-President and the coach (1 year each), these bans to cover all football-related activities.

On July 2, 2012 the High Criminal Court in Istanbul addressed the case and concluded that, under the guidance of Fenerbahçe's President, the club constituted a criminal organization. The President was therefore sentenced to 2½ years' imprisonment for building a criminal organization and with 3 years and 9 months for manipulation of the outcomes of

¹ BGE 4A_324/2014 of October 16, 2014, Fenerbahçe Spor Kulübü, represented by Dr. Bernhard Berger and Dr. Andreas Güngerich, and UEFA, represented by Dr. Jean-Marc Reymond and Delphine Rochat. Generally, decisions of the Federal Supreme Court are made public as to the parties involved in an anonymised form only, whereas counsel are always identified. In actions for annulment against CAS awards the Federal Supreme Court does, however, occasionally deviate from this policy - as in the present case. It is, however not clear based on which standards it does so.



matches. Other Fenerbahçe personnel, including the coach and the CFO and other directors, were given lesser sentences with like terms.

Thereafter, UEFA's Disciplinary Commission became involved and, after a 2-year investigation, on June 22, 2013, it decided that Fenerbahçe should be banned for 3 years from all UEFA competitions, the 3rd year's ban being probationary only. On July 10, 2013, the UEFA Appeal Chamber then reduced this sanction to a 2-year ban. Subsequently, Fenerbahçe filed an appeal against this decision with CAS and applied for suspensive effect; UEFA did not object to this. Fenerbahçe and UEFA thereafter agreed on a rather tight timetable for the CAS proceedings and the latter then issued the operative part of its decision on August 28, 2013 (the "CAS Award"), confirming the UEFA Appeal Chamber's decision. Fenerbahçe appealed that decision to the Federal Supreme Court which denied the suspensive effect of such action for annulment.

2. The Considerations

The Federal Supreme Court had first to deal with a number of Fenerbahçe's arguments alleging both violation of its right to be heard and violation of the equal treatment of the parties, both pursuant to Art. 190(2)(d) PILA. Fenerbahçe argued that the CAS had "rushed" the proceedings through by reaching its decision a mere six weeks after the lodging of the appeal and taking a mere six days following a multi-day hearing to render its decision and to publish the operative part thereof. These expedited proceedings stood, according to Fenerbahçe, in stark contrast to the two years (2011-13) it had taken UEFA to carry out its own investigations and publish its report. Fenerbahçe also argued that it had not voluntarily submitted to those expedited proceedings but had to sign the UEFA's admission form, which provided for such expedited proceedings, in order to be permitted to participate in the UEFA competitions.

In response, the Federal Supreme Court confirmed its longstanding practice according to which a party, not satisfied with the way proceedings have been held, has to raise its objection immediately with the arbitral tribunal, thus allowing it an opportunity to cure any shortcomings in the proceedings. Fenerbahçe had failed to have done so and its arguments on this issue therefore had to be dismissed.

Fenerbahçe also argued that CAS had violated Fenerbahçe's right to be heard by the surprising application of a legal provision. Whilst CAS had apparently held that Fenerbahçe had been involved in manipulation of the outcomes of matches only four times, UEFA's Appeal Chamber had held that this had been the case in eight matches and CAS had, nevertheless, failed to have drawn the appropriate conclusions from this reduction by reducing the sanctions accordingly. The CAS Award did, however, deal in detail with the relevant arguments concerning why it had not reduced the 2-year ban. It had the discretion to apply a ban of 1 to 8 years and it had expressly explained why, given the prevailing circumstances, the 2-year ban should continue to stand. Fenerbahçe's argument on this issue therefore failed.

Fenerbahçe also raised further arguments as to the alleged violation of its right to be heard by arguing that CAS had failed to have considered certain relevant documents. The Federal Supreme Court considered that this argument also failed, both on its merits, since CAS had in fact addressed all relevant questions in its award, and because certain of Fenerbahçe's arguments constituted undue appellatory criticism.

Finally, Fenerbahçe argued that the CAS Award had violated public policy pursuant to Art.190(2)(e) PILA in having disregarded the fundamental principle of *ne bis in idem* since, in Fenerbahçe's view, two different sanctions had been imposed upon it for the same criminal act. This argument gave the Federal Supreme Court the opportunity to restate its position as to the procedural public policy:

"Procedural public policy is breached in the case of the violation of fundamental and generally recognized procedural principles, the disregard of which contradicts the sense of justice in an intolerable way, so that the decision appears absolutely incompatible with the values and legal order of a state ruled by law² [...] The Arbitral Tribunal violates procedural public policy when it leaves



unheeded in its award the material legal force of an earlier judgement or when it deviates in the final award from the opinion expressed in a preliminary award as to a material preliminary issue³."

The Federal Supreme Court then continued by stating that, in principle, *ne bis in idem* did indeed form part of procedural public policy in the sense of Art.190(2)(e) PILA. However, it left open the question as to whether this fundamental principle should also apply in disciplinary matters in sport by making reference to a previous decision in this field.⁴

According to the Federal Supreme Court, this question did not need to be resolved in the present case since the CAS Award already assumed that *ne bis in idem* should be respected and had consequently analyzed whether the sanctions imposed upon Fenerbahçe were consistent with that principle. The Federal Supreme Court therefore restricted its review to the question as to whether the CAS Award had properly applied that principle.

Fenerbahçe argued that the principle of *ne bis in idem* had been violated since the TFF's prior decision (dated August 24, 2011) had excluded Fenerbahçe from the 2011/2012 Champions League and it could therefore not be excluded a second time. However, the CAS Award had apparently⁵ addressed this issue and had concluded that the TFF's decision would not exclude a further ban for additional seasons. In reaching that conclusion, the CAS Award had applied

Art. 50(3) of the UEFA statutes (2010 version) which stated:

"The admission to a UEFA competition of a Member Association or club directly or indirectly involved in any activity aimed at arranging or influencing the outcome of a match at national or international level can be refused with immediate effect, without prejudice to any possible disciplinary measures". (emphasis added)

The CAS Award had then found further support for its position in Art. 2.05 and 2.06 UCLR (Regulations of the UEFA Champions League for the season 2011/2012) which stated, *inter alia*:

"In addition to the administrative measures of declaring a club ineligible, as provided for in paragraph 2.05, the UEFA Organs for the Administration of Justice can, if the circumstances so justify, also take disciplinary measures in accordance with the UEFA Disciplinary Regulations."

Consequently, the CAS Award had concluded that Art. 50(3) of the UEFA statutes, in combination with Arts. 2.05 and 2.06 UCLR, provided for a two-level procedure. In a first step, applying Art. 2.05 UCLR, a 1-year ban could be imposed as an administrative measure. In a second step, sanctions could be issued as a disciplinary measure ("*in addition to the administrative measure [...]*") in respect of which there was no limitation on the duration of a ban. According to the CAS Award those two sanctions had to be differentiated since UEFA has a legitimate interest to exclude immediately a football club from its competition without going through a lengthy disciplinary procedure. This administrative measure is therefore not the final decision but is only a preliminary sanction preserving the integrity of the particular competition, in this case the 2011/2012 Champions League.

The Federal Supreme Court accepted this distinction. The application of the principle *ne bis in idem* would presuppose that the court of the first proceedings had the possibility to review the facts of the particular case in all respects.⁶ This had, however, not been the case

² References to BGE 140 III 287 consid. 3.1, see our Newsletter of June 25, 2014, and BGE 136 III 345 consid. 2.1 (the famous decision of Club Atletico de Madrid SAD vs Sport Lisboa Benfica-Football SAD and FIFA, the first decision ever where an international arbitral award was squashed under Art. 190(2)(e) PILA, see our Newsletter of July 6, 2010).

³ Again with references to the above two Federal Supreme Court decisions. Translation courtesy of Charles Poncet, Geneva.

⁴ BGE 4 A_386/2010 of January 3, 2011, one of the three Valverde decisions, against WADA, UCI and the Royal Cycling Federation of Spain where the Federal Supreme Court stated in consid. 9.3.1:

"That a violation of the principle of ne bis in idem may fall within the scope of Art. 190(2)(e) PILA is one thing. That sport disciplinary law would also be governed by that principle germane to criminal law is another matter which is not obvious [...]"; translation courtesy of Charles Poncet, Geneva.

⁵ The CAS award is not published on the website of CAS.

⁶ BGE 135 IV 6 consid. 3.3 and BGE 119 1b 311 consid. 3 c
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in the present matter, the relevant TFF decision on August 24, 2014 was of a purely administrative nature only.

Fenerbahçe had also failed to establish properly in which respect there should be an identity between the two sanctions in the present case. Consequently, the Federal Supreme Court held that the CAS Award had not violated the principle of *ne bis in idem* and Fenerbahçe's relevant argument that the CAS Award violated procedural public policy also failed.

3. Conclusions

The considerations of the Federal Supreme Court as to the alleged violations of Fenerbahçe's right to be heard do not necessitate any comment. Fenerbahçe had no convincing arguments in this respect. Nevertheless, the considerations of the Federal Supreme Court, combined with various citations of recent decisions in this respect, provide helpful guidance in the analysis of this procedural issue.

As to *ne bis in idem*, it seems obvious that this principle forms part of procedural public policy. *Ne bis in idem* and *res judicata* are procedural twins, each serving the same purpose. The objective of the first one is that the same criminal matter cannot be decided twice and that of the second one prevents a court deciding an issue which has already been decided by a previous court based on the same facts in a dispute between the same parties. Whilst the Federal Supreme Court did not in fact render a formal decision as to the application of *ne bis in idem* as procedural public policy pursuant to Art. 190(2)(e)PILA, the language actually chosen by the Federal Supreme Court leaves no doubt that this principle does indeed form part of procedural public policy.

A more complex question concerns the reservation made by the Federal Supreme Court in the application of this principle in sports related matters where - as already established in the Valverde case and also now in the present case - different levels of sanctions may exist, though based on the same facts. In the Valverde case there were disciplinary proceedings

"opened in Italy [...] to protect the good conduct of sport competitions on Italian soil,

whilst the second disciplinary proceedings aimed at sanctioning the athlete for behaviour contrary to the rules of the sport he practices professionally, which justified a worldwide extension of the sanction against him. Thus according to the majority of the panel the principle of ne bis in idem could not be applied in this case for lack of an identity of object [...] applying the principle of ne bis in idem supposes that the goods protected are identical (identity of object). Thus the prohibition of double prosecution does not prevent trying the same person when the same behaviour may have consequences that are not only criminal but also civil, administrative or disciplinary [...]."

For once, at least in this respect, it is justifiable to pay respect to the "specificity of sport", often called upon by the Federal Supreme Court, and to apply the principle *ne bis in idem* in this field only once the required identity has been clearly established in this regard. The present Federal Supreme Court decision is certainly helpful in having clarified this issue and it follows that *ne bis in idem* is to be applied in sports related matters only once it is clearly established that the two sanctions under scrutiny actually address and protect the very same good ("*Rechtsgut*").

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