

Case Corporación Club Deportivo Tulua (Tulua) v Club Atlético Nacional S.A.

TAS 2018/A/6057

NOTE ON THE FEDERAL COURT JUDGMENT 4A 564/2020

TAS enters an enchanted forest and finds itself in hell

In a judgment dated 7 June 2021, the Swiss Federal Tribunal annulled the award rendered by a Panel of Arbitrators of the Court of Arbitration for Sport (CAS) on 20 June 2019. The Federal Court held that CAS wrongly acknowledged its jurisdiction in a case where it admitted an appeal against a decision rendered by the Colombian Football Federation's (FCF) Players' Status Committee (CSJ), which had found Club Atlético Nacional S.A. (Atlético Nacional)(Colombia) to pay USD 5,000,000 to the appellant, Corporación Club Deportivo Tulua.

In essence, the Swiss Federal Tribunal held that the FCF's regulations did not provide for an appeal to CAS against the CSJ's decision.

The interest of this judgment lies in the following points:

- When a party challenges the jurisdiction of the CAS, it is not obliged to determine which authority would be competent instead of the CAS (§ 6.1 of the ATF).
- The objection to the CAS' jurisdiction must be raised at the latest in the Respondent's answer, pursuant to Article R55 of the CAS Code. It is not possible to infer from a party's silence, on a jurisdictional issue at the stage of provisional measures a possible tacit admission on its part of the CAS jurisdiction. The mere fact of responding to a request for provisional measures cannot be equated with the proceeding without reserves on the merits of the case or a tacit acceptance of the CAS' jurisdiction. It is not even necessary to raise the exception of incompetence in the context of the response to a request for provisional measures (§§ 6.3.1 and 6.3.2 of the ATF).
- The argument that the interpretation of regulatory provisions by a Panel of Arbitrators is definitive and cannot be reviewed by the Federal Supreme Court is wrong and must be rejected. When it is seized with the complaint of lack of jurisdiction, the Swiss Federal Tribunal freely reviews the legal issues without being bound by the legal considerations expressed by a Panel of Arbitrators on the subject of its jurisdiction (§ 6.4 of the ATF).
- On the merits, the Arbitration Panel argued in its award, in a rather flowery formulation, that it had decided to delve into the numerous internal provisions of the FCF, its various bodies and procedures, in order to determine whether or not there was a right of appeal to CAS, taking the risk of getting lost in an "enchanted forest". This formulation did not fail to provoke a reaction from the Swiss Federal Tribunal, which held that the reasoning of the Arbitration Panel was particularly puzzling and that it should have stuck to its initial conclusion and refrained from going into the enchanted forest, but preferred to venture into it at the risk of getting lost (§ 6.5 of the ATF).

- The Federal Court also took the opportunity to clarify that the principle of *in dubio contra proferentem* does not apply when it is invoked, not against the author of a rule, in this case the FCF, but against the appellant club. In other words, the Arbitration Panel wrongly applied this principle to the appellant club, Club Deportivo Tulua, in order to make it bear an interpretation of the FCF's rules against it and thus recognise the jurisdiction of CAS (§ 6.5.1 of the ATF).
- The Federal Court also specified that the "*pro arbitrato*" principle, invoked by the Arbitration Panel to say that, when the parties' intention to avoid the State's jurisdiction is established, the principle of utility (Ütilitätsgedanke) must be applied, i.e. the pathological clause must be given a meaning that allows the arbitration agreement to be upheld, does not apply in this case, given the absence of any possibility of appeal to the CAS (§ 6.5.2 of the ATF).

The consequence of the annulment of the CAS award is that Club Deportivo Tulua can demand without further delay the payment of USD 5,000,000 to which Atlético Nacional has been condemned, taking into account that this decision of the CSJ FCF is no longer subject to appeal or, at least, that the time limits for contesting this decision before a possible competent authority have undoubtedly expired.

Libra Law congratulates Club Deportivo Tulua club on this fantastic achievement.

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