Arbitration CAS 2011/A/2451 RC Recreativo de Huelva SAD v. Trabzonspor SK, award of 4 April 2012

Panel: Mr Stuart McInnes (United Kingdom), President; Mr Efraim Barak (Israel); Mr Angelo Cascella (Italy)

Football
Transfer
Condition of validity of a transfer agreement
Time limit for the payment of the transfer fee
Consequence of the invalidation of the transfer on the employment contract
Absence of compensation for damages

1. **A valid and binding transfer agreement between two clubs includes an agreed amount to be paid within a strict time limit by the club to which the player is transferred. The agreed amount constitutes an essential element of the contract.**

2. **Where the transfer agreement expressly provides for a specific time of payment, articles 78 and 79 of the Swiss Code of Obligations are not applicable as they are of dispositive law. The payment of the transfer sum after the agreed specific time of payment allows the creditor club to consider the transfer "invalid" due to the non payment of the transfer sum in due time.**

3. **If an employment agreement between a player and his new club was concluded on the assumption that a transfer agreement would be concluded between the new and the former clubs, and was made pending such transfer agreement; once the transfer agreement becomes invalid, it follows that the employment agreement should also be considered invalid and that the existing employment agreement between the player and his former club remains valid.**

4. **The fact that a player decided to leave his former club and to move to play with a new club to which he was supposed to be transferred, notwithstanding that the transfer agreement no longer exists, does not – *per se* – establish any right of compensation between the two clubs. To this latter end, the former club must pursue a claim against the player under Article 17 of the FIFA Regulations on the Status and Transfer of Players for unilateral breach of contract without just cause which, if accepted by the competent FIFA body, will embrace the joint and several liability of the new club.**

RC Recreativo de Huelva SAD ("the Appellant" or "Huelva") is a Spanish football club, affiliated with the Royal Spanish Football Federation ("RFEF"), which in turn is affiliated with the Fédération Internationale de Football Association (FIFA).

Trabzonspor SK ("the Respondent" or "Trabzonspor") is a Turkish football club, affiliated with the Turkish Football Federation (TFF), which in turn is affiliated with the Fédération Internationale de Football Association (FIFA).

The elements set out below are a summary of the main relevant facts, as established by the Panel on the basis of the written submissions of the parties, the exhibits filed, the decision rendered by the Single Judge of the Player's Status Committee ("the Single Judge") on 27 October 2010 ("the Appealed Decision") in the case between the Appellant and the Respondent, as well as the oral pleadings and comments made during the hearing. Additional facts may be set out, where relevant, in the legal considerations of the present award.

On 2 August 2006, the Respondent and the Turkish player, E. ("the Player") signed an employment contract valid from 1 August 2006 until 31 May 2008.

At the end of the month of August 2007, the Appellant and Respondent negotiated the transfer of the Player from Trabzonspor to Huelva. At the time of the negotiations, the Player was injured.

On 30 August 2007, the Appellant and the Player concluded an employment contract valid from 1 September 2007 until 30 June 2008.

On 31 August 2007, at the beginning of the afternoon, the Appellant sent by fax a signed version of the transfer agreement to the Respondent.

By fax of the same date, timed 22:20 pm, the Respondent informed the Appellant that, with regard to the potential transfer of the Player, the transfer agreement would be signed by its Vice President, who had been so authorized by its Executive Committee. The Respondent further agreed to receive the transfer monies to its bank account in the net amount of USD 1'000'000 and stated that on receipt of the monies, the International Transfer Certificate ("the ITC") for the Player would be issued and sent to the Appellant.

On the same date at 22:32 pm, the Respondent sent the transfer agreement by fax to the Appellant, counter-signed by its Vice President. Article 2.1 of the transfer agreement indicated that the amount of USD 1'000'000 was to be paid before 23:59 pm on the same date, i.e. Friday 31 August 2007.

Subsequently on the same date, the Parties had telephone contacts regarding the timing of payment of the transfer sum.

At or about the same time, the RFEF requested the TFF to issue the ITC for the Player.

On 4 September 2007, the Respondent informed the Appellant by fax, that it considered the agreement to transfer the Player was not valid as the transfer monies were not paid on 31 August

2007, as set out in Article 2.1 of the transfer agreement. The Respondent further informed the Appellant that it had instructed its bank to send the monies back to the Appellant, in the event that it was received at a later stage.

On 5 September 2007, the RFEF contacted FIFA requesting its assistance in obtaining the ITC for the Player from the TFF, based on the employment contract signed between the Player and the Appellant.

On 10 September and on 1 October 2007, the TFF answered FIFA's request explaining that according to the Respondent, the Player still had a valid contract until 31 May 2008 and that the transfer agreement dated 31 August 2007 was invalid because the payment did not take place within the prescribed time period. Therefore, the TFF refused to issue the ITC.

On 16 October 2007, the Single Judge of the FIFA's Status Committee authorised the RFEF to provisionally register the Player with the Appellant, with immediate effect.

On 24 October 2007, following the provisional registration of the Player with the Appellant, the Respondent requested that the Appellant pay the agreed transfer monies in the sum of USD 1'000'000.

On 29 October 2007, the Appellant replied to the Respondent, that it would not pay the requested transfer monies as it was deprived of the Player's services for a long period of time in view of his injury and, further that it intended presenting a case to FIFA for a reduction in the transfer sum together with a claim for loss and damages arising from the Players inability to play arising from his injuries.

On 5 November and 4 December 2007, the Respondent again requested payment from the Appellant of the agreed transfer sum. The Appellant received no response to either request.

On 14 December 2007, the Respondent submitted a claim to FIFA, requesting *inter alia* that the Appellant pay the transfer monies of USD 1'000'000.

On 27 October 2009, the Single Judge of the Player's Status Committee rendered a decision, ordering the Appellant to pay the Respondent the sum of USD 930'303. representing the agreed transfer sum, as reduced, to take account of the fact that the Appellant had been deprived from the Player's services for quite a long period of time, due to *"the fact that the TFF had not sent the ITC of the player to the RFEF, based on the wrong assumption of the Claimant/Counter-Respondent that it could "retain" the player because the late payment of the transfer compensation"*.

On 19 May 2011, the Appellant filed a Statement of Appeal with CAS against the decision rendered by the Single Judge of the FIFA Player's Status Committee on 27 October 2010.

On 2 June 2011, the Appellant filed its Appeal Brief. In its main conclusion, the Appellant requested the Panel:

"To adopt an award declaring the nullity of the said decision [the decision of the Single Judge dated 27 October 2007] and adopting a new one declaring that the Respondent must pay to the Appellant the amount of 923,472,92 Euro as loss and damages".

On 7 June 2011, the CAS Court office set a time limit of twenty days for the Respondent to file its Answer and informed the Parties that as the Respondent had not nominated any arbitrator within the prescribed time limit, it would be up to the President of the CAS Appeals Arbitration Division, or his Deputy, to nominate an Arbitrator in lieu of the Respondent.

On 23 June 2011, the Respondent requested the CAS Court office to order the Appellant *"to file an Appeal Brief completely in English as well as file an English translation of the transfer agreement between the parties"* and to set a new time limit regarding the filing of the Answer once the requested documents would be filed.

On 24 June 2011, the CAS Court office informed the Parties that the above-mentioned Respondent's requests were rejected and that the time limit set for the Respondent to file its Answer was confirmed.

On 28 June 2011, the CAS Court office informed the Parties that the Deputy President of the Appeals Arbitration Division had appointed Mr Angelo Cascella as Arbitrator for the Respondent.

On 29 June 2011, the Respondent filed its Answer. In para. 18 of the Answer, the Respondent requested that the Appellant be ordered to provide CAS with the original Employment Contract dated 30 August 2011 in order to help it calculate the compensation amount due by the Appellant.

On 4 July 2011, the Appellant informed CAS that it wished a hearing to be held in the case at hand.

On 11 July 2011, the Respondent informed CAS that it deemed that a hearing was not necessary as the file was sufficiently clear and that therefore, it requested that an award be issued solely on the basis of the Parties written submissions.

On 22 July 2011, the Parties were informed that the following individuals had been appointed as Arbitrators: Mr Stuart McInnes, attorney-at-law in London, United Kingdom, as President of the Panel, sitting with Mr Efraim Barak, attorney-at-law in Tel Aviv, Israel and Mr Angelo Cascella, attorney-at-law in Vicenza, Italy as Members of the Panel.

On 20 December 2011, a Hearing was held at the CAS Headquarters in Lausanne, Switzerland.

At the end of the Hearing the Parties requested an extension of time before issue of the award to further negotiate with a view to finding an amicable settlement to the dispute. The Panel acceded to the request and a final deadline of 10 January 2012 was set.

As no agreement was reached between the Parties by the deadline date, the Panel decided to render the present award.

The following outline of the Parties' positions is illustrative only and does not necessarily comprise every contention put forward by the parties. The Panel, however, has carefully considered all the submissions made by the Parties, even if there is no specific reference to those submissions in the following summary.

The Appellant summarised its position in the Appeal Brief, which states in particular:

A. There was a transfer contract finalized on a Friday night of the last day of the transfer window (31st August 2007).

B. Banks were not open until Monday 3rd of September 2007) [sic] and the Appellant did pay the agreed transfer fee.

C. The Respondent refused the payment and sent it back.

D. The Appellant had then to go to FIFA to obtain the Player ITC, which was only given by FIFA Single Judge on the 17th October, even though it took some days more to receive it.

E. The Appellant was deprived from the Player during a month and a half due to the bad faith of the Respondent, which refused the money and tried to maintain the player.

F. The award should recognize such behaviour and bad faith and the Panel must give compensation to the Appellant or, at least, mitigation of the amount decided by the Single Judge.

The Respondent's position, expressed in its Answer, can be summarised as follows:

The Parties concluded a transfer agreement on 31 August 2007.

- The Appellant was obliged to make the payment of USD 1'000'000 out of the usual business hours on or before 23:59 on the same day.
- The payment was made too late as the Respondent only received the money on 5 September 2007.
- The Respondent was entitled to cancel the contract and to send the money back.
- In October 2007, the Parties agreed to pay a compensation sum of the same amount of USD 1'000'000

A Hearing was held on 20 December 2011 at the CAS headquarters in Lausanne, Switzerland.

LAW

CAS Jurisdiction and scope of the arbitration agreement

1. Pursuant to Article R47 of the Code:

   An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.

2. The jurisdiction of the CAS derives from Articles 62 and 63 of the FIFA Statutes and was confirmed by the Parties when signing the Order of Procedure. The jurisdiction of CAS in the present case is not disputed by the Parties.

3. Under Article R57 of the Code, the Panel has the full power to review the facts and the law and may issue a de novo decision superseding, entirely or partially, the appealed one.

4. Article R58 of the CAS Code states the following:

   The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

5. In view of the mentioned provisions, the Panel considers that the law applicable to the present dispute shall be the FIFA Regulations and Swiss Law.

Merits

6. It is not disputed by the Parties that they entered into an agreement regarding the transfer of the Player on the late evening of Friday 31 August 2007 and that the agreed transfer sum was to be paid on the same day at or before 23:59 pm.

7. It is also not disputed by the Parties that following the receipt, of the signed transfer agreement by the Appellant at 22:32 pm, there was at least one telephone conversation between Mr Dumois and Mrs Karahasanoglu regarding the payment.

8. According to Mr Dumois, he called the Appellant's bank to order the payment, but an employee, who was still in the office at that time, answered that it would not be possible to proceed to make the payment that day as the currency market was closed and that in any event the IBAN number provided was incorrect. Mr Dumois immediately called Mrs Karahasanoglu in order to inform her of the situation and requested that the Appellant be allowed to order the payment on the next business day, i.e. on Monday 3 September 2007, which was allegedly accepted by Mrs Karahasanoglu.

9. Mrs Karahasanoglu gave evidence that Mr Dumois actually called her after dispatch of the signed contract, but asserted that it was agreed that even though it was not possible to transfer the money on the same day, the order should be passed before midnight and a written confirmation should be sent to the Respondent. She further stated that as the confirmation was not received that evening and that the money was not received either on 3rd nor on 4th September 2007, the Executive Committee of the Respondent decided that the transfer agreement was invalid. Such allegations were confirmed at the Hearing by Mr Zengin.

10. Following the decision of the Executive Committee, the Respondent informed the Appellant, by a fax dated 4 September 2007, that the transfer agreement was cancelled and that the transfer monies that were finally received on 5 September 2007, were returned.

11. The Panel is of the opinion that the transfer agreement dated 31 August 2007 was a binding and valid agreement, with the obligation upon the Appellant to pay USD 1'000'000 by 23:59 pm that day, being an essential element of the contract. The Panel acknowledges that in evidence the strict time limit was changed by agreement of Mrs Karahasanoglu on behalf of the Respondent in that she spoke with Mr Dumois late on 31 August 3007 and indicated that the Respondent accepted that the payment could not be received on that day but was to be made on the next business day, namely 3rd September 2007.

12. As neither the confirmation of the payment nor the money was received on 3rd and/or 4th September 2007, the Respondent informed the Appellant that it considered the agreement "invalid", by virtue of non-payment of the transfer sum and that it already *"gave order to our bank to refund an eventual later payment immediately"*. This assertion of *"invalidity"* is evidenced by the Respondent's return of the monies on 5 September 2007 and its refusal to allow the issuance, by the TFF, of the ITC to transfer the player. The Panel also considers that the wording of that letter implies that the Respondent knew on the 4th September that the money was shortly to be received in its bank account, in consequence of the telephone conversation between Mr. Dumois and Mrs. Karahasanoglu, however it had determined to retain the Player instead of accepting the transfer monies preferring to consider the agreement as no longer valid.

13. The Appellant asserts that the payment made on 3 September 2007, and received in the Respondent's bank account on 5 September 2007, was valid by virtue of application of Articles 78 and 79 of the Swiss Code of Obligations. Such provisions read the following:

Article 78

1 Where the time of performance or the last day of a time limit falls on a Sunday or on a day officially recognised as a public holiday at the place of performance, the time of performance or the last day of a time limit is deemed to be the next working day.

2 Any agreement to the contrary is unaffected.

Article 79

Performance of the obligation must be made and accepted during normal business hours on the date stipulated.

14. The Respondent submits that these provisions are not applicable to the case at hand as they are of dispositive law and that the transfer agreement expressly provides for a specific time of payment, which was Friday 31 August 2007 at 23:59 pm, i.e. the day before a weekend and outside the usual business hours.

15. The Panel is of the opinion that the Respondent's position on the matter shall be upheld as Article 78 para. 2 implies that the Parties can agree that the performance of an obligation can occur on a Sunday or a day officially recognised as a public holiday and that, according to legal commentary, Article 79 CO is of dispositive law (HOHL F., in: Commentaire Romand, Code des obligations I, p. 491, N 10 ad Art. 79). In the case at hand, the Parties agreed that the payment had to be made at or before 23:59 pm on Friday 31 August 2007 and this agreement was therefore valid and binding under the above-mentioned provisions of Swiss law.

16. In view of the above, the Panel concludes that the transfer agreement was set aside by the Respondent as invalid on or about 4 September 2007 and that Respondent preferred, due to the short delay in the arrival of the transfer monies, and in spite the fact that they knew that the transfer fee was about to be received, to consider the agreement as no longer valid.

17. In view of the fact that at most, the payment of the transfer fee was delayed for one or two days due to the transfer process, and the decision of the Respondent to consider and declare the contract invalid and further to send back the transfer monies that were actually received in the Bank account on September 5, the Panel is of the opinion that no breach of the contract occurred on either part and that therefore, at that point, when the contract was actually considered by the Respondent as invalid, neither the Respondent, nor the Appellant is in a position to request any compensation.

18. Considering this conclusion, the Panel deems that all the facts and arguments regarding the Player's injury are irrelevant for the resolution of the present dispute.

19. Furthermore, as the employment agreement between the Appellant and the Player was made on the assumption that a transfer agreement would be concluded between the two clubs, and was made pending such transfer agreement; once the transfer agreement became invalid, it follows that the employment agreement should also be considered invalid and that the existing employment agreement between the Player and the Respondent remained valid.

20. The Panel wishes to emphasise that as it considered the transfer agreement to be invalid, it follows that the Player's contract with the Respondent was still valid. The fact that the Player decided to leave the Respondent and to move to play with the Appellant, notwithstanding that the transfer agreement no longer existed, does not – per se – establish any right of compensation between the two clubs. In such circumstances the Respondent should have pursued a claim against the Player under Article 17 of the FIFA Regulations on the Status and Transfer of Players for unilateral breach of contract without just cause. Such recourse, if confirmed and accepted by the competent FIFA body, would have embraced the joint and several liability of the Appellant. It is therefore the regrettable consequence of the Respondent's own failure to

adopt this course that the Player was effectively transferred to the Appellant at no cost and with no compensation, but that the Panel cannot remedy such default.

Conclusion

21. On the basis of the foregoing, the Panel concludes that:
    - The transfer agreement concluded on 31 August 2007 by the Parties was invalidated by the Respondent due to the late payment of the transfer sum.
    - The Appellant is not entitled to any compensation for loss and damages with regard to the transfer of the Player.
    - The Respondent is not entitled to any transfer compensation sum with regard to the transfer of the Player.

22. The Panel took into consideration in its discussion and subsequent deliberation all the evidence and the arguments presented by the Parties even if they have not been summarised or addressed herein.

The Court of Arbitration for Sport rules:

1. The appeal filed by Recreativo de Huelva SAD against the decision issued by the Single Judge of the FIFA Player's Status Committee on 27 October 2010 is partially upheld.

2. Recreativo de Huelva SAD is not entitled to receive any compensation from Trabzonspor SK for loss and damages with regard to the transfer of the player E.

3. Trabzonspor SK is not entitled to receive any compensation from Recreativo de Huelva SAD with regard to the transfer of the player E.

(…)

6. All other claims are dismissed.