Arbitration CAS 2016/A/4733 Sergei Serdyukov v. FC Tyumen & Football Union of Russia (FUR), award of 7 April 2007

Panel: Mr Marco Balmelli (Switzerland), Sole Arbitrator

Football
Contractual dispute
Determination of the law applicable to the dispute
Inapplicability to labour relations of common provisions of Russian civil legislation on validity of transactions

1. **According to art. 187 para. 1 of the Swiss Private International Law Act, *"the arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such a choice, according to the law with which the action is most closely connected"*. According to the legal doctrine, the choice of law made by the parties can be tacit and or/indirect, by reference to the rules of an arbitral institution. In agreeing to arbitrate a dispute according to the CAS Code, the parties submit themselves to the conflict-of-law contained therein, in particular to art. R58 of the CAS Code.**

2. **Common provisions of Russian civil legislation regarding validity of transactions are not applicable to labour relations because a labour agreement is not a transaction in the meaning of art. 153 of the Civil Code of Russia.**

I. PARTIES

1. Mr Sergei Serdyukov (the "Player" or the "Appellant") is a Russian professional football Player, currently employed by FC Dynamo Stavropol (Russian 3rd League).

2. FC Tyumen (the "Club" or the "First Respondent") is a Russian professional football club, currently competing in the National Football League (the "NFL", Russian 2nd League). It is affiliated to the Football Union of Russia which is, in turn, affiliated to the Fédération Internationale de Football Association ("FIFA").

3. The Football Union of Russia (the "FUR" or the "Second Respondent") is a Russian public sports organization and is affiliated to FIFA.

II. FACTUAL BACKGROUND

A. Background Facts

4. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced. Additional facts and allegations found in the parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.

5. On 24 June 2013, the Player and the Club entered into an employment contract valid until 15 June 2014 (the "Contract"). At this time, the Club was competing in the Professional Football League (the "PFL", Russia's 3rd League). According to Article 7.2 of the Contract, the *"Employee may be paid a bonus for achievements of sports results in compliance with the regulations on bonuses"*.

6. According to the Regulations on Bonus Payments to the Professional Football Players and Administrative Personnel of Tyumen Football Team (the "Bonus Regulations"), players competing in the PFL 2013/2014 season were entitled to bonus payments for each win or draw. In case the Club was promoted to the NFL, the Bonus Regulations held as follows in its Article 6 (the "Promotion Bonus"):

> *"For inclusion of Tyumen football Team into the National Football League in 2014 – bonus for each victory which qualifies for a bonus and tied game bonus shall be doubled, i.e., increased by 100%"*.

7. Until the end of the season, the Club had made bonus payments in the amount of RUB 997,500 to the Player according to the Bonus Regulations.

8. After a successful season 2013/2014, the Club was promoted to the NFL. The Club did, however, not pay the Promotion Bonus according to Article 6 of the Bonus Regulations. Apparently, the Club refused to pay such Promotion Bonus to all players and staff who were leaving the Club at the end of the season 2014.

B. Proceedings before the FUR Dispute Resolution Bodies

9. The Player lodged a claim before the FUR Dispute Resolution Chamber (the "NDRC") which issued a decision on 19 March 2015, dismissing the claim.

10. On 9 July 2015, the FUR Players' Status Committee (the "NPSC") upheld the Player's appeal and condemned the Club to pay to the Player the Promotion Bonus of RUB 997,500 (EUR 15,333). Furthermore, the NPSC ordered a provisional measure, prohibiting the Club from registering new players. Similar decisions were issued for seven other players and three coaches.

11. On 7 August 2015, the Club filed a request for review of the Decision before the FUR Executive Board (at the time being FUR's supervisory body).

12. On 15 August 2015, the Bureau of the FUR Executive Board submitted a decision for review, reverting the case back to NPSC.

13. On 18 December 2015, the NPSC again dismissed the supervisory claim submitted by the Club and upheld the decision dated 9 July 2015. This decision was not appealed by the Club and became final (the "Decision").

14. On 12 February 2016, after the Club did not pay its obligation, the Player filed a request for enforcement of the Decision before the NDRC.

C. Decision taken by an ordinary court

15. In February 2016, Mr Chernykh, an employee of the Club, filed a claim before an ordinary Russian court for the payment of the Promotion Bonus. The claim was dismissed by decision dated 19 April 2016 (the "Court Decision"). The Court Decision entered into force on 29 May 2016.

D. New proceedings before the NPSC

16. On 16 May 2016, the Club filed a request for review of the Decision before the NPSC, in essence relying on the Court Decision and on Article 64 of the FUR Regulations.

17. Article 64 of the FUR Regulations provides as follows:

> *"Revision of decision based on newly discovered evidences*
>
> *1. Entered into force decisions of NDRC or NPSC can be reviewed based on new or newly discovered evidences in case if the case was not considered by the Court of Arbitration for Sports in Lausanne (Switzerland).*
>
> *2. Grounds for revision of NDRC or NPSC decisions, which came into force, are:*
>
> *1) Newly discovered evidences (sic) – essential evidences for the case, which were not and could not been known to the applicant, and existed to the date when decision was made, including (…).*
>
> *2) New evidences (sic), occurred after the decision is rendered and which have essential meaning for case resolution:*
>
> *- recognition by entered into force judgment of regular court of arbitration court of invalidity transaction, that caused adoption of illegal (inconsistent to regulations) or unreasonable decision on case".*

18. On 21 June 2016, the NPSC issued a decision, upholding the Club's request and referred the case back to the NDRC in order to review it and lifted the ban for registering new players (the "Appealed Decision"). The Appealed Decision stated, in essence, the following considerations:

- The Court Decision, which engaged the same persons as in the case at hand, should at least be taken into account.

- The Court Decision shall be considered as new evidence in terms of Article 64 para. 2.1 of the FUR Regulations, which gives ground for review.

- Since the Decision was taken, the FUR Regulations have changed. The NDRC is now competent to rule on the merits. As this change of competence may cause procedural problems, all decisions, which have been issued by the NPSC or the NDRC in this matter, are cancelled and the case is referred back to the NDRC in order to review it and issue a new decision.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

19. On 28 July 2016, the Appellant filed its statement of appeal against the Appealed Decision in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (2016) (the "Code").

20. In accordance with Article R51 of the Code, the Appellant filed its appeal brief on 8 August 2016.

21. On 18 August 2016, noting that the Respondents failed to provide their observations with regard to the Appellant's request to submit the present dispute to a sole arbitrator, the CAS Court Office advised the parties that the question of the composition of the Arbitral Tribunal shall be referred to the President of the CAS Appeals Arbitration Division, or her Deputy, in accordance with Article R50 para. 1 of the Code.

22. In accordance with Article R55 of the Code, the First Respondent filed its answer on 29 August 2016, while the Second Respondent failed to file its answer within the prescribed deadline.

23. On 5 September 2016, the parties were advised that, taking into consideration all the circumstances of the present matter, the President of the CAS Appeals Arbitration Division had decided to submit this arbitral procedure to a sole arbitrator.

24. On 12 October 2016, the parties were informed that Dr Marco Balmelli, attorney-at-law in Basel, Switzerland, had been appointed as Sole Arbitrator.

25. On 4 November 2016, the parties were summoned to a hearing to be held on 13 December 2016 in Lausanne, Switzerland.

26. On 13 December 2016, such hearing was held in Lausanne, Switzerland. In addition to the Sole Arbitrator and Mr Fabien Cagneux, Counsel to the CAS, the following persons attended the hearing:

- For the Appellant: Ms Darina Nikitina, Attorney-at-law, Moscow, Russia.
- For the First Respondent: Mr Igor Merkulov, Tyumen, Russia.
- The Second Respondent did not participate at the hearing.
- Ms Irina Merkulova acted as interpreter for Counsel for the First Respondent.

27. No witnesses or experts were heard. The parties were afforded ample opportunity to present their case, submit their arguments and answer the questions posed by the Sole Arbitrator.

28. Before the hearing was concluded, the Appellant and the First Respondent expressly stated that they did not have any objection with the procedure adopted by the Sole Arbitrator and that their right to be heard had been respected.

29. The Sole Arbitrator confirms that he carefully heard and took into account in the subsequent deliberations all of the submissions, evidence, and arguments presented by the parties, even if they have not been specifically summarized or referred to in the present award.

IV. SUBMISSIONS OF THE PARTIES

30. The following outline of the Parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the Parties. The Sole Arbitrator, however, has carefully considered all the submissions made by the Parties, even if no explicit reference has been made in what immediately follows. The Parties' written submissions and the content of the Appealed Decision were all taken into consideration.

A. The Appellant

31. The Appellant filed the following prayers for relief:

1) *The appeal filed by the player Serdyukov Sergei is upheld;*
2) *The appealed decision no. 247/16/0-2 issued by [FUR] Player's Status Committee on 21 June 2016 is annulled and set aside;*
3) *The NPSC Decision dated 9 July 2015 is stayed in force in full;*
4) *FC Tyumen and [FUR] shall bear all costs incurred with the present procedure;*

5) FC Tyumen and [FUR] shall pay to the player Serdyukov Sergei a contribution towards his legal and other costs, in an amount to be determined at the discretion of the Panel.

32. The Appellant's submissions, in essence, may be summarized as follows:

- There was no ground to review the NPSC Decision according to Article 64 of the FUR Regulations. It is obvious that Article 64 para. 2.1 of the FUR Regulations does not apply since the Court Decision (April 2016) was taken after the Decision (December 2015) was rendered.

- Considering Article 64 para. 2.2 of the FUR Regulations, the definition of a "transaction" is provided by Article 153 of the Russian Civil Code (CC): *"under transaction are recognizes actions of individuals and legal entities, aiming on the establishment, the amendment or the cessation of the civil rights and duties"*.

- In the case at hand, neither the Court Decision nor the Appealed Decision held that there was an invalid transaction regarding the bonus payment. Tyumen's Bonus Regulations is of strict labor law nature. Labor agreements cannot be considered invalid in case they worsen the situation for an employee compared to the state's labor regulations.

- According to the Russian Supreme Court, it is inadmissible to apply the consequences of invalidity of civil law transactions to labor relations, because a reversal of the employment contract is impossible.

- Hence, there was no civil relation between the Player and the Club and there was no *"civil transaction"*. Therefore, Article 64 para. 2.2 of the FUR Regulations does not apply.

- Furthermore, the NPSC was not competent to deal with the request for review and it was not competent to annul the Decision in force. The factual background of the Court Decision differed from the case at hand. Furthermore, the Player was not party to such proceedings. Therefore, the Court Decision may not be prejudicial in any way for the Player's case. The Court Decision could only affect the Claimant (*e.g.* Mr Chernykh) and the Club – but not the Player or anyone else.

- On 18 December 2015, it was decided that the Club shall pay the Promotion Bonus. The Club did not appeal against such decision; it is therefore final and *res iudicata* (Article 53 of the FUR Procedural Rules). Since there were no grounds for a review, the Decision shall be considered binding and final.

B. The Respondents

33. The First Respondent filed the following prayers for relief:

1. To refuse the football player's appeal in full.

2. *To impose legal costs of the case at the football player.*

34. The First Respondent's submission, in essence, may be summarized as follows:

- The Bonus Regulations was not valid as the Club's coach did not have the authority to sign such regulation. This was confirmed by the Court Decision.

- The Appealed Decision refers to all the relevant provisions. It is crucial to review the Decision in order to avoid discrepancies between two judgements and to ensure justice for all the employees.

- All bonus payments have been made according to the Bonus Regulations dated 15 January 2010.
- The Player was a third party to the proceedings before the State Court. Therefore, the Court Decision is also binding for him.

35. As mentioned at paragraph 22 of the present award, the Second Respondent did not file its answer within the given time limit.

V. JURISDICTION

36. The jurisdiction of the CAS – which is not disputed by the Parties – derives from:

Article 47 of the FUR Statutes which provides:

"3. In accordance with the relevant provisions of the FIFA, UEFA and [FUR] Statutes, any appeal against final and legally binding decisions of the FIFA, UEFA and [FUR] shall be heard by the CAS (…)".

And Article R47 of the Code which provides:

"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".

The jurisdiction of the CAS is further confirmed by the Order of Procedure duly signed by the Parties.

37. Therefore, the Sole Arbitrator considers that CAS is competent to decide over this case.

VI. ADMISSIBILITY

38. Article R49 of the Code provides as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders his decision after considering any submission made by the other parties".

39. The Appealed Decision was notified to the Appellant on 11 April 2016. The statement of appeal was filed on 3 May 2016, *i.e.* within the deadline of 21 days set by Article 53 para. 2 of the FUR Regulation and R49 of the Code. The appeal brief was filed within due time. The appeal further complied with all other requirements of Articles R48 and R51 of the Code, including the payment of the CAS Court Office fee. Therefore, the appeal is admissible.

VII. APPLICABLE LAW

40. It is generally accepted that the choice of the place of arbitration also determines the law to be applied to arbitration proceedings. The Swiss Private International Law Act ("PILA") is the relevant arbitration rules of law for an arbitration held in Switzerland (DUTOIT B., Droit international privé Suisse, commentaire de la loi fédérale du 18 décembre 1987, Bâle 2005, N. 1 on Article 176 PILA; TSCHANZ P-Y., in Commentaire romand, Loi sur le droit international privé - Convention de Lugano, 2011, n° 1, p. 1627, ad Article 186 PILA). Article 176 para. 1 PILA provides that the provisions of Chapter 12 of PILA regarding international arbitration shall apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and if, at the time the arbitration agreement was entered into, at least one of the parties had neither its domicile nor its usual residence in Switzerland.

41. CAS has its seat in Lausanne, Switzerland. Therefore, PILA is applicable. Article 187 para. 1 of the PILA provides – *inter alia* – that *"the arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such a choice, according to the law with which the action is most closely connected"*. According to the legal doctrine, the choice of law made by the parties can be tacit and/or indirect, by reference to the rules of an arbitral institution. In agreeing to arbitrate the present dispute according to the CAS Code, the Parties have submitted themselves to the conflict-of-law rules contained therein, in particular to Article R58 of the CAS Code (CAS 2008/A/1705 para. 9 and references; CAS 2008/A/1639, para. 21 and references; CAS 2006/A/1141, para. 61).

42. Article R58 of the Code provides the following:

"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

43. Article R58 of the Code indicates how the Sole Arbitrator must determine which substantive rules/laws are to be applied to the merits of the dispute. This provision recognizes the pre-eminence of the *"applicable regulations"* to the *"rules of law chosen by the parties",* which are only applicable *"subsidiarily"*. Article R58 of the Code does not admit any derogation and imposes a hierarchy of norms, which implies for the Sole Arbitrator the obligation to resolve the matter pursuant to the regulations of the relevant *"federation, association or sports-related body"*. Should this body of norms leave a *lacuna*, it would be filled by the *"rules of law chosen by the parties"*.

44. The Sole Arbitrator notes that the Contract refers to the FUR Regulations to be applicable in case of a dispute. Furthermore, both Parties refer in their submissions to Russian law. Therefore, the Sole Arbitrator deems it appropriate to apply the FUR Regulations and, on a subsidiary basis, Russian law to the dispute.

VIII. MERITS

45. It is undisputed that the Decision entered into force after the Club failed to lodge an appeal with CAS. The Appealed Decision held that there was reason to review this final decision while the Appellant denies any grounds for revision of the Decision. The Sole Arbitrator shall therefore evaluate if there are criteria that would led to a revision of the Decision according to Article 64 of the FUR Regulations.

46. The Sole Arbitrator primarily notes that the NPSC, in the Appealed Decision, and the Club both referred to Article 64 para. 2.1 of the FUR Regulations which provides as follows:

> *"1) Newly discovered evidences – essential evidences for the case, which were not and could not been known to the applicant, and existed to the date when decision was made, including (…)".*

47. The Sole Arbitrator considers that, according to such provision, only evidence, *which already existed at the time when the Decision was made*, could give grounds for revision [emphasis added]. Since the Court Decision (dated 19 April 2016) was indisputably taken after the Decision was issued (18 December 2015), the Sole Arbitrator concludes that Article 64 para. 2.1 of FUR Regulations does not apply in the case at hand.

48. Considering Article 64 para. 2.2 of the FUR Regulations, which provides as follows:

> *"2) New evidences, occurred after the decision is rendered and which have essential meaning for case resolution:*
>
> *"recognition by entered into force judgment of regular court of arbitration, court of invalidity transaction, that caused adoption of illegal (inconsistent to regulations) or unreasonable decision on case".*

49. The Sole Arbitrator determines that this provision may only refer to exceptional circumstances as the revision of a final and binding decision may only be granted cautiously.

50. Deeming it crucial to determine the meaning of an "*invalidity transaction*", the Sole Arbitrator turns to the Parties' submissions in order to find guidance with respect to the proper interpretation in Russian Civil Law. The Appellant filed an extract of the Russian Supreme Court's jurisprudence, stating:

> *"Common provisions of civil legislation on invalidity of transactions (articles 166-167 of Civil Code of Russia) are not applicable to labour relations, because labour agreement is not a transaction in meaning of art. 153 of Civil Code of Russia (…)".*

51. The First Respondent did not provide any provision or jurisprudence regarding this issue and did not dispute such jurisprudence filed by the Appellant. In the absence of any other guidance provided by the Parties, the Sole Arbitrator finds that it has not been established that the Court Decision recognized an *"invalidity transaction (sic), that caused adoption of illegal or unreasonable decision on case"*:

- From Russian jurisprudence, the Sole Arbitrator notes that labour relations may not be considered as "transactions". Since the Player was employed by the Club, the Sole Arbitrator deems it sufficiently established that the doctrine of an invalid transaction does not apply to labour relations.

- The Club failed to prove that the Court Decision refers to an invalid transaction: the Court Decision established that the Bonus Regulations do not create liability for the Club. It does however not mention any reference to an invalid transaction.

- The Sole Arbitrator further notes that the Court Decision was taken in a matter between Mr Chernykh and the Club. The Player was not a party to such proceedings. The Club failed to prove that the Court Decision produced any legal effect *vis-à-vis* the Player due to the reference as a "third party" and, being not a party during the procedure that led to the issuance of the Court Decision, the Player is therefore not bound to such decision.

- It is not contested that the Club made several bonus payments during the season. The Club did not provide any other bonus regulations. Therefore, it is obvious that the Club made such bonus payments according to the Bonus Regulations. Thus, the Sole Arbitrator is convinced that Article 6 the Bonus Regulations must apply.

52. The Sole Arbitrator therefore holds that there were no grounds for revision of the Decision according to Article 64 of the FUR Regulations. In conclusion, the appeal dated 28 July 2016 shall be upheld and the Appealed Decision shall be set aside. Therefore, the Decision taken by the NPSC dated 18 December 2015, which ordered the Club to pay bonus payments in the amount of RUB 997,500 to the Player, remains final and binding.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Sergei Serdyukov on 28 July 2016 against the decision rendered on 21 June 2016 by the FUR Players' Status Committee is upheld.

2. The decision rendered on 21 June 2016 by the FUR Players' Status Committee is set aside.

3. The decision rendered on 9 July 2015 by the FUR Players' Status Committee remains in force.

4. (…).

5. (…).

6. (…).

7. All other prayers for relief are dismissed.