Arbitration CAS 2004/A/678 Apollon Kalamarias F.C. v. Davidson Oliveira Morais, award of 20 May 2005

Panel: The Hon. Michael Beloff QC (United Kingdom), President; Mr Pantelis Dedes (Greece); Mr Paolo Roberto Murray (Brazil)

Football
Contract of employment
Primacy of general principles of law over particular laws of particular countries in the context of global sport
Validity of a unilateral option clause inserted in the employment contract

1. **In context of the global sport, which has seen both on the national plane and on the international plane an enhanced emphasis on freedom of movement for players, it is appropriate to qualify particular laws of particular countries by reference to general principles of law which command wider allegiance. This reflects the growth of a *lex sportiva* or a *lex judica* which earlier CAS decisions have recognised.**

2. **Unilateral options are, in general, problematic, since they limit the freedom of the party that cannot make use of the option in an excessive manner. Furthermore, such options are not based on reciprocity, since the right to extend a contract is left exclusively at the discretion of one party.**

Apollon Kalamarias F.C. ("the Club") is a professional football club currently in the First Division of the Greek Football League, Davidson Oliveira Morais ("the Player") is a professional football player of Brazilian nationality.

This is an appeal by the Club against a decision of FIFA of 22 July 2004 which declared invalid the Club's exercise, for the season 2004-2005, of a unilateral option to extend the contract between the player and the club for 4 years.

On 30 July 2003 the Player signed an employment contract ("the Contract") in standard form initially for a period from 30 July 2003 until 30 June 2004.

By the Contract, the parties agreed on a monthly wage for the Player of EUR 587, with extra bonuses at the Christmas and Easter and vacation benefits. In addition, the Player was to receive EUR 96,000 in specified instalments in respect of his acquisition by the Club.

The Contract provided the Club with a unilateral right to renew it annually up to four more years, subject to an obligation to notify the Player within a deadline of 5 days prior to commencement of

the transfer period – which in Greece lasts from 1 July to 31 July –, and to spell out both the financial terms and forms of renewal (e.g. continuous or discontinuous) on an annual or semestrial basis.

On 24 May 2004 the Club sent a letter to the Player in purported exercise of such right, designed to renew the contract from 1 July 2004 until 30 June 2005 on the same financial terms as to wages as before, which he declined to sign.

On 3 June 2004 the Player applied to FIFA to challenge the validity of the unilateral renewal of the Contract by the Club.

On 22 July 2004, efforts to negotiate a solution having aborted, the Dispute Resolution Chamber ("DRC") of FIFA decided that, subject to the Player's acceptance of the renewal Contract, the Contract was terminated as of 30 June 2004 ("the Decision").

The Decision states:

> *"Unilateral options are, in general, problematic, since they limit the freedom of the party that cannot make use of the option in an excessive manner. Furthermore, such options are not based on reciprocity, since the right to extend a contract is left exclusively at the discretion of one party.*
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> *In the case at hand, the extension contained in the relevant employment contract is unilateral to the benefit of the club only, i.e. the stronger party in the employment relationship, and may be exercised by the club during a period of four footballing seasons. Furthermore, in the present matter, as regards the option being currently exercised by the player, there is no apparent gain for the player, as the conditions of employment remain unaltered. The Chamber concurred that the aforementioned specifics of the unilateral extension option in the case at hand do not fit within the general principles of labour law.*
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> *Taking into consideration all the above, the members of the Chamber agreed that the unilateral extension option in the relevant employment contract is not legally binding on the player, Davidson de Oliveira Morais. Consequently, should the player in question not wish to accept the conditions contained in the notification of the extension of contract by Apollon Kalamarias FC, the relevant employment contract has come to an end as its date of expiry, i.e. 30th June 2004".*

On 2 August 2004 the Club received notification of the Decision via the Hellenic Football Federation ("HFF").

Since January 2005 the Player has played for another Greek club, OFI FC Crete.

On 6 August 2004 the Club filed a statement of appeal before the Court of Arbitration for Sport ("CAS") seeking to have the Decision set aside. On the same day the Club applied for the stay of execution of the decision ("stay").

On 11 August 2004 FIFA filed a submission, in which they maintained that the contractual dispute was between the Club and the Player, the Club's prayers for relief were not directed at FIFA and that, as a consequence, FIFA should not be considered as a Respondent to the arbitration, alternatively for an extension of time to provide its arguments to stay.

On 12 August 2004, the Player lodged a submission replying to the Club's arguments with respect to the application to stay the Decision, and on 15 August 2004 lodged supplementary papers.

On 17 August 2004 sitting in Athens, the Panel issued an order on provisional measure whereby it dismissed the Club's application for a stay for reasons set out in the determination of even date, i.e. that someone cannot be compelled to remain in the employment of another against his wishes, and that the remedy for any breach of a valid contract lies in damages This is the position under Swiss law (Article 337 d of the Swiss Civil Code), Greek Law (Section 673 of the Greek Civil Code), and indeed the common law.

On 18 August 2004 the Club filed an appeal brief. We note that the only remedy sought, costs apart, was the annulment of the decision and an acceptance of the validity of the unilateral renewal of the contract.

The Club argues:

(i) By virtue of Greek Sports Law namely art. 90 of Law 2725/1999, the parties may agree that a club can unilaterally renew a contract as long as the following conditions are satisfied, namely:
- the overall duration of the contract, including its extensions, does not exceed five years.
- at the signing of the initial written contract, the financial terms of the renewal were agreed.

(ii) According to such governing Greek law, the Contract and the unilateral renewal option is valid.

(iii) At the time of his signature of the Contract, the Player was aware of the terms of the Contract, including the renewal option which was explained to him.

(iv) The Contract was not, contrary to the DRC's analysis, unilateral but bilateral.

On 20 September 2004 the Player filed an answer.

The Player argues:

(i) at the time of the signature, not being fluent in Greek, he was unaware of the Club's right unilaterally to extend the duration of the Contract and it was not explained to him.

(ii) The dispute should be decided on the basis, as he put it in his answer of FIFA's *"wide knowledge on international laws regulating football contracts throughout the world"*, and the DRC's Decision upheld on the basis that the unilateral option was invalid.

The Player expressly conceded at the outset of the hearing any allegation that the Club had not breached any term of the contract in the first year of its subsistence ("the Players Concessions"). Various allegations and counter-allegations about the parties' behaviour vis-à-vis each other both before and after the inception of the dispute between them featured in the documentation, and to an

extent in the oral evidence. We noted them, but no more, since they appeared irrelevant to the issues, given the player's concessions.

LAW

Jurisdiction

1. Art.R27 of the Code of Sports-related Arbitration ("the Code") provides that the Code applies whenever the parties have agreed to refer a sports-related dispute to the CAS. Such disputes may arise either out of a contract containing an arbitration clause, or involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies provide for an appeal to the CAS.

2. In disputes between players and clubs adjudicated upon by FIFA, the jurisdiction of CAS as an appellate body derives from by Art. 59 and 60 para I of the Statutes of FIFA.

3. Furthermore the Decision stated expressly that it might be appealed against before CAS.

4. In principle CAS therefore has jurisdiction to rule on this matter.

5. Although the Club requests the annulment of the Decision it is clear that the true dispute is between the Club and the Player with the DRC being only the first tier adjudicative body. Since FIFA did not wish to be a party, and accepted, in accordance with recent practice, that it would be bound by any decision of CAS, we decided that it should not remain a Respondent, although it could participate as an interested party. In the event it has chosen not to do so.

Applicable Law

6. Art. R58 of the Code provides that:

   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 decisions.

7. Under Art. R58 accordingly primacy is given to the rules of law chosen by the parties. If such choice has not been made, then the Panel has an option; either to apply the law of the country in which the respondent body is domiciled; or to apply the rules of law, the application of which the Panel deems appropriate.

8. In this case the contract specifically states that it is *"in accordance to 1. Law 2725/99"* (English translation). Law 2725/99 is Greek sports law. In our view this is an express choice by the parties of Greek law as the governing law.

9. The Panel must accordingly apply Greek law, subject only to overriding considerations of public policy.

Admissibility

10. The statement of appeal by the Club was filed within the deadline specified in the FIFA Statutes and the decision i.e. 10 days. It complies with the requirements of Art. R48 of the Code.

11. It follows that the statement of appeal is admissible.

Issues

12. Did the player know what he was signing? ("the factual issue").

13. In any event is the unilateral option valid? ("the legal issue").

A. Factual issue: Analysis

14. It is indisputable that the Player signed the contract. It seems to us that, accordingly, it is for him to establish that he did know what he was signing, especially since it involved an important career step from amateur to professional football in Greece.

15. The Player's evidence was that he took the contract on trust in the light of a previous association – which was not clearly defined – with the Club's President, Mr Papadopoulos, another signatory to the contract; that he read nothing before the third page which contained the wages to be paid up to 2008; that he took those figures as "symbolic" only; and that he never read still less appreciated the full meaning of the terms of the contract until the Club sought to exercise its option shortly before his application to FIFA, that he was not fluent in legal Greek nor knowledgeable about Greek law and never had explained to him the existence or significance of the unilateral option.

16. The evidence on behalf of the club was given by former employees Mr Luiz Dacroce, the Deputy Coach and Mr Eduardo Amorim, the Coach, both of Brazilian origin and Portuguese speakers. The former stated, and the latter confirmed, that he had both translated into the player's native Portuguese the contract and its terms, including that of the unilateral renewal, and explained them to the player. Mr Amorim also said that the Player was assisted by a Greek lawyer. It is however, clear that Mrs Tsakono, an attorney, was a witness to the contract on behalf of the Player's Union – although the Player averred ignorance of her role – and a Mr

Savidis signed it for the Hellenic Football Federation ("HFF"). Mr Amorim also said that the Player had with him a Brazilian agent although he was not able to provide any convincing confirmation of their identity. The Player denied this too.

17. We are sensitive to the difficulties posed in assessing where the truth lay, given that the key witnesses all had to use the services of a professional interpreter, and, in the case of the Player, of his wife. But nonetheless we had the advantage of seeing and assessing the witnesses, and our assessment of their testimony and demeanour was confirmed by other matters to which we now refer.

18. We do not consider that the Player discharged the evidential burden, which in our view, lay upon him (see para 14 above). Indeed we found the evidence produced on behalf of the Club more compelling on this issue. Our main reasons are these:

(1) We find it difficult to accept that anyone, especially someone as acutely conscious of his financial interests as the Player clearly is, would simply ignore the text of an important agreement.

(2) In particular it is inherently unlikely that he only looked at and saw the third and fourth pages of the contract, which clearly started at paragraph 7 only, without calling for the earlier pages.

(3) The projected wages at page 3 indicated a possible duration of the contract until 2008. The figures were in Arabic as well as Greek script. This would surely have alerted him to the possibility that it was contemplated he might remain with the Club for up to 5 years. His explanation that the figures were "symbolic" is curious in its choice of word, and unconvincing in its analysis.

(4) Whereas up to the time that he gave oral testimony, the Player's case, articulated in correspondence, drafted on his instructions by his wife or mother-in-law, was that he did not have any full explanation of the unilateral option, in his testimony he actually suggested that Mr Dacroce mislead him by describing the option as bilateral. We can see no reason why Mr Dacroce – or anyone else on behalf of the Club – should have deliberately or even inadvertently mistranslated or misrepresented a standard term, used, we were told, in several other contracts of the same period. The Club had no reason to believe that the renewal option could ever be held to be unlawful: on the contrary the validity of its terms was vouched for by Greek law.

(5) The Player's explanation that he signed the contract in the presence of Mr Dacroce only strikes us as equally implausible, given the other signatures to it which on their face were contemporary, and the fact that in the ordinary course of events clubs are represented when players sign.

(6) The Player's objection to the unilateral renewal stemmed from the fact that, as a member of the team which had won promotion to the first division of the HFL, he was worth, in his view, more than the projected salary in the contract which was frozen for the second year in respect to which the option was renewed. This provided a motive for seeking to escape from the toils of what he now found to be an irksome obligation by being less than candid about the actual facts.

(7) The player signed a contract with OFI Crete FC which also provides for a unilateral option, albeit, in its amended form, for one year only. The players' explanation was that he was happy to sign the later contract when he knew what was involved was, again, not very convincing since his objection to the earlier contract with the Club was as to its content, not merely that its content had not been explained.

19. We therefore reject the Player's case that he was not bound by his signature.

B. Analysis: The Law

20. On the one hand

(1) By letter dated 20 July 2004 the HFL confirmed to FIFA that the agreement was legal *"according to Greek governing laws"*.

(2) The Agreement appears indeed conformable to Article 90 of Law 2725 which applies to sportsmen and women; prohibits a contract for a professional athlete of more than five years duration: and in subparagraph 3 allows for a right of unilateral renewal by the club where the contract is less than five years, subject to the specification of the financial terms of renewal.

(3) The Agreement is in standard form and has self-evidently been utilised for several years and in the case of many footballers without previous effective objection.

(4) To set it aside would arguably, as the appeal brief puts it

"amend the Greek sports law in a way that jeopardizes the future and stability of all Greek clubs since all players who had already signed and agreed for a unilateral renewal could easily breach their contracts without even paying compensation to their clubs".

21. On the other hand

(1) Indisputably there is inequality of bargaining power between clubs and players.

(2) The option in the Agreement is unilateral; the advantages are all on the side of the club.

(3) Even if the financial terms had to be specified in advance, they necessarily take no account of the possible enhancement of a players value – and hence earning power – over a five year period eg: if he becomes an international player during that time.

(4) Five years is a significant portion of a footballer's active career: whereas in other walks of life it is or may be a relatively small fraction.

(5) Although the exercise of the option – if exercised – cannot in law compel the Player to play for a club, it can render him liable to damages if he does not do so, and thus achieve the same effect in fact, if not in law.

(6) The Club, under the option, need not give the Player any notification of the intent to exercise the option until five days prior to the commencement of the transfer period. This would leave the Player, in respect of whom such option was not exercised, with little time to find an alternative club. The Club by contrast would enjoy the luxury of a late choice.

22. The situation under the standard form Greek footballers contract can, of course, be distinguished from a situation where a club and player sign, say, a five year deal. In that instance each is bound. The player takes the risk that his value may increase, the club that his value may decrease. But there are advantages to both sides not least of stability.

23. We received no convincing response to our question of the club and its lawyers – What advantage did the player gain from the unilateral option? To say that he subscribed to it as a price for joining the second division club from a fourth division club avoids rather than answers our question.

24. It is noticeable that the DRC of FIFA, whose own regulations are designed to achieve contractual stability, nonetheless, find the Greek sports law in relation to the unilateral law inconsistent with *"general principles of labour law"*.

25. In our view, in context of the global sport, which has seen both on the national plane (*Eastham v Newcastle United* 1964 Ch. 413) and on the international plane (*Bosman* ECJ Case C415/93) (in both of which transfers on the rules were impugned) an enhanced emphasis on freedom of movement for players, it is appropriate to qualify particular laws of particular countries by reference to general principles of law which command wider allegiance. This reflects the growth of a *lex sportiva* or a *lex judica* which earlier CAS decisions have recognised (CAS 98/200 para 156) when the Panel said:

"The Panel is of the opinion that all sporting institutions, and in particular all international federations, must abide by general principles of law. Due to the transnational nature of sporting competitions, the effects of the conduct and deed of international federations are felt in a sporting community throughout various countries. Therefore, the substantive and procedural rules to be respected by international federations cannot be reduced only to its own statutes and regulations and to the laws of the country where the federation is incorporated or of the country where its headquarters are. Sports law has developed and consolidated along the years, particularly through the arbitral settlement of disputes, a set of unwritten legal principles – a sort of lex mercatoria for sports or, so to speak, a lex ludica – to which national and international sports federations must conform, regardless of the presence of such principles within their own statutes and regulations or within any applicable national law, provided that they do not conflict with any national "public policy" ("ordre public") provision applicable to a given case. Certainly, general principles of law drawn from a comparative or common denominator reading of various domestic legal systems and, in particular, the prohibition of arbitrary or unreasonable rules and measures can be deemed to be part of such lex judica".

26. We note the reliance on general principles of labour law in another CAS case involving a contract governed by Greek law (CAS 2004/A/640 para. 13), although the issue which confronted the Panel there was markedly different from that which confronts us, and the solution lay in applying, not qualifying Greek law.

27. For these reasons we come to the conclusion that the DRC's decision ought to stand, it was handed down by a multinational Panel of broad international experience who would enjoy a collective wisdom and appreciation of where the acceptable limits on restraint of trade lay. It is appropriate to mitigate the letter of Greek law by the spirit of general principles.

Conclusion

28. For the above reasons we would dismiss the appeal.

The Court of Arbitration for Sport rules:

1. The appeal filed on 5 of August 2004 by Apollon Kalamarias F.C. against the decision issued on 22 July 2004 by the FIFA Dispute Resolution Chamber is dismissed.

(…).