Arbitration CAS 2006/A/1157 Club Atlético Boca Juniors v. Genoa Cricket and Football Club S.p.A, award of 31 January 2007

Panel: Mr Peter Leaver (United Kingdom), President; Mr José Juan Pintó (Spain); Mr Jean-Pierre Morand (Switzerland)

Football
International transfer of a player
Provisional registration of the player

According to a long and consistent line of CAS jurisprudence, as well as the jurisprudence of many municipal systems of law, a person may not be required to perform a contract for personal services against his or her will, *a fortiori* if this person is still a minor that has moved from a country to another one with his family. It is inconceivable that any tribunal anywhere in the world would require this person either to be separated from his family, and have to move back to his former country against his will, or require his family once more to uproot itself from the new country to move back to the former country in order to perform the disputed extension of an employment contract.

The Appellant, Club Atlético Boca Juniors ("Boca"), is a professional football club, which competes in the Primera División, the top football league competition in Argentina.

The Respondent, Genoa Cricket and Football Club S.p.A ("Genoa"), is also a professional football club. Genoa currently competes in Serie B, the second football league competition in Italy.

F. is currently 16 years old. He was born in 1990 at Rosario, Argentina. It appears that F. has dual Italian and Argentine nationality.

On 18 September 2005, when he was 15 years old, F. entered into a contract with Boca pursuant to which he agreed to play football only and exclusively for Boca. The contract was stated to terminate on 30 June 2006, when F. would have been 16 years old, but Boca was given the right to extend the term twice. If Boca exercised that right, each extension would be for one year. The contract contains the signatures of F., his – unidentified – legal representative and, on behalf of Boca, Mr Pompilio and Mr Buzio, respectively Boca's First Vice-President and Secretary-General.

In December 2005 F. and his family moved to Italy.

On 1 July 2006 F. entered into a contract with Genoa pursuant to which he agreed to play football for Genoa for three years. The contract was counter-signed by F.'s parents as F. was still a minor.

On 6 July 2006 the Italian Football Federation, on Genoa's behalf, requested the Argentinean Football Association to issue an International Transfer Certificate in respect of F.

On 14 July 2006 the Argentinean Football Association responded to the request, stating that F. was still under contract to Boca. In summary, Boca asserted, through the Argentinean Football Association, that on 31 May 2006 it had exercised the right to extend F.'s contract by one year. According to Boca, it exercised the right by sending a telegram to F. to an address in Buenos Aires.

The dispute was referred to the Fédération Internationale de Football ("FIFA"), which, in turn and in accordance with its Statutes and Regulations, referred the matter to the Single Judge of the Players' Status Committee.

On 22 August 2006 the Single Judge decided that the Italian Football Federation could provisionally register F. as a Genoa player. The Single Judge recorded that he had jurisdiction to adjudicate as to whether a provisional registration should be issued in respect of F. Provisional registration is the first step in a case where there is an issue between clubs or associations as to whether an International Transfer Certificate should be issued. Once he had decided that he had jurisdiction, the only issue before the Single Judge was whether the provisional registration should be issued. That is important in the light of certain submissions by Boca in this appeal to which reference will be made later in this Award. The Single Judge first considered whether there was a contractual relationship between F. and Boca. He referred to the provision by which Boca had a right to extend the term of the contract, and to the submissions put forward on behalf of F. that, first, Boca had not communicated the exercise of the right to him, and, secondly, that even if Boca had exercised the right any extension would have to be considered null and void. In regard to the second submission, the Single Judge referred to the jurisprudence of the FIFA Dispute Resolution Chamber and to CAS jurisprudence which had concluded that unilateral options were, in general, void as being in unlawful restraint of trade.

In support of the validity of the unilateral right to extend the contract, Boca relied upon a legal opinion from Dr Wolfgang Portmann, a professor of private and employment law at Zurich University, dated 10 February 2006 ("the Opinion"). The Opinion was addressed to FIFA. In the Opinion Dr Portmann expressed the view that such provisions are *"admissible in principle"* from the point of view of Swiss private international law, but that there had to be certain safeguards in relation to their exercise. One of those safeguards was that the provision had to appear in bold characters immediately above the player's signature.

The Single Judge noted that the provision in the contract between F. and Boca did not appear in that style or in that position, and he, therefore, doubted that the provision was enforceable. In those circumstances the Single Judge concluded that he also had to be doubtful that a contractual relationship existed between F. and Boca. Accordingly, the Single Judge authorised the Italian Football Federation to register F. provisionally with Genoa.

Finally, the Single Judge made it clear that his decision was made without coming to any conclusion as to the substance of the contractual dispute, that is, whether Boca had exercised its right, and, if it

had, whether that right was enforceable, and without prejudice to any claim that Boca might make for compensation for contractual breach. No such claim was before the Single Judge.

On 19 September 2006, Boca filed a statement of appeal with the CAS in which it sought the revocation of the Decision.

LAW

Jurisdiction

1. CAS jurisdiction derives from Art. R47 of the Code of Sports-related Arbitration (the "Code") and of Art. 60 ff. of the FIFA Statutes (edition August 2006). Furthermore, Art. 23 para. 3 of the Regulations provides, inter alia, that decisions reached by the Single Judge may be appealed to the CAS.

2. Further, by signing the Order of Procedure the parties accept that CAS has jurisdiction to hear this appeal.

Admissibility

3. There is no dispute as to the admissibility of the appeal, either in relation to its filing within the deadline provided by Art. 61 of the FIFA Statutes, or in respect of its compliance with all other requirements of Art. R48 of the Code.

4. It follows that the appeal is admissible.

Applicable Law

5. Art. R58 of the Code is in the following terms:

   "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".

6. Art. 60 para. 2 of the FIFA Statutes further provides for the application of the various regulations of FIFA, and, additionally, Swiss law.

7. In the present matter, the parties have not agreed on the application of any particular law. Therefore, the rules and regulations of FIFA shall apply primarily and Swiss law shall apply subsidiarily

Boca's Appeal

8. The basis of Boca's appeal is that the Single Judge had misdirected himself in deciding that F. had not been notified of the extension of the contract: *"That is to say, the decision is sustained in an inaccurate assumption, which is that the player was not notified of the extension of his labor contract …"*.

9. But, this is a misrepresentation of the Single Judge's decision. The Single Judge referred to the Opinion, on which Boca relied, and concluded that on a *"very preliminary evaluation alone of the contract at stake"*, the contract did not comply with the formal requirements identified in the Opinion. He went on to state that this conclusion led him further to conclude that he had to *"doubt that a contractual relationship … still subsists"* between F. and Boca. He made very clear that he was not making a decision on the *"substance of the contractual dispute"*.

10. The Panel is of the opinion that, in this section of the Decision, the Single Judge was simply stating that, the burden being upon Boca to establish that the option on which it relied was enforceable, Boca had failed to discharge that burden. In particular, the contract upon which Boca relied did not conform to the requirements for the grant of an enforceable option stipulated in the Opinion.

11. The Single Judge made very clear that the provisional registration did not preclude Boca making a claim for compensation for contractual breach, but that Boca would have to prove that it was entitled to such compensation.

12. Thus, the only decision made by the Single Judge from which Boca can appeal is whether the Single Judge was entitled to reach the conclusion that Boca had failed to discharge the burden of proof that the option was enforceable. Although comparisons may not always be helpful, the Panel views the decision of the Single Judge as being similar to the decision that a Court would have to make when being asked to grant a party interlocutory relief, namely, has that party satisfied the Court that there is a serious issue to be tried and that interlocutory relief should be granted because damages would not be an adequate remedy.

13. The Single Judge clearly concluded that there was an issue to be tried, namely, whether a contractual relationship still subsisted, although he was of the view that Boca's case was weak in the light of the Opinion, but that, in any event, damages, *"compensation for contractual breach"*, would be an adequate remedy for Boca.

14. The Panel has been at pains to identify what the Single Judge decided, so that the scope of the appeal could be clearly understood. This aspect is particularly important in the present appeal because Boca appears to be under the impression that the Panel could, if it were to allow the appeal, not only revoke the provisional registration but also make an award of compensation in

its favour. That argument appears in Boca's correspondence with the CAS Court Office, although no such claim is made by Boca in its statement of appeal or in its appeal brief. In the light of the analysis contained above as to the ambit and scope of the Decision, it would not be open to the Panel to make any such award, even if it were to allow Boca's appeal. The issue of compensation, if any, is not a matter before the Panel.

15. Genoa supports the Decision, and submits that the appeal should be dismissed. Genoa relies upon the reasoning of the Single Judge, but, in addition, submits that no such option as is relied upon by Boca is or can or should be enforceable, whether under Argentinean law or Swiss law or the Regulations.

Decision

16. The Panel has set out its analysis of the Decision above. It agrees with the Decision, although it does not entirely concur with the Single Judge's reasoning. The Single Judge appeared to place considerable weight on the Opinion, and implied that, if he had not had such doubts about whether the option had been exercised in compliance with the conditions set forth in the Opinion, he would have refused the provisional registration. The Panel is not prepared to give the Opinion such weight. Indeed, the Panel has great difficulty in following Dr Portmann's reasoning, and in accepting the validity and enforceability of a unilateral option.

17. Fortunately, the Panel does not have to decide that issue in the present case. That is because the Panel would put its decision on a wider basis. Boca's case essentially is that F. should be required to play for Boca, and should not be permitted to play for another club during the period of the disputed extension of the contract. Such a submission founders on a long and consistent line of CAS jurisprudence, as well as the jurisprudence of many municipal systems of law, that will not require a person to perform a contract for personal services against his or her will (see for instance CAS 2006/A/1100).

18. The present case is an a fortiori case. F. is still a minor. He has moved from Argentina to Italy with his family. He wants to remain in Italy with his family. The Panel finds it inconceivable that any tribunal anywhere in the world would require F. either to be separated from his family, and have to move back to Argentina against his will, or require F.'s family once more to uproot itself from Italy to move back to Argentina.

19. It follows that the Panel dismisses Boca's appeal.

20. The Panel wishes to make it clear that nothing that it has stated in this Award is to be taken as any reflection on Boca's entitlement to claim compensation. Whether Boca is entitled to any compensation is not a matter with which this Panel is concerned, any more than was the Single Judge. Nor should anything that the Panel states in this Award be taken as an indication that the Panel has formed any view as to whether the option was valid and enforceable, or whether, if it was, whether it was validly exercised.

The Court of Arbitration for Sport rules that:

1. The appeal by Club Atletico Boca Juniors against the decision issued on 22 August 2006 by the Single Judge of the FIFA Players' Status Committee is dismissed.

(…)