

FIFA and the CAS rule on rescission/buy-out clauses

It is well known that coordination between rescission clauses/buy-out clauses and the solidarity mechanism is far from a peaceful issue in the world of football. This is confirmed by precedents, such as CAS award 2011/A/2356 *SS Lazio SpA v. CA Vélez Sarsfield* (player Mauro Zárate), which mainly focussed on the scope of the term 'transfer' for the purposes of the solidarity contribution provisions. Recently a new pronouncement on this matter has been issued by the Court of Arbitration for Sport ('CAS') in a conflict between AS Monaco and Sevilla FC following the move of player Geoffrey Kondogbia (CAS 2015/A/4188). Jordi López Batet, Partner at Pintó Ruiz & Del Valle, provides detailed commentary on the reasoning followed in the case.

At the beginning of the 2012/13 season, the French club RC Lens transferred Geoffrey Kondogbia to Sevilla FC. The new club and the player signed an employment agreement for five sporting seasons, which included a 'rescission clause' in accordance with the Spanish Royal Decree 1006/1985, which dictates the special labour relationship of professional athletes (the 'Royal Decree'). By virtue of this clause, in the event of early unilateral rescission of the contract by the player before the expiration of the agreed term, the player was obliged to indemnify Sevilla FC in the sum of €20 million.

At the end of the first contractual season, the player wanted to leave Sevilla FC and be hired by AS Monaco, and as such notified Sevilla of his intention to rescind the employment agreement by paying €20 million on the basis of



Jordi López Batet

the rescission clause. A cheque issued by AS Monaco was deposited in the Spanish Football League account to be paid to Sevilla and the player and AS Monaco signed a new employment agreement.

Some months later, AS Monaco received a claim requesting payment of the solidarity contribution from RC Lens as regards the 'transfer' of the player. AS Monaco replied to the request stating (i) that it was not aware of any established legal precedent pursuant to which an obligation to pay a solidarity contribution arises following the movement of a player based on the exercise of the rescission right granted to players in the Royal Decree, and (ii) that it would not be appropriate for AS Monaco to make any solidarity contribution unless it was established by all the parties involved that the move of player fell within the scope of the solidarity contribution provisions of the FIFA Regulations on the Status and Transfer of Players ('RSTP') and that Sevilla FC confirmed its willingness to reimburse AS Monaco for the relevant amount.

In spite of AS Monaco, Lens insisted on its claim. AS Monaco decided to inform Sevilla FC about Lens' request and the possibility that FIFA could consider the move of the player a 'transfer' in the sense of the FIFA RSTP, and asked FC Sevilla to provide its view on two possibilities to solve the matter: either Sevilla pay the solidarity contribution sum directly to Sevilla FC or Sevilla reimburse the solidarity contribution that AS Monaco may pay to Lens. Sevilla FC's replied: it had nothing to pay neither to RC Lens nor to AS Monaco.

RC Lens started proceedings with FIFA against AS Monaco requesting payment of the

solidarity contribution, on the basis that the player had been effectively 'transferred' (in the sense of the FIFA RSTP) from Sevilla FC to the respondent. AS Monaco sustained that no transfer giving rise to the payment of a solidarity contribution took place, and that in the event that AS Monaco was ordered to pay this contribution, Sevilla FC should reimburse AS Monaco in accordance with FIFA jurisprudence regarding similar cases in which 100% of the transfer compensation (without deduction of the 5% solidarity contribution) was paid to the player's former club. Sevilla FC was thus called to join the proceedings, in which it stated that the €20 million received exercising the rescission right foreseen in the Royal Decree was to be considered a net amount to compensate the loss or damage caused by the player's leaving, and that any solidarity compensation that may exist should be paid by the new club, AS Monaco.

The FIFA Dispute Resolution Chamber accepted RC Lens' claim, ordered AS Monaco to pay €606,600 plus interest to RC Lens as a solidarity contribution and rejected AS Monaco's claim for reimbursement against Sevilla FC. FIFA considered that a transfer had taken place and thus the provisions in Article 21 and Annex 5 of the FIFA RSTP were to be applied, and that in view of the particularities of the case, the characteristics of buy-outs in connection with the Royal Decree and the indemnification clause, no reimbursement from Sevilla FC to AS Monaco could take place.

The issues

The particularities of this case have mainly to do with the parties' reaction to the FIFA decision and the factual and 'procedural' decisions thereafter. On one hand,

AS Monaco, instead of appealing the FIFA Decision *in toto*, decided to pay the sum it was ordered to pay to RC Lens whilst at the same time appealing the FIFA Decision before the CAS but only to the extent that Sevilla FC reimburse the payment it made to RC Lens. On the other hand, Sevilla FC did not appeal the FIFA Decision; however, at the time of answering the appeal filed by AS Monaco, Sevilla FC intended to file a sort of counterclaim requesting that the CAS declare that no transfer of the player took place and thus that no solidarity contribution was due.

Therefore, the situation of the dispute in this second instance became completely different: the order of payment of the solidarity contribution to RC Lens had become final and binding, as it was not appealed by AS Monaco; this order was executed, as AS Monaco paid the relevant sum to RC Lens, which thus was not a party to the proceedings anymore; and Sevilla, by not appealing the FIFA Decision, appeared to consent to its terms but at the same time was seeking for a declaration that a transfer of the player never took place and that no solidarity contribution had to be paid.

In light of this, the Panel had to address three issues: (i) whether it could enter into the discussion regarding the consideration of the player's move as a 'transfer' for the purposes of the solidarity contribution; (ii) whether the counterclaim filed by Sevilla FC was admissible; and (iii) whether Sevilla FC had to reimburse AS Monaco the sum paid to RC Lens.

With regard to the first issue, the Panel made it clear that the fact that AS Monaco's appeal was limited to the question of the payment's reimbursement prevented the Panel from considering the transfer matter, as it had been expressly excluded

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from the object of the appeal, and therefore that it would assume in the resolution of the case that the move of the player constituted a transfer. This conclusion, together with the fact that RC Lens was not a party to the proceedings at the CAS and the content of Article R55 of the CAS (which stipulates that counterclaims are no longer admissible in appeal proceedings before the CAS), influenced the Panel's decision on the second issue: the counterclaim filed by Sevilla FC had to be declared inadmissible.

Therefore, the *quaestio litis* was limited to the third issue (the appropriateness of the reimbursement requested by Sevilla FC). In this respect, the Panel noted that (i) in accordance with the FIFA RSTP, 5% of any compensation payable to the former club shall be deducted and distributed by the new club as solidarity contribution to the clubs involved in his training and education, (ii) in accordance with the 2005 Commentary to the FIFA RSTP, if the new club has paid the entire transfer compensation to the former club without deducting the 5% solidarity contribution, a claim of the new club for recovering the amount paid in excess may be lodged with FIFA, and (iii) the parties are free to agree on "internal arrangements" (the Panel's words) concerning the payment of solidarity contribution as long as the new club remains responsible for the training clubs. The Panel stated that in the case at stake, given the special configuration of the "rescission clause," the parties neither negotiated the transfer conditions nor agreed on issues related to the payment of the solidarity contribution, given it was undisputed that the player's employment agreement termination could only be effected

if €20 million was paid to Sevilla FC. The Panel stressed that AS Monaco used the opportunity offered by the Royal Decree to hire the player, and thus it shall accept any inconvenient consequences thereof, and that prior to executing the transaction, it was aware of the FIFA rules concerning solidarity contribution and of the provisions of the Royal Decree. This led the Panel to believe that AS Monaco was obliged to pay the solidarity contribution and that there were no grounds for ordering Sevilla FC to reimburse AS Monaco for the sum paid to RC Lens. The Panel confirmed the FIFA Decision.

Some considerations

Questions in regards to the award:

- The configuration of the appeal prevented the Panel from deciding on one of the key issues: whether the move of the player *in casu* was to be considered a transfer. It would have been interesting to see how the Panel would have addressed the other issues and how the Panel would have considered related precedents such as CAS 2010/A/2098 *Sevilla FC v. RC Lens* or the *Zárate* case.

- The Panel, while dealing with the counterclaim filed by Sevilla FC, mentioned that it cannot be ruled out in advance that a party, in specific situations, may have sufficient interest in appealing a decision even if it is happy with the final outcome, so that it is not precluded from making submissions concerning certain elements of the decision which the counterparty decided to exclude from the appeal.

At this stage, we will have to see how the situation evolves when similar cases are brought before FIFA and the CAS.

Jordi López Batet Partner
Pintó Ruiz & Del Valle, Barcelona
jlopez@pintoruilzdelvalle.com