



Arbitration CAS 2012/A/2957 Football Club Khimki v. Eljver Rača, award of 5 February 2014

Panel: Mr Dirk-Reiner Martens (Germany), President; Mr Mika Palmgren (Finland); Mrs Vesna Bergant Rakocovic (Slovenia)

Football

Contract between a club and a player's agent

Conditions for appointing a handwriting expert

CAS scope of review of the expert report

1. The following three considerations have to be taken into account in determining that a handwriting expert is necessary: (i) one of the main issues of the case is whether the player's signature on the litigious documents is genuine; (ii) it is impossible for the untrained observer to detect a forged signature; and (iii) a handwriting evidence evaluation takes into consideration several different variables, such as the type of printed material present, the paper, the handwriting and the shape of handwritten characters and also requires training, experience and specific tools and skills.
2. Given its lack of expertise in handwriting analysis, a panel shall limit its examination of the expert report to a review of whether the expert has considered the correct issues and exercised his/her expertise in a manner which does not appear to be arbitrary or illogical. Basically, the panel must determine whether the expert's opinion is soundly based on the primary facts and whether the expert's process led to a sound conclusion derived from those facts. Thus, the panel will take into consideration, *inter alia*, the expert's standing, experience, and cogency of his/her evidence in analysing his/her report.

I. FACTUAL BACKGROUND

1. PARTIES

- 1.1 Football Club Khimki (hereinafter referred to as the "Appellant" or the "Club") is a Russian football club which is a member of the Russian Football Union ("RFU"). It is currently playing in Russia's first division.
- 1.2 Mr Eljver Rača (hereinafter referred to as the "Respondent" or "Mr Rača") is a players' agent licensed by the national football association of Croatia.
- 1.3 Hereinafter, the Appellant and the Respondent are collectively referred to as the "Parties".

2. FACTS

- 2.1 In broad terms, Mr Raça and the Club agreed to three contracts in which Mr Raça would be compensated for negotiating a contract extension for D., a player with the Club. The Club claims that the parties agreed to a fourth contract which lowered Mr Raça's compensation by EUR 300,000, while Mr Raça claims that he did not sign this alleged agreement, and, therefore, he is entitled to the EUR 300,000, still owed to him under the original agreements. In the present proceedings, the Club seeks to have the decision of the Single Judge of the FIFA Players' Status Committee dated 24 April 2012 overturned which provided that Mr Raça was entitled to receive EUR 300,000, in compensation still owed to him under the original contracts.
- 2.2 Below is a summary of the main relevant facts, as established on the basis of the Parties' written submissions and their pleadings at the hearing. Additional facts may be set out, where relevant, in connection with the legal discussion which follows.
- 2.3 On 25 December 2008, the Parties agreed to a business agreement in which the Club agreed to pay EUR 600,000, to Mr Raça on or before 31 December 2009 in the event that D.'s contract was extended with the Club ("First Contract").
- 2.4 On 10 July 2009, the Club remitted a payment of EUR 100,000, to Mr Raça.
- 2.5 On 31 July 2009, the Parties agreed to a second business agreement amending the First Contract by requiring the Club to pay EUR 100,000, to Mr Raça on or before 31 December 2009 ("Second Contract"). On the same day, the parties also executed an "Acceptance Certificate", i.e. a receipt, which acknowledged that Mr Raça had *"fulfilled his obligations... to the fullest extent"*.
- 2.6 On 15 October 2009, the Parties agreed to a third business agreement in which Mr Raça would receive EUR 500,000, in exchange for conducting negotiations to extend D.'s contract ("Third Contract"). Article 2.1 of the Third Contract reads as follows:
- "The amount of remuneration for the Agent is fixed and is equal to 500,000.00 (five hundred thousand) Euro, VAT is not applicable, that shall be paid till 31.12.2009. Payment in part is possible".*
- This Third Contract also provided that the First Contract would *"no longer be valid"*.
- 2.7 On 17 December 2009, the Club remitted a payment of EUR 100,000, to Mr Raça.
- 2.8 On 23 December 2009, the Club remitted a payment of EUR 100,000, to Mr Raça.
- 2.9 After initially seeking to file a claim with the RFU, Mr Raça filed a claim for EUR 300,000, against the Club with FIFA on 24 January 2011.
- 2.10 On 7 February 2012, the Club argued for the first time in its final submission to FIFA that the Parties executed a fourth business agreement in which Mr Raça purportedly agreed to a EUR 300,000, reduction of his commission owed under the Third Contract in exchange for the Club's agreement to allow D. to leave on a free transfer ("Fourth Contract"). Article 1 of the Fourth

Contract reads as follows:

“Paragraph 2.1 of the agency agreement No. 15/10-09 of October 15, 2009 “Agreement Price” shall be amended as follows:

“The amount of remuneration for the Agent is fixed and is equal to 200,000.00 (two hundred thousand) Euro, VAT is not applicable, that shall be paid till 31.12.2009. Payment in part is possible”.

The Club also provided two Acceptance Certificates purportedly executed on 29 December 2009. Mr Raça refutes that he ever signed the Fourth Contract or the two Acceptance Certificates (“Disputed Agreements”).

- 2.11 On 24 April 2012, the Single Judge of the FIFA Players’ Status Committee (“Single Judge”) rendered his decision. The Single Judge ruled that Mr Raça was entitled to the EUR 300,000, based on the Third Contract (“FIFA Decision”). Despite the Single Judge’s request to receive the originals of the Disputed Agreements from the Club, he had not received these originals by the time that he rendered his decision. Thus, the Single Judge concluded that *“said documents should not be taken into account in the present analysis”*.
- 2.12 On 27 September 2012, the FIFA Decision was sent to the Parties.

3. PROCEEDINGS BEFORE CAS

- 3.1 By letter dated 17 October 2012, the Appellant filed its Statement of Appeal against the Respondent and FIFA with the Court of Arbitration for Sport (“CAS”) with respect to the decision issued by the FIFA Single Judge of the Players’ Status Committee on 24 April 2012. The Appellant submitted the following prayer for relief in its Statement of Appeal:
- “To overturn the ruling of the Single Judge of the FIFA Players’ Status Committee in full”.*
- The Appellant also requested the stay of the FIFA Decision.
- 3.2 On 22 October 2012, the CAS Court Office acknowledged receipt of the Statement of Appeal. The CAS also included a CAS decision that directly addressed the Appellant’s request for a stay of execution and asked the Appellant to state whether he wished to continue with his application in light of this jurisprudence.
- 3.3 By facsimile dated 25 October 2012, the Appellant withdrew his application for a stay of execution.
- 3.4 By facsimile dated 31 October 2012, FIFA requested that it be excluded as a Respondent in the action.
- 3.5 By facsimile dated 1 November 2012, Appellant withdrew its appeal against FIFA.
- 3.6 On the same day, the CAS Court Office acknowledged receipt of the Appeal Brief dated 26 October 2012 and the Appellant’s withdrawal of its appeal against FIFA.

- 3.7 On 22 November 2012, the Respondent filed his Answer.
- 3.8 By letter dated 29 November 2012, the Appellant informed the CAS Office of its preference that an award should be issued without a hearing if a second round of submissions was granted. Alternatively, it requested that a hearing be held if the Panel decided not to allow a second round of submissions.
- 3.9 By letter dated 3 December 2012, the CAS Court Office informed the Appellant that the Panel, once constituted, would decide if a second round of submissions was necessary.
- 3.10 On 21 December 2012, the CAS Court Office issued a notice to the Parties that the Panel was constituted in the following composition: Mr Dirk-Reiner Martens as President, Mr Mika Palmgren as Arbitrator appointed by the Appellant and Mrs Vesna Bergant Rakoccevic as Arbitrator appointed by the Respondent.
- 3.11 By facsimile dated 28 December 2012, the Respondent stated his preference was that a hearing not be held.
- 3.12 By facsimile dated 15 January 2013, the CAS Court Office invited the Parties to submit a second round of submissions.
- 3.13 On 25 January 2013, the Appellant submitted its Reply.
- 3.14 On 4 February 2013, the Respondent submitted his Rejoinder.
- 3.15 On 26 February 2013, the CAS Court Office informed the Parties that the Panel decided to hold a hearing pursuant to Article R57, Paragraph 2 of the Code of Sports-related Arbitration (the “Code”).
- 3.16 On 19 March 2013, the CAS Court Office informed the Respondent that he had the burden of proof regarding his claim that he did not sign the Disputed Agreements and requested that the Appellant provide the originals of the Disputed Agreements.
- 3.17 On 4 April 2013, the Appellant signed the Order of Procedure.
- 3.18 On 9 April 2013, the Respondent signed the Order of Procedure.
- 3.19 A hearing was held in Lausanne on 24 April 2013 (the “Hearing”).
- 3.20 The Appellant was represented by Mr Alexander Kalyagin, Club Representative. The Respondent, who was personally present, was assisted by his counsel, Mr Damir Pokupec.
- 3.21 At the beginning of the Hearing, the Panel provided an overview of the undisputed facts and asked the Parties to confirm these facts. Both Parties agreed that the facts provided by the Panel were undisputed with the exception of the validity of the Disputed Agreements and the question whether D. left the Club at the end of 2009 via a free transfer.

- 3.22 Afterwards, the Panel heard oral arguments from both Parties. The Appellant explained the circumstances surrounding the Disputed Agreements as well as how the Disputed Agreements were executed. This explanation had been provided to the Club Representative by the President of the Club, who was not present at the Hearing, but was available by telephone if the Panel wished to hear his testimony. The Respondent objected to hearing the testimony of the President by telephone.
- 3.23 The Panel held that the President was not allowed to testify for several reasons. The President did not speak English and the only person who could translate was the Club Representative. Likewise, there was no way to confirm that the person on the other end of the line was, in fact, the President of the Club.
- 3.24 Towards the end of the Hearing, the Panel discussed the possibility of the Panel's appointment of an expert to analyse the signatures of the Disputed Agreements. The Panel explained that the Parties would have the opportunity to respond to the Expert's Report in writing but would not have the opportunity to cross-examine the expert. Both Parties agreed to this procedure.
- 3.25 At the end of the Hearing, the Parties confirmed that they had no objections to raise regarding the conduct of the proceedings to this point.
- 3.26 By letter dated 17 July 2013, the CAS Court Office informed the Parties that the Panel had decided to appoint an expert in forensic handwriting analysis and had appointed Mrs Deborah Boegli as the expert. The letter also requested that the Respondent send samples of his signature by 23 July 2013.
- 3.27 On 2 August 2013, the Respondent submitted samples of his signature in the form of a document dated 21 May 2007 and a bank document dated 4 November 2010.
- 3.28 On 4 September 2013, the Expert submitted her report to the CAS Court Office which was then forwarded to the Parties on 13 September 2013. The Parties were provided fifteen (15) days to submit their response to the Expert's Report.
- 3.29 On 30 September 2013, the Respondent submitted his position on the Expert Report.
- 3.30 On 3 October 2013, the Appellant submitted its position on the Expert Report.

4. THE PARTIES' SUBMISSIONS

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

4.2 The Appellant's Submissions

- 4.2.1 Mr Raça executed the Disputed Agreements which bear his signature. These agreements were necessary because the Club had undergone a regime change and had a change in their budget. This change in budget meant that the Club needed to release itself from certain financial obligations, including the D.'s contract and the commission owed to Mr Raça. Therefore, the Club and Mr Raça agreed to the Fourth Contract allowing him to receive EUR 200,000, in December 2009 and allowing D. to leave the Club on a free transfer. The Club paid Mr Raça, and the player left the Club at the end of the month on a free transfer by mutual agreement.
- 4.2.2 Mr Raça and the Club President discussed the Forth Contract during a telephone conference. Mr Raça understands some Russian and could be understood by the Club President even if he used a Croatian word. The Club then drafted the Fourth Contract. The Club President signed it and applied the Club's seal. As per Mr Raça's instructions, the documents were then sent to him by personal courier. The courier delivered the documents and witnessed Mr Raça's signature. The courier then returned the Fourth Agreement to the Club. As a result, the Club made two payments of EUR 100,000, each to Mr Raça, and its obligation to Mr Raça was complete.
- 4.2.3 The Appellant submitted the following prayers for relief to:

'FC Khimki kindly asks CAS to overturn the Decision of the Judge of the FIFA Players' Status Committee passed 24 April 2012:

- *to dismiss the claim of the Players' Agent Elhjer Raca [sic]*
- *to establish that the final costs of the proceedings in the amount of CHF 20,000.00 (according to Item 4 of the Decision) should be charged from the Players' Agent Elhjer Raca as the only responsible for the present dispute".*

4.3 The Respondent's Submissions

- 4.3.1 Under the terms of the First Contract, Mr Raça was entitled to receive EUR 600,000. After getting paid EUR 100,000, on 10 July 2009, the Parties executed the Third Agreement which entitled Mr Raça to the remaining EUR 500,000, while allowing the Club more time to pay the amount owed. Mr Raça never executed the Fourth Agreement and would never waive EUR 300,000.
- 4.3.2 Mr Raça and the Club President would be unable to agree to terms over the telephone because neither party spoke each other's language. Mr Raça speaks Croatian and only knows a little bit of English, and the Club President does not speak any languages other than Russian. Likewise, the Club did not provide any information regarding who delivered the Disputed Agreements to Mr Raça nor where these documents were couriered to. The Club cannot be sure that Mr Raça signed it if they do not even know who delivered it.
- 4.3.3 The Club did not produce these Disputed Agreements until two years into this dispute. The Club had plenty of time to produce these documents before the RFU or FIFA but produced

them only in their last submission to FIFA.

4.3.4 The Respondent submitted the following prayer for relief:

“The Respondent is therefore asking the Court of Arbitration for Sport to confirm the Decision of the Single Judge of the FIFA Players’ Status Committee passed 24 April 2012 regarding the claim lodged in front of FIFA by Players’ agent Eljver Raca, Croatia against Football Club Khimki”.

II. LAW

1. JURISDICTION

1.1 The jurisdiction of the CAS in the present case is based on Article R47 of the Code and Article 67 of the FIFA Statutes.

Article R47 of the Code provides the following:

“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”.

Article 67 para.1 of the FIFA Statutes (July 2012 edition) provides as follows:

“Appeals against final decisions passed by FIFA’s legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question”.

The Panel notes that neither party disputed the jurisdiction of the CAS and that both parties confirmed the jurisdiction of the CAS by signing the Order of Procedure. It follows that the CAS has jurisdiction to decide the present dispute.

2. ADMISSIBILITY

2.1 The Appellant submitted its statement of appeal within the deadline provided for by Article R49 of the Code and complied with all the other requirements set forth by Article R48 of the CAS Code.

2.2 Consequently, it follows that the appeal is admissible.

3. APPLICABLE LAW

3.1 The Panel finds that Swiss law is applicable to the present dispute.

3.2 Article R58 of the CAS Code stipulates that

“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 the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

3.3 The Fourth Contract states, *inter alia*, that in situations not covered by that agreement, the provisions of the Third Contract would apply. The Third Contract provides that:

“If the parties do not meet their obligation within the time limits agreed in point 3.1 of this contract, all disputes and disagreements shall be resolved in accordance with the valid documents of the International Football Federation (FIFA), the European Football Federation (UEFA) and Russian Football Union (RFU)”.

3.4 The appeal before the CAS is based on a decision of a FIFA legal body. Article 66, Paragraph 2 of the FIFA Statutes stipulates that:

“The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA, and, additionally, Swiss law”.

3.5 Therefore, the Panel finds that Swiss law shall apply to the present dispute to the extent that the FIFA regulations are silent on any relevant issue.

4. MERITS

4.1 The Panel finds that the appeal is not well founded. The Third Contract still governs the relationship between the Parties because the Panel finds that the Fourth Contract was executed by the Respondent for the reasons stated below.

The Expert finds that it is more likely than not that Mr Raça signed the Disputed Agreements

4.2 Article R44.3, Paragraph 2 provides that:

“If it deems it appropriate to supplement the presentations of the parties, the Panel may at any time... appoint and hear experts”.

4.3 Previous CAS jurisprudence has taken into account the following three considerations in determining that a handwriting expert was necessary:

- one of the main issues of the case is whether the Player’s signature on the litigious documents was genuine;
- it is impossible for the untrained observer to detect a forged signature;
- a handwriting evidence evaluation takes into consideration several different variables, such as the type of printed material present, the paper, the handwriting and the shape of handwritten characters and also requires training, experience and specific tools and skills.

- 4.4 After presenting the Parties with an opportunity to provide their own expert opinion to avoid any perception of bias towards one of the Parties, the Panel found that these considerations weighed in favour of appointing an expert after the Hearing. Consequently, on 17 July 2013, the Panel decided to appoint an expert in graphology, Mrs Deborah Boegli who specialises in the authentication of documents and signatures and is a graduate of the Swiss Federal School of Graphology, pursuant to Article R44.3, Paragraph 2 of the Code.
- 4.5 The appointed expert was asked to compare the uncontested signatures of Mr Raça from a document dated 21 May 2007, the originals of the First and Third Agreements, a bank document dated 4 November 2010 and the Hearing sign-in sheet with the signatures on the originals of the Disputed Agreements.
- 4.6 Mrs Boegli first examined the documents with the naked eye and then under various enlargements using first magnifying glasses and then digital magnifiers. She analysed the general appearance of the questioned signatures and the way each stroke was formed in writing them. Finally, Mrs Boegli compared the characteristics of the questioned signatures with the characteristics of the reference signatures to identify similarities and differences in order to make a determination. She found that the samples were from varied dates, including the date of the Disputed Agreements. She found that these signatures revealed similarities and “*natural variations*”.
- 4.7 Given the Panel’s lack of expertise in handwriting analysis, previous CAS jurisprudence (CAS 2010/A/2240) requires the Panel to limit its examination of the expert report to a review of whether the expert had considered the correct issues and exercised his/her expertise in a manner which did not appear to be arbitrary or illogical. Basically, the Panel must determine whether the expert’s opinion is soundly based on the primary facts and whether the expert’s process led to a sound conclusion derived from those facts. Thus, the Panel will take into consideration, *inter alia*, the expert’s standing, experience, and cogency of his evidence in analysing his report.
- 4.8 Mrs Boegli delivered the expert opinion. She is a graduate of Swiss Federal School of Graphology and specialises in this kind of analysis. Mrs Boegli has written several published articles in the field of handwriting analysis. Her report was clear and was based on the samples provided. It convincingly explains how she reached her conclusions. Therefore, the Panel finds that Mrs Boegli’s opinion is credible and reliable.
- 4.9 In her report, Mrs Boegli came to the conclusion that “[b]eyond a reasonable scientific doubt or an excellent freehand imitation, the signature corresponds with the reference signatures of Mr. Eljver Raça. The undersigned is of the opinion that the questioned signatures were placed by Mr. Eljver Raça”. The Panel is confident that it can admit this opinion into evidence and that its conclusion is well founded based on the process described above.

None of the Respondent's objections to the Expert's Report convince the Panel to question its validity

- 4.10 In his comments on the Expert Report, the Respondent raises six reasons why the Panel should not accept Mrs. Boegli's expert opinion. The Panel will examine and dismiss these six reasons in turn below.
- 4.11 First, the Respondent states that the Expert Opinion is "*very brief*" and does not state "*which tools (name and characteristics) she used in making this Opinion*". The Panel finds that this objection does not undermine the quality of the Report. Mrs Boegli provided enough analysis for the Panel to determine her process even if the Report was brief as alleged by the Respondent. She stated her procedure, discussed how she analysed the samples and even provided diagrams of her findings based on her examination. Thus, the Report was sufficient. Likewise, she did state that she first used the naked eye then magnifying glasses and, finally, digital magnifiers. The Panel finds that this seems to be a natural progression from no tools, to basic tools to more advanced tools. The name of the tools is inconsequential and the characteristics are sufficiently described. In the eyes of the Panel, this process seems sufficiently thorough.
- 4.12 Second, the Respondent highlights the language used in Mrs Boegli's conclusion regarding "*an excellent freehand imitation*" and claims that the expert leaves open the possibility of a forgery. Regarding this reason, it is worth nothing that the standard of proof for this proceeding is preponderance of the evidence, *i.e.* more likely than not. Here, Mrs Boegli in the phrase directly before the statement about imitation states that "*beyond a reasonable scientific doubt*" the signatures are Mr Raça's. Thus, she states that even looking at these signatures applying a higher standard of proof than the one to be used in civil cases, the signatures in question are Mr Raça's. Even so, just because there is a low percentage chance of forgery does not mean that forgery has been proven in this case. The burden of proof for forgery would be on the Respondent. The Panel finds that the Respondent has failed to meet his burden of proof because he has failed to demonstrate anything other than a very remote possibility of forgery. Thus, the Panel finds that this argument must be dismissed.
- 4.13 Third, the Respondent asserts that he does have the originals or copies of these Disputed Agreements, nor do any of these documents bear his seal. The Panel finds that this objection does not go to the validity of the signature on these documents which based on the Expert Report is Mr Raça's. Therefore, this reason must also be dismissed.
- 4.14 Fourth, the Respondent refutes the idea that he would logically waive EUR 300,000, worth of commissions or that he would start a procedure before FIFA if he signed these documents. Again, this reason does not go to the heart of the issue. The fact of the matter is the Expert Report which demonstrates that the signature on these Disputed Agreements is his. Therefore, his reasons for signing these documents and starting this procedure, whether logical or illogical, are immaterial.
- 4.15 Fifth, the Respondent states that he was not in Russia on the date that these Disputed Agreements were concluded. In support of this proposition, he provided his passport which demonstrates that he was not in Russia on the date of these Agreements. This reason, likewise,

does not counter the fact that the signature is his on the Disputed Agreements according to the Expert Report. Therefore, this reason must be dismissed.

- 4.16 Finally, the Respondent argues that the Appellant's description of how these Disputed Agreements reached Mr Raça is questionable and demonstrates that these Disputed Agreements never reached Mr Raça. The Respondents point out that the Appellant stated that they gave the documents to "*some man*" whose name they did not know and delivered the documents at "*some time they also didn't know*". While the Appellant's description of the courier delivery contained holes, the fact still remains that the Respondent's signature appears on the Disputed Agreements according to the Expert Report. Thus, how the Disputed Agreements got to the Respondent becomes irrelevant because these agreements bear his signature according to the Expert Report.
- 4.17 Based on the above, the Respondent has failed to provide any concrete reasons why the Panel should not accept the Expert Report. Therefore, the Panel accepts the Expert Report and finds that the signatures on the Disputed Agreements are Mr Raça's. Thus, the Respondent concluded these Disputed Agreements and is bound by their respective terms.

ON THESE GROUNDS

The Court of Arbitration for Sport hereby rules:

1. The appeal filed by FC Khimki on 18 October 2012 against the decision issued by the FIFA Single Judge of the Players' Status Committee on 24 April 2012 is upheld.
 2. The decision issued by the FIFA Single Judge of the Players' Status Committee on 24 April 2012 is set aside.
- (...)
5. All other motions or prayers for relief are dismissed.