Arbitration CAS 2007/A/1351 SC FC Unirea 2006 SA v. Nenad Pavlovic

Panel: Mr Mark Hovell (United Kingdom), Sole Arbitrator

Football
Breach of the employment contract without just cause
Applicable law in case of "tacit or indirect choice of law"
Interpretation of the contract
Consequences from non-registration of an employment contract

1. **In the absence of any express choice of any specific law, there is, in cases of appeals against decisions issued by FIFA, a tacit and indirect choice of law, in accordance with article R58 of the CAS Code and article 60 para. 2 of the FIFA Statutes. Such tacit and indirect choice of law is considered as valid under Swiss law and complies in particular with article 187 para. 2 of the Swiss Private International Law Act (PIL). The issues arising by such a "tacit or indirect choice of law" should therefore be interpreted in accordance with the FIFA Statutes and regulations and Swiss law should apply complementarily, whereas there is no place for the application of any other national law.**

2. **When the interpretation of a contract is in dispute, the judge seeks the true and mutually agreed upon intention of the parties, without regard to incorrect statements or manner of expressions used by the parties by mistake or in order to conceal the true nature of the contract. If this cannot be established, the contract must be interpreted according to the requirements of good faith. The judge has to seek how a declaration or the external manifestation of a party could have been reasonably understood dependent upon the individual circumstances of the case (objective approach), by looking first to the words actually used or conduct engaged in. In order to go beyond the apparent meaning of the words or the conduct by the parties, due consideration is to be given to all relevant circumstances of the case. This includes the negotiations, any subsequent conduct of the parties and usages.**

3. **So long as the parties do not submit evidence or precedents to support the claim that non-registration renders the contract of employment "void", it is determined that the contract – together with its deriving contractual obligations – remains.**

The Appellant is SC Fotbal Club Unirea 2006 SA a football club with its registered office in Alba Iulia, Romania. The Appellant is a member of Federation Romana de Fotbal (the Romanian Football Federation) (RFF), which has been affiliated to FIFA since 1923.

At some stage the Appellant appears to have adopted the "Unirea 2006" title, as in previous correspondence, and indeed, in the Fédération Internationale de Football Association (FIFA) decision, that is the subject of this Arbitration, the Appellant has been referred to as Fotball Club Municipal Apulum SA. The fiscal number of this Club is 17785536 and references herein to the Appellant are intended to refer to this Club, whether it has used the titles "Unirea 2006" or "FCM Apulum" or any extension or derivatives thereof.

The Respondent is Nenad Pavlovic, a professional football player from Serbia (the "Respondent").

The various facts including (alleged) contracts signed with regard to the Respondent

On 4 February 2005, it is alleged that FC Apulum Unirea, Albu Iulia ("the Original Club") and the Respondent entered into a contract of employment for a period of 10 months for the period 1 March 2005 to 5 January 2006 ("the Contract").

The Respondent states that he ceased playing for the Original Club on or before 15 April 2005 and left Romania.

The Respondent claimed that the Original Club had failed to provide him with a valid work permit/visa, and that his departure from Romania was so as to avoid breaking Romanian law.

On or about 28 July 2005, the Original Club ceased to exist and a new club was formed in its place – the Appellant.

On 16 August 2005, Adalbert Kassu, the General Secretary of RFF wrote to the Appellant confirming that the Original Club had been disaffiliated from RFF and that the Appellant had been affiliated, and also confirmed that the Appellant took over the debts of the Original Club which arose *"from transfer agreements, contracts … generally named sport debts"*.

The correspondence was sent to FIFA before the Dispute Resolution Chamber's meeting ("DRC")

On 22 December 2005, the Respondent lodged a claim in front of FIFA for breach of contract by the Appellant. The Respondent submitted that the Appellant owed him salary and match bonuses in the amount of USD 20,500. The Respondent claimed that these sums were due under the Contract, which had a total sum payable amounting to USD 23,000, but he had only received USD 2,500 to date.

The Respondent also emphasised that pursuant to the appendix to the Contract, the Contract would be considered dissolved at the expense of the Appellant and the Respondent would be free to move on if the Appellant failed to pay any amount that had fallen due and sought confirmation of that point.

By letter dated 19 May 2006, FIFA requested the Respondent to submit a copy of the original Contract. The Respondent had presented only a Serbian version of the Romanian original and an English translation of this Serbian version by that stage.

By letter dated 25 May 2006, the then Football Association of Serbia and Montenegro submitted a letter from the Respondent dated 22 May 2006 in which the Respondent repeated his claim for the payment of USD 20,500. The Respondent also sent FIFA a copy of the requested signed Contract.

In replying to FIFA's letter dated 19 May 2006, the RFF forwarded a letter that the Appellant had sent to RFF, dated 23 May 2006. In this letter the Appellant stated that the Respondent was under contract with the Original Club, but stated that there was no contact between itself and the Respondent.

By letter dated 7 June 2006, the RFF informed FIFA that the Original Club was disaffiliated on 28 July 2005, and it had resolved to affiliate with the Appellant on the same date. Subsequently, by letter dated 16 August 2005, the RFF had informed the Appellant that as a condition of the affiliation, it would assume the debts of the Original Club. According to a decision taken by the Executive Committee of the RFF, the Appellant was therefore responsible for the debts of the old Original Club.

By letter dated 15 August 2006, FIFA asked the Respondent to inform it whether he had found another club for which to play football in the period March 2005 to January 2006. Originally, this request was unanswered but in the proceedings the Respondent stated that he had not played for any other club because he had signed an 11 month contract with the Original Club on 4 February 2005.

The DRC analysed whether it was competent to deal with the matter at stake. In this respect, it referred to Art. 18 para. 2 and 3 of the Rules Governing the Procedures of the Players' Status Committee and DRC. The dispute was submitted to FIFA on 22 December 2005. As a consequence, the DRC concluded that the revised Rules Governing Procedures (edition 2005) on matters pending before the decision-making bodies of FIFA were applicable on the matter at hand.

With regard to the competence of the DRC, Art. 3 para. 1 of the above-mentioned Rules states that the DRC shall examine its jurisdiction in the light of articles 22 to 24 of the current version of the Regulations for the Status and Transfer of Players (edition 2005). In accordance with Art. 24 para. 1 and in connection with Art. 22 (d) of the aforementioned Regulations, the DRC shall adjudicate on employment-related disputes between a club and a player that have an international dimension.

As a consequence, the DRC concluded it was the competent body to decide on the dispute between the Respondent and the Appellant.

The DRC further concluded that there was a contract between the Respondent and the Original Club, signed in February 2005 which was due to run for a period of 10 months, with effect from 1 March 2005 to 5 January 2006.

The DRC accepted the information put to them by RFF, that:

- the Original Club was no longer in existence; and
- the Appellant, after its affiliation to RFF at the end of July 2005, was *"responsible to take over all rights and debts"* of the Original Club;

and, as such, the DRC unanimously declared that the Appellant *"must be considered as the Club that entered into the contractual relationship with the* [Respondent] *via the employment contract concluded on 4 February 2005"*.

The DRC determined that the Appellant had not presented any justifications for the non-payment of the amounts fallen due to the Respondent under the Contract and that the DRC considered there had been a breach of the Contract, without just cause by the Original Club.

In consequence, and in application of article 17 of the FIFA Regulations for the Status and Transfer of Players, which foresees that in case of a breach of contract without just cause, the party in breach must pay compensation to the other party, the DRC had to deliberate whether the Appellant was accountable for outstanding payments and compensation towards the Respondent.

The DRC stated that the Appellant had to pay the Respondent USD 4,800 in respect of outstanding salaries and to compensate the Respondent with the amount of USD 8,000, representing approximately 50% of the remaining contractual value of the Contract. In this respect, the DRC highlighted the fact that the Respondent had not searched for another club to play for having left Romania and decided that this must be held against the Respondent in the sense that he was not entitled to the whole remaining contractual value of the Contract concluded at the beginning of February 2005.

On 26 July 2007, the Appellant filed a statement of appeal with the Court of Arbitration for Sport (CAS). This document contains a statement of the facts and legal arguments accompanied by supporting documents. It challenged the Decision, submitting the following request for relief:

> *"Regarding the assumed contract that would have existed between the player and the former club, we present the fact that the Romanian Football Federation (RFF) does not have registered any contract on behalf of this player's name and the former football club. According to Romanian law regarding the football competition taking place, any signed contract will be taken to the Football Federation, otherwise it will become void. Because this contract hasn't been taken to the Federation and the player didn't do anything about registering it, we consider that the lack of action on his part will lead to the idea that this contract never existed. In other words, the Chamber didn't return with an address to Romanian Football Federation in order to show that this contract ever existed.*
>
> *A simple request to RFF will clear this aspect.*
>
> *We show that this litigation is based on a contract that never existed, a fact that we have showed in our other replies towards the Chamber, as it is mentioned in the beforehand documents.*
>
> *The Club has no debts toward the player Nenad Pavlovic, none is mentioned in any written document. We show that the player couldn't provide the original contract, but only a series of copies which the Camber [SIC] didn't verify their authenticity.*
>
> *The admission of such complained would mean that each time a player needs a certain amount of money, he can make a request which will be admitted automatically, although all the documents that were the basis of the litigation aren't true".*

On 14 August 2007, the Appellant filed its appeal brief.

The Appellant's submissions, in essence, were as follows:

"On February 2005, the player Nenad Pavlovic has come to our club in order to become player for our team.

After the discussion with him, it was established that he was going to clarify his situation regarding his visa for staying in Romania and his work permit. Following, the player came to practice games, declaring to the representatives of the club that his situation was going to be solved.

Meanwhile the conditions for a possible contract to be signed were set. This contract has never been signed because the legal situation of the player wasn't solved, the player leaving the club in the end.

As it can be seen from the fax notification from the Romanian Football League nr 1073/July 24th 2007 (which you already have in your file), the contract which is the basis of this litigation never existed and we do not know where that paper came from in the first place".

As evidence, the Appellant attached one document to its Statement of Appeal – a letter dated 24th July 2007 from Liga Profesionista de Fotball (the Romanian Football League) stating that the Respondent was not registered with them as a professional player in either 2003/4 or 2004/5 seasons, *"meaning that the player was not licensed with FC Unirea, Alba Iulia".*

With their Appeal Brief, the Appellant attached a written statement, (not notarised) from Ioan Vlad, the Sports Director of the Original Club. In this he states:

- the Respondent was paid USD 2,500 as *"expenses"*;
- there was a condition that needed to be fulfilled (i.e. the work permit) before any contract with the Respondent was signed; and
- *"this contract was never signed because the player did not succeed in solving his legal situation regarding his visa. Eventually the player left the club in April 2005".*

On 3 September 2007, the Respondent filed an answer, with the following summary of his request for relief:

- The Contract was signed;
- It was the obligation of the Original Club to obtain the working visa;
- He made several attempts to get the Original Club to obtain the visa or to settle the Contract, so he could play elsewhere;
- The decision of the DRC should be upheld; and
- The costs of the Arbitration are to be paid by the Appellant.

On 5 November 2007 the CAS wrote to the RFF in order to better understand the registration procedure for trialists and full-time professional footballers in Romania, as follows:

"a. Are the names and details of all players that enter into a professional contract with a club in Romania registered by that club with yourselves?

b. Is there a difference between a player who joins a club on trial, yet still signs a professional contract with a club?

c. Did you ever receive such details, or a copy of the contract itself, in the matter between Football Club FC Apulum Unirea and Mr Nenad Pavlovic, in or around 20th December 2005?"

The Romanian Football Association replied on 12 November 2007, as follows:

"a. According the Romanian Football Federation's Status and Transfer of the players (Art.10.10), all contracts signed by the Romanian football clubs with players must be registered at the Romanian Football Federation, at the Professional League or at the Regional Football Association, if the last nominated organize competitions for professional players.

b. According Romanian Football Federation's Disciplinary Code (art 66.2) if one player is playing for another club that he is not registered with (in a friendly or official match) this represents an infraction of discipline. In the same Disciplinary Code (art 83.1) it is also stipulated that [it] is forbidden for a player to participate to the training sessions or to be used for friendly matches without a writing agreement of his club. The club which uses a player without his club's permission won't be allowed to make players transfer for the next transfer period in Romania.

c. On 16.02.05, we received the ITC of player Nenad Pavlovic (last club FC Ciukaricki Beograd) requested by our club FC Apulum Unirea. The club FC Apulum Unirea never registered the player at the Romanian Professional League and the registration had to be made there. For that reason, there is no copy of the contract between the player Nenad Pavlovic and FC Apulum Unirea".

The Sole Arbitrator, having consulted the parties, deemed himself to be sufficiently well informed pursuant to article R 57 of the Code of Sports related Arbitration (the Code), and decided to dispense with the need for a formal hearing.

LAW

CAS Jurisdiction

1. The jurisdiction of the CAS, which is not disputed, derives from articles 60 ff. of the FIFA Statutes and articles R47 of the Code. It is further confirmed by the order of procedure duly signed by the parties.

2. It follows that the CAS has jurisdiction to decide on the present dispute.

3. Under article R57 of the Code, the Sole Arbitrator has the full power to review the facts and the law.

Applicable Law

4. Article R58 of the Code provides the following:

"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".

5. Article 60 para. 2 of the FIFA Statutes provides *"[t]he 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".*

6. Considering the facts, the Sole Arbitrator is of the opinion that the parties have not expressly agreed on any specific national law. As the seat of CAS is in Lausanne, Switzerland, this arbitration is subject to the rules of Swiss international private law ("PIL"). Article 187 para. 1 PIL provides the arbitral tribunal decides in accordance with the law chosen by the parties or, in the absence of any such choice, in accordance with the rules, with which the case has the closest connection. Although the parties have not expressly chosen any specific law, there is, in cases of appeals against decisions issued by FIFA, a tacit and indirect choice of law, in accordance with article R58 of the Code and article 60 para. 2 of the FIFA Statutes. Such tacit and indirect choice of law is considered as valid under Swiss law and complies with in particular with article 187 para. 2 PIL (see KARRER T., Basler Kommentar zum Internationalen and Privatrecht, Basel/Frankfurt a.M. 1996, N. 92 & 96, ad Art. 187 LDIP; POUDRET/BESSON, Droit comparé de l'arbitrage international, 2002, N. 683, page 613; DUTOIT B., Droit international privé Suisse, Commentaire de la Loi fédérale du 18 décembre, Bâle 1987, N.4 ad Art. 187 LDIP, page 657; CAS 2004/A/574).

7. The Sole Arbitrator accordingly holds that the issues to be determined in the present matter must be interpreted in accordance with the FIFA Statutes and Regulations. Swiss law shall apply complementarily. There is thus no place for the application of any other national law, such as Romanian.

Admissibility

8. The appeal was filed within the deadline provided by the FIFA Statutes and stated in the decision of the FIFA Players' Status Committee. It complied with all other requirements of article R48 of the Code.

9. It follows that the appeal is admissible.

Merits

10. The parties do not agree that the Contract was either signed and/or registered correctly. The Appellant has argued that it was not signed, was subject to an unfulfilled condition and/or was not properly registered thus rending it "void"; whilst the Respondent asserts that the Contract was signed and is valid.

11. Pursuant to article 1 of the Swiss Code of Obligations ("Swiss CO"), a contract requires the mutual agreement of the parties. This agreement may be either express or implied.

12. When the interpretation of a contract is in dispute, the judge seeks the true and mutually agreed upon intention of the parties, without regard to incorrect statements or manner of expressions used by the parties by mistake or in order to conceal the true nature of the contract (Article 18 para.1 of the Swiss CO). When the mutually agreed real intention of the parties cannot be established, the contract must be interpreted according to the requirements of good faith (ATF 129 III 664; 128 III 419 consid. 2.2 p. 422). The judge has to seek how a declaration or the external manifestation of a party could have been reasonably understood dependent upon the individual circumstances of the case (ATF 129 III 118 consid. 2.5 p. 122; 128 III 419 consid. 2.2p. 422).

13. The requirements of good faith tend to give the preference to a more objective approach. The emphasis is not so much on what a party may have meant but on how a reasonable man would have understood his declaration (ATF 129 III 118 consid. 2.5 p. 122; 128 III 419 consid. 2.2 p. 422).

14. In determining the intent of a party or the intent, which a reasonable person would have had in the same circumstances, it is necessary to look first to the words actually used or conduct engaged in. However, the investigation is not to be limited to those words or the conduct even if they appear to give a clear answer to the question. In order to go beyond the apparent meaning of the words or the conduct by the parties, due consideration is to be given to all relevant circumstances of the case. This includes the negotiations, any subsequent conduct of the parties and usages.

15. The Respondent, through the Football Association of Serbia and Montenegro, on 25 May 2006, has supplied the DRC with a copy of the signed Contract. This document is purported to be executed by Malusel Viorel, the executive president of the Original Club, as is the appendix containing the salary details and other benefits. The Contract bears the stamp of the Original Club.

16. The Appellant, on the one hand, in its letter to RFF dated 23 May 2006, confirms that *"the above mentioned player [the Respondent] was under contract with the football club FC Apulum Unirea…"*. However, later, in its Statement of Appeal, the Appellant states *"this litigation is based on a contract that never existed"* and in its Appeal Brief, states that as the visa/permit was never obtained, *"This contract has never been signed…"*.

17. The Appellant does appear to query the authenticity of the *"series of copies"* that the Respondent produced, but implied it was for the DRC to verify their authenticity.

18. The Appellant also states that as the Contract was not lodged with the RFF, then *"it will become void"*. The Appellant implies it would be the obligation of the Respondent to register it.

19. Whilst the Appellant does not state whether it or the Respondent was responsible for applying for the work permit/visa, the Respondent states that it was the responsibility of the Original Club.

20. Both the Romanian Football League ("RFL") in their letter of 24 July 2007 and the RFF in their letter to the CAS of 12th November 2007, confirm that the Contract was not registered with either body, however, neither go on to say that non-registration results in the Contract becoming *"void"*, the RFF, instead, refer to other sanctions, primarily against the club, should it attempt to field the player in a game.

21. It is not disputed that the work permit/visa was not obtained, as such, the main issues to be determined by the Sole Arbitrator are:-

    A. *was the Contract signed by the Original Club?*

    B. *was the Contract registered with RFL or RFF?*

    C. *if not, what is the affect of non-registration?*

A. Was the Contract signed by FC Apulum Unirea?

22. There is a signed copy on the DRC's file, which appears to bear the stamp of "FC Apulum Unirea", the Original Club, and the signature of the president of the Original Club. Whilst the Appellant in this Appeal to the CAS has challenged the DRC (not the Sole Arbitrator) to question its authenticity, it has not advanced any grounds as to why it should be deemed unauthentic, as such the Sole Arbitrator determines the DRC acted reasonably in accepting this as a true copy. Further, the submissions of the Appellant are inconsistent as to whether there was a contract or not in particular, as stated before, on the 23 May 2006, the Appellant in its letter to RFF confirmed the Respondent was under contract with the Original Club.

B. Was the contract registered with RFL or RFF?

23. The Sole Arbitrator accepts the submissions of the Appellant and the evidence from both the RFL and the RFF that the Contract was not registered with either body.

C. What is the effect of non-registration?

24. The question of who should have registered the Contract is of no relevance. The Sole Arbitrator was provided with no evidence or precedents to support the Appellant's claim that non-registration rendered the Contract void. The correspondence from the RFF provides alternative sanctions and, as such, the Sole Arbitrator determines that the Contract continued and there remained a contractual obligation to the Respondent upon the Original Club.

25. Neither party has commented on the RFF's ruling that the Appellant is responsible for the debts of Original Club, and as such the Sole Arbitrator concurs with the DRC, that the Respondent is responsible and that sums due under that Contract should be treated as a debt of the Original Club, which the Appellant has assumed responsibility for.

26. The Sole Arbitrator notes the Respondent has not requested the quantum of the award by the DRC to be increased or altered, and as such the Sole Arbitrator has determined to uphold the decision of the DRC in full, and as such the Appeal is rejected.

The Court of Arbitration for Sport rules:

1. The appeal filed at the Court of Arbitration for Sport by SC FC Unirea 2006 SA against Mr Nenad Pavlovic with respect to a decision issued by the Dispute Resolution Chamber of the FIFA is rejected.

2. The appealed decision of the Dispute Resolution Chamber of the FIFA, dated 23 February 2007, is upheld.

3. SC FC Unirea 2006 SA is ordered to pay to Mr Nenad Pavlovic the amount of USD 12,800, plus interest at 5% (five percent) per annum as from 5 August 2007.

4. (…).

5. (…).

6. All other or further claims are dismissed.