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## Case Overview: CAS 2018/A/5809 Apollon Limassol v. Torino FC

Lombardi Associates represented the Italian club Torino FC in an appeal against a FIFA decision by Cypriot club Apollon Limassol before the Court of Arbitration for Sport (“CAS”).

### Brief facts

On 22 July 2013 Apollon Limassol (“Apollon”) and Torino FC (“Torino”) entered into a transfer agreement (“Transfer Agreement”) according to which the player Nikola Maksimovic (“the Player”) was transferred from Apollon to Torino on a temporary basis with an option for Torino to register the Player permanently.

For the permanent transfer of the Player, the parties agreed a transfer amount (“the Transfer Fee”) payable in 12 instalments over the course of 36 months.

The Transfer Agreement also provided a sell-on/acceleration clause (“Clause”) in favour of Apollon, which reads:

*“Apollon hereby agrees and acknowledges that it shall accept the sums payable to it under this Agreement in full and final settlement of any and all claims it may have now or at any time in future in respect of the Players registration with [Torino]. In any case in which [Torino] has exercised the Option and sells the Player's rights and transfers the Player to another club on a permanent basis ("Future Transfer") before it has completed the payment of the entire Purchase Consideration stipulated above. For the remaining amount to be paid by [Torino] of EUR 3,500,000.00, [Torino] will pay to Apollon a percentage of the amount paid to [Torino] for the transfer which will be equal to the percentage still due to Apollon of EUR 3,500,000.00 in that moment. In case the payments of a Future Transfer are later than the payments agreed between Apollon and [Torino], [Torino] will make payments under the payment schedule defined in this Clause 1 of this Private Agreement.”*

Torino duly exercised the option right for the definitive transfer of the Player from Apollon, and registered the Player permanently as from 1 July 2014.

On 31 August 2016, Torino FC transferred the Player to SSC Napoli (“Napoli”) on a temporary basis with a “compulsory option right” in favour of Napoli to register the Player permanently as

from the 2017/2018 season. In particular, Napoli's option to register the Player permanently was made conditional upon Napoli achieving their first point in the Italian Serie A League table after 2 February 2017.

On 20 December 2016, Apollon requested Torino to pay an additional amount due according to the Clause. However, Torino argued that the Player was transferred on a temporary basis and therefore no additional amount was due.

On 15 February 2017, Apollon filed a claim with FIFA against Torino.

### The FIFA Decision

On 10 November 2017, the Single Judge of the Players' Status Committee issued a decision rejecting the claim filed by Apollon.

The Single Judge observed that the parties had different positions in relation to the nature of the Clause: Apollon referred to the Clause as a sell-on clause, whereas Torino deemed that the Clause was to be interpreted as an acceleration clause.

Regardless of the legal nature of the Clause, the Single Judge noted that the obligation for Torino to pay the amount to Apollon under the Clause was subject to three conditions:

1. Torino had exercised the option to sign the Player on a permanent basis;
2. Torino transferred the Player to a third club on a permanent basis;
3. the permanent transfer to a third club occurred before Torino has completed the payment of the Transfer Fee to Apollon, *i.e.* before 30 June 2017.

The Single Judge acknowledged that the occurrence of the first condition was undisputed.

As to the second and third conditions, the Single Judge referred to the documentation on file, and in particular:

- a) to the loan agreement concluded between Torino and Napoli on 31 August 2016, according to which the player was transferred on a temporary basis from Torino to Napoli until the end of the 2016/2017 season, *i.e.* 30 June 2017, and that the potential permanent transfer of the player from Torino to Napoli would only take effect as of the 2017/2018 season, *i.e.* at the earliest on 1 July 2017;
- b) to the official documents issued by the Italian Football Federation ("FIGC"), according to which the player was registered with Napoli only on 4 July 2017.

Finally, the Single Judge noted that Torino had indeed paid the last instalment of the Transfer Fee to Apollon on 29 June 2017.

In light of the above, the Single Judge established that the Player had not been transferred on a permanent basis from Torino to a third club before 30 June 2017, and concluded that Torino was under no obligation to pay any amount to Apollon under the Clause.

The decision issued by FIFA was appealed by Apollon before CAS.

### The CAS Award

By award dated 15 April 2019, CAS set aside the decision issued by FIFA and partially upheld the appeal lodged by Apollon.

In particular, the Panel firstly found that the Clause had to be interpreted as a sell-on clause and not an acceleration clause.

As to the nature of the Player's transfer to Napoli, the Panel analysed the relevant contract by applying Swiss law, being the law applicable to the Transfer Agreement concluded between Apollon and Torino.

Accordingly, the Panel found that although it is not forbidden by the various regulations of the FIGC or Italian law to make a permanent transfer subject to a pre-determined condition whose non-occurrence is merely hypothetical, Torino had a duty to act in good faith towards Apollon in concluding the transfer agreement with Napoli.

On the contrary, according to the reasoning put forward by the Panel, Torino did not act in good faith towards Apollon in concluding the transfer agreement with Napoli, because the condition for a permanent transfer therein is not an actual condition under Swiss law, since the parties relied on a fact - Napoli achieving their first point in the Italian Serie A League table after 2 February 2017 - which was certain at the moment of signing the contract: for this reason, the clause agreed by Torino and Napoli in their agreement constituted a suspensory time limit and not a condition under Swiss law.

Thus, the Panel concluded that the agreement concluded by Torino and Napoli for the transfer of the Player on a temporary basis with a "compulsory option right" is to be seen as a set of acts aimed at permanently transferring the Player to Napoli, regardless of the Player's formal registration with the FIGC.

As a result, the Panel decided that the condition provided by the Clause had been triggered and therefore Apollon was entitled to receive a payment under the Clause which, however, differed greatly from the one claimed by the Cypriot club.

To this end, Apollon had requested an amount corresponding to 34% of the entire amount agreed between Napoli and Torino for the transfer of the Player. The Panel ultimately rejected such request and, following Torino's arguments, calculated the percentage due to Apollon on

the remaining amount that was still to be paid by Torino to Apollon “in that moment”, *i.e.* at the time of the Player permanently transferring to Napoli. This calculation, which is consistent with the wording of the Clause, resulted in Apollon receiving an amount over seven times lower than the one they had claimed.

#### Analysis of the award

The award at stake is particularly interesting in light of the different stances adopted by FIFA and CAS in relation to the evidence considered, and the probative value attributed to the evidence filed by the parties.

The main controversial issue regarded the temporary / permanent nature of the Torino – Napoli agreement, which theoretically could have triggered the Clause.

FIFA adopted a very formalistic stance and heavily relied upon the information provided by its member association the FIGC, and the Italian Serie A League.

In particular, FIFA relied on the content of the contract filed at the FIGC and on the official document issued by the Italian Serie A League that showed that after the end of his first season on loan with Napoli, the Player returned to Torino and on 4 July 2017 he was still registered with Torino.

Such approach is understandable: given that the FIGC is a FIFA member, the Single Judge enhanced the value of documents issued by the FIGC and based its decision upon such evidence.

As a result, the Single Judge established that the Player had not been transferred on a permanent basis from Torino to a third club before 30 June 2017 and concluded that Torino was under no obligation to pay any amount to Apollon under the Clause.

On the contrary, CAS openly lessened the value of the official documents filed by Torino and focused on the practical results of the Torino-Napoli contract.

According to the reasoning put forward by the CAS Panel, even though the formal situation as administered by the FIGC was different, with respect to the legal relationship between Apollon and Torino, the Player's transfer from Torino to Napoli had to be considered permanent as from 31 August 2016; as a result, the Panel acknowledged Apollon's right to receive fees from Torino on the basis of the Clause.

It must be noted that the Panel did not examine the nature of the transfer agreement concluded by Torino and Napoli *per se*, but within the analysis of the legal relationship between Apollon and Torino. By doing so, it interpreted the contract under Swiss law, being the law applicable to the Apollon-Torino agreement, despite the Torino-Napoli agreement being governed by Italian law. Such approach appears to be questionable at least.

Furthermore, the conclusion reached by the Panel, although it may look fair, is not convincing from a legal standpoint: as a matter of fact, the Panel on one side acknowledged the legitimacy of the structure of the Torino-Napoli agreement and its compliance with the applicable Italian regulations, but on the other side it considered that Torino violated a duty to act in good faith towards Apollon in concluding such contract, because the condition for a permanent transfer therein was not an actual condition under Swiss law.

By saying so, the Panel considered that the only reason behind the structure of the Torino-Napoli agreement was to avoid the payment due under the Clause, without taking into account the presence of another club involved – Napoli - which had no interest whatsoever in relation to the Apollon-Torino contract, nor to the several legal ramifications that the Torino-Napoli contract actually had.

On this point, it must be noted that the distinction between a temporary and a permanent transfer is not merely superficial, but has substantial legal implications for all of the parties involved: because of the formal temporary nature of the Torino-Napoli contract, Napoli had no right to permanently transfer the player to a third club before the end of the first season; Torino continued to bear the "risk of loss" were the Player to get injured; Torino could not register a capital gain for the entire transfer fee payable under the Napoli Contract; and Torino and the Player continued to owe obligations to one another, given that their employment contract was only suspended.

As a result, by adopting such a practical approach and disregarding the formal structure of the contract, the Panel decided not to consider as relevant the legal ramifications deriving from the contract concluded by Torino and Napoli and decided to focus only on the consequences that such contract had in relation to the Apollon-Torino agreement.

By doing so, CAS adopted a stance contrary to the one taken by FIFA and overturned the decision issued in the first instance.

Incidentally, and as a general remark, it is not uncommon that FIFA and CAS reach diverging decisions. This is also due to the fact that the proceedings in the two instances are different and such circumstance entails that the two adjudicatory bodies rely on – often - different evidentiary elements.

In the case at stake, the Panel heavily relied on the deposition of a witness provided during the hearing in order to ascertain the intention of the parties during the negotiations in respect as to whether the Clause was to be considered a sell-on clause or an acceleration clause. As a result, it concluded that the Clause had to be considered as a sell-on clause.

FIFA did not solve such matter but, in any case, it would have not relied on the same evidentiary elements upon which CAS based its findings given that FIFA proceedings, in the vast majority of cases, are carried out in writing and hearings are very rare (if not practically non-existent) despite the clear wording of article 11 of the Rules Governing the Procedures of the Players'

Status Committee and the Dispute Resolution Chamber that explicitly provides for such possibility.

### Conclusions

We note that FIFA and CAS had different approach towards the present case: FIFA adopted a formalistic and straightforward stance, enhancing the form adopted by Torino and Napoli for the Torino-Napoli agreement and the contents of the official documents provided by the FIGC.

On the contrary, CAS openly disregarded the formal aspects of the Torino – Napoli contract and focused on the actual ramifications of such contract on the Apollon-Torino contract, by applying the law applicable to the Apollon-Torino contract to any aspect related to the dispute at hand. As a result of this analysis, the Panel reached the conclusion that Torino had a duty to act in good faith towards Apollon in the conclusion of the contract with Napoli and therefore, by applying Swiss law, considered the Torino-Napoli agreement as a permanent transfer as from the 31 August 2016.

Such conclusion looks quite arguable, not only in light of the arbitrary application of Swiss law by the Panel, but also considering that the temporary nature of the Torino-Napoli agreement does entail specific legal consequences for Torino and Napoli, which have been completely disregarded by the Panel.

Moreover, by agreeing on a sell-on fee conditional upon the occurrence of certain circumstances (*i.e.* Torino had to transfer the Player to a third club on a permanent basis before the 30 June 2017) Apollon left Torino free to decide whether or not to transfer the Player in a way that would have triggered the additional payment due pursuant to the Clause: it appears therefore arguable that CAS considered the legitimate and valid legal structure chosen by Torino and Napoli for the transfer of the Player as being against good faith.

As a general remark, it must be noted that contrary to the formalistic approach that FIFA had to this dispute, CAS adopted a pragmatic approach aimed at favouring the substance over the form. However, the arguments used by the Panel to support such stance raise doubts as to whether the Panel went too far in neglecting the existing legal ramifications of the contract's structure chosen by Torino and Napoli for the Player's transfer.

Finally, it is worth noting that the issue relating to the nature of the Clause as a sell-on / acceleration clause arose exclusively due to the relevant clause being poorly drafted by the parties.

Lombardi Associates