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Case Overview: CAS 2019/A/6115 & CAS 2019/A/6125

Earlier this year, Lombardi Associates successfully represented clients Torino FC S.p.A (“**Torino**”) in two appeals submitted by Mexican club, Club Universidad Nacional A.C. (“**Pumas**”) to the Court of Arbitration for Sport (“**CAS**”) against decisions of the FIFA Disciplinary Committee and Players’ Status Committee respectively, relating to the same transfer agreement.

Factual Background

On 23 July 2017, Torino and Pumas reached agreement (the “**Transfer Agreement**”) for the permanent transfer of the player Gastón Alexis Silva Perdomo (the “**Player**”). The agreed transfer fee was USD 1,600,000 and the agreement was signed by Torino, Pumas and the Player (the “**Parties**”) on 25 July. It is important to note, given subsequent events, that the transfer fee was reduced from the initial offer, as Pumas assumed a debt of USD 400,000 owed to the Player by Torino.

Pumas sent to the Player, via his mother (also acting as his agent) a pre-contract document. This document outlined the duration and economic conditions of the employment Pumas were proposing to the Player. This document was signed by Pumas and by the Player’s mother, but not the Player.

Subsequently on 27 July, the Player travelled to the Consulate of Mexico in Madrid in order to obtain his Mexican residence permit. Pumas had provided the Player with a copy of his flight tickets to travel to Mexico that same day. Just a few hours later however, the Player did not board the scheduled flight and did not travel to Mexico.

On the following day, 28 July, Torino received a formal offer from the Argentinean club, Club Atlético Independiente (“**Independiente**”) for the Player. Torino replied to this offer on 31 July, informing Independiente that the Player was no longer a Torino player, explaining that the Transfer Agreement had been concluded on 23 July. Also on 31 July, Pumas issued a statement to the effect that the Player had not fulfilled his obligations pursuant to the Transfer Agreement.

The Player wrote to Torino, Pumas and the Mexican Football Federation (“**FMF**”) informing them of his desire to play for Independiente. Torino, on 2 August, wrote to Pumas clarifying that its position was that the Transfer Agreement had been properly concluded and encouraging them to finalise the Player’s registration in order to quash speculation over his future. Torino replied

to the Player on 3 August, informing him that, pursuant to the Transfer Agreement, he had been transferred to Pumas. On August 4, the Player was registered with Pumas according to the FIFA Transfer Matching System.

On 23 August, Pumas raised a claim before the Dispute Resolution Chamber of FIFA (“DRC”). Pumas sought compensation for breach of contract in the amount of USD 5,134,658.18 plus interest from the Player, with Independiente to be held jointly and severally liable, and requested the DRC to impose sporting sanctions upon the Player, Independiente and Torino. Pumas alleged that the Italian club and Argentinean club had induced the Player to terminate his employment relationship with Pumas.

Pumas then wrote to Torino, on 28 August, informing them that although the Transfer Agreement signed by the Parties stipulated that the first instalment of the transfer fee was due on 31 August, in light of the Player’s non-fulfilment of his obligations, Pumas would instead deposit the amount due with the FMF, pending the outcome of the dispute before FIFA.

In response, Torino relied upon a clause in the Transfer Agreement which stated, “*Failing by Universidad Nacional to respect the payment of any instalment under point 2.1 above, will result in the entire remaining Transfer Amount being due immediately*”. On 2 September, they wrote to Pumas requesting payment of the full amount of USD 1,600,000. A deadline of 10 days for payment was provided. No payment was forthcoming and on 15 September a claim was filed against Pumas by Torino, for overdue payables under article 12bis of the FIFA Regulations on the Status and Transfer of Players, with the Players’ Status Committee of FIFA (“PSC”).

Separately, after signing an employment contract with the Player dated 31 July 2017, Independiente had petitioned to be allowed to register the Player and FIFA granted provisional permission on 26 September via a decision of the Single Judge of FIFA’s Players’ Status Committee.

Timeline of Key Events

21 July 2017 – Pumas submit an offer to Torino for the Player.

24 July 2017 – the Player’s mother (also his agent) and Pumas sign a pre-contract document.

25 July 2017 – the Parties sign the Transfer Agreement, dated 23 July 2017, an agreement for the permanent transfer of the Player.

27 July 2017 – the Player travelled to Madrid, to the Consulate of Mexico to obtain a Mexican residence permit. Pumas provided tickets for him to travel to Mexico that evening. The Player did not travel to Mexico.

28 July 2017 – Independiente makes a formal offer for the Player.

31 July 2017 – Torino rejects the Independiente offer, informing them the Player has signed for Pumas. Pumas issue a press release stating the Player refused to join them. The Player enters a contract of employment with Independiente.

3 August 2017 – the Player is registered with the FMF after FIFA issue the ITC.

23 August 2017 – Pumas submit a claim to the DRC against the Player, Independiente and Torino.

28 August 2017 – Pumas informs Torino it will not pay the first instalment and instead it will deposit it with the FMF, pending the outcome of the dispute before the DRC.

2 September 2017 – Torino writes to Pumas requesting payment of the whole amount of the Transfer Agreement within 10 days.

15 September 2017 – Torino lodges a claim with the PSC seeking payment of the whole amount of the transfer fee and for sporting sanctions to be imposed on Pumas.

26 September 2017 – the PSC authorises the provisional registration of the Player with Independiente.

The FIFA Decisions

FIFA's decision-making bodies had two claims to consider. The claim lodged by Torino against Pumas before the PSC (the "**12bis Claim**") and the claim lodged by Pumas against the Player, Independiente and Torino before the DRC (the "**Breach of Contract Claim**"). Pumas asked FIFA to consolidate the claims but this was contested by Torino, which argued that the claims were separate. This objection was sustained and the matters were heard separately.

12bis Claim

The Single Judge of the PSC carefully considered the Transfer Agreement, noting the obligations incumbent upon each of the Parties pursuant to it. Pumas undertook the obligation to pay a transfer compensation fee of USD 1,600,000, payable in 4 instalments. The Single Judge further noted the acceleration clause, mandating that should Pumas fail to respect any instalment provided for in the Transfer Agreement, the full amount would fall due.

In considering the effect of the Transfer Agreement, the Single Judge examined its object, namely, Torino committing to transfer the Player to Pumas, Pumas committing to sign the Player from Torino and the Player committing to and accepting his transfer from Torino to Pumas. Torino sustained before the PSC that it had respected and performed all of its obligations toward Pumas arising from the Transfer Agreement.

Pumas held, in their response to the claim, that their actions in depositing the amount due to Torino on 31 August 2017 amounted to compliance. Pumas contended that the exceptional circumstances which resulted in Pumas own legal action were justification for Torino not receiving the amounts directly. Further, the Single Judge noted Pumas' position that the '*spirit and essence*' of the Transfer Agreement was for Pumas to benefit from the professional services of the player, which it had been unable to do so.

The first concern of the Single Judge, given it was uncontested the first instalment had not been paid, was whether Pumas had valid reason to do so or, if as claimed by Pumas, the Transfer Agreement should be considered null. Considering this point, it was emphasised that the

Transfer Agreement did not contain a clause which made its validity subject to the successful conclusion of an employment contract between Pumas and the Player. The obligation to pay the transfer compensation was therefore independent from any obligation the Player might have had towards Pumas on the basis of an employment contract. Accordingly, regardless of any potential breach from the Player to the detriment of Pumas, the obligation to pay the transfer compensation to Torino remained in place. The Single Judge rejected Pumas' arguments in this regard and held that the Transfer Agreement had to be considered as valid and binding upon Torino and Pumas.

Furthermore, the Single Judge pointed out that the Player was registered with Pumas on 4 August 2017, per FIFA TMS.

No valid reason was found to exist for the non-payment of the contractually agreed amounts and so the Single Judge moved to consider the acceleration clause contained in the Transfer Agreement. The non-payment of the first instalment amounted to a breach of the contractual terms and therefore, per the acceleration clause, the full amount of transfer compensation became due.

On 5 June 2018, the decision of the Single Judge was notified to the parties. Torino's claim was partially accepted. Pumas were ordered to pay to Torino the amount of USD 1,600,000 with interest of 5% per annum from 1 September 2017 until the date of effective payment. Torino's additional request for sporting sanctions was not accepted as the Italian club had not followed the proper 12bis procedures, which required them to wait 30 days from the due date of the payment before putting Pumas in default.

Breach of Contract Claim

Pumas claim saw them seeking USD 5,134,658.18, to be paid jointly by the Player and Independiente.

The DRC began its consideration of the matter with an examination of the pre-contract document, which Pumas submitted should be regarded as valid and binding and that the Player should be held in breach of. The Players' position, was that he had never signed an employment contract with Pumas and as such, could not have committed a breach of contract. The Player further argued that in any event, the pre-contract could not be considered valid, as it had been signed by his mother and did not contain his signature, which should be deemed an essential element.

Independiente supported the argument of the Player, submitting that there was no valid contract and therefore no breach could be attributed to the Player, and by extension, Independiente could not be liable for a non-existent breach. Torino submitted that it had no place in this matter, given that it was not the new club of the Player and as such, could not be liable for the consequences of any breach.

Given the aforementioned positions of the parties to this dispute, ascertaining the existence of a valid and binding pre-contract between the Player and Pumas, in order to then assess whether there had been a breach of contract and the consequences of any such breach, was the first consideration of the DRC.

Pumas maintained their position that there was a valid pre-contract, binding the Player to them. The DRC observed that it was uncontested that such document was not signed by the Player, but rather his mother. Pumas alleged that the subsequent acts of the Player – signing the Transfer Agreement and travelling to Madrid to obtain his residence permit - ratified the validity of the pre-contract, essentially meaning that the Player had provided explicit, or tacit, consent.

Further, Pumas contended that Mrs Perdomo had created the appearance of a mandate and accordingly, in good faith, Pumas proceeded on the belief the Player would fulfil the obligations contained in the document. On the contrary, the Player reaffirmed his argument, denying that he providing such consent to his mother.

The DRC also noted that the Player submitted that the reason he did not finalise an employment contract with Pumas was that the USD 400,000 which it had assumed the obligation to pay to the Player was not provided for in the pre-contract. The DRC recalled that Pumas counterpoint was that the amount would have been one of the terms of the employment contract.

Assessing the full circumstances, the DRC held that Pumas and the Player had not reached an agreement on all of the essential conditions of employment. In this matter, the pre-contract was the only document on file referring to contractual terms and it could not be viewed as a valid and binding employment contract. The amount of USD 400,000 was to be considered an essential element per the longstanding jurisprudence of the DRC and its omission from the pre-contract was fatal.

A further essential element which the DRC emphasised was missing was the signature of the Player. As it was uncontested the Player's signature was absent from the pre-contract, the DRC examined the argument put forward by Pumas that the Player had mandated his mother to conclude the agreement. The DRC, with reference to art.12 par.3 of the Procedural Rules, ruled that the burden of proof shall be carried by the party alleging a fact. In this matter, Pumas were unable to prove to the satisfaction of the DRC that such a mandate existed and accordingly, the DRC could not accept this line of argument.

Additionally, the DRC did not accept Pumas' reasoning that the Player had committed himself by virtue of his actions once his mother had signed the pre-contract. In the absence of an agreement on the essential conditions, it could not be established under which contractual conditions the Player would have been expected to commit himself to. The DRC was unable to find such essential conditions in the Transfer Agreement and thus, the Player's signature on this document was not sufficient to establish his employment relationship with Pumas.

In the absence of a valid and binding employment agreement, the DRC had no possibility to examine whether an alleged employment contract had been breached and therefore, the claim of Pumas had to be rejected.

Concluding, the DRC put on record that,

“As a final remark, the DRC unanimously deemed important to stress that although there is no regulatory or legal basis to sanction the player’s behavior, in the Chamber’s view, the player in question did not show proper due diligence in the negotiations with the Claimant with respect to the potential conclusion of an employment relationship between them, taking into account that he had, in principle, already consented to his transfer to the Claimant by signing the transfer agreement together with his former club, Torino. That being said, the Chamber still recognized that there is, on the other hand, an even higher duty on a club to ensure that it properly secures a player’s signature of an employment contract.”

CAS

Filing appeals at CAS against both decisions of FIFA, the PSC decision condemning them to pay the transfer compensation to Torino and the DRC decision that there had been no breach of contract, Pumas again sought to have the matters conjoined. This was again disputed by Torino, particularly given the matters at FIFA had been considered by two different disciplinary bodies. CAS agreed and the matters were again to be considered separately.

The hearings before CAS took place on 10 (appeal against the PSC decision) and 11 (appeal against the DRC decision) June 2019 and at the invitation of the President of the Panel (the same President in both procedure), the parties to the respective proceedings undertook settlement discussions.

12bis case

Pumas agreed to pay to Torino the amount of UDS 1,800,000 in full and final settlement, renouncing claims to any potential sell-on fee included in the Transfer Agreement, and further renouncing any right to claim legal expenses and costs which had arisen in connection with the matter, from Pumas.

Breach of contract case

A settlement agreement was executed, which stipulated that Independiente should pay to Torino the amount of USD 1,800,000 in addition to legal fees and expenses incurred in the concurrent CAS proceedings. Further, if Independiente transfer the Player to a third club during his registration with Independiente, Torino shall receive 20% of the transfer fee.

Independiente also agreed to pay to Pumas, the sum of USD 450,000.

Conclusions

This case (or two cases if the resultant litigations are considered in isolation) highlights a number of considerations which clubs and players should be cognisant of when transfer agreements are being discussed.

A purchasing club should always seek to ensure that transfer agreements are conditional upon the signing of a contract of employment between the player and the new club. Pumas were found by the PSC to be liable for the transfer fee (and indeed the full amount pursuant to the acceleration clause) despite not being in a position to benefit from the Player's services.

When seeking to rely on a pre-contract, clubs must be certain that all of the essential elements are present. In the matter discussed, the repayment of the USD 400,000 debt owed to the Player was considered as such an element.

The authority granted by a mandate should also be clear. Pumas sought to rely on the Player's mandate with his agent (mother) believing that it was sufficient. Accordingly, they took no further steps to ratify the employment agreement and relationship with the Player prior to ratifying the Transfer Agreement.

Finally, the procedural requirements of RSTP Article 12bis should be respected. By not following the stipulated timescales, Torino, although successful, had their request for sporting sanctions against Pumas rejected.