



Arbitration CAS 2004/A/691 FC Barcelona SAD v. Manchester United FC, award of 9 February 2005

Panel: Mr Stephan Netzle (Switzerland), President; Mr Cándido Paz-Ares (Spain); Mr José Juan Pintó (Spain)

Football

Transfer

Validity of the procedure before the FIFA Dispute Resolution Chamber despite a procedural error considered not material

No application of the FIFA regulations relating to the maintenance of contractual stability in an amateur relationship

- 1. It is not demonstrated that the lack of submissions of the national federation's comments on the dispute contrary to art. 42 para. 3 of the FIFA Regulations could have influenced the outcome of the case. The error is therefore not material and cannot have invalidated the procedure before the DRC.**
- 2. The FIFA Regulations do not control the amateur relationship and contain no provisions about the establishment or substance of such amateur relationship. Consequently, it would be inconsistent with the purpose and the scope of the FIFA Regulations to apply the provisions about "contractual stability" on a mere amateur relationship. The interests of the club which has engaged an amateur player are still protected by the provisions about trainings compensation when an amateur player becomes a non-amateur. The mere fact of a written agreement between the Appellant and the Player which regulated the status of the Player as an amateur does not suffice to trigger the application of the FIFA Regulations regarding contractual stability. The amateur status is not defined by reference of an "amateur contract" but by the fact that a player "has never received any remuneration other than reimbursement of their actual expenses incurred during the course of their participation in any activity connected with association football". Therefore the FIFA Regulations concerning the Stability of Contracts are not applicable to the amateur relationship between a Player and a Club.**

On 24 July 2002 FC Barcelona ("the Appellant"), a Spanish football private sports association, Gerard Piqué Bernabeu ("the Player") and his parents signed a "non professional" contract ("the Amateur Contract"), a pre-contract ("the Pre-Contract") which had as an attachment a draft employment contract ("the Employment Contract", all together "the Contracts"). At that time, the Player was 15 years old.

The Amateur Contract was signed for a period from 24 July 2002 until 30 June 2008. The Amateur Contract specifically stated that it was “*in keeping with the provisions relating to “amateur” football players, and neither Royal Decree 1006/1985 of 26 June, which regulates the working relations of professional sportspersons, nor the federative rules relating to such professionals*” were applicable, as the Player was “*devoting himself to the practice of sport and receiving in return compensation only for [...] expenses*”.

The Amateur Contract further provided for a compensation of EUR [...] payable to the Appellant if the Player terminated the contract for no cause attributable to the club and joined another club. An early termination without the club’s agreement would further entitle the club to retain the licence and registration until the expiry of the Amateur Contract. The Parties further committed themselves to sign an employment contract upon the realization of any of the following expressly specified conditions:

- at first request of the Appellant,
- upon the Player participating, in a single season, in a total of ten official matches with the Appellant’s B Team,
- at the first request of the Player, should he receive a definite proposal of employment from another club, or,
- in any case at the end of the season in which the Player reached the age of 18 years.

The second contract signed on 24 July 2002 was the Pre-Contract. The Pre-Contract essentially provided for the conclusion of a future employment contract for a period of maximum 5 years as from the realization of any of the conditions set forth in the Amateur Contract and in the Pre-Contract (the conditions being identical) and regulated the consequences of a refusal to sign the Employment Contract by any of the parties.

The documents signed by the Player on 24 July 2004 also included an Employment Contract. This Employment Contract was attached to the Pre-Contract and was like the Amateur Contract and the Pre-Contract signed by the Appellant, the Player and his parents. The Employment Contract stipulated the amounts of the Player’s salary for each season (the seasons, however, undated). The Employment Contract further provided for penalties in case of early termination of the Employment Contract by the Player.

In December 2003, the Appellant, the Arsenal Football Club plc., London (“Arsenal”) and the Player – the latter through his agent, Mr Arturo Canales (“the Agent”) – initiated negotiations concerning a transfer of the Player to Arsenal.

On 28 April 2004, Manchester United FC (“the Respondent”) informed the Appellant that it was “*interested in registering the player*” and offered the Appellant the payment of a training compensation “*in accordance with Chapter VII of the FIFA Regulations on the Status and Transfer of Player (July 2001) and relevant FIFA Circulars*”.

On the same day, the Appellant replied that it had already reached an agreement with Arsenal and urged the Respondent to refrain “*from any and all acts related to our player Mr Gerard Piqué*”.

On 1 July 2004, the Player signed a contract with the Respondent. This contract was referred to as an employment contract in the Decision of the FIFA Dispute Resolution Chamber but turned out to be a non-professional Scholarship Agreement when it was submitted at the hearing upon request of the Panel. The Respondent explained that this agreement was to be replaced by a professional contract on the Player's 18th birthday.

When the Appellant learned about the agreement between the Respondent and the Player, it turned to the FIFA Dispute Resolution Chamber (DRC) and requested that the Player abide by the agreements signed with the Appellant, and for the Respondent to be held liable for inducing the breach of the contract between the Appellant and the Player.

The Respondent maintained its offer to pay the Appellant EUR [...] as compensation for the Player's training and education but denied any right of the Appellant to further compensation for the transfer of the Player.

On 22 July 2004, the DRC issued a decision (the "Decision") rejecting the Claim of the club FC Barcelona and directing Manchester United to pay EUR [...] to FC Barcelona as compensation for the training and education of the player Pique Bernabeu.

On 12 August 2004, the Appellant filed the statement of appeal with the CAS and requested to set the Decision aside. Simultaneously, the Appellant filed a motion to stay the execution of the decision in order to prevent the issuance of the international transfer certificate (the "International Transfer Certificate") by the competent authorities.

On 23 August 2004, the Appellant filed the appeal brief.

On 24 August 2004, the Respondent requested the CAS to dismiss the motion to stay and further applied for an order that the International Transfer Certificate be issued immediately to the Appellant by the Spanish Football Federation (RFEF) or, alternatively, by FIFA.

On 30 August 2004, the Deputy President of the CAS Appeal Arbitration Division dismissed both the Appellant's and the Respondent's applications.

On 27 September 2004, the Respondent filed its answer.

Subsequently, the International Transfer Certificate was issued to the FA.

On 9 December 2004, the Respondent submitted its contract with the Player dated 1 July 2004 by fax.

On 13 December 2004, a hearing was held at the premises of the CAS in Lausanne ("the Hearing"). In its statement of appeal of 12 August 2004, the Appellant requested that the Panel:

- *“Annuls the appealed Decision and refers the case back to the previous instance; or, alternatively*
- *Issues a new decision which replaces the Decision challenged”.*

On the merits, the Appellant argued that the Player did not have a mere amateur status but was bound by a “training contract” and that such contract was subject to rules on contractual stability (Chapter VIII of the FIFA Regulations). As the Player failed to comply with its contractual obligations, he was in unilateral breach of contract which entitled the Appellant to prevent the issuance of the Player’s International Transfer Certificate.

In its answer of 27 September 2004, the Respondent requested the following:

- “1) *To reject entirely the Statement of Appeal of the Appellant.*
- 2) *To confirm in all its contents the Decision.*
- 3) *To order the Appellant to pay all the legal costs”.*

On the merits, the Respondent argued that the Player had the status of an amateur player when he signed the agreement with the Respondent. As such, he was entitled under FIFA Regulations to change the club at any time for no other consideration than the training compensation established by the FIFA Regulations. Such training compensation was offered to the Appellant and the Player was therefore free to sign a new contract with the Respondent.

LAW

CAS Jurisdiction

1. The jurisdiction of CAS, which is not disputed, derives from art. 59 ff. of the FIFA Statutes and R47 of the Code. It is further confirmed by the order of procedure duly signed by both parties.
2. It follows that the CAS has jurisdiction to decide the present dispute.

Applicable law

3. Under art. 59 para. 2 of the FIFA Statutes “*CAS applies the various regulations of FIFA or, if applicable, of the Confederations, Members, Leagues and clubs and, additionally, Swiss law*”.
4. Under art. R58 of the Code “[*t*]he 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 of sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel seems appropriate. In the latter case, the Panel shall give reasons for its decision”.

5. FIFA, the sports-related body which has issued the challenged decision, is an association under art. 60 ff. of the Swiss Civil Code. The Appellant and the Respondent are members of the national football associations under the laws of their respective countries, which are again members of FIFA. As such, they are bound to abide by FIFA's applicable rules and regulations (articles 10 para. 4, 13 para. 1).
6. Spanish law applies if and to the extent to which the contractual obligations between the Appellant and the Player must be interpreted, since the Amateur Contract and the Pre-Contract contain references to Royal Decree 1006/1985, i.e. to Spanish Law and the Employment Contract contains an explicit choice of Spanish Law.

Issues to be decided by the Panel

A. On formal grounds

7. As a first step, the Panel must address the following procedural questions:
 - Did FIFA violate its procedural rules, namely art. 42 para. 3 of the FIFA Regulations by ignoring to ask the RFEF for its opinion before reaching its decision?
 - If yes, what are the consequences of such procedural error?
 - Was the Appellant allowed to withdraw its petitions on specific performance at the Hearing and to alter its petition to a petition for a declaratory judgement?

B. On the merits

8. To determine whether the Respondent induced the Player to a breach of his contractual relationship with the Appellant the Panel must first identify the legal nature of the Amateur Contract, the Pre-Contract and the Employment Contract.
9. Then, the Panel must ascertain whether the agreement between the Player and the Appellant is subject to a category of contracts to which Chapter VIII of the FIFA Regulations (on "Maintenance of Contractual Stability") applies.
10. If the agreement between the Player and the Appellant falls into a category governed by Title VIII of the FIFA Regulations, the Panel must determine whether the signing of a contract between the Player and the Respondent constituted a violation of said Regulations.

On formal grounds

A. *Violation of art. 42 para. 3 of the FIFA Regulations*

11. Art. 42 para. 1 (b) of the FIFA Regulations regulates the dispute resolution process before the DRC. The rules of procedure are further set out in the Regulations governing the Application of the Regulations for the Status and Transfer of Player (“the Application Regulations”).
12. According to art. 42 para. 3 of the FIFA Regulations “*before reaching its decision [...], the Dispute Resolution Chamber shall ask the national association which had the player’s registration before the dispute arose to give its opinion*”.
13. Under art. 16 para. 4 of the Application Regulations “*the Dispute Resolution Chamber shall send a copy of all the relevant documents pertaining to the dispute to the national association which held the registration of the player involved in the dispute when the dispute arose and set a deadline within which the association may send its written observation on the dispute. A copy of these observations shall be forwarded to the parties to the dispute*”.
14. As the DRC-file shows, the RFEF has not been invited to submit its comments on the dispute. Nor has the RFEF ever submitted such comments on its own initiative. The Respondent has not disputed these facts. The Appellant has requested the Panel to annul the Decision on the grounds of a violation of procedural rules.
15. The Panel holds this objection of the Appellant to be overly formalistic, mainly because of two reasons:
 - (i) The DRC-file shows (and it was confirmed by the Appellant at the Hearing) that all correspondence from the DRC to the Appellant was conducted via the RFEF. Although not explicitly invited to express its opinion, the RFEF was therefore aware of the dispute and its subject matter and had at any time, the possibility to intervene either spontaneously or at the Appellant’s request.
 - (ii) Art. 42 para. 3 of the FIFA Regulations shall safeguard primarily the interests of the national federations, not the Appellant’s. However, the violation of art. 42 para. 3 of the FIFA Regulations is not claimed by RFEF but only by the Appellant.
16. Under these circumstances and since the Appellant has not demonstrated how the RFEF’s opinion could have influenced the outcome of the case, the Panel finds that the error of the DRC was not material and did not invalidate the procedure before the DRC. The claim to annul the Decision and to refer the case back for a new decision based on the violation of art. 42 para. 3 of FIFA Regulations is therefore dismissed.

B. *Amendment of the Appellant’s Claim (declaratory award)*

17. At the Hearing, the Appellant withdrew its petition against the delivery of the International Transfer Certificate for the Player and restricted its claim to a declaration by CAS that the

Respondent had induced the Player to breach the contract “*contrary to the principle of maintenance of contractual stability of Chapter VIII of the FIFA Regulations for the Status and Transfer of Players*”. The Respondent did not object to these amendments of the Appellant’s petitions.

18. Under art. R56 of the Code “[u]nless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement their argument, nor to produce new exhibits, not to specify further evidence on which they intend to rely after the submission of the grounds for the appeal and of the answer”.
19. The Appellant amended its petition after the submission of the answer. However, the Respondent did not oppose to such amendment at the Hearing. The Panel also notes that the amendment constitutes a limitation of the Appellant’s initial claim. The Respondent’s procedural rights are thus not affected by the withdrawal of one of the Appellant’s claim.
20. In view of these circumstances, the Panel holds that the withdrawal of the Appellant’s petition to prevent the issuance of the International Transfer Certificate is admissible.
21. This leaves the Panel only with a complaint for a declaratory judgement. Swiss procedural law requires the claimant to demonstrate an actual interest of the claimant in such declaration (see Awards of the Swiss Federal Tribunal 123 III 51, 123 II 97 and 120 II 20). This requirement is reviewed *ex officio*. The Swiss Federal Tribunal has repeatedly denied the existence of an actual interest in a merely declaratory award if the underlying controversy was about damages and/or specific performance.
22. As a consequence of the parties’ control over the procedure arbitration panels have a wider discretion to admit complaints for declaratory judgements than state courts. The Code does not address this issue and does not exclude declaratory awards. Nor has the Respondent objected to a declaratory award.
23. In the case at stake, it is indeed uncertain whether the Contracts between the Appellant and the Player comply with the FIFA Regulations and there is an actual interest of the Appellant as a contractual partner of a large number of amateur and professional players to have this question resolved. The Panel has therefore no reservation to accept the complaint for a declaratory award.

Merits

A. Relevant Contracts and applicable FIFA Regulations

24. The Appellant seeks a declaration that the Respondent induced the Player to a breach of contract “*contrary to the principle of maintenance of contractual stability of Chapter VIII of the FIFA Regulations for the Status and Transfer of Players*”. CAS has not been asked to determine whether there was a breach of contract or an inducement thereto under Spanish law. The Appellant has explicitly defined the mission of the Panel to rule only on the conduct of Respondent

based on the FIFA Regulations for the Status and Transfer of Players. Such constraint is binding upon the Panel (*ne eat iudex ultra petitum partium*).

25. The Player has moved from a member club of RFEF (the Appellant) to a member club of the FA (the Respondent). The applicability of the Regulations of FIFA for the Status and Transfer of Players as approved on 5 July 2001 (“the FIFA Regulations”) is uncontested.
26. The Appellant derives its complaint from the Amateur Contract and the Pre-Contract. As to the Employment Contract, the Appellant stated in its written submissions that the same was to enter into force “*if agreed*” latest on 1 January 2005. It is evident from the terms of the Pre-Contract (whereas under clause TWO “*the parties undertake [...] to sign and commence the working relationship*”, whereas “*non-signature of the contract of employment by F.C. Barcelona or the Player*” would bring about the consequences of clause FIVE of the Pre-Contract and whereas under SEVEN the “*annexed model contract of employment*” was to be registered) that the Employment Contract was not to enter automatically into force upon fulfilment of any conditions, but required a separate consensus of the parties. Such understanding was confirmed by the conduct of the Appellant which sent to the Player a new draft of an employment contract (the “Proposed Employment Contract”) in February 2004. The Proposed Employment Contract differed slightly from the Employment Contract and had a start and ending date but was never signed by the Player.
27. At the Hearing the Appellant confirmed that it considered only the Amateur Contract and the Pre-Contract to contain valid and enforceable obligations. The Panel has thus not to decide on the validity, the qualification or the potential breach by the Respondent of the Employment Contract.

B. *No “training contracts” under the applicable FIFA Regulations*

28. It is undisputed that the Amateur Contract itself does not constitute a non-amateur contract as defined by the FIFA Regulations. However, the Appellant argues that the Amateur Contract must be read in connexion with the Pre-Contract and the Employment Contract. Such combination resulted in a “training contract” which must be distinguished from a mere amateur relationship and fell into the category of contracts to which Chapter VIII of the FIFA Regulations applied.
29. The Respondent disputes that the FIFA Regulations recognize a third kind of contracts, namely “training contracts”, which are neither professional contracts nor amateur contracts.
30. Under the title “Player categories”, the FIFA Regulations contain the following relevant provisions:

“*Art. 1*

Players at national association affiliated to FIFA are classified either as amateur or non-amateur.

Art. 2

¹ *Players who have never received any remuneration other than reimbursement of their actual expenses incurred during the course of their participation in any activity connected with association football are regarded as amateur.*

² *Travel and hotel expenses incurred through involvement in a match and costs of a player's equipment, insurance and training may be reimbursed without jeopardising a player's amateur status.*

³ *Any player who has ever received remuneration in excess of the expenses and costs described in par. 2 of this article in respect of participation in an activity connected with association football shall be regarded as non-amateur unless he has reacquired amateur status under the terms of Art. 26 par. 1 below.*

Art. 3

¹ *A player's status shall be determined by the national association with which he is registered.*

[...]"

31. The Appellant's construction of a third category of "training contracts", standing between mere amateur and professional employment contracts has no basis in the applicable FIFA Regulations. Article 1 of the FIFA Regulations is unequivocal to this point and there is no subset of "training" contracts: According to the FIFA Regulations, a player is either an amateur or a non-amateur, depending whether he meets the requirements of art. 2 para. 1 and art. 2 para. 2 (amateur) or art. 2 para. 3 (non-amateur). *Tertium non datur.*
32. As the Amateur Contract evidences, the remuneration offered to the Player did not exceed the actual expenses incurred by the Player through its football activity. Further elements confirm that the Amateur Contract was to establish an amateur football player relationship between the Player and the Appellant in the terms of art. 2 para. 1 of the FIFA Regulations; i.e. the title of the contract, the explicit exclusion of Royal Decree 1006/1985 (regulating the labour relationship of professional players), and, ultimately, the fact that the Player was, at the time when he signed the Contracts, not yet 16 years old and thus too young to validly enter an employment relationship under Spanish Labour Law (cf. art. 7 of the "Estatuto del Trabajador").
33. This result remains the same if the Amateur Contract and the Pre-Contract are not reviewed jointly but individually. Also the Pre-Contract *per se* did not change the Player's status as an amateur since it did not contain any of the elements which define a non-amateur according to art. 2 para. 3 of the FIFA Regulations. Such elements were conditional only upon signing of the Employment Contract.
34. The contractual relation between the Player and the Appellant must be qualified, in accordance with art. 1 of the FIFA Regulations, either as amateur or as non-amateur. The Panel concludes that when the Player signed the Agreement with the Respondent, he had the status of an amateur player in terms of art. 2 para. 1 of the FIFA Regulations.

C. *Application of Chapter VIII of the FIFA Regulations*

35. Obviously, the Player signed the agreement with the Respondent on or before 1 July 2004, i.e. before the target termination dates of the Amateur Contract and the Pre-Contract.
36. Whether the signing of a new agreement with another club while an amateur contract and/or a pre-contract in view of an employment contract with the first club was still running constituted a breach under Spanish law, is not subject to the review of this Panel since it has been explicitly asked to restrict its analysis exclusively to a potential violation of the FIFA Regulations.
37. The FIFA Regulations address unilateral breaches of contract in Chapter VIII (“Maintenance of Contractual Stability”). It is yet true that the FIFA Regulations are not perfectly clear in defining which contracts are subject to Chapter VIII. However, taking the purpose and the context of the FIFA Regulations in its entirety into account, the Panel has no doubt that Chapter VIII is only speaking of non-amateur contracts in the meaning of art. 2 para. 3 of the FIFA Regulations.
38. It must be remembered that the FIFA Regulations have been issued to regulate the legal and economic aspects of the transfer of players in accordance with the principle of free movement of workers as established by the EC treaty and substantiated by the European Court of Justice in its ruling of 15 December 1995 (case C-415/93), thereby taking the specific needs of *professional* football into account. In this context, any provisions in the FIFA regulations affecting the player’s freedom of movement should be interpreted narrowly.
39. The FIFA Regulations are characterized by two basic principles: (i) the principle that clubs must be compensated for their efforts of educating and training the young players and (ii) the principle that the professional relationship between a player and his club must be respected (see Circular no. 769 of FIFA to the national associations, dated 24 August 2001).
40. In this context, the distinction and the transition between amateur and non-amateur players are of utmost importance: (i) At the time when an amateur becomes a non-amateur (or professional), the club which trained and educated the young player up to that level must be compensated (Chapter VII), and (ii) when a club employs a player (which becomes then by definition a non-amateur), the contractual parties may rely on the stability of the professional relationship which shall not be disturbed by competing clubs (Chapter VIII). The FIFA Regulations do not control the amateur relationship and contain no provisions about the establishment or substance of such amateur relationship. Consequently, it would be inconsistent with the purpose and the scope of the FIFA Regulations to apply the provisions about “contractual stability” on a mere amateur relationship. The interests of the club which has engaged an amateur player are still protected by the provisions about trainings compensation when an amateur player becomes a non-amateur.
41. The same result, whereas Chapter VIII on contractual stability is not applicable to amateur players, follows from a verbal and systematic interpretation of the FIFA Regulations.

42. Art. 4 of the FIFA Regulations determines that “[e]very player designated as a non-amateur by his national association shall have a written contract with the club employing him”. The second paragraph of art. 4 sets out the minimum requirements of “such contracts” which are not restricted to *written* contracts. Obviously, Art. 4 is not meant to stipulate a mere formality but defines a “contract” in the meaning of the FIFA Regulations as an agreement between a player and a club *employing* him (Art. 4 para. 2, *in fine*), i.e. employing a player in a *non-amateur status*.
43. This finding is confirmed by various provisions which are reasonable only if the term “contract” is understood as an agreement between a non-amateur player and the club employing him, see e.g.:
- Art. 5 para. 3 (ii) of the FIFA Regulation requires to submit a player’s contract for registration with the competent national association only and consistently “*in the case of a non-amateur*”.
 - Art. 17 of the FIFA Regulations sets out the amount of compensation “[W]hen a player signs his first contract as a non-amateur, or when a player moves as a non-amateur at the end of his contract”.
 - Chapter VIII of the FIFA Regulation deals with unilateral breaches of contract. Art. 22 (1) determines that the “*remuneration and other benefits under the existing contract and/or the new contract*” must be taken into consideration when the compensation for breach of contract is to be compensated. Remuneration or other benefits characterize a non-amateur relationship.
 - Circular letter No 769 of FIFA to the national associations explains the need for contractual stability but refers also to sportive justifications as reasons to terminate a contract “*which can go beyond just causes found in regular employment law*” (see p. 21, last para.).
44. It is yet true that there existed written agreements between the Appellant and the Player which regulated the status of the Player as an amateur. However, the mere fact of a written agreement does not suffice to trigger the application of the FIFA Regulations regarding contractual stability. The amateur status is not defined by reference of an “amateur contract” but by the fact that a player “*has never received any remuneration other than reimbursement of their actual expenses incurred during the course of their participation in any activity connected with association football*” (Art. 2 para. 2 of the FIFA Regulations).
45. The Panel finds therefore that the FIFA Regulations concerning the Stability of Contracts (Chapter VIII) are not applicable to the amateur relationship between the Player and the Appellant. It is therefore not necessary to review whether the Respondent induced a breach of contract and violated art. 22 para. 2 of the FIFA Regulations.
46. Thus, the Panel declines to declare that the Respondent had induced a breach of contract contrary to the principle of maintenance of contractual stability of Chapter VIII of the FIFA Regulations for the Status and Transfer of Players. The appeal is therefore dismissed.

47. For the sake of clarity, the Panel reminds the parties that the obligation of the Respondent to pay a trainings and education compensation in the amount of EUR [...] to the Appellant according to art. 2 and 3 of the Decision has not been disputed and was thus not subject to the Panel's review.

The Court of Arbitration for Sport rules:

1. The appeal filed by Barcelona FC is dismissed and the decision issued on 22 July 2004 by the FIFA Dispute Resolution Chamber is upheld.
2. (...)