Football:

Waiver of rights to training compensation

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Introduction

In the FIFA Regulations on the Status and Transfer of Players (RSTP), provisions are laid down regarding the conditions to claim training compensation. The amounts can be substantial and many disputes have been settled before the sports tribunals over the last years.

This article specifically examines under what circumstances a new club may assume that no training compensation is due by the new club to any of the former clubs of a football player. In other words, this article will focus and deal with the legal question under what circumstances a former club has legally waived its right to receive any amount for training compensation.

The RSTP are silent on this question, which is also underlined in the jurisprudence, as it follows that the RSTP do not expressly foresee the waiver by a training club of its entitlement to training compensation.[3]

Therefore, to make a careful analysis, all the relevant and most recent published decisions of the FIFA Dispute Resolution Chamber (DRC) and the Court of Arbitration for Sport (CAS) will be discussed and brought to the attention of the reader.

After the decisions of the DRC and the CAS have been discussed, final comments will follow. More specifically, the principles that derive from the sports jurisprudence and legal pitfalls will be highlighted.

Leading jurisprudence of DRC and CAS

Background

From the well-established jurisprudence of the DRC, it explicitly follows that football clubs are fully entitled to exclude their right to training compensation. However, for the new club of the player, it is of the utmost importance that provisions in that regard are drafted in a legally correct manner and in accordance with the basic principles of well-established jurisprudence.

In this regard, it must be mentioned that a waiver of right does not need to take a particular form. For example, there is not a requirement that the waiver of training compensation be recorded in a bilateral agreement between the former and the new club, although this can be the case, for example, in a transfer agreement.

However, if no transfer agreement is concluded, it is not necessary to conclude a bilateral agreement. In fact, a unilateral declaration is sufficient and unilateral waivers that are not made in a contractual context can thus be considered as fully valid.[4]

In the following paragraphs, the general accepted principles regarding the validity of a waiver of training compensation will be highlighted with reference to the most relevant and recent DRC and CAS jurisprudence. It will become clear in what circumstances a new club may assume that no training compensation is due to any of the former clubs of a football player.

Principles deriving from leading jurisprudence

As a starting point, only a club that is entitled to receive training compensation can waive its right. For example, the entitlement to training compensation cannot be excluded by an agreement between the new club and a player[5], an agent[6] or any other third party, not being the club that is entitled to receive training compensation in accordance with the

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3 CAS 2017/A/5277 *FK Sarajevo v. KVC Westerlo*, award of 16 April 2018.

4 CAS 2017/A/5277 *FK Sarajevo v. KVC Westerlo*, award of 16 April 2018.

5 DRC 2 November 2005, no. 115377. See also DRC 18 August 2006, no. 86130B.

6 DRC 21 May 2010, no. 510425.

RSTP. In this regard, it is also important to mention that the persons within the club who waive the right of a club to claim training compensation must be authorised to act on behalf of the former club[7], although also employees of the club can hold the new club accountable for any payment.[8]

In view of the above, the jurisprudence of the DRC makes absolutely clear that only the former club, that is officially entitled to receive training compensation, can waive its right to receive any training compensation, which also follows from more recent CAS jurisprudence.[9] The club that is entitled to receive training compensation needs to explicitly waive its right to training compensation. It is of the utmost relevance to draft specific provisions in a transfer agreement, or in the so-called "waiver" (if the parties do not conclude a transfer agreement), precisely and legally correct in order to avoid any misunderstanding. In this respect, it must be taken into account that it is the new club that must prove, with conclusive and compelling evidence, that the former club of the player explicitly waived its right to claim training compensation.[10]

We are confronted with many cases before the DRC and CAS in which a party is of the opinion that it did not waive its right to training compensation for the player concerned, and that a discussion arises as to the question how words in a waiver must be interpreted.

For example, if a former club confirmed that no "transfer sum" had to be paid in respect of the expiry of the employment contract, which was at stake in a decision of the DRC of 9 November 2004, no. 114461. In this decision, it was confirmed by the former club that "the contract of ... (the player) expires on 30 June 2002 and that no more transfer fees exist."[11] As result of this statement, the new club relied on the fact that no training compensation was due. The DRC, however, concluded that this only meant that no transfer fee would be due in case of a future acquisition of the player's federative rights and underlined that no reference was made to the right to claim any training compensation. The new club did not agree and appealed to the CAS.[12]

The CAS followed the DRC approach. The new club should have understood this statement in the sense that no transfer fees were due, but a training compensation could still be claimed. Or, at the least, the new club should have checked this latter point with the claiming club (which recommendation was also made by the DRC in a decision of 28 September 2007[13]). For these reasons, the CAS finally did not consider the statement in this case to be a valid legal waiver.

As opposed to the words "transfer fees" as referred to in the above-mentioned DRC case of 22 November 2004, the DRC jurisprudence also shows that "financial compensation" could not be understood to only include transfer compensation. For example, in the case of 26 October 2006, the DRC had to decide whether the term "financial compensation" contained in the waiver of a club also referred to its possible right to receive training compensation. [14] The DRC stressed that the notion "financial compensation" was a general and unspecified term which, in principle, could not be understood to only include transfer compensation. The DRC considered that the term rather encompassed any kind of monetary compensation which the club could have requested in connection with the player, including training compensation.

Also the term "free transfer" does not automatically mean that the club forfeits its right to training compensation. For example, in its decision of 7 September 2011, the DRC considered that "free transfer" could not be interpreted as a waiver of training compensation.[15] The same approach is taken by the CAS. For example, a letter by which the club granted the player the status of "free agent" did not amount to a waiver of the club's right to training compensation, at least, not in the eyes of the CAS, as follows from the award in CAS 2009/A/1919.[16] The CAS Panel was of the opinion that the letter did not evidence a possible waiver of the club's right to receive training compensation.[17] The same applies to a statement of a club that the player did not have a contract, which does not automatically mean that no training compensation is due.[18]

Also, in a case of the CAS award of 20 November 2013, the "Dundee-Vélez case", the CAS had to decide on the validity of a "waiver".19 In this case, the CAS decided that Dundee United could not have reasonably understood from a termination agreement that Vélez Sarsfield waived its right to training compensation. In

7 DRC 7 September 2011, no. 9112744.

8 DRC 26 April 2012, no. 412107.

9 CAS 2017/A/5277 *FK Sarajevo v. KVC Westerlo*, award of 16 April 2018.

10 See also CAS 2017/A/5277 *FK Sarajevo v. KVC Westerlo*, award of 16 April 2018; DRC 17 June 2016, no. 06161092-E.

11 DRC 9 November 2004, no. 114461.

12 DRC 9 November 2004, no. 114461.

13 DRC 28 September 2007, no. 9719.

14 DRC 26 October 2006, no. 106574.

15 DRC 7 September 2011, no. 9112744.

16 CAS 2009/A/1919 *Club Salernitana Calcio 1919, S.p.A. v. Club Atlético River Plate & Brian Cesar Costa*, award of 7 May 2010.

17 CAS 2009/A/1919 *Club Salernitana Calcio 1919 S.p.A. v. Club Atlético River Plate & Brian Cesar Costa*, award of 7 May 2010.

18 DRC 21 September 2012, no. 9122324.

19 CAS 2013/A/3119 *Dundee United FC v. Club Atletico Vélez Sarsfield*, award of 20 November 2013; See also CAS 2009/A/1810 and 1811 *SV Wilhelmshaven v. Club Atlético Excursionistas & Club Atlético River Plate*, award of 5 October 2009; CAS 2010/A/2069 *Galatasaray A.S. v. Aachener TSV Alemannia F.C.*, award of 16 August 2010; CAS 2010/A/2075 *Marítimo da Madeira SAD and Coritiba Footballclub*, award of 2010.

this regard, the CAS Panel decided, as the CAS Panel had decided in the abovementioned case of the CAS award of 19 December 2005, that, as a matter of common sense, Dundee United could, at least, have checked the position with the former club Vélez Sarsfield.

It must also be taken into account that the new club cannot shift its financial obligations, for example to the new player, even if this is laid down in an agreement between the player and the new club. For example, in its decision of 12 June 2012, the DRC decided that a player cannot be held responsible for the payment of training compensation to the former club.[20] In other words, the DRC Judge considered that the agreement that the respondent had concluded with the player could not set aside the relevant provisions regarding training compensation contained in the RSTP. The DRC Judge finally decided in this case that the respondent was liable to pay an amount of training compensation to the claimant, as also follows from DRC 23 July 2015.[21]

More recent jurisprudence is also in line with the above approach, although there is not much jurisprudence in recent years.[22] For example, in a decision of the DRC of 17 June 2016, the respondent club only sought proof of the fact that the former club had waived its right in the wording of the termination agreement. Subsequently, the DRC stressed that the termination agreement only established that the player and the claimant had no financial claims against each other, but nowhere mentioned that the claimant waived his right to receive training compensation. Having said that, the DRC decided that no element in that part of the termination agreement, nor in the entire document, could possibly lead to the understanding that the claimant was waiving its right to receive training compensation for the player.[23]

It is useful to shed some light on a more recent dispute, which was dealt with before the CAS, between FK Sarajevo and KVC Westerlo. In short, FK Sarajevo, the appellant, a professional football club based in Bosnia and Herzegovina, claimed to be entitled to an amount of training compensation from the Belgian professional football club KVC Westerlo for the signing of a professional contract between the latter club and a Bosnian player, who had previously been registered with FK Sarajevo before the age of 21. Westerlo successfully contested the claim filed by Sarajevo before the DRC and the CAS. The crucial element in this case was the fact that, shortly after the contract between Sarajevo and the player expired, the general manager of Sarajevo issued a letter to the player in which he – with authorisation of the president of his club – confirmed that:

"Sarajevo will not ask for training compensation from the new club if the new club of the player agrees to pay 10% of the total nett transfer fee, should the player be transferred or loaned from new club to the third club; and the new club of the player, should the player return back to FK Sarajevo, will not request any compensation or transfer fee or any other funds from FK Sarajevo."

Based on this document, Westerlo was – rightfully – convinced that no training compensation was due and, therefore, decided to conclude a contract with him.

The CAS Panel, in the above-mentioned case, stressed, in line with the above approach, that a waiver of training compensation may only be assumed in case it was unmistakable that the renouncing club had indeed intended to waive its right to training compensation. Further, the award shows that only the club that is entitled to training compensation can waive this right.[24]

Final comments

Analysing the leading jurisprudence of the competent authorities, DRC and CAS, it is clear that there must be conclusive evidence that a party actually waived its right to training compensation. Implied waivers will not be recognised. A waiver of rights may only be assumed in case it is unmistakable that the renouncing club had indeed intended to waive its right to training compensation. In this regard, it is also of the utmost importance to realise that the new club bears the burden of proving that the former club had actually waived its entitlement to receive training compensation from the new club. This burden of proof should not be taken lightly.

The jurisprudence of the DRC and the CAS further shows that, in case words are unclear, or at least not clear enough, the new club will not be able to prove that the former club waived its right to training compensation. As a result, training compensation has to be paid.

As decided in the DRC case of 24 November 2011 (no. 11113518), and to avoid any misunderstanding in relation to future claims, it can further be relevant and it is, therefore, advisable to print the waiver on the club's letterhead (with a correct club stamp). Obviously, it is to be recommended that the waiver is actually signed by an authorized person, as previously mentioned.

Following the above decisions of the DRC and the CAS, we can conclude that parties are entitled to exclude their entitlement for training compensation by stipulating this in an agreement.

Under Swiss law, a waiver of rights does not need to take a particular form. There is no requirement that the waiver of training compensation be recorded in a bilateral agreement. However, it is only the former club that is

20 DRC 12 June 2012, no. 6122546.

21 DRC 23 July 2015, no. 07150005.

22 See for example, CAS 2017/A/5350/5351/5352/5353 *FK Sileks v. GFK Dubo ica Leskovac*, awards of 24 April 2018, and CAS 2017/A/5277 *FK Sarajevo v. KVC Westerlo*, award of 16 April 2018.

23 DRC 17 June 2016, no. 06161092-E.

24 CAS 2017/A/5277 *FK Sarajevo v. KVC Westerlo*, award of 16 April 2018. This concerns an appeal of DRC 9 February 2017, no. 02171318-E.

entitled to receive training compensation, which can validly waive its right for training compensation. In other words, any possible financial settlements concluded with any other parties, such as players and intermediaries, cannot, in any sense, take away the former club's legal entitlement to receive training compensation.

In order not to take any unnecessary risks and to avoid any substantial payments for training compensation, it is strongly recommended to follow the leading jurisprudence and to contact the former club of the player directly to ask for information, or a confirmation, regarding its legal position with regard to any claims for training compensation in relation to the player.

If two clubs intend to agree that one of those clubs will waive its right to training compensation, the former club of the player must explicitly waive its right to training compensation before the new club concludes a player's contract. Only this club is bound to this waiver and not any other former clubs.

The following provision, in the view of the authors, will suffice and is "DRC- and CAS-proof":

"[The former club] *herewith explicitly confirms that it renounces and waives any possible right to training compensation as mentioned in Article 20 and Annex 4 of the FIFA Regulations on the Status and Transfer of Player. Therefore, [the former club] will not, neither now nor in the future, claim any amount of training compensation from [the new club] for the player concerned in case the player signs a professional contract with* [the new club]."