

Chapter 16

Young Football Players: Training Policies

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16.1 CAS 2003/0/530 AJ Auxerre v. Valencia and M. Sissoko

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Mohammed Sissoko was trained by AJ Auxerre. According to French regulations, such youngsters have to sign their first contract with the training club, provided such a contract is offered by the club. Finally AJ Auxerre offered the player conversion of the trainee contract into a professional ‘intern player’ contract. However, Sissoko signed a

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professional contract with FC Valencia. AJ Auxerre thus filed a CAS case, and the ruling was eventually decided in their favour. For the first time in CAS' history the training club received financial compensation which exceeded the basic training indemnities. This compensation covered both transfer and youth team costs. The author analyses these regulations and explains the result of this decision: strengthening the principle of the free movement of young players, and establishing the training club's right to receive fair financial compensation.

16.1.1 Introduction

The *Sissoko* award rendered by the Court of Arbitration of Sport (CAS) on 27 August 2004 is an award of the utmost importance: it defends the protection of the young football players' training.

In fact, the *Sissoko* award constitutes a crucial decision for the French football and its training system since it offers new legal means to insure its durability.

The facts of the case are the followings: Mohammed Sissoko and the French Club "AJ Auxerre" signed a 3-years "aspirant" contract on 16 February 2000. Before the end of his "aspirant contract" (officially 30 June 2003) and according to the Professional Football Charter, which is considered as a collective labour agreement in France, the Auxerre Club offered M. Sissoko to sign a new professional "intern player" contract (*joueur stagiaire*). M. Sissoko declined to sign it.

Mohammed Sissoko signed a new 5 seasons labour contract as a professional player with FC Valence on 1 July 2003. The FIFA authorised the Spanish Royal Federation of Football to qualify M. Sissoko on a temporary basis for evolving in FC Valence. The FIFA Dispute Resolution Chamber (DRC) confirmed this authorisation and invited AJ Auxerre to ask FC Valence for training indemnities. In this decision, the DRC refused the implementation of the French Professional Football Charter. The DRC considered that an international transfer must exclusively be governed by the FIFA rules according to which, a player is free to get hired by the club of his own choice as long as his former contract is expired.

Before examining the contribution of the *Sissoko* award on the player status (II), one needs to briefly analyse the major point here at stake: training policies for young sportsmen and -women (I).

16.1.2 Training Policy for Young Football Players in Question

The training of the young football players has been one of the most important concerns of the French (B) and European (A) sport authorities.

16.1.2.1 An European Issue

The Presidency conclusions of the Nice European Council Meeting on 7, 8, 9 November 2000 says that "training policies for young sportsmen and -women are

the life blood of sport, national teams and top-level involvement in sport and must be encouraged”. The other European institutions have also recognised the importance of training policies. With the famous case *Bosman*,¹ the European Court of Justice (ECJ) states the fundamental objectives that justify a breach of the principle of freedom of movement (point 106—*Bosman*). Article 165 of the Treaty on the Functioning of the European Union (TFEU) inserts for the first time “sport” within the founding treaties. Article 165 TFEU also insists on the social and educational functions of sport. It also stresses the importance to protect, physically and morally, young sportsmen and -women.

Pursuing the same logic, the European Commission in its White Paper on Sport (2007) states that “investment in and promotion of training of young talented sportsmen and sportswomen in proper conditions is crucial for a sustainable development of sport at all levels”. In order to ensure the reintegration of professional sportspersons into the labour market at the end of their sporting careers, the Commission also emphasises “the importance of taking into account at an early stage the need to provide “dual career” training for young sportsmen and sportswomen and to provide high quality local training centres to safeguard their moral, educational and professional interests.”

Finally, the Presidency conclusions of the French Presidency of the European Union (December 2008), underlines the social and educational functions of the sport, especially related to the “dual career” of the sportsmen.

The necessity to protect young sportsmen and -women with high standard training policies that associate education and sport has become an European question. This question was, originally, a French concern.

16.1.2.2 A French Concern

In order to have a good understanding of the legal issues of the Sissoko case, one needs to explain the contractual aspects of the French training policy for young football players.

In France, the training policy for young football players is characterised by a training cycle that is completed by the player between his 16th and his 21st years. Section L.211-5 of the French “Code du Sport” requires the player and the football club to sign a “Convention de formation” (agreement for training).

Section R. 211-91 (*sqq.*) of the “Code du Sport” specifies which stipulations must be included within the “Convention de formation”.

Thus, in France, a football player for his training can sign two types of contracts simultaneously but pursuing different goals:

- the “*Convention de formation*” establishes reciprocal rights and obligations of the player and of the Club

¹ ECJ, 15 December 2005, *Bosman*, C-415/93.

- the “*Contrat de joueur en formation*” (Apprentice, Aspirant, Trainee or Elite) determines the conditions of employment—payment... Such contracts are considered as labour contracts.

In other words, the training player is linked to his club by a “convention de formation” to which can be added a “*contrat de joueur en formation*”.

As a result, all training player must sign a “*convention de formation*” with their training club.

This obligation is stated by the Professional Football Charter. In France, contrary to other countries, a collective labour agreement in the football field (the Charter mentioned above) exists and is applicable. This collective labour agreement was negotiated and signed by all, even by the football players.

With the *Sissoko* case, debates in front of the Court of Arbitration of Sport were mainly related to the scope of the French Charter.

16.1.3 The Recognition of the Importance of Training Policies for Young Football Players

The *Sissoko* case constitutes an outstanding award within the CAS case-law (A). This award was confirmed in 2005 by a very similar case N’Zogbia. This confirmation of the *Sissoko* award expresses clearly the CAS’ position on the question of training policies regarding young football players (B).

16.1.3.1 The Contribution of the Sissoko Award

In the *Sissoko* case, the award rendered by the CAS is threefold.

First of all, in order to respect fundamental freedoms, it is not possible to reintegrate M. Sissoko in his former French club. Secondly, M. Sissoko had refused to sign a trainee-contract (*contrat de stagiaire*) with his training club and signed a professional contract with FC Valence. Due to these facts, M. Sissoko has violated the Professional Football Charter and thus, his contractual obligations. Thirdly, AJ Auxerre should get financial compensations for damages superior to the simple training indemnities. In other words, with the *Sissoko* award, the CAS admits the principle of free movement of football players but, for the first time, it establishes the right for the training club to get a fair financial compensation.

In this Award, the CAS concluded that M. Sissoko had violated his contractual obligations (1). Thus, the CAS developed the right of the training club to get a fair financial compensation for damages (2).

Violation of Contractual Obligations

The Court confirmed that Sissoko could stay in Spain. It could not have decided in a different way: according to the principles of contractual freedom implemented in

the French “Code civil” and “Code du travail” it was not possible to force M. Sissoko to reintegrate his former French club.

After having acknowledged the existence of a contract between M. Sissoko and AJ Auxerre and its binding effect, the CAS has recognized the violation of these contractual obligations.

47. Il est évident que les règles de la Charte sont de portée nationale et ne sauraient prétendre déployer leurs effets dans un autre Etat. La Chambre se devait toutefois d'examiner, au regard des “arrangements” nationaux français, les conséquences d'une violation, par S., de certaines de ses obligations contractuelles à l'égard de l'AJ Auxerre. Cet examen constitue la “prise en compte” instaurée à l'Article 43 du Règlement FIFA; il doit porter non seulement sur le comportement du joueur et ses conséquences, mais aussi sur celles de l'attitude de Valence CF, dont il paraît évident qu'il était en pourparlers avec S. alors que ce dernier était encore sous contrat avec la demanderesse.

Thus, the CAS consecrates the provisions of a national collective labour agreement.

On a general basis, according to the FIFA rules, the CAS considers that the FIFA is responsible for all international transfers and that the FIFA must take into account national provisions in order to guarantee legal security.

49. De manière générale, il est de la responsabilité de la FIFA, dans chaque cas de transfert international, et en tenant compte, le cas échéant, des “arrangements” d'ordre national par le jeu de l'article 43 du Règlement FIFA, d'examiner les engagements pris par toutes les parties impliquées et de tirer alors les conclusions pertinentes, dans un souci de garantie de la sécurité juridique des intervenants notamment.

Compensation for Damages

According to the CAS, the damages allocated to the training club have to be higher than the arithmetical calculation of the training indemnities planned by the FIFA rules.

For the first time, the CAS allocates to the training club damages in order to compensate the loss of a player.

The Right of the Training Club to get a Fair Compensation

The FIFA rules related to training indemnities create an infringement of the principle of free movement if general interest is at stake here: the training policies for young football players. The CAS also considers that the FIFA DRC must obtain from FC Valence a training indemnity for AJ Auxerre. In bill n°826 of 31 October 2002, the FIFA plans that “in specific circumstances, the amount of the training indemnity should be adjusted in order to take into account specificities of the case in question” (point 53). The CAS also underlines the possibility for the French football club to ask for damages, a sum higher than the training indemnity, if some evidence shows that the club is a victim of a disloyal headhunting.

The Exception: Training Indemnities can be Revised if Exceptional Circumstances Happened

Based on the FIFA rules, the CAS has determined some specific circumstances that prove the existence of a damage suffered by AJ Auxerre. It is related to the violation by the player of his contractual obligations towards his training club and the bad faith of FC Valence.

The Court deduces the right for AJ Auxerre to ask for financial compensations higher than the simple sum for training indemnity calculated in compliance with the FIFA rules (point 54).

Beyond the refund of the amount invested in training and educating the player, the French club must get an additional indemnity in order to compensate the damage that was caused by the departure of the player.

It remains to evaluate such damage. The question was not asked to the CAS. It sends the question back to the DRC:

54. Il n'échoit pas à la Formation d'examiner plus en détail les prétentions que la demanderesse peut faire valoir à l'encontre de Valence FC ou de M. Sissoko. En effet, elle n'a pas pris de conclusions, même subsidiaires, tendant au paiement d'indemnités en sa faveur. La Formation ne saurait dès lors statuer ultra petita et, dans ces circonstances, elle ne peut que renvoyer l'AJ Auxerre à faire valoir ses prétentions devant les organes compétents de la FIFA, auxquels il appartiendra de se prononcer dans le sens des considérants de la présente sentence.

After months of negotiations, the two clubs agreed on a transactional indemnity.

The Confirmation of the Sissoko Award

In 2007 the CAS confirmed the *Sissoko* award with the *N'Zogbia* award.²

This case opposed the French football club Le Havre to M. N'Zogbia who was just transferred to Newcastle Club. M. N'Zogbia had refused to sign a "*contrat de stagiaire*" offered by his training club Le Havre and preferred to be transferred to Newcastle. This transfer was contradictory to French law.

In this particular case, contrary to *Sissoko*, a "convention de formation" existed between the French Club and the player. The goal of this convention was to determine the practical details of his education and professional training. The same question that was asked in the *Sissoko* case was raised in the *N'Zogbia* case. The question was to know if the player had to sign his first professional contract at the end of his training with the club that trained him.

The arbitrators in this case gave the same answer that they did it in the *Sissoko* award. The TAS confirmed one more time the need to protect the training policies

² CAS, 28 October 2005 and CAS, 17 July 2007, *Le Havre AC c. FIFA, New Castle, Charles N'Zogbia*.

for young football players. After the CAS has rendered this award, the *N'Zogbia* case came in front of the Federal Swiss Court which rejected the appeal.

16.2 CAS 2004/A/791 N'Zogbia

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With the *N'Zogbia* Award the CAS confirmed its ruling established in the *Sissoko* Award. The dispute arose when *N'Zogbia* moved from his training club Le Havre to Newcastle Club. In breach of French regulations *N'Zogbia* refused to sign a 'contrat de stagiaire' with Le Havre. In contrast to '*Sissoko*,' *N'Zogbia* and Le Havre had set up a 'convention de formation' covering *N'Zogbia*'s education and professional training. As already demonstrated in the *Sissoko* Award, the CAS upheld the validity of the regulations obliging the player to sign his first professional contract with the training club at the end of his training. However, contrary to the *Sissoko* Award, *N'Zogbia* was required to pay Le Havre compensation of € 545,812. The author regards this compensation as a 'deterrent to contractual freedom.'

16.2.1 *The Dispute*

The undersigned defended Charles *N'Zogbia* in an attempt to annul the second award rendered by the CAS, appeal which was rejected for the Swiss Supreme Court considered that the decision to appeal should have been the partial award.

In March 2003, Charles *N'Zogbia*, a player born in May 1986—thus aged 16 and 10 months at the time—, signed three agreements with the French club Le Havre, the first being named "convention de formation" (training agreement), a mandatory agreement imposed by the French football league allowing young players not only to be formed on-field but also to receive a proper professional education, the second "*contrat de joueur aspirant*" (aspirant player agreement) and the third "*dispositions particulières*" (special clauses) according to which the club was supposed to offer to the player a trainee agreement in April 2004 and to propose him a professional agreement in April 2006, should the player's results be sufficient. The first agreement was valid from July 2003 until June 2006, the second for one year and the third did not have any specified duration.

The training agreement between the player and Le Havre stated that in case the player would terminate the agreement without cause, he could be condemned to a training compensation should he play in any other French club. This agreement also contained a mandatory choice of forum clause whereby any dispute between the training club and a player would need to be brought before the French professional league—and then to the administrative judicial bodies in France.

In July 2004, the player did not return to practise in Le Havre; he was then hired by Newcastle in early August 2004. This club requested from the FA that it requests the international transfer certificate from the FFF, which the FFF refused.

Le Havre then seized the FIFA of a claim against the sole Newcastle, procedure to which the player was not a party; by this claim, Le Havre requested that the player be obliged to come back and to sign a professional agreement with Le Havre and, subsidiarily, that Newcastle be condemned to pay a compensation.

On 26 November 2004, FIFA's dispute resolution chamber decided that it was not competent to decide upon a training agreement between a minor and a French club, that since the player had not entered into any employment contract with Le Havre, he was free to go to Newcastle and that the latter had to pay to Le Havre a training compensation of EUR 300'000.

On 17 December 2004, Le Havre seised the CAS of an appeal directed against *the sole FIFA*. By this appeal, Le Havre sought (a) the annulment of FIFA's decision, (b) a declaration that the player was contractually bound to Le Havre, (c) that the player be condemned to sign a trainee agreement with Le Havre, (d) the suspension of the player until he would reintegrate Le Havre and (d) that all persons or entities having encouraged the breach of the training agreement with the player be condemned to any and all sports and financial sanctions foreseen by the FIFA regulations.

Both the player and Newcastle requested to intervene and thus became parties.

On 27 October 2005, the CAS rendered a partial award.

16.2.2 Partial Award

In that decision, the CAS considered, among other things, that FIFA had been wrong in deciding that it was incompetent to decide upon the club's and the player's rights and obligations pursuant to the training agreement. In addition, the CAS considered that the player had breached his "contractual obligations" towards the club and stated that the parties would be invited to file a written statement "on the issue of possible additional compensation due to Le Havre, in accordance with the grounds of this partial award".

According to para 91 of the partial award, these grounds are that "since the training agreement unilaterally terminated by the player and the employment agreement he signed with Newcastle must be taken into consideration, the Panel must determine whether the special sanctions foreseen by the training agreement and/or the ones applicable in terms of maintenance of contractual stability in football according to the FIFA regulations must be applied and to what extent".

On 17 February 2006, *without filing any evidence* to support this claim, Le Havre requested that the player and Newcastle be condemned to pay it between EUR 3,700,000 and 4,260,000.

On 7 June 2006, the player rose that such plea was inadmissible since (a) the CAS did not have jurisdiction to condemn him for breach of the training agreement and (b) Le Havre never sought any payment from him, be it before the FIFA or in its declaration and statement of appeal before the CAS.

16.2.3 *Final Award*

More than a year later, on 17 July 2007, the CAS decided that the player had to be condemned to pay EUR 545,812 to Le Havre.

This indemnity was segregated in two, EUR 195,812 for the so-called harm caused to Le Havre for the lack of possibility to use the player on-field for two seasons, calculated according to the player's future salary as a trainee (EUR 19,812 in total) plus EUR 88,000 per year of costs to train him—which means that a prejudice was calculated by adding *non-incurred* expenses. Second, the CAS considered that an additional sum of EUR 350,000 was due as loss of chance (*perte d'une chance*) to negotiate a future transfer for that player, amount fixed *ex aequo et bono*, by *reference* to Article 42 para 2 and 43 para 1 of the Swiss code of obligations, plus interest at 5% per year as of 1st August 2004.

16.2.4 *Commentary*

Both awards rendered by the CAS in the *N'Zogbia* case are perfect examples of what should not be done, from a procedural point of view, on the merits and in terms of opportunity.

From a procedural point of view, Le Havre did not seize the CAS of a case against the player or Newcastle. The appeal was directed against FIFA, period. Sure, the player (and Newcastle) intervened in the arbitral proceedings but though this intervention made them defendants, it did not have as a result to change Le Havre's pleas requesting the annulment of FIFA's decision, a declaration that the player had breached his training agreement and a claim based on tort against the ones who had incited him to breach said agreement—and certainly not a claim based on contract against the player.

In addition, the CAS had no jurisdiction to decide upon the enforcement of a training agreement between a junior player and a French club, containing a clause designating the French football league as the sole competent jurisdiction in case of dispute.

On the merits, one has difficulties in understanding how on earth it can be possible to:

- consider that a young player can be condemned to pay compensation to its French training club whereas (a) the foreign club which obtained the player's services already paid a training compensation and (b) the agreement binding both parties only foresees the possibility to condemn the player when he leaves his training club for another French club, in other words only when the player competes against the club which trained him;
- whatever the applicable law (in such case French law), decide that a prejudice can be made of non-incurred expenses, which is a total heresy;

- decide upon an indemnity *ex aequo et bono* by reference to provisions of the Swiss code of obligations whereas the training agreement was subject to French law;
- use equity to fix an indemnity to cover the absence of demonstration of the prejudice.

Last, in terms of opportunity, it is a shame that the CAS considers that training agreements between juniors and clubs cannot be terminated by the player, the condemnation to pay EUR 600,000 plus interest being a definitive deterrent to contractual freedom. A junior should have the choice of the place where he wants to learn how to play football—and to learn in general—and clubs should be able to keep promising players only if they provide them with sufficient support and a future.