Arbitration CAS 2006/A/1196 Sociedade Esportiva Palmeiras v. Clube Desportivo Nacional, award of 19 July 2007

Panel: Prof. Massimo Coccia (Italy), President; Mrs Margarita Echeverria Bermúdez (Costa Rica); Mr João Nogueira Da Rocha (Portugal)

Football
Transfer of a player
Validity of a dual pricing method where a portion of the transfer fee depends on a future and uncertain event
Assignment of the economic rights over the player

1. **A dual pricing method of a transfer fee where a first portion is a fixed amount and a second portion a variable and uncertain amount, to be determined on the basis of a percentage of any further profitable transfer of the player to another club, is legally valid, even though a portion of the price depends on a future and uncertain event. Indeed, under Swiss law a price is sufficiently determined, and thus legitimate, when the price can be determined on the basis of the circumstances (art. 184 al. 3 CO).**

2. **In principle, a partial transfer of the rights over a player is legally feasible. As several CAS awards have clarified, such economic rights over a player, being ordinary contract rights, may be partially assigned and thus apportioned among different clubs, even though, obviously, a player may only render his performances to a single club at any given time.**

Sociedade Esportiva Palmeiras ("Palmeiras" or the "Appellant") is a professional football club incorporated under the laws of Brazil with its headquarters in São Paulo, Brazil. It is affiliated to the Confederaçao Brasileira de Futebol (the "Brazilian Federation" or "CBF"), which is affiliated to FIFA.

Clube Desportivo Nacional da Madeira ("Nacional" or the "Respondent") is a professional football club incorporated under the laws of Portugal with its registered office in Funchal, Portugal. It is affiliated to the Federaçao Portuguesa de Futebol (the "Portuguese Federation" or "FPF"), which is affiliated to FIFA.

On 2 December 2002, Palmeiras and Nacional entered into an agreement (the "First Contract"), for the transfer of the player P. (the "Player") from the Appellant to the Respondent. The Player gave his express consent to the deal.

The agreed basic transfer price in favor of Palmeiras was USD 410,000. Moreover, as provided by art. IV, para. D, of the First Contract, the parties agreed as follows (as translated from the Portuguese original):

> *"Although the relationship of the CONSENTING PLAYER* [i.e. P.] *is with the ASSIGNEE* [i.e. Nacional], *an interest in the order of 10% (ten per cent) is guaranteed to the ASSIGNOR* [i.e. Palmeiras] *at any time on the amount that exceeds USD 410,000.00 (four hundred and ten thousand American dollars) on the transfer hereon or what may be calculated in a future and possible negotiation of the CONSENTING PLAYER".*

The two clubs agreed that the aforementioned 10% of any amount exceeding USD 410,000 was to be paid in a single installment due on the execution of the relevant transfer agreement. Indeed, art. IV, para E, of the First Contract reads as follows (as translated from the Portuguese original):

> *"The amount calculated at the time of the future and possible negotiation shall be effectively paid by the ASSIGNEE to the ASSIGNOR in a single installment due on the same date as the signing of the contract of the future negotiation".*

On 1 July 2004, the Respondent and another Portuguese club, the Futebol Clube do Porto ("Porto"), entered into an agreement (the "Second Contract") for the transfer of the player from Nacional to Porto (the "Second Transfer"). The agreed basic price for the Second Transfer was EUR 1,500,000. In addition, as set forth in art. 3 of the Second Contract, Nacional and Porto agreed as follows (as translated from the Portuguese original):

> *"Futebol Club do Porto, Futebol, SAD, undertakes to liquidate to C.D. Nacional the amount corresponding to 50% of the total that may be earned with the assignment of the sports registration rights of the player P.".*

On 17 January 2006, Nacional paid to Palmeiras the amount of EUR 82,100 making reference to the terms of art. IV, para. D, of the First Contract.

On 17 October 2005, Palmeiras submitted a claim with the Player's Status Committee of FIFA (hereinafter the "PSC"), stating that it had not entirely received the agreed 10% share of the transfer compensation arising from the Second Contract. Moreover, Palmeiras underlined that up to the time of the claim Nacional had paid only 205,000 USD of the agreed fixed price amount. On these grounds Palmeiras requested to be acknowledged as creditor of:

- *Amount of the business referring to 50% of the player's rights assignment from Nacional to Porto: EUR 1,500,000.00;*
- *The amount equivalent to 50% of the player's business from Palmeiras to Nacional, converted from dollars to EUR: 169,421,48 EUR;*
- *Net amount for the calculation basis of the rate owed to Palmeiras: EUR 1,330,578.60;*
- *Amount owed to Palmeiras in October 2004: EUR 133,057.86 (one hundred and thirty-three thousand, five hundred and seventy-eight EUR and sixty cents).*

Nacional replied that its payment of EUR 82,100 was satisfactory and in compliance with the terms of the agreement. The Respondent argued that, in addition to the amount of USD 410,000, a

deduction of EUR 269,000 had to be made in order to determine the reference amount for the 10% share (to be more precise EUR 119,000 allegedly paid to the mediation agency "OnSoccer" and EUR 150,000 allegedly paid to the Player on the occasion of his transfer).

On 3 November 2005, the FIFA secretariat, prompted by the Appellant's queries, wrote a letter to the Portuguese Federation, stating the following:

> *"SE Palmeiras is presently requesting FIFA to intervene in the matter at hand in order to protect its agreementual rights, in particular, regarding the payment of the alleged outstanding transfer fee in connection with the relevant transfer agreement signed between the parties on December 2002, concerning the player P.".*

After verifying that there was no possibility to reach an amicable solution, the FIFA secretariat informed the interested clubs that the case was going to be submitted to the PSC.

The PSC ascertained that, after the Second Transfer, Palmeiras had not received its whole 10% share under art. IV, para. D, of the First Contract. On this basis and considering the disagreement between the clubs on the relevant calculation, the PSC went on to determine the amount of such 10% share. First, the Committee stated that, actually, the whole transfer price agreed in the Second Contract was split into two items: (a) the fixed amount of EUR 1,500,000 and (b) the 50% of any future income derived from a further transfer of the player from Porto to another club. With regard to item (b), the PSC pointed out that there was no evidence that such further transfer had occurred.

Based on the above facts and considerations, the PSC unanimously declared that Palmeiras was entitled to a 10% share of the difference between EUR 1,500,000 and USD 410,000.

Then, the PSC rejected the Appellant's argument based on the alleged partial assignment by Nacional to Porto of the player's rights. Indeed, the PSC pointed out that the Respondent had transferred 100% of the player's services to Porto, and not 50% as argued by the Appellant, since the services of a football player cannot be divided among two clubs.

On the other hand, the PSC rejected the deduction of EUR 269,000 asked for by the Respondent, since there was no evidence of any agreement between the parties supporting such kind of deduction.

In conclusion, the PSC stated that at present only one item (see *supra*) could be determined, confirming that both clubs could be entitled to additional amounts in case of a further transfer from Porto to another club.

On 17 October 2006, the PSC issued its decision on the matter (the "Appealed Decision") holding as follows:

> *"The Respondent, Clube Desportivo Nacional, shall pay to the Claimant, SE Palmeiras, the amount of EUR 34.015.70 plus 5% interest p.a. starting on 1 October 2004 until the effective day of payment".*

On 27 December 2006, Palmeiras appealed before the CAS filing its Statement of Appeal. In January 2007, it filed its Appeal Brief.

Pursuant to art. R57 of the Code of Sports-related Arbitration (the "Code"), the Panel consulted the parties and, deeming itself to be sufficiently well informed, decided not to hold a hearing and to issue an award on the basis of the written submissions only.

LAW

Jurisdiction

1. The jurisdiction of the CAS, which is undisputed, derives from articles 60-62 of the FIFA Statutes and, specifically, from art. R47 of the Code witch provides that:

   "A party may appeal from the decision of a disciplinary tribunal or similar body of a federation, association or sports body, insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports body".

2. Moreover, the jurisdiction of the CAS over the present dispute is acknowledged by the parties in their written submissions.

3. It follows that the CAS has jurisdiction to decide the present dispute.

Applicable Law

4. Art. R58 of the Code reads as follows:

   "The 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 or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

5. Then, art. 60.2 of the FIFA Statutes provides as follows:

   "The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".

6. The Panel remarks that the *"applicable regulations"* mentioned by art. R58 of the Code are indeed all FIFA rules material to the dispute at stake. Then, the Panel notes that the Palmeiras-Nacional Agreement does not contain any express choice of law. Pursuant to art. R58 of the Code, as FIFA is a Swiss association having its seat in Zurich, *"the law of the country in which the federation [...] which has issued the challenged decision is domiciled"* is Swiss law. Art. 60.2 of the FIFA Statutes confirms that Swiss law should be applied in addition to FIFA rules.

7. Therefore, the Panel holds that the dispute must be decided in accordance with all pertinent FIFA statutes and regulations and, complementarily, in accordance with Swiss Law.

8. The applicable procedure in this case is the appeal arbitration procedure provided for by art. R47 *et seq.* of the Code. The Panel, pursuant to art. R57 of the Code, has *"full power to review the facts and law"* and may thus review *de novo* the case.

Merits

9. The Panel notes that the facts of the case are clear and undisputed by the parties. The Player was transferred first from Palmeiras to Nacional and then from Nacional to Porto. Both transfers occurred while the Player was under contract with the club giving him away; hence, in both cases the economic rights over the Player were negotiated between the interested clubs and a transfer price was agreed.

10. The Panel remarks that, in both transactions, the agreed transfer price was a sum made up of two items: (i) a fixed amount, and (ii) a variable and uncertain amount, to be determined on the basis of a percentage of any further profitable transfer of the Player to another club (see *supra*). In the Panel's opinion, this dual configuration of the transfer price is legitimate because, even though a portion of the price depends on a future and uncertain event, it is easily possible to determine the aggregate price that a club must ultimately pay to the other if and when a further transfer occurs. Indeed, under Swiss law a price is sufficiently determined, and thus legitimate, when the price can be determined on the basis of the circumstances (art. 184 para. 3 of the Swiss Code of Obligations), as is the case here.

11. Having acknowledged the lawfulness of the dual pricing method used for the two successive transfers of the Player, the Panel notes that the focus of the present dispute is the correct calculation of the variable portion of the transfer price to be paid by the Appellant to the Respondent.

12. During the FIFA proceedings and in this arbitration, the Appellant has consistently submitted claim for compensation based on the supposed partial transfer occurred between Nacional and Porto. Accordingly, the Appellant has insisted all along on claiming that the Respondent still owes EUR 50,957.86, in addition to the amount of EUR 82,100.00 that it had already paid to the Appellant.

13. The Panel observes that, in principle, a partial transfer of the rights over a player is legally feasible. Indeed, a club holding an employment contract with a player is entitled, with the player's consent, to transfer the player to another club, that is to assign the contract rights – the so-called *"economic rights over the player"* – in exchange for a transfer price (i.e. a given sum of money or other consideration). As several CAS awards have clarified (see e.g. CAS 2004/A/635; CAS 2004/A/701), such economic rights over a player, being ordinary contract rights, may be partially assigned and thus apportioned among different clubs, even though, obviously, a player may only render his performances to a single club at any given time. Accordingly, in principle,

the Appellant's argument that Nacional assigned to Porto only 50% of the rights over the Player could be admitted if it was backed up by the content of the Second Contract.

14. However, having carefully read the Second Contract, the Panel is of the opinion that in the case at stake no partial assignment of the economic rights over the Player occurred. In fact, no clause of the Second Contract mentions a partial assignment of the rights over the Player. On the contrary, art. 1 of the Second Contract seems to indicate that Nacional and Porto intended the assignment to cover the whole 100% of the rights over the Player, reading as follows: *"Clube Desportivo Nacional assigns to Futebol Clube do Porto, Futebol, SAD, the sports registration rights of the player P., on a definitive basis"*.

15. Therefore, the Panel upholds the PSC's conclusion that the Appellant is entitled to receive a 10% share of the difference between EUR 1,500,000 and USD 410,000. In addition, if and when Porto profitably transfers again the Player, the Appellant will be entitled to receive a 10% share of the 50% share that Porto will have to pay to the Respondent pursuant to art. 3 of the Second Contract (see *supra*).

16. The Panel also agrees with the PSC's opinion that the deductions for the expenses allegedly incurred by the Respondent (see *supra*) cannot be accepted. In fact, the First Contract does not include any provision allowing the deduction of expenses incurred by Nacional for the transfer of the Player to Porto. The First Contract even provides the opposite, stating as follows: *"It is the duty of the Assignee [Nacional] to pay … any other expenses of any nature concerning the Consenting Player"* (art. V, para. A). In any event, the Panel remarks that no conclusive evidence of the actual occurrence of those payments was exhibited and, therefore, the Respondent did not satisfy its burden of proof. As a result, the deductions claimed by the Respondent must be disregarded.

17. In the Panel's view, in order to calculate the correct amount that the Respondent must pay to the Appellant, the amount of USD 410,000 must first be converted to the equivalent amount in EUR. The Panel finds that the date for the conversion USD/EUR must be the day when the payment was due, that is on 1 July 2004 when the Second Contract was signed (art. IV, para. E, of the First Contract: *"… a single installment due on the same date as the signing of the contract of the future negotiation"*).

18. The Panel holds that the Respondent's argument that the conversion should be done at the rate prevailing on 2 December 2002 cannot be accepted because it is not based on what the parties agreed in the First Contract.

19. Accordingly, the Panel upholds the conversion from USD to EUR set out by the PSC on the basis of the rate prevailing on 1 July 2004, and confirms that on that date 1 EUR corresponded to USD 1.21. Therefore, for the purposes of the calculation, USD 410,000 must be equated to EUR 338,843, which must then be subtracted from EUR 1,500,000. The result is EUR 1,161,157.

20. In accordance with the above calculation, the Panel finds that the 10% share due to Palmeiras amounts to EUR 116,115.70. From this sum, the amount of EUR 82,100 – undisputedly paid to Palmeiras already – must be deducted.

21. As a consequence, the Panel finds that the Respondent must pay EUR 34,015.70 to the Appellant. The Panel also agrees with the PSC that a yearly interest rate of 5% must be paid by the Respondent, as from the date of the Claimant's request (1 October 2004).

22. In addition, as already mentioned, should Porto transfer again the Player at a profit, the Appellant will be entitled to receive a 10% share of any further amount that Porto will pay to Nacional.

23. In conclusion, the Panel adjudges and declares that Nacional must pay to Palmeiras EUR 34,015.70 plus a yearly interest rate of 5% as from 1 October 2004 until the date of effective payment.

The Court of Arbitration for Sport rules:

1. The appeal submitted by Sociedade Esportiva Palmeiras against the decision issued on 17 October 2006 by the Player's Status Committee of FIFA is dismissed.

2. The counterclaim submitted by Clube Desportivo Nacional da Madeira is dismissed.

3. The decision issued on 17 October 2006 by the Player's Status Committee of FIFA is upheld.

4. Clube Desportivo Nacional da Madeira is ordered to pay to Sociedade Esportiva Palmeiras the amount of EUR 34,015.70 (thirty-four thousand fifteen Euro and seventy cents), plus 5% per annum interest on this amount as from 1 October 2004 until the date of full settlement.

5. All other motions or prayers for relief are dismissed.

(…).