Arbitration CAS 2007/A/1407 Ronaldo Guiaro v. Beşiktaş Jimnastik Kulübü, award of 22 October 2008

Panel: Mr Chris Georghiades (Cyprus); President; Mr Rui Botica Santos (Portugal); Mr Pedro Tomas Marques (Spain)

Football
Termination agreement to an employment contract
Interpretation of the wording of a contract

The real and common intention of the parties shall be ascertained in order to interpret a contract. All circumstances surrounding the making of the contract which would assist in determining how the language of the document would have been understood by a reasonable man should be taken into account. If this common intention cannot be determined with certainty based on the wording, the judge must examine and interpret the formal agreement between the parties in order to define their subjective common intention.

Mr Ronaldo Guiaro (the "Appellant" or the "Player") is a professional footballer who played for the Respondent during the football season 2004/2005.

The Turkish football club of Beşiktaş Jimnastik Kulübü (the "Respondent" or the "Club") a member of the Turkish Football Association.

On 17th October 2003 the Respondent and the Appellant (together the "Parties") signed an employment contract valid from 1st July 2004 to 30th June 2006 (the "Employment Agreement").

On the 4th July 2005 the Parties entered into an agreement whereby they agreed pursuant to the terms and conditions of the said agreement to terminate the employment agreement entered into on the 17th October 2003 (the "Termination Agreement").

Para. 3 of the Termination Agreement provided that the Club would pay to the Player a termination fee, totalling USD 800.000 payable in the manner detailed therein.

Para. 3 of the Termination Agreement provides as follows:

> *"the club will pay the player net 500,000 USD as contract termination fee within 3 days after signing the agreement. If the club fails to do so, this agreement will be null and void. In addition, the club will make the player 3 payments of net 100,000 USD on 15 August 2005, on 15 November 2005 and on 15 January 2006, respectively, as contract termination fee. If the club fails to make any of these three payments on time, the rest of the contract, signed on 17 October 2003, will immediately be effective".*

The Club paid the amount of USD 500,000 as well as the two payments of USD 100,000. The two payments of USD 100,000 were delayed to be paid however the Player by his behaviour and/or otherwise agreed to the late payment.

The third and last payment of USD 100,000 was not paid by the Club as a result of which the Player lodged a formal complaint with the FIFA Dispute Resolution Chamber requesting payment of the amount of USD 1,200,000 from the Club alleging that as a result of the default the Club was liable to pay the amounts he otherwise would be entitled to receive pursuant to the Employment Agreement.

The matter was dealt with by the FIFA Dispute Resolution Chamber (DRC) which on the 8th June 2007 issued its decision (the "Decision") accepting the Player's claim partially and establishing that the Respondent should pay the amount of USD 100.000 plus interest to the Player. The Decision was communicated to the parties by way of a fax dated 4 October 2007.

The Player not being wholly satisfied with the Decision filed with the CAS a Statement of Appeal, dated 25/10/2007 followed by an Appeal Brief, dated 2/11/2007 appealing against the Decision.

The Appellant's submissions are set out in his statement of Appeal and Appeal Brief however following clarifications given by his legal counsel during the hearing can be summarized as follows:

(i) The Appellant's monetary claim is restricted to the amount of USD 1,200,000 as more specifically set out in his Appeal Brief of 2/11/2007 whilst para. 2 of the claim is abandoned;

(ii) The matter to be considered and decided upon by the Panel is the true and proper interpretation of the provisions of para. 3 of the Termination Agreement which clearly amount to a penalty clause which when applied entitles the Player to receive the amount of USD 1,100,000.

On the 11th December 2007 the Respondent filed its answer which contains an extensive list of submissions which again following clarifications provided by its legal counsel during the hearing can be summarized as follows:

(i) The Parties voluntarily agreed to terminate the employment agreement dated 17th October 2003.

(ii) The non-competition clause inserted in the Termination Agreement (para 4) is a normal provision found in agreements of this nature i.e. termination contracts.

(iii) There were delays in the payments to be made pursuant to the Termination Agreement which the Player accepted.

(vi) The failure of the Club to pay the third payment of USD 100,000 does not provide the Player with a right to claim the monies which otherwise were payable under the Employment Agreement. The Termination Agreement does not refer to such a right, it does not state the quantum of damages.

(v) The interpretation of para. 3 of the Termination Agreement is closely related to the facts of the case and particularly those which brought about the conclusion of the Termination Agreement and the intention of the Parties. The Respondent was not prepared to have to pay a huge amount of money if it would not have the benefit of the Player's services.

(vi) Article 82 of the Swiss Code of Obligations requires that one must offer services so as to be able to claim the provisions of contract.

(vii) The monies claimed amount to an unjust enrichment.

(viii) By way of subsidiary arguments the amount claimed is completely disproportionate to the amount due under the Termination Agreement. Pursuant to the provisions of article 163 of the Swiss Code of Obligations the Panel has the power to reduce the compensation. In any event the Player failed to mitigate his losses, if any.

On the basis of all documents on file, particularly the Appeal Brief and Reply and the clarifications provided by counsel to the Parties the Panel attempted to sum up the matter describing it as follows:

(i) The Appellant alleges that the DRC was wrong in its Decision failing to find that the default of the Respondent to pay the last payment set out in the Termination Agreement had as a result the triggering of a penalty clause which is to be found in the Employment Agreement.

(ii) The Respondent argues that the Appellant is restricted or otherwise estopped from claiming as above mentioned for the following reasons:

- The Appellant failed to make his services available but only claimed the contract value.
- The Appellant is estopped from claiming as he previously accepted late payments.
- The penalty (if any) is disproportionate to the amount due.
- The Appellant failed to mitigate his losses (if any).

(iii) The whole matter as to whether the Termination Agreement contains or otherwise refers to a penalty clause is a matter of interpretation of the same.

LAW

CAS Jurisdiction

1. The jurisdiction of the CAS, which is not disputed, derives from articles 59ff of the FIFA Statutes and art. R47 of the Code of Sports-related Arbitration ("the Code"). It is further confirmed by the Order of Procedure duly signed by the Parties.

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

3. Under art. R57 of the Code, the Panel has the full power to review the facts and the law.

Applicable Law

3. Art. R58 of the Code specifies that:

"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".

4. In the present case, there was no agreement among the parties regarding the application of any particular law.

5. In the absence of an agreement as regards the applicable law it follows that the FIFA Rules and Regulations and Swiss law are applicable to the present case.

Admissibility

6. The appeal was filed within the applicable deadline provided by art.60 of the FIFA Statutes.

7. It follows that the appeal is admissible.

Merits

8. Art. 18 para. 1 CO provides that:

"As regards both the form and content of a contract, the real intention which is mutually agreed upon shall be considered, and not an incorrect statement or manner of expression used by the parties, whether due to error, or with the intention of concealing the true nature of the contract".

9. The main task of the Panel, therefore, is to discover the real intention of the parties when the Termination Agreement was drafted.

10. The task of ascertaining the intention of the parties must be approached objectively, the question is not what one or other of the parties meant or understood by the words used but the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of concluding the Termination Agreement.

11. The cardinal presumption is that the Parties have intended what they have in fact said, so that their words must be construed as they stand. However this is not to say that the meaning of the words in a written document must be ascertained by reference to the words of the document alone. In the modern world of law, courts and tribunals in principle look at all circumstances surrounding the making of the contract which would assist in determining how the language of the document would have been understood by a reasonable man.

12. The construction (interpretation) of written documents (contracts) is a question of mixed law and facts. The expression "construction" when applied to a document includes two things, the meaning of the words and their legal effect.

13. The starting point in constructing a contract is that the words are to be given their ordinary and natural meaning. Courts assume that parties use language in the way that reasonable persons ordinarily do. Terms therefore are to be understood in their plain, ordinary and popular sense, unless they have generally in respect to the subject-matter a peculiar sense distinct from the popular sense of the words or the context evidently points out that they must in the particular instance be understood in some other special and peculiar sense.

14. This conclusion is also confirmed by Swiss doctrine, particularly WINIGER, Commentaire Romand – CO I, Basel 2003, n. 18-20 ad Art. 18 CO, which establishes that the parties' common intention must prevail on the wording of their contract. If this common intention cannot be determined with certainty based on the wording, the judge must examine and interpret the formal agreement between the parties in order to define their subjective common intention. This interpretation will first take into account the ordinary sense one can give to the expressions used by the parties and how they could reasonably understand them. The behaviour of the parties, their respective interests in the contract and its goal can also be taken into account as complementary means of interpretation (WINIGER, op. cit., n. 33, 37 and 134 ad art. 18 CO; WIEGAND, op. cit., n. 29 and 30 ad art. 18 CO).

15. The rule that words must be construed in their ordinary sense will be departed from when the meaning would involve an absurdity or create an inconsistency with the rest of the document.

16. It is not open to a court or other tribunal to revise the words used by the parties in order to bring them into line with what the court/tribunal may think the parties really intended or ought to have intended. But if, from the documents itself and the admissible background, the intention of the parties can reasonably be found, then the court/tribunal will give effect to that intention even though that involves departing from or qualifying particular words used.

17. To put it otherwise, when a court/tribunal can collect from the language within the document the real intentions of the parties they are bound to give effect to them by supplying anything necessarily to be inferred from the terms used.

18. It is also important to note that when seeking the real intention of the parties, in accordance with the jurisprudence of the Swiss Federal Court, the unclear declarations or wordings in a contract will be interpreted against the party that drafted the contract (ATF 124 III 155, 158, consid. 1b), being the responsibility of the author of the contract to choose its formulation with adequate precision (*in dubio contra stipulatorem*). Moreover, the interpretation must stick to the legal solutions under Swiss law under which in case of doubt the protection of the weakest party shall prevail (ATF 126 III 388, 391, consid. 9d).

25. Within the framework of the above mentioned the Panel went to the task of interpreting the provisions of para. 3 of the Termination Agreement which read as follows:

"the club will pay the player net 500,000 USD as contract termination fee within 3 days after signing the agreement. If the club fails to do so, this agreement will be null and void. In addition, the club will make the player 3 payments of net 100,000 USD on 15 August 2005, on 15 November 2005 and on 15 January 2006, respectively, as contract termination fee. If the club fails to make any of these three payments on time, the rest of the contract, signed on 17 October 2003, will immediately be effective".

26. Reading the provisions of the said paragraph there is no express provision referring to a penalty clause per se, however the Panel is obliged to construe the Termination Agreement as a whole so as to ascertain the intention of the Parties, to give efficacy to the contract and/or imply a term which is so obvious that the parties must have intended it to form part of their contract.

27. The surrounding circumstances were adduced from the documents on file and indirectly by the parties through statements and/or explanations provided by their legal counsel as to the then prevailing circumstances.

28. During the hearing the Panel indicated that it would be more helpful the prevailing circumstances were put forth through the media of direct witness statements however it acknowledged that the Parties were entitled to treat the manner by which their case was to be presented.

27. On the basis of the statements and/or explanations provided by counsels for the Parties as well as taking consideration of the documents on file the Panel understood the facts with respect the conclusion of the Termination Agreement to be as follows:

(i) The Respondent was facing certain financial difficulties and needed to reduce its monetary exposure whilst the Appellant wished to return to Brazil whereupon both Parties agreed to the termination of the Employment Agreement.

(ii) The termination was evidenced by the parties signing the Termination Agreement upon the terms and conditions contained therein.

(iii) The Appellant was to receive by way of compensation and/or otherwise the total amount of USD 800,000, payable in the manner detailed in the Termination Agreement.

(iv) In case of default by the Club to pay any of the amounts detailed in the Termination Agreement there would be repercussions. In the case of failure to pay the amount of USD 500,000 the Termination Agreement would be null and void whilst in the case of failure to pay on the due dates any of the three payments of USD 100,000 the provisions of the Employment Agreement would be effective.

(v) The Appellant with respect to two of the payments of USD 100,000 accepted late payment.

(vi) The third payment of USD 100,000 was not paid on time and the Appellant did not accept or agree to a late payment but lodged a complaint with the FIFA DRC claiming compensation as per the Employment Agreement.

(vii) The Parties did not intend to have the Employment Agreement revived in to something which was not feasible particularly after the lapse of time as between the signing of the Termination Agreement and the dates of the payments to be made and/or actually made.

(viii) The Employment Agreement was definitely brought to an end both as a result of entering the Termination Agreement but and as a result of the provisions of para. 5 of the said agreement which provides *"Both parties agree irrevocably that the above mentioned labour contract becomes null and void as soon as this agreement is signed"*.

28. On the basis of the above the Panel is of the view that the Parties intention when drawing up the Termination Agreement and particularly para. 3 was that the Player should be safeguarded in the case where the Club failed to meet its monetary obligations. In the first instance the Termination Agreement becoming null and void and in the second instance (i.e. in respect of the three payments) that a higher monetary obligation would apply, this being the amounts otherwise due under the Employment Agreement.

29. The Panel understands that the provisions contained under para. 3 of the Termination Agreement should have been supplemented by incorporating into the said paragraph the monetary provision of the Employment Agreement as constituting the agreed quantum of damages in case of default.

30. Nevertheless, the Panel finds that the reference to the *"rest of the contract signed on 17th October 2003 …"* relates to the monetary obligations of the Respondent should it fail to meet its obligations under the Termination Agreement and on the ground that the Respondent failed to pay the third payment of USD 100,000 it rendered itself liable to the payment of the amount of USD 1,200,000.

31. Having found as above the Panel drew its attention to the fact that the Respondent has paid in total the amount of USD 800,000 with the third payment made following the DRC Decision on the 19 November 2007 (after the Appellant filed its statement of appeal with the CAS) and consequently considered necessary to deduct the said amount leaving the balance of USD 400,000 which will constitute the amount to be awarded for the Respondent's default to pay the third payment.

The Court of Arbitration for Sport rules:

1. The appeal filed by the Mr Ronaldo Guiaro against the Decision issued by the FIFA DRC on 8 June 2007 is partly upheld.

2. The Decision issued by the FIFA DRC on 8 June 2007 is set aside and Besiktas Jimnastik Kulübü is ordered to pay to Ronaldo Guiaro the amount of USD 400,000.

3. That interest at the rate of 5% shall be paid in respect of the amount of USD 400,000 calculated as of the date of the notification of the present award.

4. All further claims from the parties are rejected.

(…).