Arbitration CAS 2012/A/2733 Stichting Heracles Almelo v. FC Flora Tallinn, award of 27 November 2012

Panel: Mr Mark Hovell (United Kingdom), Sole Arbitrator

Football
Transfer with a sell-on clause
Application of the contra proferentum principle
Distinction between a loan and a definitive transfer

1. **If both parties had the possibility to check the agreement and to negotiate the terms before signing it, the two clubs are of equal footing and of equal bargaining power and the "contra proferentum" principle cannot apply.**

2. **If it is the new club rather than the former one that pays the wages and other expenses of the player, the former club cannot call the player back or use his services anymore, the player cannot be sent back (in case of injury), the new club insures the player and is responsible for the medical attention for the player, or it doesn't matter if the new club and the player enter into a contract of employment together, then the scheme is rather of a definitive transfer than of a loan agreement, regardless of the name that is given to the operation.**

1. THE PARTIES

1.1. Stichting Heracles Almelo (hereinafter referred to as "Heracles" or "the Appellant") is a football club with its registered office in Almelo, the Netherlands. It is a member of the Royal Netherlands Football Association and plays in the Eredivisie League.

1.2. FC Flora Tallinn (hereinafter referred to as "FC Flora" or "the Respondent") is a football club with its registered office in Tallinn, Estonia. It is a member of the Estonian Football Association and plays in the Meistriliiga.

2. FACTUAL BACKGROUND

2.1. Below is a summary of the main relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced in the present proceedings. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Sole Arbitrator has considered all the facts, allegations, legal arguments and

evidence submitted by the parties in the present proceedings, he refers in this award only to the submissions and evidence he considers necessary to explain his reasoning.

2.2. On 1 July 2005, the Respondent and the Appellant signed a transfer agreement (hereinafter referred to as "the Agreement") concerning the transfer of Ragnar Klavan (hereinafter referred to as "the Player") from the Respondent to the Appellant; the Player subsequently signed an employment contract with the Appellant for the period from 1 July 2005 until 30 June 2009.

2.3. Article 4 of the Agreement contained a "sell on clause" which stipulated *"In case Heracles sells Ragnar Klavan to a third club, FC Flora will receive 15% of the transfer fee over 200,000 Euro"*.

2.4. On 28 January 2009, the Appellant and another Dutch club, AZ Alkmaar (hereinafter referred to as "AZ"), concluded an agreement entitled "secondment agreement" (hereinafter referred to as "the AZ Agreement"). The AZ Agreement stipulated that Heracles *"hereby declares that it is seconding the player […] to the host club, AZ […], for the period from 28 January to 30 June 2009"* and that an amount of EUR 380,000 would be paid, in seven unequal instalments, by AZ to the Appellant as a "secondment fee".

2.5. On 1 July 2009, the Player signs a 4 year contract with AZ.

2.6. On 4 August 2009, the Respondent lodged a claim with FIFA against the Appellant for breach of the Agreement. In this respect, the Respondent stated that the Appellant had failed to pay to it the 15 % of the transfer fee over EUR 200,000 for the subsequent transfer of the Player from the Appellant to AZ.

2.7. On 14 November 2011, FIFA communicated the findings of the decision taken by the Single Judge of the FIFA Players' Status Committee (hereinafter referred to as the "FIFA PSC") on 31 October 2011 (hereinafter referred to as "the Appealed Decision") as following:

1. "The claim of the Claimant, FC Flora Tallinn, is accepted.

2. The Respondent, Heracles Almelo, has to pay to the Claimant, FC Flora Tallinn, the amount of EUR 27,000, within 30 days as from the date of notification of this decision.

3. If the aforementioned sum is not paid within the aforementioned deadline, an interest of rate of 5 % p.a will apply as of the expiry of the fixed time limit and the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.

4. The costs of the proceedings in the amount of CHF 3,000 are to be paid by the Respondent, Heracles Almelo, within 30 days as from the notification of the present decision, as follows:

4.1 The amount of CHF 2,000 to FIFA….

4.2 The amount of CHF 1,000 to the Claimant, FC Flora Tallinn.

5. The Claimant, FC Flora Tallinn, is directed to inform the Respondent, Heracles Almelo, immediately and directly of the account number to which the remittance under points 2 and 4.2 is to be made and to notify the Players' Status Committee of every payment received".

2.8. The Appellant, requested FIFA to send the grounds of the decision of the FIFA PSC in accordance with Art. 15 and 18 of the Rules Governing the Procedures of the Players' Status Committee.

2.9. On 13 February 2012, FIFA communicated the grounds of the decision dated 31 October 2011.

3. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

3.1. On 24 February 2012, the Appellant lodged its Statement of Appeal with the Court of Arbitration for Sport (hereinafter referred to as the "CAS") submitting the following requests for relief:

*"**Primary:***

(i) The appeal of the Appellant is upheld and the decision of the Single Judge of the Players' Status Committee of FIFA dated 31 October 2011 is set aside;

(ii) No compensation is payable by the Appellant based on the "sell on clause" as laid down in the transfer agreement between the Appellant and the Respondent;

(iii) To grant an order that the Respondent shall be liable for all costs and expenses incurred by the Appellant in bringing this appeal including the costs and expenses of the CAS.

***Subsidiary**:*

(i) The appeal of the Appellant is upheld and the decision of the Single Judge of the Players' Status Committee of FIFA dated 31 October 2011 is set aside;

(ii) The amount of compensation payable by the Appellant based on the "sell on clause" as laid down in the transfer agreement between the Appellant and the Respondent shall be reduced in such way that costs such as the salary payments (which have been paid by the Appellant) during the period of loan of the player Ragnar Klavan from the Appellant to AZ Alkmaar as from 28 January 2009 until 30 June 2009 shall be deducted from the amount of compensation payable by the Appellant as established in the PSC decision.

(iii) To grant an order that the Respondent shall be liable for all costs and expenses incurred by the Appellant in bringing this appeal including the costs and expenses of the CAS".

3.2. On 14 March 2012, the Appellant lodged its Appeal Brief with the CAS confirming the above-mentioned requests for relief.

3.3. On 2 April 2012, the Respondent filed its Answer with the CAS with the following requests for relief:

(i) "To reject entirely the appeal of the Appellant, Stichting Heracles Almelo.

(ii) To uphold the decision of the Single Judge of the FIFA Players' Status Committee of 31 October 2011 stating that the Appellant is liable to pay a compensation of EUR 27,000 to the Respondent as well as 5 % interest per annum as from the date of expiry of the deadline of 30 days set by the Single Judge.

(iii) To condemn the Appellant to bear all the administrative costs and arbitrators fees of this Appeal as well as a sum of 10,000 CHF for the legal and other costs of the Respondent".

3.4. On 3 April 2012, the CAS invited the parties to inform the CAS by 10 April 2012 whether they preferred a hearing to be held or for the Sole Arbitrator to issue an award based on the parties' written submissions.

3.5. On 4 April 2012, the Respondent informed CAS of its preference for a hearing.

3.6. On 5 April 2012, the Appellant informed CAS that it preferred to have written procedures only and that no hearing would be held for financial and procedural economy.

3.7. On 11 May 2012, the CAS invited FIFA to provide the CAS and the parties with a copy of the complete case file produced by FIFA in connection with the matter.

3.8. On 27 July 2012 the CAS informed the parties that having considered the file in this matter and pursuant to Article R44.3 and R57 of the Code of Sports-related Arbitration (hereinafter referred to as "the CAS Code"), the Sole Arbitrator proposed to deal with the matter on the papers, without holding a hearing. Furthermore, the parties were given the opportunity to file a second round of written submissions. The Appellant was given a time limit of fifteen days from receipt of said letter to file a second submission. The parties were also asked by the Sole Arbitrator to address the following points in their submissions:

1. "Provide all information they have regarding the player's deal with AZ Alkmaar, in particular, whether the player signed a pre-contract or memorandum of understanding with AZ Alkmaar.

2. The date on which the transfer window shuts in Holland in January 2011.

3. What other offers had the club received for the player before he left them?"

3.9. On 10 August 2012, the Appellant provided CAS with its Statement of Reply. The Appellant answered the above questions of CAS as follows:

1. "As far as the Appellant knows, the Player did not sign a pre-contract or a memorandum of understanding with AZ Alkmaar. The Appellant does not have any further relevant information with regards to the Player's deal with AZ Alkmaar. […]

2. The date on which the transfer window shut in January 2011, is 31 January.

3. The Appellant can inform the CAS that no offers were received by the Appellant from any other clubs for the Player before his leaving from the Appellant to AZ Alkmaar".

3.10. The Respondent was given fifteen days upon receipt of the Appellant's submission to file a written submission in reply.

3.11. On 22 August and 24 August 2012, the Respondent provided CAS with its submission in reply. The Respondent answered the above questions of CAS as follows:

1. "Due to the fact that we are an Estonian club, we are not a party to any dealings between the Appellant and AZ Alkmaar and we do not have any contact with Player nor his representatives, it is impossible for us to provide any information in this regard.

That is to say, we cannot prove that the Player signed a pre-contract or memorandum of understanding with AZ Alkmaar. Moreover, it should be noted that attempts were made to contact AZ Alkmaar in this regard, however all correspondence was ignored by the club representatives. Proof of such can be presented upon request by the CAS.

2. Although it is our belief that due to the fact that the Appellant is a Dutch club, and as such, more qualified to answer this question, we can confirm that the date that the "January Dutch transfer window" shuts was 31 January 2011.

3. *Again we cannot provide information which we never would have received. Any offers which the Appellant would have received for the Player in January 2011 are in their possession. Previously to been transferred to the Appellant, a Spanish club, Real Sociedad de San Sebastian was interested in the player but at the end, there was no final agreement. […]".*

4. THE APPOINTMENT OF THE SOLE ARBITRATOR AND THE HEARING

4.1. The Agreement did not provide for the number or the names of arbitrators. The CAS reminded the parties on 17 April 2012 that pursuant to Article R50 of the CAS Code, the President of the Division could decide to submit the appeal to a sole arbitrator, taking into account the circumstances of the case.

4.2. On 17 April 2012, the Respondent confirmed its agreement with the fact that the case would be submitted to a Sole Arbitrator appointed by the President of the Appeals Arbitration Division (or his Deputy) pursuant to Article R54 of the CAS Code.

4.3. By letter dated 19 April 2012, the CAS informed the parties that Mark Hovell had been appointed the Sole Arbitrator to hear the matter. The parties did not raise any objection to the appointment of the Sole Arbitrator.

4.4. In accordance with Article R57 of the CAS Code, the Sole Arbitrator deemed himself sufficiently well informed and decided not to hold a hearing.

4.5. The parties signed the Order of Procedure in the case in hand confirming the decision to dispense with a hearing.

5. THE PARTIES' SUBMISSIONS

A. Appellant's Submissions

5.1. In summary, the Appellant submits the following in support of its requests for relief:

a. That the Appellant has fully complied with the Agreement between the parties and that no compensation is due as the "sell on clause" in Article 4 explicitly stipulates that compensation is only due in case the Appellant "sells" the Player to a third club. The Player was loaned to AZ.

b. The Sole Arbitrator should apply a literal interpretation of the "sell on clause" as it is clear that the clause only refers to a transfer on a definitive basis by using the wording "sell" and relied upon the CAS jurisprudence in CAS 2010/A/2098 and CAS 2004/A/642.

c. In case there is any ambiguity in the wording of a clause, the clause in dispute should be interpreted against the party seeking to rely on it, i.e. the Respondent (contra proferentum).

d. It is absolutely clear, that the Player was not sold to, but was merely on loan at the Dutch football club AZ, as the Appellant was still paying the salary of the Player until the end of the loan period. Furthermore, the AZ Agreement was expressly called "uitleenovereenkomst" which translates to "secondment agreement" in English.

e. The Appellant noted that the FIFA PSC appeared to follow the "overall circumstances" test established in CAS 2007/A/1219. However, the two sets of facts were quite different:

   i. here the Appellant continued to pay the salary of the Player;

   ii. the wording in that case referred to "will be transferred" not "sells";

   iii. the agreement in that case was titled "transfer agreement"; and

   iv. the respondent not the claimant, drafted the ambiguous words – the opposite of the matter in hand.

f. If AZ had really wanted the Player in January 2009, it would not have loaned the Player but it would have transferred him on a definitive basis without the risk that the Player would sign with another club.

g. It is not relevant that the Player signed an employment agreement with AZ shortly after the expiry of the AZ Agreement because the Player was in his last six months of his employment contract with the Appellant as result of which he was legally free to conclude a contract with another club, such as AZ.

h. Mr. Dennis van der Wee of AZ asked Mr. Raymond Oelering of the Appellant via e-mail on 24 June 2009 whether or not the "30% construction" applied during the period the Player played for the Appellant. The latter proves that the "30% construction" was also going to be part of the conditions of employment with AZ, thus no employment contract had been concluded between the Player and AZ by 24 June 2009 since the email indicates that AZ was still preparing the employment contract of the Player.

i. On a subsidiary basis, even if the Sole Arbitrator is of the opinion that the "sell on clause" is applicable and the overall circumstances are in favour of the Respondent, the amount based on the "sell on clause" shall be reduced in such way that costs such as the salary and other related payments (which have been paid by the Appellant totaling EUR 72,005.84) during the period of loan of the Player shall be deducted from the loan compensation paid by AZ to the Appellant.

B. Respondent's Submissions

5.2. In summary the Respondent submitted the following in defence:

a. That the AZ Agreement between the Appellant and AZ is not a loan agreement but is in fact a transfer on a definitive and final basis. The FIFA PSC correctly concluded this.

b. The FIFA PSC correctly applied the test in CAS 2007/A/1219. The following criteria were identified:

   i. the payment of a substantial fee;

   ii. a transfer up to the expiry of the Player's Contract with the Appellant;

   iii. the lack of obligations between the Appellant and the Player; and

   iv. the mere labeling of an agreement as a "loan" does not make it one.

c. In accordance with the Commentary on the FIFA Regulations on the Status and Transfer of Players (hereinafter referred to as the "FIFA Commentary"), the club of origin (which is the Appellant in this case), by means of a loan seeks to benefit from the experience gained by the player by regularly playing with the new club (AZ in this case) upon the player's return to the club of origin. The loan period was until 30 June 2009, at which stage the Player's contract with the Appellant would have expired, so he would not fulfill the concept of a loan.

d. Before the start of the "loan" period, the Player and AZ had already agreed upon a four year deal starting on 1 July 2009, i.e. the day after the expiry of both the "loan" period and the Player's employment contract with the Appellant so that it was impossible for the Player to return to the Appellant after the loan period expired.

e. Moreover a Director of AZ at that time clearly stated on the internet that the Player had already signed with AZ for the following season, before the player joined AZ on a "loan" basis.

f. Due to several injuries, AZ wanted to bring forward the definitive transfer of the Player. As a result, the Appellant, AZ and the Player agreed upon the immediate transfer of the Player on 28 January 2009.

g. Those three parties labeled the first part of the aforementioned transfer as a "loan" or "secondment" in order to circumvent the "sell on clause" in the Agreement.

h. The Appellant received a fairly substantial fee upon the "loan" of the Player to AZ with only five months left on the Player's employment contract with the Appellant; AZ paid the significant amount of EUR 380,000 for a loan period of five months. Such an amount cannot be considered as a loan fee, but merely a compensation for a definitive transfer.

i. Although it is true that the Appellant officially continued paying the Player's salary while he was playing for AZ, it is submitted that these expenses were in fact included in the transfer fee paid by AZ to the Appellant in order to make the transaction look like a "loan", whereas it was in fact a definitive transfer.

j. The email about the "30% construction" does not prove that the Player had not agreed upon signing his employment contract with AZ before 24 June 2009 as it is common practice in the world of professional football that a player signs a memorandum of understanding or a pre-contract with a club. Detailed provisions such as the one regarding the applicability of the 30% construction would only be included in the actual employment contract which was signed on 1 July 2009. The Respondent submits the principle arrangements between the Player and AZ were concluded in January 2009 and put in such memorandum or pre-contract.

k. Subsidiary, even if the Sole Arbitrator decides that the Appellant is indeed liable to pay an additional compensation to the Respondent in accordance with the "sell on clause" in Art. 4 of the Agreement, it is submitted by the Respondent that the amount payable shall be EUR 27,000 and that no deductions should be considered.

C. Appellant's Submissions in Reply

5.3. As Article R57 of the CAS Code stipulates that the Sole Arbitrator must *"deem himself sufficiently well informed"* to deal with the matter on the papers, the parties were asked to provide the Sole Arbitrator with a second round of submissions and to answer some specific queries he had.

5.4. In summary the Appellant provided the CAS with the following submissions in reply:

a. The Respondent refers to the FIFA Commentary and states that in case of a loan, the club of origin seeks to benefit from the experience gained by regularly playing with the new club, upon the player's return to the club of origin. However, the Respondent provides the CAS with this information as if this were always the case. It can also happen that the experience gained by a player is not enough for the club of origin to let him return.

b. The Respondent states that the Player already reached an agreement with AZ to join the club. However, this is not demonstrated with any evidence. It is the Respondent who claims a right based on an alleged fact and has to carry the burden of proof.

c. The statement of the Director of AZ, which the Respondent referred to, cannot be entitled as valid evidence as the FIFA Dispute Resolution Chamber (hereinafter referred to as the "FIFA DRC") already decided that internet communications, such as print-outs of an internet homepage, cannot be considered as sufficient evidence (FIFA DRC judgment of 7 April 2011, no. 411330).

d. The Appellant repeated the fact that they had paid the salary of the Player while he was on loan with AZ and that this is a decisive factor that the "loan" was actually a loan and not a hidden definitive transfer.

D. Respondent's Submissions in Reply

5.5. In summary the Respondent answered the Appellant's submissions as follows:

a. FIFA already issued the correct decision in this dispute seeing the actions of the Appellant as what they were; an attempt at circumvention of contract.

b. The fact that the Player left AZ for an unknown value but for a minimum of EUR 250,000, shows that the Appellant would not have let such a valuable player leave their club for free, and not even benefitted from the Player's services as a professional football player.

6. JURISDICTION OF THE CAS

6.1. Article R47 of the CAS Code provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS 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-related body".

6.2. The CAS recognizes its jurisdiction based on Article R47 of the CAS Code and Articles 62 and 63 of the FIFA statutes.

6.3. Article 62 of the FIFA Statutes provides that CAS has jurisdiction to resolve disputes between FIFA, members, confederations, leagues, clubs, players, officials and licensed match agents and players' agents.

6.4. According to Article 63 the CAS has jurisdiction if the time limits have been respected and if all other internal channels have been exhausted. As the exceptions of Article 63.3 do not apply to this case, the CAS determines that it has jurisdiction.

6.5. The CAS jurisdiction, based on the above, has not been disputed by the parties; furthermore it was expressly confirmed by the parties' signing the Order of Procedure.

7. APPLICABLE LAW

7.1. Article R58 of the Code provides 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".

7.2. The Sole Arbitrator noted that the parties had both referred to the FIFA Regulations on the Status and Transfer of Players (hereinafter referred to as the "FIFA RSTP") and that they agreed that the applicable FIFA RSTP were the 2008 edition.

7.3. Moreover, Article 62 paragraph 2 of the FIFA Statutes provides that the:

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

7.4. The "Federation" in the sense of Article R58 of the Code, i.e. FIFA, is domiciled in Switzerland, a fact that also requires that Swiss Law be applicable.

7.5. The Sole Arbitrator determined and both parties agreed that the FIFA Regulations are applicable primarily and Swiss law shall be applied in the alternative in the matter at hand.

8. THE SOLE ARBITRATOR'S FINDINGS ON THE MERITS

8.1. The Sole Arbitrator analyzed the following issues in order to decide on the merits of the case:

a) Is there any ambiguity surrounding Article 4 of the Agreement?

b) If so, what is the correct test to distinguish between a loan and a transfer?

c) How do the facts of the matter at hand fall within that test?

d) If there is a breach of the Agreement, what should the damages be?

A. Ambiguity?

8.2. The Sole Arbitrator notes the Appellant's view that the wording of Article 4 of the Agreement is clear and unambiguous. It refers to "selling" the Player and sharing the "transfer fee". The Respondent disagrees. However, both parties cite various previous CAS decisions (such as CAS 2007/A/1219, CAS 2010/A/2098 and CAS 2011/A/2356) which all broadly consider the same issue - is a loan payment (or in some of the cases, a payment made by a new club on behalf of a player "buying out" his contract) a transfer fee? There appears, to the Sole Arbitrator, to be a history of such clauses being regarded as ambiguous. In the matter at hand, the drafting could have been better. Whilst "selling" and "transfer fee" point to a definitive transfer, Article 4 could have expressly excluded any true loan fee i.e. sums for temporary transfers. The Sole Arbitrator notes that the Article was drafted by the Respondent and the "contra proferentum" submissions of the Appellant, but the Appellant presumably checked the Agreement and had the opportunity to negotiate its terms before signing it and the two clubs are of equal footing and equal bargaining power. The real issue here, in the opinion of the Sole Arbitrator, is more whether the loan was a true loan or a transfer/sale, labelled as a "loan".

8.3. The Appellant cites CAS 2010/A/2098 in support of its position that a "loan" is not a "sale". The Sole Arbitrator notes the panel in that case carefully analysed what is involved in a sale – in particular the consent of both clubs (the current employer of the player and the new one) and the player is normally required. In that case the current club did not consent to the player leaving, he breached his contract, and that club received compensation (or damages), pursuant to the FIFA RSTP, from the new club via the player. In the case at hand, the Player, AZ and the Appellant all consented to the arrangements – the question still remains, was this a true loan or a transfer?

8.4. Further, the parties both agreed on the application of the FIFA RSTP and Swiss Law. The Sole Arbitrator refers to CAS 2007/A/1219 which sets out the position under Swiss Law, at paragraphs 11 to 14.

> *"11. Pursuant to article 1 of the Swiss Code of Obligations, a contract requires the mutual agreement of the parties. This agreement may be either express or implied.*
>
> *12. When the interpretation of a contract is in dispute, the judge seeks the true and mutually agreed upon intention of the parties, without regard to incorrect statements or manner of expressions used by the parties by mistake or in order to conceal the true nature of the contract (Article 18 par. 1 of the Swiss Code of Obligations). When the mutually agreed real intention of the parties cannot be established, the contract must be interpreted according to the requirements of good faith (ATF 129 III 664; 128 III 419 consid. 2.2 p. 422). The judge has to seek how a declaration or the external manifestation of a party could have been reasonably understood dependent upon the individual circumstances of the case (ATF 129 III 118 consid. 2.5 p 122; 128 III 419 consid. 2.2 p 422).*

13. The requirements of good faith tend to give the preference to a more objective approach. The emphasis is not so much on what a party may have meant but on how a reasonable man would have understood his declaration (ATF 129 III 118 consid. 2.5 p 122; 128 III 419 consid. 2.2 p 422).

14. In determining the intent of a party or the intent which a reasonable person would have had in the same circumstances, it is necessary to look first to the words actually used or the conduct engaged in. However, the investigation is not to be limited to those words or the conduct even if they appear to give a clear answer to the question. In order to go beyond the apparent meaning of the words or the conduct by the parties, due consideration is to be given to all relevant circumstances of the case. This includes the negotiations, any subsequent conduct of the parties and usages".

8.5. As such, the Sole Arbitrator considers, in accordance with the applicable law, it is necessary to go beyond the wording of Article 4 of the Agreement and to consider the reasonable man's interpretation of Article 4.

B. The overall circumstances test

8.6. Loan deals are becoming more and more common in modern professional football. The Sole Arbitrator notes the FIFA Commentary that the Respondent part quoted. The entire commentary is:

"1. Whenever a player is transferred on a loan basis, the club of origin authorizes the new club to use the services of the player for the duration of the loan contract. However, as a general rule, the club of origin intends to recover the services of the player at the end of the loan period, given that, usually, the employment contract it signed with the player is still valid. By means of the loan, the club of origin often seeks to benefit from the experience gained by the player by regularly playing with the new club (cf. also 3 hereunder). Therefore, the new club is not entitled to transfer the player to a third club without the written authorisation of the club that lent him out. This right to a say awarded to the club of origin also ensures that the latter's investments in order to obtain the services of the player in view of a specific predetermined period of time are duly protected.

2. During the period that the player is on loan, the effects of the employment contract with the club of origin are suspended, i.e. the club of origin is not obliged to pay the player's salary and to provide him with adequate training and/or other privileges or entitlements as foreseen in the contract. It is the responsibility of the new club to pay the player's salary in accordance with the new contract with the player.

3. The loan of a player is often used to foster young talented players that would otherwise not find opportunities in a team. These players are therefore loaned to a club with the purpose of letting them regularly play and thus gain experience. Frequently, the club of origin transfers these players on a free loan basis and sometimes covers the salary of the player either entirely or partially".

8.7. Loan deals certainly can be used to improve the abilities of a player, that might not be getting regular football at his club, by sending him out to another club to play matches. Often, this will suit a bigger club with younger players. Often one might expect to see certain clauses within such a loan agreement between the two clubs which may oblige the borrower club to

play the player; there may be clauses that enable the lending club to recall the player, for example if he is needed due to injuries or lack of form of other players at the lending club; there may be terms dealing with how injuries are dealt with; and who pays the wages of the player, in different circumstances.

8.8. That said, the Appellant rightly stated that not all loans are this way. Indeed the FIFA Commentary refers to "the general rule" implying there are exceptions or other types of loans. Clubs sometimes allow unwanted players to go on loan with another club, with a view to that club trialling the player, with a view to taking a transfer of him or signing him, should he be out of contract at the end of the loan period.

8.9. So any judging body attempting to ascertain how a reasonable man may view the overall circumstances should start by reviewing the agreement between the two clubs. Does it deal with those matters mentioned above? What is its title (although the Sole Arbitrator notes that different weight may be attached to these different circumstances, and what a document is called is of lower weight when considering its express terms; the terms that one might expect to see in a loan agreement, but have been omitted; along with what the overall effect of the agreement has on the parties; rather than just what it is labeled)? What is the term of the agreement compared to the remainder of the player's contract with the first club? Who pays his basic wages? Who pays bonuses? Has the player signed a pre-contract agreement with the second club? Does the second club have any option to acquire the player at the end of the agreement? Who insures the player? Who is responsible for any medical cover/treatment? How much is paid by the second club to the first? Is the fee more than a reimbursement of the wages? And so on.

C. Applying the test to these facts

8.10. The Sole Arbitrator firstly reviewed the AZ Agreement that was appended to the Appellant's Appeal Brief. In favour of this being a true loan, the Sole Arbitrator notes:

a) It is entitled "Secondment Agreement" and refers to a secondment throughout;

b) The contract of employment between the Player and Heracles remained current and Heracles paid his wages (whilst AZ paid any bonuses, this would be expected as if the Player is not playing for Heracles he cannot score the goals or make the appearances necessary to achieve any bonuses); and

c) Heracles paid the Player's agent his commission during that period and also some travel expenses.

8.11. In favour of this being a definitive transfer:

a) There was no mechanism to either call the Player back (in case of his requirement back at Heracles), nor to send the Player back (in case of an injury);

b) AZ paid a large sum of EUR 380,000, in comparison to the wages and other expenses paid by Heracles (stated, and not challenged by the Respondent, as EUR 72,005.84), the net part of which compensated Heracles for the loss of the services of the Player;

c) The duration of the AZ Agreement mirrored the remaining part of the Player's contract of employment with Heracles;

d) AZ insured the Player;

e) AZ were responsible for the medical attention for the Player, but did have a duty to keep Heracles informed of any injuries.

8.12. The Sole Arbitrator also took note of the other evidence put forward by the parties, as part of the overall circumstances. The Respondent submitted that the Player and AZ had signed a pre-contract agreement in January 2009, and as such the Player was effectively transferred on that date. The Appellant rightly stated that there was no proof here and that the burden of proof to support such submission is upon the Respondent. There is a page from a website seemingly quoting a Director of AZ saying that an agreement existed with the Player before the arrangements with the Appellant. The Appellant states that the FIFA DRC do not accept website pages as evidence and in any event, it put forward an email from AZ dated 24 June 2009, in which AZ were requesting the type of information they would need from the Appellant to draw up a contract of employment with the Player. On the whole, the evidence supplied here by both parties was relatively inconclusive. However, the Sole Arbitrator does not particularly see the relevance of the Appellant's position. If AZ and the Player had not bound themselves to each other at any time during the duration of the AZ Agreement, it would just have meant the Player was free to join another club or AZ were free not to sign the Player once the AZ Agreement had run its course – the sum paid to the Appellant remained the same. If the Respondent could have established that the Player was definitely going to be an AZ player for the duration of the AZ Agreement and the next 4 years at the time that the AZ Agreement was entered into, then that would support a definitive transfer, but the Respondent could not establish that; instead it relies on a hindsight submission, as the Player did sign with AZ for a 4 year term on 1 July 2009.

8.13. When balancing these circumstances together, the Sole Arbitrator asks himself (or considers what a reasonable man may answer if he so asked himself) the same question the sole arbitrator asked at the end of paragraph 23 in CAS 2007/A/1219 – *"What would have been different, if the transfer was to be a final transfer and not a loan?"* The main difference is that the Appellant would not have paid the wages and other expenses of the Player amounting to EUR 72,005.84. The Appellant had no remaining control over the Player – it could not call him back or use his services anymore. Nor could he be sent back, nor did it matter if AZ and the Player entered into a contract of employment together.

8.14. The Sole Arbitrator is satisfied that the net fee paid for the Player by AZ therefore compensated the Appellant in exactly the same way as if there had been a definitive transfer. The parties had contractually agreed that should a transfer fee be paid over EUR 200,000, then the Respondent should receive 15% of this. The word "sells" is different from "loans"

in a literal sense, but in accordance with Swiss law, when one looks at these overall circumstances, the Sole Arbitrator is satisfied that a reasonable man would see no difference.

D. The compensation

8.15. The Appellant, in its subsidiary argumentation, submitted that if the Sole Arbitrator determined that Article 4 of the Agreement applied to the fee paid by AZ, then it should be to the net fee i.e. net of the wages and other expenses paid by the Appellant. The Respondent, without any grounds, disagreed. In coming to the decision the Sole Arbitrator has, in order to remove the difference between a loan and a definitive transfer, considered the net position and agrees with the Appellant that it is the net part of the AZ fee that is subject to Article 4 of the Agreement.

8.16. The Appealed Decision awarded interest on the sum the Single Judge deemed due at the rate of 5% to run from 30 days after the notification of that Appealed Decision. The notification was on 14 November 2011, so interest should run from 14 December 2011, but on the sum awarded below.

9. CONCLUSION

9.1 The Sole Arbitrator determines that the Appellant shall pay the sum of EUR 16,199.12 to the Appellant (being 15% of EUR 380,000 less EUR 72,005.84) plus interest at 5% as from 14 December 2011.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The Appeal filed by Stichting Heracles Almelo at the Court of Arbitration for Sport on 24 February 2012, against the decision of the Single Judge of the FIFA Players' Status Committee is partially accepted.

2. The decision issued on 31 October 2011 by the Single Judge of the FIFA Players' Status Committee is set aside and replaced with this award.

3. Stichting Heracles Almelo shall pay the sum of EUR 16,199.12 (sixteen thousand, one hundred and ninety-nine Euro and twelve cents) to FC Flora Tallinn, plus interest at 5% (five percent) as from 14 December 2011.

4. (…).

5. (…).

6. All other prayers for relief are dismissed.