Arbitration CAS 2010/A/2077 Inverness Caledonian Thistle FC v. Marius Constantin Niculae, award of 10 December 2010

Panel: Mr Christian Duve (Germany), President; The Hon. Michael Beloff QC (United Kingdom); Mr Ralph Zloczower (Switzerland)

Football
Transfer
Applicable law to the burden of proof
Interpretation of a contractual provision
Burden of proof

1. **Under Swiss law, the choice of substantive law made by the parties extends to the rules concerning the burden of proof.**

2. **According to Scottish law, a contractual provision must be construed in the context of the contract in which it was found. Furthermore, a contract must be interpreted objectively, according to the standards of a reasonable third party who is aware of the commercial context in which the contract occurs. Moreover, it is permissible when interpreting a contract to have regard to the circumstances in which the contract came to be concluded.**

3. **Under Scottish law, the general rule governing matters of burden of proof provides that in the normal case the burden, initially at least, rests upon the pursuer, since the pursuer cannot, merely by raising an action, require his opponent to disprove his allegations as a condition of escaping liability. Furthermore, in CAS arbitration, any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue.**

Inverness Caledonian Thistle FC (the "Appellant") is a Scottish football club currently playing in the Scottish Premier League.

Marius Constantin Niculae (the "Respondent") is a Romanian professional football player currently registered with Romanian club FC Dinamo Bucureşti ("FC Dinamo").

On 10 August 2007, Appellant and Respondent entered into a two year employment contract (the "Employment Contract"), registering Respondent as a player for Appellant's professional football team.

In particular, the Employment Contract contained the following provisions:

> *Part B article 8: Transfer to another club – 30% of transfer fee received*
>
> *In the event that during the Term of this Contract the Player's registration is transferred to another football club the Player shall,* ***subject to such transfer having been initiated by the Club****, be entitled to a payment from the Club equivalent to the above specified percentage.*
>
> *Schedule 2 article 3.1.17*
>
> *The Player, unless and only to the extent that he is prevented by illness, accident or other incapacity or permitted absence, shall during the Employment:*
>
> *3.1.17* ***not, except with the consent of the Club, personally or by any other person, party or agent engage in any discussions, negotiations or communications with any other association football club*** *or any person acting or bearing to act for same with respect to the employment or other engagement of the Player as a footballer or in any other employment or capacity.*
>
> *Schedule 2 article 4*
>
> *The Player will primarily be based at the Club's principal stadium and, where separate from the principal stadium,* ***at any training and coaching facilities from time to time established or provided by the Club but the Player shall (without further remuneration) be required to perform his duties and responsibilities under and in terms of this Agreement at such place or places, whether within or outside of Scotland****, as the Club may from time to time require.*
>
> *Schedule 2 article 10.2: Proper Law, Registration etc.*
>
> *The construction, validity, performance and execution of this Agreement* ***shall be governed by the law of Scotland*** *(…)*
>
> [Emphasis added].

Previously, on 16 July 2007, Mr. Alan Savage, Appellant's former chairman as well as chairman of the Orion Group, had sent a letter to Respondent (the "Letter of Intent by Alan Savage"). According to this document, Respondent would represent the image of Orion Group in Romania from 1 August 2007 until 31 July 2009 in exchange for an agreed salary of € 8,333 a month, a single payment of € 100,000, and a possible bonus of € 10,000 in case more than 100,000 Romanian nationals register on Orion's database.

On 11 April 2008, BBC Scotland reported on the resignation of Appellant's former chairman, Mr. Alan Savage suggesting that his departure might have an impact on the future of Respondent with Appellant as part of Respondent's salary was directly paid by Mr. Savage's company, the Orion Group.

On 23 April 2008, BBC Scotland reported on statements made by Mr. David Sutherland, portrayed as a major stakeholder of Appellant, suggesting that Appellant would not be able to afford Respondent's services for the upcoming 2008/2009 sporting season.

In June 2008, striker Mr. Andy Borrowman was hired by Appellant and Mr. Graham Bayne, a centre forward, was transferred from Appellant to Dunfermine FC.

In an online press article published on an unknown date but with the apparent date of last update being 12 July 2008, *Press & Journa*l reproduced the following quote of Appellant's vice-chairman and Director of Football, Mr. Graeme Bennett:

> *We have had a friendly and constructive discussion with Marius.*
>
> *We informed him that we had received offers from two clubs for him and we had rejected them as they did not meet a realistic valuation.*
>
> *Marius indicated that if any further offers came in he would wish the opportunity to consider them.*
>
> *The club has agreed to inform him of any such offer that is acceptable to us and then allow him to talk directly to a club which has tabled an offer.*
>
> *In the meantime he has begun training with the first team squad and will be available for selection until or unless we receive an offer which is satisfactory.*

In another online press article published on an unknown date but with the apparent date of last update being 18 July 2008, *Press & Journal* quoted Mr. Bennett as follows:

> *We have made a huge financial commitment with Marius and we want to make our money back.*
>
> *If no-one comes up with a realistic offer we will keep him for a second year and he is factored into our budget for this season.*

On 19 July 2008, a meeting took place at Kingsmill Hotel in Inverness, Scotland (the "Meeting of 19 July 2008"). According to the submissions of the parties, at the meeting Respondent's career was discussed between representatives of Appellant (Mr. George Fraser – Chairman, Mr. Graeme Bennett – Vice Chairman) and Respondent and his advisor (Mr. Steve Cairns).

At the Meeting of 19 July 2008, Appellant claimed that Respondent had expressed that the German club 1. FC Kaiserslautern and Greek club PAOK FC would make offers in the amount of € 500,000 for a transfer of Respondent. However, as Respondent allegedly wished to return to Romania and FC Dinamo would offer only € 200,000 for his transfer, Appellant claimed that Respondent had waived his right to a 30 % share of the transfer fee obtained by Appellant as well as the fees remaining for the second year under the Employment Contract. Yet, due to the fact that the offered transfer fee was too low, Appellant submitted that it had been agreed between the parties that Respondent could travel to Romania to negotiate a higher transfer fee with FC Dinamo.

As evidence of what was discussed at the Meeting of 19 July 2008, Appellant produced the affidavits of Mr. Bennett and Mr. Fraser as well as their oral statements provided at the hearing. Furthermore, Appellant submitted an unsigned file note drafted by Mr. George Fraser, Appellant's Chairman (the "Appellant's File Note"). In addition, Appellant claimed that Mr. Steve Cairns produced a written note on behalf of Respondent expressing the waiver of his rights as described in the above paragraph.

On 21 July 2008, Appellant received offers by German club 1. FC Kaiserslautern and Greek club PAOK FC for a transfer of Respondent at an amount of € 500,000. In the meantime, Respondent travelled to Romania to train with FC Dinamo.

On 22 July 2008, the *Inverness Courier* reported on Respondent's travel to Romania during the time of the pre-season tour to Denmark of Appellant's first team. Furthermore, in relation to Appellant's rejection of further offers for Respondent's transfer, Mr. Bennett was now quoted in the following terms:

> *We made an investment in the player and we want a major part of that investment back.*
>
> *There has been a lot of speculation involving Marius over the last month. But at the end of the day he is still a Caley Thistle player until otherwise.*

On 24 July 2008, FC Dinamo made an offer for the transfer of Respondent at an amount of € 300,000.

On 25 July 2008, the websites *FIFA.com* and *UEFA.com* reported that Respondent and FC Dinamo had entered into a four-year employment contract.

On 27 July 2008, Respondent was shown training with FC Dinamo on the Romanian club's website.

On 30 July 2008, according to Appellant, a telephone conversation took place between Appellant's representatives (Mr. Graeme Bennett – Vice Chairman; Mr. Mike Smith) and Respondent. According to the file note taken by Appellant of this conversation, Respondent expressed that Appellant had agreed to his transfer to FC Dinamo, that he was now a "Bucharest player" and that Appellant from now on would have to speak to his lawyer.

On 31 July 2008, Appellant sent a fax letter to Respondent concerned with the phone conversation between the parties of 30 July 2008, stating, *inter alia*, the following:

> *It has come to the attention of the Club that you have been photographed signing a contract with the football club SC Dinamo 1948 SA purportedly for four years and those pictures have been displayed on the website of said club from last Friday, namely 25th July 2008. The accompanying report on the website advised that you have signed a contract with SC Dinamo 1948 SA as of 24th July 2008.*
>
> *It is further understood from a number of sources that you have been training with SC Dinamo 1948 SA during this week and possibly also the week before.*
>
> *It is clear that your actions are singularly repudiatory breaches of contract entitling the Club to regard itself as discharged from any obligations it may otherwise have had under its former contract of employment with you as of 30th July 2008. The Club regards the contract of employment as so discharged.*
>
> *In any event and irrespective of the foregoing, your statements to the Club's representatives on 30th July 2008 were clear and unequivocal and you signified termination of your contract unilaterally in the course of the conversation on 30th July 2008.*

On 31 July 2008, Appellant sent a fax letter to FC Dinamo with the following content:

In the light of the conduct of the Player, we accept your offer in relation to the transfer of the Player and hold the transfer agreement between our clubs as concluded and agreed.

On that basis we are informing the Scottish Football Association that this club consents to the release of the International Transfer Certificate for the Player.

Our solicitors are transferring back to us the sums paid by you, which we accept as payment in relation to the transfer of the Player and in conclusion and settlement of the transfer agreement between us.

On 31 July 2008, Appellant sent a fax letter to the Scottish Football Association confirming that the Employment Contract had been terminated and that Appellant consented to the release of the International Transfer Certificate (ITC) for Respondent.

On 1 August 2008, Respondent was officially transferred to FC Dinamo for an amount of € 500,000. Appellant received € 475,000 from FC Dinamo, 5 % of the agreed amount being withheld as solidarity contribution to be distributed among Respondent's former training clubs.

In August 2008, Mr. Adam Rooney is hired by Appellant as a centre forward. Moreover, in January and February 2009 four additional players were hired by Appellant.

On 10 November 2008, Respondent initiated proceedings before the FIFA Dispute Resolution Chamber (DRC), claiming the amount of € 150,000 from Appellant pursuant to Article 8 of Part B to the Employment Contract which entitles Respondent to receive a share of 30 % of the transfer fee obtained by Appellant in case the transfer has been initiated by Appellant.

On 17 September 2009, the DRC issued a decision partially upholding Respondent's claim, ordering Appellant to pay € 142,500 to Respondent (the "DRC Decision").

On 13 October 2009, the DRC Decision was notified to the parties. The initial notification did not state the grounds of the DRC Decision.

On 19 October 2009, Appellant requested the grounds of the DRC Decision.

On 18 February 2010, the grounds of the DRC Decision were notified to the parties. The DRC found that Appellant had not fulfilled its burden of proving that the transfer had not been initiated by Appellant. However, as Appellant was effectively paid by FC Dinamo only an amount of € 475,000 (5 % being withheld as solidarity contribution to be distributed to the Player's training clubs), the DRC established that Appellant only had to pay 30 % of the effectively made payment, amounting to € 142,500.

On 9 March 2010, Appellant filed a Statement of Appeal challenging the DRC Decision.

On 18 March 2010, Appellant filed its Appeal Brief.

On 8 April 2010, Respondent filed his Answer.

On 23 April 2010, the CAS Court Office reverted Appellant to article R56 of the Code of Sports-related Arbitration (the "CAS Code") with regard to Appellant's request to supplement earlier submissions.

On 27 April 2010, Appellant reserved its position on whether to make an application under article R56 at that stage until it is determined whether Scottish law would be applicable and, separately, whether a hearing would be held.

On 23 August 2010, the CAS Court Office sent a fax to the parties taking due note that neither Respondent nor his counsel would attend the hearing scheduled for 26 August 2010. Moreover, the parties were informed that, by virtue of article R57 of the CAS Code and taking into account that Respondent had been aware and had agreed to the selected hearing date, the Panel had decided to adhere to its decision to hold the hearing on 26 August 2010. Furthermore, in light of the particular circumstances of the case, Respondent was offered the opportunity to participate in the hearing by teleconference. Consequently, Respondent was invited to provide the CAS Court Office with his contact details and availability for the hearing on or before 25 August 2010. Additionally, Appellant was requested to bring to the hearing a copy of the budgets for the 2007/2008 and 2008/2009 sporting seasons. However, Respondent refrained from providing the CAS Court Office with his contact details and availability for the hearing.

On 26 August 2010, a hearing was held at the CAS in Lausanne.

At the hearing, Appellant was represented by its chairman, Mr. George Fraser, its vice chairman, Mr. Graeme Bennett, and by its legal counsel, Mr. Rod McKenzie. Respondent did not participate in the hearing, neither in person nor represented by a legal counsel.

At the outset of the hearing, the following preliminary issues were addressed: the absence of Respondent and the new documentary evidence produced by Appellant as requested by the Panel, namely copies of Appellant's budget of the 2007/2008 and 2008/2009 sporting seasons.

The hearing proceeded with the examination of Appellant's chairman, Mr. George Fraser, who began by explaining that he did not hold an executive position and was not remunerated by Appellant for his services as chairman. During his examination, Mr. Fraser explained that Mr. Sutherland had left the position of Appellant's chairman two years before Respondent joined Appellant as a player and was at the time of the news reports not a major personal shareholder of Appellant. Hence, Mr. Sutherland's statements were not attributable to Appellant.

Furthermore, Mr. Fraser explained that he had prepared Appellant's File Note after the Meeting of 19 July 2008 as a result of his experiences in his career in the construction businesses, where the regular preparation of file notes subsequent to negotiations and meetings helped avoiding evidentiary problems in case of possible disputes. Appellant's File Note was an accurate representation of his recollection of what had happened at that meeting. According to his recollection of the facts, it was only then that Mr. Fraser found out for the first time about Respondent's determination to leave Appellant.

Mr. Fraser was surprised that Respondent announced that two offers were about to be made by German club 1. FC Kaiserslautern and Greek club FC PAOK. Moreover, Mr Fraser did not know how Respondent was able to predict the incoming offers that eventually reached Appellant on 21 July 2010. However, according to Mr. Fraser, Respondent announced at the Meeting of 19 July 2008 that he wanted to be transferred to FC Dinamo and waived his right to 30 % of the transfer fee, regardless of the amount obtained by Appellant for the transfer. Yet, owing to the fact that the offer made by FC Dinamo was too low, Respondent was allowed to go to Romania to train with FC Dinamo and seek a higher offer. During his examination, Mr. Fraser confirmed that he had not been aware of any previous offers made by third clubs prior to the offers by 1. FC Kaiserslautern and FC PAOK and stated that the news articles in this regard were incorrect. Concerning Respondent's absence from the club's trainings, Mr. Fraser indicated that before the Meeting of 19 July 2008 Respondent refused to travel with Appellant's first team to Denmark and that Respondent did not return to Appellant after the trip to Romania. According to Mr. Fraser, the first successful contact between the parties took place not before 30 July 2008 via telephone, when Respondent communicated to Appellant that he was a "Bucharest player". Hence, Appellant refrained from imposing sanctions on Respondent to avoid the return of a disaffected player and felt compelled to accept the transfer to FC Dinamo at the amount of € 500,000.

Subsequently, Appellant's vice-chairman and director of football, Mr. Graeme Bennett was examined. Mr. Bennett began by stating that he had held the position of director of football for at least ten years and that this was an executive position, for which he had been paid by Appellant in the past. As director of football, he was in charge of negotiating transfers and, in particular, he had been involved in the negotiation of the Employment Contract, along with Appellant's former chairman. Mr. Bennett confirmed that Respondent had had the opportunity to take home the Employment Contract for 24 hours before signing it and that his ability to speak English was good enough for him to understand the wording of the Employment Contract. With regard to the events that led to this dispute, Mr. Bennett said that he had been misquoted in the press articles presented to the Panel as evidence and emphasized that there had been significant speculation at the time regarding Respondent's future, in particular since Respondent had been signed-on by Appellant it was known by the press that the Employment Contract included a clause that would entitle Respondent to receive a percentage of the transfer fee in case he would be transferred to another club.

Concerning the scheduling of the Meeting of 19 July 2008, Mr. Bennett explained that on Friday, 18 July 2008, he had received a call from Mr. Steve Cairns on behalf of Respondent requesting for a meeting because Respondent had refused to attend the training camp in Denmark. Thus, Mr. Bennett informed Mr. Fraser about the request and, due to the fact that there was a match at the stadium on Saturday, they decided to meet with Respondent at the Kingsmill Hotel. At the meeting, Respondent suggested that Appellant would soon receive offers by third clubs for a transfer of Respondent. However, Mr. Bennett explained that he understood Respondent's announcement in this regard as rather vague, adding to the general speculation about a transfer of Respondent at the time. In fact, Mr. Bennett declared that he did not know of any official offers for a transfer of Respondent prior to the Meeting of 19 July 2008. According to Mr. Bennett, at the meeting Mr. Steve Cairns presented a written note on behalf of Respondent which contained a transfer offer by FC Dinamo at an amount of € 200,000. According to Mr. Bennett, since the amount offered was too low for Appellant, Respondent waived his right to the 30 % share of the transfer fee. However, the offer was nonetheless

rejected so the parties agreed to allow Respondent to travel to Romania to negotiate with FC Dinamo for a higher transfer fee but Respondent never returned. According to Mr. Bennett, Appellant tried to communicate with Respondent several times and was only able to reach him on 30 July 2008, after finding out that Respondent had signed a new employment contract with FC Dinamo, when Respondent informed Appellant that this matter would have to be handled by his lawyers. In light of the circumstances, Appellant saw no other option as to proceed with the transfer of Respondent to FC Dinamo and therefore Appellant's chief executive, Mr. Mike Smith, agreed to the transfer offer made by FC Dinamo at an amount of € 500,000.

Additionally, Mr. Bennett confirmed that prior to the Meeting of 19 July 2008, Appellant had received some informal calls from agents and other verbal conversations inquiring about Respondent's future but Mr. Bennett said that Appellant made it clear that any serious offer had to be put in writing to be presented to Appellant's board of directors. Furthermore, he mentioned that Appellant in general had been open to offers for Respondent and that an agent on behalf of 1. FC Kaiserslautern called Appellant prior to the Meeting of 19 July 2008 to inquire about Respondent. However, Mr. Bennett emphasized that Appellant wanted to keep Respondent as a player for the two-year duration of the Employment Contract but that it had at that point in time become clear that Respondent wanted to play elsewhere.

During the course of the hearing, Appellant was given the opportunity to deliver opening and closing statements and to examine and the appointed witnesses. At the conclusion of the hearing, Appellant, after making submissions in support of its request for relief, raised no objections regarding its right to be heard and to be treated equally in the arbitration proceedings.

On 27 August 2010, Respondent was informed by the CAS Court Office about the holding of the hearing on 26 August 2010. In this context, Respondent was forwarded a CD-Rom containing a recording of the hearing as well as copies of Appellant's budgets for the 2007/2008 and 2008/2009 sporting seasons, which were newly presented at the hearing. Respondent was given until 3 September 2010 to comment on the new submissions.

On 2 September 2010, Respondent submitted four comments in regard to Appellant's budgets for the 2007/2008 and 2008/2009 sporting seasons. In his letter Respondent referred to two documents supposedly attached to his submissions. However, these documents were not received by the CAS Court Office at the time.

On 8 September 2010, Appellant expressed its readiness to comment on Respondent's latest submissions.

On 17 September 2010, Respondent was invited to complete his submission of 2 September 2010 by providing the two missing documents on or before 23 September 2010.

On 21 September 2010, Respondent completed his submissions of 2 September 2010 by filing the two missing documents with the CAS Court Office. These were the Letter of Intent by Alan Savage (referred to above) and the payment order made by FC Dinamo in favor of Appellant in the amount

of € 475,000. Consequently, Appellant was given one week to file its comments concerning Respondent's latest submissions.

On 28 September 2010, Appellant sent its final submissions to the CAS Court Office in reply to Respondent's submissions of 21 September 2010.

On 29 September 2010, Respondent was invited to submit within one week his comments in regard to Appellant's final submissions of 28 September 2010. However, Respondent refrained from making further submissions in this regard.

LAW

Jurisdiction

1. The jurisdiction of CAS, which is not disputed between the parties, derives from articles 62 and 63 of the FIFA Statutes. Article R47 of the CAS Code also provides basis for the jurisdiction of CAS in the present matter.

2. The scope of the Panel's jurisdiction is defined in article R57 of the CAS Code, which provides:

   The panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance.

3. As a result, CAS is not bound by the facts as established by the DRC if parties present new facts in the present proceedings.

Admissibility

4. The DRC Decision was notified to the parties on 13 October 2009. Since the DRC Decision did not state grounds, Appellant had, according to Article 15 of the Rules governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber, ten days to request the grounds of the decision until 23 October 2009 before the decision would come into force. Appellant duly requested the grounds of the DRC Decision on 19 October 2009. The grounds of the DRC Decision were notified to the parties on 18 February 2010.

5. Thus, under article 63 (1) of the FIFA Statutes, Appellant had until 11 March 2010 to file its Statement of Appeal, which it did on 9 March 2010. In addition, under article R51 of the CAS Code, Appellant had until 21 March 2010 to file his Appeal Brief, which it did on 18 March 2010.

6. In light of the above, the Panel concludes that the appeal is admissible.

Applicable Law

7. Abiding by article R58 CAS Code, the CAS settles disputes:

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.

8. Furthermore, as the seat of the CAS is in Lausanne, Switzerland, according to article R28 of the CAS Code this arbitration is subject to the rules of the Swiss Private International Law Act (PILA; 176 para. 1 PILA). Article 187 para. 1 PILA provides that the arbitral tribunal decides in accordance with the law chosen by the parties or, in the absence of any choice, in accordance with the rules with which the case has the closest connection (cf. CAS 2008/A/1453, preliminary decision of 8 February 2008, para. 6; CAS 2006/A/1141, order of 31 August 2006, para. 6).

9. In the present case, both parties have explicitly stated which law they deem applicable to the present dispute. Appellant argued that the present dispute should be decided on the basis of Scottish law. In turn, Respondent maintained that the case should be decided according to the laws and regulations of FIFA, as well as international principles regarding the burden of proof.

10. To determine the law applicable to this dispute, the Panel reverts to article 10.2 of Schedule 2 of the Employment Contract, which contains a choice-of-law clause in favor of Scottish law for matters concerning "the construction, validity, performance and execution" of the Employment Contract, as described in paragraph 0 above. Consequently, pursuant to article R58 CAS Code and article 187 para. 1 PILA, the Panel finds that matters concerning the construction, validity, performance and execution of the Employment Contract are governed by Scottish law.

11. Furthermore, the Panel takes into consideration Article 62 (2) of the FIFA Statutes, which states that:

CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law.

12. As both parties are – at least indirectly – affiliated to FIFA and are thus bound by the FIFA Statutes (cf. RIEMER H.M., *Berner Kommentar ad. Art. 60-79 ZGB,* para. 511 and 515; CAS 2004/A/574; CAS [recte: TAS] 2005/A/983 & 984, para. 36; CAS 2006/A/1180, para. 7.10; and CAS 2008/A/1518, para. 113), the Panel holds that in respect of matters not concerned with the construction, validity, performance and execution of the Employment Contract, the various regulations of FIFA and, additionally Swiss law, are applicable (cf. CAS 2005/A/871, para. 4.15; CAS 2009/A/1517, para. 118; and CAS 2009/A/1934 & 1946, para. 96).

13. Finally, since under Swiss law the choice of substantive law made by the parties extends to the rules concerning the burden of proof (cf. BGE 115 II 300 S. 303; BGE 107 II 484 S. 486; BGE 97 III 12 S. 15; BGE 88 I 11 S. 15; also KOFMEL EHRENZELLER S., *Art. 8 ZGB – Aktuelles zu einer vertrauten Beweisregel in nationalen und internationalen Fällen*, ZBJV, Band 137, 2001, p. 832; also NIGG G., *Das Beweisrecht bei Internationalen Privatrechtsstreitigkeiten: Ein Überblick*, in LEUENBERGER

Ch., *Der Beweis im Zivilprozess*, Schriften der Stiftung für die Weiterbildung schweizerischer Richterinnen und Richter, Band 1; Bern 2000, p. 40), the Panel finds that Scottish law is applicable to the rules concerning burden of proof, according to article 10.2 of Schedule 2 of the Employment Contract.

Merits

14. In order to determine whether the DRC rightfully denied Respondent's claim to a 30 % share of the transfer fee which Appellant has obtained from FC Dinamo, the following main issues have to be resolved by the Panel:

    A. What are the terms of the Employment Contract?

    B. Is Respondent entitled to receive 30 % of the transfer fee obtained by Appellant?

    C. What are the legal consequences of the Panel's findings under questions a) and b)?

A. Terms of the Employment Contract

15. As explained in detail above, it is undisputed between the parties that by means of the Employment Contract, Appellant hired Respondent as a player to play in Appellant's professional football team. Moreover, it is also undisputed that the Employment Contract provided that Respondent is entitled to receive from Appellant 30 % of any transfer fee obtained by Appellant subject to the fulfilment of two conditions: (i) that Respondent is transferred to another football club before the end of the term of the Employment Contract; and (ii) that this transfer has been initiated by Appellant.

16. Furthermore, as mentioned above, it is undisputed that on 1 August 2008 Respondent was transferred during the term of the Employment Contract to FC Dinamo for an amount of € 500,000, of which the amount of € 475,000 was accrued by Appellant. However, what is disputed in this case is whether Respondent's transfer has been initiated by Appellant and therefore, whether Respondent is entitled to receive 30 % of the accrued transfer fee.

B. Entitlement of Respondent to receive 30 % of the transfer fee accrued by Appellant

17. Appellant claimed that Respondent was not entitled to a 30 % share of the accrued transfer fee on four grounds: first, that Appellant had not initiated the transfer; second, that Respondent bore the burden of proving that Appellant had initiated the transfer to FC Dinamo and that Respondent has not discharged this burden; third, that Respondent had waived its right to receive 30 % of the transfer fee accrued by Appellant; and fourth, that Respondent had been in material breach of his obligations under the Employment Contract.

18. Respondent submitted that he was entitled to a 30 % share of the transfer fee accrued by Appellant based on four grounds: first, Appellant had initiated the transfer; second, Appellant

bore the burden of proving that it had not initiated the transfer; third, Respondent had not waived his right to a 30 % share of the transfer fee; and fourth, Respondent had not been in material breach of his obligations under the Employment Contract and therefore Appellant was not obliged to make any payment under the Employment Contract.

19. Therefore, the Panel has to determine:

a) whether Respondent's transfer has been initiated by Appellant, as alleged by Respondent;

b) depending on the answer to question (1), whether Respondent has waived his right to receive 30 % of the transfer fee accrued by Appellant, as alleged by Appellant;

c) depending on the answer to question (2), whether Respondent has breached his obligations under the Employment Contract, as alleged by Appellant.

a) Was the transfer initiated by Appellant?

20. Appellant submitted that it had not initiated Respondent's transfer to FC Dinamo but that, to the contrary, it had been Respondent who initiated the transfer at the Meeting of 19 July 2008. It was only then that Respondent mentioned to Appellant for the first time a possible transfer to FC Dinamo. At the Meeting of 19 July 2008, Respondent expressed that he did not want to play for Appellant any longer and asked to be transferred to FC Dinamo at an amount of € 200,000. Thus, Respondent started the transfer process by forwarding the transfer offer made by FC Dinamo to Appellant. Alternatively, Appellant maintained that FC Dinamo had initiated the transfer by making an unsolicited offer in the amount of € 300,000 on 24 July 2008. As evidence of its submissions, Appellant relied on Appellant's File Note as well as on the affidavits and oral statements of Appellant's Chairman and Vice-Chairman, Mr. George Fraser and Mr. Graeme Bennett.

21. In turn, Respondent claimed that Appellant had initiated the transfer because, due to the severe financial difficulties, it had no longer been able to afford Respondent's services. Hence, Appellant decided to transfer Respondent. Respondent contested the Appellant's File Note as a mere internal document solely produced by Appellant, which bore no signature. As evidence for his allegations, Respondent brought forward several press articles portraying certain financial difficulties of Appellant as well as statements by club officials indicating a general openness of Appellant towards a transfer of Respondent during the time prior to the Meeting of 19 July 2008.

22. To counter Respondent's arguments, Appellant produced the budgets for the seasons 2007/2008 and 2008/2009 to show that Respondent had been included in the budget for the second season of the employment term and that, once Respondent left the club, other players were hired. Consequently, Appellant maintained that any amounts that could have been saved with Respondent's departure had been invested by Appellant on other players, therefore contesting Respondent's allegation that Appellant had initiated the transfer because it could not afford Respondent's services.

23. In order to determine whether Appellant initiated Respondent's transfer, the Panel first analyzes the term "initiated" contained in article 8 of Part B of the Employment Contract. For that purpose, the Panel turns to the rules on contract interpretation under Scottish law.

24. According to Scottish law, a contractual provision must be construed in the context of the contract in which it was found. Furthermore, a contract must be interpreted objectively, according to the standards of a reasonable third party who is aware of the commercial context in which the contract occurs. Moreover, it is permissible when interpreting a contract to have regard to the circumstances in which the contract came to be concluded (see *Emcor Drake and Scull Ltd v Edinburgh Royal Joint Venture*, judgment by the Outer House, Lord Drummond Young, reported in the *Scots Law Times* 2005, p. 1237, paras. I *et seq*.).

25. The definition of the term "initiated" is to "commence; start; originate; introduce; inchoate; begin; or set going" (*Black's Law Dictionary*, Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern, 5th edition, p. 705; see also *The Oxford Dictionary for the Business World*, Oxford University Press 1993, p. 416; and *Shorter Oxford English Dictionary on Historical Principles*, 5th edition).

26. Consequently, the Panel construes the condition precedent contained in article 8 of Part B of the Employment Contract "initiated by the Club" to mean that Appellant has to be the party who began, set going or originated the transfer process in order for Respondent to be entitled to a 30 % share of the accrued transfer fee. In other words, the Panel finds that Respondent is only entitled to a 30 % share of the accrued transfer fee if Appellant began, set going or originated the transfer process of Respondent to FC Dinamo.

27. As a result, in order to determine whether Appellant initiated Respondent's transfer to FC Dinamo, the Panel will first evaluate which party bears the burden of proving that this condition precedent has been fulfilled [see section aa)] and will then determine whether such burden has been duly discharged [see section ab)].

aa) Who bears the burden of proof?

28. To determine which party bears the burden of proving that Respondent's transfer to FC Dinamo was initiated by Appellant, the Panel considers the general rule governing matters of burden of proof, which provides that:

in the normal case the burden, initially at least, rests upon the pursuer, since […] the pursuer cannot, merely by raising an action, require his opponent to disprove his allegations as a condition of escaping liability

(WALKER/WALKER, The Law of Evidence in Scotland, Ross, 2nd edition, chapter 2, p. 13, para. 2.2.3).

29. Furthermore, the Panel takes into account the rulings of previous CAS Panel establishing that *"in CAS arbitration, any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue. In other words, the party which asserts facts to support its rights has the burden of establishing them*

[…]. The Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one. Hence, if a party wishes to establish some facts and persuade the deciding body, it must actively substantiate its allegations with convincing evidence" (CAS 2003/A/506, para. 54; and CAS 2009/A/1810 & 1811, para. 46; and CAS 2009/A/1975, p. 13, para. 72).

30. In light of the above, the Panel finds that Respondent bears the burden of proving that his transfer to FC Dinamo was initiated by Appellant in order to successfully claim under Part B article 8 of the Employment Contract that he is entitled to 30 % of the transfer fee accrued by Appellant.

ab) Has Respondent discharged its burden of proof?

31. After closely examining the evidence and considering the submissions of the parties, the Panel rules that Respondent has failed to discharge his burden of proving that Appellant had initiated Respondent's transfer to FC Dinamo.

32. The Panel arrived at the previously mentioned ruling after taking the following approach: first, it closely examined the evidence presented by the parties and subsequently, it analyzed it in order to assess whether Appellant initiated Respondent's transfer to FC Dinamo.

- Evidence on the record

33. The evidence on the record of Respondent's transfer process is composed of:

a) Three uncontested written transfer offers for Respondent's services:
   - two in the amount of € 500,000 from 1. FC Kaiserslautern and from PAOK FC; and
   - one transfer offer in the amount of € 300,000 from FC Dinamo.

b) Other contemporary documentation:
   - Appellant's File Note, contested by Respondent, portraying what was discussed at the Meeting of 19 July 2008;
   - The uncontested file note made by Appellant dated 30 July 2008 concerning the telephone conversation that took place between Appellant's representatives and Respondent when, *inter alia*, Respondent referred to himself as a "Bucharest player";
   - The uncontested fax sent by Appellant to Respondent on 31 July 2008 regarding the telephone conversation they had the previous day and the breach of contract;
   - The uncontested fax sent by Appellant to FC Dinamo on 31 July 2008 accepting the transfer offer "in light of the conduct of the Player"; and
   - The uncontested fax sent by Appellant to the Scottish Football Association on 31 July 2008 consenting to the release of the ITC for Respondent.

c) The affidavits and the oral statements of Mr. Bennett and Mr. Fraser.

d) The website posts regarding Respondent's career:
   - The uncontested posts that appeared on the websites FIFA.com and UEFA.com on 25 July 2008 reporting on Respondent's four-year employment contract with FC Dinamo; and
   - The uncontested post on FC Dinamo's website dated 27 July 2008 showing Respondent training with the Romanian club.

34. The evidence before this Panel relating to Appellant's alleged predisposition to transfer Respondent due to severe financial difficulties includes:

a) The Letter of Intent by Alan Savage indicating that Respondent would be remunerated by the Orion Group for representing the group's image in Romania.

b) Press articles:
   - two press articles from BBC Scotland dated 11 April 2008 and 23 April 2008 suggesting that due to Mr. Savage's resignation, Appellant would no longer be able to afford Respondent's services;
   - two online press articles from Press & Journal purportedly last updated on 12 July 2008 and 18 July 2008 reporting on Appellant's significant investment in Respondent and quoting Mr. Bennett saying, *inter alia*, that unsatisfactory transfer offers had been received for Respondent Appellant and that he would remain with the team until a realistic offer would be made; and
   - a press article from Inverness Courier dated 22 July 2008 reporting on Respondent's travel to Romania during Appellant's team pre-seasonal tour in Denmark and on Appellant's rejection of offers for Respondent's transfer. Moreover, it quoted Mr. Bennett saying that Appellant wanted to get back a major part of its investment in Respondent.

c) Appellant's budget for the seasons 2007/2008 and 2008/2009 indicating the following:
   - that Respondent had been included in the budget for the second season of the employment term and that the following players;
   - that in June 2008 striker Mr. Andy Borrowman was hired by Appellant;
   - that in June 2008 Mr. Graham Bayne, a centre forward, was transferred from Appellant to Dunfermine FC;
   - that in August 2008 Mr. Adam Rooney was hired by Appellant as a centre forward; and
   - that in January and February 2009 four additional players were hired by Appellant.

- Analysis of the evidence

35. First, based on Appellant's File Note, the affidavits and oral statements of Mr. Bennett and Mr. Fraser and the transfer offers on record, the Panel finds that at the Meeting of 19 July 2008 Respondent informed Appellant not only of the transfer offer made by FC Dinamo for Respondent's services but also that two other offers would be made by 1. FC Kaiserslautern

and by PAOK FC, which were only received by Appellant on 21 July 2008, two days after the Meeting of 19 July 2008. Hence, the Panel finds these offers were not solicited by Appellant.

36. Second, it is uncontested that after the Meeting of 19 July 2008 Respondent was granted leave to travel to Romania to train with FC Dinamo. It is also uncontested that Respondent did not go to the pre-season training in Denmark with Appellant's team but that he instead travelled to Romania, trained with FC Dinamo and did not return from this trip. Following this training and five days after the Meeting of 19 July 2008, a fourth and higher transfer offer from FC Dinamo was made on 24 July 2008. In this regard, there is no evidence on the record or allegation by Respondent that this offer had been solicited by Appellant. The next day, on 25 July 2008, the websites of both FIFA and UEFA reported that Respondent had signed an employment contract with FC Dinamo. Two days thereafter, on 27 July 2008, FC Dinamo reported that Respondent was already training with its squad.

37. Third, the uncontested contemporary documentation mentioned in paragraph 33.b) above as well as the statements of Mr. Fraser and Mr. Bennett mentioned in paragraph 33 c) show that Appellant tried to contact Respondent when getting the news that he had signed an employment contract with FC Dinamo. However, when realizing that Respondent considered himself a *"Bucharest player"* and would not return to train with Appellant's team, Appellant *"in light of the conduct of the Player"* accepted FC Dinamo's offer for Respondent's services and consented to the release of the ITC, as evidenced by the faxes sent by Appellant on 31 July 2008.

38. Fourth, the Panel finds that the evidence mentioned in paragraph 34 above is not sufficient to prove Respondent's allegation that Appellant initiated Respondent's transfer to FC Dinamo because it could not afford his services for the season 2008/2009 due to severe financial difficulties:

    a) The Panel notes that Respondent did not provide the Panel with additional evidence that would show that, after the Letter of Intent by Alan Savage referred to in paragraph 34 a) above, Respondent actually received the sums mentioned therein for the use of his image rights in Romania. Respondent could have provided, for example, an affidavit vowing to that fact, or a written contract that could have followed the Letter of Intent by Alan Savage, or bank statements showing that these amounts were indeed deposited in his bank account. In any case, even if the Panel were to consider that Respondent and the Orion Group had indeed entered into such contractual agreement, the Panel cannot find sufficient evidence that the resignation of Mr. Alan Savage in fact led to Appellant suffering from severe financial difficulties. Moreover, even if the Panel were to consider that Mr. Savage's resignation caused several difficulties to Appellant; the Panel finds that Respondent was unable to show that these circumstances led to an actual initiation of Respondent's transfer by Appellant. On the contrary, if Mr. Savage's resignation to his position as Appellant's Chairman would have meant the termination of the agreement regarding Respondent's image rights, the Panel would be inclined to analyze this as an incentive for Respondent to leave Scotland, as his income would have therefore been reduced.

    b) The Panel considers that the press articles mentioned in paragraph 34 b) above do not show any initiative on the part of the Appellant' regarding Respondent's transfer process

to FC Dinamo or even portray Appellant as actively seeking offers from third clubs. To the contrary, Appellant is reported as receiving unsolicited and undervalued offers. However, the Panel finds that these press articles indicate that Appellant was in general inclined to transfer Respondent in case it would receive an offer that met *"a realistic valuation"* of the services of Respondent and of the *"huge financial commitment"* made by Appellant in obtaining these services. Furthermore, the Panel notes that at the hearing Mr. Bennett acknowledged that, even if Appellant would have liked to keep Respondent's services for the 2008/2009 sporting season, Appellant was indeed in general open to receiving offers for the transfer of Respondent, which is not the same as saying that it would itself solicit such offers.

c) However, the Panel finds that Appellant has successfully proved that its financial situation did not necessarily require a transfer of Respondent. The budgets of the 2007/2008 and 2008/2009 sporting seasons submitted by Appellant mentioned in paragraph 34 c) above do not show a peculiar reference to a financial crisis of Appellant's club. In this regard, Appellant convincingly explained at the hearing that Respondent was indeed included in the budget for the 2008/2009 sporting season. Furthermore, Appellant's budgets reveal that, already in June 2008, it signed another player whose salary was nearly as high as that of Respondent. Had Appellant been in such a severe financial condition as portrayed by Respondent, the Panel deems it unlikely that Appellant would have employed another high fee earner one month prior to Respondent's transfer, and two after Mr. Savage's resignation. In addition, Appellant's accounts show that money "saved" by not paying the salary of Respondent after his departure was reinvested in hiring five new players, rather than being withheld or paid to creditors as a result of the alleged severe financial situation.

39. Even if the Panel were to deem that the evidence produced showed that Appellant was in general open to transfer Respondent; the Panel is not persuaded by the available evidence that Respondent's transfer process to FC Dinamo was indeed initiated by Appellant. In particular, Respondent did not provide specific evidence regarding the transfer on which the Panel could rely. For example, Respondent could have requested the participation in the hearing of Mr. Steve Cairns who attended the Meeting of 19 July 2008. Moreover, Respondent could have requested the participation in the hearing of the representative(s) of his current employer, FC Dinamo, who participated in the transfer negotiations and could therefore know how Respondent's transfer was initiated. However, Respondent failed to produce any witnesses or to submit any other evidence convincing the Panel that the Respondent's transfer to FC Dinamo was initiated by Appellant.

40. Finally, the Panel having heard and seen the witnesses for Appellant was disposed to accept their evidence.

C. Legal consequences of the Panel's findings

41. The Panel has found that Respondent did not discharge his burden of proving that Appellant has initiated Respondent's transfer to FC Dinamo. Therefore, the Panel finds that Respondent

is not entitled to 30 % of the transfer fee obtained by Appellant. As a result, the Panel does not need to rule on Appellant's alternative arguments whether Respondent waived his right to a 30 % share of the accrued transfer fee or whether Respondent breached his obligations under the Employment Contract.

42. Accordingly, all other prayers for relief are rejected. The present appeal is dismissed.

The Court of Arbitration for Sport rules:

1. The Appeal filed by Inverness Caledonian Thistle Football Club against the Decision by the FIFA Dispute Resolution Chamber issued on 17 September 2009 is upheld.

2. The Decision by the FIFA Dispute Resolution Chamber issued on 17 September 2009 is annulled.

(…)

5. All other prayers for relief are rejected.