



Arbitration CAS 2011/A/2508 Club Sportif Sfaxien v. Ashantigold Sporting Club, award of 17 January 2012

Panel: Mr Alasdair Bell (United Kingdom), Sole Arbitrator

Football

Transfer contract with a resale clause

Principle of contra proferentem

Even if there might be alternative interpretations of a particular provision, Article 1 of Swiss Code of Obligations provides that the spirit of the provision be considered, and in the absence of resolution by that means, that the principle of *contra proferentem* be applied.

Club Sportif Sfaxien (“the Appellant”) is a football club affiliated to the Tunisian Football Federation.

Ashantigold Sporting Club (“the Respondent”), is a football club affiliated to the Ghana Football Association.

The parties signed a transfer contract dated 20 July 2007 (“the Transfer Contract”) providing for the transfer of the professional football player, O. (“the Player”) from the Respondent to the Appellant.

The Transfer Contract was a one-page document written in French and a translation of it has been provided by the Appellant and is not challenged by the Respondent. The Transfer Contract provided, *inter alia*, at Article 2 that the transfer fee for the Player would be USD 80,000, payable in two equal instalments of USD 40,000 around the 20 August 2007 and the 20 September 2007.

Under Article 3 of the Transfer Contract, the Appellant committed to pay to the Respondent “30% *sur le plus value après déduction des frais des agents légaux et conventionnels sur le montant de tout éventuel transfert du joueur vers un autre Club*”. The translation of this contract that has been provided by the Appellant states that this provides that the Appellant commits to pay to the Respondent “30% *on the surplus after deduction of the agents’ fee legal and conventional on the amount of a possible transfer of the player towards another Club*”.

On or about 2 December 2008, the Player was transferred to the Qatari Club, Al Sadd. Al Sadd paid an amount of EUR 2,500,000 for the transfer.

The Respondent presented two claims to FIFA in relation to the Transfer Contract. The first claim, dated 4 January 2008, concerned the payment of the transfer compensation of USD 80,000, pursuant to Article 2 of the Transfer Contract. The Respondent claimed that the amount due under Article 2

had not been paid by the Appellant. The second claim, dated 2 June 2009, concerned the payment of a proportion of the transfer compensation that was paid by Al Sadd, pursuant to Article 3 of the Transfer Contract. The Respondent claimed that the amount due under Article 3 had not been paid by the Appellant, and claimed that the amount payable was 30% of the transfer amount of EUR 2,500,000, that is, EUR 750,000.

On 17 September 2010, the Single Judge of the Players' Status Committee of FIFA, Mr. Geoff Thompson, ("the Single Judge") rendered a decision in relation to the two claims.

The Single Judge first confirmed that the Players' Status Committee of FIFA (including its Single judge) was competent to deal with the matter, which concerned a dispute between clubs belonging to different national associations (i.e. Ghana and Tunisia). As regards the substance of the case, the Single Judge found that, pursuant to Art. 26 paras. 1 and 2 of the Regulations on the Status and Transfer of Players (edition 2010) since the complaints were lodged on 4 January 2008 and 2 June 2009 respectively, the 2008 version of the Regulations on the Status and Transfer of Players ("the Regulations") should apply.

The Single Judge decided that the first claim was not upheld, as the Respondent had been paid a reduced amount negotiated by an intermediary. The Single Judge decided that the second claim was partially upheld and that the Respondent should be paid EUR 733,766, being 30% of the transfer amount of EUR 2,500,000 less the original transfer fee of USD 80,000. This, the second decision of the Single Judge, is the decision appealed to CAS.

The Single Judge awarded the Respondent EUR 733,766 to be paid by Appellant within 30 days, with interest to run at a rate of 5% if the amount was not paid as directed. The Appellant was to pay CHF 16,000 to FIFA in respect of costs, and Respondent was to pay CHF 9,000 to FIFA in respect of costs. This decision was notified to the parties on 23 June 2011.

By Statement of Appeal dated 13 July 2011, the Appellant appealed the decision of the Single Judge. The Appellant submitted its Appeal Brief on 23 July 2011 and the Respondent submitted its Answer on 2 August 2011.

On 10 and 7 November 2011 respectively, the Appellant and the Respondent signed an Order of Procedure by which they confirmed that the Code of Sports-related Arbitration ("the Code"), 2010 edition and the provisions of Chapter 12 of Swiss Private International Law Statute (PILS) should apply to this dispute. The parties further acknowledged that the jurisdiction of the CAS in the present case is based on Articles 62 and 63 of the FIFA Statutes, as well as Article R47 of the Code.

The Appellant admits that it failed to pay any amount under Article 3 of the Transfer Contract, and blames this on its former management. It submits that the Single Judge erred and failed to perform his judicial functions properly in that he miscalculated the amount due to the Respondent.

The Appellant submits that the Single Judge was wrong to decide that no deductions had been invoked by the parties in respect of agent fees. The Appellant submits that of the transfer amount of USD 2,500,000 paid in December 2008, USD 500,000 was paid directly by Al Sadd to the Agent of the

Player, Mr. Ridha Dridi. The remaining USD 2,000,000 was paid to the Appellant. In support of this submission, the Appellant submits a copy of a contract dated 2 December 2008 providing for such payments, and copies of two telegraphic transfers from Al Sadd to the Appellant and Mr. Dridi respectively.

The Appellant submits that the copy of the contract could not be given to FIFA during the proceedings under appeal, as there had not been a copy of that contract in the possession of the Appellant at that stage. The Appellant stated that it had sent the signed copy of the contract to Al Sadd and had not received a copy of the completed contract until after the FIFA proceedings had concluded.

The Appellant submits that, on a literal reading of the Transfer Contract between the parties, the amount to be paid is to be calculated in three steps. First, the initial transfer fee, i.e. USD 80,000 should be deducted from the total transfer compensation of EUR 2,500,000. Secondly, 30% of the remaining figure should be calculated. Thirdly, from this remaining figure, the agent fees should be deducted. The final figure arrived at is the figure that the Respondent is owed, submits the Appellant.

The Appellant submits that, carrying out this calculation, the first step requires that the average exchange rate between US dollar and Euro for 2008 should be established, which the Appellant submits was EUR 1 = USD 1.3. Therefore, according to the Appellant, the sum of USD 80,000 should be equated to EUR 61,538. According to the Appellant, this amount should then be deducted from the transfer fee paid by Al Sadd, that is to say, a sum of EUR 2,500,000 less EUR 61,538 which gives a figure of EUR 2,438,462. After this, 30% of the relevant amount should be calculated, which is EUR 731,538. Finally, according to the Appellant, the total amount of the agent fees of EUR 500,000 should then be deducted and this produces the figure that is due to the Respondent. The Appellant calculates this as being EUR 231,538.

The Appellant asks the Sole Arbitrator to annul the decision under appeal and to establish that the Respondent is entitled to the payment of EUR 231,538 and to order the Respondent to pay the costs of the arbitration and the legal expenses of the Appellant.

The Respondent does not dispute the jurisdiction of CAS.

The Respondent acknowledges that it understood any agents' fees would be deducted from the total sum of the transfer if there was an agents' fee to be paid.

The Respondent highlights the financial imbalance between the parties, and that despite the acknowledgment of money due to the Respondent (albeit a lesser amount than is disputed) no money has, in fact, been paid to date by the Appellant. The Respondent submits that the Appellant has unduly and unfairly delayed performance of its obligations under the Transfer Contract, insofar as it delayed paying monies due under the original transfer agreement and deliberately failed to inform the Respondent of the subsequent transfer of the Player to Al Sadd, much less did it pay the Respondent the amount it became entitled to as a result of this subsequent transfer.

The Respondent submits that the first time that there was any mention of a payment to an agent was in these proceedings before CAS and that under FIFA regulations all agent commissions should be registered in the contract and at the Federations, and no such commission was recorded in this case. The Respondent states that the existence of an agent commission in the present case is based on unsubstantiated evidence and hearsay, and that the Sole Arbitrator should infer that no such amount was paid and that this is simply a device being used by the Appellant to lower the amount payable to the Respondent.

The Respondent also submits that it was understood at all times that agents fees, if payable, should be deducted from the total amount before the calculation of the 30% due to the Respondent.

The Respondent submits, in the alternative, that if the Appellant did pay agents' fees, they used unlicensed agents and paid them exorbitant fees contrary to applicable FIFA regulations.

In conclusion, the Respondent asks the Sole Arbitrator to dismiss the appeal in its entirety and confirm the decision under appeal, to award the costs of the appeal against the Appellant, and order the Appellant to pay the legal fees of the Respondent.

LAW

CAS Jurisdiction

1. Article R47 of the Code of Sports-related Arbitration (the "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".
2. Article 15 (2) of the FIFA Rules governing the procedures of the Players' Status Committee and the Dispute Resolution Chamber (2010 edition) ("the 2010 Procedural Rules") state:
"If a party requests the grounds of a decision, the motivated decision will be communicated to the parties in full, written form. The time limit to lodge an appeal begins upon receipt of this motivated decision".
3. Article 63 (1) of the FIFA Statutes (August 2010 edition) state as follows:
"63 Jurisdiction of CAS
1. Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question".
4. On 23 June 2011, FIFA notified the full decision to the parties, including the reasons for the decision, which had not previously been notified.

5. The Statement of Appeal was filed on 13 July 2011, within the 21-days deadline set forth by the FIFA Statutes, and is therefore admissible.
6. Moreover, the Respondent does not contest jurisdiction of the CAS.

Applicable law

7. 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”.
8. Paragraph 2 of the FIFA 2008 Procedural Rules provides as follows:
“2. Applicable Material Law
In their application and adjudication of law, the Player’s Status Committee and the DRC shall apply the FIFA Statutes and regulations while taking into account all relevant arrangements, laws and/or collective bargaining agreements that exist at national level, as well as the specificity of sport”.
9. Pursuant to Article 62 of the FIFA Statutes, *“The provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law”.*
10. As the dispute between the parties the subject of the decision under appeal arose in 2009, the Sole Arbitrator considers that the FIFA 2008 Regulations on the Status and Transfer of Players are the proper regulations to apply to the case before him, and subsidiarily Swiss law.

The Sole Arbitrator’s Findings on the Merits

11. The Sole Arbitrator considers that this dispute should be examined in the context of the applicable FIFA Regulations and the legal framework established under those Regulations. The Sole Arbitrator has carefully considered the submissions of both parties.
 - A. *Contract with Al Sadd*
12. The Sole Arbitrator is satisfied that there was a transfer contract between the Appellant and Al Sadd. Indeed, this is not in dispute between the parties, and the Respondent based its arguments in terms of the remuneration that it should receive, on the existence of such a contract.

B. *Deduction of Agents Fees*

13. However, the Sole Arbitrator is not satisfied that the Appellant has discharged the onus on it of proving that agent's fees should be deducted in the manner that it submits. In particular, the Sole Arbitrator notes that there appears to have been no submissions at all before the Single Judge that any amount of commission was paid to an agent, let alone an amount that was so large in relative and absolute terms, i.e. EUR 500,000 which constitutes one fifth of the total amount apparently paid as a transfer fee by Al Sadd. The Sole Arbitrator cannot accept the explanation of the Appellant as to why it did not even draw the attention of the Single Judge to the payment of such a substantial commission. In this respect, the Sole Arbitrator refers specifically to paragraph 26 of the contested decision which laconically records as follows: "*For the sake of good order, the Single Judge remarked that although article 3 of the contract stipulates that agent fees should be deducted from the relevant 30%, **the parties had not invoked any such deductions***" (emphasis added). The Sole Arbitrator finds it scarcely credible to believe that, if a commission of EUR 500,000 had actually been paid to an agent, the Appellant would not even have mentioned it at all in the proceedings before FIFA.
14. In light of these circumstances, and for the sake of completeness, the Sole Arbitrator is also not satisfied that the supporting documentation supplied to him in these proceedings is sufficient, in the context of this case, to substantiate the claim made by the Appellant. In this respect, the Sole Arbitrator also notes that the Appellant has produced no witness statement either from Al Sadd (who allegedly paid the EUR 500,000) or Mr. Dridi (who allegedly received it) to help substantiate the claim that this amount, or indeed any amount, was paid as commission. As such, the Sole Arbitrator finds that there is not sufficient evidence to prove that an agent's fee was actually paid by the Appellant in this case.
15. In view of this finding, the Sole Arbitrator does not need to determine whether any permissible deduction in relation to an agent's fee should be made before the calculation of the 30% of the transfer fee (as submitted by the Respondent) or after this amount of 30% had been calculated (as submitted by the Appellant). However, again for the sake of completeness, the Sole Arbitrator observes that both the literal and common sense interpretation of the contract would suggest that any agent's commission would need to be deducted first. In this respect, the Sole Arbitrator notes that the wording of the relevant clause in the contract reads, inter alia, as follows: "*Club Sportif Sfaxien commits to pay Ashantigold Sporting Club Ltd 30% on the surplus **after** deduction of the agent's fee*" (emphasis added). Logically, this must imply that the "surplus" (to which the figure of 30% is applied) is determined "after" the deduction of any agent's fee (i.e. as it is, in fact, specified in the contract).
16. Furthermore, even if there might possibly be two alternative interpretations of this particular contractual provision (which has not been demonstrated to the satisfaction of the Sole Arbitrator) it must also be noted that the contract in question was apparently drafted by the Appellant. As such, Article 1 of Swiss Code of Obligations provides that the spirit of the provision be considered, and in the absence of resolution by that means, that the principle of *contra proferentem* be applied to interpret the provision (See CAS 2003/A/461 & 471 & 473). For present purposes, it would seem that the 2007 contract is headed with the crest and details of

the Appellant, and that if the spirit of the provision was not determinative of the issue, an interpretation of the provision against the Appellant would be appropriate. However, as there are no permissible deductions for the purpose of this calculation for the reasons set out above, this question does not arise.

C. Calculation of the amount due

17. Therefore, the amount that is payable to the Claimant by the Respondent is 30% of the remainder of EUR 2,500,000 less \$80,000. This is the same calculation as that undertaken by the Single Judge of the Players' Status Committee in the decision under appeal.
18. The Sole Arbitrator does not deem it necessary to re-calculate that amount as neither party took issue with this aspect of the decision under appeal, and therefore upholds the decision of the Single Judge in this regard.

Conclusion

19. The Sole Arbitrator concludes that the Appellant has failed in its appeal, and upholds the decision under appeal.

The Court of Arbitration for Sport rules:

1. The appeal filed by Club Sportif Sfaxien on 13 July 2011 against the decision issued by the FIFA Players' Status Committee on 17 December 2010 is dismissed.
2. (...).
3. (...).
4. All other requests for relief are rejected.