**Arbitration CAS 2013/A/3379 Club Gaziantepspor v. Santos Futebol Clube, award of 8 May 2014**

Panel: Mr Rui Botica Santos (Portugal), Sole Arbitrator

*Football*
*Contract on economic rights and loan agreement*
*Construction of a contractual agreement*

**The *"contra proferentem"* principle according to which any provision with an unclear wording has to be interpreted against the author of the wording is meant for terms which were not individually negotiated. As such, it normally applies to situations involving standardized contracts or where the parties are of unequal bargaining power. However, if the contractual arrangements containing the relevant terms were negotiated between the parties, a party cannot be held liable for an unclear formulation. Instead of resorting to the *"contra proferentem"* principle, the common intention of the parties to the contractual arrangements shall be sought according to Article 18, paragraph 1 of the Swiss Code of Obligations.**

## I. THE PARTIES

1. Club Gaziantepspor (hereinafter referred to as "Gaziantep" or the "Appellant") is a Turkish football club affiliated to the Turkish Football Federation (hereinafter referred to as the "TFF"). The latter is a member of the Fédération International de Football

2. Santos Futebol Clube (hereinafter referred to as "Santos" or the "Respondent") is a Brazilian football club affiliated to the Confederação Brasileira de Futebol (hereinafter reffered to as the "CBF"). Similarly, the CBF is in turn a member of FIFA.

## II. THE FACTS

3. This appeal was filed by Gaziantep against the decision rendered by the Single Judge of the Players' Status Committee of FIFA (hereinafter referred to as the "FIFA Single Judge") passed on 5 June 2013 (hereinafter referred to as the "Appealed Decision"). The grounds of the Appealed Decision were notified to the Parties on 17 October 2013.

4. Below is a summary of the most relevant facts and the background giving rise to the present dispute on the basis of the Parties' submissions and the evidence examined in the course of the present appeal proceedings. Additional factual background may also be mentioned in the legal considerations of the present award.

**II.1. The contractual arrangements about the economic rights to the federative rights of the player R., his loan and subsequent transfer**

5. On 16 July 2008, the Appellant, the Respondent, the player R. (hereinafter referred to as the "Player"), and the Brazilian football club Goiás Sporte Clube (hereinafter referred to as "Goiás") concluded a contract entitled *"Private contract of the stipulation and participation on the financial and economic rights of a soccer athlete"* (hereinafter referred to as "Contract on Economic Rights"). The Contract on Economic Rights (i) governs the economic rights to the Player, (ii) sets out the distribution of the economic rights in the event of a national or international transfer while the Player is registered with Santos, and (iii) states the conditions of the relevant negotiation.

6. Subsequently, on 22 July 2008, the same parties to the Contract on Economic Rights signed the *"Temporary cession contract of the sportive right of a professional soccer athlete and other agreements"* (hereinafter referred to as "Loan Agreement"). The Loan Agreement governs the loan of the Player from Santos to Gaziantep, subject to Goiás' consent, from 16 July 2008 until 15 July 2011 in exchange for an overall fee of USD 500,000 payable in three instalments, namely: USD 200,000 on 25 July 2008; USD 150,000 on 25 September 2008; and USD 150,000 on 25 December 2008. In addition, the Loan Agreement contains terms and conditions relating to both the parties' shares in the economic rights to the federative rights to the Player and the negotiation of a transfer from Gaziantep to a third-party club.

7. Clause 2 of the Contract on Economic Rights stipulates the distribution of the monies resulting from the transfer of the Player's federative rights, while registered with Santos: 50% to Goiás; 50% to Gaziantep; and USD 200,000 to be paid by Gaziantep to Santos.

8. In addition, pursuant to clause 3 of the Contract on Economic Rights, Gaziantep may start negotiations about the Player's federative rights with third-party clubs but must inform Goiás and Santos ahead of a final agreement. Further, clause 9 of the Loan Agreement provides for the required written consent of Santos in order to early terminate the employment contract between Gaziantep and the Player.

9. Similarly, clause 3 of the Loan Agreement sets the parties' shares in a future transfer fee for the Player in light of the preceding clauses of the Loan Agreement at: 50% for Goiás with the minimum amount set at EUR 1,500,000; and 50% for Santos. And clause 2 of the Loan Agreement provides that Gaziantep should pay Goiás the net amount of EUR 1,500,000 as a minimum price for the definitive acquisition of the sporting rights of the Player.

10. Furthermore, according to clause 4(1) of the Loan Agreement, Gaziantep and Santos undertake to accept any offer for the acquisition of the Player's sporting rights exceeding EUR 3,000,000. However, if the offer is below EUR 3,000,000 the agreement of Santos, Gaziantep, and Goiás is required (clause 4(2)). Finally, Gaziantep shall seek Santos' and Goiás' express consent ahead of concluding an agreement for the federative rights of the Player in exchange for a fee below EUR 3,000,000 (clause 4(3)).

11. Clause 12(1) of the Loan Agreement sets a penalty in the amount of EUR 1,500,000 to be paid to each of the other parties in the event of breach of contract.

12. Pursuant to clause 18 of the Loan Agreement, Santos accepts any responsibility deriving from the loan and undertakes to maintain the employment contract with the Player until 15 July 2011 whereby it owns 100% of the Player's federative rights. Santos also accepted to pay Goiás the penalty set out under clause 12(1) if it fails to comply with its obligations under clause 18.

13. In clause 19 of the Loan Agreement, there is a further reference to a penalty in the amount of EUR 1,500,000 to be paid to Goiás if an agreement involving the player is concluded during the term of the Loan Agreement without Goiás' consent.

14. On 4 July 2009, Gaziantep exercised its buy-out option of 100% of the Player's sporting rights, pursuant to Clause 2 of the Loan Agreement. Following this, on 7 August 2009, Gaziantep renewed the Player's registration with the Turkish Football Federation, fielded him in three league games, and transferred him to Besiktas J.K. (hereinafter referred to as "Besiktas") on 29 August 2009.

## III. THE FIFA SINGLE JUDGE PROCEEDINGS

15. On 19 November 2010, Santos filed a claim before the FIFA Single Judge for Gaziantep's breach of contract on several accounts.

16. Firstly, Santos claimed that Gaziantep had failed to pay the second and third instalments under the Loan Agreement by their respective due dates, and requested the ensuing penalty for late payment as foreseen by the Loan Agreement. Secondly, Santos reported that in August 2009, Gaziantep had transferred the Player to the Turkish club Besiktas for approximately EUR 8,000,000, and thus requested payment of USD 200,000 net compensation, pursuant to clause 2 of the Contract on Economic Rights, since, in its view, the Player at that time was still registered with Santos. In addition, Santos argued that according to clause 3 of the Loan Agreement it was entitled to 50% of the *"economic rights"* of an eventual transfer of the Player on a definitive basis. Despite the terms of the contractual arrangements, Santos stressed that it had not received anything. Thirdly, Santos claimed that Gaziantep had breached the Loan Agreement in that it failed to secure Santos' consent ahead of transferring the Player to Besiktas, and requested financial compensation in the amount of EUR 1,500,000, pursuant to clause 12(1) of the Loan Agreement. Finally, Santos requested that disciplinary sanctions for infringement of Article 10(3) of FIFA's Regulations on the Status and Tranfer of Players be imposed on Gaziantep.

17. Gaziantep rejected Santos' claim entirely. Regarding the penalty for late payment of the instalments under the Loan Agreement, Gaziantep argued that Santos had given its consent to the delayed payments and, ultimately, dismissed the claim about the second instalment for being time-barred and the claim about the third instalment as being excessive and disproportionate, amounting to unjust enrichment. Similarly, Gaziantep contested Santos' alleged right to compensation for the transfer of the Player. In this regard, Gaziantep explained that it had

availed itself of its right to exercise a buy-out option to acquire 100% of the Player's economic and federative rights on a definitive basis by paying Goiás EUR 1,500,000, pursuant to clause 2 of the Loan Agreement, as notified to Santos and Goiás on 4 July 2009. Finally, Gaziantep referred to clause 9 of the Loan Agreement and construed said clause as an obligation on Gaziantep to inform Santos of the termination or continuation of the contractual relationship between Gaziantep and the Player. However, it ruled out interpreting clause 9 as requiring Santos' written consent for termination.

18. On 5 June 2013, the FIFA Single Judge issued his decision and:

a) Partially accepted Santos' claim;
b) Ordered Gaziantep to pay Santos within 30 days (i) USD 200,000 as outstanding sell-on fee plus 5% interest per annum from 19 November 2010 until the date of effective payment; and (ii) USD 729 as interest for late payment on the third instalment.
c) Ordered Santos and Gaziantep to pay, respectively, CHF 15,000 and CHF 10,000 as costs of the proceedings.

19. The Appealed Decision was based on the following grounds:

a. A penalty of USD 50,000 per week for late payment is disproportionate and exorbitant and thus must be reduced to 5% per annum. The claim for late payment about the second instalment is time-barred and thus rejected.

b. The FIFA Single Judge came to the conclusion that Clause 2 of the Contract on Economic Rights has to be construed as a sell-on fee in case of a subsequent transfer, as this must have been the real intention of the parties at the time of execution of the Contract on Economic Rights. On the other hand, the FIFA Single Judge stated that clause 3(1) of the Loan Agreement clearly provides for a sell-on fee irrespective of the exercise of the buy-out option of clause 2 of the Loan Agreement. Therefore, the FIFA Single Judge concluded that clause 2 of the Contract on Economic Rights and clause 3(1) of the Loan Agreement have the same purpose. As a consequence, according to the FIFA Single Judge, Santos is entitled to receive a sell-on fee on the basis of both clauses. However, since Santos based its request for transfer-related compensation/sell-on fee only on clause 2 of the Contract on Economic Rights, a sell-on fee in the amount of USD 200,000 shall be granted. In addition, interests as of the date of the claim, as no date had been indicated together with the request for interests, shall be granted.

c. Clauses 9 and 4(1) of the Loan Agreement were examined and the FIFA Single Judge concluded that, pursuant to clause 9, Gaziantep was only obliged to keep Santos informed about the Player's career and/or a potential sell-on fee. Further, in the view of the FIFA Single Judge, clause 4(1) of the Loan Agreement contains Santos' agreement to grant its consent in the face of an offer for the Player in excess of EUR 3,000,000. Consequently, the FIFA Single Judge stated that since there was no need to seek Santos' consent to a EUR 8,000,000 offer for the Player,

no breach of clause 9 resulted from the failure to secure Santos' consent. Thus, Santos' request for EUR 1,500,000 for breach of contract must be rejected.

## IV. THE ARBITRAL PROCEEDINGS BEFORE THE CAS

20. On 7 November 2013, the Appellant filed its Statement of Appeal at the Court of Arbitration for Sport (hereinafter referred to as the "CAS"). The Appellant requested that the matter be submitted to a Sole Arbitrator and decided on the basis of the Parties' written submissions.

21. On 12 November 2013, the CAS Court Office acknowledged receipt of the Appellant's Statement of Appeal and granted the Appellant a ten-day time limit to file its appeal brief following the expiry of the time limit for the appeal. The CAS Court Office also granted the Respondent five days to state whether it agreed to have the matter decided by a Sole Arbitrator, failure to which the composition of the Panel would be decided by the President of the CAS Appeals Arbitration Division, or his deputy, in accordance with Article 50 of the Code of Sports-related Arbitration (hereinafter referred to as the "CAS Code").

22. On 18 November 2013, the Appellant filed its Appeal Brief, in accordance with Article R51 of the CAS Code.

23. On 21 November 2013, the CAS Court Office informed the parties that having heard no response from the Respondent as to the Appellant's request for a Sole Arbitrator, the matter would be referred to the President of the CAS Appeals Arbitration Division for a decision.

24. On 22 November 2013, the Respondent agreed to have the matter decided by a Sole Arbitrator.

25. On 25 November 2013, FIFA renounced its right to intervene in these proceedings.

26. On 23 December 2013, the Respondent filed its Answer, in accordance with Article R55 of the CAS Code.

27. On 30 December 2013, the Appellant indicated its desire to have the matter decided on the basis of the Parties' written submissions.

28. On 27 December 2013, the Respondent indicated its desire to have the matter decided on the basis of the Parties' written submissions.

29. On 13 January 2014, the Parties were informed that the Panel appointed to decide this appeal was constituted as follows:

    - Sole Arbitrator: Mr. Rui Botica-Santos, attorney-at-law in Lisbon, Portugal

30. On 31 January 2014, the CAS Court Office requested FIFA to provide it with information and documents available on the Transfer Matching System (TMS) with respect to the details of Gaziantep's and Santos' instructions to the FIFA TMS administration to convert the loan of

the Player from Santos to Gaziantep into a permanent transfer. Further, on this same date, the CAS Court Office informed the parties of its request to FIFA TMS.

31. The Respondent and the Appellant signed the Order of Procedure, respectively, on 3 and 4 February 2014. By doing so, the Parties confirmed that they waived their right to a hearing and that they agreed that the Sole Arbitrator may decide this matter based on the written submissions. The Parties confirmed that their right to be heard had been respected.

32. On 10 February 2014, FIFA TMS informed the CAS Court Office by letter that, on or about 4 November 2008, Gaziantep entered an "Engage Against Payment" instruction in FIFA TMS in connection with the Player. Although, according to FIFA TMS, no documents were uploaded in this transfer, Gaziantep indicated in FIFA TMS that a transfer agreement providing for a fixed transfer fee of USD 500,000 and a conditional fee of USD 1,750,000 had been executed. Further, the term of the employment contract of the Player, namely from 29 July 2008 to 31 May 2011, was also reported. Following this, there was never a counter instruction relating to this transfer entered in FIFA TMS by Santos. Finally, on or about 3 December 2010, Gaziantep cancelled the abovementioned instruction in FIFA TMS arguing that it had been made for FIFA TMS education purposes.

33. On 13 February 2014, the CAS Court Office provided the parties with a copy of the letter received from FIFA TMS.

## V. THE PARTIES' POSITIONS

### V.1. The Appellant's position

34. Gaziantep's submissions can be summarised as follows:

a. Gaziantep points out that the Contract on Economic Rights and the Loan Agreement had been drafted in São Paulo by Santos. Therefore, it argues that both contractual documents need to be assessed in light of the following principle: interpret the contract against the party who drafted it.

b. Gaziantep disagrees with the construction of the real intention of the parties to be found in the FIFA decision. As to the real intention of the parties, according to the Appellant, Santos and Gaziantep were ready to execute the definitive transfer of the Player but in order to meet Goiás financial expectations of a transfer fee of at least EUR 3,000,000, *i.e.* a gain of EUR 1,500,000 given Goiás' 50% share in the economic rights to the federative rights of the Player, the present contractual structure was devised. Gaziantep thus holds that the aim was to secure a return of EUR 1,500,000 to Goiás for the definitive transfer of the Player. In addition, Gaziantep maintains that the real intention of Santos and Gaziantep had been to transfer on a definitive basis 50% of the rights to the Player, previously held by Santos, to Gaziantep. In this regard, Gaziantep argues that this is supported by (i) the fact that the term of the employment contract between Gaziantep and the Player overlapped but for a month with that entered into by Santos

and the Player; and (ii) the transfer from Santos to Gaziantep (clause 2 of the Contract on Economic Rights) of the possible income of 50% of a future transfer fee.

c. Gaziantep rejects FIFA's conclusion in relation to the sell-on fee(s). According to Gaziantep, the payments under clause 3(1) of the Loan Agreement may not be claimed if the buy-out option (of clause 2 of the Loan Agreement) is exercised, contrary to FIFA's view. If this were not the case, then Gaziantep would not only have to pay to Santos but also to Goiás another EUR 1,500,000, on top of the payment under clause 2 of the Loan Agreement. Consequently, Gaziantep maintains that after having exercised the buy-out option it had no further financial obligations to Santos.

d. As for clause 2 of the Contract on Economic Rights, Gaziantep stresses that FIFA has disregarded that the distribution of monies provided for this clause is made dependent on the condition that the transfer be concluded while the Player is still registered with Santos and loaned to Gaziantep. Further, Gaziantep argues that the exercise of the buy-out option (clause 2 of the Loan Agreement) rendered the sell-on fee in clause 2 of the Contract on Economic Rights purposeless.

35. In conclusion, Gaziantep requests the CAS to rule as follows:

*"1) accept the appeal against the challenged FIFA decision;*
*2) set aside the challenged decision with regard to the order to pay USD 200,000 to Santos;*
*3) establish that Gaziantep shall not pay any amount to Santos;*
*4) order Santos to pay the legal expenses incurred by Gaziantep; and*
*5) order Santos to bear the costs of the arbitration procedure".*

## V.2. The Respondent's position

36. The Respondent's submissions are summarised as follows:

a. Santos holds that contracts need to be interpreted on the basis of their provisions and the real intention of the parties, as established under Swiss Law and CAS jurisprudence. Santos argues that the principle put forward by the Appellant should therefore not be relied upon. In this regard, while admitting having drafted the draft of the Loan Agreement Santos stresses that its terms had been negotiated and accepted by Goiás, Gaziantep, and Santos.

b. According to Santos, clause 2 of the Contract on Economic Rights and clause 3(1) of the Loan Agreement should be read in conjunction. Santos argues that such approach is supported by the reference in clause 3(1) to the Loan Agreement. In particular, this reference reads *"respecting a private agreement between SANTOS and the "GAZIANTEP" issued and signed on the 22th of July. Of July, 2008"*. Consequently, in Santos's view, it follows that it was entitled to USD 200,000, just as the FIFA had concluded. Santos maintains that this conclusion was reinforced by the fact that FIFA, unlike in the case of the

request for EUR 1,500,000 compensation for breach of contract, considered Santos's right to USD 200,000 compensation to be straight-forward.

37. Santos concludes by requesting that the CAS:

*"1) uphold FIFA decision;*
*2) order the Appellant to pay all legal expenses incurred by the Respondent; and*
*3)order the Appellant to bear all costs resulting from the proceedings before CAS".*

## VI. LEGAL ANALYSIS

### VI.1 Jurisdiction of the CAS

38. The jurisdiction of the CAS, which is not disputed, derives from Articles 66 and 67 of the FIFA Statutes edition 2012 and Article R47 of the CAS Code.

39. Moreover, the Parties confirmed the jurisdiction of the CAS by signing the Order of Procedure.

40. It follows that the CAS has jurisdiction to decide this dispute.

### VI.2 Admissibility

41. In accordance with Article 67.1 of the FIFA Statutes, *"[a]ppeals 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".*

42. The grounds of the Appealed Decision were notified to the Appellant on 17 October 2013 and the Statement of Appeal filed on 7 November 2013. This was within the required twenty-one days.

43. It follows that the appeal is admissible. Furthermore, no objection has been raised by the Respondent.

### VI.3 Law applicable to the merits

44. Article R58 of the CAS Code provides the following:

*"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".*

45. Furthermore, Article 66.2 of the FIFA Statutes states that *"[t]he 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"*.

46. It therefore follows that the law applicable to the present appeal shall be primarily the FIFA regulations and Swiss law subsidiarily.

47. In accordance with Article 26.1 of the FIFA RSTP editions 2012 and 2010, the FIFA RSTP 2010 edition shall apply to the substance of the case considering that Santos´s claim before the FIFA DRC was filed on 19 November 2010.

### VI.4 The Merits of the Appeal

48. Based on the Parties' submissions, the issue for determination is whether Santos' is entitled to USD 200,000 compensation on the basis of clause 2 of the Contract on Economic Rights. The Sole Arbitrator notes that the Appellant does not challenge the Appealed Decision in relation to grant USD 729 as interest for late payment of the third instalment of the loan fee agreed under the Loan Agreement. In order to decide the present matter, the Sole Arbitrator also needs to establish the links between the Contract on Economic Rights and the Loan Agreement, in particular, regarding the parties' share in a future transfer fee for the Player.

#### *(i) What are the links between the Contract on Economic Rights and the Loan Agreement, and in particular regarding the parties' share in a future transfer fee for the Player?*

49. First of all, it must be stressed that in spite of the compensation granted by the Appealed Decision being based on the Contract on Economic Rights only, both the Contract on Economic Rights and the Loan Agreement will be examined here. This is warranted by: (i) the intertwined nature of the contractual documents, as evidenced in the grounds of the Appealed Decision as well as in the parties' submissions to the CAS; and (ii) clause 6 of the Contract on Economic Rights, which makes the validity of this agreement dependent upon the fulfilment by Gaziantep of the payment obligations under the Loan Agreement. Further, the connection between both agreements results from clause 7 of the Contract on Economic Rights. Pursuant to clause 7, the contract term of the Contract on Economic Rights starts running as from 26 December 2008, *i.e.* a day after the third instalment under the Loan Agreement becomes due, refers to clause 6 of the same agreement.

50. The first of the two contracts that the parties entered into was the Contract on Economic Rights, namely on 16 July 2008. Clause 2 of the Contract on Economic Rights sets out the distribution of the monies resulting from the transfer of the Player's federative rights. According to the foreseen distribution, Goiás and Gaziantep shall receive each 50% of the relevant fee, while Santos shall receive USD 200,000 net from Gaziantep. Further, according to this same clause 2, these percentages and fixed payment shall apply while the Player is registered with Santos.

51. The second of the contracts the parties entered into was the Loan Agreement, namely on 22 July 2008. The recitals of the Loan Agreement state, *inter alia*, that (i) Santos holds 100% of the sporting rights of the Player; (ii) through the Loan Agreement Gaziantep acquires temporarily Santos' 100% of the sporting rights of the Player; (iii) while Santos holds 50% of the economic rights to the federative rights of the Player; (iv) Goiás owns the remaining 50% of the economic rights and *"wants to keep them as partner of Gaziantept"*. Further, clause 2 of the Loan Agreement sets the minimum price for the definitive acquisition of the federative rights by Gaziantep at EUR 1,500,000 net, to be paid to Goiás.

52. In addition, clause 3 of the Loan Agreement, *"considering the agreements made in the anterior clauses on the economic and financial rights"*, sets out the parties' shares in a future transfer fee for the Player at: 50% for Goiás, for a minimum amount of EUR 1,500,000; and 50% for Santos. Clause 3 also contains a reference to a private agreement dated 22 July 2008 between Santos and Gaziantep and appears to state that the parties' share set out in Clause 3 shall be in line or, at least, shall not run contrary to said agreement, in the following terms *"respecting a private agreement between SANTOS and the "GAZIANTEP" issued and signed on the 22th. Of July,2008"*.

53. It follows that despite the clear links between the Contract on Economic Rights and the Loan Agreement, as explained in paragraph 49 above, the parties' distribution of the monies resulting from a future transfer of the Player provided for by each agreement are inconsistent.

***(ii) Is the meaning of the contractual clauses relevant to the appeal disputed by the parties?***

54. The inconsistency identified in VI.4 (i) above gives, in turn, rise to divergent interpretations of the clauses relevant to the present dispute by Gaziantep and Santos. Gaziantep and Santos find little or no common ground as to how the clauses relevant to the dispute shall be construed. This conclusion can be drawn from the subject of proceedings before the FIFA Single Judge and, now, before the CAS, as well as from Gaziantep and Santos submissions in both instances.

55. Against this background, as with all issues of construction, the Sole Arbitrator must first consider the words of the relevant provision. If the meaning of those words is clear, it is not permissible for the parties to adduce evidence of their intentions (CAS 2004/A/642). However, as pointed out in section VI.4(i) above, the clauses of the contractual arrangements, key to the present dispute, are not only unclear but also provide for inconsistent allocations of the parties' shares in the future transfer of the Player.

56. Having established that the wording of the relevant clauses does not provide for a sufficiently clear contractual basis to decide on the present appeal, the Sole Arbitrator must proceed to interpret the parties' contractual arrangements.

***(iii) How are the contractual arrangements between the parties to be construed?***

57. Firstly, the Sole Arbitrator rules out relying on the principle *"contra proferentem"*, *i.e. "that any provision with an unclear wording has to be interpreted against the author of the wording"* (CAS

2008/A/1622-1624), as requested by Gaziantep, as a means to overcome the difficulties posed by the divergent interpretations of the contractual arrangements by the contract parties.

58. Whereas this principle is accepted under Swiss law (ATF 87 II 89, JT 1961 I 1529; Tribunal Fédéral, 25 February 2003, 4C.350/2002 (Dame B contre X)) and has been relied upon by various CAS Panels, the present situation does not warrant an interpretation according to the principle *"contra proferentem"*. The *"contra proferentem"* principle is meant for terms which were not individually negotiated. As such, it normally applies to situations involving standardized contracts or where the parties are of unequal bargaining power, as can be seen from CAS awards (CAS 2008/A/1502; CAS 2007/A/1396 & 1402). However, in the case at hand, Gaziantep did not prove that it had seen the terms at stake imposed on itself by Santos. Therefore, if the contractual arrangements containing the relevant terms were negotiated between the parties, a party cannot be held liable for an unclear formulation.

59. Furthermore, the fact that there was no apparent inequality as to the bargaining power of the parties supports the decision to not rely on the principle *"contra proferentem"* and thus reject Gaziantep's request.

60. Instead of resorting to the *"contra proferentem"* principle, the Sole Arbitrator must attempt to establish the common intention of the parties to the contractual arrangements. In this regard, the Sole Arbitrator expressly refers to Article 18, paragraph 1, of the Swiss Code of Obligations (hereinafter "CO") as the legal basis for this approach. Pursuant to Article 18, paragraph 1, CO *"As regards both the form and content of a contract, the real intent which is mutually agreed upon shall be considered, and not an incorrect statement or manner of expression used by the parties, whether due to error, or with the intention of concealing the true nature of the contract"*.

### *(iv) What is the actual common intention of the parties?*

61. In order to ascertain the actual common intention of the parties, the Sole Arbitrator, unlike in the case where the words of the relevant provisions are clear, will consider the parties' evidence in this regard (CAS 2004/A/642).

62. Firstly, reference must be made to the FIFA Single Judge's interpretation of the common intention of the parties, as reported on in section III, paragraph 19.b above. In his decision, the FIFA Single Judge came to the conclusion that clause 2 of the Contract on Economic Rights and clause 3(1) of the Loan Agreement provide each for a sell-on fee irrespective of the exercise of the buy-out option of clause 2 of the Loan Agreement. As a consequence, Santos should have been entitled to receive a sell-on fee on the basis of both clauses. However, since Santos based its request for transfer-related compensation/sell-on fee only on clause 2 of the Contract on Economic Rights, a sell-on fee in the net amount of USD 200,000 was granted.

63. Santos, as indicated in section V.2, paragraph 36.b above, shares the FIFA Single Judge's conclusion that it was entitled to USD 200,000 (net). In addition, Santos states that in support of this conclusion clause 2 of the Contract on Economic Rights and clause 3(1) of the Loan Agreement should be read in conjunction.

64. Gaziantep instead, as described in section V.1, paragraphs 34.b, c, and d above, claims that the real intention of the parties was to effect the definitive transfer of the Player but in order to meet Goiás financial expectations of a transfer fee of at least EUR 1,500,000 the present contractual structure was devised. Consequently, Gaziantep maintains that Santos did transfer on a definitive basis its 50% share in the economic rights to the federative rights of the Player to Gaziantep. Further, Gaziantep argues that the transfer of the economic rights is consistent with the term of the Loan Agreement and Gaziantep's 50% share in the income resulting from a future transfer fee, pursuant to clause 2 of the Contract on Economic Rights. Gaziantep also rejects the FIFA Single Judge's conclusion that clause 3(1) of the Loan Agreement remains enforceable regardless of the exercise of the buy-out option of clause 2 of the Loan Agreement. Finally, Gaziantep argues that after it exercised the buy-out option, the Player was no longer registered with Santos. Therefore, since pursuant to clause 2 of the Contract on Economic Rights the Player's registration with Santos was the condition for payment to Santos of USD 200,000 net compensation, Gaziantep argues that no compensation was due on the basis of this clause.

65. After having recapitulated the main arguments of the parties as regards their actual common intention as well as FIFA Single Judge's conclusion in this regard, the Sole Arbitrator will seek to ascertain the true and common intention of the parties, pursuant to Article 18 CO.

66. In the Sole Arbitrator's view, the Loan Agreement and the Contract on Economic Rights need not only be read in conjunction, but rather they must be regarded as one contractual structure devised to serve several purposes, namely those set out in paragraph 67 below. Such contractual structure makes the Sole Arbitrator inclined to believe that the underlying reason for the arrangements between the parties was to showcase the Player in Europe with the ultimate aim of transferring him to a third-party club; while the option remained for the club in Europe, *i.e.* Gaziantep, to acquire 100% of the Player's federative rights.

67. This contractual structure was also intended to provide for a minimum return of EUR 1,500,000 for Goiás' stake in the economic rights to the federative rights of the Player. Goiás' minimum return was to be obtained through Gaziantep's definitive acquisition of the Player's sporting rights or through the transfer of the Player to a third-party club. In addition, the contracts also sought to remunerate both Santos and Gaziantep in the event of a transfer of the Player to a third-party club. However, the Sole Arbitrator points out that, pursuant to the Contract on Economic Rights, Santos' right to a share in the return from a transfer of the Player to a third-party club was dependent on Santos' ultimate title over the Player's federative rights. Therefore, the parties' real intention at the time the contract was signed must have been to establish a sell-on fee in case of a subsequent transfer of the Player from Gaziantep to a third-party club, in line with FIFA Single Judge's initial conclusion, while securing a minimum return of EUR 1,500,000 for Goiás.

68. In this regard, the following clauses aim at securing the agreed minimum return to Goiás in a number of situations:

    a) clause 2 of the Loan Agreement, where the buy-out option is exercised by Gaziantep;

b) where the income resulting from the transfer of the Player to a third-party club is distributed according to clause 3(1) of the Loan Agreement;

c) where the income resulting from the transfer of the Player to a third-party club is distributed according to clause 2 of the Contract on Economic Rights read in conjunction with clause 3(1) of the Loan Agreement;

d) where Santos, while holding 100% of the federative rights of the Player, presumably as a result of a definitive transfer of the Player to a third-party club, terminates the employment contract with the Player, pursuant to clause 18 of the Loan Agreement; and

e) where an agreement involving the Player is concluded durign the term of the Loan Agreement without Goiás' consent, pursuant to clause 19 of the Loan Agreement.

69. As for the sell-on fee, the dual system for the distribution of the parties' share in a future transfer of the Player, to be found respectively in clause 3(1) of the Loan Agreement and clause 2 of the Contract on Economic Rights, finds its meaning only provided that by complying with the payments under the Loan Agreement Gaziantep acquires Santos' 50% stake in the economic rights to the federative rights of the Player.

70. In the view of the Sole Arbitrator, the interpretation according to which Santos' would have meant to transfer its 50% stake in the economic rights to the federative rights of the Player to Gaziantep is supported by the validity of the Contract on Economic Rights being made dependant upon the fulfilment by Gaziantep of the payment obligations under the Loan Agreement, pursuant to clause 6 of the Contract on Economic Rights. Further, this connection is confirmed by clause 7 of the Contract on Economic Rights. According to clause 7, the term of the Contract on Economic Rights was set to start running as from 26 December 2008, *i.e.* a day after the third instalment under the Loan Agreement would have become due. Furthermore, in clause 7 of the Contract on Economic Rights there is a direct reference to clause 6.

71. The parties' will was therefore for the system for the distribution of their shares in the economic rights stipulated in the Contract on Economic Rights to start applying from the entry into force of this contract. In addition, this interaction between both contractual documents is evidenced by clause 3(1) of the Loan Agreement, which governs the alternative system for the distribution of the parties' economic rights. Clause 3(1) states *"respecting a private agreement between SANTOS and the "GAZIANTEP" issued and signed on the 22th of July. Of July, 2008"*, as pointed out by Santos in its submission to the CAS (see paragraph 36.b above). In the opinion of the Sole Arbitrator, this sentence must be interpreted as meaning that regard must be had of the Contract on Economic Rights. In other words, by including in the system for the distribution of the parties' shares in the economic rights under the Loan Agreement a reference to the Contract on Economic Rights, the parties must have wanted to avoid any inconsistency resulting from the application of both systems for the distribution of the parties' shares in the economic rights. Finally, the Sole Arbitrator points out that the Loan Agreement does not subject its own validity or the validity of the loan to the fulfilment of the payment obligations of Gaziantep towards Santos, or at least only does so partly. In this regard, in clause 1 of the Loan Agreement, Santos

reserves itself the right to oppose the issue of the transfer certificate if Gaziantep fails to pay the first instalment, due on 25 July 2008.

72. Therefore, it can be drawn, on the one hand, that the validity of the Contract on Economic Rights is subject to the fulfilment of the financial obligations of Gaziantep towards Santos under the Loan Agreement. On the other hand, it follows that the system for the distribution of the shares in a future transfer of the Player set out in clause 2 of the Contract on Economic Rights, according to which Gaziantep is entitled to 50% of the economic rights, is applicable only as long as the Contract on Economic Rights has entered into force and is thus valid and binding on the parties.

73. Consequently, the Sole Arbitrator is of the opinion that since the parties executed both contracts within a short period of time, i.e. between 16 and 22 July 2008, they could not have intended, nor overseen, the inconsistency of parts of the contracts as essential as the clauses governing the parties' shares in the economic rights. Further, it must be pointed out that while Gaziantep has argued in favour of this interpretation in its appeal, Santos has not directly disputed such a claim.

74. Were this interpretation to be retained, then both systems for the distribution of the parties' shares in the economic rights would be consistent with each other. In order to illustrate this it suffices to consider the following scenarios:

a) Where Gaziantep meets its financial obligations under the Loan Agreement, then clause 2 of the Contract on Economic Rights shall govern the distribution of the parties' shares in the economic rights. In this scenario, Gaziantep is entitled to 50% of the monies resulting from a transfer of the Player, as explained in paragraph 69 above. This is consistent with the assumption that Gaziantep owns 50% of the economic rights, acquired through the payments made under the Loan Agreement. Further, according to clause 3(1) of the Loan Agreement, as explained in paragraph 71 above, in the event of a transfer of the Player, and where the Contract on Economic Rights is in force, the system for the distribution of the parties' shares of clause 2 of the contract shall take precedence over the system of clause 3(1) of the Loan Agreement.

b) Where Gaziantep fails to meet its financial obligations under the Loan Agreement, then the Contract on Economic Rights shall not enter into force. In this case, only the system for the distribution of the parties's shares of clause 3(1) of the Loan Agreement binds the parties. Pursuant to clause 3(1) of the Loan Agreement, the income resulting from a transfer of the Player shall be shared in equal parts by Goiás and Santos, *i.e.* each is entitled to 50%. This is consistent with the scenario where the following events are accounted for: Gaziantep fails to meet its financial obligations under the Loan Agreement and thus does not acquire 50% of the economic rights; Santos keeps its 50% share; the Contract on Economic Rights does not enter into force; the Loan Agreement governs the distribution of monies resulting from a transfer of the Player; and Santos is entitled to 50% of the income from the transfer.

75. In continuation, the Sole Arbitrator assesses the implications of the exercise of the buy-out option of clause 2 of the Loan Agreement after the acquisition by Gaziantep of 50% of the economic rights by making the payments agreed under the Loan Agreement.

76. In accordance with the reasoning presented above, in the event of a subsequent transfer of the Player in this scenario, both systems for the distribution of the parties' may as well apply, and do so as follows:

77. As regards Santos' entitlement to compensation, clause 2 of the Contract on Economic Rights takes precedence over clause 3(1) of the Loan Agreement, as explained in paragraph 71 above. According to clause 3(1), Santos' basis for compensation under clause 2 of the Contract on Economic Rights is its title as ultimate holder of the federative rights of the Player, in the sense of Article 10(3) of the Regulations on the Status and Transfer of Players. Therefore, it follows that Santos is not entitled to any compensation as the Player has been transferred on a definitive basis following the prior exercise of the buy-out option by Gaziantep, and thus from that moment on Santos did not hold any federative rights of the Player (CAS 2004/A/701).

78. Notwithstanding this, in the Sole Arbitrator's view, this conclusion is not as straight-forward as it may seem on first look. The Sole Arbitrator notes that the parties had agreed on detailed rules governing the consent to a transfer of the Player's federative rights to a third-party club, namely under clause 4 of the Loan Agreement. In addition, the Sole Arbitrator points out that said rules expressly refer to federative rights. Consequently, clause 4 of the Loan Agreement must have been intended to apply unless Gaziantep had exercised the buy-out option, as from this moment the potential transfer of the Player's federative rights to a third-party club would have required only the consent of Gaziantep, the Player, and the new club. In other words, the parties appear to have agreed that the system for distribution of their shares in the economic rights under the Contract on Economic Rights would apply in the event that the Player's federative rights be transferred to a third-party. However, it seems that the parties' will was instead for this system for distribution to not apply if Gazain had exercised the buy-out option and thus acquired the Player's federative rights on a definitive basis.

79. Furthermore, the Sole Arbitrator points out that even though Gaziantep did exercise the buy-out option and so acquired 100% of the Player's federative rights, Gaziantep in turn transferred the Player to Besiktas during the same summer transfer period. As a matter of fact, the Sole Arbitrator stresses that the transfer of the Player from Gaziantep to Besiktas was effected, following the exercise of the buy-out option, 22 days after Gaziantep's renewal of the Player's registration with the Turkish Football Federation, as indicated in paragraph 14 above.

80. In the Sole Arbitrator's opinion, the real intention of Gaziantep was not to acquire the Player, but rather to sell him to a third-party club and thereby maximise its gains by taking advantage of having acquired the Player in the first place. Proceeding in this manner Gaziantep circumvented the application of the system for distribution under the Contract on Economic Rights. In support of this conclusion, the Sole Arbitrator further refers to the information provided by FIFA TMS at the request of the CAS Court Office (see paragraph 32 above). According to FIFA TMS records of the temporary transfer of the Player from Santos to Gaziantep, the latter indicated in FIFA TMS that a transfer agreement providing for a fixed

transfer fee of USD 500,000 and a conditional fee of USD 1,750,000 had been executed. In this regard, the Sole Arbitrator notes that USD 1,750,000 may well have been intended for the minimum amount to be paid to Goiás, *i.e.* USD 1,500,000, and the sell-on fee compensation meant for Santos, *i.e.* USD 200,000 net.

81. In addition, the Sole Arbitrator has reason to believe that Gaziantep sought to disguise its departure from the course of action agreed under the contracts in the event of the transfer of the Player to a third-party club by cancelling the FIFA TMS instruction little over two weeks after Santos filed its claim before the FIFA Single Judge. Namely, Santos' claim was lodged before the FIFA Single Judge on 19 November 2010 while Gaziantep cancelled the FIFA TMS instruction on 3 December 2010.

82. In light of all of the above it can be concluded that:

(i) the fulfilment of the financial obligations under the Loan Agreement by Gaziantep determined the entry into force of the Contract on Economic Rights;

(ii) as a result of the entry into force of the Contract on Economic Rights, the system for the distribution of the parties' shares in the transfer of the Player from Gaziantep to a third party club under this agreement shall apply;

(iii) pursuant to the system for distribution under the Contract on Economic Rights, Santos is entitled to USD 200,000 net compensation provided that the transfer is effected while Santos is the ultimate holder of the Player's federative rights;

(iv) Gaziantep acquired 100% of the Player's federative rights by exercising the buy-out option and therefore Santos was left without a basis for its claiming the USD 200,000 net compensation; and

(v) Gaziantep's real intention, however, was not to integrate the Player into its team but rather to transfer him on to a third-party club in order to capitalize on the transfer of the Player while escaping its sell-on financial obligations towards Santos pursuant to the Contract on Economic Rights, namely sell-on compensation in the amount of USD 200,000 net for the transfer of the Player to a third-party club.

83. The Sole Arbitrator is of the opinion that the basic legal principle *pacta sunt servanda* should never be easily disregarded. The facts of this case, as recapitulated in the previous paragraph, lead the Sole Arbitrator to believe that Gaziantep tried to circumvent this fundamental principle of the law of contracts.

84. Based on the foregoing, the Sole Arbitrator is of the opinion that Gaziantep decided to avoid its obligations under the Contract on Economic Rights by artificially exercising the buy-out option set forth by this agreement. In this way, Gaziantep aimed at ensuring for itself a greater share from the transfer of the Player to a third-party club, despite an already accepted 50% share according to the system for distribution under the Contract on Economic Rights. Gaziantep's attitude is not *bona fide* and is in violation of the principle *pacta sunt servanda*.

### VI.5 Conclusion

85. Gaziantep's appeal against the FIFA Single Judge decision dated 5 June 2013 is rejected. The FIFA Single Judge decision dated 5 June 2013 is confirmed as to the order to Gaziantep to pay to Santos USD 200,000 as outstanding sell-on fee and the corresponding interest.

## ON THESE GROUNDS

**The Court of Arbitration for Sport rules that:**

1. The appeal filed by Club Gaziantepspor against the FIFA Single Judge decision dated 5 June 2013 is rejected.

2. The decision issued on 5 June 2013 by the Single Judge of the FIFA Players' Status Committee is confirmed.

3. (…).

4. (…).

5. All other and further claims or prayers for relief are dismissed.