



Arbitration CAS 2014/A/3588 Bursaspor Kulubu Dernegi v. AS Nancy Lorraine, award of 30 September 2014

Panel: Mr Marco Balmelli (Switzerland), President; Prof. Ulrich Haas (Germany); Mr François Klein (France)

Football

Interpretation of a conditional bonus clause in a transfer contract

Interpretation of contract

Principle of contra proferentem

1. In case there is a discrepancy between the literal wording of an agreement and the common intention of the parties when they signed such agreement, the latter shall prevail. However, in cases where the parties obviously do not share a common understanding or consensus of the meaning of the relevant contractual clause, under French law, the judge is entitled and obliged to consider objective circumstances in order to interpret the disputed clause.
2. As many other civil law systems, French law incorporates the principle of *contra proferentem* (article 1162 French Civil Code) according to which in case the provision of a contract that is subject to dispute can be understood in various ways and it is not possible to resolve the doubt through common interpretation, such provision should be interpreted in favor of the non-drafting party. In other words, the risk of drafting an obscure clause shall be borne by the drafting party only.

I. THE PARTIES

1. Bursaspor Kulubu Dernegi (“Bursaspor” or “Appellant”) is a professional Turkish football club that competes in the Turkish Süper Lig. The Appellant is affiliated to the Turkish Football Federation, which in turn is affiliated to the Fédération Internationale de Football Association (“FIFA”).
2. AS Nancy Lorraine (“Nancy” or “Respondent”) is a professional French football club that competes in the French Ligue 2. The Respondent is affiliated to the French Football Federation, which in turn is affiliated to FIFA.

II. FACTS

3. Below is a summary of the main relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the facts, allegations, legal arguments, and evidence submitted by the parties in the present proceedings, it refers in this award only to the submissions and evidence it considers necessary to explain its reasoning.
4. On 30 June 2011, the Appellant and the Respondent entered into a transfer agreement (the "Agreement") by means of which the player A. (the "Player") was transferred from Nancy to Bursaspor for a transfer fee of EUR 2'100'000.00, plus conditional bonus payments. The Agreement was drafted by the Respondent.
5. Regarding the conditional bonus payments, art. 3 of the Agreement, reads as follows:

"Art. 3

A l'indemnité principale s'ajoute les bonus suivants:

- *Si le Club Bursaspor participe à la Champions League et que le joueur dispute au moins 20 (vingt) matches officiels dans la saison, le club Bursaspor versera 200 000,00 € selon les modalités prévues à l'article 5.*
- *Si le Club Bursaspor participe à l'Europa League et que le joueur dispute au moins 20 (vingt) matches officiels dans la saison, le club Bursaspor versera 150 000,00 € selon les modalités prévues à l'article 5".*

An informal translation of the abovementioned clause into English will be read as follows:

"Art. 3

In addition to the main transfer fee the following bonus payments are to be added:

- *Should Bursaspor participate in the Champions League and should the Player participate in at least 20 (twenty) official games during the season, Bursaspor shall pay EUR 200'000.00 [...] according to the modalities as stipulated in art. 5.*
- *Should Bursaspor participate in the Europa League and should the Player participate in at least 20 (twenty) official games during the season, Bursaspor shall pay EUR 150'000.00 [...] according to the modalities as stipulated in art. 5".*

6. As a result of Bursaspor's performance during the 2010/2011 Turkish Süper League, Bursaspor qualified for the play-off round of the 2011/2012 UEFA Europa League ("UEL"). However, Bursaspor failed to qualify for the UEL group stage by losing the play-offs against RSC Anderlecht.
7. After the season 2011/2012, the Respondent requested the Appellant to pay the bonus referring to art. 3 of the Agreement (invoice dated 30 June 2012). The Respondent based its request on the fact that the Player had played more than 20 games during the season 2011/2012 and the Appellant had participated in the UEL. The Appellant refused to pay, alleging that one of the conditions foreseen in art. 3 of the Agreement for the payment of such bonus was not met since it did not reach the UEL in accordance with the terms of the Agreement, as Bursaspor lost the play-offs and did not reach the group stage.

III. SUMMARY OF THE PROCEEDINGS BEFORE THE FIFA PLAYERS' STATUS COMMITTEE

8. On 19 November 2012, the Respondent filed a claim with FIFA against the Appellant requesting payment in the amount of EUR 150'000.00, plus 5% interest on said amount as of 15 July 2012. The Respondent argued that the conditions foreseen in art. 3 of the Agreement were met because the Player had played at least 35 matches during the relevant season and the Appellant had participated in the UEL 2011/2012.
9. Bursaspor acknowledged in its reply that the Player had participated in more than 20 matches during the season 2011/2012. However, it denied to have participated in the UEL 2011/2012 as they lost the play-offs against Anderlecht and therefore, one of the two cumulative conditions foreseen in art. 3 of the Agreement for the payment of the bonus had not been met.
10. On 15 January 2014, the Single Judge of the FIFA Players' Status Committee issued his decision (the "Appealed Decision"). In the Appealed Decision, the Single Judge first noted that the Agreement did not specify whether the expression "*participate in the UEL*" refers only to the group stage of the UEL or if the condition had already been met by reaching the previous qualification round of the UEL.
11. The Single Judge then turned his attention to the relevant articles in the Regulations of the UEFA Europe League ("UEL Regulations"):

Art. 1: Scope of application

The present regulations govern the rights, duties and responsibilities of all parties participating and involved in the preparation and organisation of the 2013/14 UEFA Europa League including its qualifying phase and the play-offs (hereinafter the competition).

[...]

Art. 7: Competition System - Number of rounds

7.01 As shown in Annex Ib, the competition consists of:

a) a qualifying phase:

- first qualifying round*
- second qualifying round*
- third qualifying round*

b) play-offs

c) the UEFA Europa League:

- group stage (six match days)*
- round of 32*
- round of 16*
- quarter-finals*
- semi-finals*
- final.*

12. With regard to art. 1 of the UEL Regulations, the Single Judge came to the conclusion that the UEL involves *inter alia* not only the group stage and subsequent knock-out stages, but also the previous qualifying and play-offs rounds. The Single Judge further stated that since art. 3 of the Agreement only made a general reference to the UEL, the mere participation of the Appellant in the play-offs of the UEL qualifies as participation in the UEL upon the terms of the Agreement. Therefore, the Single Judge concluded that the conditions of the bonus payment as stipulated in art. 3 of the Agreement have been met.
13. In accordance with the considerations abovementioned, the Single Judge rendered his decision upholding the claim of Nancy. In doing so, the Appellant was ordered to pay the Respondent the bonus in the amount of EUR 150'000.00, plus 5% interests as of 15 July 2012 as well as the final costs of the proceedings in the amount of CHF 12'000.00.

IV. SUMMARY OF THE ARBITRAL PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

14. On 2 May 2014, the Appellant filed a statement of appeal against the Appealed Decision with the Court of Arbitration for Sport (“CAS”) in accordance with art. R48 of the Code of Sports-related Arbitration Rules (the “Code”).
15. On 12 May 2014, the Appellant filed its Appeal Brief, requesting that:
 - *“The decision of FIFA DRC is based on crucially wrong assessment and CAS must revoke it.*
 - *All cost and expenses for legal procedure should be born on the side of the respondent’s parties”.*

16. On 20 May 2014, the Respondent filed its answer, requesting:

“to confirm the decision made by FIFA to order the BURSASPOR Club to pay the SASP AS NANCY LORRAINE an allowance amounting to EUR 150’000.00 plus 5% default interest from July 15 2012 and to cover the expenses amounting to CHF 3’000.00 paid in advance by SASP AS NANCY LORRAINE under art. 17 and to cover the expenses of the proceedings”.

17. On 11 June 2014, the CAS Court Office informed the parties that pursuant to art. R54 of the Code, the Panel appointed to decide the case was constituted as follows:

President: Dr. Marco Balmelli, Attorney-at-Law, Basel, Switzerland
Arbitrators: Mr François Klein, Attorney-at-Law, Paris, France
Prof. Dr. Ulrich Haas, Attorney-at-Law, Zurich, Switzerland.

18. On 8 July 2014, a hearing was held in Lausanne, Switzerland. All members of the Panel were present. At the beginning of the hearing, the Panel invited the parties to try settling the dispute but the Respondent refused such invitation. Thereafter, the parties’ counsel made their respective opening statements and answered the questions raised by the Panel. Finally, the parties’ respective counsels made their closing statements.
19. Both at the beginning and at the end of the hearing, the parties expressly declared that they were satisfied with the way in which the proceedings had been conducted.

V. SUMMARY OF THE PARTIES’ SUBMISSIONS

20. The following outline of the parties’ positions is illustrative only and does not necessarily comprise each and every contention put forward by the parties. The Panel, however, has carefully considered all the submissions made by the parties, even if no explicit reference has been made in what immediately follows. The parties’ written submissions, their verbal submissions at the hearing and the contents of the Appealed Decision were all taken into consideration.

A. Bursaspor

21. In the Appeal Brief, the Appellant stated the following:
- The Appellant sustains that in accordance with art. 3 of the Agreement, the term “Europa League” is very clear by providing that the competition begins as of the group stage.
 - The Appellant had only qualified for the play-offs where it had lost and therefore did not qualify for the group stage. Hence, one of the two cumulative conditions foreseen in art. 3 of the Agreement was not met and, thus, Bursaspor, is not obliged to pay Nancy the bonus of EUR 150’000.00.

- The *ratio* of the provision was to grant the Respondent the opportunity to participate in the revenues that the Appellant would have obtained in case it had qualified to the 2011/2012 UEL, which at the end did not occur. Therefore, Bursaspor only agreed on a bonus payment in case of receiving money from UEFA itself. Therefore, the Appealed Decision is based on a wrong interpretation of art. 3 of the Agreement and it must be set aside.

B. Nancy

22. In the answer, the Respondent stated the following:

- In accordance with art. 3 of the Agreement, the payment of the bonus therein foreseen was subject to the fulfilment of two cumulative conditions. The first condition related to the Player's participation in more than 20 matches during the season 2011/12 was met, which is undisputed by both parties.
- The definition provided for the term "Europa League" in the UEL Regulations is lined out in art. 7 UEL Regulations. It clearly provides that the UEL includes all stages of the competition, involving not only the group stage but also the previous qualification and play-offs rounds.
- The Appellant had qualified for the play-offs and therefore participated in the UEL. Therefore, also the second condition foreseen in art. 3 of the Agreement for the bonus payment was met.
- The Appellant intends to make a distinction which is not foreseen in the Agreement. The Agreement clearly refers to the entire competition of the UEL.
- Therefore, the Appealed Decision was correct and the appeal shall be dismissed.

VI. LEGAL CONSIDERATIONS

A. Jurisdiction

23. Art. R47 of 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".

24. CAS jurisdiction is established under Art. 66 (1) and 67 (1) of the FIFA Statutes. Furthermore, the jurisdiction of the CAS has been expressly accepted by the parties, which both signed the Order of Procedure of the present case. Therefore, the Panel considers that CAS is competent to decide this case.

B. Admissibility

25. Art. R49 of the Code provides as follows:

“In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late”.

26. The grounds of the Appealed Decision were notified on 15 April 2014. The Appellant filed its Statement of Appeal on 2 May 2014. Therefore, the appeal was timely submitted.

C. Applicable law

27. Art. R58 of the Code provides as follows:

“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

Furthermore, art. 8 of the Agreement reads as follows:

“Cet accord est régi par les Règlements de la FIFA et par la loi française”.

An informal translation of the abovementioned article into English reads as follows:

“This agreement is governed by FIFA Regulations and French law”.

28. The parties agreed that the present dispute shall be decided in accordance with the various regulations of FIFA and, additionally, French law.

D. Merits

29. The Appellant requests the Panel to set aside the Appealed Decision. The Appellant mainly argues that the second condition foreseen in art. 3 of the Agreement (*“should Bursaspor participate in the UEFA Europa League”*) would have only been met if the Appellant had reached the group stage of the UEL. The Appellant alleges that the common understanding of “Europa League”

clearly refers to the group stage and not to the previous qualification rounds or play-offs whereby no revenues are obtained by clubs from UEFA. Furthermore, the Appellant pointed out that a bonus payment would be coherent only if Bursaspor had obtained certain revenues from UEFA by reaching the UEL group stage. Therefore, the common understanding of the parties when they signed the Agreement was that the participation in the UEL means reaching the group stage.

30. The Respondent states that the Appellant took part in the UEL 2012/2013 (recte: 2011/2012) and therefore the conditions according to art. 3 of the Agreement for the payment of the bonus were met. The Respondent refers to art. 7 UEL Regulations which clearly mentions that the UEL involves not only the group stage but also the previous qualifications and play-off rounds. Furthermore, the Respondent claims that the Appellant is attempting to introduce a distinction in the definition of the UEL which was not foreseen in the Agreement in order to avoid the payment of the bonus.
31. Considering the statements of the parties, the Panel notes that they have different understandings regarding the actual meaning of art. 3 of the Agreement. Hence, the only question for the Panel is to determine whether the Appellant participated in the 2011/12 UEL in accordance with the wording of art. 3 of the Agreement by playing the play-offs but failing to qualify for the subsequent group stage.
32. At this stage and taking into account that the Agreement does not provide any definition of the UEL, the Panel considers pertinent to refer to the wording of art. 1 and 7 of the UEL Regulations, which read as follows:

Art. 1: Scope of application

The present regulations govern the rights, duties and responsibilities of all parties participating and involved in the preparation and organisation of the 2013/14 UEFA Europa League including its qualifying phase and the play-offs (hereinafter the competition).

[...]

Art. 7: Competition System - Number of rounds

7.01 As shown in Annex Ib, the competition consists of:

a) a qualifying phase:

- first qualifying round*
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b) play-offs

c) the UEFA Europa League:

- group stage (six match days)*
- round of 32*
- round of 16*
- quarter-finals*
- semi-finals*
- final.*

33. The Panel, considering the wording of the Agreement as well as the wording of articles 1 and 7 of the UEL Regulations, finds that there are two possible ways to interpret art. 3 of the Agreement:
- A wide interpretation based upon art. 1 of the UEL Regulations, in which the term UEL as such may be understood as the whole competition, including not only the group stage, but also the previous qualifying and play-offs.
 - A narrow interpretation based upon art. 7 of the UEL Regulations, in which the term UEL may be understood as the competition which begins with the group stage “UEFA Europa League”, thus, excluding the previous stages such as the qualifications and play-offs rounds.
34. The Panel therefore concludes that neither the Agreement nor the UEL Regulations provide a clear understanding of whether the condition foreseen in art. 3 of the Agreement was met (i.e. the Appellant’s participation in the UEL). The Panel therefore holds that the common intention of the parties by signing art. 3 of the Agreement was not clear and therefore art. 3 cannot be implemented without its proper interpretation.
35. Regarding the interpretation of said clause, the Panel has to decide the issue taking into consideration the applicable law which provide guidance for the interpretation of the wording of the Agreement.
36. In order to interpret art. 3 of the Agreement, the Panel notes that the applicable regulations, amongst others the FIFA and UEL Regulations do not provide any provision related to the interpretation of contractual clauses. Thus, in accordance with Art. R58 of the Code and art. 8 of the Agreement, the Panel considers pertinent to refer to French law in order to interpret art. 3 of the Agreement.
37. Regarding the interpretation of contractual clauses, the Panel considers pertinent to refer to art. 1156 of the French Civil Code (“FCC”), which provides : “*On doit dans les conventions rechercher quelle a été la commune intention des parties contractantes, plutôt que de s’arrêter au sens littéral des termes*”. In other words, in case there is a discrepancy between the literal wording of an

agreement and the common intention of the parties when they signed such agreement, the latter shall prevail. However, in cases where the parties obviously do not share a common understanding or consensus of the meaning of the relevant contractual clause, under French law, the judge is entitled and obliged to consider objective circumstances in order to interpret the disputed clause, in other words, *to interpret the relevant contractual clause in accordance with the proper sense of the contract at all and the usage and the custom between the parties or in general.*

38. According to art. 1135 FCC, a contractual party is not only obliged to perform an explicit obligation foreseen in the contract but also those which despite not being foreseen in the contract, may arise in accordance with the principle of good faith and proper interpretation. The judge shall also take into consideration *'all that ought to follow from the nature of the obligation under equity, usage, and the law'*.
39. Art. 1134 (3) FCC provides that contractual obligations shall be executed in accordance with the principle of *good faith*. Furthermore, as many other civil law systems, French law incorporates the principle of *contra proferentem* (art. 1162 FCC). Due to that principle, when the provision of a contract that is subject to dispute can be understood in various ways and it is not possible to resolve the doubt through common interpretation, such provision should be interpreted in favor of the non-drafting party. In other words, the risk of drafting an obscure clause shall be borne by the drafting party only.
40. Taking these rules of contractual interpretation under French law into account, the Panel notes that:
 - The timeline of the case can be lined out as follows: On 22 May 2011, the season of the Turkish Süper League ended. Bursaspor finished third and was therefore directly qualified for the 3rd qualification round of the UEL. When the Agreement was signed on 30 June 2011, the parties therefore knew that Bursaspor had already qualified for the 3rd qualification round of the UEL. This raises the question why Bursaspor should have been interested in paying a bonus for reaching only the qualification round of the UEL since a) this qualification had already been achieved when the Agreement was signed and b) the Player did not contribute to this success as it was a result of the Appellant's performance in the season prior to the Player's transfer to Bursaspor.
 - Furthermore, the Panel notes that only participants of the group stage receive the so-called "group stage fee", which is paid directly by UEFA (2011/2012 EUR 640'000.00 each), a fact that was confirmed by both parties during the hearing. Furthermore, clubs also receive performance bonuses during the group stage and rewards for qualifying to further stages of the competition. From an economic perspective, it only seems reasonable that Bursaspor would have agreed to pay a bonus in case it had obtained certain revenues from UEFA due to its participation in the UEL group stage.
 - The Panel considers that the common intention of the parties when they signed the Agreement was that the disputed condition foreseen in art. 3 (i.e. the participation of

Bursaspor in the UEL) would have only been met in case Bursaspor had obtained revenues from UEFA due to its qualification to the UEL group stage.

- The Panel further considers that its interpretation also complies with the *principle of contra proferentem* (art. 1162 FCC) since the Respondent drafted the Agreement. Therefore, the risk of drafting an obscure clause shall be borne by the Respondent only.

VII. CONCLUSION

41. Based on the foregoing, and after taking into due consideration all the evidences produced and arguments raised by the parties, the Panel finds that:

- (i) the Appellant and the Respondent entered into an Agreement;
- (ii) art. 3 of the Agreement foresaw a payment of a bonus subject to the fulfilment of two conditions: a) the Player is selected to play in at least 20 official matches during the season and b) the participation of Bursaspor in the UEL.
- (iii) it is undisputed that the first condition was met, whereas with respect to the second condition, the parties have a different understanding of what a participation in the UEL means.
- (iv) taking into account that the Agreement does not provide a definition of the UEL and in view of art. 1 and 7 of the UEL Regulations, art. 3 of the Agreement could be interpreted in different ways (narrowly or widely);
- (v) therefore, art. 3 of the Agreement has to be interpreted by the Panel according to French law. In order to interpret art. 3 of the Agreement, the clause must be interpreted with respect to all the objective circumstances, the principles of *good faith* and *contra proferentem*,
- (vi) from the objective circumstances of this case, the Panel considers that the Appellant would have never agreed on a payment of a bonus without reaching the group stage because only in this scenario, the Appellant would have obtained certain revenues from UEFA;
- (vii) taking into account that the Respondent was the party which drafted the Agreement, the risk of drafting an obscure clause shall be borne by the latter only (*principle of contra proferentem*);
- (viii) therefore, the Panel considers that the second condition lined out in art. 3 of the Agreement (i.e. "*participate in the UEL*") would have only been met in case Bursaspor had reached (at least) the group stage of the UEL. Since the Appellant did not reach the group stage during the season 2011/2012 UEL, the Panel is of the view that the Respondent is not entitled to claim the payment of the disputed bonus foreseen in art. 3 of the Agreement.

42. Based on these conclusions, the Panel decides that the Appellant's appeal is upheld and, consequently, to set aside the Appealed Decision. Therefore, the Appellant shall not pay the disputed bonus to the Respondent.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Bursaspor Kulubu Dernegi against the decision rendered by the Single Judge of the FIFA Players' Status Committee on 15 January 2014 is upheld.
2. The decision rendered by the Single Judge of the FIFA Players' Status Committee on 15 January 2014 is set aside.

(...)

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