



Arbitration CAS 2009/A/1834 FK Baník Sokolov, a.s. v. FC Hradec Králové, a.s., award of 13 October 2009

Panel: Mr Vít Horacek (Czech Republic), Sole Arbitrator

Football

Loan agreement

Possibility to reopen the proceedings and exhaustion of internal remedies

Applicable law to the merits of the dispute

Validity of a contractual penalty provision according to Czech law

Principle of fair play in a commercial relationship

Decision without holding a hearing

1. A reopening of proceedings is an extraordinary remedial measure and is not a standard appeal method; new proceedings can be opened only on the basis of exceptional circumstances like when new circumstances of the case have been discovered or new evidence has been found. A provision according to which “clubs cannot appeal but can apply for a retrial (new proceedings)” is therefore not considered as offering an “internal legal remedy” within the meaning of the CAS Code.
2. In case of a contractual relationship between two Czech parties and a decision issued by a Czech body, Czech law should be the prevailing material law for the particular business relationship of the parties.
3. A contractual penalty is understood under Czech law as an obligation securing the main obligation of the contracting party. In this respect, in case of an agreement of the parties to pay a contractual penalty for a breach of the contractual obligation by the breaching party, the latter is obliged to pay the contractual penalty even if there is no damage caused by the breach of the obligation. The contractual penalty clause has to be in written form and the amount of the contractual penalty has to be mentioned in the contract.
4. It is very doubtful whether anyone can argue with a “Fair Play” concept in the commercial relationship. It is a pure business issue when there is an agreement between the parties to provide to one of the parties a player for a reasonable consideration. Even if there is a question of fair play, then the fair play must be obeyed by both parties. Therefore signing an agreement where no valid provision is in place is absolutely against any fair play principles.
5. A CAS panel may decide on a case without holding a hearing if the parties have not agreed to have a hearing and the panel deems that a hearing is not necessary because the arbitration proceedings in the specific case are purely about legal questions and

these could be reviewed based on the comments received from the parties.

FK Baník Sokolov (“the Appellant”) is a football club with identification number 26407833 and its registered office in the Czech Republic. It is a member of the Czech-Moravian Football Association (CMFA or, when quoting the parties, CMFS), which is affiliated to FIFA.

FC Hradec Králové (“the Respondent”) is a football club with identification number 27479307 and with its registered office in the Czech Republic. It is a member of the Czech-Moravian Football Association, which is affiliated to FIFA.

On July 8th, 2008, the parties concluded a Loan Contract. The object of this contract is the loan, by the Respondent of the football player Mr. Martin Čupr to the Appellant for a period from July 1st, 2008 to June 30th, 2009. The provided loan compensation, under Article (a) of the contract, is an amount of 80.000 CZK, excluding VAT; and the payment of all the financial obligations of the Respondent towards the player by the Appellant.

Furthermore, Article (d) of this contract provides that: *“FK Baník Sokolov agrees (is obliged not to allow) that in mutual football games during the football season 2008/2009 the player Mr. Martin Čupr will not be nominated for the game. In case of breach of this provision FK Baník Sokolov agrees (is obliged to) to pay contractual penalty in the amount of 500.000 CZK”*.

On Sunday October 5, 2008, the parties played against each other in the second highest football league of Czech-Moravian Football Association and the player Mr. Martin Čupr was nominated for the game. He therefore played in the team of the Appellant in a match against the Respondent.

On November 6, 2008, the Respondent sent an invoice to the Appellant claiming the payment of the contractual penalty provided for in the Loan Contract, *i.e.* an amount of 500.000 CZK.

The Appellant refused to pay this contractual penalty, because according to it, Article (d) of the Loan Contract would breach *“the principles of sports namely the principle of equal opportunities (equality of weapons)”*.

On January 5, 2009, the Respondent filed a request for arbitration to the Arbitration Commission of CMFA requesting it to order to the Appellant the payment of the contractual penalty.

On April 1, 2009 the Arbitration Commission of CMFA issued its decision, by which the Appellant was obliged to pay an amount of 500.000 CZK to the Respondent, as well the arbitration fee.

The Appellant filed an appeal against this decision to the Court of Arbitration for Sport (CAS) in Lausanne.

The Appellant filed its Statement of Appeal to CAS on April 22, 2009 and its Appeal brief on April 30, 2009.

The parties agreed that the dispute be heard and decided by a Sole Arbitrator.

The Respondent properly filed its “Statement of Defense” on May 21, 2009.

On 15 September 2009, the CAS Court Office sent an order of procedure to the parties and informed them that the Sole Arbitrator has decided to issue a decision based on their written submissions.

The Appellant essentially sustained the following conclusions:

- Article (d) of the loan contract (“FK Baník Sokolov agrees that in mutual football games during the football season 2008/2009 the player Mr. Martin Čupr will not be nominated for the game. In case of breach of this provision FK Baník Sokolov agrees to pay contractual penalty in the amount of 500.000 CZK”) would not be valid as it would be contrary to good morals and to the principle of fair play.

The Respondent essentially sustains these conclusions as follows:

- As to the contractual penalty being contrary to the principles of fair play, this would not be right. On the contrary the conduct of the Appellant was against the principles of fair play, in that it knew that it would not abide by the contractual provisions already by the time of concluding the Loan Contract;
- On top of that, the Appellant would never have objected to that provision in the Loan Contract itself and never said the contractual penalty was unlawful;
- In its testimony before the Arbitration Commission of CMFA, the Appellant would have stated that at the time of concluding the Loan Contract it already knew that the provision related to the contractual penalty would not be obeyed because of its nullity;
- The opinion of the Appellant that the contractual penalty provision is contrary to the principle of fair play should be rejected, it would on the contrary, be the Appellant’s conduct which would breach such principle.

LAW

Jurisdiction of the Appellate and Review Commission and Exhaustion of prior legal remedies

1. In order to decide on the admissibility of the present appeal, the Sole Arbitrator looks at the special circumstances of the case. The Sole Arbitrator notes that Statutes of CMFA provide in Article 22 for two-instances proceedings. In particular, the Sole Arbitrator notes that there is a lack of clarity as to how Appellant could comply with the two-instance principle before the CMFA. In this regard, the Sole Arbitrator will address two issues: first, the jurisdiction of the

Appellate and Review Commission; and second, Appellant's efforts to exhaust the legal remedies available to it within the CMFA before lodging its appeal before the CAS.

2. Article 22 of the CMFA, which is part of the CMFA Statutes since at least the year 2001, provides the following:

"1. Decisions regarding the rights and obligations of the [CMFA] members and competition participants shall be made in two instances. This shall not prejudice the right of the [CMFA] Appellate and Review Commission to review decisions pursuant to the provisions of Article 10, Section 3.

2. No [CMFA] member and competition participant will be denied the right to invoke its rights before the [CMFA] authorities. Czech authorities shall adjust its activities so as to prevent delays and ensure the proper and timely discussion of any motions subject to their decision".

A. The jurisdiction of the Appellate and Review Commission

3. In order to address the issue of jurisdiction, the legal framework of the CMFA needs to be analyzed.

4. The CMFA Statutes govern the relationship between the CMFA and its members. Generally speaking, they organize how the CMFA and its different authorities function. In particular, Articles 10 and 11 deal with the composition and functions of its dispute resolution bodies, the Appellate and Review Commission and the Arbitration Commission respectively.

5. Article 10 of the CMFA Statutes states:

"1. The Appellate and Review Commission shall decide as an authority of the second instance in all appeals against the decisions of [commissions] governing competitions on the national level regarding competition and disciplinary issues, registration, transfers, and appeals against the decision of the [CMFA] registration division. [...]

3. Upon suggestion, the Appellate and Review Commission is also authorized to review decisions issued in appeal proceedings by the District and Regional Football Association authorities in competition and disciplinary matters; change, cancel, or return such decisions for further review, if such decisions are in violation of the [CMFA] Statutes, Rules and Regulations. The Appellate and Review Commission is also entitled to decide whether the schedules of all competition levels and decisions of the governing authorities are in compliance with the Competition Rules and competition schedules, and to decide in other matters in accordance with the [CMFA] rules and regulations.

4. The Appellate and Review Commission shall convene at least once a month. Its term of office is 4 years. Changes in the Appellate and Review Commission may be made by any General Meeting.

5. The activities of the Appellate and Review Commission are governed in detail by the Statute and Appellate Rules, conformed by the Executive Committee upon the proposal of the Appellate and Review Commission".

6. Article 11 of the CMFA Statutes provides:

“1. The Arbitration Commission is entitled to settle disputes between legal entities and physical persons within the [CMFA], especially disputes arising from professional contracts between clubs and players, disputes regarding the fulfillment of contracts between clubs regarding the compensation for transferred players, and other disputes arising from similar contracts.

2. The activities of the Arbitration Commission are governed in detail by a Statute, confirmed by the Executive Committee upon the Arbitration Commission’s proposal”.

7. On a subordinated hierarchical level, both the Arbitration Commission and the Appellate and Review Commission have their own statutes and rules pursuant to Articles 10.5 and 11.2 of the CMFA Statutes.
8. The power of the Appellate and Review Commission to review decisions of the Arbitration Commission was not constituted by the CMFA Statutes, the Rules of the Arbitration Commission or the Rules of the Appellate and Review Commission, or “*by any other rules of order or regulations valid and effective*” within the CMFA.

B. *Exhaustion of internal legal remedies*

9. Addressing the second issue, Article 61 of the FIFA Statutes and Article R47 of the CAS Code on Sports-related Arbitration (“the CAS Code”) state the requirements for the filing of an appeal before the CAS.

Article 61 of the FIFA Statutes 2008 - 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.

2. Recourse may only be made to CAS after all other internal channels have been exhausted.

3. CAS, however, does not deal with appeals arising from:

(a) violations of the Laws of the Game;

(b) suspensions of up to four matches or up to three months (with the exception of doping decisions);

(c) decisions against which an appeal to an independent and duly constituted arbitration tribunal recognized under the rules of an Association or Confederation may be made”.

Article R47 of the CAS Code - Appeal

“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”.

[Emphasis added by the Panel].

10. According to CMFA information received by CAS on July 24, 2009 “*Clubs cannot appeal but can apply for a retrial (new proceedings) and did not*”. It is therefore clear that even if there was a chance to restart proceedings, even the Sole Arbitrator doesn’t believe so, the Appellant did not open new proceedings.
11. A reopening of proceedings is, however, an extraordinary remedial measure and it is not a standard appeal proceedings. Renewal proceedings can be opened only in exceptional circumstances like when new circumstances of the case have been discovered or new evidence found.
12. It is therefore clear that all internal legal remedies (standard legal remedies) have been exhausted by the Appellant.

Jurisdiction

13. The jurisdiction of CAS derives from Article 23 of the Statutes of the Football Association of the Czech Republic which contains an arbitration clause in favor of CAS “*as specified in the applicable regulations of FIFA and UEFA*”. Since, the wording of these Statutes is binding on all football clubs operating in the Czech Republic, both parties are bound by the arbitration clause contained in Article 23 of the mentioned Statute.
14. In the present case, Article 23 of the Statutes of the CMFA contains an arbitration clause in favor of CAS. Article 61 of the FIFA Statutes provides for appeals against final decisions from members of FIFA within 21 days of the notification and excludes awards delivered by independent and duly constituted arbitral tribunals recognized by the associations. The award from the Arbitration Commission was final. Therefore, local remedies were exhausted. Moreover, the Statement of Appeal was filed before CAS within the deadline.
15. The scope of the Panel’s (Sole Arbitrator) jurisdiction is defined in Article R57 of the CAS Code, which provides that: “*The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance*”.

Applicable Law

16. Pursuant to Article R58 of the CAS Code the CAS settles the disputes according to 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, that the CAS deems appropriate.

17. It is without any doubt that there is contractual relationship between two Czech parties and a decision issued by a Czech body, therefore Czech law is prevailing material law in this business relationship of the parties.

Merits of the Appeal

18. The questions to be reviewed and decided as material questions in this case are:
- Is the contractual penalty provision a valid provision according to Czech law?
 - Is the Appellant obliged to pay the contractual penalty?
19. The relationship between parties is governed by the Czech law, namely the Commercial Code, the Law number 513/1991 Coll. and the Czech Civil Code, the Law number 40/1964 Coll.
20. The Civil Code says in Section 544 that it is an agreement of the parties to pay a contractual penalty in case of a breach of the contractual obligation by the breaching party, which is obliged to pay the contractual penalty even if there is no damage caused by the breach of the obligation.
21. The contractual penalty clause has to be in written form and the contractual penalty amount has to be mentioned.
22. The contractual penalty is understood under the Czech concept of law as an obligation securing the main obligation of the contracting party.
23. The Sole Arbitrator has to conclude based on the documents and statements of the parties that the agreement and the contractual penalty clause was properly and with free will of the parties agreed and signed for.
24. It is very doubtful whether any one can argue with a “Fair Play” concept in the commercial relationship. There is no sport in question at all but it is a pure business issue when there is an agreement between the parties to provide to one of the parties a player for a reasonable consideration.
25. It was clear (before) from the agreement and also from the hearing before the CMFA Arbitration Commission and on top of that also confirmed by the Respondent when it said in its Statement of Defense that *“the amount of payment for a player appearing as a guest given in the Article a) of the Loan Contract was agreed with regard to the fact that the player Mr. Martin Čupr will not be nominated for mutual matches as given by the Article d) of the Loan Contract. In case the provision was not included in the Contract, the sum for the player required by the Respondent would be much higher”*.
26. Even if there is a question of fair play then the fair play must be obeyed by both parties. Therefore signing an agreement where no valid provision is in place is absolutely against any fair play principles.

27. As to the question of good morals, the same arguments could be applicable here. It is without any doubt that signing a business agreement between sporting clubs and having in place contractual penalty for breach of an obligation is not against good morals. Opposite, it is recognized as a standard and valid clause in the Czech legal environment and also international – including sport environment as well.
28. As to the equality of the parties and competition between them, the Sole Arbitrator is of the opinion that nothing in this case had any unlawful impact on equality of the parties and anyhow unlawfully influenced their mutual competition.
29. Based on all above arguments the Sole Arbitrator finds that there is a proper decision of the CMFA Arbitration Commission and the Appellant is obliged to pay the contractual penalty in full.
30. The Sole Arbitrator decides this case without holding a hearing considering that the parties did not agree to have a hearing and that such hearing was, in the opinion of the Sole Arbitrator, not necessary because the appellate arbitration proceedings in this case are purely about legal questions and these could be reviewed based on the comments received from the parties and CMFA.

The Court of Arbitration for Sport rules:

1. The appeal of FK Baník Sokolov, a.s. is dismissed.
 2. The Decision of the arbitration commission of the Czech-Moravian Football Association is confirmed in full.
- (...).