Arbitration CAS 2012/A/2738 FK Teplice a.s. v. Eintracht Frankfurt Fussball AG, award of 16 July 2012

Panel: Mr Lars Hilliger (Denmark), President; Mr Vit Horacek (Czech Republic); Mr Goetz Eilers (Germany)

Football
Transfer
Interpretation of a contractual clause
Burden of proof

1. **The interpretation rule according to which a disputed provision should be comprehended in favour of the party which is not the drafter of the contract has no material relevance in a case where the wording of the provision in question is sufficiently clear.**

2. **In CAS arbitration, any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue. In other words, the party which asserts facts to support its rights has the burden of establishing them. The Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one. Hence, if a party wishes to establish some facts and persuade the deciding body, it must actively substantiate its allegations with convincing evidence.**

FK Teplice (the "Appellant") is a Czech football club affiliated with the Czech Football Federation, which in turn is affiliated with the FIFA.

Eintracht Frankfurt Fussball AG (the "Respondent") is a German football club affiliated with the Deutscher Fußball-Bund, which in turn is affiliated with FIFA.

The elements set out below are a summary of the main relevant facts, as established by the Panel on the basis of the decision rendered by the FIFA Players' Status Committee (the "FIFA PSC") on 31 October 2011(the "Decision") in the case between the Appellant and the Respondent, the written submissions of the Parties and the exhibits filed. Additional facts may be set out, where relevant, in the legal considerations of the present Award.

Following negotiations just before Christmas between the Parties, on 27 December 2007, the Parties signed a transfer agreement (the "Contract") for the transfer of the Czech football player M. (the

"Player") from the Appellant to the Respondent. The Player was accordingly transferred to the Respondent from the beginning of January 2008.

The Contract was drafted in German by the Respondent and this German-language version of the signed Contract is the only official one.

Article 4 of the original Contract has the following wording: *"Solte der Spieler innerhalb des bestehenden Arbeitsverhältnisses mit Eintracht Frankfurt 20 Bundesliga-Meisterschaftsspiele von Beginn an in einem jeweiligen Kalenderjahr (01.01. bis 31.12.) absolvieren, so erhält der FK Teplice jeweils pro Kalenderjahr eine weitere Transferentschädigung i. H. v. 100.000,- Euro. Die Zahlung ist jeweils per 01.01. eines jeden Jahres durch Rechnungsstellung vom FK Teplice fällig".*

The translation of Article 4 of the Contract into English, which was applied by the FIFA PSC, reads as follows: *"Should the player, within the existing working relationship with Eintracht Frankfurt, participate in 20 Bundesliga championship matches from the beginning during each calendar year (from 01.01 to 31.12), FK Teplice will be entitled to an additional transfer compensation of EUR 100,000 per calendar year (…)".*

On 27 June 2011, the Appellant lodged a claim against the Respondent arguing that the Player had *"started in agreed number (20) of Bundesliga matches in the course of year 2009".* In this regard, the Appellant provided FIFA with a list of matches in which the Player participated. According to that list, the Player was part of the "team line-up" of the Respondent in a total of 20 matches in the period from 31 January 2009 to 19 December 2009. Given these circumstances, the Appellant deemed to be entitled to receive the agreed amount of EUR 100,000.00 since the condition of Article 4 of the Contract was fulfilled as the Appellant argued that the element to be taken into account was the number of matches the Player had played from the beginning of the calendar year. Consequently, the Appellant requested the amount of EUR 100,000.00 from the Respondent, plus interest at the rate of 7% as from 1 May 2011.

On 18 August 2011, the Respondent rejected the claim in its entirety, emphasising that the Appellant's interpretation of the wording of Article 4 of the Contract was mistaken. According to the Respondent, it was clear that the words *"from the beginning"* referred grammatically and unambiguously to *"20 Bundesliga championship matches"* and not, as claimed by the Appellant, to *"calendar year"*. Based on that, the Respondent argued that in order for Article 4 of the Contract to apply, the Player should have played each game from the first minute and, thus, should have belonged to the starting line-up. Since the Player, according to the Respondent, had participated *"from the beginning"* in less than 20 Bundesliga championship matches in 2009, the Appellant should not be entitled to any additional compensation.

In its reply of 9 September 2011, the Appellant reiterated its claim and emphasised that the Contract was drafted by the Respondent in German, and that any ambiguity or double meaning must be interpreted in favour of the Appellant.

In its response to that second submission of the Appellant, the Respondent only referred to its position already submitted.

On 30 September 2011, the Deutscher Fußball-Bund informed FIFA that the Player was part of the starting line-up in a total of 15 matches with the Respondent during the year 2009.

Against the background of these circumstances, the Single Judge of the FIFA PSC concluded as follows:

The specification *"from the beginning"* contained in Article 4 of the Contract was undoubtedly linked to 20 Bundesliga championship matches. In addition, the Single Judge of the FIFA PSC was keen to point out that the part *"during each calendar year (from 01.01. to 31.12)"* already indicated the exact period of time during which the Player had to play the relevant 20 matches and that therefore, the words *"from the beginning"* could not possible be linked to it.

Given the information provided above, the Single Judge concluded that the words *"from the beginning"* clearly referred to the beginning of each Bundesliga championship match and, therefore, that the criterion to be taken into account in the particular context of Article 4 of the Contract was the number of matches in which the Player was part of the starting eleven players, i.e. the matches in which the Player had been lined up from the very beginning of the match.

Consequently, the Single Judge held that Article 4 of the Contract had to be understood in the sense that if the Player participated in at least 20 Bundesliga championship matches *"from the beginning"* of these matches, i.e. from the first minute, thus belonged in the starting eleven (the starting line-up), during a calendar year, i.e. from 1 January to 31 December of each calendar year, the additional amount of EUR 100,000.00 was due by the Respondent to the Appellant.

Having established the above, the Single Judge acknowledged that, from the contents of the correspondence received from the Deutscher Fußball-Bund, the Player was (only) part of the starting line-up in a total of 15 matches with the Respondent during the year 2009.

As a consequence, the Single Judge came to the conclusion that the condition of Article 4 of the Contract was not met since the Player had not played in the starting line-up for at least 20 Bundesliga championship matches and that the Appellant would therefore not be entitled to receive the conditional amount of EUR 100,000.00.

In the light of these circumstances, the FIFA PSC decided as follows in its Decision:

> *"1. The Claim of the Claimant (the Appellant, FK Teplice) is rejected.*
>
> *2. The costs of the proceedings in the amount of CHF 7,000 are to be paid by the Claimant, FK Teplice. (…)".*

On 6 March 2012, the Appellant filed a Statement of Appeal with CAS, challenging the Decision, which had been notified to the Appellant with its grounds on 17 February 2012.

On 15 March 2012, the Appellant filed its Appeal Brief, requesting the following from CAS:

"1. To replace the Decision and issue a new decision which accepts the Appellant's claim for payment and orders the Respondent to pay all procedural costs effected before the FIFA PSC and CAS in an amount to be assessed by CAS".

On 26 March 2012, FIFA informed the CAS Court Office that it renounced its right to intervene in the present appeal procedure.

On 29 March 2012, the Respondent filed its answer, presenting the following requests for relief:

"1) To dismiss the Appeal.

2) To order the Appellant to pay the costs of the procedure including the Respondent's legal fees and expenses".

By letter of 3 April 2012, the Respondent suggested that the Panel should decide the matter based on the Parties' written submissions.

On 5 April 2012, the Appellant informed the CAS Court Office that it preferred a hearing to be held.

By letter of 20 April 2012, the Parties were informed that the Panel had decided to hold a hearing in the matter.

On 13 June 2012, the day before the Hearing was scheduled for, the CAS Court Office received from the Appellant the Appellant's Final Statement, which was forwarded to the Respondent and the Panel later that day. The Appellant was informed at the same time that the written proceeding was closed and that the admissibility of the Appellant's Final Statement would be dealt with by the Panel at the beginning of the Hearing.

A hearing was held on 14 June 2012 at the CAS premises in Lausanne. All the members of the Panel were present. The Parties did not raise any objection as to the constitution and composition of the Panel.

The following people attended the Hearing and were heard by the Panel:

- For the Appellant: Ms Jana Franova (attorney-at-law), Mr Frantisek Hrdlicka (Executive Manager of the Appellant), P. (former Player's Agent for the player M.) and Mr Jan Skypalar (the Appellant's Sports Director acting as interpreter for Mr. Hrdlicka).
- For the Respondent: Dr Joachim Rain (attorney-at-law) and Mr Heribert Bruchhagen (Chairman of the board of directors of the Respondent – heard by conference call).

The Panel commenced the Hearing by addressing the question of the admissibility of the Appellant's Final Statement filed on 13 June 2012, in which connection the Respondent, questioned directly by the Panel, objected to the statement being declared admissible.

The Panel then referred to Article R56 of the Code: *"Unless the parties agree otherwise or the President of the Panel orders otherwise on basis of exceptional circumstances, the parties shall not be authorized to supplement or amend*

their requests or their argument, nor to produce new exhibits, nor to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer".

Since the parties did not agree on the admissibility and since the Panel did not find any exceptional circumstances with regard to the reason for the late filing of the statement, the Appellant's Final Statement was declared inadmissible, which the Appellant accepted.

During the testimonies of Mr Hrdlicka and P., the Panel was informed that the Contract signed between the Parties was translated into the Czech language on behalf of the Appellant before the signing of the contract. This translated version was never handed over to the Respondent before the signing and was never included in either the FIFA or the CAS file before the Hearing.

Questioned directly, both Parties expressed a request that this translated version be allowed into the file, in which the Panel was also interested. This translated version of the Contract in the Czech language was therefore distributed to the Respondent and the Panel and, accordingly, was included in the file.

The Parties had ample opportunity to present their cases, submit their arguments and answer the questions posed by the Panel. After the Parties' final submissions, the Panel closed the Hearing and reserved its Final Award. The Panel heard carefully and took into account in its discussion and subsequent deliberation all the evidence and arguments presented by the Parties even if they have not been summarised in the present Award. Upon closure, the Parties expressly stated that they did not have any objection in respect of their right to be heard and to be treated equally in these arbitration proceedings.

LAW

CAS Jurisdiction and Admissibility of the Appeal

1. Article R47 of the Code states as follows: *"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body".*

2. With respect to the Decision, the jurisdiction of CAS derives from art. 62 and art. 63 of the FIFA Statutes. In addition, neither the Appellant nor the Respondent objected to the jurisdiction of CAS, and both Parties confirmed the CAS jurisdiction when signing the Order of Procedure.

3. The Decision with its grounds was notified to the Parties on 17 February 2012, and the Appellant's Statement of Appeal was lodged on 6 March 2012, i.e. within the statutory time limit set forth by the FIFA Statutes, which is not disputed. Furthermore, the Statement of Appeal complied with all other requirements of Article R48 of the Code.

4. It follows that CAS has jurisdiction to decide on the present Appeal and that the Appeal is admissible.

5. Under Article R57 of the Code, the Panel has full power to review the facts and the law and may issue a de novo decision superseding, entirely or partially, the appealed one.

Applicable Law

6. Art. 62 par. 2 of the FIFA Statutes states as follows: *"The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".*

7. Article R58 of the Code states as follows: *"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

8. The Panel notes that in the present matter the Parties have not agreed on the application of any specific national law. The applicable law in this case will consequently be the regulations of FIFA and, additionally, Swiss law.

9. Since the claim was lodged with FIFA on 27 June 2011 with reference to article 26 paragraphs 1 and 2 of the Regulations on the Status and Transfer of Players (editions 2010), the Panel confirmed that the 2010 edition of the Regulations on the Status and Transfer of Players is applicable to the present case.

Discussion on the Merits

10. Initially, the Panel notes that it is undisputed between the Parties that the Player was part of the starting line-up for a total of 15 matches with the Respondent during the year 2009 and that the Player, during the same year, participated in a total of 21 Bundesliga championship matches, including the 15 matches where he was included in the starting line-up.

11. Furthermore, the Panel notes that it is not disputed between the Parties whether the provision of Article 4 has been validly concluded or whether the Appellant is entitled to receive the agreed bonus amount of EUR 100,000.00 if the condition agreed in the provision is assumed to have been fulfilled.

12. Thus, the only issue to be resolved by the Panel is what must be assumed to have been agreed between the Parties as a condition for the Appellant's entitlement to a bonus of EUR 100,000.00 in accordance with Article 4 of the Contract, i.e. whether the Player is required to have appeared in the Respondent's starting line-up for a minimum of 20 Bundesliga championship matches within a calendar year or whether it is sufficient for the Player to have participated in a minimum of 20 Bundesliga championship matches within the same period, but without necessarily being in the starting line-up?

13. Article 4 of the original Contract reads as follows: *"Sollte der Spieler innerhalb des bestehenden Arbeitsverhältnisses mit Eintracht Frankfurt 20 Bundesliga-Meisterschaftsspiele von Beginn an in einem jeweiligen Kalenderjahr (01.01. bis 31.12.) absolvieren, so erhält der FK Teplice jeweils pro Kalnderjahr eine weitere Transferentschädigung i. H. v. 100.000,- Euro. Die Zahlung ist jeweils per 01.01. eines jeden Jahres durch Rechnungsstellung vom FK Teplice fällig".*

14. After having examined the wording of Article 4, the Panel agrees with the FIFA PSC that the following English translation conveys the meaning of the original text loyally and correctly, and the Panel therefore uses this translation for the interpretation of the contents of the Article: *"Should the player, within the existing working relationship with Eintracht Frankfurt, participate in 20 Bundesliga championship matches from the beginning during each calendar year (from 01.01 to 31.12), FK Teplice will be entitled to an additional transfer compensation of EUR 100,000 per calendar year (…)".*

15. Against this background, the Panel analysed the contents of the provision and subsequently concluded that *"from the beginning"* – based on a strictly literal interpretation of the provision – relates unambiguously to the time of the Player's participation in the matches concerned.

16. Hence, the Panel rejects the Appellant's allegation that *"from the beginning"*, from a linguistic point of view, relates to the period (calendar year) in which the number of played matches must be calculated. The Panel emphasises in that connection that such an alleged reference would imply that there would be three references to the calendar year in the Article, which the Panel does not find to be probable, regardless of whether or not the transfer actually took effect at the beginning of a calendar year as mentioned by the Appellant.

17. The interpretation rule mentioned by the Appellant, according to which a disputed provision should be comprehended in favour of the party which is not the drafter of the contract, has no material relevance in this specific case where the wording of the provision in question, in the opinion of the Panel, is so sufficiently clear that it should have been up to the Appellant to call direction to any issues of disagreement on the contents prior to the signing of the Contract.

18. Similarly, the Panel finds that it is irrelevant in this specific case that the Contract has been drafted in German. The Appellant, as an equal negotiating party, thus holds an equal share of the responsibility for choosing the contract language, and it should further be noted that the Appellant, before the signing of the Contract, actually arranged for its translation into Czech, in which connection the Appellant should have been able to discover any difference between the Appellant's intention and the contents of the provision in question.

19. Given these circumstances, the Panel is thus of the opinion that it can be concluded, against the background of an interpretation of Article 4 of the Contract, that the Parties have agreed according to the wording of the Contracts that a bonus will be payable under this provision only if the Player is included in the Respondent's starting line-up for a minimum of 20 Bundesliga championship matches within a calendar year.

20. The question then is, as stipulated by the Appellant, whether this comprehension of the provision is not in accordance with the Parties' original common intention, after which the legal effect of the provision should be adjusted accordingly.

21. The Panel refers to the general legal principle of burden of proof, according to which any party claiming a right on the basis of an alleged fact must carry the burden of proof, proving that the alleged fact is as claimed.

22. The Panel notes that this is in line with article 8 of the Swiss Civil Code (Swiss CC), which stipulates as follows:

"Chaque partie doit, si la loi ne prescrit le contraire, prouver les faits qu'elle allègue pour en déduire son droit".

In free translation

"Each party must, if the law does not provide for the contrary, prove the facts it alleges to derive its right".

As a result, the Panel reaffirms the principle established by CAS jurisprudence that *"in CAS arbitration, any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue. In other words, the party which asserts facts to support its rights has the burden of establishing them (…). The Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one. Hence, if a party wishes to establish some facts and persuade the deciding body, it must actively substantiate its allegations with convincing evidence"* (cf. CAS 2003/A/506, para. 54; CAS 2009/A/1810 & 1811, para. 46 and CAS 2009/A/1975, para. 71 ff).

23. The Appellant refers, with a view to being able to discharge this burden of proof in regard to the testimonies of Mr Frantisek Hrdlicka and P. to the Panel, according to which it has allegedly been proven that the Parties agreed, during the negotiations conducted in December 2007, that it was the number of appearances within a calendar year that was supposed to be the decisive factor for determining entitlement to bonus payment under Article 4.

24. The existence of this original common intention is supported by the circumstance that any other contents, in the Appellant's view, could potentially involve situations where the Player, as a result of substitute appearances, would in reality have had a substantial value for the Respondent, but without imposing on the Respondent an obligation to pay the agreed bonus amount to the Appellant.

25. Against the background of the statements and submissions made by the Parties and to FIFA, the Panel does not find that the Appellant has been capable of discharging the burden of proof to show that the Parties had a common intention different from the one described in 19 above.

26. The Panel notes in that connection that the testimonies of Mr Frantisek Hrdlicka and P. to the Panel are directly contrary to the testimony of Mr Bruchhagen, and, in consequence, these testimonies cannot be accorded substantial weight alone.

27. Moreover, the Panel notes that the examples of "substitute situations" referred to by the Appellant, which were supposed to speak against the literal comprehension of the contents of the Article, do not seem to be convincing, let alone probable. On the contrary, the Panel notes that it seems probable – in connection with the acquisition of a talented U19 national team player against payment of a quite substantial transfer amount – that the acquiring club bases an additional payment, if applicable, on the number of matches in which the player participates *"from the beginning"*, rather than basing such a payment merely on the number of appearances, and the Panel further notes that an established fixed player, all else being equal, will generally be more valuable for a club than a substitute player.

28. When it comes to the contents of the Czech translation of the Contract, which the Appellant arranged at its own initiative prior to the signing of the Contract, Article 4 in this translation reads as follows: *"Pokud se hráč v rámci existující pracovní smlouvy s Eintracht Frankfurt zúčastní 20 mistrovských utkání spolkové ligy a to od počátku každého kalendářního roku (1.1. – 31.12.), pak FK TEPLICE obdrží za každý kalendářní rok další náhradu za postoupení ve výši 100.000 EURO (…)".*

29. The Panel notes than an English translation of this Czech text reads as follows: *"Should the player, within the existing working relationship with Eintracht Frankfurt, participate in 20 Bundesliga championship matches from the beginning* ***of*** *each calendar year (from 01.01 to 31.12), FK Teplice will be entitled to an additional transfer compensation of EUR 100,000 per calendar year (…)".*

30. With reference to this translation, the Panel understands why the Appellant may have been led to believe that *"from the beginning"* relates to the calendar year as this text, in the Panel's opinion, is apparently an inadequate or, at any rate, inaccurate translation.

31. The Panel notes, however, that the contents of this Czech translation is of no relevance to the dispute in question since only the original signed German version of the Contract is valid between and binding on the Parties. Furthermore, the Respondent was indisputably not advised of the contents prior to the signing of the Contract, and the Appellant bears the risk that it has apparently received an inadequate translation.

32. In these circumstances of the case, the Panel agrees with the contents of the Decision where the Appellant's claim was rejected.

Summary

33. Based on the foregoing and after taking into consideration all evidence produced and all arguments made, the Panel decides to reject the Appellant's claim since the condition according to Article 4 of the Contract is not fulfilled.

34. The Appeal is therefore dismissed.

The Court of Arbitration for Sport rules:

1. The Appeal filed on 6 March 2012 by FK Teplice a.s. against Eintracht Frankfurt Fussball AG regarding the decision pronounced by the FIFA Players' Status Committee on 31 October 2011 is dismissed.

2. The decision of the FIFA Players' Status Committee on 31 October is confirmed.

(…)

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