Arbitration CAS 2005/A/848 Sport Club Internacional v. Bayer 04 Leverkusen, award of 23 February 2006

Panel: Mr Michele Bernasconi (Switzerland), President; Ms Margarita Echeverria Bermúdez (Costa Rica); Prof. Ulrich Haas (Germany)

Football
Transfer
"Sell-on clause"
Default of the debtor

1. **Clauses providing for risk-sharing and participation of a transferring club in possible, uncertain gains obtained by the new club in the event of a further transfer to a third club, are not uncommon in international transfer agreements of professional football players. The economic rationale of such clauses is, generally, that by agreeing into such arrangement, the transferring club accepts to receive, in a first place, a lower "first" transfer fee, with the expectation of receiving an additional "fee" if the recipient club will be able to transfer, with profit, the player to a third club.**

2. **Under Swiss law, if an obligation is due, the debtor will be in default upon being reminded thereof by the creditor (art. 102 para. 1 CO). If a certain due date was agreed upon for performance or if such a date arises from a stipulated and duly exercised notice of termination, the debtor will already be in default upon the expiration of such date (art. 102 para. 2 CO). Further, it is widely accepted under Swiss doctrine that no reminder is necessary, when, under the concrete circumstances of the case, the debtor alone can determine, when he or she must pay.**

The Appellant Sport Club Internacional ("Internacional" or the "Appellant") is a Brazilian football club affiliated to the Confederaçaõ Brasileira de Futebol (the "Brazilian Federation") with headquarters in Porto Alegre, Rio Grande do Sul, Brazil.

The Respondent Bayer 04 Leverkusen ("Bayer 04" or the "Respondent") is a German football club affiliated to the German Football Association with headquarters in Leverkusen, Germany.

On 12 December 2000, Internacional and Bayer 04 signed a transfer agreement (the "Transfer Agreement") concerning the player L. (the "Player") for the amount of USD 9,200,000.

Article 3 of the mentioned Transfer Agreement stipulates:

"If the Player is sold by Bayer 04 during the term of the contract to be signed between them, which term not be less than 3 (three) years, Bayer 04 shall pay Inter 25% of the difference between the transfer price then agreed and the amount herein set forth".

On 22 June 2004, Internacional contacted the FIFA Administration and stated that the Player was transferred from Bayer 04 to the German club FC Bayern Munich and, therefore, Internacional is entitled to receive compensation according to article 3 of the Transfer Agreement signed on 12 December 2000 plus 5% interest as from date of the signature of the Transfer Agreement until the effective date of payment.

On 19 August 2004, Bayer 04 stated that Internacional is not entitled to receive any remuneration, since the main requirement of article 3 of the Transfer Agreement is that the Player is transferred during the term of the employment contract signed between them at the time of the transfer and this requirement is not fulfilled.

Bayer 04 pointed out that the Player was not transferred during the term of the employment contract signed at the time he was transferred to them. The Player and Bayer 04 signed a first employment contract on 2 January 2001, valid until 30 June 2005, but this employment contract was mutually terminated on 30 June 2003 since during the season 2002/2003 Bayer 04 encountered the risk of descending into the second league and according to the employment contract the Player was only entitled to play in the first league. Against this background, the Respondent and the Player signed a second employment contract on 2 May 2003 valid until 30 June 2007.

Finally, Bayer 04 maintained that the Player was transferred to FC Bayern Munich in May 2004, i.e. during the term of the second employment contract and this contract does not fall under article 3 of the Transfer Agreement signed on 12 December 2000.

On 22 October 2004, Internacional contested Bayer 04's position and pointed out that the fact that the Player and Bayer 04 signed a new employment contract does not affect the contractual obligations between both clubs. Moreover, Internacional stressed that the grounds upon which Bayer 04 revoked the first employment contract never occurred and have been nothing more than a threat.

On 27 October 2004, upon FIFA's request, the German Football Association sent a copy of the Transfer Agreement signed between Bayer 04 and FC Bayern Munich on 25 May 2004, according to which the parties agreed a transfer fee amounting to EUR 12,000,000.

On 29 July 2004, Internacional filed through the Brazilian Federation a complaint before the Player's Status Committee of FIFA pleading the right to receive 25%, plus interest of 5%, on the difference between the amount of the transaction executed between the German clubs and the amount paid by Bayer 04 to Internacional on the occasion of the transfer in the end of 2000. With letter received by FIFA on 19 August 2004 Bayer 04 filed a response brief stating that Internacional is not entitled to participate in the transfer sum paid to Bayer 04 by FC Bayern Munich as section 3 of the agreement between Bayer 04 and Internacional is not fulfilled and gives no basis for such a claim. On 19 October 2004 Internacional replied to the response brief filed by Bayer 04, restating its position.

On 15 February 2005 the Players' Status Committee of FIFA passed its decision (hereinafter the "Appealed Decision"), whereby:

> *"1. The claim of the Claimant, Sport Club Internacional, is rejected".*

The Players' Status Committee based its decision on the following grounds:

> *"1. […]*
>
> *2. The Committee carefully considered the contents of the transfer agreement concluded between the parties on 12 December 2000. In particular, the Committee acknowledged that article 3 of the mentioned agreement clearly establishes that if the player is sold by the Respondent during the term of the employment contract to be signed between them, which term not to be less that 3 (three) years, the Respondent shall pay to the Claimant 25% of the difference between the transfer price then agreed and the amount set in the transfer agreement dated 12 December 2000.*
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> *3. Furthermore, the Committee acknowledged that the Respondent and the player signed a first employment contract on 2 January 2001, valid until 30 June 2005, and that the player, as clearly stated in article 3 of the transfer contract, actually rendered his services to the Respondent at least for three years.*
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> *4. Moreover, the Committee maintained that the employment contract was mutually terminated on 30 June 2003, because during the season 2002/2003 the Respondent encountered the risk of descending into the second league and according to clause 9 d of the employment contract the player was only entitled to play in the first league.*
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> *5. The Committee also acknowledged that the Respondent and the player signed a new employment contract on 2 May 2003 valid until June 2007 and that the player was transferred to FC Bayern Munich on 25 May 2004.*
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> *6. After a carefully [recte: careful] study of all documents contained in the file the Committee determined that the Respondent signed a second employment contract with the player due to sports related reasons, in particular due to the fact that the Respondent was encountering the risk of descending into the second league, which would have meant that the player would have been unable to render his services to the Respondent.*
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> *7. In this respect, the Committee pointed out that, based on the documents provided, the Respondent did not sign the second employment contract with the aim to avoid the contractual obligations established in article 3 of the transfer agreement, as affirmed by the Claimant.*
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> *8. The Committee unanimously concluded that article 3 of the transfer agreement clearly establishes that the Claimant should financially participate in a further transfer only in case that the further transfer would take place within the terms of the employment contract to be signed between the Respondent and the player as a result of the transfer agreement dated 12 December 2000.*
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> *9. The Committee pointed out that the player was transferred to FC Bayern Munich on 25 May 2004, which means that he was transferred during the terms of the second employment contract.*
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> *10. As a result, the Committee concluded that the fulfilment condition of article 3 of the transfer agreement, i.e. during the term of the employment contract signed between them at the time of the transfer, is not given.*
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> *11. Taking into account all of the above, the Players' Status Committee unanimously decided that the Claimant's claim is rejected".*

On 16 March 2005, Internacional lodged an appeal with the Court of Arbitration for Sport ("CAS") against the Appealed Decision of the FIFA Players' Status Committee.

On 23 March 2005, Internacional filed its appeal brief. Internacional submitted the following request for relief:

> *"(a) to reformulate the decision appealed in order to acknowledge that the player L. ("L.") has been transferred from the Respondent to Bayern Munich during the period of validity **originally** established by the first agreement executed between this player and the Respondent and that, therefore, the Appellant is entitled to receive the equivalent to 25% (twenty-five percent) on the difference, between the value of the transfers (the first one to the Respondent, and second from the latter to Bayern Munich), according to the provision of section 3 of the agreement entered into by and between the parties of these appeal;*
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> *(b) to acknowledge that the rescission of the first labor agreement executed by the player and the Respondent (by mutual consent of both parties), during the period of validity originally established, with the immediate signature of a new agreement, does not affect the right invoked by the Appellant, exactly because the player's transfer to Bayern Munich have been accomplished within such period of validity, originally established by the first contract;*
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> *(c) to determine the incidence of 5% (five percent) interests per year on the total amount of the conviction, on the transfer agreed between the Respondent and Bayern Munich;*
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> *(d) to condemn the Respondent to repay to the Appellant all the costs related to the current proceeding".*

The Respondent filed its answer brief on 18 April 2005. Bayer 04 pleads that:

> *"1. The appeal of Appellant shall be rejected.*
>
> *2. The costs of arbitration shall be borne by Appellant".*

The hearing was held on 13 October 2005 at the CAS headquarters in Lausanne, Switzerland. The Panel attended the hearing, assisted by Mr Jorge Ibarrola, Counsel to the CAS. The Appellant was represented by Mr Daniel Cravo Souza, Attorney at law, Porto Alegre, Brazil. The Respondent was represented by Ms Christine Bernard, General Council, Leverkusen, Germany. Also present on behalf of the Respondent was Mr Daniel Fischer, translator.

The two witnesses heard by the Panel were S., called by the Appellant and N. called by the Respondent. The above-mentioned witnesses were heard at the hearing.

During or after the hearing the parties did not raise any objection and confirmed their satisfaction with regard to their right to be heard and to be treated equally in these arbitral proceedings.

After the parties' final arguments, the Panel closed the hearing and reserved its final award.

LAW

Jurisdiction

1. The jurisdiction of CAS, which is not disputed, derives from Art. 59 to 61 of the FIFA Statutes and art. R47 of the Code, in combination with section 7 of the Transfer Agreement. It is further confirmed by the order of procedure duly signed by both parties.

2. It follows that the CAS has jurisdiction to decide the present dispute.

Applicable Law

3. Art. R58 of the Code reads 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".

4. Then, Art. 59 para.2 of the FIFA Statutes provides as follows:

   "The CAS Code of Sports-Related Arbitration governs the arbitration proceedings. With regard to substance, CAS applies the various regulations of FIFA [...] and, additionally, Swiss law".

5. The Panel remarks that the *"applicable regulations"* are indeed all FIFA rules material to the dispute at stake, and in particular the FIFA Regulations for the Status and Transfer of Players of 5 July 2001 (the "Regulations 2001") with the related FIFA Regulations governing the Application of the Regulations for the Status and Transfer of Players (the "Application Regulations").

6. Then, the Panel notes that none of the agreements entered into by the parties contain any express choice of law.

7. Taking into account Art. 59 para. 2 of the FIFA Statutes, the application of which is agreed upon by the parties, the Panel holds that the dispute must be decided according to the applicable FIFA statutes and regulations and, complementarily, to Swiss Law.

Merits

A. Introduction

8. The issues at stake are mainly of contractual nature and, in particular, they relate to the meaning of art. 3 of the Transfer Agreement.

9. At the latest at the hearing it has been confirmed by the parties that the factual background of the dispute is, to a large extent, undisputed: among other things, it is undisputed (i) that the parties entered into the Transfer Agreement, (ii) that the Player L. and the Respondent signed a first document named "employment contract" on 2 January 2001 and a second document, also called "employment contract" on 2 May 2003 and (iii) that the Player has been transferred from the Respondent to a third club, FC Bayern Munich, per end of June 2004.

10. What is disputed among the parties is merely which are the financial consequences of the transfer of the Player to the third club, as with regard to the contractual relationship between the Appellant and the Respondent.

11. Therefore, the Panel has to answer the following questions:

- Is the transfer of the Player from the Respondent to FC Bayern Munich a transfer as defined in art. 3 of the Transfer Agreement?
- If yes, which are the consequences triggered by such a transfer?

B. Is the transfer of the Player from the Respondent to FC Bayern Munich a transfer as defined in art. 3 of the Transfer Agreement?

12. Art. 3 of the Transfer Agreement reads as follows:

"If the PLAYER is sold by BAYER during the term of the contract to be signed between them, which term not to be less than 3(three) years, BAYER shall pay INTER 25% of the difference between the transfer price than agreed and the amount herein set forth".

13. As mentioned, it is undisputed that the Player has been transferred from the Respondent to FC Bayern Munich. In other words it is undisputed that the Player has been "sold" by the Respondent, as foreseen as a first condition of the above quoted art. 3 of the Transfer Agreement. The fact that a human being cannot be "sold" in the legal meaning of such term, is, in this context, irrelevant.

14. The Respondent argues that the transfer of the Player has not taken place during the term of the first employment contract between Player and Respondent and that therefore the second condition for the applicability of art. 3 is not fulfilled.

15. It cannot be denied that art. 3 of the Transfer Agreements puts forward a second condition, which is a timing requirement of the "sale" to take place. The Respondent is supposed to pay an additional amount of money to the Appellant if *"during the term of the contract to be signed"* with the Player a transfer does take place.

16. The Panel, taking in due consideration the wording of the Transfer Agreement and after careful review of all means of evidence produced by the parties, is of the view that the purpose of the arrangement contained in art. 3 of the Transfer Agreement was nothing else that an agreement

of the parties to share potential future gains that the Respondent could have had made by "selling" the Player to a third club.

17. Clauses providing for such kind of risk-sharing and of participation of a transferring club in possible, uncertain gains obtained by the new club in the event of a further transfer to a third club, are not uncommon in international transfer agreements of professional football players. The economic rationale of such clauses is, generally, that by agreeing into such arrangement, the transferring club accepts to receive, in a first place, a lower "first" transfer fee, with the expectation of receiving an additional "fee" if the recipient club will be able to transfer, with profit, the player to a third club (see for instance CAS 2005/A/896).

18. Of course, the recipient club will not be able to transfer the player to a third club with profit, if the player's contract with the recipient club is, at that point of time, already expired and, therefore, the player is free to enter into a new contract with any new club, without any transfer fee to be paid by the third club to the former club.

19. In the present case, one can therefore argue that the timing limitation, i.e. the second condition contained in art. 3 of the Transfer Agreement, is the expression of such obvious, factual condition, since no "sale" in the meaning of art. 3 of the Transfer Agreement would have been ever possible once the contractual relationship between the Player and the Respondent had been terminated.

20. The Respondent further argued that art. 3 of the Transfer Agreement is referring to the term *"of the contract to be signed"* between the Respondent and the Player. The Respondent maintained that such, first contract was signed on 2 January 2001, but that such contract was not any more in existence when the Player was transferred to the new club, since a second, new agreement had been in the meantime concluded between the Player and the Respondent. Based on this, the Respondent believes that the conditions of art. 3 of the Transfer Agreement are not fulfilled.

21. The Panel does not share the Respondent' view, for the following reasons. First, one has to note that the "second agreement" is not a complete new agreement. The facts show that the "new" arrangement was rather a simple amendment of the existing, and continued contractual relationship. One will consider for instance that the two documents are to a very large extent identical. Only, in the second document the Player and the Respondent had agreed to include the 2. Bundesliga, to an increase of salary, and to an extension of the term. It may not have been a pure chance that in the title of the second document – "Employment Contract" – the following has been added: "Amendment to agreement", in the German, signed version even clearer: "Vertrags-Zusatz".

22. Accordingly, while, from a strictly formal point of view, it is true that two documents have been signed, it cannot be denied that the employment relationship was not a new, but rather an extended one.

23. Furthermore, the rationale of the Transfer Agreement described above makes clear that the parties' real intention was not to limit the risks and profits share arrangement to the strict

duration of a certain contract. Would this have been the case, the Respondent would have been theoretically in position to terminate a first employment agreement with the Player after even just two days, replace the terminated contract with a new one, and prevent by this the application of art. 3 of the Transfer Agreement.

24. The Panel, after having heard the parties and reviewed the evidence produced, is of the view that such a one-sided interpretation does not correspond to the real intention of the parties. Accordingly, the Panel believes that art. 3 of the Transfer Agreement is to be interpreted as a provision granting a profit share in the "sale" of the Player by the Respondent and to a third party, provided this is taking place during the contractual relationship between the Respondent and the Player, independently whether this was happening during the term determined in a first or in a later document.

25. Therefore, also the second condition for the application of art. 3 of the Transfer Agreement is fulfilled and the transfer of the Player from the Respondent to FC Bayern Munich is a transfer as defined in art. 3 of the Transfer Agreement.

C. Which are the consequences triggered by such a transfer?

26. According to art. 3 of the Transfer Agreement in the event of a transfer of the Player to a third club, *"BAYER shall pay INTER 25% of the difference between the transfer price than agreed and the amount herein set forth"*.

27. While it is clear which percentage has to be applied, i.e. 25%, less clear is which amounts shall be taken in consideration for such calculation.

28. Based on the evidence produced by the parties, it has been determined that the price paid by FC Bayern Munich to the Respondent for the transfer of the Player has been of EUR 12,000,000. This amount has to be read as being the *"transfer price than agreed"*, as stated in art. 3 of the Transfer Agreement.

29. It now remains to define, which is the amount to be deduced from the amount paid by FC Bayern Munich, taking in consideration that art. 3 of the Transfer Agreement refers simply to "the amount herein set forth".

30. Art. 2 of the Transfer Agreement reads as follows:

"As compensation for the transfer and sale of the federative rights of the PLAYER, BAYER shall pay INTER USD 8,000,000 (eight million United States Dollars), plus USD 1,200,000 (one million two hundred thousand United states Dolars) as transfer payment for the PLAYER, totaling USD 9,200,000 (nine million two hundred thousand United States Dollars)".

31. It is not clear whether the amount referred to in art. 3 does correspond to the whole amount payable by the Respondent, i.e. USD 9,200,000, or only to the amount payable to the Appellant, i.e. USD 8,000,000, the latter as argued by the Appellant.

32. The Panel notes that in some other provisions of the Transfer Agreement, like for instance in art. 2.2 the concept of *"amount herein agreed"* is used as with regard to the "full" amount, i.e. USD 9,200,000. Further, both partial amounts, i.e. the amount of USD 8 million to the Appellant and that of USD 1.2 million for the Player are defined in art. 2 of the Transfer Agreement as being amounts due for the transfer of the Player. Accordingly, since art. 3 itself is ruling a situation of transfer and is referring to "transfer price", and taking in due consideration the statements and explanations made by the parties, the Panel comes to the conclusion that the relevant amount as per art. 3 of the Transfer Agreement is the whole amount paid by the Respondent for the first transfer of the Player, i.e. USD 9,200,000.

33. Therefore, the Appellant is entitled to receive an amount equal to 25% of the difference between EUR 12,000,000 and USD 9,200,000.

34. As with regard to the exchange rate applicable, the Appellant maintained during the hearing that the amount due had to be calculated in United States Dollars. The Panel considers that this is indeed the currency of the Transfer Agreement. Therefore, and taking into consideration that the Respondent did not raise any dispute in that respect, the amount payable to the Appellant must be calculated in United States Dollars.

35. At the hearing, the parties basically agreed that if there was an exchange rate to be applied, this was to be made at the date of 1 July 2004, i.e. the effective date of the agreement relating to the transfer of the Player from the Respondent to FC Bayern Munich. Further, the parties indicated the average rate applied by the Banque Cantonale Vaudoise to be appropriate for a calculation, if any, of the conversion of Euros in United States Dollars.

36. On 1 July 2004, the average conversion rate USD/EUR applied by the Banque Cantonale Vaudoise was 1.2158 (i.e. 1 EUR = 1.2158 USD). Therefore, applying such exchange rate, the amount of EUR 12,000,000 does correspond to an amount of USD 14,589,600. Accordingly, the difference between the two transfer prices was of USD 14,589,600 minus USD 9,200,000, i.e. USD 5,389,600.

37. Based on the above grounds, the Respondent has to pay an amount equal to 25% of USD 5,389,600, i.e. USD 1,347,400.

38. The Appellant asked for default interests of 5% p.a. to be granted by the Panel, starting as from the date of the signature of the Transfer Agreement. However, no amount based on art. 3 of the Transfer Agreement was due upon signature of that agreement. Rather, the amount became payable when the Player was transferred to the FC Bayern Munich. The fact that in the contract between FC Bayern Munich and the Respondent the amount agreed for the transfer of the Player was not due at once but in three instalments is, in respect of the present dispute, irrelevant.

39. Under Swiss law, if an obligation is due, the debtor will be in default upon being reminded thereof by the creditor (art. 102 para. 1 of the Swiss Code of Obligations, "CO"). If a certain

due date was agreed upon for performance or if such a date arises from a stipulated and duly exercised notice of termination, the debtor will already be in default upon the expiration of such date (art. 102 para. 2 CO). Further, it is widely accepted under Swiss doctrine that no reminder is necessary, when, under the concrete circumstances of the case, the debtor alone can determine, when he or she must pay (cf. VON TUHR/ESCHER, Schweizerisches Obligationenrecht, Allgemeiner Teil, page 140; WIEGAND W., in: Basler Kommentar zum Schweizerischen Privatrecht, OR I, N 11 ad art. 102 CO).

40. In the present case, the Respondent was indeed the first only party being in position to determine that a certain amount was due to the Appellant, and even to calculate such amount. Accordingly, the Panel is of the view that the Respondent was in default as per the effective date of the transfer of the Player to FC Bayern Munich, i.e. 1 July 2004, representing this date the date upon which the Player was "sold" to FC Bayern Munich, in the meaning of art. 3 of the Transfer Agreement. Therefore, late payment interests equal to 5% are due as from 1 July 2004.

41. Finally, based on all the elements and the evidence produced by the parties, any other or further claims of the parties are dismissed.

The Court of Arbitration for Sport rules:

1. The appeal filed by Sport Club Internacional on 16 March 2005 is upheld in part.

2. The decision of the FIFA Players' Status Committee of 15 February 2005 is reversed, as follows:
   - Bayer 04 Leverkusen is ordered to pay to Sport Club Internacional USD 1,347,400 (one million three hundred and forty-seven thousand four hundred US Dollars), with 5% interests p.a. starting from 1 July 2004.

3. All other motions or prayers for relief are dismissed.

(…).