Arbitration CAS 2004/A/701 Sport Club Internacional v. Galatasaray Spor Kulübü Dernegi, award of 17 March 2005

Panel: Prof. Massimo Coccia (Italy), President; Mr Michele Bernasconi (Switzerland); Ms Margarita Echeverria Bermúdez (Costa Rica)

Football
Loan transfer ("co-ownership agreement")
Legality of the trade between clubs of the economic rights of a player
Legal distinction between registration of a player and economic rights
Assignment of the economic rights related to a player to different right holders

1. **Although the FIFA Regulations do not allow a player to be registered to play for two different clubs affiliated to the same or to different national associations at any given time, such FIFA provision is related only to the player's registration and does not prevent two clubs from apportioning between them the economic rights related to a player, as long as the player is under an employment contract with either team and expressly consents to such apportionment. The trade – including sale or loan – between clubs of all or part of the economic rights to the performances of a player, with the player's consent, is thus compatible with FIFA regulations, and, accordingly, a co-ownership agreement is not *per se* illegitimate or unenforceable.**

2. **A legal distinction should be drawn between the "registration" of a player and the "economic rights" related to a player: the registration of a professional player with a club and the pertinent national federation serves the administrative purpose of licensing that player and certifying that solely a given club is entitled to field him during a given period; such registration is possible only if there is an employment contract between the club and the player; then, a club holding an employment contract with a player may assign, with the indispensable player's consent, the contract rights to another club in exchange for a given sum of money or other consideration, and those contract rights may be defined as the "economic rights to the performances of the player"; this commercial transaction is legally possible only with regard to players who are under contract, since players who are free from contractual engagements – the so-called "free agents" – may be hired by any club freely, with no economic rights involved.**

3. **While a player's registration may not be shared simultaneously by different clubs – from the viewpoint of the administration of the sport, and thus of FIFA, a player can only play for one club at a time and needs a transfer certificate in order to change club –, the economic rights, being ordinary contract rights, may be partially assigned and thus apportioned among different right holders.**

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 Galatasaray Spor Kulübü Derneği ("Galatasaray" or the "Respondent") is a Turkish football club affiliated to the Türkiye Futbol Federasyonu (the "Turkish Federation") with headquarters in Istanbul, Turkey.

On 1 July 2002, by signing a "Professional Football Player Contract" (the "Employment Contract"), Galatasaray hired the Brazilian football player F. (the "Player") for a period of five years. F. was not a free agent, as the economic rights to his performances were held, with his consent, by Internacional (50%) and by a third party (50%). Accordingly, Galatasaray acquired 50% of the rights from such third party, and dealt with Internacional in respect of the outstanding portion of the rights.

On 2 July 2002, Galatasaray, Internacional, the Player and his agent signed an agreement entitled *"Convençao de Co-Propiedade"* (the "Co-ownership Agreement"), which included *inter alia* the following clauses (as translated from the Portuguese original):

> *"CLAUSE 1: The Seller, owner of 50% of the economical and sports rights over Player F., hereby authorizes the Player to sign an employment contract with the Buyer for a period of five years from the 2nd of July 2002 to the 31st of May 2007.*
>
> *CLAUSE 2: The Buyer shall have the option to buy 40% of the economical and sports rights over the Player worth USD 1,000,000.00 (one million American dollars) until the 15th of December 2002 […].*
>
> *CLAUSE 3: If the Buyer does not opt to buy the Player on the date disposed on Clause 2, the 40% of the economical and sports rights over the Player owned by the Seller shall be set at USD 3,500,000.00 (three million and five hundred thousand American dollars).*
>
> *CLAUSE 4: The sell option of 100% of the economical and sports rights over the Player shall be set at a minimum price of USD 8,000,000.00 (eight million American dollars).*
>
> *CLAUSE 5: In case of sale of 100% of the economical and sports rights over the Player to another Club, this shall pay the USD 3,500,000.00 (three million and five hundred thousand American dollars) directly to the Seller.*
>
> *CLAUSE 6 – IMPEDIMENT: The Buyer cannot sell or loan the Player without prior consent from the Seller and the negotiations shall be conducted and concluded by the Player's Agents. […]*
>
> *CLAUSE 8: If the Buyer does not exercise its option to buy the Player as disposed on clause 2, the Buyer pledges to pay the Seller the amount of USD 100,000.00 (one hundred thousand American dollars) on the 1st of July of each season, beginning on the 1st of July 2003, for the rental of 50% of the economical and sports rights over the Player belonging to the Seller.*
>
> *CLAUSE 9 – IMPEDIMENT: The Player is present on this act to agree and consent to all clauses and conditions established on the contract hereon. […]*
>
> *CLAUSE 11: Any litigation concerning the interpretation or application of the convention heron shall be submitted to the jurisdiction of F.I.F.A.".*

In short, as far as material to this case, the Co-ownership Agreement provided that Galatasaray was authorized to hire the Player for five football seasons, until 31 May 2007. The parties agreed also that Galatasaray had the option, until 15 December 2002, to purchase 40% of the rights over the Player for the price of USD 1,000,000; after such date, the price would have been of USD 3,500,000. If the said purchase option was not exercised, Galatasaray had to pay a yearly fee of USD 100,000 to Internacional for the loan of 50% of the rights over the Player. In any event, Galatasaray had the option to buy for itself or for a third club 100% of those rights at a minimum price of eight million USD.

Galatasaray did not avail itself of the option to pay one million USD and purchase 40% of the economic rights over the Player by 15 December 2002. Subsequently, Galatasaray never offered to purchase all or part of the portion of economic rights held by Internacional.

The Player concluded the 2002/03 football season playing for Galatasaray. On 3 July 2003, Galatasaray and the Player agreed upon an amendment to the Employment Contract with regard to the Player's remuneration and terms of payment. The Player started the 2003/04 football season with Galatasaray.

With a letter dated 21 October 2003, the Player communicated to Galatasaray its decision to terminate the Employment Contract due to personal and professional reasons. The day after, on 22 October 2003, the Player and Galatasaray signed a Termination Agreement *"with the purpose to terminate all existing agreements between them and in particular the labor contract signed on 1 July 2002"* and containing the terms and conditions of the termination. In particular, Galatasaray and the Player recognized that all rights and obligations arising from the Employment Contract had to be considered extinguished and that no claims could have been raised by either party with regard to their whole contractual relationship. Moreover, Galatasaray agreed *"to pay to the Player the balance amounting to 600,000 USD"* in six monthly instalments.

On 7 November 2003, Internacional filed through the Brazilian Federation a complaint before the Players' Status Committee of FIFA claiming the breach of the Co-ownership Agreement and requesting Galatasaray the payment of USD 3,500,000. On 20 May 2004, Galatasaray filed through the Brazilian Federation a response brief stating that the Co-ownership Agreement had not been breached because the Player had unilaterally terminated the Employment Contract. On 3 June 2003, Internacional replied to the response brief filed by Galatasaray.

On 20 August 2004, the Single Judge of the FIFA Players' Status Committee communicated its decision, whereby:

> *"I. The claim of the Claimant, Sport Club Internacional, is partially accepted. The Respondent, Galatasaray S.K., has to pay the amount of USD 100,000 to the Claimant;*
>
> *II. Any further claims lodged by the Claimant are rejected […]".*

The FIFA Single Judge based its decision on the following grounds:

> *"2. The Single judge considered that the parties signed a "co-ownership convention" concerning the player F. on 2 July 2002 and therefore, this case has to be judged in the light of the new Regulations for the Status and*

Transfer of Players (edition 1 September 2001). Consequently, the compensation system (art. 14 et sqq) as per the old Regulations in no longer valid under the applicable Regulations.

3. The Single Judge acknowledged that the player was transferred and that he signed an employment contract with the Respondent for the period as from 4 July 2002 until 31 May 2007, which was terminated unilaterally by the player on 21 October 2003.

4. Furthermore, the Single Judge pointed out that in accordance with the above mentioned Regulations a player is only bound to a club due to an employment contract and compensation – after the employment relation is terminated – is only owed to the previous club according to Art. 13 et sqq of the above-mentioned Regulations.

5. However, the Single Judge considered that the Respondent did benefit from the services of the player from the moment that his employment contract came into force, until the day of the cancellation of this contract on 21 October 2003. Consequently, and in the light of the signed "co-ownership convention" the Claimant has to be compensated by the Respondent for the 15 months the player played for the Respondent.

6. Therefore, the Single Judge concluded that compensation in the amount of USD 100,000 is reasonable".

In compliance with the above decision of the FIFA Single Judge, on 16 September 2004 Galatasaray paid to Internacional USD 100,000, and Internacional acknowledged the payment.

On 30 August 2004, Internacional lodged an appeal with the Court of Arbitration for Sport (CAS) against the said decision of the Single Judge of the FIFA Players' Status Committee (the "Appealed Decision").

On 8 September 2004, Internacional filed its appeal brief.

The Respondent filed its answer brief on 4 October 2004. Additional submissions were filed by the Appellant and the Respondent on 29 December 2004 and on 5 January 2005, respectively.

A hearing was held on 11 January 2005 at the office of the President of the Panel in Rome, Italy.

The only witness heard by the Panel was Mr Jorge Moreira Machado, called by the Appellant. The above witness was heard by teleconference as authorized by the President of the Panel pursuant to Art. R44.2 of the Code of Sports-related Arbitration (the "Code"). During or after the hearing the parties did not raise with the Panel any objection in respect of their right to be heard and to be treated equally in the arbitration proceedings. After the parties' final arguments, the Panel closed the hearing and reserved its final award.

Internacional submitted the following request for relief:

"(a) to reverse the decision appealed declaring that the Respondent has to pay to the Appellant the amount of US$ 3,500,000.00 (three million and five hundred thousand North-American dollars), as well the US$ 100,000.00 (one hundred thousand North-American dollars) as decided by the previously mentioned FIFA's organ, relating the indemnification resultant of the unilateral rescission of the co-ownership convention, signed between the Appellant and the Respondent, involving the transfer of the player F.; and (b) to condemn the Respondent to compensate the Appellant for all the expenditures related to this proceeding".

The Respondent contended that the Panel should reject the Appellant's motions and submits the following requests for relief:

"(i) Dismiss all of the Appellant's claims;

(ii) order the Appellant to reimburse to the Respondent the costs of Arbitration including reasonable legal and all other costs that the Respondent incurred in connection with this Arbitration".

LAW

CAS Jurisdiction

1. The jurisdiction of CAS, which is not disputed, derives from arts. 59-61 of the FIFA Statutes and R47 of the Code, in combination with clause 11 of the Contract (see above). 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. 59.2 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 of 5 July 2001 entitled "Regulations for the Status and Transfer of Players" (the "Status and Transfer Regulations") with the related "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 and the Player contain any express choice of law. Pursuant to R58 of the Code, as FIFA is a Swiss association having its seat in Zurich, *"the law of the country in which the federation […] which has*

issued the challenged decision is domiciled" is Swiss law. Art. 59.2 of the FIFA Statutes confirms that Swiss law should be applied in addition to FIFA rules.

7. Therefore, the Panel holds that the dispute must be decided according to FIFA statutes and regulations and, complementarily, to Swiss Law.

Merits

8. During the FIFA proceeding and in this arbitration, the Appellant has consistently put forward a claim for compensation based on the alleged Respondent's breach of the Co-ownership Agreement. Before examining the substance of the claim, however, the Panel must ascertain *ex officio* whether the Co-ownership Agreement is enforceable with regards to the FIFA Regulations. Indeed, the CAS could not enforce an agreement which the FIFA rules were to disallow.

A. Enforceability of the Co-ownership Agreement

9. Some doubts might be raised as to the enforceability of a contract – such as the Co-ownership Agreement – establishing the joint control of two (or more) clubs over the performances of a player, when reading art. 1.1 of the Application Regulations, which so provides: *"No player may be registered to play for two different clubs affiliated to the same or to different national associations at any given time. The registration constitutes the licence for a player to play football"*.

10. Yet, the Panel is of the opinion that such FIFA provision is related only to the player's registration and does not prevent two clubs from apportioning between them the economic rights related to a player, as long as the player is under an employment contract with either team and expressly consents to such apportionment.

11. In the Panel's opinion, a legal differentiation should be drawn between the "registration" of a player and the "economic rights" related to a player:

- the registration of a professional player with a club and the pertinent national federation serves the administrative purpose of licensing that player and certifying that solely a given club is entitled to field him during a given period; obviously, such registration is possible only if there is an employment contract between the club and the player;
- then, a club holding an employment contract with a player may assign, with the indispensable player's consent, the contract rights to another club in exchange for a given sum of money or other consideration, and those contract rights may be defined as the *"economic rights to the performances of the player"* ("economic rights"); this commercial transaction is legally possible only with regard to players who are under contract, since players who are free from contractual engagements – the so-called "free agents" – may be hired by any club freely, with no economic rights involved.

12. In accordance with the above differentiation, while a player's registration may not be shared simultaneously by different clubs – from the viewpoint of the administration of the sport, and thus of FIFA, a player can only play for one club at a time and needs a transfer certificate in order to change club –, the economic rights, being ordinary contract rights, may be partially assigned and thus apportioned among different right holders. The Panel takes comfort from the fact that its opinion is consistent with the opinion recently rendered by another CAS panel on the same issue (CAS 2004/A/635).

13. Even in case of a loan there is a clear distinction between the registration of the player (with the related transfer certificate) and the economic rights to his performances. Indeed, art. 10 of the Status and Transfer Regulations explicitly distinguishes between the registration issue (*"the loan of a player by one club to another is dealt with administratively like a transfer. An international registration transfer certificate shall therefore be issued"*) and the economic rights issue (*"The conditions governing the loan of a non-amateur player (duration of the loan, obligations to which the loan is subject) shall be regulated by concluding a separate written contract between the two clubs and the player concerned"*).

14. In view of the above, the Panel is of the opinion that the trade – including sale or loan – between clubs of all or part of the economic rights to the performances of a player, with the player's consent, is compatible with FIFA regulations. Accordingly, the Co-ownership Agreement is not per se illegitimate or unenforceable. Therefore, the Panel may adjudicate the substance of the case, i.e. it may determine whether and to what extent the Respondent has breached the Co-ownership Agreement and the Appellant is entitled to receive compensation.

B. Termination of the Employment Contract and breach of the Co-ownership Agreement

15. Under the Co-ownership Agreement the Respondent had the right, alternatively, to buy 40% of the economic rights over the Player – at different prices, depending on the date (clauses 2 and 3 of the Co-ownership Agreement) – or to find a third party who would buy them (clauses 4 and 5 of the Co-ownership Agreement). In the absence of any purchase of the Player's rights, the Respondent had to pay a yearly fee of USD 100,000 for the loan of 50% of the said economic rights (clause 8 of the Co-ownership Agreement).

16. It is undisputed that the Respondent never bought all or part of the Player's economic rights held by the Appellant, nor was under any obligation to do so. However, the Player left the club without the Appellant's consent and this circumstance gave rise to the present dispute. In this respect, the Respondent argues that the termination of the Employment Contract was unilaterally effected by the Player through the letter of 21 October 2003 (see above), while the Appellant argues that the termination was bilaterally agreed (see above).

17. The Panel is not persuaded by the Respondent's submission that the Player rescinded the Employment Contract unilaterally and that the Respondent could do nothing about it. Indeed, with the Termination Agreement dated 22 October 2003 Galatasaray formally consented to the termination of the Employment Contract. The premise of the Termination Agreement clearly states that the parties *"conclude this termination agreement with the purpose to terminate all existing agreements between them and in particular the Employment Contract signed on 1 July 2002"*. No

reference is made in the Termination Agreement to a previous communication by the Player nor to his unilateral termination of the Employment Contract.

18. In the Panel's view, even assuming that the Player terminated unilaterally the Employment Contract, by signing the Termination Agreement and by not contesting the Player's attempt to leave the club, the Respondent did accept such termination, thus rendering it bilateral anyways. In particular, in order to prove its bona fide effort to protect the rights of the Appellant, the Respondent could and should have resorted to the FIFA rules for the "maintenance of contractual stability", which provide for possible compensation or disciplinary sanctions (art. 21 *et seq*. of the Status and Transfer Regulations). Quite the opposite, the Respondent adopted immediately an acquiescent attitude towards the Player's unilateral termination, even agreeing to perform some payments in his favour.

19. The Panel is thus of the opinion that the Respondent, because of its consent to the termination of the Employment Agreement, is barred from arguing that its obligations under the Co-ownership Agreement terminated as a consequence of the termination of the Employment Agreement (see above). Indeed, the Co-ownership Agreement established a sort of joint venture between the two clubs, whereby they arranged to jointly hold title to the economic rights to the performances of the Player. As a result of their reciprocal commitments, both clubs had a duty of transparency and cooperation towards each other; in particular, neither club was in a position to lawfully hire or release the Player, or trade him to a third club, without the other club's consent.

20. In the Panel's view the Respondent, by allowing the Player to become a free agent without the Appellant's consent, breached the Co-ownership Agreement. As a result, the Panel finds, and so holds, that the Respondent must pay some compensation to the Appellant.

C. Compensation

21. As mentioned, the Co-ownership Agreement did not compel the Respondent to buy or sell to third parties the economic rights related to the Player. In the absence of any purchase or sale of those economic rights, the Respondent's was only obliged to pay a yearly fee of USD 100,000 until 31 May 2007.

22. The Panel notes that the Appellant was not able to present any evidence – for example, offers from third parties – with respect to its claim for damages in the amount of USD 3,500,000. More importantly, there is no evidence that the Appellant's share of the Player's economic rights was going to be sold at all. In the Panel's view, no damages can be awarded on the basis of a mere hypothesis.

23. The Panel is thus of the opinion that, as the only payment certainly owed by the Respondent under the Co-ownership Agreement was the yearly fee of USD 100,000, the Appellant can only claim damages in relation to the loss of such yearly fee.

24. Accordingly, the Panel finds that the unwarranted release of the Player and early termination of the Employment Contract caused to the Appellant a direct economic damage corresponding to the yearly fees that the Respondent had agreed to pay for five years, for a total amount of USD 500,000. In the Panel's opinion, the circumstance that the Respondent has not availed itself of the performances of the Player for the full five-year period is immaterial in view of the Respondent's consent to the early termination of the Player's employment.

25. As a result, the Panel holds, partially reversing the decision of the FIFA Single Judge, that the Appellant must pay to the Respondent a compensation of USD 500,000. However, as the Respondent already paid USD 100,000 to the Appellant pursuant to the Appealed Decision, the Respondent shall pay to the Appellant the sum of USD 400,000 (four hundred thousand).

The Court of Arbitration for Sport rules:

1. The appeal filed by Sport Club Internacional on 30 August 2004 is upheld in part.

2. The appealed decision issued on 9 August 2004 by the Single Judge of the FIFA Players' Status Committee is partially reversed, as follows:

3. Sport Club Internacional is entitled to keep the amount of USD 100,000 (one hundred thousand United States Dollars) paid by Galatasaray Spor Kulübü Derneği;

4. Galatasaray Spor Kulübü Derneği is ordered to pay to Sport Club Internacional USD 400,000 (four hundred thousand United States Dollars).

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

(…).