Arbitration CAS 2003/O/527 Hamburger Sport-Verein e.V. v. Odense Boldklub, award of 21 April 2004

Panel: Mr Stephan Netzle (Switzerland), President; Mr Goetz Eilers (Germany); Mr Johan Evensen (Denmark)

Football
Training compensation
Duration of the training period
Calculation of the compensation

1. **The contractual clause stating *"a) If the new club is domiciled in the EU, Norway, Iceland or Liechtenstein, the club may not claim payment of an amount from the new club in connection with change of club (hereinafter referred to as "transfer fee")* is only meant to remind the parties of the implications of the "Bosman"-decision and notably to make a distinction between the transfer fee issue and the training compensation issue.**

2. **The completion of the training period of an athlete has to be considered in view of FIFA Circular letter No 801 which states the scale, the characteristics and the level of games of clubs. The date of signature of a first non-amateur contract between a player and a club and the number of games played by the player in the "A" team of the club during a given season as well as the technical skills and speed are to be taken into consideration to determine the duration of the training period.**

3. **FIFA Circular Letter No 826 states the criterions to calculate a training compensation and indicate training compensation amounts depending on the age of the player, on the division as well as on the categories of the clubs the player is playing for. An average of the indicative amounts per season has to be calculated.**

4. **If the effective costs incurred by a club for the formation and the education of a player are allegedly lower than the ones calculated on the basis of the indicative amounts mentioned in the FIFA Circular Letter No 826 are not proven, then the indicative amounts of the Circular Letter applies.**

Hamburger Sport-Verein e.V. ("the Claimant") is a German football club and a member of "die Liga-Fussballverband e.V". which is a member of the German National Football Association (Deutscher Fussball-Bund), which is affiliated to FIFA since 1904.

Odense Boldklub ("the Respondent") is a Danish football club and a member of the Danish National Football Association (Dansk Boldspil-Union), which is also affiliated to FIFA since 1904.

The player L. registered with the Respondent from 1991 to 30 June 2002. He is a Danish citizen.

On 1 October 1996, a first non-amateur contract was entered into between L. and the Respondent.

The Claimant submitted that:

- during the 1996-1997 season, L. played 5 games with Respondent's "A"-team;
- during the 1997-1998 season, L. played 15 games with Respondent's "A"-team.

These submissions have been confirmed by the Respondent during the hearing.

On 18 November 1998, a second non-amateur contract was concluded between L. and the Respondent. It expired on 30 June 2002 and contained the following provision:

> *"If the player, after expiry of the contract, commences an engagement as a player in a new club, the following applies:*
>
> *a) If the new club is domiciled in the EU, Norway, Iceland or Liechtenstein, the club may not claim payment of an amount from the new club in connection with change of club (hereinafter referred to as "transfer fee")".*

The Claimant submitted that from season 1998-1999 to season 2001-2002, L. played every game with Respondent's "A"-team and fulfilled his contractual obligations until 30 June 2002.

During season 1998-1999, the Respondent's "A"-team was relegated to the second division.

The Claimant and L. signed a non-amateur contract dated 10 June 2002 which became effective as per 1 July 2002.

L. turned 23 years on 20 September 2002.

By fax dated 27 March 2002 addressed to FIFA, the Respondent's Counsel lodged a claim against the Claimant in the following terms:

> *"(…) I hereby kindly ask FIFA to decide a dispute between OB and Hamburger Sport-Verein e.V. (…) concerning compensation for the training and education of the player L. (…)*
>
> *It is submitted that all conditions of OB being entitled to compensation are present as*
>
> - *L. was below the age of 23, both at the time of signing the contract with HSV and at the time of starting in the club,*
> - *it is a change of clubs which takes place,*
> - *from a professional club in one country to a professional club in another,*
> - *OB has offered L. a renewal of the contract on the same financial terms as the ones which have applied so far,*
> - *The contract between L. and HSV was made after 1 September 2001".*

By fax dated 15 January 2003, the Respondent adjusted the claim lodged in the above-mentioned fax as follows:

> *"I have calculated the amount according to FIFA Circular No 826 of 31.10.2002 – Revised FIFA Regulations for Status and Transfer of Player – Training Compensation like this:*
>
> | | |
> |---|---|
> | *3 years – European category 4 – according to article 7 no. 2* | *€ 30,000* |
> | *7 years – European category ½ average – according to article 7 no. 4.a* | *€ 525,000* |
> | | *€ 555,000"* |

On 14 November 2003, the FIFA Dispute Resolution Chamber of the Players' Status Committee decided to grant the Respondent 50% of the amount requested and issued the following decision:

> *"1. The German club Hamburger Sport Verein has to pay the amount of EUR 277,500.00 to the Danish club Odense Boldklub within 30 days of notification of the present decision.*
>
> *2. If the German club Hamburger Sport Verein fails to comply with the above-mentioned deadline, an interest rate of 4.50% per year will apply.*
>
> *3. This decision may be appealed before the Court of Arbitration for Sport (CAS) within 20 days of receiving notification of this decision by contacting the court directly in writing and by following the directions issued by the CAS (…)".*

The decision was notified to the parties on 28 November 2003.

On 15 December 2003, the Claimant filed a request for Arbitration with the Court of Arbitration for Sport (CAS). It challenged the above-mentioned decision, submitting the following request for relief:

> *"1. The Court of Arbitration for Sport should annul the decision of the FIFA Dispute Resolution Chamber of Player Status Committee dating 14 November 2003.*
>
> *2. The Court of Arbitration for Sport should affirm that the Appellant is not obliged to pay any Training Compensation to the Respondent in respect of the player L.".*

On 19 January 2004, the Respondent submitted to CAS the following prayers for relief:

> *"Primary claim:*
>
> *The Appellant is held liable to pay training compensation to the Respondent amounting to €555,000.00 in accordance with FIFA's Circular Letter No. 826 of 31 October 2002 in respect of the player L..*
>
> *Alternative claim:*
>
> *The Appellant is held liable to pay a smaller amount than the amount claimed primarily in training compensation in accordance with FIFA's Circular Letter No. 826 of 31 October 2002 in respect of the player L..*
>
> *Tertiary claim:*
>
> *The Decision of the FIFA Dispute Resolution Chamber of Player Status Committee dated 14 November 2003 is affirmed".*

A hearing was held on 23 March 2004.

LAW

CAS Jurisdiction

1. Art. R27 of the Code of Sports-related Arbitration ("Code") provides that the Code applies whenever the parties have agreed to refer a sports-related dispute to the CAS. Such disputes may arise out of a contract containing an arbitration clause, or be the subject of a later arbitration agreement.

2. *In casu*, the jurisdiction of the CAS results:
   - from the Decision issued by the FIFA Dispute Resolution Chamber of the Players' Status Committee on 14 November 2003, which provided the following:
     "(…)
     3. This decision may be appealed before the Court of Arbitration for Sport (CAS) within 20 days of receiving notification of this decision by contacting the court directly in writing and by following the directions issued by the CAS (…)".
   - from the signature by the parties of the Order of Procedure in March 2004.

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

Applicable law

4. Art. R45 of the Code provides that the Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss Law.

5. In the present matter, the parties refer exclusively to the FIFA Regulations. They have not agreed on the application of any other particular law.

6. Therefore, the FIFA Regulations shall primarily apply and Swiss law shall apply complementarily.

Admissibility

7. The request for arbitration was filed within the deadline stated in the decision rendered by the FIFA Dispute Resolution Chamber of the Players' Status Committee on 14 November 2003

that is within twenty days after notification of such decision. It also complies with the requirements of Art. R38 of the Code.

8. It follows that the request for arbitration is admissible.

9. In its answer, the Respondent has raised three claims. Two of them (i.e. the claim for training compensations in excess of the training compensation as determined by the FIFA Dispute Resolution Chamber) must be considered as counterclaims. Such counterclaims are admissible if they are raised in the context of the answer to the request of arbitration (Art. R39 of the Code).

Main issues

10. The main issues to be resolved by the Panel are:

    a) Did the Respondent renounce to any training compensation in the contract signed with L. on 18 November 1998?

    b) If the answer is no, how must the training compensation be calculated?

    c) Are there any reasons to adjust the training compensation?

A. Did the Respondent renounce to any training compensation in the contract with L. signed on 18 November 1998?

11. Said contract states that *"a) If the new club is domiciled in the EU, Norway, Iceland or Liechtenstein, the club may not claim payment of an amount from the new club in connection with change of club (hereinafter referred to as "transfer fee")"* ("the quoted clause").

12. At the hearing, the Respondent argued that the "quoted clause" was directly related to the Bosman case and had no separate meaning.

13. In 1995, the European Court of Justice ruled in the Bosman case:

    "Article 48 of the EEC Treaty precludes the application of rules laid down by sporting associations, under which a professional football player who is a citizen of one Member State may not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club has paid to the former club a transfer, training or development fee".

    According to the European Commission, the decision of the European Court of Justice meant:

    "If a professional football player's contract with his club expires and if that player is a citizen of one of the Member States of the European Union, this club cannot prevent the player from signing a new contract with another club in another Member State or making it more difficult, by asking this new club to pay a transfer, training or development fee".

(http://europa.eu.int/comm/sport/key_files/circ/b_bosman_en.html)

The European Commission confirmed that the European countries involved were all 15 EU Member States and Iceland, Liechtenstein and Norway, members of the EEA (European Economic Area), because the EEA-Agreement granted workers and self-employed people the right to move and establish themselves freely within the Community (freedom of persons).

The "Bosman"-decision had immediate effect and did not provide for a transition period. This means that the judgment was applicable as of 15 December 1995.

14. The Panel agrees with the Respondent that the "quoted clause" was only meant to remind the parties of the implications of the "Bosman"-decision and that the parties to the contract signed on 18 November 1998 did not intend to go beyond the limits set by said decision, notably for the following reasons:

- The second non-amateur contract between the Respondent and L. of 18 November 1998 is a standard contract which bears the seal of the Danish Football Association. The "quoted clause" was obviously not negotiated in the particular case of L. It seems very unlikely to the Panel that the Danish Football Association recommended to all its members to give up all their possible rights and to be stricter than necessary.
- The wording of the "quoted clause" corresponds to the formula of the "Bosman"-decision as specified by the European commission. It is therefore not a coincidence that both the "quoted clause" and the "Bosman"-decision mention only the EU Member States, Iceland, Liechtenstein and Norway, but not any other countries.
- The "quoted clause" refers only to "transferbetaling" (transfer fee), which is a distinct issue from the one discussed in the present case.

15. Under these circumstances, it can be left open whether the Claimant who was not a party to the second non-amateur contract between the Respondent and L. of 18 November 1998, is entitled to enforce, in its own name, the "quoted clause" or to draw any rights thereof.

16. For all those reasons, the Panel is convinced that the "quoted clause" of the contract between the Respondent and L. does not cover the training compensation as set forth in the FIFA Regulations. Therefore, the "quoted clause" is not applicable in the present dispute and does not compromise in any way the right of the Respondent to claim training compensation.

B. How must the training compensation be calculated?

17. This case is governed primarily by the FIFA Regulations. For the implementation of the FIFA Regulations, the FIFA has issued a number of Circular Letters. Although these Circular Letters are not regulations in a strict legal sense, they reflect the understanding of the FIFA and the general practice of the federations and associations belonging thereto. Thus, the Panel considers these Circular Letters to be relevant also for the interpretation of the FIFA Regulations.

18. Art. 46 par. 3 of the FIFA Regulations provides that:

"Contracts between players and clubs concluded before 1 September 2001 will continue to be governed by the previous version of these regulations, which came into force on 1 October 1997, unless the clubs and the players expressly agree to subject their agreements signed after 5 July 2001 to these regulations".

19. FIFA Circular Letter No 826 dated 31 October 2002 further provides that:

"For greater certainty, it is reaffirmed (as already established in circular letter no. 799) that the revised regulations are applicable to all transfers of players that have occurred after the entry into force of the revised transfer regulations on 1 September 2001. All pending cases on the compensation amounts owed for the training of young players that have transferred as from 1 September 2001 are to be calculated in accordance with the present circular".

20. L. was transferred to the Claimant on 1 July 2002. As a result, the FIFA Regulations of 2001 are applicable to that transfer and its consequences, in particular to the compensation for the education and training of the player.

21. The Claimant raised the issue that FIFA Circular Letter No 826 was not applicable because it was not yet communicated on the date of the transfer of L. to the Claimant.

22. The fact that FIFA Circular Letter No 826 was not in force at the date of the transfer of L. (1 July 2002) is not decisive. Instead, it must be noted that FIFA Circular Letter No 826 was issued well before 14 November 2003, i.e. the date when the FIFA Dispute Resolution Chamber determined the trainings compensation upon request of the Respondent.

23. Furthermore, FIFA Circular Letter No 826 did not create a new obligation of the clubs which would not have existed otherwise. Said letter rather simplified and facilitated the determination of the training compensation within the framework of the Regulations and Circular Letters which existed already at the time of the transfer of L. Before that date, FIFA had communicated the relevant parameters and criteria to calculate the training compensation (FIFA Regulations governing the Application of the Regulations for the Status and Transfers of Players dated 5 July 2001, Art. 6 and FIFA Circular Letter No 799 of 19 March 2002). Thus, the Claimant must have been aware not only of the principle but also of the dimension of the training compensation.

24. In addition, if the application of the indicative amounts according to FIFA Circular Letter No 826 would have lead to a disproportionate result, the Claimant was still entitled to ask the Dispute Resolution Chamber for review, based on the actual training and education costs.

25. The Panel has no difficulty to rely on FIFA Circular Letter No 826 as a valid basis for the calculation of the training compensation. The Panel does not share the view of the FIFA Dispute Resolution Chamber that the fact that FIFA Circular Letter No 826 was not yet issued when L. and the Claimant signed the employment contract would justify an adjustment from the indicative amount.

26. The relevant provisions and guidelines for the calculation of the training compensation are the following:

Art. 13 of the FIFA Regulations

"A player's training and education takes place between the ages of 12 and 23. Training compensation shall be payable, as a general rule, up to the age of 23 for training incurred up to the age of 21, unless it is evident that a player has already terminated his training period before the age of 21. In the latter case, compensation shall be due until the player reaches the age of 23, but the calculation of the amount of compensation shall be based on the years between 12 and the age when it is established that the player actually completed his training".

FIFA Circular Letter No 826:

"Until a more definitive calculation system is put into place, FIFA has established the following indicative amounts on the basis of information received for all national associations on a confederation basis, also keeping in mind the many requests from interested parties for simplicity:

(…)

Europe:
1. Category: EURO 90,000
2. Category: EURO 60,000
3. Category: EURO 30,000
4. Category: EURO 10,000

These amounts will be used when applying the provisions contained in Chapter VII of the FIFA Regulations for the Status and Transfer of Players (hereafter "Basic Regulations"), as well as Chapter III of the Regulations governing the Application of the Regulations for the Status and Transfer of Players (hereafter "Application Regulations"), together with circular letters nos. 769 and 799, subject to the simplifications outlined below".

Art. 7 of the Regulations governing the Application of the FIFA Regulations:

"1 The compensation for training and education shall be obtained by multiplying the amount corresponding to the category of the training club for which the player was registered by the number of years of training from 12 to 21.

2 To ensure that training compensation for very young players is not set at unreasonably high levels, the amount for players aged 12 to 15 shall be based on the training and education costs for category 4.

(…)

4 However, in the EU/EEA area, compensation for training is based on the training and education costs of the country in which the training club was located. The following rules apply:

(a) the player moves from a lower to a higher category: calculation is the average of the training costs for the two categories".

FIFA Circular Letter No 801:

"The Committee was asked to determine what triggers the end of a player's training and/or education. It maintained that it is a question of proof, which is at the burden of the club that is claiming this fact. A player

who regularly performs for the club's "A" team could be considered as having accomplished his training period. This may certainly signal that the formation of a player has been completed but there may be other indications hereto. The decision on this will have to be taken on a case-by-case basis. This principle will also apply to apprentice professionals or players under a scholarship agreement".

27. L. signed his first non-amateur contract with the Respondent on 1 October 1996. During season 1996 – 1997, he played five times with the Respondent's "A"-team. During season 1997 – 1998, he was engaged more regularly and played 15 times with the "A"-team. At that time, he had already spent many years with the Respondent's club and was noticed for his good technical skills and speed. L. can therefore be considered as having completed his training period before the beginning of season 1997 – 1998, in view of the scale, the characteristics and the level of games of the Respondent's club at that time. Based on the foregoing, the Panel finds that L.'s training period started in 1991 (i.e. the season 1991 – 1992), when he first registered with the Respondent, and lasted 6 years, that is until the end of the Season 1996 – 1997.

It is undisputed that the Claimant is a first division club, belonging to category 1 under the terms of the FIFA Circular Letter No 826, for which the indicative amount of training compensation is EUR 90,000 per year. Likewise, the Respondent is a first division club, belonging to category 2, for which the indicative amount of training compensation is EUR 60,000. The average of both amounts is EUR 75,000. Between the ages of 12 and 15 years, the indicative training compensation for both the Claimant and the Respondent is EUR 10,000 per year. According to FIFA Circular Letter No 769, the period "between 12 and 15 years" as set out in Art. 7 para. 2 of the Regulations governing the Application of the FIFA Regulations must be understood as three seasons only.

28. The calculating of the training compensation is the following:

Season 91-92 – category 4	EUR 10,000
Season 92-93 – category 4	EUR 10,000
Season 93-94 – category 4	EUR 10,000
Season 94-95 – average between cat. 1 and 2	EUR 75,000
Season 95-96 – average between cat. 1 and 2	EUR 75,000
Season 96-97 – average between cat. 1 and 2	EUR 75,000
Training compensation	**EUR 255,000**

C. Are there any reasons to adjust the training compensation?

29. According to the Claimant, this amount is far too high. In its opinion, the actual training costs of the Respond must have been considerably lower and shall be reduced accordingly. According to the Respondent's primary claim, however, the training compensation must be fixed at a far higher level, namely at EUR 555'000.

30. The Panel shares the view of the FIFA Dispute Resolution Chamber that in view of the circumstances, the training compensation as initially requested by the Respondent is clearly

disproportionate. However, it does not agree with the factors which the prior instance applied. It is yet true that according to the FIFA Regulations, Art. 42 para. 1(b)(iv), the Dispute Resolution Chamber *"shall have discretion to adjust the training fee, if it is clearly disproportionate to the case under review"*. The general principle of equal treatment of the member federations requires that such adjustments must be based only on criteria established by the applicable rules and regulations.

31. FIFA Circular Letter No 826, page 2, last paragraph, states

"Any party that objects to the result of a calculation based on the rules on training compensation is entitled to refer the matter to the Dispute Resolution Chamber. The Chamber will then review whether the training compensation fee calculated on the basis of the indicative amounts and the principles of the revised regulations, as simplified below, is clearly disproportionate to the case under review in accordance with Art. 42.1.b.(iv) of the Basic Regulations, while taking into account the indicative nature of these amounts. Whenever particular circumstances are given, the Dispute Resolution Chamber can adjust the amounts for the training compensation so as to reflect the specific situation of a case. For this task the Dispute Resolution Chamber can ask for all documents and/or information it deems necessary, such as invoices, training centres, budgets, etc".

It follows that the club objecting to a training compensation calculated on the basis of the indicative amounts mentioned within the FIFA Circular Letter No 826 is entitled to prove that such compensation is disproportionate on the basis of concrete evidentiary documents, such as invoices, costs of training centers, budgets, etc. In the absence of sufficient evidence, the indicative amount applies.

32. The Panel finds that the Claimant has not proven that the effective costs incurred by the Respondent for the formation and the education of L. were lower than the ones calculated on the basis of the indicative amounts mentioned in the FIFA Circular Letter No 826. The Claimant argued primarily that only a very short period of time elapsed between the 1 July 2002, date at which the new contract between the Claimant and the player entered into force and 20 September 2002, date at which L. reached the age of 23. The Claimant's submission is a distinct issue and therefore irrelevant as far as the real and effective training costs incurred by the Respondent for the formation and the education of L. are concerned. The fact that the contract between the Claimant and L. entered into force only 82 days prior to the latter's 23rd birthday is not, in law, a correct criterion, as only economic factors may be taken into account and not time factors when a decision has to be taken whether or not the indicative amounts in the FIFA Circular Letter No 826 are excessive (see CAS 2003/O/500 of 24 February 2004).

33. Nor do the FIFA Regulations or the Circular Letters contain any provision according to which the training compensation must be split between the old and the new club if the education of the player is completed before his 21st birthday but continues to play for the old club (see also the example in FIFA Circular Letter No 769). The fact that the education was terminated before the 21st birthday may lead to a shorter education period to be compensated by the new club but not to an adjustment because of an alleged "benefit" of the player's service for the old club. The Panel finds therefore that the fact that *"L. concluded his first non-amateur contract with the Respondent already on 1 October 1996 and (has) permanently played with the "A"-team during the last five and a half seasons"* does not justify any deduction from the training

compensation, but is already sufficiently reflected in the reduced education period as set out in para. 27 above.

34. On the other hand, the Respondent has not brought forward any factual arguments in support of its primary claim, namely that the trainings compensation must be augmented to EUR 555,000. The Respondent has contented itself with a reference to the general assumption according to which the education is considered to be completed at age 21 (Art. 13 of the FIFA Regulations). It has not submitted any evidence which demonstrated that the Respondent continued to invest in the player's education after he started to play regularly with the "A"-team. In the absence of such evidence, also the salary of the player must be regarded as reflecting his actual market value and not as an investment. The claim of a higher education compensation than EUR 255'000 is therefore unfounded.

35. Based on the foregoing, the Panel reached the conclusion that the training compensation to be awarded to the Respondent shall thus amount to EUR 255,000.

36. Since no interest on the training compensation has been claimed for in the Respondent's written submissions, the training compensation is awarded without interest.

Confidentiality

37. Art. R43 of the Code provides as follows:

"Proceedings under these Procedural Rules are confidential. The parties, the arbitrators and the CAS undertake not to disclose to any third party any facts or other information relating to the dispute or the proceedings. Awards shall not be made public unless the award itself so provides or all parties agree".

38. In the present case, the parties have agreed at the hearing, to waive their respective confidentiality duties. As a consequence, the present proceedings shall not be confidential and the award will thus be made public.

The Court of Arbitration for Sport rules:

1. The motions in the request for arbitration filed on 15 December 2003 by Hamburger Sport-Verein e.V., in connection with the decision issued on 14 November 2003 by the FIFA Dispute Resolution Chamber of The Players' Status Committee, are dismissed.

2. The counterclaims filed by Odense Boldklub in its prayers for relief dated 19 January 2004 are also rejected.

3. Hamburger Sport-Verein e.V. is ordered to pay Odense Boldklub the sum of EUR 255,000 (two hundred and fifty-five thousand Euros) as training compensation for the player L. within 30 days of the notification of the present award.

(…)