CAS 2007/A/1219 Club Sekondi Hasaacas FC v. Club Borussia Mönchengladbach, award of 9 July 2007

Panel: Mr Michele Bernasconi (Switzerland), Sole Arbitrator

Football
Transfer agreement
Temporary transfer
Distinction between a loan agreement and a final transfer
Application of the sell-on clause agreed by the parties in a transfer agreement

1. **A transfer cannot be qualified as temporary only because there is allegedly a unilateral option clause allowing, theoretically, the former Club to possibly extend its contract with the Player. In addition, the validity and enforceability of such an option clause is disputed under Swiss law. In other words, even if the former Club had exercised its option in a timely manner, the Player could have possibly contested the extension of the contract and thus his obligation to return to the former Club. This situation does hardly differ from a typical, final transfer of a player, who is joining a club after his former employer accepted the early termination of their contractual obligations against a financial compensation. Accordingly, the former club cannot derive any right from the alleged temporary nature of the particular transfer of the Player.**

2. **When the transfer of the Player in loan is, in many ways and in particular from an economical point of view, very much equivalent to a final transfer: the former club received a fairly substantial fee, the Player was transferred up until the expiry of his contract with the former club and the former club did not have any obligations towards the Player during the loan period and, finally, the Player moved to another club, the new agreement entered into being denominated "transfer agreement", there would have been no difference if the transfer was to be a final transfer and not a loan.**

3. **When the sell-on clause inserted in a Transfer Agreement does not specify whether the transfer triggering the right of the former club to a certain sum is only a final transfer or not, it is hardly imaginable that the mutual consent of the parties is to limit such right to a final transfer and to exclude any transfer which was structured as a loan but was de facto in many ways similar and equivalent to a final transfer.**

Club Sekondi Hasaacas FC is a football club with its registered office in Takoradi, Ghana ("the Appellant"). It is a member of the Ghana Football Association, which has been affiliated to the Fédération Internationale de Football Association (FIFA) since 1958.

Club Borussia VfL 1900 Mönchengladbach is a football club with its registered office in Mönchengladbach, Germany ("the Respondent"). It is a member of the Deutscher Fussball-Bund (DFB), itself affiliated to the FIFA since 1904.

On 15 October 1999, the parties signed an agreement (the "Transfer Agreement") regarding the transfer of the player L. ("the Player") from the Appellant to the Respondent. This document reads as follows where relevant (as translated into English by the Appellant):

> *"Subject of this contract is the transfer of the player L., born on 14.01.1982, from Sekondi to Borussia Mönchengladbach, where he is going to sign a contract as amateur player under contract.*
>
> *(…)*
>
> ***§4***
>
> *In case that the player L., born on 14.01.1982, and Borussia sign a legally valid professional player contract and the player L. takes up this contract Borussia will pay Sekondi a transfer amount of*
>
> *US-$ 95.000.- (…)*
>
> *The claim of payment will become due when L. is entitled to play as professional player and the International Transfer Certificate (I.T.C.) has come in to Borussia Mönchengladbach.*
>
> *In case that L. will be transferred from Borussia to another club within his time as professional player, Sekondi will receive 15% of the net transfer fee resulting from this transfer.*
>
> ***§5***
>
> *This contract goes by the rules of the German Football Association (DFB) and the relevant rules of UEFA and FIFA.*
>
> *(…)*
>
> ***§ 9***
>
> *Exclusive court of jurisdiction and place where this contract is to be fulfilled is for both parties of this contract Mönchengladbach".*

The German original text of para. 4 of the Transfer Agreement reads as follows:

> *"Unterzeichnen der Spieler L. und Borussia einen rechtsgültigen Lizenzspielervertrag bei der Borussia und tritt er diesen an, so erhält Sekondi Hasaakas mit der Lizenzspielberechtigung für diesen Spieler eine Transferentschädigung in Höhe von US$ 95,000.-- (...).*
>
> *Diese Transfersummer ist gegen Vorlage einer Rechnung mit Wirksam werden der Lizenzspielberechtigung von L. und dem Ausstellen des International Transfer Certificate (I.T.C.) durch Sekondi fällig.*
>
> *Sollte L. in seiner Zeit als Lizenzspieler von der Borussia zu einem anderen Verein transferiert werden, so erhält Sekondi 15% der sich aus diesem Wechsel ergebenden Netto-Transfersumme".*

It is undisputed that the Respondent and the Player signed the following three labour agreements:

- a first contract valid from 27 September 1999 to 30 June 2001;

- a second contract effective from 1 July 2001 to 30 June 2003;
- an agreement extending the second contract to 30 June 2005. This document had an option clause which allowed the Respondent to unilaterally prolong the contract for the sporting seasons 2005/2006 and 2006/2007. This option was exercisable until 31 May 2005 by means of a letter sent to the Player.

On 12 January 2004, the Respondent signed with 1. FC Nürnberg a document with the following heading (as freely translated into English) *"Transfer Agreement"*. The main characteristics of this contract can be summarised as follows:

- The Respondent accepted to loan the Player to 1. FC Nürnberg from 12 January 2004 to 30 June 2005 (Section 1 of the preamble, sections 2 and 4 of article 1 as well as article 3).
- 1. FC Nürnberg committed itself to sign a labour agreement with the Player as from 12 January 2004 until 30 June 2005 and, for the same period, to insure the latter against accidents (Section 3 of the preamble, sections 1 and 3 of article 2).
- The transfer compensation to be paid to the Respondent varied depending on whether 1. FC Nünrnberg was qualified for the first or for the second league during the season 2004/2005. If the club was qualified for the second league, the compensation was of EUR 125,000. If it was qualified for the first league, the compensation was of EUR 200,000. The compensation was due on 1 July 2004 (Article 3).
- Section 1 of article 4 states that the Player was to return to the Respondent at the end of June 2005, in order to carry out his contractual obligations with the Respondent.
- 1. FC Nürnberg could unilaterally decide to enter into a labour agreement with the Player for the period running after 30 June 2005 (Sections 2 ff. of article 4). This option was exercisable until 30 April 2005 by means of a letter sent to the Respondent. Section 4 of article 4 reads as follows (as freely translated into English):

  "In case Nürnberg exercises this option before 30.04.2005, Nürnberg must pay to Borussia a further transfer compensation of EUR 1,500,000 (…) (minus the lending fee already paid according to article 3, section 1 or 2)".

It is undisputed that 1. FC Nürnberg entered into a labour contract with the Player, effective from 12 January 2004 until 30 June 2005 and that it paid to the Respondent a net sum of EUR 200,000 in accordance with article 3 of the agreement signed on 12 January 2004.

Neither the Respondent nor 1. FC Nürnberg extended their contractual relationship with the Player after 30 June 2005. Later on, after the expiry of his contract with 1. FC Nürnberg, the Player signed a new contract with the German club Energie Cottbus.

On 5 October 2004 and on the basis of para. 4 ("the sell-on clause") of the Transfer Agreement dated 15 October 1999, the Appellant informed the Respondent of its intention to claim the payment of a share of 15% of the net fee paid by 1. FC Nürnberg for the transfer of the player L.

On 25 November 2004, the Respondent informed the Appellant that the Player was actually loaned to 1. FC Nürnberg and that it had not received any payment at that time.

On 10 June 2005, the Appellant made its submission to the FIFA's competent body. It claimed an amount of EUR 30,000, which was the sum equivalent to 15% of the net fee received by the Respondent for the transfer of the Player to 1. FC Nürnberg.

On 26 September 2006, the Single Judge of the FIFA Players' Status Committee reached the conclusion that the sell-on clause as agreed by the parties, did not apply to the loan of the Player. As a result, he decided the following:

> *"1. The claim of the Ghanaian club Sekondi Hasaacas FC is rejected.*
>
> *2. According to art. 61 par. 1 of the FIFA Status this decision may be appealed before the Court of Arbitration for Sport (CAS). The statement of appeal must be sent to the CAS directly within 21 days of receiving notification of this decision (…)".*

On 5 January 2007, the Appellant was notified of the decision issued by the Single Judge of the FIFA Players' Status Committee ("the Decision").

It is undisputed that to date, the Respondent has not paid any amount to the Appellant in connection with the sell-on clause.

On 26 January 2007, the Appellant filed a statement of appeal with the Court of Arbitration for Sport (CAS).

On 2 February 2007, the Appellant filed its appeal brief.

On 26 February 2007, the Respondent filed an answer.

The parties agreed to waive a hearing, which the Sole Arbitrator decided not to hold.

LAW

1. The jurisdiction of CAS, which is not disputed, derives from articles 60 ff. of the FIFA Statutes and article R47 of the Code of Sport-related Arbitration (the "Code"). It is further confirmed by the order of procedure duly signed by the parties.

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

3. Under article R57 of the Code, the Sole Arbitrator has the full power to review the facts and the law.

4. Article R58 of the Code provides the following:

   "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".

5. Article 60 par. 2 of the FIFA Statutes provides *"[t]he 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".*

6. Para. 5 of the Transfer Agreement dated 15 October 1999 only provides that *"[t]his contract goes by the rules of the German Football Association (DFB) and the relevant rules of UEFA and FIFA".* The wording of this provision does not allow considering that it establishes an election of a particular national law. Therefore, the Sole Arbitrator is of the opinion that the parties have not agreed on the application of any specific national law. He is comforted in his position by the fact that, in their respective submissions, the parties refer exclusively to FIFA's regulations. As a result, subject to the primacy of applicable FIFA's regulations, Swiss Law shall apply complementarily.

7. The appeal was filed within the deadline provided by the FIFA Statutes and stated in the decision of the Single Judge of the FIFA Players' Status Committee. It complied with all other requirements of article R48 of the Code.

8. It follows that the appeal is admissible.

9. The issue to be decided upon is whether para. 4 of the Transfer Agreement dated 15 October 1999 applies to the compensation paid by 1. FC Nürnberg to the Respondent for the transfer of the player L.

10. The parties do not agree with the meaning of para. 4 of the Transfer Agreement dated 15 October 1999, which provides that *"In case that L. will be transferred from Borussia to another club within his time as professional player, Sekondi will receive 15% of the net transfer fee resulting from this transfer".* The Appellant is of the opinion that this provision applies to any transfer of the Player whereas the Respondent asserts that it should only apply to a definitive transfer.

11. Pursuant to article 1 of the Swiss Code of Obligations, a contract requires the mutual agreement of the parties. This agreement may be either express or implied.

12. When the interpretation of a contract is in dispute, the judge seeks the true and mutually agreed upon intention of the parties, without regard to incorrect statements or manner of expressions used by the parties by mistake or in order to conceal the true nature of the contract (Article 18 par. 1 of the Swiss Code of Obligations). When the mutually agreed real intention of the parties cannot be established, the contract must be interpreted according to the requirements of good faith (ATF 129 III 664; 128 III 419 consid. 2.2 p. 422). The judge

has to seek how a declaration or the external manifestation of a party could have been reasonably understood dependent upon the individual circumstances of the case (ATF 129 III 118 consid. 2.5 p. 122; 128 III 419 consid. 2.2 p. 422).

13. The requirements of good faith tend to give the preference to a more objective approach. The emphasis is not so much on what a party may have meant but on how a reasonable man would have understood his declaration (ATF 129 III 118 consid. 2.5 p. 122; 128 III 419 consid. 2.2 p. 422).

14. In determining the intent of a party or the intent which a reasonable person would have had in the same circumstances, it is necessary to look first to the words actually used or the conduct engaged in. However, the investigation is not to be limited to those words or the conduct even if they appear to give a clear answer to the question. In order to go beyond the apparent meaning of the words or the conduct by the parties, due consideration is to be given to all relevant circumstances of the case. This includes the negotiations, any subsequent conduct of the parties and usages.

15. To agree on a sell-on clause as the parties did in the Transfer Agreement, is a quite standard practice in the world of professional football. It is in particular often used in transfers like the one here at stake, involving a club of the level of the Appellant on one side and a club like the Respondent that is a member of a major league on the other side. Such transfers of a fairly unknown player from a "small league" to a "top league" club give a chance to the player's talents to be put in evidence and to increase accordingly his market value. Under such circumstances transferring clubs are often willing to accept a rather small "fixed price", if they are given through a sell-on clause the possibility to benefit from a later increase in the value of the player. The sell-on clause also allows the receiving club not to pay at once a too high transfer fee in case the player gets injured or his talent does not develop as expected. It is certainly true, as indicated by the Respondent, that often sell-on clauses are referring to "real", i.e. final transfers, as triggering element for a participation of the original club in the increase of the value of the player. But of course the parties of a transfer agreement are free to decide on a case by case basis on which terms a sell-on clause shall be triggered.

16. In the Transfer Agreement dated 15 October 1999, the parties expressly divided Mr L.'s transfer fee in two parts. One part was a fixed amount of USD 95,000 payable in one instalment and the other part was a share of the fee resulting from the Player's subsequent transfer. The original German text speaks of "transfer to another club" (*"…zu einem anderen Verein transferiert werden…"*) and also to "change of club" (*"…15% der sich aus diesem Wechsel ergebenden Netto-Transfersumme…"*).

17. The Appellant does, as mentioned, consider a transfer in loan as being a "transfer" as per para. 4 of the Transfer Agreement.

18. The Respondent's main argument is that the Player was not transferred but was actually loaned to another club. In its opinion, the sell-on clause does not cover loans, which are only temporary transfers, but only final, definitive transfers.

19. The Sole Arbitrator observes that the Respondent is opposing to the Appellant the terms of an agreement – the one between the two German clubs – to which the Appellant was not a party. It may be added in this respect that based on the evidence produced by the parties, the Respondent has never informed spontaneously the Appellant of the negotiations, conclusion or existence of the transfer agreement between the Respondent and the 1. FC Nürnberg.

20. The real nature and the real intentions of the Respondent and the 1. FC Nürnberg in connection with the contract dated 12 January 2004 are not clear. Can the transfer of the Player from the Respondent to the 1. FC Nürnberg really be qualified as temporary? In the facts, the Player has never returned to the Respondent, nor the Respondent has used, or tried to use, any unilateral right it may have. Further, the third employment contract between the Player and the Respondent was a fix-term agreement effective until 30 June 2005. The Respondent transferred the Player to 1. FC Nürnberg for a period of time which also expired on 30 June 2005. Can such a transfer be qualified as temporary only because there is allegedly a unilateral option clause allowing, theoretically, the Respondent to possibly extend its contract with the Player?

21. First, the Respondent did not use such unilateral option. Second, the validity and enforceability of such an option clause is disputed under Swiss law (ATF 108 II 115; WYLER R., Droit du Travail, Berne 2002, p. 322; ATF 123 III 246; TERCIER P., Les Contrats Spéciaux, 3ème édition, 2003, N. 3312, p. 482). In other words, even if the Respondent had exercised its option in a timely manner, the Player could have possibly contested the extension of the contract and thus his obligation to return to the Respondent. It can be left open whether German law – if applicable – would lead to the same result, although the literature leads one to think so (see the references in PORTMANN W., Einseitige Optionsklauseln in Arbeitsverträgen von Fussballspielern, eine Beurteilung aus der Sicht der internationalen Schiedsgerichtsbarkeit im Sport, Causa Sport 2/2006, 5.2 a).

22. The club 1. FC Nürnberg paid EUR 200,000 to the Respondent in order to be able to register the Player with its team as from 12 January 2004 to June 2005. For the same period, it also insured the Player and signed a labour agreement with him. Consequently, it paid for the Player's salary, which was then not supported by the Respondent any more. The transfer fee of EUR 200,000 had obviously no other purpose than to compensate the Respondent for the loss of the Player's services.

23. The present situation is very common and in the present case does hardly differ from a typical, final transfer of a player, who is joining a club after his former employer accepted the early termination of their contractual obligations against a financial compensation. Accordingly, the Sole Arbitrator cannot see how the Respondent can derive any right from the alleged temporary nature of the particular transfer of the Player to 1. FC Nürnberg. Against this background, one can say that the transfer of the Player in loan from the Respondent to the 1. FC Nürnberg was, in many ways and in particular from an economical point of view, very much equivalent to a final transfer: the Respondent received a fairly substantial fee (in particular if compared to the fixed transfer fee paid to the Appellant), the

Player was transferred up until the expiry of his contract with the Respondent and the Respondent did not have any obligations towards the Player during the loan period. Finally, the Player changed his club, leaving the Respondent for the 1. FC Nürnberg, and the 1. FC Nürnberg and the Respondent called the agreement entered into "transfer agreement". What would have been different, if the transfer was to be a final transfer and not a loan?

24. Additionally, if one wants to determine the understanding that a reasonable person would in good faith attribute to the Transfer Agreement, the following should be noted:

25. The only conditions for the sell-on clause regarding the Player as contained in the Transfer Agreement to be triggered were the following:
    - L. is playing as a professional player for the Respondent;
    - the Respondent transfers the Player to another club;
    - the Appellant receives a compensation equal to 15% of the sum that the Respondent is receiving out of the change of club of the Player.

26. It has been established that the Transfer Agreement was drafted by the Respondent According to Swiss law and to the principle of *"in dubio contra stipulatorem"*, in case of ambiguity, the interpretation unfavourable to the author has to be adopted for he had it in his power to make his meaning plain (ATF 99 II 75ff; 100 II 153 ff.). The Respondent cannot submit that if *"(…) the parties intended the appellant to be entitled to participate in the fee, even for a mere loan, they would and indeed should have expressed* ***this*** *specifically, by making – supplementary – use of the term "loan"*.

27. The Transfer Agreement does not specify whether the transfer triggering the right of the Appellant to a certain sum is only a final transfer or not. In view of the Sole Arbitrator, it is hardly imaginable that the mutual consent of the parties was to limit such right to a final transfer and to exclude any transfer which was structured as a loan but was de facto in many ways similar and equivalent to a final transfer like the one from the Respondent to the 1. FC Nürnberg.

28. Under such circumstances, the argument of the Respondent, that under such an interpretation the Appellant would have potentially the right to claim repeatedly the 15% portion of a loan fee, is not convincing.

29. It results from the above-mentioned reasons, based on the evidence produced by the parties, on the words used by the parties and on the circumstances of the present case and of the specific transfer of the Player to the 1. FC Nürnberg, that the sell-on clause of the Transfer Agreement dated 15 October 1999 applies to that transfer.

30. Consequently, the Appellant is entitled to 15% of the net profit realized by the Respondent from Mr L.'s transfer to the 1. FC Nürnberg and must therefore be awarded EUR 30,000.

31. With regard to the interest and in the absence of a specific contractual clause, the Sole

Arbitrator can only apply the legal interest due pursuant to article 104 of the Swiss Code of Obligations. This provision foresees that the debtor, on notice to pay an amount of money, owes an interest at the rate of 5 % per annum.

32. Regarding the *dies a quo* for the interest, the Appellant submits that the interest of 5% shall be incurred as from 1 August 2004. The Appellant did not submit any evidence that a formal notice to pay was sent to the Respondent at that date. On the contrary, the first contact between the parties regarding the payment based on the sell-on clause took place on 5 October 2004. At that time, the Appellant only informed the Respondent of its intention to claim the payment of a share of 15% of the net fee paid by 1. FC Nürnberg for the transfer of the player L. Under those circumstances and absent any other evidence, the Sole Arbitrator holds that there was no notice to pay until 10 June 2005, when the Appellant brought the case before the FIFA's competent body. As a consequence, the interest of 5% shall be calculated as from 11 June 2005.

33. All other prayers for relief are rejected.

The Court of Arbitration for Sport rules:

1. The appeal is partially upheld.

2. The appealed decision issued on 24 September 2006 by the Single Judge of the FIFA Players' Status Committee is annulled.

3. Club Borussia VfL 1900 Mönchengladbach is ordered to pay to Club Sekondi Hasaacas FC the amount of EUR 30'000 (thirty thousand Euros), plus interest at 5% (five percent) as from 11 June 2005.

4. (…).