Arbitration CAS 2004/A/797 Confederação Brasileira de Futbol (CBF) v. Bayer 04 Leverkusen Fussball, award of 25 January 2006

Panel: Mr Jan Paulsson (France), President; Mr Paulo Roberto Murray (Brazil); Mr Goetz Eilers (Germany)

Football
Solidarity contribution
Absence of normative effect of a FIFA circular
5% figure as absolute requirement or as ceiling of the solidarity contribution

1. **The role of a circular is to assist in understanding rules which already exist. The notion that a circular may create certain rights is inconsistent with its role as merely interpretive.**

2. **The simple reference to "5%" instead of "up to 5%" in Article 25 of the FIFA Regulations for the Status and Transfer of Players does not reveal an intent that in all cases the solidarity contribution must attain that proportion of the transfer fee. Many examples confirm in a compelling manner that one cannot possibly accept that the 5% figure was intended as an absolute requirement rather than a ceiling. The inference is overwhelming that it is the latter.**

This is an appeal from a decision dated 26 November 2004 of the FIFA Dispute Resolution Chamber. The appeal to CAS was filed in timely fashion, and both parties accept that CAS has jurisdiction pursuant to Art. 59ff of the FIFA Statutes and R47 of the Code of Sport-related arbitration (the "Code"), and that the Panel has full authority to review issues of fact and law.

Invoking Art. 44 of the FIFA Regulations for the Status and Transfer of Players, edition 2001 (the "Regulations"), Bayer 04 Leverkusen Fussball GmbH ("Leverkusen") initially took the position that the appeal should be considered inadmissible on the grounds that the original claim before the FIFA Chamber had been filed out of time. Upon disclosure of a copy of CBF's original complaint, this objection was withdrawn.

After the receipt of written pleadings and evidence, the Panel conducted a hearing in Lausanne on 20 September 2005 when the parties' counsel made oral submissions and answered questions from the Panel. No witnesses were called.

CBF claims that it is entitled to a share of the "solidarity contribution" required under the FIFA Regulations with respect to international transfers, which (it says) is 5% of the transfer fee of USD

8.5 million paid by Leverkusen to São Paolo on account of the player Françoaldo Sena de Souza, commonly known as "França".

The share of the solidarity contribution claimed by CBF arises from the period from 2 March 1988, França's 12th birthday, to 10 October 1992, when he was first registered by a club, Nacional Futebol Club, at age 16. During that period, CBF explains, França's career "cannot be traced back" to any club.

The principle asserted by CBF is that a national association is entitled to a share of the solidarity contribution on account of years during which it is not possible to identify any clubs having trained a given player.

The FIFA Dispute Resolution Chamber rejected the claim on the ground that it had no basis in either Article 25 of the Regulations or Articles 10 and 11 of the Application Regulations. The Chamber distinguished this form of compensation from that relating to training, as provided for in Article 19 of the Regulations and Article 8(d) of the Application Regulations. The Chamber rejected the CBF's attempt to rely on FIFA Circular No. 769, which the Chamber said had been mistaken in referring to the possible right of associations to receive solidarity contributions.

Article 25 of the Regulations provides that:

> *"if a non-amateur player moves during the course of a contract, a proportion (5%) of any compensation paid to the previous club will be distributed to the clubs involved in the training and education of the player".*

Article 10 of the Application Regulations goes on to provide that:

> *"this solidarity contribution shall be apportioned between the clubs concerned according to the age of the player at the time they provided him with training and education".*

Circular No. 769 was addressed to the national associations affiliated with FIFA by the FIFA General Secretary. Under heading 4 ("solidarity mechanism"), at page 15, the following statement appears:

> *"If the career of the player cannot be traced back to the age of 12, the amount for any 'missing years' will be distributed to the national association of origin of the player and be ear-marked for the training of young players".*

It is undisputed that Leverkusen has paid solidarity contributions to França's Brazilian clubs. The problem arises with respect to his "untraceable" years, and the crucial issue of the normative status of the quoted passage from Circular No. 769.

CBF argues that Circular No. 769 *"does not annul FIFA Regulations, does not change its content and does not impose any obligations different from those provided by FIFA Regulations"*. CBF goes on to say that if Circular No. 769 is not applied as written, the spirit or *ratio legis* of the solidarity contribution would be violated in this case because a proportional division among França's three Brazilian clubs – excluding the "untraceable" years – would result in a 2.75% solidarity contribution, whereas the Regulations require the full 5% of the transfer fee, and not "up to" 5%.

CBF develops its notion of the *ratio legis* as follows:

> *"The purpose of the solidarity mechanism institute is to compensate (with the percentage of 5%) the entities responsible for training and educating young players. Considering that most of the entities where players start their activities (public schools, neighbourhood fields, social clubs, public facilities etc.) are not eligible to claim the solidarity mechanism, due to the fact that they are not affiliated to any national association, Circular No. 769 recognized that the national associations should have the right to claim the solidarity mechanism.*
>
> *Therefore, the national associations that claim the solidarity contribution actually claim on behalf of such non-affiliated entities. The evidence is that, differently from what occurs with the solidarity contribution received by clubs, <u>in case of national associations</u>, the regulations establishes that <u>the amounts received in connection with the distribution of solidarity contribution shall be exclusively 'ear-marked for the training of young players'</u>".*
>
> *(emphasis in the original)*

Considering that the definition of the solidarity mechanism in the Regulations is, in its words, *"very short, poor and vague"*, CBF contends that Circular No. 769 must be accepted *"as an authentic instrument for the interpretation of the Regulations"*.

Leverkusen counters with what one might call an anti-*ratio legis*, i.e. reasons why it should *not* be assumed that the FIFA rule-makers wished to achieve the consequences that would stem from the concept set down in Circular No. 769. If a player was not trained at all in his earliest years, Leverkusen argues, there was no cost that merits compensation. Or if he was trained by clubs or educational institutions not affiliated with the association, *"the compensation payments cannot benefit those who have rendered the corresponding services"*, since it is "in the nature" of an association to act only in the interest of its members.

LAW

1. This is a debate which is appropriate for policy-makers and legislative bodies, not for a tribunal mandated to decide on legal grounds. Nor is it a debate susceptible of resolution in the form of a rule by the Secretary General of FIFA; the Executive Board holds that exclusive authority.

2. The burden of demonstrating the existence of an entitlement surely falls on the party seeking to rely upon it: *actori incumbit probatio*.

3. CAS has no power to legislate. The *ratio legis* proposed by CBF might have been, and still might be, appealing to the rule-makers. But CAS is not authorised to usurp their place. And indeed the reader of the lengthy Circular No. 769 (21 single-spaced pages) should have no difficulty in understanding the point made in its very first paragraph: *"This circular will summarize and explain the main points of the new regulations"*. To summarize or explain is to assist in

understanding rules which already exist. There can be no question of creating rights or obligations. Moreover, in its conclusion Circular No. 769 explains the transitional arrangements involved in connection with "the new regulations" coming into force on 1 September 2001. There is no reference to the "coming into force" of Circular No. 769, thus confirming that it is not an autonomous source of binding rules.

4. Insisting nevertheless on the normative effect of Circular No. 769, CBF relies on the proposition that the FIFA Dispute Resolution Chamber, in a previous case involving two clubs, based its decision on another Circular, namely No. 826. The question in that case was the duty of the club paying the transfer fee to retain the percentage representing the solidarity contribution.

5. A crucial difficulty with CBF's appeal, however, is its own contention that *"it is absolutely clear that [Circular No. 769] granted national associations with the right to receive the solidarity contribution"*. The notion that a Circular may create (i.e. grant) certain rights is inconsistent with its role as merely interpretive. The precedent involved regarding Circular No. 826 (which at any rate is not binding on this Panel) appears to have concerned the *practical procedure* for ensuring that the Regulations were given effect, and not the creation of autonomous substantive rights and obligations.

6. Nor did the CBF find itself on persuasive ground when its written submissions invited the CAS Panel to decide this case on the assumption that the simple reference to "5%" instead of "up to 5%" revealed an intent that in all cases the solidarity contribution must attain that proportion of the transfer fee. Leverkusen invokes a number of imaginable situations in which it would be absurd to insist that a full 5% be payable. For example, if one previous club failed to assert its entitlement, and allowed the time-limit for raising claims to lapse, why should other claiming clubs suddenly be given a windfall? And if a player was transferred internationally at age 19, why should the solidarity contribution be computed as though the maximal 11 years of training and education had been provided? Under Art. 10 of the Application Regulations, which defined the tranches to be aggregated, 40% of the compensation will not have vested in the case of a player of that age. Or, yet again, what if a player's record is perfectly traceable to a particular club, but that club has gone out of existence? Then the explicit precondition of non-traceability contemplated in Circular No. 769 would not be extant. Each of these examples confirms in a compelling manner that one cannot possibly accept that the 5% figure was intended as an absolute requirement rather than a ceiling. The inference is overwhelming that it is the latter.

7. Answering questions from the Panel, counsel to CBF in his very able oral presentation conceded in good faith that there is no absolute duty for a transferee club to pay a 5% solidarity contribution in cases where the player was transferred before all of the eleven annual tranches following his 12th birthday had been accumulated. The transfer of an 18 year old player would attract only one-half of the 5%.

8. If the amount of the solidarity contribution may be less than 5%, depending on the number of seasons a player has trained with a club, and it is thus established that the Regulations do

not impose a full 5% contribution in each case, how can it be said – contrary to the explicit reference to "clubs" in Article 25 of the Regulations and Article 11 of the Application Regulations, that the entitled of *national associations* to receive compensation on account of untraceable years is an implication necessary to fulfill the purpose of Article 25? This is the central argument of CBF. It is unpersuasive. Looking at Articles 25 of the Regulations and 11 of the Application Regulations, a receiving club would draw the conclusion that it was required to retain only such amounts as corresponded to years of training with previous clubs. To require such a club to set aside a greater amount to be paid to national associations on account of untraceable years would be to create an additional obligation. This could not be done by the FIFA Secretary General.

9. Art. 19 of the Regulations provides as follows:

   "If a link between the player and his former club cannot be established, or if the training club does not make itself known within two years of the player signing his first non-amateur contract, training compensation is paid to the national association of the country where the player was trained. This compensation shall be earmarked for youth football development programmes in the country in question".

   This text makes it crystal clear that a national association may become entitled to training compensation. There is no similar provision with respect to solidarity compensation. In other words, CBF is seeking to read the equivalent of Art. 19 of the Regulations into the Regulations with respect to solidarity compensation. The flaw in CBF's case is that there is no such provision in the Regulations, which moreover demonstrate by the existence of Art. 19 that the rule-makers know exactly how to express themselves when they wanted to create a possible entitlement for associations. To say that FIFA's rule-makers must have meant to say something which they so pointedly did not would be unwarranted, and indeed somewhat disrespectful.

10. Two incidental arguments may be disposed of summarily. CBF points to the fact that FIFA has now amended its Regulations in accordance with the concept of Circular No. 769. This argument is of no assistance to CBF. Many laws are unsurprisingly preceded by statements which end up convincing the rule-makers. That does not mean that those statements have legal effect. Nor is the Panel impressed by reference to the "jurisprudence" of the FIFA Chamber, which CBF says upholds the normative character of Circulars. If that is so, that "jurisprudence" is unreliable and insusceptible of being followed by this Panel. A different situation might arise if a complaint alleges detrimental reliance on FIFA Circulars, but no such question arises for decision in this case.

The Court of Arbitration for Sport rules:

1. The appeal filed by Confederação Brasileira de Futball against the decision issued on 26 November 2004 by the FIFA Dispute Resolution Chamber is dismissed.

2. (...).