**Arbitration CAS 2010/A/2306 Ahmed Fathy v. Mohamed Hamid, award of 29 August 2011**

Panel: Mr Alasdair Bell (United Kingdom), President; Mr Olivier Carrard (Switzerland); Mr Efraim Barak (Israel)

*Football*
*Players' agent contract*
*Spirit of the FIFA Player's Agents Regulations*
*Principles of interpretation of a contract*
*Termination for just cause*

1. **The spirit of the FIFA Player's Agents Regulations is to protect the interests of the player through imposing high standards on the agent and clarity in the dealings between agent and player, through the Code of Professional Conduct and the elaboration of a standard form contract to be used by the parties. The Regulations necessarily establish a framework which attempts to properly redress the natural imbalance in bargaining power, knowledge and negotiating skill that exists between a player and an agent.**

2. **In circumstances where there are two competing interpretations of the provisions of the contract, Article 1 of Swiss Code of Obligations provides that the spirit of provision be considered, and in the absence of resolution by that means, that the principle of *contra proferentem* be used to interpret the provision. According to Swiss jurisprudence, this rule applies when the provisions of a contract that is subject to dispute can be understood in various ways and it is not possible to resolve the doubt through a common interpretation.**

3. **Even though a contract of duration does not contain any express provisions on termination it is today commonly admitted that it can be cancelled for reasoned motives, even in the absence of a legal requirement. The foundation of such a general principle belongs to the protection of the personality in the sense of the Article 27 of Civil Swiss Code.**

Mr. Ahmed Fathy ("the Appellant") is a professional footballer of Egyptian nationality living in Cairo, Egypt and playing for the Egyptian football club Al Ahly.

Mr. Mohamed Hamid ("the Respondent") is a professional football agent of Austrian nationality living in Vienna, Austria, and licensed with the Austrian Football Association.

The parties signed a representation contract dated 11 November 2006 ("the Agency Agreement").

The Agency Agreement was a two page document written in English, and provided, inter alia, that the term of the agreement *"will be issued until 31.01.2007"* but went on to state that if the Appellant signed a contract with any football club during the 2007/2008 season on the basis of any representation work done by the Respondent, *"the agreement will automatically be extended for a period of two years from the date on which the player signes* (sic) *the contract with the football club. Under this circumstance the Licensed Agent will enjoy an exclusive relationship with the player for a full two years"*.

At paragraph 4 under the heading "Representation" the Agency Agreement stated that:

> *"The Player shall not represent himself in any negotiation without written permission of the Agent. Also, he is not allowed to take any services from any other Manager without to inform the Agent named above or to get his permission"*.

At paragraph 5 under the heading "Commission and Payment Condition" it stated:

> *"The Player agrees to pay 10% commission from his annual basic income which he will receive from the club to the Agent named above as a result for his services, contract negotiations or renegotiations through the above mentioned Agent. The Player is obliged to pay the Licensed Agent named above the whole agreed 10% commission as soon as he will receive the first instalement* (sic) *of his income of the club to which he has been transferred.*
>
> *The payment has to be against receipt. This receipt covers all expenses which the Agent named above has to undertake in performing his duties under this agreement"*.

At paragraph 10 under the heading "Disputes" it stated:

> *"Any dispute between the parties which is not regulated in this agreement has to be dealt with by the Football Association in the first instance and referred to FIFA"*.

At paragraph 11 it stated under the heading "Jurisdiction":

> *"Both parties agree that the Vienna court is the legal court in the case of extreme disputes"*.

On 18 January 2007, the Appellant signed a professional football player's contract with Sheffield United Football Club Plc. ("Sheffield"), an English Premier League club. The Respondent signed the contract as the Appellant's agent.

The contract between the Appellant and Sheffield provided that the Appellant would be employed up to 30 June 2010, and would be paid monthly in arrears for the duration of the contract. Though the date of employment of the Appellant was not specified in the contract, it was stated that up to the 30 June 2008, he would be paid GBP 3,750 per week, from 1 July 2008 to 30 June 2009, he would be paid GBP 4,250 per week, and from 1 July 2009 to 30 June 2010, he would be paid GBP 4,750 per week.

In addition, the Appellant was to receive other benefits including appearance monies for Premier League and Championship League games, and was to receive GBP 100,000 in signing on fees, to be

paid in four equal instalments of GBP 25,000 on 14 February 2007, 14 February 2008, 14 February 2009 and 14 February 2010. These were only to be paid if the Appellant was still employed by the club on those dates.

At the end of the 2006-2007 season, Sheffield was relegated from the Premier League to the Championship.

By letter dated 27 August 2007, the Appellant informed the Respondent that as of that date, he informed him that he was putting *"a final term to our collaboration and this irrevocably, without previous notice. The reason why is that you did not carry out the necessary means to satisfy the contract's needs (information, advices, permanent and personalized support etc). Consequently, I lost all confidence in the real quality and necessity to apply further on the services of your group which, as for me, were quite deficient"*.

The Appellant also wrote to the Secretary of the Austrian Football Federation informing him that he had cancelled his contract and outlining reasons for so doing, which the Appellant stated included a non-consensual move that the Respondent had arranged from Sheffield to an Egyptian Club Zamalek; that the Respondent had not assisted the Appellant in his dealings with Sheffield; that the Agency Agreement violated the relevant FIFA Regulations, the FIFA Player's Agents Regulations (2001 version) ("the FIFA Regulations"), in that it provided for an automatic extension of the Representation Contract for two years, thus exceeding the two year maximum laid down in the FIFA Regulations of two years; and that copy of the Agency Agreement was not filed with the Appellant's local football association within 30 days of the date of signature as provided in the FIFA Regulations.

The Appellant's contract was terminated with Sheffield United on 6 September 2007 and he signed a new contract with the Egyptian Club Al Ahly on 4 January 2008 without the assistance of the Respondent.

The Appellant was paid a total of GBP 90,000 in his employment with Sheffield, and paid the Respondent a total of GBP 15,000 for his services.

The Respondent lodged a claim with FIFA on 11 October 2007, and a decision was rendered by the Single Judge of the Players' Status Committee on 11 August 2010 ("the decision under appeal"). This is the decision appealed against in this case. The rules applicable to the case were deemed to be the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (2005 edition) ("the Procedural Rules") and the FIFA Regulations.

The decision under appeal found that the Appellant was liable to pay 10% of the total value of the employment contract with Sheffield as it related to basic pay and the signing on fees. In other words, 10% of the full amount that the Appellant would have received if he had remained with the club until 30 June 2010 (including the signing on fee).

The Appellant was therefore ordered to pay, in addition to the GBP 15,000 already paid by him, GBP 69,925 to the Respondent, together with 5 % annual interest from 31 January 2007 until the date of payment, within 30 days of the date of the decision. The claim by the Respondent for payment of a 10% proportion of the value of the contract that the Appellant concluded with the club Al Ahly,

which would have amounted to more than EGP 400,000 was rejected in the decision under appeal, as it was held that though a player may exclusively transfer his "placement rights" to an agent, such a clause could not exclude a player negotiating a contract on his own behalf, and could only serve to prevent another agent representing the player.

A Statement of Appeal serving as Appeal Brief was filed in French by the Appellant on 10 December 2010. By Order dated 28 December 2010, the Deputy President of the Appeals Arbitration Division of the CAS pronounced that the language of this case be English. An English version of the Statement of Appeal serving as Appeal Brief was filed on 16 March 2011.

The Respondent filed his answer on 2 February 2011.

By letter dated 15 March 2011, following the fact that none of the parties deemed a hearing necessary, the parties were informed that the Panel considered that a hearing was not necessary in the present case and that it would render an award based on the Parties' written submissions.

## LAW

### Jurisdiction of the CAS

1. Article R47 of the Code of Sports-related Arbitration (the "Code") provides as follows:

   *"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body".*

2. Article 15 (2) of the FIFA Rules governing the procedures of the Players' Status Committee and the Dispute Resolution Chamber (2010 edition) ("the 2010 Procedural Rules") state:

   *"If a party requests the grounds of a decision, the motivated decision will be communicated to the parties in full, written form. The time limit to lodge an appeal begins upon receipt of this motivated decision".*

3. Article 63 (1) of the FIFA Statutes (August 2010 edition) state as follows:

   *"Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question".*

4. On 24 November 2010, FIFA notified the full decision to the parties, including the reasons for the decision, which had not previously been notified.

5. The Statement of Appeal serving as Appeal Brief has been filed on 10 December 2010, within the 21-days deadline set forth by the FIFA Statutes, and is therefore admissible.

6. Moreover, the Respondent does not contest jurisdiction of the CAS.

**Applicable Law**

7. Article R58 of the Code provides 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".*

8. Paragraph 10 of the Agency Agreement states that:

*"Any disputes between the parties which is not regulated in this agreement has to be dealt with by the Football Association in the first instance and referred to the FIFA".*

9. Article 2 of the FIFA 2010 Procedural Rules provide as follows:

*"2. Applicable Material Law*

*In their application and adjudication of law, the Player's Status Committee and the DRC shall apply te FIFA Statutes and regulations while taking into account all relevant arrangements, laws and/or collective bargaining agreements that exist at national level, as well as the specificity of sport".*

10. Pursuant to Article 62 of the FIFA Statutes, *"The 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".*

11. As the dispute between the parties arose in 2007, the Panel considers that the FIFA 2001 Regulations are the proper regulations to apply to the case before the parties, as was correctly determined in the decision under appeal, and subsidiarily Swiss law.

**The Panel's Findings on the Merits**

12. The Panel considers that this dispute should be examined in the context of the FIFA Regulations and the legal framework established under those Regulations.

13. As a point of departure, it may be noted that these Regulations impose certain obligations on the agent, and require under Articles 4 to 9 that he or she be qualified by examination, insured, and also that he or she signs a Code of Professional Conduct. The Regulations are more extensive and burdensome on agents than on players, whose obligations under the Regulations are set down in Articles 16 and 17. However, this is hardly surprising, since the rules in question regulate the interaction between agents and players and, as such, are designed to govern the relationship between persons who are by definition professional negotiators (i.e. agents) and persons who have an entirely different expertise (i.e. football players) who have elected to

delegate the task of negotiation and representation to a selected agent as they consider that person far better able to represent their interests than they themselves would be. Thus, to the extent that the Regulations govern the relationship between agents and the players, they necessarily establish a framework which attempts to properly redress the natural imbalance in bargaining power, knowledge and negotiating skill that exists between a player and an agent. The Panel finds that the fundamental spirit of fair play as well as the spirit of the Olympic Charter on which the CAS itself is based (see for instance CAS 2009/A/1757) and the aims of sporting justice require the Panel to bear this relationship in mind when considering this case.

14. In that context, the Panel notes that the Code of Conduct at Annexe B to the Regulations which every agent is required to sign and abide by the principles of under Article 8 of the Regulations, provides at paras. I to III as follows:

*"I*

*The players' agent is required to perform his occupation conscientiously and conduct himself in his profession and other business practices in a manner worthy of respect and befitting his profession.*

*II*

*The players' agent shall adhere to the truth, clarity and objectivity in his dealings with his client, negotiating partners and other parties.*

*III*

*The players' agent shall protect the interests of his client in compliance with the law and a sense of fairness, while creating clear legal relations".*

15. Article 12 of the Regulations provide at the relevant provisions as follows:

*"1. A players' agent may represent or take care of the interests of a player or a club in compliance with art. 11 only if he has concluded a written contract with the player or club.*

*2. Such a contract shall be limited to a period of two years but may be renewed in writing at the express request of both parties. It may not be tacitly prolonged….*

*(...)*

*4 The amount of remuneration due to a players' agent who has been engaged to act on a player's behalf is calculated on the basis of the player's annual basic gross income (i.e. excluding other benefits such as a car, a flat, point premiums and/or any kind of bonus or privilege) that the players' agent has negotiated for him in the employment contract.*

*5. The players' agent and the player shall decide in advance whether the player will remunerate the players' agent with a lump sum payment at the start of the employment contract that the players' agent has negotiated for the player or whether he will pay annual instalments at the end of a contractual year.*

*6. If the players' agent and the player do not decide on a lump sum payment and the players' employment negotiated by the players' agent on his behalf lasts longer than the representation contract between the players' agent and the player, the players' agent is entitled to annual remuneration even after the expiry of the representation contract. This entitlement lasts until the player's employment contract expires or as soon as the player signs a new employment contract without the help of the same player's agent.*

*(...)*

*9 FIFA will provide its standard representation contract (cf. Annexe C) to the national associations. Every players' agent is required to use this standard contract. The parties to the contract are at liberty to conclude additional agreements and to supplement the standard contract accordingly, provided the relevant public law provisions for arranging employment in the country concerned are observed without fail".*

16. While the parties are *"at liberty to conclude additional agreements and to supplement the standard contract accordingly"* the implication is that they cannot remove elements of that standard contract.

17. Contrary to this provision, the standard form contract was not used by the Respondent in this case. In particular, that standard representation contract provides two options in relation to payment of the agent by commission as follows:

*"2) Remuneration*

*Only the client may remunerate the players' agent for the work he has accomplished.*

*The players' agent shall receive commission amounting to ____ % of the annual gross basic salary due to the player as a result of the employment contracts negotiated by the players' agent.*

- *a lump sum payment at the start of the employment contract* ___
- *annual payments at the end of each contractual year* ___

*(mark where appropriate)".*

18. The Panel is of the view that the provision for the remuneration of the Respondent in the contract signed by the parties is not clear. That Agency Agreement states that *"[t]he Player agrees to pay 10% commission from his annual basic income which he will receive from the club to the Agent (…)"* and goes on to state that *"the Player is obliged to pay the Licensed Agent named above the whole agreed 10% commission as soon as he will receive the first instalment of his income of the club to which he has been transferred".*

19. If the Panel were to favour the construction of the Respondent in this case, the phrase "annual basic income" would in fact be read to mean "basic income" (or "entire basic income") and the word annual would be tautological.

20. In the Opinion of the Panel there are two possible interpretations of the remuneration provisions under this agency contract. Simply put, one interpretation is that the Respondent should be entitled to receive a 10% commission based on one year's income received by the player (his "annual income"); the other interpretation is that the Respondent should be entitled to receive a 10% commission based on the "total value of the contract" that had been negotiated on behalf of the Appellant.

21. In any event, the Panel cannot agree with the statement made at paragraph 11 of the decision under appeal, where the Single Judge asserted that: *"the parties had expressly decided that an amount representing 10% of what the Respondent was entitled to earn from Sheffield during the totality of his contract (…) was due to the Claimant".* In the opinion of the Panel, the agency contract in this case contains

no such "express decision". To the contrary, as the Panel has indicated above, two possible interpretations are possible.

22. Furthermore, the Panel notes that neither possible interpretation would envisage that the signing fee on be included in the calculation of commission as such a fee is clearly not part of the player's "annual basic income" whether the latter term is construed as corresponding to a single year or a number of years.

23. The Panel is cognizant of the provisions in the applicable Regulations which provide at Article 12(4) that the remuneration of an agent should be on the basis of annual basic income, however, it considers that this provision may be contained in the Regulations to indicate that bonuses or similar payments should not be included in the commission calculation of the agent and does not necessarily suggest that the phrase must be interpreted as meaning that the entirety of the payments due under the contract should be considered.

24. In any event, however Article 12(4) of the Regulations is construed, the Panel remains of the opinion that the precise terms used in the contract between the Appellant and the Respondent are capable of two interpretations and in a private law contract of this nature between two consenting parties it is the contract itself (rather than the FIFA Regulations) that is of primary relevance. Moreover, it may be questioned to what extent the Appellant may validly rely on provisions of the FIFA Regulations which (allegedly) support its own interpretation regarding the calculation of commission when the Appellant has, at the same time, breached his own obligations under these same Regulations, for example, by failing to use the standard representation contract.

25. In Swiss law, the interpretation has to begin usually with the analysis of the literal sense. The words must be understood normally by their common sense. It is necessary to take into account the context of the sentence and the whole contract as well as its purpose. The interpretation has to respect the logic of the contract (See CORBOZ, in: Le contrat dans tous ses états, p. 271).

26. In circumstances where there are two competing interpretations of the provisions of the contract, Article 1 of Swiss Code of Obligations provides that the spirit of provision be considered, and in the absence of resolution by that means, that the principle of *contra proferentem* be used to interpret the provision (see CAS 2003/A/461 & 471 & 473).

27. According to Swiss jurisprudence, this rule applies when the provisions of a contract that is subject to dispute can be understood in various ways and it is not possible to resolve the doubt through a common interpretation (Decision of the Federal Court 5C.208 / 2006 of January 8th 2007, consid. 3.1; ATF 122 III 118 consid. 2d; ATF 118 II 342 consid. 1a p. 344; ATF 100 II 144 consid. 4c; ATF 99 II 290 consid. 5).

28. As discussed by the Panel, it is clear that the spirit of the applicable Regulations is to protect the interests of the player through imposing high standards on the agent and clarity in the dealings between agent and player, through the Code of Professional Conduct and the elaboration of a standard form contract to be used by the parties. As mentioned above, the

Regulations are designed in part to redress the natural imbalance in bargaining position between players and agents.

29. In contravention of those provisions, the Panel finds that the Respondent has not used the contract provided as standard which could easily have resolved the question at issue between the parties.

30. Further, the Respondent has not ensured clarity nor created clear legal relations as he is required to do under the Code of Professional Conduct.

31. It may also be noted that, if the interpretation of the Respondent was correct, the entirety of the monies due under the contract would be payable when the player received the first payment from the club. This would mean that the player would be liable to pay GBP 74,925 at the end of his first month employment with Sheffield when he would only have earned GBP 15,000. In and of itself, the Panel finds that this term is very onerous and would need to be set out clearly and unequivocally in the contract if the Appellant was able to rely on its own interpretation of the commission clause whilst at the same time satisfying the requirements of clarity and fairness as contained in the Code of Professional Conduct. The Panel considers that this standard of clarity was not met.

32. In light of the above considerations, the Panel concludes, by a majority decision, that the Respondent was not entitled to the payment of 10% of the total earnings that the player would have made had he remained with Sheffield until 30 June 2010 but rather to 10% of his annual income, which in the present case should correspond to 10% of his first year's salary.

33. The Panel notes in passing that such a conclusion is consistent with the decision in the case CAS2006/A/1019, in which the panel held that:

*"The payment of an agent's fee is normally made out of the amount specified in the particular contract as a result of which entitlement seems to arise only* ***after conclusion of the contract and payment of the amount(s)*** *specified by the particular contract"* (emphasis added).

34. In other words, this case suggests that the default position is that until money has been paid, commission due on that money does not become payable.

35. With respect to the subsequent contract that the player negotiated with the Egyptian club Al Ahly on 4 January 2008 (in relation to which the Respondent also claimed commission) the Single Judge held that the exclusivity provision contained in the representation agreement could not be invoked in order to prevent the player himself seeking alternative employment. In this respect, the decision under appeal states at para. 24 as follows:

*"even if according to the representation agreement, the "placement rights" should be exclusively transferred to the players' agent, such a clause cannot be taken into consideration if the player negotiates and concludes the employment contract himself as such exclusivity-only clause can only be objected to other players' agents. The Single Judge evoked that, as part of the right of personality, the client of a players' agent, who signed an exclusive representation contract, is still at liberty to negotiate employment contracts on his own".*

36. For the purposes of the present case the Panel does not deem it necessary to assess whether the right of personality (as that concept is understood as a matter of Swiss law) would serve as a means to nullify the exclusivity obligation contained in Clause 4 of the Representation contract. In this connection, the Panel notes that, in accordance with Clause 2 of this contract, the agreement was valid until 31.01.2007 and was only to be extended for a period of two years *"In the case the player will sign a contract with any football club (…) in the season 2007/2008"*. In fact, the Appellant signed a contract with Sheffield on 18 January 2007, which is in the season 2006/2007. On a strict reading of the contract, therefore, the question of the two year extension does not arise.

37. Furthermore, the Panel notes that the Appellant served notice of termination of the representation contract on the Respondent at the end of August 2007. Whilst the contract does not contain any express provisions on termination there is no reason why, as a matter of Swiss law, this contract could not be repudiated by the Appellant for the reasons set out in his letter sent at the end of August. Indeed it is today commonly admitted that any contract of duration can be cancelled for reasoned motives, even in the absence of a legal requirement. The foundation of such a general principle belongs to the protection of the personality in the sense of the Article 27 of Civil Swiss Code (see VENTURI-ZEN-RUFFINEN, La résiliation pour justes motifs des contrats de durée, Semaine Judiciaire 2008 II). Moreover, this repudiation does not appear to have been contested by the Respondent. In these circumstances, given that the contract with the Egyptian club Al Ahly was signed on 4 January 2008, the question of entitlement to commission does not arise because even if, contrary to wording of the representation contract, it had been validly extended for a period of 2 years when the Appellant signed with Sheffield on 18 January 2007 (in the season 2006/2007) this extension was cut short in August 2007 when the Appellant terminated the contract and therefore the validity of the exclusivity provision contained in Clause 4 of the representation contract does not need to be further examined for the purposes of this case.

**The Court of Arbitration for Sport rules:**

1. The Appeal is partially successful insofar as the decision of the Single Judge should be revised so that the commission due to the Respondent will be based on 10% of the annual income due to the Appellant in the first year of his employment contract with Sheffield, that is to say 10% of (26 x GBP 3,750) plus 10% of (26 x GBP 4,250) which equals 10% of GBP 208,000 i.e. GBP 20,800. Since the Appellant has already paid the Respondent GBP 15,000 this means he is still liable for GBP 5,800.

(…)

4. All other requests for relief are rejected.