VEGALTA SENDAI V/S PFC CSKA MOSCOW – A CASE OF ‘AD IMPOSIBILIA NEMO TENETUR’?

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ABSTRACT

The present article deals with a pertinent issue of interpreting commercial legal contracts between two football clubs for loaning a player. The loan arrangement was conditional in nature as it mandated that the player plays 50% of the games in a season. Unfortunately, the player gets injured during the season and the club concerned is unable to provide the player with sufficient game time. CAS in the present case had the opportunity of weighing ‘the literal interpretation’ approach against ‘a purposive interpretation’ approach in interpreting commercial contracts. Should CAS literally abide by the 50% stipulated target of achieving game time or should it take into account the player injury which made it impossible to provide game time to the player concerned? This article analysis the case with an Indian perspective on the findings of CAS jurisprudence before revealing the outcome of the present case.

Vegalta Sendai v/s PFC CSKA Moscow

Vedanta Sendai ("**Appellant / Sendai**") is a professional Japanese Football Club affiliated with the Japanese Football Association. It currently plays in the Meiji Yasuda J2 League in Japan[1] (at the time when the concerned appeal was filed before CAS, they were playing in the J1 League which is the Tier 1 league of Japanese Football).

PFC CSKA Moscow ("**1st Respondent / CSKA**") is a professional Russian football club which is affiliated with the Russian Football Union. They are currently playing in the Russian Premier League which is the tier-1 league of Russian Football[2].

FIFA ("**2nd Respondent / FIFA**") is the world governing body of football which is based in Zurich, Switzerland.[3]

Factual Background

The table hereinbelow presents a list of relevant facts pertaining to the present case[4]:

SN	Date	Fact
1	August 2018	Takuma Nishimura, a Japanese football player ("**Player**") was transferred from Sendai to CSKA
2	January 2020	The Player was loaned to a Portuguese football club Portimonense Sporting Clube ("**Portimonense**") by CSKA
3	19 March 2020	Sendai, CSKA, Portimonense and the Player entered into an agreement titled Professional Football Player Registration Sub-Loan and Loan Agreement ("**Loan Agreement**")

[1] J-LEAGUE, https://www.jleague.co/clubs/Vegalta-Sendai/#bio (last visited Sep. 26, 2022)
[2] CSKA, https://en.pfc-cska.com/, (last visited Sep. 26, 2022)
[3] FIFA, https://www.fifa.com/about-fifa, (last visited Sep. 26, 2022)
[4] Vegalta Sendai v. PFC CSKA Moscow (CAS 2021/A/8306), at 1-9

4	Spring 2020	FIFA TMS Department requests CSKA and Sendai to provide an explanation on breaching Article 18bis (1) of the FIFA Regulations on the Status and Transfer of Players ("**FIFA RSTP**") in respect of clause 6 of the Loan Agreement
5	23 July 2020	The FIFA Disciplinary Committee ("**FIFA DC**") finds CSKA and Sendai guilty of infringing provisions of *third party influence* on account of inserting Clause 6 in the Loan Agreement and fined both the clubs accordingly
6	22 October 2020	CSKA addresses communication to Sendai asking for an explanation for not including the Player in the squad for the previous 3 games
7	30 October 2020	Sendai replies to the aforesaid communication by informing CSKA that the Player was injured (and provided medical evidence with regards thereto)
8	17 February 2021	CSKA and Sendai enter into a Player Transfer Agreement ("**Transfer Agreement**") whereby the Player was transferred from CSKA to Sendai
9	19 March 2021	CSKA addresses communication to Sendai for payment of compensation of 100,000 Euros as the Player had only played 39% of the games on loan to Sendai, as opposed to 50% of the games, which was the commercial understanding between parties under the Loan Agreement

10	25 March 2021	Sendai replies to CSKA's aforesaid communication by justifying that the lack of playing time was on account of injury to the Player and hence, they have not breached any terms of the Loan Agreement
11	26 March 2021	CSKA writes a letter to Sendai maintaining its stance of seeking compensation and set a 10 day limit for payment of the same
12	30 March 2021	Sendai responds to CSKA and suggests the issue be resolved by FIFA's relevant bodies
13	8 April 2021	CSKA lodges a claim against Sendai before the FIFA Players' Status Committee ("**FIFA PSC**") as the Player did not play 50% of the games, as stipulated in the Loan Agreement
14	10 August 2021	The FIFA PSC accepts CSKA's claim and directs Sendai to pay the compensation amount for not playing the Player for 50% of the games
15	25 September 2021	Proceedings before the Court of Arbitration for Sport ("**CAS**") commenced

Bone of Contention: Contractual Clause

As particularized in the above table, the Loan Agreement whereby Sendai was required to make the Player play for 50% of the games in a season became the bone of contention in the

proceedings before CAS. Before we analyze the CAS Appeal with a legal lens, it is imperative to examine clause 6 of the Loan Agreement, which is reproduced hereinbelow:

> *"In case the PLAYER during the Loan Periods participates in less than 50% matches for SENDAI in the J-League sporting season 2020, provided that only the matches in which the PLAYER played 45 (Forty-five) or more minutes shall be taken into account, SENDAI shall pay CSKA a conditional transfer compensation in the amount of 100,000 (One hundred thousand) Euros NET, i.e. exclusive of any solidarity contributions, training compensations, taxes, levies or bank commissions, etc., no later than 31 January 2021"*[5]

Unfortunately for the Player and Sendai, the Player got injured during the course of the concerned season. Therefore, he was not able to play 50% of the games for Sendai, as envisaged in the Agreement. CAS was presented with an interesting case whereby the clause could either take a *literal interpretation* (50% being the unconditional and absolute benchmark for determining fulfilment of contractual obligations) or a *purposive interpretation* (the object of the Loan Agreement and the clause in question was to ensure the Player gets playing time, which he did when he was available to play and injury free) route in determining the outcome of the Appeal in question.

***Impossibilium nulla obligation est* – can one be expected to do the impossible?**

The legal maxim of "*impossibilium nulla obligation est*" is well documented in Indian legal jurisprudence. The Supreme Court case of *Chandra Kishore Jha v. Mahavir Prasad & Ors (1999)*[6] involved presentation of an election petition in the Patna High Court. Under the prescribed court rules of the Patna High Court, the election petition could only be presented in open court till 4:15 pm. Unfortunately for the Appellant, neither the Designated Election Judge nor the Bench hearing civil applications was *admittedly* available after 3:15 pm on that given day, which was also the last day as per the Indian Limitation Act governing the facts of this case. The Appellant was not able to file his election petition on account of the curtailed working hours of the Court on that particular day. However, the Supreme Court was quick to observe that:

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[5] *Id*. at 3

[6] Chandra Kishore Jha v. Mahavir Prasad & Ors (1999) SCC OnLine SC 946

"Neither the Designated Election Judge before whom the election petition could be formally presented in the open court nor the Bench hearing civil applications and motions was admittedly available on 16-5-1995 after 3.15 p.m., after the obituary reference since admittedly the Chief Justice of the High Court had declared that "the Court shall not sit for the rest of the day" after 3.15 p.m. Law does not expect a party to do the impossible — impossibilium nulla obligatio est — as in the instant case, the election petition could not be filed on 16-5-1995 during the court hours, as for all intents and purposes, the Court was closed on 16-5-1995 after 3.15 p.m." [7]

The Doctrine of Impossibility was further exemplified in the case of *State of M.P. v. Narmada Bachao Andolan*[8] which

"Doctrine of impossibility"

39. The court has to consider and understand the scope of application of the doctrines of lex non cogit ad impossibilia (the law does not compel a man to do what he cannot possibly perform); impossibilium nulla obligatio est (the law does not expect a party to do the impossible); and impotentia excusat legem in the qualified sense that there is a necessary or invincible disability to perform the mandatory part of the law or to forbear the prohibitory. These maxims are akin to the maxim of Roman law nemo tenetur ad impossibilia (no one is bound to do an impossibility) which is derived from common sense and natural equity and has been adopted and applied in law from time immemorial. Therefore, when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like an act of God, the circumstances will be taken as a valid excuse. (Vide Chandra Kishore Jha v. Mahavir Prasad [(1999) 8 SCC 266 : AIR 1999 SC 3558] , Hira Tikkoo v. UT, Chandigarh [(2004) 6 SCC 765 : AIR 2004 SC 3649] and HUDA v. Dr. Babeswar Kanhar [(2005) 1 SCC 191 : AIR 2005 SC 1491].)"[9]

Correspondingly, it was Sendai's primary contention (in the proceedings before the FIFA PSC) that it was not possible for them to ensure the Player got the requisite game time, as stipulated in the Loan Agreement considering the Player got injured. Thus, the possibility of him playing

[7] *Id*. at 272
[8] State of M.P. v. Narmada Bachao Andolan (2011) 7 SCC 639
[9] *Id*. at 671

had to be ruled out, at least, during the injury phase. It was their contention that the injury period should be discounted from calculating the "50%" statistic i.e. "*the participation percentage should be calculated based on the matches where the Player had in fact been available/eligible to play, thus excluding the games where he was, for instance, injured.*"[10]

***In claris non fit interpretation* – is the contractual clause clear and express enough?**

The Delhi High Court in *The United Commercial Bank v. Bhim Sain Makhija & Anr*[11] opined that the approach on interpreting legal language can neither be arbitrary nor mechanical. If the words used are plain and simple, the Court must give effect to them. However, if words used, however plain, defeat the intent of the draftsman, it ought to be considered and one must not resort to literal interpretation of the language used. Quoting Professor Tedeschi, the Delhi High Court stated:

> *"Interpretation is not a mechanical nor even a psychological process. It is a reconstruction of another's thought - normative thought, if we are dealing with legal interpretation - and it cannot be compared at all to the emptying of a substance from one vessel to another, nor to the reflection of an image in a mirror or to a photograph. Interpretation is the copying of another's thought into the range of our spiritual life, and it can be done only by our thought process."*[12]

In the present case, CSKA asserted that the language used in clause 6 of the Loan Agreement is plain and simple. It does not leave any room for ambiguity and it accurately represents the intent of the parties concerned. The said clause is unconditional in nature with the only other condition being that 'the Player should play 45 minutes or more in a game for it to be counted towards the 50% target of game-time sought to be achieved'. Therefore, the exclusion of any other condition is an accurate yardstick to suggest that the intention of Sendai and CSKA is reflected in the simple language used in the said clause.

***Pacta Sunt Servada* – Agreements must be fulfilled**

The fundamental premise of contract law is that it binds the parties to the terms and conditions stated in the contract. One can partly deviate or postpone from such contractual obligations provided consent is obtained from the other concerned party to the contract. This principle was

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[10] *Supra* Note 4, at 7
[11] The United Commercial Bank v. Bhim Sain Makhija & Anr (1993) 27 DRJ 495
[12] *Id*. at 498

propounded by the ancient Roman's who developed the phrase 'pacta sunt servanda'. Infact, it is widely documented that the Roman Emperor (1556-1564) stated, *"Let justice be done, though the world perishes"*. A literal application of this principle embodied in contract law may result in unfair outcomes which may be 'antithetical to good faith'.

It is pertinent to note that in the present case, two clubs playing in the Tier-1 league in their respective countries entered into contractual obligations with each other. The presumption that both the clubs have an understanding of the business of football and the larger commercial industry which deals with 'player transfers' operates against the party affected in the present case i.e. Sendai. One could make an argument on behalf of Sendai by relying on the 'Doctrine of Frustration' of a contract. According to *Satyabrata Ghose v. Mugneeram Bangur & Co*[13], Sedai could assert frustration of contract if (i) it is not possible to achieve the intent underlying the transaction; (ii) Sendai and CSKA, both were aware of Sendai's primary purpose for entering into a contract; and (iii) "frustration was caused by a qualifying supervening event".

Some instances where the principle of 'frustration of contract' is widely utilized are '(i) when property is sold for a specific use but the local municipality passes a zoning law/bye-law that directly affects the purpose for which the contract was initially signed; (ii) an employee is hired but since the place of employment itself gets harmed, damaged etc., the hiring no longer remains valid'.[14] It is worth examining the Principles relating to International Commercial Contracts 2004, which touches upon the concept of 'hardship'[15], which in turn closely resonates with the principle of 'frustration of contract'. Article 6.2.1. of the abovementioned principles states:

> *""hardship exists when the onset of incidents fundamentally modifies the equilibrium of the contract, either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and*
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> > *a. the events occur or become known to the disadvantaged party after the conclusion of the contract;*

[13] Satyabrata Ghose v. Mugneeram Bangur & Co (1954) SCR 310
[14] Swarnendu Chatterjee & Arushi Bhag, Dealing with Notions of Hardship and Force Majeure in International Commercial Contracts: Tackling unforeseen events in a changing world, SCC ONLINE BLOG OPED(Sep. 26, 2022, 10:30pm), https://www.scconline.com/blog/post/2021/08/08/force-majeure/
[15] UNIDROIT principles of International Contracts 2004 (Sep. 25, 2022, 10:45 pm), https://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf

b. the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;

c. the events are beyond the control of the disadvantaged party; and

d. the risk of the events was not assumed by the disadvantaged party."[16]

A deeper scrutiny of the abovementioned doctrines and principles suggests that the degree of foreseeability by Sendai is the primary factor based on which Clause 6 of the Loan Agreement may be interpreted in a *literal* or *purposive* way. The test of interpretation then takes the shape of "was it reasonably foreseeable for Sendai to envisage a scenario where the Player could be injured during a football season in the J-League?"

Proceedings before the FIFA DC[17]

In July 2020, the FIFA DC intimated the parties concerned that there was potential breach by SENDAI and CSKA of Article 18bis (1) FIFA RSTP which states:

"18bis Third-party influence on clubs

1. *No club shall enter into a contract which enables the counter club/counter clubs, and vice versa, or any third party to acquire the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams"*[18]

In accordance with the abovementioned provision, FIFA DC held that Clause 6 of the Loan Agreement prevented Sendai from making a '*free decision*' as to player selection in a game with the object of achieving the best result for the team. The clause in question would result in Sendai making a compromised decision regarding Player selection in order to avoid an adverse financial impact as per the contract between Sendai and CSKA.[19] Therefore, both the clubs were fined.

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[16] *Id*. at 182
[17] The present article intentionally does not address the detailed arguments made by Sendai and CSKA before the FIFA DC and FIFA PSC. Additionally, the relevant provisions of the Swiss Civil Code, although relevant, are beyond the scope and analysis of this article.
[18] FIFA Regulations on the Status and Transfer of Players (Sep. 21, 2022, 11:00 pm), https://digitalhub.fifa.com/m/4c9a61a3e5b2c68e/original/ao68trzk4bbaezlipx9u-pdf.pdf
[19] *Supra* Note 4, at 4

Proceedings before the FIFA PSC

In April 2021, CSKA filed a claim against Sendai as the Player had not played 50% of the games, as stipulated in Clause 6 of the Loan Agreement. It was Sendai's contention that Article 119 of the Swiss Code of Obligations addresses a scenario where a contractual duty cannot be performed for circumstances beyond its control[20]. In the present case, an injury to the Player was beyond the control of Sendai. They did not contest the fact that the Player has not played 50% of the games, but instead submitted that the participation percentage should be calculated taking into account the games for which the Player was actually available and injury free[21].

FIFA PSC made the following observations against Sendai[22]:

1. The contractual clause 6 of the Loan Agreement was clear and unequivocal and was in accordance with the principle of *in claris non fit interpretatio,* as enunciated hereinabove;

2. If the intention of the Parties was to calculate the percentage of playing time based on the availability of the Player concerned, a condition or a clause to that effect should have been drafted in the contract;

3. The circumstance of a player being injured during a football season is foreseeable and cannot be categorized as a circumstance that is 'unpredictable';

4. It upheld the principle of *pacta sunt servanda* and resorted to *literal interpretation* of the contract by directing Sendai to pay the contractually agreed contingent fee.

Proceedings before CAS

In September 2021, Sendai filed its Appeal against the Order of FIFA PSC before CAS, which had to resolve two primary legal issues (amongst others which are beyond the scope of the present article):

> *"a) Is Clause 6 of the Loan Agreement enforceable regardless of the FIFA DC Decisions?*

[20] *Supra* Note 4, at 7
[21] *Supra* Note 4, at 7
[22] *Supra* Note 4, at 7-9

and in the affirmative;

b) Did conditional transfer compensation pursuant to Clause 6 of the Loan Agreement fall due?"[23]

CAS held Sendai in violation of its contractual obligations and fined them in accordance with the Loan Agreement executed with CSKA for the following reasons, as exemplified hereinbelow:

1. Contractual Freedom under Swiss Law and Article 18bis of FIFA RSTP

Reliance was placed on an earlier CAS order in the matter of *Arsenal FC v FIFA*[24] in addressing the issue of third party influence on Sport which stated:

"the main purpose of article 18bis of the [FIFA RSTP] is to preserve the integrity of the competition as a whole by aiming at strengthening the autonomy of clubs in diverse aspects, including in relation to the transfer of players"[25]

Furthermore, reference was made to the Swiss Code of Obligations, especially Article 18 and 19 therein which permit the contracting parties to freely determine the contours of their contractual obligation, albeit within the limits of law. Moreover, a contract becomes void provided the terms are either immoral, impossible or unlawful.[26] Therefore, as long the contract is not unlawful, 2 football clubs that are governed by Swiss law have the contractual freedom to determine their own conditions, terms and obligations as they wish to enter into "*without being subject to any limitations, except against entering into an unlawful contract*".[27]

2. Article 18bis of FIFA RSTP an exception

CAS opined that FIFA has the authority to lay down its own rules and regulations for the purpose of self-governance. However, their rules and regulations are subject the Swiss law,

[23] *Supra* Note 4, at 18
[24] Arsenal FC v. FIFA CAS/2020/A/7417
[25] *Supra* Note 4, at 18
[26] *Supra* Note 4, at 18
[27] *Supra* Note 4, at 19

which they must observe. Therefore, Article 18bis of FIFA RSTP is to be interpreted as an exception to the principle of contractual freedom, which is well enshrined in Swiss law.

Furthermore, it relied on the observations of a 2018 CAS judgment in the case of *Sociedade Esportiva Palmeiras v. Fédération Internationale de Football Association*[28] which sets out the parameters of Article 18bis of FIFA RSTP as follows:

> *"Article 18bis RSTP is not concerned with the issue of the validity and/or the binding nature of the contractual provisions enabling a party to an agreement to exercise undue influence to its counter party-football club. This is a matter to be settled under the applicable law, which is the task of the FIFA Players' Status Committee (PSC) when called to examine the validity and the binding nature of the same contractual provisions in the context of a contractual dispute that is brought before the FIFA PSC. It is perfectly possible that said contractually agreed provisions are enforceable under a set of applicable (civil law) rules and at the same time fall foul of Article 18bis RSTP (which at any case does not and cannot determine whether they are illegal, invalid or unenforceable)."*[29]

3. In accordance with the aforesaid case-laws, CAS held that Clause 6 of the Loan Agreement was an valid enforceable clause which did not compromise Sendai's freedom to contract with CSKA. It cannot be construed that Sendai was made to give up its financial freedom or that it was subject to CSKA's arbitrariness. Hence, the possibility of the said clause being null and void was ruled out.[30]

4. Literal Interpretation

CAS relied on the wordings of Article 18 of the Swiss Code of Obligations which states:

> *"When assessing the form and terms of a contract, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or*

[28] Sociedade Esportiva Palmeiras v. Fédération Internationale de Football Association CAS 2018/A/6027, https://jurisprudence.tas-cas.org/Shared%20Documents/6027.pdf
[29] *Id*. at 2
[30] *Supra* Note 4, at 20

designations they may have used either in error or by way of disguising the true nature of the agreement."[31]

CAS relies on a catena of other CAS jurisprudence to further elucidate the above established principle on interpreting commercial contracts. It opines that the risk of a football player during a football season is a possibility that the transacting football clubs must account for. Therefore, the prerogative lies with the Sendai to ensure that an exemption in respect of 'an injury clause' was set out in the Loan Agreement.

In view of the aforesaid, CAS dismissed the reliefs prayed for by Sendai in the present case and confirmed the findings of FIFA PSC[32].

Conclusion

In the present case, certain well-established principles of law in interpreting commercial contracts surfaced before CAS. Needless to say, the approach of *literal interpretation* triumphed over a *purposive interpretation* approach. It is imperative that established football clubs (in this case, clubs playing in Tier 1 league of their respective countries at the time) expressly set out conditions in a contract in order to establish their intent for doing so. In this case, Clause 6 of the Loan Agreement expressly defined the contours of game time (i.e. 45 minutes or more) in a given season, thus operating as a conditional facet to the clause in question. Therefore, the absence of an 'injury clause' suggests that it was intentionally omitted from the contract based on the commercial understanding of parties at that point in time. Unsurprisingly, CAS left no stone unturned in relying on extensive legal jurisprudence to rightfully arrive at its finding of levying costs on Sendai.

[31] *Supra* Note 4, at 21
[32] *Supra* Note 4, at 25

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