



Arbitration CAS 2012/A/2697 Brescia Calcio S.p.A v. West Ham United FC, award of 21 August 2012

Panel: Prof. Petros Mavroidis (Greece); Mr Rui Botica Santos (Portugal); Mr Stuart McInnes (United Kingdom)

Football

Breach of a transfer agreement for non-payment of a transfer fee instalment

Burden of proof related to the breach of a confidentiality clause

Compensation for damages caused by the discontinuation of the proceedings

Counterclaim

1. A party who failed to satisfy its burden of proof in evidence substantiating that it suffered loss or damage in consequence of a website publication of a statement by another party is not entitled to any compensation in this regard.
2. The costs incurred by a party for the unnecessary national courts proceedings brought about by another party's own choice to first file the case before national courts, and after, in parallel, before FIFA shall be compensated by the latter. Even if the contract granted the parties the possibility of solving the claim before the national courts, the fact that such clause was against the FIFA Statutes and that once the respondent became aware of that fact, the case was withdrawn, generated unnecessary costs. In principle, a "proforma" is not sufficient, in itself, to prove the damage incurred by a party. However, according to Article 42 para. 2 of the SCO, a "proforma" invoice, analysed in the light of the complete file, can be sufficient evidence to conclude that the amount due to the damaged party for the discontinuation of the proceedings, can be estimate to the amount requested by the appellant.
3. According to the CAS Code, no counterclaim can be introduced in CAS appeal arbitration procedure.

I. THE PARTIES

1. Brescia Calcio S.p.A (hereinafter referred to as the "Appellant" or "Brescia") is an Italian football club, affiliated to the Italian Football Federation (Federazione Italiana Giuoco Calcio (hereinafter referred to as the "FIGC")) which in turn is affiliated to the Fédération Internationale de Football Association ("FIFA").

2. West Ham United FC (hereinafter referred to as the “Respondent” or “West Ham”) is an English football club, affiliated to the Football Association (“FA”), which in turn is affiliated to FIFA.

II. FACTUAL BACKGROUND

3. The elements set out below are a summary of the main relevant facts, as established by the Panel on the basis of the written submissions of the Parties, the exhibits filed, the decision rendered by the FIFA Single Judge of the Players’ Status Committee on 21 November 2011 (hereinafter referred to as the “Appealed Decision”) in the case between the Appellant and the Respondent, as well as the oral pleadings and comments made during the hearing. Additional facts may be set out, where relevant, in the legal considerations of the present award.
4. A. is an Italian football player, born [in] 1983 (hereinafter referred to as the “Player”).
5. On 20 August 2010, the Parties concluded a transfer agreement (hereinafter referred to as the “Transfer Agreement”) for the Player, under the terms of which *inter alia* the Appellant assumed the obligation to pay to the Respondent the amount of EUR 2,200,000 in three instalments, as follows:
- EUR 500,000 within fifteen days of the Player’s registration for Brescia.
 - EUR 500,000 no later than 30 June 2011.
 - EUR 1,200,000 no later than 30 September 2011.
6. Article 5 of the Transfer Agreement stated the following:

“5. OTHER TERMS

(a) The financial terms of this Agreement are strictly confidential and shall at no time be divulged to a third party without the prior consent of both parties except:

- (i) To the appropriate football authorities;*
- (ii) If required by applicable laws or regulations of the Stock Exchange or any other recognised Investment exchange;*
- (iii) As required by government department or any governmental or quasi governmental authority, official or agency;*
- (iv) To our respective professional advisers on terms that the same shall be kept confidential; and*
- (v) If and to the extent that the same shall have entered the public domain otherwise than by reason of unauthorised disclosure.*

(b) If any provision of this Agreement shall be held to be illegal or unenforceable, in whole or part, the parties will agree in good faith an amendment to that provision to make it valid and legal reflecting as much as possible the original intent. The validity and enforceability of the rest of the Agreement shall be unaffected.

(c) Both parties represent and warrant unconditionally that they are fully entitled and authorised to sign and execute the terms of this Agreement.

(d) This Agreement sets out the entire agreement between the parties hereto and supersedes all prior discussions, statements, representations and undertakings between them or their advisers.

(e) This Agreement is subject to the FIFA Regulations on the Status and Transfer of Players. Any and all disputes within the jurisdiction of FIFA shall be handled by the competent FIFA Committee.

(f) This Agreement is intended by the parties to have legal effect and shall be governed by and interpreted in accordance with English law and both parties submit to the jurisdiction of the English courts”.

7. The first instalment of the transfer was paid by the Appellant to the Respondent in accordance with the Transfer Agreement.
8. At the end of the sporting season 2010/2011, the Appellant was relegated from Serie A, the highest level in Italy, to Serie B. This relegation materially affected the financial situation of the Appellant.
9. At the time when the second instalment was due, the Parties were involved in another dispute concerning the transfer of another Player, Savio Nsereko.
10. Between 29 June and 13 July 2011, the Parties exchanged correspondence concerning *inter alia* the payment due by the Appellant regarding the transfer of the Player.
11. On 8 July 2011, the Respondent published a statement (hereinafter the “Statement”) on its website, as follows:

“The club have contacted the Italian FA and FIFA with regard to non-payment of a transfer fee instalment. West Ham United have asked the Italian Football Association (FIGC) to suspend A.’s player registration with Brescia Calcio spa with immediate effect.

The Italian international was transferred to Brescia in August 2010 for €2.2m. Due to the failure of Brescia to pay the latest instalment fee, West Ham have asked the FIGC to suspend the player’s registration and requested that the national association and FIFA impose sporting sanctions until the matter is resolved.

A. spent a year at West Ham after signing on a five-year contract from AS Livorno Calcio in August 2009. Following his return to his homeland with Brescia, he scored six goals in 31 Serie A appearances and earned his first Italy cap”.

12. The Statement was taken up by the media, in particular in England and in Italy.
13. On 11 July, the Appellant sent a letter to the Respondent in order to:
 - complain about the publication of the Statement which was, according to the Appellant, “an unwarranted and ignoble attack on the reputation of Brescia”;
 - to confirm that it was willing to renounce to its claim against West Ham with regard to the friendly game which was to be organised between the Parties’ first team (in the terms

of the transfer of the player Savio Nsereko), and which was never organised by the Respondent;

- to explain that it was unable to pay the second instalment of the transfer fee in respect of the Player due to its financial problems resulting from its and because it had not received the 'TV rights' income from the Italian football league, but indicated that the situation should be resolved by the end of the following transfer window;
 - suggest that the Parties should amicably agree on the postponement of the deadline for payment of the second instalment in view of its ongoing financial problems; and
 - propose that this payment should be postponed until September 2011, including interest on the unpaid amounts.
14. The Appellant submitted that it sustained damage in consequence of the publication of the Statement, and that it was obliged to explain the situation to some of its creditors.
 15. On 14 July, the Respondent informed the Appellant that it had commenced proceedings against it concerning non-payment of the second instalment of the transfer fee of the Player. The action was commenced in the High Court of Justice, Queen's Bench Division, in England.
 16. On 15 July 2011, the Appellant sent a letter to FIFA, the FIGC and the Respondent. The substance of this correspondence was to report that the Respondent had violated the FIFA Statutes by taking the matter to the ordinary courts and requested that FIFA take action to prevent the Respondent from persisting with such violation.
 17. On 18 July 2011, FIFA informed the Appellant of the Respondent's claim lodged before the FIFA Players' Status Committee (hereinafter referred to as the "FIFA PSC").
 18. On 2 August 2011, the Player was transferred from Brescia to Bologna FC 1909 in a "co-ownership deal".
 19. In August 2011, there was a continued exchange of correspondence between the Appellant, the Respondent and FIFA about the proceedings in front of the High Court in England.
 20. On 23 August 2011, FIFA sent a letter to the FA, requesting to be informed of the action that the FA would take in order to guarantee the respect of the FIFA Statutes.
 21. Following another extended exchange of correspondence, on 3 October 2011, the Respondent informed the Appellant, that it had withdrawn its claim before the English courts.
 22. On 14 October 2011, the Respondent amended its claim before the FIFA PSC in view of the failure by the Appellant to pay the third instalment (EUR 1,200,000).
 23. On 21 November 2011, the Single Judge of the FIFA PSC rendered a decision, ordering the Appellant to pay the sum of EUR 1,700,000 to the Respondent in the framework of transfer of the Player.

III. SUMMARY OF THE ARBITRAL PROCEEDINGS BEFORE THE CAS

24. On 13 January 2012, the Appellant filed a Statement of Appeal with CAS against the decision rendered by the Single Judge of the FIFA PSC on 21 November 2011.
25. On 13 January, the CAS Court Office informed the Parties of the receipt of the Statement of Appeal filed by the Appellant and, in particular, the appointment by the Appellant of Mr Rui Botica Santos, Attorney-at-law, Portugal, as arbitrator.
26. On 23 January 2012, the Appellant filed its Appeal Brief.
27. On 19 January 2012, the Respondent appointed The Hon. Michael Beloff QC, Barrister, United Kingdom, as arbitrator.
28. On 25 January 2012, the CAS Court Office informed the Respondent of the filing of the Appeal Brief by the Appellant and set a deadline of twenty days to the Respondent to file its Answer.
29. On 14 February 2012, the Respondent filed its Answer.
30. On 15 February 2012, the CAS Court Office informed the Parties that in accordance with Article R56 of the Code of Sports-related Arbitration (hereinafter referred to as the “CAS Code”) that *“unless the Parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument, nor to produce new exhibits, nor to specify further evidence on which they intend to rely after the submission of the appeal brief and the answer”*.
31. On 22 March 2012, the Parties were informed that the following had been appointed as Arbitrators: Mr Petros C. Mavroidis, Professor, Switzerland, as President of the Panel, sitting with Mr Rui Botica Santos, Attorney-at-law, Portugal and The Hon. Michael Beloff QC, Barrister, United Kingdom as Members of the Panel.
32. On 24 April 2012, the Parties were informed that a hearing would be held in the present dispute on 26 or 27 June 2012.
33. On 27 April 2012, the Appellant informed the CAS Court Office that it would not be available for a hearing on 26 or 27 June 2012, as the last week of June is usually the period used by the FIGC for the resolution of the co-ownership (*“Diritto di partecipazione”*) of players and that the Appellant was involved in the resolution for the Player. The Appellant further stated that the outcome of this particular procedure for the Player would have an influence on the present dispute before CAS and that if a hearing took place on one of the proposed dates, it would *“undermine Appellant's ability to rely on testimony of the witnesses named in the present proceedings as well as be ill-timed considering that important events relevant to the merits of the dispute will take place on the said dates or immediately thereafter”*. The Appellant therefore requested that the hearing take place after 30 June 2012.

34. On 9 May 2012, the Appellant informed the CAS Court Office that, as proposed, it would be available for a hearing on 4 July 2012. It further stated that it was still awaiting instructions from the Panel regarding its objections with respect to some of the Respondent's submissions, such as the inadmissibility of the counterclaim contained in the Respondent's Answer.
35. On the same date, the Respondent informed the CAS Court Office that Ms Brady, the Respondent's only witness, would not be available on 4 July 2012 for the hearing, due to professional commitments.
36. On 15 May 2012, the Parties were informed that a hearing would take place on 4 July 2012, at a location to be confirmed.
37. On 16 May 2012, the Parties were informed that Mr Serge Vittoz, attorney-at-law, Switzerland, would act as ad hoc Clerk in the present matter.
38. On 18 May 2012, the Respondent objected to holding a hearing on 4 July 2012, referring to its letter dated 9 May 2012. The Respondent further pointed out to minor mistakes in the Order of Procedure sent to the Parties.
39. On 22 May 2012, the Appellant signed the Order of Procedure.
40. On 25 May 2012, the Respondent signed the Order of Procedure, with an amendment regarding the amount in dispute, which is, according to the Respondent approximately EUR 500,000 plus interest as the Appellant had raised no dispute regarding the payment of EUR 1,700,000 and as the Single Judge's decision dated 21 November 2011 includes interest.
41. On 25 May 2012, the Parties were informed that the hearing scheduled on 4 July 2012, would take place at the Lausanne Palace Hotel in Lausanne, Switzerland.
42. On 28 May 2012, the Respondent informed the CAS Court Office that the Respondent details were:

"Counsel: Tom Cleaver

Solicitor: Henri Brandman

Witness: Andrew Pincher, Club Secretary".

And that as "a result of the unavailability of Ms. Karren Brady on 4th July 2012, the Respondent must apply for permission under Article R55 of the Code to file a late witness statement from Mr. Andrew Pincher in her stead".

43. On 30 May 2012, the Appellant requested explanation from the Respondent about the presence of Mr Tom Cleaver in the list of its representatives. In particular, the Appellant wanted to know if he was the Tom Cleaver who was working at the law firm Blackstone Chambers, the same law firm of which the party appointed arbitrator of Respondent, The Hon. Michael Beloff QC, is a member. The Appellant further stated that it reserved *"any and*

all rights to take action on the basis of the information provided by Respondent including but not limited to challenging an arbitrator”.

44. On the same date, the Respondent made the following comments regarding the Appellant’s request regarding Mr Tom Cleaver:

- “1. *Blackstone Chambers is not a “law firm”, but a set of barristers’ chambers.*
2. *Like all self-employed barristers, members of Blackstone Chambers work as independent legal practitioners.*
3. *The Hon. Michael Beloff QC is a very distinguished arbitrator in sports-related matters, and it is common for him (or other arbitrators at Blackstone Chambers) to be engaged in matters in respect of which other members of chambers are advocates for one or both parties to the arbitration. As Chambers & Partners 2012 points out, “Blackstone Chambers is a name that has become synonymous with sports law at the Bar: a glance at any of the leading sports cases invariably reveals the involvement of at least one of the set’s members”.*

45. On 4 June 2012, the Appellant filed with the CAS Court Office a petition for challenge of the nomination of The Hon. Michael Beloff QC, pursuant to Article R34 of the Code.
46. On 13 June 2012, the Respondent informed the CAS Court Office that Ms. Karren Brady, Respondent’s vice-chairman, would be available for the hearing.
47. On 15 June 2012, the Appellant informed the CAS Court Office that Mr Roberto Zanzi and Mr Andrea Iaconi would not appear as witness before CAS for various reasons. Attached to the letter, the Appellant submitted the Witness Statements of Messrs Fabio Corioni and Ernesto Tansini.
48. On 26 June 2012, the International Council of Arbitration for Sport (hereinafter referred to as the “ICAS”) granted the petition challenging the participation of Hon. Michael Beloff QC in the Panel filed by the Appellant. In its decision, the ICAS in particular stated that in *“view of the recent developments in international arbitration exposed above, the evolution in the organisation of barrister’s chambers in United Kingdom and the fact that the parties do not come from the same legal system, the ICAS Board considers that, even though it is convinced that the Hon. Michael Beloff Q.C. is a perfectly independent and impartial arbitrator, the Appellant’s petition shall be granted on the basis of the arguments it raises and which objectively can cast some doubts, at least in appearance, as to the arbitrator’s independence. In particular, the ICAS Board is troubled that the Respondent, at no time when it referred to Mr Tom Cleaver, made any spontaneous reference to the fact that he was a barrister member of Blackstone Chambers, while the name of Mr Brandman was always associated with the name of his law firm since the beginning of this arbitration”.*
49. On 27 June 2012, the Appellant informed the CAS Court Office that Mr Fabio Corioni, Ms Antonella Corioni, and Mr Ernesto Tansini would appear as expert witnesses at the hearing.
50. On 28 June 2012, the Parties were informed that the new composition of the Panel would be the following: Mr Petros C. Mavroidis, Professor, Switzerland, as President of the Panel, sitting

with Mr Rui Botica Santos, Attorney-at-law, Portugal and Mr Stuart McInnes, Solicitor, United Kingdom as Members of the Panel, following the new nomination of an arbitrator by the Respondent.

51. On 2 July 2012, the Appellant informed the CAS Court Office that Ms Sara Lovato would attend the hearing as an interpreter. The Appellant further stated that Bologna FC had agreed to pay compensation of EUR 3,360,000 to the Appellant in order to extinguish the remaining economic rights resulting from the agreement of co-ownership regarding the Player and that it had now been dissolved in accordance with the rules of the FIGC.
52. On 4 July 2012, a hearing was held at the Lausanne Palace Hotel in Lausanne, Switzerland.

IV. POSITION OF THE PARTIES

53. The following outline of the Parties' positions is illustrative only and does not necessarily comprise each every contention put forward by the Parties. The Panel, however, has carefully considered all the submissions made by the Parties, even if there is no specific reference to those submissions in the following summary.

A. Brescia Calcio S.p.A (Appellant)

54. The Appellant does not contest owing the Respondent the unpaid sum, that is, the two last instalments amounting to a total of EUR 1,700,000.
55. However, the Appellant contends that it is entitled to compensation because of the alleged breach of the Transfer Agreement by the Respondent. The Appellant's position regarding this compensation is summarized in the Appeal Brief and is the following:

"Breach of choice-of-court agreement"

- *By means of lodging a claim against Brescia Calcio before the High Court of Justice Queen's Bench Division, West Ham United has breached Clause 5(e) of the transfer agreement of A.*
- *The breach has caused damage to Brescia Calcio in the form of legal costs in disputing the jurisdiction of the non-chosen forum.*
- *Compensation in the amount of EUR 24.169,06 must be awarded to Brescia Calcio.*

Breach of confidentiality

- *By means of publishing a statement containing financial information pertaining to the transfer agreement of A., West Ham United has breached Clause 5(a) of the agreement.*
- *The breach has caused financial damage to Brescia Calcio in the form of a) loss of business reputation, b) difficulties in obtaining loan financing and higher interest rates payable, c) lower transfer fees obtained by Brescia Calcio during the summer transfer window 2011 and d) a lower fee obtained by Brescia Calcio for the transfer of A.*
- *Compensation set in an amount set at the discretion of the Panel must be awarded to Brescia Calcio*

- *Appellant considers that the minimum amount of compensation due is EUR 500.000,00”.*

B. West Ham United FC (Respondent)

56. The Respondent’s position is summarized in the Answer, and is the following:

- The sum of EUR 1,700,000 is due.
- The vast majority of the Appellant’s case hinges upon the fact that the Respondent revealed that the Appellant had failed to make payment.
- The Appellant’s claim is vague and hypothetical; the alleged losses are losses which a club in its position might arguably in some cases suffer, not losses which it can prove it has suffered.
- Even if the Appellant had produced evidence of actual loss, the circumstances militate against the idea that the loss resulted from the Statement and not from other factors.
- The only respect in which it might be argued that loss could have been suffered as a result of a breach of the confidentiality clause is in respect of the transfer fee; if the Appellant had led other clubs to believe that it had paid significantly more than EUR 2,000,000 to the Respondent for the Player, and the Respondent revealed the true position, it is arguably possible that the willingness of other clubs to pay over the odds for the Player would be reduced and that they might have lowered their offers. However, a) there is no evidence that that happened and b) it is most likely that it did, given that, as the Appellant has accepted, Bologna FC 1909 purchased an interest in the Player at a value of EUR 3,000,000, substantially more than the EUR 2,000,000 paid by the Appellant.
- Regarding the claim relating to the costs incurred by the Appellant concerning the proceedings before the English court, the claim fails because a) the Parties had expressly agreed that they would submit to the jurisdiction of the English courts and b) the proceedings were for the recovery of an agreed debt and no dispute before FIFA had been lodged at that time. Therefore, the filing of the proceedings before the English court was not in breach of the Transfer Agreement.

57. The Respondent also filed a counterclaim claiming that the applicable interest rate should be 8.5%, in accordance with English law on the matter.

V. THE PARTIES’ REQUESTS FOR RELIEF

58. The Appellant’s requests for relief are the following:

“Brescia Calcio S.p.A hereby respectfully requests the Court of Arbitration for Sport to:

- 1) *Set aside the decision of the Single Judge of the Players’ Status Committee*

- 2) *Recognize that West Ham United has breached Clause 5(e) of the transfer agreement of A. concerning choice-of-court*
- 3) *Decide that West Ham United is liable to compensate Brescia Calcio for the financial loss suffered due to the above breach in the amount of **EUR 24.169,06***
- 4) *Recognize that West Ham United has breached Clause 5(a) of the transfer agreement of A. concerning confidentiality.*
- 5) *Decide that West Ham United is liable to compensate Brescia Calcio for the financial loss suffered due to the above breach in an amount set at the discretion of the Court of Arbitration for Sport*
- 6) *Alternatively to the above, order compensation payable by West Ham United to Brescia Calcio on the basis of general principle of law*
- 7) *Set the amount of compensation due from West Ham United to Brescia Calcio for the breach of confidentiality at an amount of no less than **EUR 500.000***
- 8) *Decide that interest in the amounts awarded is due at the rate of 5% p.a. as from the date of the breach*
- 9) *Set-off any amounts ordered as compensation by West Ham United to Brescia Calcio from any amounts payable by Brescia Calcio to West Ham United under the transfer agreement of A.*
- 10) *Alternatively, in the event of any preclusion of requests of relief, arguments or evidence, return the matter to FIFA for a new decision to be issued on the basis of more complete investigation*
- 11) *Decide that West Ham United must bear all the costs of the present arbitration*
- 12) *Decide that West Ham United must make a contribution towards the legal costs of Brescia Calcio incurred in the present proceedings in the amount of CHF 30.000,00”.*

59. The Respondent’s requests for relief are the following:

“86. [...], the Panel is respectfully asked to order that:

- a) *The Appellant pay the Respondent €1,700,000 plus interest at 8.5% from the date each instalment became due;*
- b) *The Respondent’s counterclaims be dismissed;*
- c) *The Appellant pay the Respondent CHF 5,000 in respect of the costs of the FIFA.*

87. *Alternatively, the Panel is respectfully asked simply to uphold the Decision of the Single Judge.*

88. *In addition, the Panel is respectfully asked to make an order under Rule R65.5 of the Code that the Appellant pay the costs of the arbitration and make an appropriate contribution to the legal fees and other expenses incurred by the Respondent”.*

VI. HEARING

60. A hearing was held on 4 July 2012 at the Lausanne Palace Hotel in Lausanne, Switzerland. The following persons attended the hearing:
- For the Appellant: Ms Antonella Corioni, Financial Officer and Mr Fabio Corioni, Technical Director assisted by counsels Mr Vittorio Rigo and Mr Pekka Albert Aho, as well as by Ms Sara Lovato (interpreter).
 - For the Respondent: Ms Karren Brady, Vice-chairman assisted by counsels Mr Henri Brandmann, and Mr Tom Cleaver.
61. At the beginning of the hearing, the President asked the representative of the Parties who would give evidence in the course of the hearing to sit outside the Court before their examination.
62. The Panel heard evidence from the following persons:
- Mr Ernesto Tansini;
 - Ms Antonella Corioni;
 - Mr Fabio Corioni;
 - Ms Karen Brady.
63. Each person heard by the Panel was invited by its President to tell the truth subject to the consequences of perjury provided by Swiss law and was examined and cross-examined by the Parties, and answered questions by the Panel as well.
64. The Parties were then afforded the opportunity to present their cases, submit their arguments and to answer the questions asked by the Panel.
65. The Parties explicitly agreed that their right to be heard and to be treated equally in the arbitration proceedings had been fully observed.

VII. JURISDICTION OF THE CAS

66. Pursuant to Article R47 of the Code:
- “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”.*
67. The jurisdiction of the CAS to hear this dispute derives from Articles 62 and 63 of the FIFA Statutes and was confirmed by the Parties when signing the Order of Procedure. The jurisdiction of the CAS in the present case was not disputed by the Parties.

68. Under Article R57 of the Code, the Panel has the full power to review the facts and the law and may issue a de novo decision superseding, entirely or partially, the appealed one.

VIII. ADMISSIBILITY

69. The appeal was filed within the deadline provided by the FIFA Statutes and the Rules governing the procedures of the Players' Status Committee and the Dispute Resolution Chamber. It complied with all other requirements of article R48 of the Code.
70. It follows that the appeal is admissible.

IX. APPLICABLE LAW

71. Article R58 of the Code provides that 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.
72. In Clauses 5(e) and 5(f), the Transfer Agreement provides for conflicting provisions on the choice of law agreed upon by the Parties.
73. The Panel decided that it was the FIFA Statutes (and to the extent necessary, Swiss law) that would be applicable to this dispute. Article 60 para. 2 of the FIFA Statutes, in its applicable version to this case, provides that CAS shall primarily apply the various Regulations of FIFA, and, additionally, Swiss law.
74. Considering that the present matter was submitted to the FIFA PSC on 7 July 2011, it is undisputed that the 2010 version of the FIFA Regulations on the Status and Transfer of Players (hereinafter, the "Regulations") are applicable. Those Regulations shall thus apply primarily, together with the other applicable rules of FIFA. Swiss law would be applied complementarily.

X. MERITS

75. It is not disputed by the Parties that they entered into an agreement regarding the transfer of the Player on 20 August 2010 under which the Player was transferred from the Respondent to the Appellant. Under the terms of Article 3 of the Transfer Agreement, transfer compensation of EUR 2,200,000 had been agreed for the transfer of the Player, and would be paid in three instalments: EUR 500,000 payable within 15 days of the Player's registration with the Appellant, EUR 500,000 payable no later than 30 June 2011 and EUR 1,200,000 payable no later than 30 September 2011.

76. It is also not disputed by the Parties that the last two instalments in the total amount of EUR 1,700,000 were still outstanding at the moment the hearing was held.

A. Alleged breach of the confidentiality clause of the Transfer Agreement

77. The Appellant alleged that the Respondent, by mentioning a) the amount of the transfer compensation, b) the payment's schedule of the agreed instalments and c) the fact that the Appellant's non-payment would give rise to disciplinary measures against it, breached the Transfer Agreement. The Panel felt that the key question before it was whether Brescia had suffered damage in consequence of publication of the Statement by the Respondent. The Panel concludes that this was not the case for the following reasons.
78. The burden of proof for the facts alleged by the Appellant lies with the Appellant itself. It is well established CAS jurisprudence (and a maxim well known in arbitration generally) that a party making a claim carries the associated burden of proof (*actori incumbit probatio*), i.e., it must give evidence of the facts on which its claim has been based (cf. CAS 2005/A/968 and CAS 2004/A/730).
79. To determine whether the Appellant actually incurred damage following the Respondent's Statement, the Panel must examine whether the evidence provided by the Appellant established the alleged facts.
80. The Appellant argued that the Respondent's Statement has had a harmful influence on a) its position in the negotiations with clubs potentially interested in buying the Player and/or other players, b) its position towards financial institutions regarding its credit risk in relation to obtaining ongoing financial support from banks and/or other sources of finance, which resulted in financial damage.
81. With regard to the position of the Appellant in the negotiations with other clubs, the Appellant only relies on Mr Fabio Corioni's evidence who testified before the Panel that after publication of the Statement interest shown by other clubs in buying the Player simply disappeared. The Appellant did not produce any document corroborating Mr Corioni's statements. It failed to quantify any alleged consequential damage.
82. Moreover, the facts of the case as recounted above show that the Appellant not only did not lose money from this transaction, but actually managed to sell the Player for a substantial profit to Bologna.
83. As to the position of the Appellant in the financial market, the Panel notes that the Respondent, in the Statement, only revealed the identity of the creditor (itself) and the failure of the Appellant to respect the instalments agreed upon. It did not magnify the sums owed by Brescia, it simply disseminated information regarding the non payment of sums properly due. Under the circumstances, it is untenable to maintain that there was *reformatio in pejus* for Brescia resulting from the revelations made by West Ham.

84. During their cross-examination, Ms. Corioni and Mr Tansini stated that the overall amount of the Appellant's debts was approximately EUR 30,000,000 towards financial institutions and EUR 7,000,000 to 8,000,000 towards other creditors. They also explained that one of the elements of the business plan produced to convince the financial institutions to loan money to the Appellant, was the selling of players, in particular the Player and that the loan rates increased because of the difficulties surrounding the Player's sale. The Appellant nevertheless, did not submit any documents in evidence substantiating its allegations and as a result, it did not quantify the alleged consequential damage.
85. Furthermore, Ms Corioni and Mr Tansini confirmed at the hearing that in view of the Appellant's global financial situation it was difficult to attribute any increase in interest rates levied upon the Appellant by financial institutions at that time specifically to any circumstances involving the future transfer of the Player.
86. The Panel is of the opinion that the Statement did not render the financial situation of the Appellant any worse: the amount of money due was not influenced by the Statement, and the market was generally already aware of Brescia's financial situation.
87. Indeed, no evidence adduced by or on behalf of the Appellant disputed that the financial situation of Brescia was very critical at the time of the publication of the Statement by the Respondent. Moreover, the Appellant's income was drastically reduced in consequence of its relegation to Serie B as inevitably it would command lower Televisual-rights income, possibly a reduced income from ticket sales, and be less able to attract the level of sponsorship income enjoyed by Serie A clubs. The Appellant would in addition be obliged to respect the salary cap applicable to Serie B clubs, and thus the market was on notice that it would have to sell its best players, including the Player. This was information that the market (including the financial institutions loaning money to Brescia, as well as other clubs interesting in transacting and buying players from Brescia) generally possessed.
88. In view of the above, the Panel rejects the Appellant's claim in that it failed to satisfy the burden of proof in evidence substantiating that it suffered loss or damage in consequence of publication of the Statement by the Respondent.

B. Damage due to the commencement of proceedings before the English courts

89. The Appellant also argued that it had incurred damages in the amount of EUR 22,169.06; this sum represents legal costs following the commencement of proceedings by the Respondent before the English courts in relation to the non-payment of the two last instalments due.
90. The Panel notes that the Transfer Agreement contains under its clauses 5(e) and 5(f) two ambiguous provisions regarding choice of law, which explicitly allow for litigation before English courts as well as before FIFA.
91. This ambiguity in the Transfer Agreement should have led the Parties to re-negotiate the terms of these provisions to remove ambiguities. However, no re-negotiation occurred and thus it was open to either party to litigate in both jurisdictions.

92. The Panel is of the opinion that the Respondent shall bear the costs related to the proceedings before the English courts incurred by the Appellant as these costs were brought about by the Respondent's own choice to first file the case before the English courts, and after, in parallel, before FIFA. The Respondent ought to have pursued the said proceedings before the English courts up to the end. But once it withdrew these proceedings (following FIFA's letter dated 23 August 2011 to the FA), it caused the Appellant an unnecessary cost because the Appellant hired lawyers to defend it before the English courts, only for the said proceedings to be prematurely withdrawn. The Respondent shall therefore compensate the costs incurred by the Appellant for the unnecessary English courts proceedings. Even if the contract granted the Parties the possibility of solving the claim before the English courts, it is true that such clause was against the FIFA Statutes and once the Respondent became aware of that fact, they decided to withdraw the case, hence generating unnecessary costs.
93. At this point, the Panel shall determine the amount of the damages incurred by the Appellant thereto.
94. According to Article 42 of the Swiss Code of Obligations (hereinafter referred to as the "SCO"), whoever claims damages must prove the damage.
95. In the case at hand, the Appellant managed to evidence its damage in this regard by filing a "proforma" invoice from its legal counsels. The details of this "proforma" invoice only relate to the activities of the Appellant's counsels in relation with the proceedings before the English courts. The total of this "proforma" invoice amounts to EUR 22,169.06. In the course of the hearing, the Appellant admitted that the amount of this "proforma" invoice had not been paid at that time.
96. The Panel is of the opinion that a "proforma" is not sufficient, in itself, to prove the damage incurred by the Appellant.
97. However, according to Article 42 para. 2 of the SCO, if the exact amount of damages cannot be established, the judge shall assess them in his discretion, having regard to the ordinary course of events and the measures taken by the damaged party. In this regard, the damaged party is responsible to provide the judge, insofar as one can expect from it, all the facts constituting evidence of the existence of damage and allowing or facilitating its estimation (Decision dated 1 March 2005 of the Swiss Federal Tribunal, ref. ATF 131 III 360 c. 5.1 and the quoted references).
98. The Panel considers, that the above-mentioned "proforma" invoice, analysed in the light of the complete file, is sufficient evidence to allow it to conclude that the amount due to the Appellant by the Respondent following the commencement, by the latter, of proceedings before the English courts, can be estimate, in accordance with Article 42 para. 2 of the SCO, to the amount requested by the Appellant, i.e. EUR 22,169.06.
99. The Panel further notes that the amount of this "proforma" invoice was not contested by the Respondent in the course of the present proceedings.

100. In view of the above, the Panel concludes that the Respondent shall pay the amount of EUR 22,169.06 as damages to the Appellant following its commencement of the proceedings before the English courts, in parallel of the proceedings before FIFA.

C. The Respondent's counterclaim

101. The Respondent claims that the rate to the interest applicable to the moneys due from the Appellant ought to be 8,5% in accordance with English law and not 5% as decided by the Single Judge of the PSC.
102. The Panel does not have to decide on this counterclaim as i) no counterclaim can be introduced by the Respondent in CAS Appeal Arbitration Procedure and ii) the Parties agreed during the hearing not to pursue this matter any further.

XI. CONCLUSION

On the basis of the foregoing, the Panel concludes that:

- It rejects the claim regarding the alleged breach by the Respondent of the confidentiality-clause in the Agreement between Appellant and Respondent, since the Appellant failed to substantiate that it suffered any damage following the Respondent's Statement and therefore is not entitled to any compensation from the Respondent in this regard;
- The Respondent acted in good faith by raising a claim before the English court but must bear the cost consequences of discontinuing those proceedings, such cost to be assessed by the English Court and paid by the Respondent to the appellant.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by Brescia Calcio S.p.A. against the decision issued by the Single Judge of the FIFA Players' Statutes Committee on 21 November 2011 is partially upheld.
2. The decision of the Single Judge of the FIFA Players' Statutes Committee on 21 November 2011 is set aside.
3. Brescia Calcio S.p.A. is ordered to pay to West Ham United FC the amount of EUR 1,700,000, plus 5% interest p.a. on the following partial amounts until the effective date of the payment, as follows:

- on EUR 500,000 as from 1 July 2011;
 - on EUR 1,200,000 as from 1 October 2011.
4. West Ham United FC is ordered to pay to Brescia Calcio S.p.A the amount of EUR 22,169.06 as damages.
- (...)
7. All other claims are dismissed.