**Arbitration CAS 2013/A/3137 Genoa Cricket and Football Club S.p.A. v. Grasshopper Club Zurich, award of 7 October 2013**

Panel: Mr Manfred Nan (The Netherlands), President; Mr Mark Hovell (United Kingdom); Mr Alasdair Bell (United Kingdom)

*Football*
*Loan agreement*
*Burden of production of the proof*
*Interpretation of the wording of a contract*

1. **The CAS Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one. Hence, if a party wishes to establish some facts and persuade the deciding body, it must actively substantiate its allegations with convincing evidence.**

2. **According to the CAS jurisprudence, there is no need to look for the true intention of the parties at the moment of signing where it is reflected in the clear wording of an agreement. In this respect, a loan agreement entered into by the parties supersedes any draft agreement and addendum which merely reflects a certain progress in the negotiations which, finally resulted in the conclusion of the loan agreement. Consequently, the obligations provided by the agreement must be complied with by the parties.**

## I. PARTIES

1. Genoa Cricket and Football Club S.p.A. ("Genoa" or the "Appellant") is a football club with its registered office in Genoa, Italy. Genoa is registered with the Italian Football Federation (*Federazione Italiana Giuoco Calcio)* (the "FIGC"), which in turn is affiliated to the Fédération Internationale de Football Association (the "FIFA").

2. Grasshopper Club Zurich ("Grasshopper" or the "Respondent") is a football club with its registered office in Zurich, Switzerland. Grasshopper is registered with the Swiss Football Association (*Association Suisse de Football / Associazione Svizzera di Football / Schweizerischer Fussballverband)* (the "ASF-SFV") which in turn is also affiliated to FIFA.

## II. FACTUAL BACKGROUND

### *A. Background Facts*

3. Below is a summary of the main relevant facts, as established on the basis of the parties' written and oral submissions and the evidence examined in the course of the present appeals arbitration proceeding. This background is made for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion.

4. In June 2009, Genoa and Grasshopper started negotiations for the loan of V. (the "Player"), a professional football player of French and Italian nationality, from Genoa to Grasshopper. In this regard, both parties signed an undated draft temporary loan agreement titled *"Contratto di Trasferimento Temporaneo del Calciatore V."* (the "Draft Agreement"). On behalf of Grasshopper, this Draft Agreement was signed solely by Mr Erich Vogel, former member of the Board of Directors of Grasshopper. In addition, an undated document named *"Addendum al Contratto di Trasferimento tra il Genoa CFC S.p.A. e il Grasshoppers Club Zurigo stipulato in data _____"* (the "Addendum") was signed by both parties. Again, on behalf of Grasshopper, this Addendum was signed solely by Mr Erich Vogel.

5. On 22 June 2009, a facsimile was sent from the offices of Grasshopper to a Zurich based law firm. This facsimile contained a copy of the undated Draft Agreement and a copy of the undated Addendum. A translation of article 1(a) and (d) of the Addendum into English reads as follows:

> *"Should the Player return to Genoa following Grasshoppers' technical evaluation, Genoa shall refund Grasshoppers the amount of CHF 2,000,000.00= (CHF two million==), as per the stipulated transfer agreement dated _____, the agreement presently in force shall immediately cease to be valid and effective, with no need for any further communication between the parties involved. As an alternative, the parties are entitled to renew the Player's temporary transfer for the Sports Season 2010/2011.*
>
> *With exclusive reference to the provisions stated under article a) of this agreement, should the Player's temporary transfer be renewed for the Sports Season 2010/2011, any transfer offer presented by a third party club shall be notified to Genoa within and no later than July 30th, 2011. It is understood that the Player's temporary transfer shall be extended for one season only, at the end of which Genoa shall in no way be obliged to refund Grasshoppers any amount".*

6. On 29 June and 3 July 2009, two further draft loan agreements were prepared. These drafts do not contain any signatures.

7. On 8 July 2009, Genoa and Grasshopper concluded a loan agreement (the "Loan Agreement") for the loan of the Player from Genoa to Grasshopper for one football season, *i.e.* until 30 June 2010. This Loan Agreement was signed jointly by two board members of Grasshopper. The Loan Agreement contains, *inter alia*, the following relevant terms:

*"2. Genoa is transferring to Grasshopper the services of the Player on a loan basis for the Season 2009/10 until 30 June 2010 as well as 25% of the economical rights on the future transfer of the Player against compensation in the amount of CHF 2,000,000 (two million Swiss Francs).*

*6. In the event that no offer is received for the definitive transfer of the Player during the Season 2009/10, Genoa has the option to extend the loan period of the Player with Grasshopper for the Season 2010/11 until 30 June 2011, provided that the Player agrees to extend his employment contract with Grasshopper until 30 June 2011 for the same financial conditions as foreseen in his employment contract with Grasshopper for the Season 2009/10. Genoa shall make use of this option right by 30 June 2010. In the event that the loan period is extended for a further season, the parties agree that the provisions contained in the points 7 – 10 are extended as well and apply accordingly. For the eventual extension of the loan period for the Season 2010/11 there will be no loan fee to be paid by Grasshopper.*

*7. In the event the Player returns to Genoa at the end of the Season 2009/10, Genoa shall pay back to Grasshopper the amount of CHF 2,000,000 (two millions Swiss Francs) by 15 July 2010. Once in receipt of this amount the 25% of the economical rights on the future transfer of the Player in possession of Grasshopper will be automatically returned to Genoa and the present agreement loses any legal force. In such event, Grasshopper engages itself to instruct the Swiss Football Federation to issue the International Transfer Certificated [sic] to the Italian Football Federation in favour of Genoa at the end of the loan period. For the purpose of this agreement, also the loan of the Player from Genoa to a third club for the Season 2010/11 is considered as a return of the Player to Genoa and falls under the conditions of the present provision. However, in addition to the terms agreed in this provision the parties agree that any definitive transfer of the Player during the Summer registration period 2010 will still entitle Grasshopper to receiving 25% of the amount of the transfer compensation above CHF 2,000,000 (two million Swiss Francs).*

*8. In the event the Player does not return to Genoa at the end of the loan period and instead he is transferred on a definitive basis to a third club, the revenue received by the third club for the vent [sic] of the rights of the Player shall be distributed between Genoa and Grasshopper in accordance with the terms and deadlines agreed in the transfer contract as follows:*

*a. Grasshopper shall receive the first CHF 2,000,000 (two million Swiss Francs) of the transfer compensation;*

*b. Every [sic] amount of the transfer compensation above CHF 2,000,000 (two million Swiss Francs) shall be distributed in the following percentages:*

*i. Genoa: 75%*

*ii. Grasshopper: 25%*

*Genoa will also recognize a bonus to Grasshopper which is at the sole and full discretionality* [sic] *of the Board of Genoa".*

8. On 14 July 2009, Genoa confirmed to Grasshopper that *"(…) considering the immediate payment, Genoa agrees to a reduction of CHF 50,000 on the global amount, i.e. the amount that Grasshopper shall pay to Genoa is of CHF 1,950,000. At the same time, the amount that Genoa shall return to Grasshopper in accordance with the terms of the* [Loan Agreement] *entered into between both clubs, is as well of CHF 1,950,000".*

9. At the end of the 2009/2010 season, Genoa and Grasshopper agreed to exercise the option in paragraph 6 of the Loan Agreement and to extend the loan of the Player with Grasshopper for one season, until 30 June 2011.

10. At the end of the 2010/2011 season, the Player returned to Genoa and was subsequently transferred on loan to the Italian football club Cesena Calcio ("Cesena").

11. On 8 August 2011, Grasshopper requested from Genoa the repayment of CHF 1,950,000.

*B. Proceedings before the Single Judge of the FIFA Players' Status Committee*

12. On 28 November 2011, Grasshopper lodged a claim against Genoa with FIFA. Grasshopper maintained that article 7 of the Loan Agreement was fulfilled and that Genoa therefore had to return the amount of CHF 1,950,000 to Grasshopper. Consequently, Grasshopper claimed payment of the amount of CHF 1,950,000, plus 5% interest *p.a.* as of 16 July 2011.

13. On 19 June 2012, Genoa provided FIFA with a copy of an undated *addendum*, that was allegedly concluded after the conclusion of the Loan Agreement. Based on this *addendum* Genoa maintained that it was not an obligation to refund the amount of CHF 1,950,000 to Grasshopper, but an option. The alternative would be that if this amount would not be returned, Grasshopper would remain the owner of 25% of the economical rights on the future transfer of the Player.

14. On 10 August 2012, Grasshopper provided FIFA with a copy of an undated *addendum*, which was slightly different to the Addendum with a fax report confirming that this *addendum* was sent to a Zurich based law firm on 22 June 2009. Although the content of the two *addenda* is exactly the same, the Panel notes that the paraphs under the *addenda* are located in slightly different positions. As such, the *addendum* submitted to FIFA by Grasshopper is not exactly the same document as the *addendum* submitted to FIFA by Genoa.

15. On 23 October 2012, the Single Judge of the FIFA Players' Status Committee (the "FIFA PSC Single Judge") rendered its decision (the "Appealed Decision") with, *inter alia*, the following operative part:

    a. *"The claim of* [Grasshopper] *is accepted.*

    b. [Genoa] *has to pay to* [Grasshopper]*, within 30 days as from the date of notification of this decision, the amount of CHF 1,950,000 plus interest at 5% p.a. on said amount as of 16 July 2011 until the date of effective payment".*

16. On 15 March 2013, the grounds of the Appealed Decision were communicated to the parties, determining, *inter alia*, the following:

    - *(…) the Single Judge started by analysing the order in which the [Loan Agreement] and the [Addendum] were concluded between the parties. In this respect the Single Judge recalled that it is*

*undisputed that the [Loan Agreement] was signed by the parties on 8 July 2009. However, it is disputed by the parties when the [Addendum], which does not bear a date, was concluded between them. [Genoa] stated that the [Addendum] belonged to the [Loan Agreement] and was signed after 8 July 2009; [Grasshopper] argued that the [Addendum] belonged to the [Draft Agreement] and was signed before 8 July 2009.*

- *In this respect, the Single Judge referred to the documentation on file, in particular, to the fax report dated 22 June 2009 which indicated that the* [Addendum] *was sent by* [Grasshopper] *to a law firm, as well as to the undated [Draft Agreement] that was sent together with the* [Addendum] *on 22 June 2009. Taking into account said documents as well as taking into consideration the explanations provided by* [Grasshopper], *the Single Judge deemed that the explanations given by* [Grasshopper] *were credible and, therefore, the Single Judge was comfortably satisfied in his conclusion that the parties had already signed the [Addendum] on or before 22 June 2009, in other words, before signing the* [Loan Agreement] *on 8 July 2009. The Single Judge held that, given the timeline of the events, it could be established that the parties' intention was to replace the undated* [Draft Agreement] *and the* [Addendum], *both signed before 8 July 2009, by the* [Loan Agreement] *of 8 July 2009, which shall therefore be considered as the relevant agreement in the present matter".*
- In respect of article 7 of the Loan Agreement, *"the Single Judge went on to analyse how art. 7 of the* [Loan Agreement] *should be interpreted. On the basis of the literal wording of art. 7, the Single Judge concluded that the parties had in fact agreed upon the reimbursement of the loan compensation to* [Grasshopper] *in the event that the* [Player] *would return to [Genoa] after the (extended) loan period. The Single Judge held that the return of the* [Player] *was the sole condition that had to be met and that this would result in the obligation for* [Genoa] *to reimburse the loan compensation to* [Grasshopper], *without this being "mutually exclusive" with the 25% sell-on option. Given that it is undisputed that the [Player] was transferred on loan to a third club after the loan period with* [Grasshopper], *the Single Judge held that* [Genoa] *has to pay the amount of CHF 1,950,000 to* [Grasshopper]*".*

## III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

17. On 5 April 2013, the Appellant filed a statement of appeal, together with 4 exhibits, with the Court of Arbitration for Sport (the "CAS"). In this submission the Appellant nominated Mr Mark A. Hovell, solicitor in Manchester, England, as arbitrator.

18. On 15 April 2013, the Appellant filed its appeal brief. This document contained a statement of the facts and legal arguments, and was accompanied by 4 additional exhibits with translations into English. The Appellant challenged the Appealed Decision, submitting the following requests for relief:

> *"1. We request this Honourable Court to review the present case as to the facts and to the law, in compliance with Article R57 of the Code of Sports-related Arbitration.*
>
> *2. We request this Honourable Court to issue a new decision setting aside the decision passed by the Single Judge of the Players' Status Committee on 23rd October 2012 in its entirety and stating that declare that* [sic] *Genoa has no pending financial obligation towards Grasshopper.*

*3. In any case, we request this Honourable Court to order the Respondent to bear all costs incurred with these proceedings.*

*4. In any case, we request this Honourable Court to order the Respondent to cover all legal expenses of the Appellant related to these proceedings.*

*5. Finally, we request that a hearing be held in these proceedings".*

19. On 19 April 2013, the Respondent nominated Mr Alasdair Bell, General Counsel/Director of Legal Affairs, UEFA, Nyon, Switzerland, as arbitrator.

20. On 22 April 2013, FIFA renounced its right to request its possible intervention in the present appeals arbitration proceedings.

21. On 15 May 2013, pursuant to Article R54 of the CAS Code, and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that the Panel appointed to decide the present matter was constituted by:

Mr Manfred Nan, attorney-at-law, Arnhem, the Netherlands, as President;

Mr Mark A. Hovell, solicitor, Manchester, England, and;

Mr Alasdair Bell, General Counsel/Director of Legal Affairs, UEFA, Nyon, Switzerland, as arbitrators.

22. On 4 June 2013, the Respondent filed its answer, with 11 exhibits and translations into English, whereby it requested CAS to decide the following:

*"i. The Appellant's Appeal shall be rejected and the appealed decision of the Single Judge of FIFA's Players' Status Committee dated 23 October 2012 be confirmed.*

*ii. The procedural costs of CAS and the legal costs of the Respondent shall entirely be borne by the Appellant".*

23. On 7 June 2013, the Respondent informed CAS that it did not deem it necessary for a hearing to be held.

24. On 13 June 2013, the Appellant reiterated its request for a hearing to be held.

25. On 28 June 2013, upon the request of the President of the Panel, pursuant to Article R57 of the CAS Code, FIFA provided CAS with a copy of its file related to the present matter.

26. On 18 July 2013, both parties returned duly signed copies of the Order of Procedure to the CAS Court Office.

27. On 23 August 2013, a hearing was held in Lausanne, Switzerland. At the outset of the hearing both parties confirmed not to have any objection as to the constitution and composition of the Panel.

28. In addition to the Panel, Mr Brent J. Nowicki, Counsel to the CAS, and Mr Dennis Koolaard, *Ad hoc* Clerk, the following persons attended the hearing:

a) For the Appellant:

1) Mr Paolo Lombardi, Counsel;

b) For the Respondent:

1) Mr Vitus Derungs, Counsel;
2) Mr Dragan Rapic, Sports Director of the Respondent

29. No witnesses and experts were heard. The parties were afforded ample opportunity to present their case, submit their arguments, and answer the questions posed by the Panel.

30. Before the hearing was concluded, both parties expressly stated that they did not have any objection with the procedure and that their right to be heard had been respected.

31. The Panel confirms that it carefully heard and took into account in its discussion and subsequent deliberations all of the submissions, evidence, and arguments presented by the parties, even if they have not been specifically summarized or referred to in the present award.

## IV. SUBMISSIONS OF THE PARTIES

32. Genoa's submissions, in essence, may be summarized as follows:

- Genoa maintains that its failure to reimburse Grasshopper CHF 1,950,000 would result in Grasshopper retaining its 25% sell-on option.
- In respect of the Addendum, Genoa argues that when the document was presented to FIFA on 19 June 2012, *"the Appellant had just located a copy of this document and had scarce recollection of the circumstances under which it was discussed and signed. Now we are aware that this document was in fact known to the Respondent and was part of the negotiations and preliminary agreements reached in order to secure the temporary transfer of the Player"*.
- Anticipating Grasshopper's argument that the Addendum can only have been concluded prior to the conclusion of the Transfer Agreement, Genoa submits that *"the fact that the document in possession of the Respondent may have been drafted prior to the Transfer Agreement cannot rule out that another addendum may have been drafted after the Transfer Agreement, as we believe is the case for the copy of the addendum in the Appellant's possession"*.
- Furthermore, Genoa finds that the *addenda* in question, *"whether they were drafted prior to or after the Transfer Agreement, are not in contradiction with but complementary to the Transfer Agreement, in particular to its paragraph 7, to which they provide content"*.
- Genoa submits that *"said* [Addendum] *is in our opinion adamant in revealing the true intention of the parties: transfer the Player on loan to and grant the Respondent a 25% sell-on fee in case of a subsequent transfer to a third club in exchange for CHF 2'000'000 (CHF 1'950'000), which would*

*be returned to Grasshopper in case the player did not perform up to the expectations during the 2009/2010 season. However, if the loan was extended for a subsequent season, thus proving the Players'* [sic] *suitability for Grasshopper, Genoa would be released from the obligation to return the temporary transfer compensation paid by the Respondent"*. In this respect Genoa refers to article 18(1) of the Swiss Code of Obligations (hereinafter: the "SCO"), pursuant to which *"when interpreting a contract, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used"*.

In summary, Genoa explains the arrangements as the parties taking a "punt" (or bet) on the Player for the first season; if the loan did not work out, the loan fee was returned. However, if Grasshopper wanted the Player for a second season, then the loan was successful and no monies were to be repaid – this is the true intention or will of the parties, as reflected in the Addendum.

33. Grasshopper's submissions, in essence, may be summarised as follows:

- Referring to the fax of 22 June 2009 from Grasshopper to the Zurich based law firm, Grasshopper adheres with the decision of the PSC Single Judge in the Appealed Decision and finds that *"it is undoubtedly established that these documents were created on or before 22 June 2009"* and Grasshopper is of the opinion that *"*[t]*he documents dated 22 June 2009 are to be considered as a first draft for a loan agreement. The parties did obviously not see these documents as binding contracts. This explains why, on behalf of Grasshopper, they were only single signed and thus not legally binding"*.
- Grasshopper maintains that *"both copies of the Addendum are absolutely identical, with the single exception that the Addendum submitted by Grasshopper bears a date print that results from the mentioned fax transmission (…), whereas the Addendum submitted by Genoa bears no date print"*.
- Furthermore, Grasshopper submits that the undated Draft Agreement and the undated Addendum were single signed by Mr Erich Vogel, former member of the Board of Directors of Grasshopper. Pursuant to the Swiss Register of Commerce, which is publicly accessible and available also in Italian and English, *"Mr Vogel was entitled to sign jointly at two for Grasshopper. Therefore, by single signing these documents, he did not conclude a contract binding Grasshopper"*. In this respect, Grasshopper mentioned that the Loan Agreement was jointly signed by two board members.
- In respect of article 6 and 7 of the Loan Agreement, Grasshopper argues that *"Genoa has to refund the loan fee to Grasshopper in case of return of the player to Genoa, and this not only at the end of the season 2009/2010, but also in the event of an extension of the loan until 30 June 2011. The extension of the loan has therefore an impact on the Refund obligation only with regard to the due date of the refund: The refund is due by Genoa until 15 July 2011"*. The refund obligation *"does not grant Genoa a right to choose between the options (a. reimbursement, or b. definitively renounce on 25% of the player's economical rights). The Loan Agreement clearly provides that the reimbursement has in any case to be made until 15 July 2011. Genoa has, therefore, no choice with regard to the Refund obligation"*.
- Grasshopper does not agree with Genoa insofar as it maintains that the refund obligation should not be interpreted based on its wording, but on the intention of the

parties. Grasshopper finds that *"[t]he interpretation of the wording of the Refund obligation unequivocally provides that Genoa shall refund the loan fee to Grasshopper if the* [Player] *returns to Genoa, and this also in case of an extension of the loan until 30 June 2011.* Grasshopper therefore concludes that *"it is not necessary to artificially search for any other intention of the parties (…)"*.

## V. ADMISSIBILITY

34. The appeal was filed within the 21 days set by article 67(1) of the FIFA Statutes (2012 edition). The appeal complied with all other requirements of Article R48 of the Code of Sports-related Arbitration (the "CAS Code"), including the payment of the CAS Court Office fees.

35. It follows that the appeal is admissible.

## VI. JURISDICTION

36. The jurisdiction of CAS, which is not disputed, derives from article 67(1) of the FIFA Statutes (2012 edition) as it determines that *"[a]ppeals 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"* and Article R47 of the CAS Code.

37. The jurisdiction of CAS is further confirmed by the Order of Procedure duly signed by the parties.

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

39. Under Article R57 of the CAS Code, the Panel has full power to review the facts and the law and it may issue a new decision that replaces the decision challenged.

## VII. APPLICABLE LAW

40. Article R58 of the CAS Code provides the following:

*"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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".*

41. The Panel notes that article 66(2) of the FIFA Statutes stipulates the following:

*"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".*

42. The parties agreed to the application of the various regulations of FIFA and subsidiary to the application of Swiss law. The Panel is therefore satisfied to accept the subsidiary application of Swiss law should the need arise to fill a possible gap in the various regulations of FIFA.

## VIII. MERITS

### A. The Main Issues

43. The Panel observes that the main issues to be resolved are:

a) Did the parties sign a second *addendum* after the conclusion of the Loan Agreement?

b) Is the Appellant obliged to refund the Respondent with the amount of CHF 1,950,000?

#### *a) Did the parties sign a second addendum after the conclusion of the Loan Agreement?*

44. During the proceedings before the FIFA PSC Single Judge, the parties did not agree on the order of conclusion of the multiple agreements, more particularly, they were in dispute regarding the date of conclusion of the undated Addendum. Whereas the Appellant alleged that this document, despite not bearing any date, was signed *after* the conclusion of the Loan Agreement, the Respondent claimed that the document was signed *prior* to the conclusion of the Loan Agreement.

45. The Panel notes that with regard to this particular issue, the Appellant now states the following in its Appeal Brief:

*"Incidentally, when the addendum was presented to FIFA on 19th June 2012, the Appellant had just located a copy of this document and had scarce recollection of the circumstances under which it was discussed and signed. Now we are aware that this document was in fact known to the Respondent and was part of the negotiations and preliminary agreements reached in order to secure the temporary transfer of the Player".*

46. In light of this statement, the Panel concludes that the Appellant, in contrast to its previous statements before the FIFA PSC Single Judge, confirms that the undated Addendum and its content were known to the Appellant before the signing of the Loan Agreement.

47. Nevertheless, the Appellant adds that this factual conclusion *"cannot rule out that another addendum may have been drafted after the* [Loan Agreement], *as we believe is the case for the copy in the Appellant's possession".*

48. With regard to the evidentiary value that should be given to the undated Addendum, the Appellant alleges that *"the addenda in question, whether they were drafted prior to or after the* [Loan Agreement]*, are not in contradiction with but complementary to the* [Loan Agreement]*, in particular its paragraph 7, to which they provide content".*

49. On the other hand, the Respondent states that both copies of the undated Addendum are absolutely identical, with the single exception that the undated Addendum submitted by the

Respondent bears a date print that results from the mentioned fax transmission to the Zurich based law firm, whereas the undated Addendum submitted by the Appellant bears no date print.

50. The Panel, after a thorough examination of the documents submitted, finds that the *addendum* submitted to FIFA by the Appellant and the *addendum* submitted to FIFA by the Respondent are slightly different. The paraphs of the signatories on each page of the *addenda* are located on slightly different positions. As such, the *addendum* transmitted by facsimile to the Zurich based law firm by the Respondent, is not exactly the same *addendum* submitted to FIFA by the Appellant. However, the Panel observes that the content of the *addenda* is exactly the same. The Panel finds that this difference can be explained because the parties signed two original copies of the Addendum at the same time, which is therefore in fact one and the same document.

51. Furthermore, the Panel reminds the Appellant that the CAS Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one. Hence, if a party wishes to establish some facts and persuade the deciding body, it must actively substantiate its allegations with convincing evidence (CAS 2003/A/506; CAS 2009/A/1810).

52. In examining the documents submitted by the parties, the Panel notes that the undated Draft Agreement sent to the Zurich based law firm on 22 June 2009 contained the main terms of the agreement. However, it did not contain any provision regarding a sell-on clause. This sell-on clause was included in the undated Addendum which was sent together with the undated Draft Agreement.

53. The Panel finds that the undated Addendum is linked to this undated Draft Agreement and assumes that the parties were still in negotiation at that time. The main reason for this conclusion is that in the subsequent draft loan agreements dated 29 June and 3 July 2009, and in the final Loan Agreement, a sell-on clause was incorporated in the main contract. It therefore appears that the Draft Agreement and the Addendum were subsequently integrated into one single document, *i.e.* the draft agreement dated 29 June 2009. After the conclusion of this draft agreement, the negotiations continued and a new draft agreement was concluded on 3 July 2009 and finally the Loan Agreement itself was concluded.

54. Consequently, the Panel finds that the Addendum and the draft agreements submitted were all concluded and known to the parties prior to the conclusion of the final Loan Agreement. The Appellant failed to provide any corroborating evidence to the contrary. Accordingly, it cannot be determined that another *addendum* was concluded after the conclusion of the Loan Agreement.

55. Therefore, the Panel has no doubt that, besides the Appellant's letter dated 14 July 2009, no additional documents were signed by the parties that altered the content of the Loan Agreement.

56. Taking into account the above, the Panel will turn its attention to the interpretation of the Loan Agreement in order to decide whether or not the Respondent is entitled to an amount

equal to CHF 1,950,000, as awarded to the Respondent by the FIFA PSC Single Judge in the Appealed Decision.

***b) Is the Appellant obliged to refund the Respondent with the amount of CHF 1,950,000?***

57. The Panel recalls that it is undisputed that the Loan Agreement was concluded on 8 July 2009 and that, in accordance with the Loan Agreement and the subsequent agreement of 14 July 2012, an amount of CHF 1,950,000 was paid by the Respondent to the Appellant. Furthermore, both parties confirm that, after the initial loan period during the 2009/2010 football season, the loan period was extended with one additional football season, which resulted in the extension of articles 7-10 of the Loan Agreement, as provided for in article 6 of the Loan Agreement.

58. The Panel understands that the parties disagree with regard to the obligation of the Appellant to refund the amount of CHF 1,950,000 to the Respondent after the return of the Player to the Appellant. More specifically, the Appellant argues that no obligation to refund exists. In this respect, the Appellant mainly relies on the content of the Addendum where it is stated that if the Loan Agreement will be extended for one season, *"Genoa shall in no way be obliged to refund Grasshoppers any amount, as demonstrating the intention of the parties"*.

59. The Respondent, followed in its reasoning by the FIFA PSC Single Judge, claims the opposite. The Respondent maintains that, in accordance with article 7 of the Loan Agreement, which states that *"[i]n the event the Player returns to* [the Appellant] *at the end of the Season 2009/10,* [the Appellant] *shall pay back to* [the Respondent] *the amount of* [CHF 1,950,000] *by 15 July 2010"*, the obligation of the Appellant to refund the Respondent is subject to only one condition: the Player's return to the Appellant at the end of the season 2009/2010, respectively 2010/2011. As it is undisputed that the Player returned to the Appellant and was subsequently loaned to a third party, AC Cesena, the Respondent finds that this condition was fulfilled and the Appellant thus has an obligation to refund the Respondent with an amount of CHF 1,950,000.

60. The above is disputed by the Appellant. The Appellant avers that it was released from its obligation to refund the Respondent when it was decided to extend the loan period of the Player with the Respondent. In continuation, the Appellant asserts that "[the Appellant's] *failure to reimburse* [the Respondent] *CHF 1'950'000 would therefore result in* [the Respondent] *retaining its 25% sell-on option*. This view of the Appellant is based on the alleged intention of the parties at the moment of signing the Loan Agreement, which is reflected in the Addendum.

61. In particular, the Appellant disagrees with a literal interpretation of the relevant provisions and contends that (i) the undated Addendum complements the Loan Agreement; (ii) the Loan Agreement should be interpreted in accordance with the true intentions of the parties, even if expressed before the Loan Agreement was signed; and, (iii) when the parties agreed to extend the loan period, the Appellant was released from any obligation to refund.

62. In fact, the Appellant purports that the undated Addendum is *"[a]damant in revealing the true intention of the Parties"*. According to the Appellant, in case the loan was extended, as was the

case, the Appellant would be released from its obligation to refund the Respondent. The *ratio* of this construction, according to the Appellant, was that the Respondent was granted one season, the initial loan period, in order to find out whether the Player was suitable for its team. Such an extension of the loan period consequently proved that he was suitable and thus justified the payment of a loan fee, releasing the Appellant from its obligation to refund the Respondent. According to the Appellant, such intention is clearly reflected in the undated Addendum.

63. The Appellant hereby refers to article 18(1) of the SCO, which provides that:

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

64. The Panel finds that in the case at hand no such dwelling on inexact expressions occurs. Reading article 7 of the Loan Agreement does not leave room for interpretation as the wording is clear and unambiguous. In this respect, the Panel refers to the principle of *in claris non fit interpretatio*, which provides that the language of a provision governs its interpretation where the language is clear and explicit and does not involve an ambiguity or absurdity. In other words, the Panel does not need to look for the true intention of the parties at the moment of signing, as these are reflected in the clear wording of the Loan Agreement (CAS 2006/A/1152; CAS 2011/A/2681).

65. Nevertheless, the Panel finds that the Appellant failed to convince the Panel that the parties, at the moment of signing, had a different intention from what is reflected in the wording of the Loan Agreement. As established above, the undated Draft Agreement, complemented by the undated Addendum, merely reflects a certain progress in the negotiations which, together with the draft agreements of 29 June and 3 July 2009, finally resulted in the conclusion of the Loan Agreement.

66. The Panel's view is strengthened by the Respondent's contention that the undated Addendum was single signed by Mr Vogel, as member of the board of directors of the Respondent, whereas the Loan Agreement was signed by two representatives of the Respondent. As submitted by the Respondent, the Commercial Register of the Canton Zurich clearly provides evidence that Mr Vogel was only entitled to sign jointly with another director. Although it could be questioned whether an agreement signed by Mr Vogel alone would not bind the Respondent or whether it is reasonable to expect the Appellant to be aware of this Register, these questions can be left unanswered because the Panel finds that the single signing is at least an indication that the Respondent had no intention to be bound by the Addendum, as opposed to the Loan Agreement.

67. In this context, the Panel points out that the Appellant's contention that its choice not to reimburse the Respondent would result in the Respondent retaining its 25% share of economic rights is again not supported by the wording of the Loan Agreement. Indeed, the only condition that can be deducted from cited provision is the return of the Player to the Appellant. If this condition would materialize, the amount would have to be refunded. The

Panel consequently disagrees with the Appellant that the reimbursement of the amount and the economic rights assigned are "mutually exclusive". The reimbursement was contemplated in the Loan Agreement and only as a direct consequence of this reimbursement, the 25% of the economic rights would return from the Respondent to the Appellant. The Panel finds that this was not an alternative option to be exercised at the Appellant's discretion.

68. This is further confirmed by the language used by the Appellant itself in a letter with the official letterhead of the Appellant, dated 14 July 2009:

*"(…) considering the immediate payment, [the Appellant] agrees to a reduction of CHF 50,000 on the global amount, i.e. the amount that [The Respondent] shall pay to [the Appellant] is of CHF 1,950,000. At the same time, the amount that [the Appellant]* ***shall*** *return to [the Respondent] in accordance with the terms of the [Loan Agreement] entered into between both clubs, is as well of CHF 1,950,000"* [emphasis added by the Panel].

69. Furthermore, from the Panel's conclusions in respect of the development of the negotiations between the parties leading up to the conclusion of the Loan Agreement described *supra*, the Panel finds it irreconcilable that the parties had the intention for the Addendum to remain effective as a separate document besides the Loan Agreement. If this would have been the intention of the parties, at least a reference to the Addendum should have been incorporated in the Loan Agreement. The Addendum therefore does not complement the Loan Agreement, the Loan Agreement supersedes the draft agreements and the Addendum.

70. Based on this finding, and also because article 6 of the draft loan agreements dated 29 June and 3 July 2009 both stipulate that *"[i]n the event the Player returns to* [the Appellant] *at the end of the Season 2009/10,* [the Appellant] *shall pay back to* [the Respondent] *the amount of CHF 2,000,000 (two million Swiss Francs) by 15 July 2010"*, the Panel comes to the conclusion that the true intention of the parties is reflected in the Loan Agreement and not in the Addendum. If the real intention was reflected in the Addendum, the Panel finds that the Appellant should have objected to the content of the two draft agreements and the final Loan Agreement.

71. Finally, at the occasion of the hearing, the Panel posed certain questions to the parties in order to understand the economics behind the deal. The answers given by the Appellant in this respect failed to convince the Panel that the true intention of the parties was reflected in the Addendum and not in the Loan Agreement.

72. In particular, the construction suggested by the Appellant would require the Panel to believe that the true intention of the parties was that the Appellant could, at its sole discretion, decide to extend the Loan Agreement after the first year and, simply by doing so, avoid the obligation to refund the amount of CHF 1,950,000 to the Respondent. The Panel is of the opinion that this was not the true intention of the parties, nor can such an interpretation be derived from a straight-forward reading of the Loan Agreement.

73. Consequently, taking into account all the above, the Panel concludes that the Appellant has the obligation to refund the amount of CHF 1,950,000 to the Respondent.

74. In respect of the interest, the Panel notes that pursuant to article 7 of the Loan Agreement, the original due date for reimbursement was 15 July 2010. By the extension of the loan period at the end of the 2009/2010 season in conjunction with article 6 of the Loan Agreement, which determines that *"[i]n the event that the loan period is extended for a further season, the parties agree that the provisions contained in the points 7 – 10 are extended as well and apply accordingly"*, the Panel confirms the Appealed Decision and finds that interest shall accrue at a rate of 5% *per annum* as of 16 July 2011.

### B. Conclusion

75. Based on the foregoing, and after taking into due consideration all the evidence produced and all arguments made, the Panel finds that:

a) The parties did not sign a second *addendum* after the conclusion of the Loan Agreement.

b) The Appellant is obliged to refund the Respondent with an amount of CHF 1,950,000, with interest at a rate of 5% *per annum* accruing as of 16 July 2011.

76. Any further claims or requests for relief are dismissed.

## ON THESE GROUNDS

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

1. The appeal filed on 5 April 2013 by Genoa Cricket and Football Club S.p.A. against the Decision issued on 23 October 2012 by the Single Judge of the Players' Status Committee of the Fédération Internationale de Football Association is dismissed.

2. The Decision issued on 23 October 2012 by the Single Judge of the Players' Status Committee of the Fédération Internationale de Football Association is confirmed.

3. (…).

4. (…).

5. All other motions or prayers for relief are dismissed.