Arbitration CAS 2013/A/3206 Genoa Cricket and Football Club S.p.A. v. Gelsenkirchen Schalke 04, award of 7 March 2014

Panel: Prof. Petros Mavroidis (Greece), President; The Hon. Michael Beloff QC (United Kingdom); Mr Michele Bernasconi (Switzerland)

Football
Breach of a transfer agreement
Entitlement to amend the relief sought in the appeal brief
Choice of the applicable law by the parties
Validity of a contractual interest rate

1. **The CAS case law has explicitly recognized that a party can always amend the relief sought in its appeal brief, to which the other party will in any event have a full opportunity to reply.**

2. **According to the jurisprudence of the Swiss Federal Tribunal, the parties' choice of law can be made at any time before or after a dispute has arisen, and is not subject to any specific requirements as to its form. Moreover, a choice of law can be revoked at any moment, provided namely that the parties so agree. In this regard, in spite of the wording of an agreement, the parties can subsequently clearly agree on the selection of a set of rules (i.e. FIFA Regulations) and of a given law (i.e. Swiss law) to govern their contractual relationship, and therefore show their intention to depart from said agreement so as to replace the application of a national law by Swiss law.**

3. **According to Switzerland's Consumer Credit Act (Loi fédérale sur le crédit à la consummation), the maximum effective annual rate of interest amounts currently to 15%. Under Swiss law, it is considered usury as per the Swiss Penal Code where a loan is granted with an interest rate of 18 % to 20 % *per annum*. The commercial nature of an agreement should also be taken into consideration to assess the contractual annual rate of interest.**

I. PARTIES

1. Genoa Cricket and Football Club S.p.A. (hereinafter the "Appellant") is a football club with its registered office in Genoa, Italy. It is a member of the Italian National Football Association (Federazione Italiana Giuoco Calcio), itself affiliated to Fédération Internationale de Football Association (hereinafter "FIFA") since 1905.

2. FC Gelsenkirchen-Schalke 04 e.V. (hereinafter the "Respondent") is a football club with its registered office in Gelsenkirchen, Germany. It is a member of the German Football Association (Deutscher Fussball-Bund), itself affiliated to the FIFA since 1904.

II. FACTUAL BACKGROUND

A. Background facts

3. Below is a summary of the relevant facts and allegations based on the Parties' written and oral submissions, pleadings and evidence adduced. Additional facts and allegations found in the Parties' written and oral submissions, pleadings and evidence will be discussed, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in its Award only to the submissions and evidence it deems necessary to explain its reasoning.

B. The agreements signed between the Parties

4. M. (hereinafter the "Player") was born in 1985 and is of Brazilian nationality. Until 2010, he was registered with the Respondent as a professional player.

5. On 4 August 2010, the Respondent accepted to transfer the Player to the Appellant for the sum of EUR 7,000,000 (hereinafter the "Transfer Fee"). In this regard, the contract (hereinafter the "Transfer Agreement") signed between the Parties provides so far as material:

"2. TRANSFER COMPENSATION

2.1 [The Appellant] is obliged to pay [the Respondent] an overall compensation in the amount of net EUR 7,000,000 (seven million Euros) in relation to the Transfer ("Transfer Fee"), payable as follows:
(a) EUR 1,250,000 at the latest on 18 August 2010;
(b) EUR 1,250,000 at the latest on 15 February 2011;
(c) EUR 1,250,000 at the latest on 1 September 2011;
(d) EUR 1,250,000 at the latest on 15 February 2012;
(e) EUR 1,000,000 at the latest on 1 September 2012;
(f) EUR 1,000,000 at the latest on 15 February 2013.(…)

4. OTHERS

(…)

4.5 This agreement, its interpretation and any disputes arising there from shall be governed by and construed in accordance with German law and applicable FIFA and UEFA Regulations shall be employed resolving any disputes.
4.6 Any disputes related to this agreement shall be submitted to the FIFA Player's Statutes Committee or Dispute Resolution Chamber ("DRC"). The parties are entitled to apply to the Court of Arbitration

for Sports ("CAS") for appeal of FIFA or DRC decisions. The parties are obliged to and shall undertake any action and measurement necessary or appropriate to ensure that only persons having Swiss citizenship or being resident in Switzerland shall become members of the CAS panel as referred to in sentence 2".

6. It is undisputed that the Transfer Agreement entered into force and that the Player was transferred to the Appellant.

7. On 31 March 2011, and because the Appellant had not timeously paid in full the second instalment of the Transfer Fee, the Parties agreed on a time extension in the following terms (hereinafter the "Amendment Agreement"):

"1. PREAMBLE

(…)

To date [the Appellant] has paid an amount of EUR 1,500,000 of the Transfer Fee to [the Respondent] as follows: (I) EUR 1,250,000 according to clause 2.1 (a) of the Transfer Agreement and (II) a partial amount of EUR 250,000 of the instalment according to clause 2.1 (b) of the Transfer Agreement, which was due on 15 February 2011 ("Second Instalment").

Consequently and as of today, [the Appellant] has to pay the remainder of the Second Instalment in the amount of EUR 1,000,000.00 to [the Respondent] ("Remainder").

Having said this, the Parties agree as follows:

2. DEFERRED PAYMENT OF THE REMAINDER

2.1. The Parties herewith agree on the deferred payment of the Remainder as follows:

(a) [The Appellant] shall pay an amount of EUR 300,000.00 to [the Respondent] within two business days after the date of signing of this Amendment Agreement.

(b) Immediately after signing this Amendment Agreement but no later than 10 April 2011, [the Appellant] shall issue two cheques payable to [the Respondent] as follows:

(I) EUR 350,000.00 on 31 May 2011;

(II) EUR 350,000.00 on 30 June 2011.

2.2 The parties clarify that the issuance of the two cheques, according to clause 2.1 (b) of this Amendment Agreement, shall not be deemed to constitute performance by Genoa CFC. Only receipt of the respective amounts on Schalke 04's bank account and provided that the amounts are not redebited shall constitute performance by Genoa CFC and shall reduce the outstanding Transfer Fee accordingly.

(…)

2.4 Irrespective of the above, future instalments of the Transfer Fee, stated in clause 2.1 (c) to 2.1 (f) of the Transfer Agreement, must also be paid by [the Appellant] and they shall become due as stated in said clauses.

3. RIGHT TO WITHDRAW, DEFAULT INTEREST

3.1 [The Respondent] has the right to withdraw from this Amendment Agreement and to assert further claims and damages, in case [the Appellant] is in breach of any of its obligations described in clause 2.1 (a) or 2.1 (b) of this Amendment Agreement or as stated in clause 2.7 (c) to 2.1 (f) of the Transfer Agreement for not or undue payment.

3.2 In case [the Respondent] exercises its right to withdraw from this Amendment Agreement according to clause 3. 1

(a) all outstanding instalments of this Amendment Agreement and of the Transfer Fee to be paid to [the Respondent] according to clause 2.1 of the Transfer Agreement shall become due with immediate effect and

(b) [The Appellant] has to pay [the Respondent] default interest of 15 per cent per annum on all outstanding instalments of this Amendment Agreement and of the Transfer Fee according to clause 2.1 of the Transfer Agreement.

3.3 If [the Respondent] decides to withdraw from this Amendment Agreement according to clause 3.1, [the Respondent] has to send a respective written declaration to [the Appellant] within six weeks after acknowledging the respective breach by [the Respondent], but not earlier than six weeks after a cheque of [the Appellant] has been redebited.

4. MISCELLANEOUS
Any other provisions of the Transfer Agreement shall remain unaffected".

8. The Appellant duly paid the sum of Euro 300,000 pursuant to article 2.1 (a) of the Amendment Agreement on 1 April 2011 but instead of two cheques as stipulated under article 2.1 (b) of the Amendment Agreement, the Appellant signed six cheques for the aggregate amount of EUR 700,000 received by the Respondent on 7 April 2011. It is undisputed - and it was confirmed by the Parties at the hearing - that at a certain stage, since the cheques could not be immediately cashed, the Parties agreed that each cheque would serve as guarantee for a specific part of the second instalment and that, whenever the Appellant made a payment, the Respondent would return a cheque for the corresponding amount.

9. The remainder of the second instalment referred to under article 2.1 (b) of the Transfer Agreement and under article 2.1 of the Amendment Agreement, was paid as follows:

- on 8 June 2011 EUR 200,000
- on 14 June 2011 EUR 100,000
- on 14 June 2011 EUR 50,000
- on 21 July 2011 EUR 150,000
- on 28 July 2011 EUR 200,000

which, together with the payment made on 1 April 2011, amounted to a total of EUR 1,000,000

10. On 5 September 2011, in reliance on the Appellant's failure to pay the third instalment referred to under article 2.1 (c) of the Transfer Agreement, the Respondent informed the Appellant in writing of its withdrawal from the Amendment Agreement, pursuant to article 3.3 of the Amendment Agreement. It requested the immediate payment of the balance of the Transfer Fee, i.e. EUR 4,500,000.

11. On 12 September 2011, the Appellant wrote to the Respondent disputing the Respondent's right to withdraw from the Amendment Agreement.

12. On the same date, the Respondent reaffirmed its right to have withdrawn from the Amendment Agreement.

13. It is undisputed - and it was confirmed by the Parties at the hearing - that on 26 September 2011, the Respondent received in its bank account from the Appellant the sum of EUR 1,250,000 corresponding to the third instalment, but not the outstanding amount of the Transfer Fee with the accrued interest.

14. It is also undisputed that the Appellant has not provided the Respondent with cheques either by way of payment or by way of guarantee in respect of the third, fourth, fifth and/or sixth instalments due under the Transfer Agreement.

C. Proceedings before the Single Judge of the FIFA Player's Status Committee

15. On 19 October 2011, the Respondent filed an application with FIFA for an order that the Appellant to pay in its favour *"EUR 3,250,000 and EUR 5,116.43 as interest for the payments made late, plus 15 % default interest p.a. on the amount of EUR 3,250,000 as from 26 September 2011 until the date of effective payment, and 15 % default interest p.a. on the amounts of EUR 4,500,000 and EUR 5,116.43 as from 2 September 2011 until 25 September 2011, as well as procedural compensation"*.

16. In a decision dated 14 November 2012, the Single Judge of the FIFA Player's Status Committee observed that the main point of contention between the Parties was whether the Respondent was entitled to exercise its right of withdrawal as provided for in article 3.1 of the Amendment Agreement. He came to the conclusion that the Respondent had complied with the requirements of that provision. Consequently, and in light of the wording of article 3.2 of the Amendment Agreement, the Single Judge of the FIFA Player's Status Committee *"considered that, upon withdrawal of the amendment agreement by the [Respondent], all outstanding amounts pursuant to both the amendment agreement and the transfer agreement became due as per 6 September 2011, the day after the [Respondent's] withdrawal. Therefore, the Single Judge decided that [the Appellant] has to pay to [the Respondent] the amount of EUR 3,250,000 and the amount of EUR 5,166.43 as interest for the delayed payment of the second instalment. Equally, [the Appellant] has to pay default interest of 15 % on the amount of EUR 4,500,000 as of 6 September 2011 until 25 September 2011 and on the amount of EUR 3,250,000 as of 26 September 2011 until the date of effective payment"*.

17. As a result, on 14 November 2012, the Single Judge of the FIFA Player's Status Committee decided the following:

"1. The claim of (…) FC Gelsenkirchen-Schalke 04, is partially accepted.

2. (…) Genoa Cricket and Football Club, has to pay to [FC Gelsenkirchen-Schalke 04], within 30 days as from the date of notification of this decision, the amounts of EUR 3,250,000 and EUR 5,116.43.

3. Within the same time-limit, [Genoa Cricket and Football Club] has to pay to [FC Gelsenkirchen-Schalke 04] 15 % interest p.a. on the amount of EUR 4,500,000 as of 6 September 2011 until 25 September 2011.

4. Furthermore, [Genoa Cricket and Football Club] has to pay to [FC Gelsenkirchen-Schalke 04] 15 % interest p.a. on the amount of EUR 3,250,000 as of 26 September 2011 until the date of effective payment.

5. If the aforementioned sums plus interest are not paid within the aforementioned deadline, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.

6. Any further claim lodged by [FC Gelsenkirchen-Schalke 04] is rejected.

*7. The final amount of costs of the proceedings in the amount of CHF 22,000 are to be paid **within 30 days** as from the date of notification of the present decision as follows:*

7.1. The amount of CHF 17,000 by [Genoa Cricket and Football Club] to FIFA (…)

7.2. The amount of CHF 3,000 by [Genoa Cricket and Football Club] to [FC Gelsenkirchen-Schalke 04]. (…)".

18. On 23 May 2013, the Parties were notified of the decision issued by the Single Judge of the FIFA Player's Status Committee (hereinafter the "Appealed Decision").

19. It is undisputed that, to date, the Appellant has not paid any further amount to the Respondent pursuant to the Transfer Agreement.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

20. On 13 June 2013, the Appellant filed its statement of appeal with the Court of Arbitration for Sport (hereinafter the "CAS") and nominated The Hon. Michael J. Beloff, QC, Barrister in London, England, as arbitrator.

21. On 26 June 2013, FIFA confirmed to the CAS Court Office that it renounced its right to request its intervention in the present arbitration proceeding.

22. On 28 June 2013, the CAS Court Office acknowledged receipt of the Appellant's appeal brief dated 24 June 2013 and took note of the Respondent's nomination of Mr Michele A. R. Bernasconi, attorney-at-law in Zurich, Switzerland, as arbitrator.

23. On 15 July 2013, the Respondent requested the time limit to file the answer to be fixed after the payment by the Appellant of its share of the advance of costs.

24. On 2 August 2013, the CAS Court Office acknowledged receipt of the Appellant's payment of its share of the advance of costs.

25. On 20 August 2013 and in a timely manner, the Respondent filed its answer.

26. On 21 August 2013, the CAS Court Office informed the Parties that the Panel to hear the case had been constituted as follows: Prof. Petros C. Mavroidis, President of the Panel, The Hon. Michael J. Beloff, QC and Mr Michele A. R. Bernasconi as arbitrators. It granted the Appellant a 10-day deadline to file its observations on the Respondent's application on the inadmissibility of the case and it invited the Parties to inform the CAS Court Office whether their preference was for a hearing to be held.

27. On 2 September 2013, the Appellant filed its submission regarding the issue of non-admissibility of the appeal raised by the Respondent, and confirmed that it wished for a hearing to be held in the present procedure.

28. On 3 September 2013, the CAS Court Office observed that the Respondent had not stated its position with reference to the holding of a hearing.

29. On 30 September 2013 and on behalf of the Panel, the CAS Court Office invited the Respondent to take position with reference to the holding of a hearing and the Appellant to give its reasons for wishing a hearing to be held. On 7 October 2013, the Parties responded to the Panel's request. The Respondent confirmed that it *"does not oppose to holding a hearing in the present matter"*.

30. The Panel decided to hold a hearing, which was scheduled for 4 February 2014, with the agreement of all the Parties to the present proceedings.

31. On 21 and 26 November 2013, the Respondent and the Appellant respectively sent to the CAS Court Office a duly signed copy of the Order of Procedure. While the Appellant did not make any comment on the said document, the Respondent asserted that the amount in dispute was not EUR 875,000 as indicated in the Order of Procedure but *"EUR 3,255,116.43 plus 15 % interest as provided for in point 3 and 4 of the challenged decision"*.

32. On 26 November 2013, the Appellant confirmed to the CAS Court Office that the *"amount in dispute corresponds to the default interest awarded by FIFA to [the Respondent], i.e. approximately € 875,000 at that point"*.

33. The hearing was held on 4 February 2014 at the CAS premises, in Lausanne, Switzerland. The Panel was assisted by Mr Antonio De Quesada, Counsel to the CAS and Mr Patrick Grandjean, *ad hoc* Clerk.

34. At the hearing the Appellant was represented by its legal counsel, Mr Paolo Lombardi, assisted by Mr Patrick Schmidiger. The Respondent was represented by its legal counsel, Mr Gianpaolo Monteneri.

35. After the Parties' closing arguments, the Panel closed the hearing and announced that its award would be rendered in due course. At the conclusion of the hearing, the Parties confirmed that their rights before the Panel had been fully respected, that they had no objections in respect to the composition of the Panel, their right to be heard and to be treated equally in the present proceedings and that they had been given the opportunity to fully present their cases.

IV. SUBMISSIONS OF THE PARTIES

A. The Appellant's submissions

36. The Appellant submitted the following requests for relief:

"REQUESTS

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 FIFA Players' Status Committee on 14th November 2012, ascertaining that the Respondent illegitimately withdrew from the Amendment Agreement dated 31st March 2011 and that the Appellant's liability is limited to the amount outstanding pursuant to clause 2.1 of the Transfer Agreement dated 4th August 2010.*
3. *We request this Honourable Court to declare that also the part of the decision condemning the Appellant to pay procedural costs in the amount of CHF 20'000, CHF17'000 of which to FIFA and CHF 3'000 to the Respondent, be annulled.*
4. *In any case, we request this Honourable Court to order the Respondent to bear all costs related to these proceedings.*
5. *In any case, we request this Honourable Court to order the Respondent to cover all legal costs of the Appellant related to these proceedings, which to date approximate CHF34'000.*
6. *Finally, we request that a hearing be held in these proceedings".*

37. The Appellant's submissions, in essence, may be summarized as follows:

- *"The Appellant recognises that the last three instalments indicated under clause 2.1 of the Transfer Agreement have been outstanding since 15th February 2012, 1st September 2012 and 15th February 2013 respectively".*
- The Appellant regrets its late payments, which can be explained by *"its deteriorating financial circumstances".*
- The Respondent was not entitled to withdraw from the Amendment Agreement. Pursuant to article 3.3 of this contract, the Respondent's right to withdraw was subject to the following two conditions:
  (i) the Respondent had to give notice in writing to the Appellant *"within six weeks of the relevant breach being discovered"*,

(ii) but the notice could not be given *"earlier than six weeks after a cheque of [the Appellant] has been redibited"*.

In the present case, the second requirement was not met. As a matter of fact, *"at no point did a cheque issued by [the Appellant] fail to clear for the purpose of applying clause 3.3 in fine"*. In his decision, the Single Judge of the FIFA Player's Status Committee did not address this issue, which had been raised by the Appellant.

- As a consequence, *"the Respondent should not have been entitled to withdraw from the Amendment Agreement and thus successfully lodge a claim with FIFA to receive at once all remaining instalments plus 15 % per annum"*.

B. The Answer

38. The Respondent filed an answer, with the following requests for relief:

"In view of the above, the Respondent respectfully asks the Panel:

1) to render the award in the present procedure by 31 December 2013;

2) to reject the appeal;

3) to uphold the Challenged Decision;

4) to condemn the Appellant to the payment in the favour of the Respondent of the legal expenses incurred;
5) to establish that the costs of the arbitration procedure shall be borne by the Appellant".

39. The Respondent's submissions, in essence, may be summarized as follows:

- The appeal is inadmissible. As a matter of fact, the Appellant submitted a new request for relief after the filing of its statement of appeal, causing an adverse effect on the Respondent's right to be heard. Under these circumstances, the Respondent was unable to *"take important procedural decisions, among others decide on the language of the procedure, the appointment of a sole arbitrator or a panel and in the latter case appoint a certain arbitrator. (…) Being aware of the exact and final demands of the appellant is thus fundamental for the respondent to know where it is standing and which procedural decisions to make"*.
- The terms of the Agreements signed by the Parties are clear and unambiguous. The Appellant initiated the present procedure with the sole objective *"to delay the payments due to the Respondent"*.
- The Appellant's allegation that the late payment can be explained by its delicate financial situation is not credible. It is inconsistent with the fact that the Appellant *"has been actively and efficiently participating in the transfer activities, particularly, of the current transfer period"*. In particular the Appellant transferred the Player on 1 June 2011 for EUR 6,000,000 but did not use this sum to discharge the debts incurred under the Transfer and the Amendment Agreements.
- In view of the circumstances, the Respondent was entitled to withdraw from the Amendment Agreement. In this regard, article 3.3 of this document *"clearly contemplated*

that as soon as the Respondent became aware of the violation committed by the Appellant it has precisely six weeks to exercise the right for withdrawal. Otherwise, should six weeks from the moment of the breach elapse and no action on the side of the Respondent followed, its specific right for the withdrawal guaranteed under the Agreements would be lost in a definitive way".

- It is undisputed that, according to the terms of article 3.3 of the Amendment Agreement, the withdrawal was subject to a written declaration from the Respondent sent *"not earlier than six weeks after a cheque from [the Appellant] has been redebited"*. However, this last requirement is impossible to fulfil and, therefore, must be disregarded.
  - The *"cheque payment method was originally selected by the parties (…) solely with respect to the payment of two tranches of the second instalment. Otherwise, the parties agreed on the wire transfer as an ordinary way for the fulfilment of payment obligations"*.
  - *"But even if the parties initially agreed in the payment via cheques in the Amendment Agreement, they subsequently amended their decision and agreed that the Appellant shall make exclusively bank wire transfers to the Respondent. The cheques as such were therefore never used or cashed in and became obsolete for the purpose of the Amendment Agreement, since they were replaced by wire transfer"*.
  - *"Moreover, the second condition, i.e. the period of six weeks to be expected after redebit of the cheque issued by the Appellant, is inapplicable to the payment of the third instalment, since this was originally agreed to be a wire one".*
- The default rate of 15% interest *per annum* is acceptable under Swiss law.

V. ADMISSIBILITY

40. The Respondent challenges the admissibility of the appeal. In its opinion, the Appellant was not authorised to submit an amended request for relief after the filing of the statement of appeal.

41. The CAS case law has explicitly recognized that the Appellant can always amend the relief sought in its appeal brief, to which the respondent(s) will in any event have a full opportunity to reply. In this regard, the Panel repeats and relies on the statement case CAS 2007/A/1434 & 1435, par. 79, page 23:

"The Panel observes that the CAS Code does not prohibit the amendment in the appeal brief of the relief requested in the statement of appeal. Such a significant procedural limitation could be enforced only if it had been expressly foreseen by the CAS Code as it is the case, for instance, with regard to the submission of new arguments which are explicitly not allowed after the filing of the appeal brief and of the answer except when agreed to by all parties (see article R56 of the CAS code). Amendments to original claims are very common in international arbitrations, as long as they are submitted within the time limit provided by the applicable regulations (see for instance articles 18 ff of the ICC Rules of Arbitration)".

42. Based on the foregoing, the Respondent's objection to the admissibility of the appeal must be rejected.

43. The appeal is admissible as the Appellant submitted it within the deadline provided by article R49 of the Code of Sport-related Arbitration (hereinafter "the Code") as well as by article 67 par. 1 of the FIFA Statutes. It complies with all the other requirements set forth by article R48 of the Code.

VI. JURISDICTION

44. Article R47 of the Code provides as follows:

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

45. The jurisdiction of CAS, which is not disputed, derives from article 4.6 of the Transfer Agreement. This provision is also applicable to the Amendment Agreement (see its article 4). It is further confirmed by the Order of Procedure duly signed by the Parties.

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

47. Under article R57 of the Code, the Panel has the full power to review the facts and the law.

VII. APPLICABLE LAW

48. Article R58 of the Code provides as follows:

"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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

49. Pursuant to article 66 par. 2 of the FIFA Statutes, *"[t]he 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".*

50. According to article 4.5 of the Transfer Agreement, *"This agreement, its interpretation and any disputes arising there from shall be governed by and construed in accordance with German law and applicable FIFA and UEFA Regulations shall be employed resolving any disputes".* This provision is also applicable to the Amendment Agreement (see its article 4).

51. However, in their respective submissions lodged before the CAS, the Parties stated that, on the basis of article 66 par. 2 of the applicable FIFA Statutes, the CAS shall primarily apply the various regulations of FIFA and additionally Swiss law (see chapter III, page 2 of the appeal brief and par. 25, page 6 of the answer). During the hearing and at the express request of the Panel, both the Appellant and the Respondent confirmed that any issue, which was not

addressed by the FIFA Regulations, should be decided upon in accordance with Swiss law. They also stated that their contractual relationship, as expressed in the Agreements, had, actually, never been treated as governed by German law.

52. The Parties' choice of law can be made at any time before or after a dispute has arisen, and is not subject to any specific requirements as to its form (see for instance Judgement of the Swiss Federal Court 4C.206/2006 of 12 October 2006; ATF 91 II 248; BONOMI A., in Commentaire Romand, Loi sur le droit international privé, Convention de Lugano, 2011, n° 43 ad. art. 116, p. 994). A choice of law can be revoked at any moment, provided namely that the Parties so agree (ATF 91 II 248; DUTOIT B., Droit international privé Suisse, Commentaire de la loi fédérale du 18 décembre 1987, Bâle 2005, N. 6 on article 116).

53. Considering that, in the present case and in spite of the wording of article 4.5. of the Transfer Agreement, the Parties clearly agreed on the selection of a set of rules (i.e. FIFA Regulations) and of a given law (i.e. Swiss law) to govern their contractual relationship, the Panel finds that the Parties had the intention to depart from the said article 4.5 so as to replace the application of German law by Swiss law.

54. As a result, subject to the primacy of applicable FIFA's regulations, Swiss Law shall apply complementarily.

VIII. MERITS

55. The main issue to be resolved by the Panel is whether the Respondent had complied with all the requirements of article 3 of the Amendment Agreement, and therefore was entitled to request from the Appellant the immediate payment of the outstanding balance of EUR 4,500,000 with a 15 % interest rate *per annum*.

56. The Appellant is of the view that the Respondent's right to withdraw from the Amendment Agreement could only be triggered where a cheque which is presented for payment *"bounces"*. According to the Appellant, the Parties to the Amendment Agreement are bound by the clear wording of its article 3.3. The fact that, at the signature of the contract, the Parties had not foreseen that no cheque would be issued in relation with the payment of the last three instalments of the Transfer Fee cannot be held against the Appellant.

A. In general

57. When the interpretation of a contractual clause is in dispute, the judge should seek to discover the true and mutually agreed upon intention of the parties, without regard to incorrect statements or manner of expressions used by the parties by mistake or in order to conceal the true nature of the contract (Art. 18 par. 1 of the Swiss Code of Obligations). When the mutually agreed real intention of the parties cannot be established, the contract must be interpreted according to the requirements of good faith (ATF 129 III 664; 128 III 419 consid. 2.2 p. 422). The judge has to seek to determine how a declaration or an external manifestation by a party could have been reasonably understood depending on the individual circumstances of the case

(ATF 129 III 118 consid. 2.5 p. 122; 128 III 419 consid. 2.2 p. 422). The requirements of good faith tend to give the preference to a more objective approach. The emphasis is not so much on what a party may have meant but on how a reasonable man would have understood his declaration (ATF 129 III 118 consid. 2.5 p. 122; 128 III 419 consid. 2.2 p. 422).

B. In the present case

58. The Amendment Agreement was signed because the Appellant failed to pay in full the second instalment of the Transfer Fee. The settlement reached between the Parties has the following two main provisions:

- Article 2 lays down the terms and conditions governing exclusively the payment of the second instalment. According to this provision:
  (i) the *"deferred payment of the remainder"* (i.e. EUR 1,000,000) was to be made in three new instalments, i.e. EUR 300,000 payable within two days, EUR 350,000 on 31 May 2011 and EUR 350,000 on 30 June 2011.
  (ii) With reference to the last two payments of EUR 350,000, the Appellant committed to *"issue two cheques payable to [the Respondent] as follows: (I) EUR 350,000.00 on 31 May 2011; (II) EUR 350,000.00 on 30 June 2011"* (see article 2.1 (b)).
  (iii) However, the *"parties clarify that the issuance of the two cheques, according to clause 2.1 (b) of this Amendment Agreement, shall not be deemed to constitute performance by Genoa CFC. Only receipt of the respective amounts on Schalke 04's bank account and provided that the amounts are not redebited shall constitute performance by Genoa CFC and shall reduce the outstanding Transfer Fee accordingly"* (see article 2.2. of the Amendment Agreement).
- Article 3 establishes under what circumstances the Respondent is entitled to withdraw from the Amendment Agreement (article 3.1), the consequences implied by the withdrawal (article 3.2) and how the withdrawal must be exercised (article 3.3).

59. As to article 2 of the Amendment Agreement, the following matters are undisputed:

- Under the, the Transfer Agreement no provision was made for particular mode of payment.
- The only provision for use of cheques in the agreements between the Parties was found in article 2.1 (b) of the Amendment Agreement.
- Instead of two cheques required by that article within the time frame there stipulated, the Appellant actually issued six cheques received by the Respondent on 7 April 2011 but none of them has ever been cashed. Their only purpose was to secure the effective payment by the Appellant of the remaining EUR 700,000 of the second instalment, because as provided under article 2.2 of the Amendment Agreement, the cheques *"shall not be deemed to constitute performance by [the Appellant]. Only receipt of the respective amounts on [the Respondent's] bank account shall constitute performance by [the Respondent]"*.
- The cheques were returned when payment in the amount thereof was made by the Appellant to the Respondent by wire transfer.

60. Article 3 of the Amendment Agreement is divided into three sections. Article 3.1 allows the Respondent to withdraw from the Amendment Agreement as soon as the Appellant fails to make any of the payments by any deadline set forth in either of the two Agreements (The Panel holds that the phrase *"not or undue payment"* which triggers the right of withdrawal means when payment is not made at all or is made late). Article 3.2 provides the consequences of the Respondent's withdrawal. Under it, when the Respondent exercises its right of withdrawal, all the outstanding amounts related to the Transfer Fee become immediately due, with a default interest of 15 % *per annum* until the actual date of payment.

61. It is undisputed that the third instalment of the Transfer Fee was paid late. Furthermore and in its own appeal brief the Appellant confirms that *"the last three instalments indicated under clause 2.1 of the Transfer Agreement have been outstanding since 15th February 2012, 1st September 2012 and 15th February 2013 respectively"*. Under these circumstances, the Panel is satisfied that the Respondent was entitled to exercise its right of withdrawal, under article 3.1 and enjoy the consequential benefits provided for under article 3.2.

62. Article 3.3 of the Amendment Agreement is the contentious provision and lies at the heart of this appeal. It reads as follows:

"If [the Respondent] decides to withdraw from this Amendment Agreement according to clause 3.1, [the Respondent] has to send a respective written declaration to [the Appellant] within six weeks after acknowledging the respective breach by [the Respondent], but not earlier than six weeks after a cheque of [the Appellant] has been redebited".

63. The Appellant submits that according to this provision, the Respondent's right to withdraw is subject to two cumulative conditions: Once it has acknowledged the Appellant's breach, the Respondent must a) give a written notice of its withdrawal, b) which cannot be sent earlier than *"six weeks after a cheque of [the Appellant] has been redebited"*. The cumulative nature of those two requirements is established by the word *"but"*, which is a coordinating conjunction, inseparably connecting the two last clauses of article 3.3.

64. In the view of the Panel, article 3.3 is a procedural provision relating to the communication of its notice of withdrawal from the Amendment Agreement by the Respondent to Appellant. It cannot sensibly be construed so as to stipulate for measures, which would prevent or materially impede the exercise of the substantive withdrawal right, provided for under article 3.1. If the Appellant's interpretation of article 3.3 were correct, given that no cheque has ever been issued for the last four instalments of the Transfer Fee, the Respondent would never be in the position to exercise its right to withdraw as it then would be impossible for it to give its notice of withdrawal *"not earlier than six weeks after a cheque of [the Appellant] has been redebited"*. So unreasonable a result cannot have been intended by the Parties when they formulated and then signed the Amendment Agreement.

65. Article 3.3 must be construed so that it best serves its purpose, which is to set the guidelines for the exercising of the right of withdrawal, i.e. to require it to be exercised in writing and within a finite period. In view of the circumstances of the case, the Panel finds that the last sentence of

article 3.3 of the Amendment Agreement comes into play only if and when the Respondent is in possession of a cheque provided by the Appellant and can otherwise be discounted. In the absence of any cheque being proffered but dishonoured, the obligation contained in article 3.3 is confined to that which precedes the word *"but"*.

66. This conclusion is supported by the fact that the reason behind the issuance of cheques was to offer to the Respondent a guarantee and not a means of payment.

67. The Panel considers that such a purposive construction can be reached either by implying the words *"if any"* after the word cheque in the last clause of article 3.3 or by reliance on article 4.7 of the Transfer Agreement which remains in effect for the Amendment Agreement as well (see its article 4). Article 4.7 provides *"Should individual provisions of this agreement be or become ineffective, the remaining provisions shall nevertheless become effective or remain in force. Any such ineffective provision shall be deemed replaced by a provision that comes closest to the intended legal and economic success and which the parties would have agreed at that time had they known about the ineffectiveness. This shall also apply mutatis mutandis to the filing of gaps (if any) which the parties would have filled, had they realised"*. To the extent that the last clause of article 3.3 is ineffective, where the breach relied on for withdrawal is of simple late payment, it can be disregarded.

68. In the case at hand, after the payment of the second instalment of the Transfer Fee, no other cheque has ever been issued by the Appellant in favour of the Respondent. It is undisputed that the third instalment was not paid on the due date, triggering the Respondent's right as set forth under article 3.1 of the Amendment Agreement. As a consequence, on 5 September 2011 and in accordance with article 3.3 of the said Agreement, the Respondent, which had acknowledged, in the sense of recognised, that breach, rightfully and in a timely manner informed the Appellant in writing of its withdrawal from the Amendment Agreement. From that moment and pursuant to article 3.2 of the Amendment Agreement, all the outstanding amounts related to the Transfer Fee became immediately due, with a default interest of 15 % *per annum* until the actual date of payment.

69. As regards the interest rate of 15 % per annum, the Panel observes that according to Switzerland's Consumer Credit Act (article 14 - Loi fédérale sur le credit à la consummation), the maximum effective annual rate of interest amounts currently to 15%. Moreover under Swiss law, it is considered usury as per article 157 of the Swiss Penal Code where a loan is granted with an interest rate of 18 % to 20 % *per annum* (ATF 92 IV 132). Based on the foregoing, taking into consideration the circumstances of the case and in particular the commercial nature of the Agreements, the Panel deems that the annual default interest rate of 15% is acceptable.

70. Regarding the *dies a quo* for the interest, the Panel fully shares the position expressed by the Single Judge of the FIFA Player's Status Committee in his Appealed Decision.

71. Based on the above considerations, the Panel finds that the Appealed Decision must be upheld.

72. The above conclusion makes it unnecessary for the Panel to consider the other requests submitted by the Parties. Accordingly, all other prayers for relief are rejected.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 13 June 2013 by Genoa Cricket and Football Club S.p.A. against the decision issued by the Single Judge of the FIFA Players' Status Committee on 14 November 2012 is dismissed.

2. The decision issued by the Single Judge of the FIFA Players' Status Committee on 14 November 2012 is affirmed.

3. (…).

4. (…).

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