



**Arbitration CAS 2013/A/3306 A.C. Siena S.p.A. v. Clube Desportivo Nacional, award of 12 March 2014**

Panel: Mr José Juan Pintó (Spain), Sole Arbitrator

*Football*

*Transfer*

*Admissibility of the statement of appeal*

*In claris non fit interpretatio*

1. A statement of appeal appears *prima facie* to have been filed in a timely manner if the appellant presented documentary evidence in the form of a shipment waybill establishing the date of shipment of the statement of appeal within the applicable time limits.
2. An agreement providing that if the player is transferred to a third club, the club becomes bound to pay to the other club 30 % of the amount received *pari passu* is clear and its literalness leaves no room for interpretation.

## **I. THE PARTIES**

1. A.C. Siena S.p.A. (“Siena” or the “Appellant”) is a football club with its registered office in Siena, Italy. It is a member of the Italian Football Federation, affiliated to the Fédération Internationale de Football Association (“FIFA”).
2. Clube Desportivo Nacional (“Nacional” or the “Respondent”) is a football club with its registered office in Madeira, Portugal. It is a member of the Portuguese Football Federation, affiliated to FIFA.

## **II. FACTS OF THE CASE. THE PROCEEDINGS BEFORE FIFA AND THE CAS**

3. A summary of the facts and background giving rise to the dispute will be developed below based on the parties’ submissions and the evidence taken. Additional background may be also mentioned in the legal considerations of the present award. In any case, the Sole Arbitrator has considered all the factual allegations, legal arguments and evidence submitted by the parties in the present proceedings, but it refers in this award only to the submissions and evidence it considers necessary to explain its reasoning.

## II.1 THE AGREEMENT SIGNED BY SIENA AND NACIONAL. THE EVENTS GIVING RISE TO THE DISPUTE

4. On 7 August 2012, Siena and Nacional entered into an agreement (hereinafter referred to as the “Agreement”) whereby Nacional agreed to the transfer of the player Luis Carlos Novo Neto (the “Player”) to Siena for an amount of EUR 1,650,000.

5. In this Agreement the parties included the following clause in Annex B:

*“In caso di cessione futura del calciatore, inoltre, SIENA si impegna a riconoscere a Madeira il 30% dell’importo ricevuto (alle medesime scadenze di incasso dalla società acquirente)”.*

According to the English version of the Agreement (which is not the prevailing version in case of divergence from the Italian version), the above-cited clause reads as follows:

*“If the footballer is transferred in the future, SIENA also undertakes to pay MADEIRA 30% of the amount received (at the same time the club acquiring the player receives payment)”.*

6. On 30 January 2013, Siena signed a transfer agreement (the “Zenit Transfer Agreement”) with FC Zenit Saint Petersburg (“FC Zenit”), whereby Siena agreed to transfer the Player to FC Zenit. The Zenit Transfer Agreement contains, among others, the following clause:

### **“II. CONSIDERATION AND PAYMENT CONDITIONS**

2.1 FC Zenit shall pay Siena € 5,850,000 (Five million eight hundred fifty thousand Euros) net as price payable for the permanent transfer of the Player (hereinafter referred to as the «Transfer Fee»).

2.2 FC Zenit shall also pay a contingency payment of €500,000 (Five hundred thousand euros) net, payable once only, if FC Zenit qualifies for the 2013/2014 Champions League Group Stage, provided the Player has a valid and not suspended employment contract with FC Zenit on the day the relevant event occurs.

2.3 [...]

2.4 FC Zenit shall pay the Transfer Fee as follows:

2.4.1. €4,350,000 (Four million three hundred fifty thousand euros) shall be paid on or before 08 February 2013;

2.4.2. €1,500,000 (One million five hundred thousand euros) shall be paid on or before 15 October 2013.

*FC Zenit shall pay the contingency payment within thirty business days as of the date the condition precedent has been met”.*

7. On 8 February 2013, FC Zenit paid Siena the amount of EUR 4,350,000 as foreseen in clause 2.4.1 of the Zenit Transfer Agreement.

8. By way of a letter dated 12 February 2013, Nacional requested the payment of 30% of the amount received by Siena from FC Zenit. The relevant part of this letter reads as follows:

*“I am writing with reference to the meeting held on February 8, 2013 regarding your pecuniary obligations vis-à-vis our client Clube Desportivo Futebol SAD. I cannot help to note that you failed to send a proposal with a payment plan by Monday 11, 2013. As you know, our client was available to find a friendly settlement of your pending obligations but this latest failure shows that any informal arrangement, unfortunately, does not yield any results.*

*Without taking into account the previous FIFA proceedings, as you know very well the outstanding and overdue amounts are EUR 1.305.000 (i.e. 30% of the first instalment received from FC Zenit). You are therefore kindly requested to honour your commitment and proceed to pay the above amount within February 15, 2003. Of course, the relevant invoice will be issued once the payment is actually received.*

*If I do not hear from you within the above time limit, I will have no other choice than to start immediately any legal proceedings against you. Please note that these proceedings will imply for you substantial additional costs that you may avoid if you proceed to pay the said amount without further ado”.*

## II.2 THE PROCEEDINGS BEFORE FIFA

9. On 15 March 2013, Nacional filed a claim against Siena before FIFA requesting the payment of EUR 1,305,000 plus 5% interest *p.a.* as of 9 February 2013 or, alternatively, the payment of 30% of any other amount FC Zenit paid Siena by virtue of the Zenit Transfer Agreement, plus 5% interest *p.a.*
10. On 5 June 2013, the Single Judge of the FIFA Players’ Status Committee (the “Judge of the PSC”) decided to uphold Nacional’s claim. The operative part of this decision reads as follows:
1. *“The claim of the Claimant, Clube Desportivo Nacional, is partially accepted.*
  2. *The Respondent, A.C. Siena, has to pay to the Claimant, **within 30 days** as from the date of notification of this decision, the amount of EUR 1,305,000, plus 5% interest *p.a.* on said amount as of 9 February 2013 until the date of effective payment.*
  3. *If the aforementioned sum plus interest is 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.*
  4. *Any further claim lodged by the Claimant is rejected.*
  5. *The final amount of costs of the proceedings in the amount of CHF 20,000 is to be paid by the Respondent, **within 30 days** as from the date of notification of the present decision as follows: [...].”*
11. The Judge of the PSC considered sufficiently proven that Siena breached the Agreement by not paying Nacional 30% of the Player’s transfer fee received from FC Zenit on 8 February 2013. As a result, Siena was ordered to pay Nacional the amount of EUR 1,305,000 (i.e., 30% of EUR

4,350,000) plus 5% interest *p.a.* accrued as of 9 February 2013 until the date of effective payment.

12. On 29 July 2013, FIFA notified the parties of the grounds of the abovementioned decision.

### II.3 THE PROCEEDINGS BEFORE THE CAS

13. On 19 August 2013, Siena decided to appeal the abovementioned decision of FIFA (hereinafter referred to as the “Appealed Decision”) before the CAS and thus filed the relevant Statement of Appeal.

14. On 28 August 2013, Siena filed its Appeal Brief before the CAS with the following request for relief:

1. *“to accept the present appeal against the Challenged Decision;*
2. *to set aside the Challenged Decision;*
3. *To establish that the Appellant shall not pay any amounts to Respondent;*
4. *to condemn the Respondent to the payment in the favour of the Appellant of the legal expenses incurred;*
5. *to establish that the costs of the arbitration procedure shall be borne by the Respondent”.*

15. On 22 September 2013, Nacional filed its Answer to the Appeal before the CAS, requesting an award be rendered in the following terms:

*“On a preliminary basis,*

*a) The appeal be declared inadmissible as time-barred;*

*On the merits,*

*b) The Appealed Decision of Single Judge be upheld;*

*c) The Appellant is condemned to pay the Respondent EUR 1,305,000 plus 5 percent interest p.a. on said amount as of 9 February 2013 until the date of effective payment.*

*d) The Respondent is entitled to receive from Appellant, a contribution towards its legal fees and other expenses incurred in connection with this arbitration”.*

16. The Sole Arbitrator dealing with this case is Mr. José Juan Pintó Sala. None of the parties raised any objection as to the appointment of the Sole Arbitrator.

17. The hearing took place in Lausanne on 10 December 2013. The Sole Arbitrator was assisted by Mr. Christopher Singer, CAS Counsel and Mr. Antonio de Quesada, *ad-hoc* clerk.

18. At the beginning of the hearing, the parties' counsels made their respective opening statements, followed by a brief summary of their respective arguments. Thereafter, the parties' respective counsels made their closing statements. At the end, the Respondent's counsel requested the Sole Arbitrator to communicate the operative part of the award to the parties in advance of the reasons. The Sole Arbitrator accepted this request on the grounds of article R59 of the Code of Sports-related Arbitration (hereinafter referred to as the "CAS Code").
19. Both at the beginning and at the end of the hearing, the parties expressly declared that they were satisfied with the way in which the proceedings had been conducted.
20. The Sole Arbitrator communicated the operative part of this award to the parties on 13 December 2013.
21. The language of these proceedings is English.

### **III. SUMMARY OF THE PARTIES' POSITIONS**

#### **III.1 SIENA**

22. Pursuant to the wording contained in Annex B of the Agreement, Siena's obligation to pay a percentage of the Player's transfer fee only arises after Siena has received the total amount of such transfer fee from FC Zenit.
23. The second instalment only became due on 15 October 2013<sup>1</sup>; therefore, it is only on or after that date that Nacional can claim the 30% of the total transfer fee Siena received from the Player's transfer to FC Zenit. Consequently, Nacional had no right to file a claim against Siena before FIFA at that moment because the amount claimed was not due yet.
24. Under the Agreement, Nacional was entitled to 30% of the net profit that Siena received for the transfer of the Player to a third club. Nonetheless, Nacional, in its claim, calculated its percentage of the transfer fee based on the gross amount Siena was to receive. In short, the parties agreed that Nacional would receive 30% of the surplus amount Siena received for the future transfer of the Player. In this respect it shall be taken into account that Siena already paid Nacional an amount of EUR 1,650,000 for the Player's initial transfer, which means that Nacional should receive 30% of EUR 4,200,000 (EUR 5,850,000 – EUR 1,650,000), or EUR 1,257,000.
25. Concerning the request for inadmissibility filed by the Respondent, the Appellant states that the Statement of Appeal was sent to the CAS on 19 August 2013 and, thus, within the term to file the appeal before the CAS. Therefore, the appeal is admissible.

#### **III.2 NACIONAL**

26. The appeal is inadmissible as the Statement of Appeal filed by Siena was filed out of term. The

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<sup>1</sup> The Appeal Brief was filed before this date.

grounds of the Appealed Decision were notified to the parties on 29 July 2013 and thus, the Appellant's deadline to file its Statement of Appeal before the CAS was 19 August 2013. However, the Statement of Appeal was filed on 20 August 2013, i.e. one day later. This fact is easily verifiable upon consulting the online tracking information of the package provided by DHL, which clearly demonstrates the Statement of Appeal was only sent on 20 August 2013 and arrived at the CAS on 21 August 2013.

27. Moreover, the shipment waybill from the courier company So.ge.tras that Siena presented to substantiate the admissibility of the Statement of Appeal is not reliable. The information on the So.ge.tras waybill plainly contradicts the electronically authenticated information that So.ge.tras itself displayed online regarding the package containing the Statement of Appeal, which demonstrated the package was sent on 20 August 2013 to Peschiera Borromeo (Italy) and not to the CAS headquarters in Lausanne (Switzerland).
28. Concerning the merits of the case, in accordance with Annex B of the Agreement, Siena should have paid Nacional 30% of the amount that Siena received from FC Zenit on 8 February 2013 as the first payment of the transfer fee received for the Player. However, Siena breached the Agreement by failing to pay Nacional.
29. The plain language of Annex B of the Agreement is unmistakable and, therefore, leaves no room for interpreting it. Stating that Siena's obligation to pay Nacional only arises after Siena receives the entire amount of the transfer fee owed by FC Zenit is absolutely inconsistent with the wording of the referred Annex.
30. According to the principle of *pacta sunt servanda*, Siena must pay the amount requested in these proceedings.
31. There is no mention of the word "net" in Annex B of the Agreement and there is also no basis to sustain Siena's calculation of the amount owed.

#### **IV. LEGAL CONSIDERATIONS**

##### **IV.1 CAS JURISDICTION**

32. The jurisdiction of the CAS to decide on the present case arises out of Article 67 of the FIFA Statutes and Article R47 of the CAS Code. In addition, CAS jurisdiction has been expressly accepted by the parties, which both signed the Order of Procedure of the present case.
33. Therefore, the Sole Arbitrator considers that CAS is competent to decide on this case.

##### **IV.2 APPLICABLE LAW**

34. Article R58 of the CAS Code reads as follows:

*“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.*

35. The Sole Arbitrator notes that the Appellant and the Respondent did not specify any choice of law in the Agreement or its Annexes. In spite of it, the Sole Arbitrator shall point out that both parties expressed in their written submissions that the present dispute shall be resolved in accordance with FIFA Regulations and Swiss Law.
36. Therefore, the Sole Arbitrator understands that the present dispute shall be resolved in accordance with FIFA Regulations and Swiss Law.

### **IV.3 ABOUT THE DISPUTE SUBMITTED TO THE COURT BY THE PARTIES**

#### ***IV.3.1. Admissibility of the appeal***

37. First of all, the Sole Arbitrator notes that both parties agreed that the Appellant’s deadline to file its Statement of Appeal was 19 August 2013 since the grounds of the Appealed Decision were notified on 29 July 2013.
38. However, the Respondent contends that the Statement of Appeal was only filed before CAS on 20 August 2013, thus, when the term to do so had already expired. Therefore, the Respondent considers that the Statement of Appeal was filed late and that, pursuant to article R32 of the CAS Code, it is inadmissible. In proof of its allegation, the Respondent submitted the shipment tracking information from the DHL website, in accordance to which the Statement of Appeal would have come into DHL’s possession on 20 August 2013 in Peschiera Borromeo (Italy).
39. On the other hand, the Appellant sustains that the Statement of Appeal was picked up at its offices by So.ge.tras, an Italian courier company, on 19 August 2013, so the Statement of Appeal was indeed admissible.

The Appellant submits the So.ge.tras shipment waybill with the handwritten date of 19 August 2013 along with a letter from Barbara Mozetich, from the So.ge.tras Complaints Office, stating the following:

*“The company Sogetras you hereby acknowledge that you have withdrawn as of 19/08/2013 (as evidenced by the waybill No. 25431272) at the offices of the Club AC Siena Spa, an envelope addressed to the court of Arbitration for Sport – Lausanne – Switzerland.*

*It also states that our company for shipments international collaborates with the company Dhl and also in this occasion the package in question it was given to DHL for the shipment”.*

40. In light of all the documentary evidence presented, the CAS, on behalf of the Sole Arbitrator, communicated the following to the parties by way of a letter dated 30 October 2013:

*“The Statement of Appeal appears prima facie as admissible because it seems to have been filed in a timely manner. The Appellant presented a shipment waybill from Sogetras that established 19 August 2013 as the date of shipment of the statement of appeal. The Sole Arbitrator also takes note of the letter from Ms. Barbbara Mozetich from Sogetras, who corroborated the date on the shipment waybill as correct and informed the CAS that Sogetras collaborates with DHL for international shipments. This collaboration may explain why a DHL shipment waybill, and not a Sogetras shipment waybill, arrived at the CAS along with the Statement of Appeal.*

*For these reasons, the Sole Arbitrator has decided to continue with the proceedings without prejudice of the right of the Respondent to raise any additional issues, arguments and/or evidences thereto at the hearing”.*

41. The parties did not raise any additional arguments or present additional evidence at the hearing with respect to the admissibility of the Statement of Appeal.
42. In light of the above mentioned, the Sole Arbitrator considers that it has been provided with convincing elements to determine that the appeal was timely filed, and thus decides that the appeal is admissible.

#### **IV.3.2. The object of the dispute**

43. According to the parties’ written submissions and the arguments raised by them in the hearing, the object of the dispute may be briefly summarized as follows: the Appellant considers that it did not have an obligation to pay the Respondent until it received the entire amount payable by FC Zenit as regards the Player’s transfer, and that only at that point, the Appellant would be bound to pay 30% of the net profit it made on the Player’s transfer to FC Zenit. Conversely, the Respondent holds that Appellant shall pay the amount claimed as the prerequisites and events foreseen in Annex B of the Agreement have taken place, and Siena has no valid ground for neither not to pay nor to pay less than the amount claimed.
44. For the resolution of the present dispute, the Sole Arbitrator deems it necessary to firstly examine the content of the relevant part of Annex B of the Agreement, which reads as follows:
  - In Italian (prevailing version in accordance with the Agreement):

*“In caso di cessione future del calciatore, inoltre, SIENA si impegna a riconoscere a MADEIRA il 30% dell’importo ricevuto (alle medesime scadenze di incasso dalla società acquirente)”.*
  - In English:

*“If the footballer is transferred in the future, SIENA also undertakes to pay MADEIRA 30% of the amount received (at the same time the club acquiring the player receives payment)”.*
45. In the Sole Arbitrator’s view, the referred provision is clear and its literalness leaves no room for interpretation, both in its Italian and English version: if the Player is transferred to a third club, Siena becomes bound to pay to Nacional 30% of the amount received *pari passu*.
46. In the present case, it is undisputed that:

- Siena transferred the Player to FC Zenit, and
  - At the time the claim was filed by Nacional before FIFA, FC Zenit had already paid Siena EUR 4,350,000 for the Player's transfer.
47. In such scenario, it is clear for the Sole Arbitrator that in accordance with the wording of the Annex B of the Agreement, Siena was obliged to pay Nacional 30% of any amount it received for the Player's transfer to a third club immediately after receiving that amount (*"alle medesime scadenze di incasso dalla società acquirente"*), and that Siena failed to do so.
48. Concerning the grounds raised by Siena not to pay (or not to pay in full) the amount claimed, none of them are acceptable for obvious reasons: these grounds are totally against the clear and unambiguous wording of Annex B of the Agreement, and no convincing evidence has been brought by the Respondent to think otherwise or to interpret the Agreement in another way.
49. Therefore, the Sole Arbitrator considers that the Appealed Decision shall be confirmed in its entirety, and consequently, the Appellant shall be ordered to pay the Respondent 30% of the amount of EUR 4,350,000, i.e. EUR 1,305,000 plus 5% interest *p.a.* as of 9 February 2013 until the date of effective payment.

## ON THESE GROUNDS

### The Court of Arbitration for Sport rules:

1. The appeal filed by A.C. Siena S.p.A. against the decision issued by the Single Judge of the FIFA Players' Status Committee on 5 June 2013 is rejected.
2. The decision of the Single Judge of the FIFA Players' Status Committee on 5 June 2013 is confirmed.
3. (...).
4. (...).
5. All other prayers for relief are rejected.