



Arbitration CAS 2013/A/3443 Ginés Carvajal Seller v. FC Dnipro Dnipropetrovsk, award of 6 October 2014

Panel: Mr Mark Hovell (United Kingdom), President; Prof. Gustavo Albano Abreu (Argentina); Mr Sofoklis Pilavios (Greece)

Football

Contract of agency

Failure to comply with the FIFA requirements regarding the form of an agency contract

Burden of proof regarding the rate of the commission due

Burden of proof regarding the agency commission due to the agent

Interests

1. In the event the agency arrangements are not recorded in a written agreement as so required by Article 19 of the 2008 FIFA Regulations on Players' Agents (FIFA Regulations), Article 31 of the FIFA Regulations allows FIFA to sanction the agent. However, the FIFA Regulations do not state the consequence of a failure regarding the form of an agency agreement as to be the invalidity of an agency agreement. In fact, they only foresee the chance to impose sanctions.
2. In the absence of any written agreement, the burden of proof is upon an agent to demonstrate that the parties had agreed upon a rate of commission. Pursuant to the CAS jurisprudence, a consequence of non-compliance with the FIFA Regulations is that the agent cannot then look to use them (and particular Article 20.4) to his benefit and claim 3%, in the alternative. The fact that it is likely that an agent was not working *pro bono* for the club should be taken into account. Moreover, the testimonies should also be taken into consideration in this respect under the balance of probabilities standard.
3. The burden of proof is upon a club to demonstrate the existence of an agreement for an agent to take his commission from the player's agent. Absent any evidence in this respect, the club should pay the agent for the services he has provided under their arrangements.
4. Under Swiss law, 5% interest is due on late payments under commercial contracts such as an agency agreement, whether in written form or not.

I. PARTIES

1. Ginés Carvajal Seller (hereinafter referred to as “the Agent” or the “Appellant”) is a football agent licensed by the Real Federación Española de Fútbol.
2. FC Dnipro Dnipropetrovsk (hereinafter referred to as “the Club” or the “Respondent”) is a football club with its registered office in Dnipropetrovsk, Ukraine. The Club is registered with the Football Federation of Ukraine (hereinafter referred to as the “FFU”) which in turn is also affiliated to Federation Internationale de Football Association (hereinafter referred to as “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 submissions and the evidence examined in the course of the present appeals arbitration proceedings. 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. The Club granted an authorisation to the Agent and Mr. Armando Ufarte to represent it in connection with the possible transfer of the Brazilian player Guiliano Victor de Paula (hereinafter referred to as “the Player”) from the Brazilian football club FC Internacional Porto Alegre (hereinafter referred to as “International”) valid until 25 February 2011 (hereinafter referred to as the “Mandate”). The Mandate was signed by Andriy Stetsenko, the Club’s General Director.
5. On 18 January 2011, International and the Club entered into an agreement to transfer the Player from International to the Club for €11,000,000 (hereinafter referred to as the “Transfer Agreement”).
6. On 1 July 2011, the Agent invoiced the Club for his services in relation to the transfer of the Player.
7. On 6 July 2011, the Agent’s lawyers wrote, by way of email and fax, to the Club requesting payment of the Agent’s invoice.
8. On 13 July 2011, the Agent’s lawyers again wrote, by way of email and fax, to the Club requesting a response and the payment of the Agent’s invoice.
9. On 29 August 2011, by way of email and fax, the Agent’s lawyers wrote again to the Club requesting payment.

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

10. On 1 September 2011, the Agent lodged a claim before FIFA's Player's Status Committee (hereinafter referred to as the "FIFA PSC").

11. On 7 February 2012, the Club rejected the Agent's claim. The Club informed FIFA, as follows:

"In reply to your letter (ref.Iza 11-02080) dated 23 January 2012, FC Dnipro would like to express of the position on this matter. Actually, players' agent Mr. Gines Carvajal Seller was authorized by FC Dnipro to negotiate with the Sport Club International regarding possible transfer player Giuliano Victor de Paula from Sport Club International to FC Dnipro. Result of this work was a transfer of the player Giuliano Victor de Paula from Sport Club International to FC Dnipro. As agreed with Mr. Gines Carvajal Seller, for receipt of the relevant remuneration for provided services was signed a contract between the company Tonietto Assessoria de esportes LTDA and FC Dnipro. Therefore, we consider that the claims against FC Dnipro from Mr. Gines Carvajal Seller is unreasonable and please be aware our position in the consideration of this matter".

12. On 10 April 2012, the Agent rejected the Club's allegations and denied having ever agreed on receiving his commission via Tonietto Assessoria de Esportes LTDA (hereinafter referred to as "Tonietto") and explained that he was not a party to the Club's agreement with Tonietto (hereinafter referred to as the "Tonietto Agreement").

13. On 23 April 2013, the Single Judge of the FIFA PSC held (hereinafter referred to as the "Appealed Decision"):

"1. The claim of the Claimant, Ginés Carvajal Seller, is rejected.

2. The final cost of the proceedings in the amount of CHF 21,000 are to be paid by the Claimant, Ginés Carvajal Seller. Considering that the Claimant, Ginés Carvajal Seller, already paid the amount of CHF 5,000 as advance of cost, the latter has to pay the remaining amount of CHF 16,000 within 30 days as from the date of notification of the present decision to the following bank account ...".

14. On 4 December 2013, the Appealed Decision was notified to the parties by facsimile.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

15. On 19 December 2013, the Agent filed the Statement of Appeal with the Court of Arbitration for Sport (hereinafter referred to as the "CAS") in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (hereinafter referred to as the "CAS Code"). The Agent made the following requests for relief:

"1. The Appellant respectfully REQUESTS that the Court of Arbitration for Sport consider this Statement of Appeal together with the accompanying documents and copies to have been duly lodged in time and in the proper form and, following the appropriate established procedures and the appointment of an arbitration panel composed of a three arbitrators, as a result of the contents of this request and the information which comes to light in the arbitration proceeding, render an award which:

- *Abolishes the Decision of the Sole Arbitrator of the Player's Status Committee FIFA of April 23, 2013 (notified in full on December 4, 2013) (Ref. Iza11-02080);*
- *Accepting in full the claim for payment made by the Appellant against the Respondent, i.e. for the payment of FIVE HUNDRED AND FIFTY THOUSAND EUROS (€550,000.00) plus any applicable taxes;*
- *The application of the sanctions on the Respondent as stipulated in Article 35 of the Regulations Player's Agent; and,*
- *Orders the Respondent to pay the administrative costs, expenses and legal expenses arising from this proceeding as well as the FIFA proceeding plus a 5% interest”.*

16. On 27 December 2013, the Agent filed its Appeal Brief, in accordance with Article R51 of the CAS Code. The Agent challenged the Appealed Decision, submitting the following amended requests for relief:

“1. *We hereby request that the COURT OF ARBITRATION FOR SPORT deem this APPEAL BRIEF as filed on behalf of MR GINÉS CARVAJAL SELLER, to claim certain amounts by FC “DNIPRO” DNIPROPETROVSK, in order for the future Appeal Arbitration Panel to eventually deliver an Award, in light of the statements herein and any other evidence provided in the course of arbitration proceedings, whereby:*

- A. *Accepting in full the claim for payment made by the Agent against the Club, i.e. for the payment of FIVE HUNDRED AND FIFTY THOUSAND EUROS (€550,000.00) plus any applicable taxes.*
- B. *The application of the sanctions stipulated in Article 35 of the Regulations Player's Agent.*
- C. *Ordering the Club to pay the legal costs and all other expenses of these proceedings plus – as indemnification for default – applicable interest pursuant to Swiss laws in relation to the amount stipulated in point A above, all of which will be calculated as of the date of the first formal request, this is, 6 July 2011 until the effective payment date.*
- D. *SUBSIDARILY, and should this Hon. Panel reject the amounts claimed by the Agent, in analogical application of Article 20.4 of the Regulations, the Agent shall be entitled to THREE HUNDRED AND THIRTY THOUSAND EUROS (€330,000.00) plus any applicable taxes”.*

17. On 30 December 2013, the CAS Court Office acknowledged receipt of the Agent's Appeal Brief. The CAS Court Office, pursuant to R55 of the CAS Code, requested the Club to submit its Answer within twenty days of receipt of the letter. Further, the letter explained that if the Club failed to submit its Answer by the given time limit, the Panel may nevertheless proceed with the arbitration and deliver an award.

18. On 10 January 2014, FIFA acknowledged receipt of CAS correspondence and renounced its right to intervene in the arbitration procedure. Despite renouncing to intervene, FIFA clarified that the Agent had not designated FIFA as a respondent to the procedure, whereas one of its

requests for relief was related to the imposition upon the Club of sanctions contained in Article 35 of the Regulations Players' Agents (2008) (hereinafter referred to as the "FIFA Regulations"). FIFA stated that any question related to the hypothetical imposition of sanctions may not be taken into account by the CAS, as confirmed in CAS jurisprudence.

19. On 27 January 2014, the Club filed its Answer. The Club confirmed that it did not wish for a hearing to be held.
20. On 3 February 2014, the Agent noted that the Club may have filed its Answer late and requested that the CAS reject the Answer and disallow the Club from taking part in the procedure. Further, the Agent requested a copy of the Tonietto Agreement and the opportunity to make further submissions in relation to the Tonietto Agreement and the Answer provided by the Club. Finally, the Agent stated his preference for a hearing to be held.
21. On 4 February 2014, the CAS Court office acknowledged receipt of the Agent's letter and informed the parties that the Panel would be informed of the delivery date of the Appeal Brief and the filing of the Answer and decide accordingly. Further, in respect of the Agent's requests, that procedural and evidentiary directions would be issued by the Panel, once constituted.
22. On 1 April 2014, the CAS Court office acknowledged receipt of the Agent's share of the advance of costs. Pursuant to Article R54 of the CAS Code, the CAS Court office informed the parties that the Panel had been constituted as follows: President Mr. Mark A. Hovell and Arbitrators, Prof. Gustavo Albano Abreu and Mr. Sofoklis Pilavios.
23. On 10 April 2014, the CAS Court Office informed the parties of the Panel's decision that the Club's Answer be rejected due to its late filing on 27 January 2014. The letter explained that the Panel held that the twenty-day time limit for filing the Answer had, according to the DHL delivery reports, started to run on 5 January 2014 following delivery of the Appeal Brief on 4 January 2014 by the CAS Court Office to the Club and, in the absence for a request for an extension, expired on 24 January 2014, pursuant to Articles R55 and R32 of the CAS Code. The letter confirmed that neither party was allowed to file any further submissions unless ordered by the Panel. The Club was requested to produce, within fourteen days from receipt of the letter, a translated version of the Tonietto Agreement. The letter confirmed that the Panel understood that the Transfer Agreement provided a transfer fee of €11,000,000 and asked that if either party disputed this fact then they were to produce a translated version of the Transfer Agreement within fourteen days of receipt of the letter. The letter confirmed that the Panel had decided to hold a hearing and that the hearing would take place on 28 May 2014, unless either party objected. Finally, the parties were invited to file written statements of any witnesses they intended to call within fourteen days of receipt of the letter.
24. A hearing was held on 28 May 2014 in Lausanne, Switzerland. The Panel was present throughout and were assisted by Mr. Christopher Singer, Counsel to the CAS. The following persons attended the hearing:

For the Agent: The Agent (in person), Mr. Javier Ferrero (counsel), Mr. Inigo de Lacalle (counsel) and Ms. Arancha Carvajal (as observer);

For the Club: Mr. Dmytro Pelin (deputy General Secretary) and Mr. Ralph Isenegger (counsel).

25. At the hearing, the parties made submissions in support of their respective cases. By agreement of the parties and with the agreement of the Panel, the Agent produced two documents at the hearing, which were accepted by agreement of the parties to the CAS file, namely, a written witness statement of Mr Marcus Motta (the lawyer to Tonietto) and a form of guarantee given by the Agent to International, in Portuguese, which the Agent subsequently translated into English for the CAS file. The following persons were heard, with the other side and the Panel given full opportunity to examine them:
- a. The Agent, in person;
 - b. Mr. Daniel Cravo: the lawyer of International, as witness called by the Agent, in person;
 - c. Mr. Jean Marguerat: a Swiss lawyer, as an expert on Swiss Law called by the Agent, in person; and
 - d. Mr. Pelin: as representative of the Club, in person.
26. At the hearing, the Panel noted that the FIFA file from the FIFA PSC proceedings had only just been received by the CAS Court Office. Therefore, it was agreed with the parties that following the conclusion of the hearing, it would be sent to the parties by the CAS Court Office and that either party may draw the Panel's attention to any particular part of the FIFA file they wished to rely upon, within 7 days of receiving the file.
27. At the conclusion of the hearing, the parties confirmed that they had no objections in respect to their right to be heard and that they had been given the opportunity to fully, equally and fairly present their cases.
28. On 5 June 2014, on behalf of the Panel, the CAS Court Office provided the parties with the FIFA file and requested the parties to draw to the Panel's attention any particular part or parts thereof that each deemed relevant, within 7 days.
29. On 6 June 2014, the Agent submitted that there was nothing in the FIFA file that supported the Respondent's allegations that the Agent had agreed to receive his remuneration from Tonietto.

IV. SUBMISSIONS OF THE PARTIES

30. The Agent's submissions, in essence, may be summarised as follows:

31. In response to the Club's statement that the Agent had agreed for his remuneration to be paid in accordance with the Tonietto Agreement, the Agent explained that he never agreed with the Club to receive his remuneration by virtue of the Tonietto Agreement. He was not a party to the Tonietto Agreement and therefore could not be a beneficiary of any payment whatsoever. The Agent further stated that Tonietto is owned by Mr Paolo Tonietto who represented the Player and finally that he was not in possession of the Tonietto Agreement. At the hearing, the Agent produced written testimony from Mr. Motta, in which he confirmed that he was the lawyer of Tonietto, who acted for the Player, and that there was no agreement to pay the Agent from Tonietto's commission or at all.
32. It was undisputed that the Club admitted that the Agent was authorised to negotiate with International regarding the possible transfer of the Player and that the Club admitted that as a result of his work the Player was transferred from International to the Club.
33. In relation to the Club's allegation that it had agreed with the Agent that the commission for his services would be paid through Tonietto, the Agent explained that the amounts paid by the Club to Tonietto were significantly greater than what the Agent was claiming. The Agent noted that the Appealed Decision referred to a payment of €1m payable by way of 2 instalments of €500,000 each. The Agent stressed that the Appealed Decision recognised that there was an agency relationship between the Player and Tonietto whereas the Agent was acting for the Club in accordance with a verbal agreement, evidenced by the Mandate. The Agent confirmed that the amounts paid in accordance with the Tonietto Agreement had nothing to do with his agreement with the Club.
34. Further, the Agent submitted that he negotiated with Tonietto and the Player. The Player wanted a salary of €2m per year over the 5 years of the playing contract. The Player had agreed a 10% commission with Tonietto, i.e. €1m. It was agreed that the Club would pay this for the Player as part of his arrangements, so the annual salary was reduced to €1,800,000 to facilitate this.
35. The parties agreed verbally that should the transfer of the Player be accomplished the remuneration of the Agent would be 5% of the final transfer fee. Therefore, the Agent's remuneration amounted to €550,000. The verbal agreement was ratified during a series of meetings that were held at the Hotel Oliva Golf, Valencia, Spain, during which the transfer was accomplished. Those meetings were attended by International's lawyer Mr. Daniel Cravo, Mr. Armando Ufarte, Mr. Marcos Motta, who was acting on behalf of both Tonietto and the Player as their lawyer, the Agent and the representatives of the Club. At the hearing, the Agent testified that these meetings went on over a couple of days and that he agreed the 5% rate of commission with Andriy Stetsenko, the Club's General Director, during these meetings.
36. Mr. Cravo confirmed that during the meetings, with all parties present, there was a dispute regarding a claim for €50,000 that a former agent of the Player was claiming from the transfer. Mr. Cravo recalled asking the Agent if he was paying it and that the Agent's reply was that he was only getting 5% commission from the Club. Mr Cravo remembered telling Tonietto to pay that sum.

37. Both Mr. Cravo and the Agent testified that the payment of the transfer fee was staggered and that the Agent gave a personal guarantee, limited to €200,000, to International that the whole transfer fee would ultimately be paid. The Agent contended that it would make only sense to give such financial guarantee if, in turn, his services were to be remunerated by the Club.
38. Once the transfer was finalized, the Agent requested the Club to make the payment for his services derived from the verbal agreement. The Agent explained that he had invoiced for his commission.
39. The Agent submitted that it was clear that the sole intention of the Club was to avoid paying the amounts owed to the Agent by alleging that the money had been paid to Tonietto.
40. In relation to the FIFA Regulations and in particular its Article 19, the Agent submitted that the Mandate was a written representation agreement. The majority of Article 19 of the FIFA Regulations in fact applied to the relationship between an agent and player rather than an agent and a club and, thus, was not relevant here. The Agent further submitted that in accordance with Article 20 paragraph 5 of the FIFA Regulations, the remuneration needed to be agreed in advance between the Club and the Agent. This was done by virtue of the verbal agreement. The FIFA Regulations did not stipulate in what manner it had to be agreed, i.e. in writing or verbally. The Agent did not agree with the Appealed Decision, in which it was explained that the incorporation of such remuneration in a relevant contract is mandatory, arguing that a verbal agreement is in fact admitted in Swiss law but also that Article 20 paragraph 5 of the FIFA Regulations did not fix the way in which agreements must be “closed”. He had an agreement, evidenced by the Mandate, with the Club and the remuneration arrangements were agreed verbally.
41. In accordance with the Swiss Code of Obligations (hereinafter referred to as the “CO”), an agreement concluded orally or by implied actions is valid and binding under Swiss law. In relation to the Mandate, the Agent acknowledged that in the Appealed Decision it was due to an alleged lack of form, i.e. absence of the amount due in commission in writing in the Mandate, that resulted in FIFA dismissing the Agent’s claim. However, Swiss law required no form for the conclusion of a mandate and, more specifically, of a brokerage contract. The verbal agreement was therefore valid. The written Mandate simply proved the existence of the verbal agreement.
42. Further, the Agent submitted that the Appealed Decision incorrectly applied the FIFA Regulations as the FIFA Regulations do not provide for a certain form, or, alternatively, the FIFA Regulations are unclear or ambiguous in that respect. The mere lack of written detail of the amount due to the Agent cannot invalidate the agreement.
43. Articles 19 and 20 of the FIFA Regulations do not require the amount of the remuneration of a club’s agent to be in writing and that the parties never agreed with such a requirement prescribed by law in accordance with Article 16 of the CO. The Agent submitted that the Mandate respected the “in writing” requirement of Article 19 paragraph 1 of the FIFA Regulations, and that the verbal agreement was valid and binding under Swiss law.

44. In conclusion, it had been sufficiently established that the Club had breached its obligations arising from the verbal agreement. The verbal agreement and the Mandate between the Agent and the Club are valid and binding under Swiss law, the Agent and the Club have fulfilled the FIFA Regulations and specifically Articles 19 and 20 of the FIFA Regulations. The Club has admitted that it used the services of the Agent in regards of the transfer before the FIFA PSC. Finally, the Agent never expected to be paid through the Tonietto and there was no proof this was intended or happened. Consequently the Club owes the Agent the amount of €550,000.
45. In the alternative, if the Panel was not convinced that the rate of 5% was agreed, then the rate of 3% should be awarded, as this is the rate under Article 20.4 of the FIFA Regulations.
46. Finally, the Agent submitted that interest should be awarded under Swiss law to any sums awarded at the rate of 5% pursuant to Article 104 of the CO, from 6 July 2011 being the date the Agent first claimed his commission until the date of effective payment.
47. The Club's submissions, in essence, may be summarised as follows:
48. The Agent was the agent of the manager of the Club's first team and had been involved in Mr. Juan de Ramos' recruitment. It was Mr. Ramos' decision to sign the Player and he had asked his own agent, the Agent, to assist. The Agent did assist, but he never asked for any commission, he was helping Mr. Ramos.
49. International required a letter of authorisation before they would talk to the Agent, and this was provided in the form of the Mandate. This was the context in which it was given, not as part of a representation agreement.
50. The Club acknowledged there was a fee of €1m, but that was for the Player's agent, Tonietto.
51. The Club noted that the Agent confirmed at the hearing that he never signed written agreements with his players, yet he was an experienced agent dealing with a Ukrainian club, but did not take the precaution of getting his arrangements in writing. He was the agent of the lead coach and did have a written contract in relation to Mr. Ramos' deal. This is evidence that he was acting as a favour for Mr. Ramos, to help him with his new club.
52. Alternatively, he did have an arrangement with Tonietto to receive a commission from it. The Club noted the personal guarantee. He gave this as he was receiving money from Tonietto.
53. The Club also submitted that there was no place for Swiss law here. The FIFA Regulations are clear, any representation agreement would have to be in writing. The Mandate was not a representation agreement, it was merely to give comfort to International. In summary, the Club agreed with the decision of the FIFA PSC in this regard.

V. ADMISSIBILITY

54. The Appeal was filed within the 21 days set by Article 67(1) of the FIFA Statutes (2013 edition). The Appeal complied with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fee.
55. It follows that the Appeal is admissible.

VI. SCOPE

56. The Agent, in his prayers for relief, requested the application of sanctions against the Club as stipulated in article 35 of the FIFA Regulations. The Panel noted that the Agent had not designated FIFA as a respondent to the present procedure. As a preliminary matter at the hearing, the Panel asked the Agent if, in the light of FIFA's correspondence he maintained this request for relief. The Agent confirmed that he did not and withdrew the request for sanctions against the Club, but confirmed all his other requests.
57. 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. JURISDICTION

58. The jurisdiction of the CAS, which is not disputed, derives from Article 67(1) of the FIFA Statutes (2013 edition) as it determines that:

“Appeals 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 from Article R47 of the CAS Code.

59. The jurisdiction of the CAS is further confirmed by the Order of Procedure duly signed by the parties.
60. It follows that the CAS has jurisdiction to decide on the present dispute.

VIII. APPLICABLE LAW

61. 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”.

62. 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”.

63. The Panel noted that the Agent had filed an expert report from Mr Marguerat, who attended the hearing to answer questions from the Club and the Panel on the contents of his report. In essence, it was Mr Marguerat’s opinion that Swiss law should be applied in parallel to the FIFA Regulations. Mr Marguerat maintained this position, even though he conceded that in his written report he had referred to the 2010 version of the CAS Code (as FIFA had referred to this in the Appealed Decision), as opposed to the 2013 version of the CAS Code.

64. The Panel noted that the wording of Article R58 of the CAS Code (2010 edition) had stated:

“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 choice, according to the law of the country in which the federation ... which issued the challenged decision is domiciled...” (emphasis added).

However, the Panel noted the addition of the word “*subsidiarily*” in the 2013 version.

65. The Panel determined that despite FIFA attaching to the Appealed Decision a set of guidance notes entitled “*Directions with respect to the appeals procedure before CAS (Code of Sports-related Arbitration, 2010 edition)*”, it is the 2013 version of the CAS Code that is applicable in the case at hand. The 2013 version came into force on 1 March 2013, before the date of the Appealed Decision, and crucially before the date of the Agent’s Appeal.

66. By way of reference to Article R58 of the CAS Code, where the clear reference is to Swiss law (being the law of the country where FIFA is domiciled) being subsidiary to the FIFA Regulations, and to Article 66 (2) of FIFA Statutes, applying Swiss Law “*additionally*”, the Panel respectfully disagreed with Mr Marguerat’s opinion that the choice of law should be both the FIFA Regulations and Swiss Law in parallel and instead determined that the FIFA Regulations are applicable, with Swiss law applying on a subsidiary basis.

67. The Panel notes the following articles of the FIFA Regulations which have particular relevance to the matter at hand:

“Definitions

[...]

1. *Players’ agent: a natural person who, for a fee, introduces players to clubs with a view to negotiating or renegotiating an employment contract or introduces two clubs to one another with a view to concluding a transfer agreement, in compliance with the provisions set forth in these regulations.*

Article 2 General

1. *Both players and clubs are entitled to engage the services of a licensed players' agent in connection with a transfer or with a view to negotiating or renegotiating an employment contract. The players' agent is entitled to be remunerated for the service he provides. In authorising the activity of players' agents, these regulations do not release a players' agent from his obligation to comply with the laws applicable in the territory of the association, in particular those relating to job placement.*

Article 19 Representation Contract

1. *A players' agent shall be permitted to represent a player or a club only by concluding the relevant written representation contract with that player or club.*

[...]

Article 20 Remuneration

1. *The amount of remuneration due to a players' agent who has been engaged to act on a player's behalf is calculated on the basis of the player's annual basic gross income, including any signing-on fee that the players' agent has negotiated for him in the employment contract. Such amount shall not include the player's other benefits such as a car, a flat, point premiums and/ or any kind of bonus or privilege which is not guaranteed.*
2. *The players' agent and the player shall decide in advance whether the player shall remunerate the players' agent with a lump sum payment at the start of the employment contract that the players' agent has negotiated for the player or whether he shall pay annual instalments at the end of each contractual year.*
3. *If the players' agent and the player do not decide on a lump sum payment and the player's employment contract negotiated by the players' agent on his behalf lasts longer than the representation contract between the player's agent and the player, the players' agent is entitled to annual remuneration even after expiry of the representation contract. This entitlement lasts until the relevant player's employment contract expires or the player signs a new employment contract without the involvement of the same players' agent.*
4. *If the players' agent and the player cannot reach agreement on the amount of remuneration to be paid or if the representation contract does not provide for such remuneration, the players' agent is entitled to payment of compensation amounting to three per cent of the basic income described in paragraph 1 above which the player is due to receive from the employment contract negotiated or renegotiated by the players' agent on his behalf.*
5. *A players' agent who has been contracted by a club shall be remunerated for his services by payment of a lump sum that has been agreed upon in advance.*

[...]

Article 31 General Provision

Sanctions may be imposed on any players' agents, player, club or association that violates these regulations, their annexes or the statutes or other regulations of FIFA, the confederations or the associations.

Article 33 Sanctions on players' agents

1. *The following sanctions may be imposed on players' agents for violation of these regulations and their annexes in accordance with the FIFA Disciplinary Code:*
 - *a reprimand or a warning;*
 - *a fine of at least CHF 5,000;*
 - *a suspension of licence for up to 12 months;*
 - *a licence withdrawal;*
 - *a ban on taking part in any football-related activity.*

These sanctions may be imposed separately or in combination.

2. *In particular, the licence shall be withdrawn if the players' agent repeatedly or seriously infringes the statutes and regulations of FIFA, the confederations or the associations.*
3. *Only the association issuing the licence may suspend or withdraw a players' agent licence. If FIFA decides to suspend or withdraw a players' agent licence, it shall, once its decision has legally come into force, address the necessary directive to the association that issued the licence”.*

IX. MERITS

A. The Main Issues

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

- a. Was there an agency relationship between the Agent and the Club or was the Agent working as a “favour” for Mr Ramos?
- b. Did this need to be in writing and if so, was the Mandate sufficient?
- c. If there was a binding agency relationship, what rate of commission was due under it?
- d. Did the Agent provide services that triggered the payment of any such commission?
- e. Did the Agent agree to take payment of any such commission from Tonietto?
- f. If not, is any interest applicable?

a) Was there an agency relationship?

69. The Panel notes that it is undisputed that the Agent assisted the Club in signing the Player. The Club confirmed the same in their letter dated 7 February 2012 to the FIFA PSC. The Agent claims that the relationship was verbal, but evidenced by the Mandate. The Club submitted that there was no agency arrangement, verbal or otherwise; rather the Agent was helping the manager, Mr Ramos, to bring in the Player as a favour.
70. Whilst the Panel notes that the Agent testified that he did not usually sign written agreements with the players he represents, he did appear to have a written agreement when Mr Ramos was brought to the Club, as its manager. However, the Panel also notes that the Agent carried out agency activity on behalf of the Club: it gave him the Mandate for this very purpose; he was present throughout the negotiations in Valencia; he dealt with the amendments to the salary of the Player to accommodate the commission to Tonietto; he gave a guarantee to International regarding the Club's commitments to that club – on balance the Panel is satisfied that an agency relationship existed between the Agent and the Club. The issues were really whether it needed to be in written form, what the commission (if any) was and whether it was agreed that such commission should be settled out of the commission the Player sacrificed to go to Tonietto.

b) Does the agreement need to be in writing?

71. The Club has directed the Panel to the wording of Article 19.1 of the FIFA Regulations:
“A players’ agent shall be permitted to represent a player or a club only by concluding the relevant written representation contract with that player or club” (emphasis added).
72. The Agent, on the other hand, argued that the Mandate fulfilled this Regulation and instead placed his emphasis on Article 20 of the FIFA Regulations. This indicates that the remuneration provisions needed to be agreed in advance, but if they weren't there was a fall back rate of 3% as commission. The Agent maintained that the commission was agreed, albeit verbally, but Article 20 of the FIFA Regulations did not require this to be in writing. Further, if anything, the FIFA Regulations were sufficiently unclear, that the Panel should refer to Swiss law. Under Swiss law, there is no requirement for the agency agreement to be in writing.
73. The Panel firstly notes that the Mandate is not a representation agreement, nor is it sufficient to fulfil the requirements of Article 19.1 of the FIFA Regulations. It may be evidence that there is an agency relationship (although, in practice, clubs and players may give a mandate to an agent to “test the water” and only later appoint the agent officially to negotiate a transaction on their behalf pursuant to a representation agreement), but on the specific wording of the Mandate it is not an agency agreement on its own. The requirement of FIFA is clear to the Panel, agency agreements, whether with a club or a player, must be in writing. There is no need for the Panel to look behind this Regulation and refer to Swiss law.
74. That noted, the Panel refers to the FIFA Regulations. In the event the agency arrangements are not recorded in a written agreement as so required, what is the result? Article 31 of the

FIFA Regulations allows FIFA to sanction the Agent. So, what are the range of sanctions? The Panel notes these are contained at Article 33.1 of the FIFA Regulations. In the Appealed Decision, the FIFA PSC effectively rendered any agency arrangements void. The Panel notes that neither is this a sanction available to the FIFA PSC pursuant to Article 33.1 nor is there any provision in the FIFA Regulations which would determine the consequences of a lack of form, be it the nullity of an agreement lacking such form or any other legal consequence. The Panel notes that the former has been considered by the CAS before and refers to the CAS jurisprudence in the matter CAS 2011/A/2660. In that matter the agent was also relying on a written authorisation that was not a standard form representation agreement and also did not state any rate of commission. At paragraph 8.21 of that award, that panel determined:

“However, the Panel holds that such failures do not invalidate the entire agency agreement. If agents fail to comply with the requirements of Article 12 of the FIFA Agency Regulations [now Article 19], Article 15 of the FIFA Regulations [now Article 31] stipulates that [p]layers’ agents who abuse the rights accorded to them or contravene any of the duties stipulated in these regulations are liable to sanctions”. But the FIFA Regulations do not state the consequence of a failure regarding the form of an agency agreement or payment details as to be the invalidity of an agency agreement... In fact, they only foresee the chance to impose sanctions”.

75. The Panel notes the lack of form in the agency relationship, but determines that it does not have the effect of invalidating such relationship.

c) *What rate of commission was due under the agreement?*

76. The Panel notes the burden of proof here is upon the Agent to demonstrate that the parties had agreed upon a 5% rate of commission. The Panel also notes the position taken by the panel in CAS 2011/A/2660, that a consequence of non-compliance with the FIFA Regulations is that the Agent cannot then look to use them (and particular Article 20.4) to his benefit and claim 3%, in the alternative.
77. The Club’s representative at the hearing, Mr. Pelin, testified that 5% was never mentioned or agreed at the meetings in Valencia. The Club’s position was that there was no commission due, as the Agent was carrying out a favour for his client, Mr. Ramos. On the other hand, the Agent submitted that he agreed this with Mr. Stetsenko, who was not present at the hearing, not with Mr. Pelin; that Mr. Cravo gave evidence that supported his position; that this “pro bono” line of argument was new before the CAS and had not been referred to at all before the FIFA PSC; and that there was not sufficient time to commit his arrangements to writing, but that he trusted the Club.
78. On balance, the Panel is satisfied that the Agent was not working “pro bono” for the Club. Whilst he may look to help his other client, Mr. Ramos, why would he do this for nothing and why would he give a substantial personal guarantee? For the Club to receive the benefit of the Agent’s services for free, would provide it with an implausible gift. The Panel is also satisfied that the commission was agreed at the rate of 5% on the balance of probabilities. Whilst Mr. Pelin denies it was, the Club haven’t brought forward Mr. Stetsenko, who the Agent submitted he dealt with and who signed the Mandate, whilst in addition to the Agent’s own testimony, there was the clear testimony of International’s lawyer, Mr. Cravo, that he recalled an argument

about commissions and that the Agent confirmed he “was only getting 5%” in a meeting attended by representatives of the Club. If it had not been agreed, then a further argument would have started.

d) *Did the Agent provide services?*

79. The Panel notes that this is undisputed. The Club used the Agent in the transfer of the Player to it from International.

e) *Did the Agent agree to take payment of any such commission from Tonietto?*

80. The Panel notes the burden of proof here is upon the Club to demonstrate that the Agent agreed with Tonietto to be paid from the commission paid to it. The Panel has the evidence of both Mr. Cravo and Mr. Motta confirming that the Player’s agent was to get a 10% commission. The Panel also notes that the initial salary demands of the Player (after negotiations by the Agent) were reduced by €1m over the 5 years and that saving was used to pay the commission to Tonietto, so in effect, the Player has paid the commission to his agent by reducing his salary. The Agent, Mr. Cravo and Mr. Motta all deny any agreement for Tonietto to pay the commission due to the Agent. The Club, on the other hand, merely allege that it was agreed between the Agent and Tonietto.

81. The Panel is not satisfied that the Club has discharged its burden of proof and is not convinced that there was any agreement for the Agent to take his commission from Tonietto. Instead, it is the Panel’s conviction that the agency arrangements were 5% of the transfer fee to the Agent from the Club and 10% of the salaries to the Player’s agent, Tonietto. The Panel notes that the Player had his salary reduced by exactly what he had to pay Tonietto and then the Club used this saving to pay Tonietto on his behalf. Why would the Player’s agent reduce its commission by €550,000? Further, it strikes the Panel as further confirmation that the Club has not actually paid any commission itself to any agent as it has reduced the Player’s salary and then paid a debt of his for him.

82. Therefore, the Panel determines that the Club should pay the Agent for the services he has provided for them under their verbal arrangements, in the sum of €550,000.

f) *Is any interest applicable?*

83. The Club did not contest that interest should accrue. The Panel notes that there appeared to be nothing in writing and there was no evidence before it that interest should accrue on any late payment. However, under Swiss law, 5% interest is due on late payments under commercial contracts such as an agency agreement, whether in written form or not. The Panel notes the first demand was made on 6 July 2011 and determines to award interest at the rate of 5% from that date until the date of effective payment by the Club.

B. Conclusion

84. Based on the foregoing, and after taking into due consideration all the evidence produced and all submissions made, the Panel allows the Appeal (as amended by the withdrawal of the request for sanctions from FIFA) and determines that the Club shall pay the sum of €550,000 together with interest at the rate of 5% per annum from 6 July 2011 until the date of effective payment.
85. 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 19 December 2013 by Ginés Carvajal Seller against the Decision issued on 23 April 2013 by the Single Judge of the Players' Status Committee of the Fédération Internationale de Football Association is accepted and the Decision is replaced by this Award.
2. FC Dnipro Dnipropetrovsk shall pay the sum of five hundred and fifty thousand Euros (€550,000) to Ginés Carvajal Seller, together with interest at the rate of 5% per annum from 6 July 2011 to the date of effective payment.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.