Arbitration CAS 2015/A/3959 CD Universidad Católica & Cruzados SADP v. Genoa Cricket and Football Club, award of 27 November 2015

Panel: Prof. Ulrich Haas (Germany), President; Mr Hernán Jorge Ferrari (Argentina); Mr Mark Hovell (United Kingdom)

Football
Transfer (international)
Existence of an arbitration agreement according to the lex arbitri
Essentialia negotii for an arbitration agreement according to Swiss law
Formal validity of the arbitration agreement and arbitrability
Meaning and effect of res judicata
Termination order as simple withdrawal of the claim without res judicata effect
Formal requirements of the initiation of arbitral proceedings according to Article R30 CAS Code
Conditions for standing to appeal to the CAS

1. **Whether or not a contract contains an agreement to arbitrate must be determined according to the *lex arbitri*. If Switzerland is the seat of the arbitral tribunal and at least one of the parties involved was not domiciled in Switzerland at the time of the execution of the arbitration agreement, the provisions of the Swiss Private International Law Act (PILA) apply. Whether there is an agreement to arbitrate between the Parties must be assessed in accordance with Article 178 par. 2 PILA. According thereto, an arbitration agreement is valid if it is in compliance either with the law chosen by the parties, the law applicable to the merits or Swiss Law.**

2. **According to Article 1 para. 1 and Article 2 para. 1 of the Swiss Code of Obligations (CO), an agreement is concluded only if the parties have, reciprocally and by mutual assent, expressed their common intent on all essential points. The points objectively essential (*essentialia negotii*) for an arbitration agreement are the intent of the parties (i) to exclude the jurisdiction of state courts by (ii) submitting to a determinable arbitral tribunal (iii) a determinable dispute.**

3. **According to Article 178 par. 1 PILA the arbitration agreement shall be valid if it is made in writing, by telegram, telex, tele copier, or any other means of communication that establishes the terms of the agreement by a text. In accordance with Article 177 par. 1 PILA a dispute is arbitrable if the dispute involves any claims of financial interest. With this open, far-reaching definition of arbitrability, the Swiss legislature wanted to broadly open the access to international arbitration.**

4. **The term *res judicata* refers to the general doctrine that an earlier and final adjudication by a court or arbitration tribunal is conclusive in subsequent proceedings involving the same subject matter or relief, the same legal grounds and the same parties (the so-called**

"triple-identity" criteria). _Res judicata_ is said to have a positive and a negative effect. The positive effect of _res judicata_ is the termination of a dispute in a final and binding manner between the parties. The negative effect prevents the re-litigation of the subject matter of the judgment or award, also referred to as _ne bis in idem_.

5. **Whether there is a waiver or a simple withdrawal does not depend upon how the decision in question is named (award, termination order, etc.). Instead, the effects depend on the applicable arbitration rules. If the latter provide that no unilateral withdrawal is possible without renouncing to the matter in dispute altogether, the decision that puts an end to the proceeding also finally disposes of the claim and, thus, has _res judicata_ effect. A CAS termination order is not a final and binding decision having _res judicata_ effects, if the appellant withdraws its appeal before the arbitral tribunal was constituted and before the appeal brief was filed. In such a case, the CAS termination order only acknowledges that an appeal with CAS had been lodged, that this appeal has then been withdrawn without a panel having been constituted, thus, leading to the (purely procedural) termination of the proceedings (without _res judicata_ effects).**

6. **Article 181 PILA does not deal with the formal requirements of the initiation of arbitral proceedings. By choosing the CAS as the competent arbitral tribunal, the parties implicitly submit their dispute to the rules of the CAS Code. Article R30 of the CAS Code provides that _"any party represented by an attorney or other person shall provide written confirmation of such representation to the CAS Court Office"_. However, Article R30 of the CAS Code is silent on the question when such written confirmation must be submitted to the CAS Court Office. Also, Article R48 of the CAS Code that deals with the (mandatory) requirements of the statement of appeal does not explicitly list the power of attorney. A power of attorney does not need to be attached to the statement of appeal in order to comply with the 21-day deadline to file the appeal.**

7. **A party has standing to appeal if it can show sufficient legal interest in the matter being appealed. In this respect the appealing party must show that it is aggrieved, i.e. that it has something at stake. It is, in general, mandatory for a party's standing to appeal that it was also a party to the initial proceedings before the legal body that rendered the appealed decision.**

A. PARTIES

1. Fundación Club Deportivo Universidad Católica de Chile (hereinafter referred to as "Universidad" or "the First Appellant") is a professional football club based in Santiago de Chile, Chile, and affiliated to the Football Federation of Chile. It is a legal entity of private law, organized as a foundation, holding 20% in shares of the Second Appellant.

2. Cruzados SADP (hereinafter referred to as "Cruzados" or "the Second Appellant"; together with the First Appellant "the Appellants") is a sports joint stock company based in Santiago de Chile, Chile.

3. Genoa Cricket and Football Club S.p.A. (hereinafter referred to as "Genoa" or "the Respondent") is a professional football club based in Genoa, Italy, and affiliated to the Italian Football Federation.

B. FACTS

4. On 29 May 2011, Cruzados, Genoa and the player L. (hereinafter "the Player") concluded a transfer agreement entitled *"Compraventa"* (hereinafter "the Contract") for the definitive transfer of the Player from Universidad to Genoa for a total compensation of USD 3,000,000 to be split between Cruzados and the Argentinian Club Boca Juniors. Universidad also signed the Contract *"by acknowledgement and adherence"*. Under the heading "FIFTEENTH", the Contract contains a dispute resolution clause that reads as follows:

> *"The parties agree that, to resolve any difficulties arising between them relating to the implementation, enforcement, breach, validity, invalidity, interpretation or otherwise arising from this contract shall be settled by the Fédération Internationale de Football Association (F.I.F.A.), acting as arbiter arbitrator or amiable compositeur and against whose decisions no appeal shall lie, the parties undertaking to comply with the decision rendered by that body, for which they extend the jurisdiction, to the arbitral jurisdiction of the CAS in Lausanne"*[1].

5. On 30 May 2011, Cruzados and Genoa concluded an agreement entitled *"Mandato"*, by means of which they agreed about the payment terms for the transfer of the Player and according to which the Respondent was obliged to pay a total compensation of USD 360,000 *"to Cruzados"* for its services on the occasion of the Player's transfer. The Mandato was also signed by Universidad *"in acknowledgement and agreement"* and provided that any party breaching the Agreement would be obliged to pay the other party a penalty in the amount of USD 100,000.

The relevant parts of the Mandato read as follows:

> *"The following agreement has been made on May 30, 2011, in Santiago, Chile, by:*
>
> *Party on the First Part:* ***Cruzados SADP****, pro se and as the manager of the economic and financial interests of* ***Club Universidad de Chile****, represented by Messrs. Jaime Luis Estevez Valencia, national identity card number 4.774.243-9, and Juan Pablo Pareja Lillo, national identity card number 10.853.201- 7, all domiciled, for these purposes, at Avenida Las Flores 13000, municipality of Las Condes, hereinafter "****Cruzados****";*
>
> *And as the other Party: The* ***Genoa Cricket and Football Club S.p.A.****, a member of the Italian Football Federation (FIGC).*

[1] Translation submitted by the Appellants.

(…)

***SECOND**: Several obligations are pending under such agreement, in particular the obligation of Genoa to pay the equivalent to twenty percent of the purchase price to Asociación Civil Club Atlético Boca Juniors, hereinafter "Boca Juniors," i.e., the the* [sic] *total and lump sum of six hundred thousand dollars (**US$600,000**).*

***THIRD**: Genoa hereby confers a special power of attorney upon Cruzados, but as broad as required by law, so that Cruzados can act on behalf of Genoa in entering into all acts and contracts required to consummate the payment of six hundred thousand dollars (**US$600,000**) to be made by Genoa to Boca Juniors and may in particular execute and sign all necessary contracts.*

*This agreement will be compensated and Genoa will pay Cruzados the sum of three hundred and sixty thousand dollars of the United States of America (**US$360,000**) for performing said power of attorney. This sum will be paid at once, in cash, after the federative rights of L. are registered in Genoa's name.*

Cruzados warrants by all means, pro se and in the capacity described in the preamble, that once Genoa's payment obligations hereunder have been performed exactly, no other sum of any type or nature will be owed by Genoa in relation to the acquisition of all rights corresponding to the Player and Cruzados hereby holds Genoa harmless from any economic damage that any person or other Club may claim in respect of the Player for any reason or in any way.

***FOURTH**: The parties stipulate that should any thereof default on the obligations arising herefrom, very particularly should Genoa not provide the necessary funding to Cruzados to perform the power of attorney or should Cruzados, on its part, not make payment to Boca Juniors after receiving the funds, the defaulting party shall pay the non-defaulting party or the party willing to comply the total and lump sum of one hundred thousand dollars (**US$100,000**). This sum shall be paid by way of fine and without prejudice to other sums payable as a damage indemnity.*

***FIFTH**: The parties agree that any difficulty arising among them because of the application, performance, default, validity, invalidity, interpretation or other difficulty arising herefrom shall be resolved by the Fédération Internationale de Football Association (FIFA) as an arbitrator ex aequo et bono or amiable compositeur. There shall be no remedies against the decision thereof and the parties undertake to abide by the ruling rendered by such association, to which they grant due competence.*

(…)"[2].

6. On 5 October 2012, Universidad lodged a claim with FIFA against Genoa for having allegedly failed to respect its contractual obligations, *i.e.* to pay the amount of USD 360,000 even though the Player had been transferred to Genoa. Furthermore, Universidad alleged that it was also entitled to receive an additional amount of USD 100,000 as penalty according to clause FOURTH of the Mandato. Cruzados was not a party to these proceedings before FIFA.

2 Translation submitted by the Appellants.

7. On 3 May 2013, FIFA informed Universidad by letter that it could not intervene in the dispute and held that:

> *"En particular, hemos advertido su intención de iniciar una demanda ante la FIFA contra el club italiano, Genoa CFC, por un supuesto incumplimiento contractual, sobre la base de un contrato de transferencia supuestamente suscrito entre la empresa "Cruzados SADP" y el club Italiano Club Genoa CFC en fecha 30 mayo de 2011.*
>
> *Luego de un exhaustivo análisis de toda la documentación por usted remitida a la FIFA en relación con el asunto de referencia, hemos tomado conocimiento que el contrato de transferencia de fecha 30 de mayo de 2011, que constituye la base de su demanda, fue concluido entre el club italiano Club Genoa FCF, y la sociedad Cruzados SADP".*
>
> [***convenience translation**: "In particular, we would like to advise you in respect of your request filed before FIFA against the Italian club Genoa FC for an alleged contractual breach of a transfer agreement signed by the company "Cruzados SADP" and the Italian club Genoa CFC dated 30 May 2011 as follows.*
>
> *After an exhaustive analysis of all the documentation remitted to FIFA in relation to the above matter, we came to the conclusion that the transfer contract dated 30 May 2011, that constitutes the basis of your claim, was concluded between the Italian club Genoa CFC and the company SADP"*].

8. On 22 May 2013, Universidad and Cruzados filed an appeal with Court of Arbitration for Sport (hereinafter referred to as the "CAS") against FIFA's notice not to intervene. On 29 May 2013 Universidad and Cruzados withdrew their appeal. As a consequence, the Deputy President of the Appeals Arbitration Division of the CAS – without entering on the questions relating to jurisdiction, admissibility, the merits or any other legal issue – issued a termination order on 10 June 2013. Accordingly, the matter was struck from the CAS role.

9. On 6 June 2013, Universidad relodged its original claim with FIFA and explained that Cruzados was created in order to manage the sporting and commercial rights of Universidad. Universidad amended its original request and was now claiming from Genoa – in addition – an amount of USD 200,000 for "daños y perjuicios" (damages).

10. On 23 September 2014 the Single Judge of the Players' Status Committee rendered a decision (hereinafter referred to as the "Appealed Decision") as follows:

> *1. "The claim of the Claimant, Deportivo Universidad, is admissible.*
> *2. The claim of the Claimant, Deportivo Universidad, is rejected.*
> *3. (…)".*

11. The reasons of the Appealed Decision provided – *inter alia* – as follows:

> *"… the Single Judge wished to highlight that the agreement signed by the Respondent [Genoa], Claimant [Universidad] and Cruzados clearly provided that the amount fixed in the agreement must have been*

paid by the Respondent to the company Cruzados. In this regard the Single Judge was keen to emphasise that article 3 of said agreement clearly stated that the compensation was to be paid by Respondent to the company Cruzados and not the Claimant itself.

Having stated the aforementioned, and in line with the reasoning of the Players' Status Committee in previous and almost identical matters, the Single Judge considered that the Claimant is not entitled to receive any compensation as the agreement clearly stipulated that the compensation was payable directly to the company Cruzsados … In other words the Single Judge held that the company Cruzados could have been entitled to the compensation fixed in the agreement but not the Respondent".

12. The Appealed Decision was notified to Universidad and Genoa on 10 February 2015.

C. PROCEEDINGS BEFORE THE CAS

13. On 2 March 2015, the Appellants – through Mr Eduardo Carlezzo from Carlezzo Advogados – filed an appeal with CAS against Genoa related to the Appealed Decision and appointed Mr Hernán Jorge Ferrari as an arbitrator. Attached to the statement of appeal was a power of attorney mandating Mr Eduardo Carlezzo and Mr Rodrigo Marrubia Pereira to represent the Second Appellant.

14. On 11 March 2015, the Appellants filed their appeal brief.

15. With letter dated 20 March 2015, the Respondent nominated Mr Mark Hovell as arbitrator. It further requested that the time limit for the Respondent to submit its answer be fixed only once the Appellants had paid their share of the advance on costs. The Respondent further objected to the admissibility and the jurisdiction of the CAS. In particular, the Respondent argued that the appeal regarding the First Appellant was inadmissible as the First Appellant had not submitted a power of attorney in favour of Mr Eduardo Carlezzo within the applicable time limit of 21 days.

16. With letter dated 24 March 2015, the Appellants rejected the Respondent's objections of 20 March 2015 and attached a power of attorney from the First Appellant mandating Mr Eduardo Carlezzo and Mr Rodrigo Marrubia Pereira from Carlezzo Advogados. The power of attorney was dated 26 February 2015.

17. With letter dated 25 March 2015, FIFA took due note of the arbitral proceedings but renounced to its right to intervene.

18. On 21 April 2015, the CAS Court Office acknowledged receipt of the payment by the Appellants of the full amount of the advance on costs. It further invited the Respondent to file its answer within 20 days of receipt of the letter and informed the Respondent that the Panel may proceed with the arbitration and deliver an award if the Respondent failed to submit such answer. Lastly, the CAS Court Office, on behalf of the Deputy President of the CAS Appeals Arbitration Division, informed the Parties that the Panel appointed to decide the dispute at hand was constituted as follows:

President: Dr Ulrich Haas, Professor in Zurich, Switzerland
Arbitrators: Mr Hernán Ferrari, attorney-at-law in Buenos Aires, Argentina
Mr Mark Hovell, solicitor in Manchester, United Kingdom.

19. On 28 April 2015, the Respondent asked the CAS Court Office to confirm that the issues of admissibility and jurisdiction would be dealt with at a preliminary stage and that the time limit for the Respondent to file its answer on the merits of the appeal would be suspended accordingly.

20. On 7 May 2015, the CAS Court Office invited the Parties to provide their position regarding CAS jurisdiction, admissibility and standing to sue on or before 18 May 2015. Separately, the Appellants were invited to provide further information regarding the group structure/collaborative structure between Universidad and Cruzados by 18 May 2015. Furthermore, the Appellants were requested to provide English translations for documents further specified in the letter by the same date. Finally, the CAS Court Office informed the Parties that the Respondent's time limit to file its answer on the merits was suspended.

21. With letter dated 13 May 2015, the CAS Court Office advised the Parties that Dr Anne Hossfeld had been appointed to assist the Panel as an ad-hoc clerk.

22. On 18 May 2015, the Parties filed their respective submissions regarding CAS jurisdiction, admissibility and standing to sue.

23. With letter dated 19 May 2015, the CAS Court Office acknowledged receipt of the Parties' submissions dated 18 May 2015 and extended the Appellants' time limit to file the translations requested by the Panel until 22 May 2015.

24. On 21 May 2015, the Appellants submitted the translation of the documents as requested by the Panel.

25. On 23 July 2015, the CAS Court Office informed the Parties that the Panel had decided that the CAS had jurisdiction to hear the appeal of the First and Second Appellant and that the First and Second Appellants' appeal was admissible. It further advised the Parties that the reasoning hereto would be disclosed in the final award. Separately, the CAS Court Office invited the Respondent to submit within 20 days of receipt of the letter an answer containing a statement of defence and all evidence upon which it intended to rely. Finally, the Appellants were invited to clarify by 30 July 2015 two issues with respect to the appeal brief, i.e. whether the amount claimed in the request no. 3 was "USD 360.000" or *"four hundred sixty thousand dollars"* and to explain to the Panel what the Appellants intended by the wording *"determine … to pay … to the Appellants"* (joint and several creditors, partial creditors, collective ownership, to whom payments shall be made etc.), and to specify to whom and how payments should be made under the requests no. 4 – 6 of the appeal brief (joint, partial, collective, etc.).

26. On 30 July 2015, the Appellants filed the requested clarifications.

27. On 5 August 2015, the Respondent requested the Panel to order a preliminary award on jurisdiction and admissibility. The Respondent further requested the suspension of the deadline to submit its answer to the appeal brief.

28. On 7 August 2015, the CAS Court Office informed the Parties that the Panel had decided to give its reasoning on jurisdiction and admissibility in the final award. It further informed the Respondent that the deadline to file its answer was maintained.

29. With letter dated 11 August 2015, the Respondent requested the Panel to confirm its position on the Appellants' standing to sue and the Respondent's standing to be sued.

30. On 12 August 2015, the CAS Court Office advised the Respondent that the Panel would decide on the Appellants' standing to sue and the Respondent's standing to be sued in the final award.

31. On 18 August 2015, the Respondent filed its answer.

32. On 24 August 2015, the CAS Court Office invited the Parties to comment whether or not they deemed a hearing to be necessary.

33. On 27 August 2015, the Appellants expressed their preference for a hearing to be held.

34. On 31 August 2015, the Respondent advised the CAS Court Office that it did not deem a hearing to be necessary.

35. On 28 September 2015, the CAS Court Office informed the Parties that the Panel had decided to render an award on the sole basis of the parties' written submissions, pursuant to Article 57 of the CAS Code. Separately, the CAS Court Office requested the Parties to sign and return a copy of the Order of Procedure that had also been enclosed in the letter by 5 October 2015.

36. On 30 September 2015, the Appellants wrote to the CAS as follows: *"… the Appellants informed their intention to hold a hearing. No answer has been received so far about the decision of the Panel … However, on the Order of Procedure is said that the Panel will not hold a hearing. Therefore, we kindly ask if it is the decision taken by the Panel".*

37. With letter dated 1 October 2015, the CAS Court Office referred the Appellants to its letter dated 28 September 2015, in which it is stated that "the Panel has decided to render an award on the sole basis of the parties' written submissions, pursuant to Article R57 of the Code".

38. On 1 October 2015, the Respondent returned a signed copy of the Order of Procedure.

39. On 6 October 2015, the CAS Court Office requested the Appellants to sign and return a copy of the Order of Procedure by 9 October 2015.

40. On 13 October 2015, the Appellants requested the Panel to include it the Order of Procedure that the Appellants had asked the Panel to hold a hearing in the matter and that such request had been denied.

41. On 14 October 2015, the CAS Court Office requested the Appellants to sign the Order of Procedure and informed them that they could make the reservation that they deem convenient with respect to item 9 of the Order of Procedure.

42. On 22 October 2015, the Appellant returned the signed Order of Procedure. Under no. 9 of said Order of Procedure the Appellant made the following remark: *"Appellants requested a hearing. They do not agree with the decision based only on the written submissions"*.

D. PARTIES' RESPECTIVE REQUESTS FOR RELIEF AND BASIC POSITIONS

43. This section of the award does not contain an exhaustive list of the Parties' contentions, its aim being to provide a summary of the substance of the Parties' main arguments. In considering and deciding upon the Parties' claims in this award, the Panel has accounted for and carefully considered all of the submissions made and evidence adduced by the Parties, including allegations and arguments not mentioned in this section of the award or in the discussion of the claims below.

1. The Appellants

44. On 2 March 2015, in their statement of appeal, and on 11 March 2015 in their appeal brief, the Appellants requested – *inter alia* – to:

1. *"Accept the appeal against the decision of FIFA, confirming that the Appellants, individually or collectively, are entitled to file the claim against Genoa Cricket and Football Club before the competent FIFA body and/or before CAS, resulting from the non-compliance by the Respondent with the financial terms of the transfer of L.;*
2. *Determine the Respondent to bring to the case the receipts (banking swifts) proving that it paid all the amounts set in the "Mandato" in connection with the transfer of L.;*
3. *Determine Genoa Cricket and Football Club to pay the amount of USD 360,000 (four* [sic] *hundred sixty thousand dollars) to the Appellants due to the transfer of the player L., plus interest of 5% per year since 18 August 2011;*
4. *Determine Genoa Cricket and Football Club to pay the amount of USD 100,000 (one hundred thousand dollars)*
5. *Determine the Respondent to pay USD 300,000 (three hundred thousand dollars) as a compensation for damages and losses;*
6. *Determine the Respondent to pay an interest rate of 8% per year over the amount of USD 460,000 since 18 August 2011, for unjust enrichment;*
7. *Condemn the Respondent to pay USD 15,000 for the legal expenses of the Appellants, as well as all expenses incurred by them during these procedures, and to bear all arbitration costs".*

45. On 30 July 2015, the Appellants submitted clarifications regarding their requests. Therein the Appellants noted that

- the correct amount claimed under no. 3 of the original requests was *"USD 360,000.00 (three hundred sixty thousand dollars)"*; and
- that both *"Cruzados and Universidad … are, individually or collectively, entitled to file a claim against Genoa and entitled to collect any money. The full payment by Genoa to each of them, Cruzados or Universidad …, is enough to finish the case. Nevertheless, due to the arrangements between Cruzados and Universidad … the final destination of any amount collected through this claim will be the Cruzado's banking account. Therefore, in the end of the day if the Panel decides to accept the claim, the determination of Genoa to pay any amount directly to Cruzados is sufficient to satisfy the parties"*.

46. As a result, the Appellants now request – *inter alia*:

1. *"Accept the appeal against the decision of FIFA, confirming that the Appellants, individually or collectively, are entitled to file the claim against Genoa Cricket and Football Club before the competent FIFA body and/or before CAS, resulting from the non-compliance by the Respondent with the financial terms of the transfer of L.;*
2. *Determine the Respondent to bring to the case the receipts (banking swifts) proving that it paid all the amounts set in the "Mandato" in connection with the transfer of L.;*
3. *Determine Genoa Cricket and Football Club to pay the amount of USD 360,000 (three hundred sixty thousand dollars) to either the First Appellant, the Second Appellant or the Appellants collectively due to the transfer of the player L., plus interest of 5% per year since 18 August 2011;*
4. *Determine Genoa Cricket and Football Club to pay the amount of USD 100,000 (one hundred thousand dollars) to either the First Appellant, the Second Appellant or the Appellants collectively.*
5. *Determine the Respondent to pay USD 300,000 (three hundred thousand dollars) as a compensation for damages and losses to either the First Appellant, the Second Appellant or the Appellants collectively;*
6. *Determine the Respondent to pay an interest rate of 8% per year over the amount of USD 460,000 since 18 August 2011, for unjust enrichment to either the First Appellant, the Second Appellant or the Appellants collectively;*
7. *Condemn the Respondent to pay USD 15,000 for the legal expenses of the Appellants, as well as all expenses incurred by them during these procedures, and to bear all arbitration costs"*.

47. The Appellants' submissions in support of their request regarding jurisdiction, admissibility and standing to sue can be summarized in essence as follows:

48. The jurisdiction of the CAS can be based on Article 67 of the FIFA Statutes that provide for a recourse to the CAS for appeals against decisions passed by FIFA's legal bodies. As a party to the proceedings before the FIFA Players' Status Committee, the First Appellant can undoubtedly rely on Article 67 of the FIFA Statutes. Same is true for the Second Appellant due to its legal relationship with the First Appellant. With respect to this, the Appellants submit that according to the Chilean law 20.019, football clubs that choose to be structured

as a non-profit organization have to transfer their professional activities to a commercial corporation. As a result, Universidad created Cruzados SADP as a joint stock company of which it holds 20% of the shares.

49. The Appellants claim – in essence – that Cruzados is the legal successor of Universidad pursuant to Article 42 of Law 20.019 that states that any legal entity that has acquired federative rights from a sports association is to be considered its legal successor regarding the acquired rights and shall be jointly liable with the assignor for any obligation or debt entered into by the assignor. Furthermore the Appellants submit that Cruzados was entitled to represent Universidad when concluding the Contract and the Mandato.

50. The Appellants have submitted a "Concession Contract" further specifying their legal relationship. The Concession Contract was signed on 1 October 2009 and granted Cruzados the use and enjoyment of Universidad's federative rights in professional football as well as other rights in form of a concession and stipulates – among others – that Cruzados is entitled to act *"on behalf of 'CDUC', sell, assign and transfer the federative, solidarity and training rights with respect to its players (…)"*. The Concession Contract also provides for a payment to Universidad of 1 % of Cruzados' annual gross revenues as well as a one-time payment of 9,977 million Chilean pesos. According to the Concession Contract, the agreement was to be implemented on 1 October 2009.

51. Lastly, the Appellants rely on statements by the Second Appellant's General Manager, Juan Pablo Pareja, and the First Appellant's President, Juan Enrique Serrano Spoerer.

In a written statement Juan Pablo Pareja explained:

> *"With regard to the transfer of player L. de Genoa Cricket and Football Club and to the debt of USD 460,000, both Universidad and Cruzados, alone or together, could file a claim with FIFA in order to receive such amount. Therefore, Universidad was entitled to file a claim with FIFA to charge the amount of USD 460,000 and, once such sum was received, it should be addressed to Cruzados".*

Similarly, Juan Enrique Serrano Spoerer stated:

> *"Cruzados SADP was the legitimated party to represent Club Deportivo Universidad in the agreements with Genoa Cricket and Football Club and Club Atletico Boca Juniors for the transfer of player L., in which we have also formally participated. Therefore, in this specific situation, both Universidad and Cruzados, alone or together, would be able to start claims before FIFA against Genoa to recover the pending amounts. Once the amount is received, it shall be sent to Cruzados".*

52. In any event, the Second Appellant claims that it can rely on the arbitration agreement in the contracts regarding the transfer of the Player.

53. Regarding the admissibility of the Appeal, the Appellants hold that the Appeal was lodged on time.

54. Regarding the issue of standing to sue, the Second Appellant claims that it is invoking a substantive right of its own; *i.e.* a right deriving from the Contract; further that it is affected by the appeal as Universidad would transfer any amount that it receives from the Respondent under the appeal to Cruzados and is therefore affected by the outcome of the proceedings. For the latter reason, the Second Appeallant also claims to have a right to appeal against the Appelaed Decision.

55. With respect to the standing to sue, the First Appellant relies on article 32 of the Swiss Civil Code (hereinafter referred to as the "CC") and claims that Cruzados represented it on the occasion of the transfer of the Player and therefore, it has its own right to claim the amounts in question. The First Appellant further relies on two statements made by the General Manager of Cruzados as well as the President of Universidad who confirm that in their opinion both the First and Second Appellants are entitled to claim said amounts.

56. The Appellants' submissions in support of the remaining questions can be summarized in essence as follows:

57. According to the Contract, the Respondent was obliged – among others – to pay an amount of USD 600,000 to Boca Juniors on the occasion of the transfer of the Player. The Parties had agreed in the Mandato that Cruzados was to assist the Respondent in making said payment to Boca Juniors. For these services the Appellants were to receive from the Respondent an amount of USD 360,000 The Parties had agreed in the Mandato that the sum would be paid once the Player had been registered with the Respondent.

58. The Player had been registered with the Respondent on 17 August 2011. However, no payment had been made under the Mandato. In particular, the Respondent did not pay the USD 360,000 to the First or the Second Appellant.

59. As a result of this breach of its contractual duties under the Mandato, the Respondent owes to the Appellants an additional fine in the amount of USD 100,000 as provided for under the FOURTH Clause of the Mandato.

60. The Appellants further claim that the fact that the Respondent did not pay the USD 360,000 as provided for under the Mandato had an impact on Cruzados' financial situation in the years 2011 and 2012 which in turn affected the price of Cruzados' shares which dropped by 13.76% in 2011. The Appellants claim compensation for these losses and damages in the amount of USD 300,000.

61. Lastly, the Appellants claim that the Respondent should not benefit from its non-compliance under the Mandato and should therefore surrender any financial benefits it had from being able to maintain the USD 460,000. As bank loans in Italy can be obtained at an interest rate of approx. 8% per year, the Appellants claim 8% interests per annum on the amount of USD 460,000 for unjust enrichment since 18 August 2011.

2. The Respondent

62. On 18 May 2015, the Respondent filed its response related to the questions of CAS jurisdiction, admissibility and standing to sue and requested the CAS Panel to render an award on jurisdiction:

> 1. *"Confirming that Universidad has failed to submit the Statement of Appeal within the 21-day time limit and declaring its appeal inadmissible.*
> 2. *Confirming that Cruzados has failed to submit an appeal with CAS in compliance with the requirements of Article R48 of the CAS Code and declaring its appeal inadmissible.*
> 3. *Confirming that Cruzados has no standing to sue in these proceedings and excluding it from the list of Appellants.*
> 4. *Declining CAS jurisdiction to handle the matter in relation to Cruzados in the current proceedings.*
> 5. *In any case, ordering the Appellants to bear all procedural costs incurred with theis appeal on stage.*
> 6. *In any case, ordering the Appellant to cover the Respondent's legal costs related to this appeal, in the amount that will be deemed appropriate".*

63. On 18 August 2015, the Respondent filed its answer to the appeal brief and requested the Panel to render an award:

> 1. *"Rejecting all requests filed by the Appellants, jointly or seperately:*
> 2. *Confirming that the claim of the Second Appellant falls outside the statute of limitations.*
> 3. *Confirming that the Second Appellant has no standing to sue in these proceedings.*
> 4. *Confirming that the Second Appellant has no cause of action against the Challenged Decision.*
> 5. *Confirming that the scope of this appeal is limited to the Challenged Decision only.*
> 6. *Confirming that the Respondent shall not pay any amount to the First Appellant.*
> 7. *Confirming that the Respondent shall not pay any amount to the Second Appellant.*
> 8. *In any case, ordering the Appellants to bear all procedural costs incurred in these proceedings.*
> 9. *In any case, ordering the Appellants to cover the Respondent's legal costs related to these proceedings in the highest possible amount".*

64. The Respondent's submissions in support of its request regarding jurisdiction, admissibility and standing to sue can be summarized in essence as follows:

65. The Respondent does not raise any objections as to the jurisdiction of the CAS regarding the First Appellant but claims that there is no agreement to arbitrate between the Respondent and the Second Appellant. In the Respondent's opinion, the Second Appellant cannot base its appeal on Article R47 of the CAS Code or article 67 of the FIFA Statutes. The Respondent claims that Article 67 of the FIFA Statutes only applies to parties under the jurisdiction of FIFA which is not the case for the Second Appellant. The latter was not a party to the proceedings before FIFA and cannot be a party to such proceedings as it does not qualify as "a club" within the meaning of the FIFA Statutes. Also, the Second Appellant has not

presented an arbitration clause between itself and the Respondent that would enable the CAS to have jurisdiction in the matter and act as appeal body between these two Parties. The Respondent further claims that the Second Appellant cannot base the jurisdiction of the CAS on the relationship it claims to have with the First Appellant. In particular, the Respondent submits that Cruzados cannot be the legal successor of Universidad, and neither can it be Universidad's agent or principal, as any remuneration under the Agreement was intended for Cruzados only.

66. Regarding the admissibility of the appeal, the Respondent claims that the appeal was not filed in time regarding the First Appellant as the power of attorney that had been attached to the appeal only authorised Mr. Carlezzo and Mr. Pereira to act on behalf of the Second Appellant. The power of attorney allegedly issued by the First Appellant on 26 February 2015 was submitted only on 23 March 2015, thus after the expiry of the 21-day limit to file an appeal. The Respondent further puts into question that the latter power of attorney had actually been issued on 26 February 2015 and suspects it had only been issued after the expiry of the 21-day limit.

67. The Respondent further claims that the Second Respondent's appeal is inadmissible as it had not been party to the proceedings before the FIFA Players' Status Committee and therefore cannot provide the CAS with a copy of the decision appealed against and a copy of the provisions of the statutes or regulations or the specific agreement providing for an appeal to CAS as required by Article R48 of the CAS Code.

68. Regarding the standing to sue the Respondent submits that the Second Appellant has no standing to appeal as it was not and cannot be a party to the proceedings before the FIFA Players' Status Committee. Only third parties that have been affected by the decision of the FIFA Players' Status Committee may have standing to file an appeal. This is, however, not the case for the Second Appellant. Further, the standing to sue must correspond to the standing to be sued, a prerequisite which the Respondent claims is also not fulfilled in the case at hand.

69. With respect to the scope and mandate of the appeals proceedings the Respondent submits that the Panel may not review the case in relation to matters in dispute that have not been the object before the FIFA instances. According to the Respondent the matter in dispute in appeals arbitration proceedings must be identical before both instances (FIFA and CAS). The Respondent notes that the Appellants' prayers for relief filed before the CAS exceed the relief filed originally before the FIFA instances. In particular, the Appellants request before the CAS:

- an additional USD 100,000.00 fine;
- an additional damage head in the amount of USD 100,000.00; and
- interests of 8% per annum for alleged unjust enrichment.
- Furthermore, the Appellants now ask to be reimbursed for their legal expenses in the amount of USD 15,000.00, whereas the First Appellant only claimed USD 5,000.00 in the proceedings before the FIFA Players Status Committee.

- Finally, the Respondent submits that – in light of the "clarifications" given by the Appellants on 30 July 2015 – Universidad appears to claim (alternatively) the various amounts not only on its behalf and for its benefit, but also for the sole benefit of Cruzados. However, any such claim or right of Universidad to claim payment (on the basis of the Mandato) for the benefit of Cruzados has not been part of the matter in dispute before the FIFA Players Status Committee. Therefore, the CAS is barred from looking at this (new) claim in context of this appeals arbitration procedure.

70. Respondent further submits that the First Appellant may not claim any amounts as it was not a party to the Mandato. According to the Respondent only the Second Appellant – if any – is holder of any rights and claims under the Mandato.

71. However, in respect of any rights held by the Second Appellant under the Mandato, the Respondent submits that these are time-barred. Pursuant to Article 25 of the FIFA Regulations on the Status and Transfer of Players a claim is time-barred if more than two years have elapsed since the event giving rise to the dispute. Furthermore, the Respondent submits that the Second Appellant cannot claim any monies under the Mandato, because the respective conditions are not fulfilled. A condition precendent for any claim of the Second Appellant is – according to the Mandato – that the payment of USD 600,000.00 to Boca Juniors occurred as provided under the SECOND clause of the Mandato. However, such payment was never made because Boca Juniors unilaterally waived its right to claim this amount. As a result, the Second Appellant is not entitled to receive any amount under the Mandato. Also, the Respondent claims that the Second Appellant did not fulfill its obligations under the Mandato and also fell short of proving its entitlement to receive such payment.

72. With respect to the Appellants' claims for damages and "unjust enrichment" the Respondent finds that these claims are so groundless, ill-concieved and disingenious that they do not deserve any further comment.

73. Respondent further requests that the procedural costs be borne by the Appellants in full and that the Respondent is awarded legals costs in the highest amount that the Panel deems applicable. To justify this request the Respondent puts forward that the Appellants' claim was frivilous.

E. THE PANEL'S DECISION TO RENDER AN AWARD BASED ON THE PARTIES' WRITTEN SUBMISSIONS

74. On 28 September 2015 the CAS Court Office informed the Parties that the Panel had decided to issue an Award based on the Parties' written submissions only. The Panel deems itself fit to do so as the underlying facts of the relevant questions in the dispute at hand – in particular, jurisdiction, admissibility, standing to sue, statute of limitations and the merits (insofar as pertinent) – are undisputed. The Parties only draw different conclusions from them. Also, no witnesses have been called by the Parties. Thus, the Panel deems itself sufficiently informed and able to decide the dispute based on the information on file.

F. PRELIMINARY OBSERVATIONS

75. The Respondent has raised several preliminary objections with respect to the appeal. Before addressing these questions in substance, the Panel will in a first step assign all objections to the categories "jurisdiction to hear the appeal", "admissibility of the appeal" and "merits of the appeal".

76. Qualifying a challenge as jurisdiction or admissibility is important, in particular regarding the possible *res judicata* effect of the decision and a possible recourse before state courts. Yet, in many cases, the distinction is not easy to articulate. With respect to this, the Panel follows the leading doctrine in jurisprudence and literature and qualifies an objection to the admissibility of the claim as a plea that the tribunal should rule the claim inadmissible on a ground other than its ultimate merit. In light of the foregoing "admissibility" covers a wide range of matters, among others, issues relating to the judicial/arbitral function; mootness of a claim (Northern Cameroons (Cameroon v. United Kingdom), Judgment, ICJ Rep. 1963, 15; Nuclear Tests Case (Australia v. France), Judgment, ICJ Rep. 1974, 253) or the failure to exhaust local remedies (Interhandel (Switzerland v. USA), Judgment, ICJ Rep. 1959, 6, 24 *et seq.*).

77. On the other hand, an objection to the jurisdiction of the tribunal is a plea that the tribunal itself is incompetent to give any ruling at all whether as to the merits or as to the admissibility of the claim. Whether the objection related to *res judicata* must be qualified as a matter of jurisdiction or admissibility, is questionable. In a decision of the Swiss Federal Tribunal (SFT) (140 III 278, E.3.4) the latter has stipulated as follows:

> *"Aussi bien, le tribunal arbitral qui entre en matière sur une prétention ayant déjà fait l'objet d'un jugement revêtu de l'autorité de la chose jugée et qui rend une sentence au sujet de ladite prétention, même s'il le fait sur la base d'une convention d'arbitrage valable empêchant de le considérer incompétent et de la sanctionner sous l'angle de la disposition précitée, ne s'arroge pas moins, au final, une compétence matérielle qui lui fait défaut".*
>
> ***[convenience translation:*** *"Thus, the arbitral tribunal addressing a claim which was already the subject of a judgment having the force of res judicata and issuing an award as to this claim at the end of the day arrogates for itself a substantive jurisdiction it does not have, even if it does so on the basis of a valid arbitration agreement preventing a finding that it has no jurisdiction pursuant to the aforesaid provision"].*

78. Another decision of the SFT points in the same direction qualifying the issue of *res judicata* as an issue of jurisdiction (SFT 140 III 520, E. 3.2.2):

> *"Cependant, le TAS a commis la même erreur en annulant le point 2 du dispositif de la décision de la CRL … Il lui a échappé, ce faisant, que le retrait de l'appel du joueur, suivi de la radiation de la procédure d'appel, avait mis un terme à cette procédure d'appel, si bien que la décision de première instance était, depuis lors, revêtue de l'autorité de la chose jugée à l'égard du joueur et du recourant. En d'autres termes, le TAS s'est arrogé une compétence rationae personae qu'il ne possédait plus, suite au retrait de*

l'appel, en annulant une décision déjà en force pour l'un des deux consorts défendeurs et désormais intangible indépendamment du sort réservé à l'appel de l'autre consort défendeur … C'est à juste titre, dès lors, que le recourant lui fait grief de s'être déclaré compétent dans cette mesure".

***[convenience translation:** "The CAS, however, has committed a similar mistake by annulling the second point of the operative part of the decision of the CRL … It failed to see, in doing so, that the withdrawal of the appeal by the player, followed by the removal of the proceeding from the CAS role, terminated the appeal procedure, consequently resulting in res judicata effects in relation to the dispute between the player and the appellant. In other terms the CAS arrogated for itself a jurisdiction ratio personae it no longer possessed following the withdrawal of the appeal when it annulled a binding decision in favour of one of the two joined defendants …. It is, therefore, for just reasons that the appellant objected to the fact that the CAS declared itself competent insofar"].*

79. However, in a very recent decision the Swiss Federal Tribunal (SFT 4A_633/2014, E. 2.4.2) found as follows:

"Auch wenn zwischen dem Problem der materiellen Rechtskraft und demjenigen der Zuständigkeit Gemeinsamkeiten bestehen, wie sie das Bundesgericht etwa im Hinblick auf seine Prüfungsbefugnis berücksichtigt hat (vgl. BGE 140 III 278 E. 3.4 S. 283), stellen die beiden auch im Bereich der internationalen Schiedsgerichtsbarkeit je eigene Eintretensvoraussetzungen dar, für die bezüglich der Anfechtung nach Art. 190 IPRG unterschiedliche Regeln anwendbar sind".

***[convenience translation:** "Even though there are similarities between the problem of res judicata and the problem of jurisdiction, which have been taken into account by the Swiss Federal Tribunal when reviewing the arbitral award in SFT 140 III 278, E. 3.4, the two issues also in the context of international arbitration in fact constitute two distinct procedural requirements, to which in the context of an appeal within the meaning of Art. 190 of the PILA different provisions apply"].*

80. The plea relating to the lack of standing to sue, is – according to settled jurisprudence of the CAS and the SFT – a question related to the merits of the case. In SFT 128 II 50, 55 the SFT has held as follows:

"Sur le plan des principes, il sied de faire clairement la distinction entre la notion de légitimation active ou passive (appelée aussi qualité pour agir ou pour défendre; Aktiv- oder Passivlegitimation), d'une part, et celle de capacité d'être partie (Parteifähigkeit), d'autre part. ***La légitimation active ou passive dans un procès civil relève du fondement matériel de l'action; elle appartient au sujet (actif ou passif) du droit invoqué en justice et son absence entraîne, non pas l'irrecevabilité de la demande, mais son rejet****".*

***[convenience translation:** "As a matter of principle, a clear distinction must be made between the notion of standing to sue or to be sued …. on the one hand and the notion of capacity to be a party in a proceeding (Parteifähigkeit) on the other hand. The standing to sue or to be sued, in a civil proceeding forms part of the merits of the claim; it belongs to the subject (active or passive) of the claim invoked before the tribunal and the lack thereof results in the dismissal of the request and not its rejection as inadmissible"].*

81. In light of the aforementioned, the Panel qualifies the following questions as pertaining to jurisdiction:

> Is there a valid arbitration clause between the First and/or Second Appellant on the one hand and the Respondent on the other hand, or do the statutes or regulations of a sports-related body provide for the jurisdiction of the CAS within the meaning of Articles R 27 and/or R47 of the CAS Code?

82. It will then deal with the issue of *res judicata* as a separate category, i.e. an issue that touches upon jurisdiction as well as admissibility.

83. Furthermore, the following questions are qualified as pertaining (solely) to admissibility:

> Has the CAS termination order (CAS 2013/A/3179, dated 10 June 2013) *res judicata* effect on the current proceedings?
>
> Was the appeal of the First Appellant filed within the 21-day time limit, even though the Statement of Appeal only attached a power of attorney from the Second Appellant, whereas the power of attorney from the First Appellant was only submitted on 23 March 2015?
>
> Have the Appellants exhausted all local remedies available to them?

84. Finally, the following question is qualified as pertaining to the merits:

> Is the Second Appellant entitled to file an appeal with CAS despite not having been a party to the proceedings before the FIFA Players' Status Committee?

G. CAS JURISDICTION

85. The question whether or not the CAS has jurisdiction to hear the present dispute must be assessed on the basis of the *lex arbitri*. As Switzerland is the seat of the arbitration and no party is domiciled in Switzerland, the provisions of the Private International Law Act (hereinafter referred to as the "PILA") apply, pursuant to its Article 176 para. 1. In accordance with Article 186 of the PILA the CAS has the power to decide upon its own jurisdiction.

86. The question of jurisdiction has to be assessed separately for each party and each claim. In the case at hand the First and the Second Appellant unanimously request:

- To establish that the Appellants are entitled to file the claim before the competent FIFA body and/or CAS;
- USD 360.000,00 plus interest in the amount of 5 % per year from the Respondent under the Mandato, to be paid to both Appellants;

- A contractual penalty of USD 100.000,00 plus interest in the amount of 5 % per year for the non-payment of the USD 360.000,00 under the Mandato, to be paid to both Appellants;
- USD 300.000,00 in damages as a result of a drop in the Second Appellant's share price related to the Respondent's non-performance under the Mandato (not specified to whom the payment shall be made);
- Interest in the amount of 8 % per year on the amount of USD 460.000,00 for unjust enrichment (not specified to whom the payment shall be made).

87. In principle, all requests of the Appellants refer to the Mandato. The Panel will therefore begin its assessment with an interpretation of the Mandato. For the sake of better readability and clarity, the Panel will first deal with the CAS's jurisdiction in relation to the Second Appellant's requests and subsequently deal with the question whether (also) the First Appellant's claims are covered by the Mandato.

1. Second Appellant

88. Article R47 of the CAS Code provides that an appeal against the decision of a federation, association or sports-related body may be filed with the CAS if – *inter alia* – the parties have concluded a specific arbitration agreement. Accordingly, the Panel will examine whether the Mandato contains a valid arbitration agreement.

89. In order for the FIFTH clause of the Mandato to apply to the Second Appellant, the latter must be party to the Mandato. Having signed the Mandato in its own name, there is no doubt that the Second Appellant is a party to the agreement.

90. However, it is questionable if the Mandato contains an arbitration clause in favour of the CAS. The Panel notes that the FIFTH clause does not mention the CAS. Instead, it contains a dispute resolution clause assigning the competence to decide disputes arising between the parties in connection with the Mandato to the Fédération Internationale de Football Association (FIFA) as an arbitrator *ex aequo et bono* or amiable compositeur. The FIFTH Clause further provides that *"there shall be no remedies against the decision thereof"*.

91. The Panel recalls that FIFA bodies – in application of the FIFA regulations – do not issue arbitral awards. Insofar the Panel subscribes to the findings in CAS 2012/O/2867, No. 5.8 which read as follows:

> *"The Claimant has correctly pointed out that the FIFA bodies – in application of the FIFA Regulations – do not issue arbitral awards. They (only) assume jurisdictional functions as so-called association tribunals. Decisions by these association tribunals must be distinguished from arbitral awards. The latter are final and binding and are issued on the basis of an arbitration agreement the purpose of which is to exclude, in principle, permanently any recourse to state courts. Proceedings before association tribunals, however, only temporarily exclude recourse to state courts. Once the internal remedies of the association are exhausted, the decision of the association tribunal can be appealed (with full power of review) before*

state courts (e.g. according to art. 75 Swiss Civil Code – 'CC') or – in case of an arbitration agreement – before an arbitral tribunal".

92. The Panel, therefore, concludes that the Parties could not grant FIFA the competence to decide potential disputes in a final and binding manner as such decisions can only be rendered by either state courts or arbitral tribunals. If, however, the Parties could not confer the mandate to act as an arbitral tribunal upon FIFA, the question arises if and – in case the question is to be answered in the affirmative – to whom the Parties (implicitly) wanted to confer such mandate. Both questions must be determined by interpreting the content of the FIFTH clause of the Mandato.

a) The principles applicable to the interpretation of the Mandato

93. Whether or not the Mandato contains an agreement to arbitrate must be determined according to the *lex arbitri* (POUDRET/BESSON, *Comparative Law of International Arbitration*, 2nd edition, London 2007, No. 112). As Switzerland is the seat of the arbitral tribunal and at least one of the parties involved was not domiciled in Switzerland at the time of the execution of the arbitration agreement, the provisions of PILA apply (Article 176 par. 1 of the PILA).

94. Whether there is an agreement to arbitrate between the Parties must be assessed in accordance with Article 178 par. 2 of the PILA. According thereto, an arbitration agreement is valid if it is in compliance either with the law chosen by the parties, the law applicable to the merits or Swiss Law. The Panel starts with an examination of the legal situation under Swiss Law.

95. Where the content of a contract is unclear, the latter has to be determined by interpretation. This principle also applies to arbitration agreements (cf. SFT 130 III 66 E. 3.2; POUDRET/BESSON, *Comparative Law of International Arbitration*, 2nd edition, London 2007, No. 304). According thereto, the arbitral tribunal must first determine the real intent of the parties (Article 18 para. 1 of the Swiss Code of Obligations – hereinafter referred to as "CO"). If it is not possible to establish such a real and common intent, the agreement is to be construed objectively, according to the so-called principle of mutual trust, namely to identify the meaning that the parties could and should give, according to the rules of good faith, to their mutual declarations of intention (see SFT 130 III 66 E. 3.2; BSK-IPRG/GRÄNICHER, 3rd edition, Basel 2013, Article 178 No. 52a; MAVROMATI/REEB, *The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials*, Alphen aan den Rijn 2015, Article R27 No. 69). The various steps foreseen in Article 18 para. 1 CO to ascertain the will of the parties are best described in the following decision by the SFT (SFT 127 III 444, E. 1b), which states – *inter alia* – as follows:

"Pour déterminer s'il y a eu effectivement accord entre parties, il y a lieu de rechercher, tout d'abord, leur réelle et commune intention (art. 18 al. 1 CO). Il incombe donc au juge d'établir, dans un premier temps, la volonté réelle des parties, le cas échéant empiriquement, sur la base d'indices. S'il ne parvient pas à déterminer cette volonté réelle, ou s'il constate qu'une partie n'a pas compris la volonté réelle manifestée par l'autre, le juge recherchera quel sens les parties pouvaient et devaient donner, selon les règles de la bonne foi, à leurs manifestations de volonté réciproques (application du principe de la confiance). A cet

égard, la jurisprudence récente a nuancé le principe selon lequel il y aurait lieu de recourir à des règles d'interprétation uniquement si les termes de l'accord passé entre parties laissent planer un doute ou sont peu clairs. On ne peut ériger en principe qu'en présence d'un "texte clair", on doit exclure d'emblée le recours à d'autres moyens d'interprétation. Il ressort de l'art. 18 al. 1 CO que le sens d'un texte, même clair, n'est pas forcément déterminant et que l'interprétation purement littérale est au contraire prohibée. Même si la teneur d'une clause contractuelle paraît claire à première vue, il peut résulter d'autres conditions du contrat, du but poursuivi par les parties ou d'autres circonstances que le texte de ladite clause ne restitue pas exactement le sens de l'accord conclu".

*[**convenience translation**: "To determine if there was an agreement between the parties one must first seek their true and common intention (art. 18 para.1 CO). The judge must therefore first establish the true will of the parties, empirically as the case may be, based on circumstances. If he cannot establish the true will or he finds that one of the parties did not understand the true will expressed by the other party, the judge will seek the meaning that the parties could and should have given to their respective declarations in accordance with the rules of good faith (application of the principle of trust). In this respect, recent case law has modified the principle according to which the rules of interpretation should apply only if the terms of the agreement between the parties leave room for doubt or are unclear. One cannot state that in the presence of a "clear text" one must exclude all other means of interpretation. It derives from Article 18 para. 1 CO that the meaning of a text, even a clear one, is not necessarily determinative and that the purely literal interpretation is on the contrary prohibited. Even if a contractual clause appears clear at first view, it can result from the conditions of the contract, from the objectives sought by the parties or from other circumstances that the text of such contractual clause does not convey exactly the content of the agreement that was concluded"].*

96. Since in the present case the Parties have failed to submit what their subjective will was at the time of the conclusion of the Mandato, the Panel must seek the meaning that the Parties could and should have given to their respective declarations in accordance with the rules of good faith.

b) Consent in respect of the essentialia negotii of an Arbitration Agreement

97. According to Article 1 para. 1 and Article 2 para. 1 CO, an agreement is concluded only if the parties have, reciprocally and by mutual assent, expressed their common intent on all essential points. The points objectively essential (*essentialia negotii*) for an arbitration agreement are the intent of the parties (i) to exclude the jurisdiction of state courts by (ii) submitting to a determinable arbitral tribunal (iii) a determinable dispute (SFT 129 III 675 E. 2.3; SFT 4A_246/2011 E. 2.1 et seq.; BSK-IPRG/GRÄNICHER, 3rd edition, Basel 2013, Article 178 No. 30; BERGER/KELLERHALS, *International and Domestic Arbitration in Switzerland*, 3rd edition, Bern 2015, No. 286).

(i) Consent to Exclude State Courts

98. The Panel finds that there are enough elements in the present case to assume that the Parties wanted to exclude recourse to state courts. In this respect the Panel notes that the FIFTH clause of the Mandato refers potential disputes to an "arbitrator". Thus, this wording is

indicative of the parties' will to provide a dispute resolution mechanism that excludes the intervention of state courts. The Panel further notes that also the interests of the Parties to the Mandato speak in favour of arbitration. The Mandato is international in character opposing parties from Chile and Italy. In international sports-related contracts opposing parties from different jurisdictions it is very common to provide for arbitration clauses. In addition, the Mandato is based on the Contract. The latter clearly refers disputes to the dispute resolution mechanisms of FIFA with recourse to CAS (and not state courts). Being so closely related, the Mandato must be interpreted in light of the Contract (Compraventa). Therefore, the Panel finds that there is consent of the Parties to establish a dispute resolution mechanism for disputes arising out of the Mandato outside state courts, i.e. before an arbitral tribunal.

(ii) CAS as the competent Arbitral Tribunal

99. The next question to be solved is, whether the Parties have agreed that CAS is the competent arbitral tribunal to resolve any disputes arising out the Mandato. According to Swiss law the arbitrator or the arbitral institution does not need to be specifically named in the arbitration agreement for it to be valid. The latter is not part of the *essentialia negotii* of an arbitration agreement (ARROYO M., *Arbitration in Switzerland*, Biggleswade 2013, Article 178 No. 18; SFT 4A_246/2011 E. 2.1). Instead, it suffices that the arbitral tribunal is determinable. Whether the Parties to the Mandato agreed upon a determinable arbitral tribunal in the case at hand is debatable, since – as previously mentioned – the FIFA bodies to which the parties have submitted do not assume functions of an arbitral tribunal. However, it follows from an objective interpretation of the Mandato that the Parties' intent was to confer jurisdiction to the CAS.

100. In this respect the Panel notes that the facts of the case are very similar to the ones mentioned in the decision of the SFT (SFT 4A_246/2011). In the latter case a CAS Panel had to interpret the following "arbitration clause" contained in Article 4 of the respective agreement: *"The competent instance in case of a dispute concerning this Agreement is the FIFA Commission, or the UEFA Commission, which will have to decide the dispute that could arise between the club and the agent"*. When interpreting the contents of this clause the competent CAS panel reasoned as follows:

> *"[…] the Panel considers that the wording of Art. 4 of the Agreement clearly expresses the intention of the parties to exclude the submission of their disputes to the State courts and to choose arbitration instead. First of all, the parties have chosen to designate an institution, namely FIFA or UEFA, to settle their dispute. By providing that a FIFA or a UEFA Commission would be the 'competent instance' in case of a dispute concerning their Agreement, the parties clearly agreed on a body which is: not a State court, not located in one of the parties' countries, familiar with the possible object of the dispute. Considering these elements and even if the Agreement is not clear on several aspects, the Panel is of the opinion that it can be drawn from an objective construction of this Agreement that the parties had a common intent to submit their dispute to arbitration. …*
>
> *The first and the most important of these elements is to be seen in the arbitration clause itself, which provides for the jurisdiction of FIFA or UEFA. It is in the view of the Panel a strong indication that the parties wanted an institution focused on sport, familiar with the disputes related to the transfer of*

players, but that the anticipated arbitral body was not limited to one single institution that would have been FIFA. Secondly, it is to be stressed that the FIFA Statutes now provide for a general appeal in front of CAS, against the decision issued by the FIFA Commission. …

In that respect, the Panel considers that the parties have clearly chosen to submit their dispute to an arbitration tribunal with a seat in Switzerland. By identifying FIFA or UEFA, the parties mentioned two institutions having their seat in Switzerland. … Going further into the interpretation of the intent of the parties, as expressed by the arbitration clause contained in the Agreement, the Panel is of the opinion that the parties wanted an institution specialized in sports' law or at least fully conversant with the so called lex sportiva especially as regards the rules developed in connection with football disputes. In that respect, it is notorious that CAS has jurisdiction to hear the appeals filed against the FIFA decisions rendered as from the year 2003. CAS has thus developed, in connection with this appeal jurisdiction, an important and regular case law concerning the decisions rendered in the world of football, namely as regards the application of the different FIFA Regulations. CAS has also developed and applied principles recognizing the specificity of the disputes arising in the world of sport".

101. The SFT supported the aforementioned decision of the CAS in its ruling and argued – *inter alia* – as follows (SFT 4A_246/2011 E. 2.3.3[3]):

"Without breaching federal law the CAS found that the Parties wanted to submit their dispute to an arbitral tribunal sitting in Switzerland, which would know sport law particularly well. The designation of FIFA as well as UEFA suggests that the Parties wanted to have a sport body decide their possible disputes under the transfer contract, which would be familiar with transfers in the business of international football. It must be noticed in particular that the CAS can review FIFA decisions concerning the transfer of players on appeal and the Appellant itself acknowledges that an appeal to the CAS would have been allowed against the decision of the FIFA Committee for the Status of Players if it had accepted jurisdiction in the case at hand. On the basis of these circumstances it must be assumed that the Parties would have submitted the possible disputes arising from their transfer agreement […] to the CAS, which regularly addresses transfers of football players, had they known that the bodies mentioned in article 4 would not have jurisdiction.

… the CAS therefore did not break federal law when it found that it had jurisdiction to decide the dispute between the Parties in connection with the transfer of player […]".

102. In light of the above, the Panel finds that it follows from the wording of the FIFTH clause of the Mandato that the Parties wanted an institution focussed on sport, familiar with disputes concerning football-related contractual relationships and having its seat in Switzerland to act as an arbitral tribunal. Thus, the Parties when concluding the Mandato wanted an institution to resolve the dispute specialized in sports law or at least fully conversant with the so called *lex sportiva*. The CAS has developed an important and regular case law concerning the application of the different FIFA regulations. Thus, the Panel holds that the FIFTH clause of the Mandato contains an arbitration agreement conferring jurisdiction upon the CAS as the competent Arbitral Tribunal.

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3 The original decision was translated from German to English by www.swissarbitrationdecisions.com.

(iii) Determinable Dispute

103. According to the SFT, an arbitration agreement is valid if the parties submit *"one or more existing or defined future differences between them to arbitration in accordance with a directly or indirectly defined legal order, thereby excluding the original jurisdiction of State courts"* (SFT 130 III 66 E. 3.1).

104. The Mandato provides in the FIFTH clause that the Parties agree *"that any difficulty arising among them because of the application, performance, default, validity, invalidity, interpretation or other difficulty arising herefrom shall be resolved …"*. This clause fulfils the requirement of certainty and determinability in respect to the arbitrable disputes.

c) Formal Validity of the Arbitration Clause and Arbitrability

105. According to Article 178 par. 1 of the PILA the arbitration agreement shall be valid if it is made in writing, by telegram, telex, tele copier, or any other means of communication that establishes the terms of the agreement by a text. In the case at hand, the arbitration clause embodied in the Mandato fulfils theses formal requirements.

106. In accordance with Article 177 par. 1 of the PILA a dispute is arbitrable if the dispute involves any claims of financial interest. With this open, far-reaching definition of arbitrability, the Swiss legislature wanted to broadly open the access to international arbitration (SFT 118 II 353 E. 3a; BERGER/KELLERHALS, *International and Domestic Arbitration in Switzerland*, 3rd edition, Bern 2015, No. 207). In light of this broad definition the Panel finds that the present dispute between the Second Appellant and the Respondent is arbitrable.

2. The First Appellant

107. Regarding the question whether or not the Mandato contains a valid arbitration clause, reference is made to the reasoning of the Panel at no. 85 *et seq.* As to the question whether or not the arbitration clause contained in the Mandato binds the First Appellant, the Panel notes that the First Appellant did not sign the latter as a party to the agreement. However, the First Appellant signed the Mandato *"in acknowledgement and agreement"*. Furthermore, the Panel notes that it is not disputed between the Parties that the CAS has jurisdiction over (potential) claims between the First Appellant and the Respondent. In its submission dated 18 May 2015, when invited by the CAS to specify its objections to these proceedings, the Respondent explicitly stated that *"*[t]*he issue of jurisdiction solely concerns the Second Respondent"*. In view of the above and considering that the present arbitration proceeding deals with an appeal against a decision rendered by FIFA, the Panel, thus, finds that the Panel has jurisdiction pursuant to Articles R47 of the CAS Code and 67 of the FIFA Statutes to hear also the First Appellant's appeal.

H. RES JUDICATA

108. The Respondent claims that the CAS termination order dated 10 June 2013 has *res judicata* effect on the current proceedings.

109. The term *res judicata* refers to the general doctrine that an earlier and final adjudication by a court or arbitration tribunal is conclusive in subsequent proceedings involving the same subject matter or relief, the same legal grounds and the same parties (the so-called "triple-identity" criteria). *Res judicata* is said to have a positive and a negative effect. The positive effect of *res judicata* is the termination of a dispute in a final and binding manner between the parties. The negative effect prevents the re-litigation of the subject matter of the judgment or award, also referred to as *ne bis in idem*. Hence, the Appellants could not lodge a claim or appeal if the substance of the latter had already been decided with res judicata effect by another forum.

1. The CAS Termination Order dated 10 June 2013

110. What effects follow from the termination order dated 10 June 2013 is questionable. The answer hereto depends on whether or not the parties that withdrew their requests intended to put an end to the arbitration proceeding only or whether they wanted to renounce to the matter in dispute altogether (see BSK-IPRG/WIRTH, 3rd ed. 2013, Article 189 No. 54). Only in the latter case there is room for *res judicata effect* as is evidenced by the following decision of the SFT (SFT 4A_374/2014, E. 4.3.2.2):

> *"En principe, seul un jugement au fond définitif jouit de l'autorité de la chose jugée, tandis qu'un jugement de procédure en force ne peut en être revêtu … . Cependant, le droit de procédure civile suisse assimile certains actes unilatéraux des parties au jugement … Ainsi en va-t-il du désistement d'action (art. 241 al. 2 CPC…), par opposition au désistement d'instance, dont les conditions sont fixées à l'art. 65 CPC. Bien que la loi ne fasse pas de distinction terminologique à cet égard, il ne faut pas confondre les deux institutions … Le désistement d'action … est l'acte par lequel le demandeur abandonne les conclusions qu'il a prises au procès; il porte sur l'action et bénéficie de l'autorité de la chose jugée. Le désistement d'instance ou retrait de la demande, en revanche, qui n'en est pas revêtu, est un acte qui met exclusivement fin à l'instance et qui ne fait pas obstacle à la réintroduction de l'action à certaines conditions …".*
>
> *[**convenience translation**: "In principle, only a final judgement on the merits has res judicata effect as opposed to a decision on procedural aspects … However, Swiss procedural law assimilates certain unilateral acts of the parties to a judgement. This is true for the waiver of a claim (art. 241 para 2 Swiss Code of Civil Procedure – CCP …), contrary to a simple withdrawal of a claim the conditions of which are prescribed in art. 65 CCP. Even though the law does not differentiate between the two institutions as far as the terminology is concerned, one should not confuse both concepts … The waiver of a claim is an act by which the claimant abandons the reasoning that he or she submitted all along the proceedings, it is directed to the claim and has res judicata effects. The withdrawal of the claim, on the contrary, that has no res judicata effect, is an act that exclusively puts an end to the procedural instance and does not prevent the refiling of the claims at a later stage under certain conditions …"].*

111. Whether there is a waiver or a simple withdrawal does not depend upon how the decision in question is named (award, termination order, etc.). Instead, the effects depend on the applicable arbitration rules. If the latter provide that no unilateral withdrawal is possible without renouncing to the matter in dispute altogether, the decision that puts an end to the proceeding also finally disposes of the claim and, thus, has *res judicata* effect. In the case at

hand the CAS Code does not provide for any specific rules in that respect. However, it is constant practice with CAS (and most other arbitral institutions, see BSK-IPRG/WIRTH, 3rd ed. 2013, Article 189 No. 55; COURVOISIER, in ARROYO (Ed), Arbitration in Switzerland, Biggleswade 2013, Article 34 Swiss Rules No. 22) that a claimant/appellant can unilaterally withdraw his appeal/request for arbitration before an appeal brief / statement of claim has been filed without renouncing his claim altogether. Thus, in the case at hand the CAS termination order dated 10 June 2013 is not a final and binding decision having *res judicata* effects, since the Appellants withdrew their appeal with CAS before the arbitral tribunal had been constituted and before the appeal brief had been filed. Thus, the CAS termination order only acknowledges that an appeal with CAS had been lodged, that this appeal has then been withdrawn without a panel having been constituted, thus, leading to the (purely procedural) termination of the proceedings (without *res judicata* effects).

2. The FIFA Decision dated 3 May 2013

112. The CAS termination order in effect was a second instance decision. In the first instance the matter between Universidad and Genoa concerning (certain) claims arising out of the Mandato was dealt with on the merits by the judicial organs of FIFA. With respect to these claims, the FIFA Players' Status Committee issued a decision on the merits on 3 May 2013. The question, thus, is whether this decision dated 3 May 2013 is vested with any *res judicata* effects.

113. The CAS jurisprudence is reluctant to accord *res judicata* effects to decisions made by judicial organs of associations. In this respect reference is made to CAS 2012/A/2912 (No. 105) in which the panel stated as follows:

> *"Res judicata – at least under Swiss law – is a procedural concept that is known only in relation to court judgments and decisions of arbitral tribunals. The concept applies in a case in which there has been a final judgment that is no longer subject to appeal. The consequence thereof is that the matter cannot be raised again in the same or in another court. Thus, no court may reconsider the matter that has been finally disposed of in the previous court judgment. In particular Swiss law does not attribute res judicata effects to administrative decisions by organs of sports associations which necessarily lack the adversarial nature of a legal procedure and decision by a judicial body. Therefore, in the Panel's view the EB was not precluded from taking into account any of the above incidents when issuing its decision on the grounds of res judicata".*

114. It appears that the SFT does not share this view. In a (recent) decision it explicitly acknowledged *res judicata* effects to a decision of a judicial organ of FIFA (SFT 140 III 520). The underlying facts of the case were as follows:

> Club A initiated proceedings before the FIFA judicial organs (CRL) against player C and club B. In this proceeding club A claimed damages from player C for early termination of the employment contract. Furthermore, club A also claimed damages for said breach from the player's new employer, i.e. club B. The CRL ruled that player C and club B were severally and jointly liable to club A in the amount of GBP 400'000. Player C and club B appealed against this decision to the CAS. Since the player C did not pay the advance of

costs, the CAS terminated his appeal and issued a termination order. In the (remaining) procedure opposing club A and club B the CAS decided to squash FIFA's decision in total and to refer the matter back to the CRL. Club A appealed the CAS award to the Swiss Federal Tribunal and submitted that CAS was not entitled to squash the CRL decision also in relation to player C, whose appeal before CAS had been terminated.

115. In its decision the SFT (SFT 140 III 520, E. 3.2.2) upheld the appeal against the CAS award for lack of jurisdiction and stated as follows:

> *"Cependant, le TAS a commis la même erreur en annulant le point 2 du dispositif de la décision de la CRL, lequel intéressait exclusivement la cause divisant le recourant avec le joueur. Il lui a échappé, ce faisant, que le retrait de l'appel du joueur, suivi de la radiation de la procédure d'appel, avait mis un terme à cette procédure d'appel, si bien que la décision de première instance était, depuis lors, revêtue de l'autorité de la chose jugée à l'égard du joueur et du recourant. En d'autres termes, le TAS s'est arrogé une compétence ratione personae qu'il ne possédait plus, suite au retrait de l'appel, en annulant une décision déjà en force pour l'un des deux consorts défendeurs et désormais intangible indépendamment du sort réservé à l'appel de l'autre consort défendeur et du risque de sentences contradictoires. … C'est à juste titre, dès lors, que le recourant lui fait grief de s'être déclaré compétent dans cette mesure. …".*
>
> *[**convenience translation:** "The CAS, however, has committed a similar mistake by annulling the second point of the operative part of the decision of the CRL that concerned only the matter opposing the appellant and the player. It failed to see, in doing so, that the withdrawal of the appeal by the player, followed by the removal of the proceeding from the CAS role, terminated the appeal procedure, consequently resulting in res judicata effects in relation to the dispute between the player and the appellant. In other terms the CAS arrogated for itself a jurisdiction ratio personae it no longer possessed following the withdrawal of the appeal when it annulled a binding decision in relation of one of the two joined defendants that was intangible and independent of the fate of the appeal of the other joined defendant and the risk of contradicting decisions. It is, therefore, for just reasons that the appellant objected to the fact that the CAS declared itself competent in this matter …"].*

116. It follows from the above decision that according to the SFT a CAS panel acts outside its competence if it ignores the binding character of the first instance decision. In the case at hand the first instance decision of FIFA dated 3 May 2013 opposing the First Appellant and the Respondent has become final and binding with the withdrawal of the appeal. The Panel doubts that the above referenced decisions by the SFT are in line with settled case law by the SFT regarding the prerequisites of *res judicata* (*see* SFT 4A_633/2014, 3.2.: an arbitral tribunal must not re-decide the merits of a case if the (foreign) decision is *capable of being recognised* in Switzerland under Articles 25 and 194 PILA). In particular the Panel doubts that the SFT actually intended to grant decisions by FIFA or other associations the same quality as decision by arbitral tribunals and state courts with respect to putting an end to proceedings in a final and binding manner. However, irrespective of whether or not decisions by judicial organs of an association in general are vested with res *judicata effects*, the Panel finds that there is no room for *res judicata* considerations in this specific case. First of all the Panel notes that the concept of *res judicata* – according to the Swiss jurisprudence – does not differ in international arbitration from the concepts applicable in state court proceedings (SFT 4A_633/2014, E.

3.2.4.). Thus, only the operative part of the decision can have *res judicata* effects (cf. KuKo-ZPO/OBERHAMMER, 2nd ed. 2014, Article 236 No. 48). It is noteworthy that the FIFA decision dated 3 May 2013 has no operative part. Furthermore, it is not possible to derive a specific and definite ruling on the matter in dispute from the decision, since the latter reads as follows:

> *"Finalmente, y en aras de preserver un buen orden administrative, deseamos informarle que nuestras indicaciones, basadas en la documentacion actualmente en nuestro poder, son de carácter meramente informativo y, por lo tanto, sin que implique prejuzgamiento alguno".*
>
> *[**convenience translation**: "Finally, in the interest of good administrative order, we would like to advise you that our conclusions, based on the documentation in our possession up until now, are of purely informative character and, in any way, are not intended to preclude any body from pursuing its claims"].*

117. To conclude, therefore, the Panel finds that its competence to decide the matter in relation to the First Appellant is not influenced / limited by FIFA's decision dated 3 May 2013.

I. ADMISSIBILITY

118. The Appellants lodged an "appeal" against a decision of a FIFA organ and, thus, have filed an Appeal Arbitration Procedure (Article R47 et seq of the CAS Code). In order for an appeal to be admissible, Article R47 of the CAS Code provides as follows:

> *"An appeal against a decision of a federation, association or sports-related body may be filed with CAS (…) if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body".*

1. Appealable Decision

119. Article R47 of the CAS Code requires that the Appeal is directed against a "decision" of a federation, association or sports-related body. The Panel has the advantage of several previous CAS decisions, which provide for an analysis of what is involved in the concept of a decision. In CAS 2014/A/3744 & 3766 the CAS Panel carefully analysed this jurisprudence and summarized it as follows (No. 191):

> *"Therefore, according to CAS jurisprudence, a decision is a communication of a federation, association or sports-related body that is not just of a mere informative nature but also contains, in substance, an actual ruling or resolution which affects in a binding manner the legal situation of the addressee. In other words, it is a communication that contains an* animus decidendi*, i.e. by its objective content (and irrespective of its form), it conveys to the addressee(s) the will of the sports body to decide on a matter".*

120. Ruling in substance on the admissibility and merits of the case, the Appealed Decision qualifies as a "decision" within the meaning of Article R47 of the CAS Code. Further, the Appealed Decision attached instructions on the right to appeal the Single Judge's ruling before CAS.

121. The Respondent puts into question that the aforementioned also applies to the Second Appellant as the latter was not a party to the proceedings before FIFA. The Respondent insofar relies – among others – on the Commentary of the Code of Arbitration for Sport (MAVROMATI/REEB, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials*) that stipulates as follows:

> *"The decision forming the subject of the appeal must be attached to the statement of appeal, so that the CAS Court Office can establish that it is a decision within the meaning of Article R47 (´decision of a federation, association or sports-related body´) and that the name(s) of the respondent(s) correspond to the ones of the parties in the initial proceedings".*

122. However, the Panel holds that the Respondent's objections – in accordance with Swiss jurisprudence (SFT 128 II 50, 55, cited *supra* no. 79) – all pertain to the standing to sue, *i. e.* the merits of the case. This conclusion is also not contradicted by the citation of the Commentary of the CAS Code. First, the Commentary only requires that the *respondent(s)* correspond to the ones of the parties in the initial proceedings which is undoubtedly the case here. Second, the citation only explains why Article R47 of the CAS Code requires that the decision forming the subject of appeal is attached to the statement of appeal. The Commentary gives two reasons: First, to enable the Court to establish that it is a decision within the meaning of Article R47 of the CAS Code and – cumulative – that the name(s) of the respondent(s) correspond(s) to the one(s) of the parties in the initial proceedings. These two reasons are independent from each other, meaning that the question if there is a decision within the meaning of Article R47 of the CAS Code does not require that the parties to the initial proceedings and the appeals procedure are identical.

123. When filing its statement of appeal, the Second Respondent also attached the Appealed Decision to it, thus, complying with the requirements listed in Article R48 of the CAS Code.

2. Timeliness of the Appeal

124. Regarding the time limit to file an appeal Article R49 of the CAS Code provides as follows:

> *"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders his decision after considering any submission made by the other parties".*

125. In the present case the Statutes and regulation of FIFA provide for a specific time limit in case of an appeal. Article 67 para. 1 of the FIFA Statutes states as follows:

> *"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".*

126. In the case at hand, the grounds of the Appealed Decision were received by the First Appellant on 10 February 2015. The statement of appeal was filed on 3 March 2015, thus, within 21 days.

127. However, the Respondent has put into question the timeliness of the appeal of the First Appellant because the power of attorney attached to the statement of appeal was only signed by the Second Appellant. The power of attorney signed by the First Appellant – dated 26 February 2015 – was only submitted to the CAS on 23 March 2015, thus, after the expiry of the 21-day time limit to file an appeal. Also, the Respondent suspects that the power of attorney had not been issued on 26 February 2015, but at a later point after the expiry of the 21-day limit.

128. The Panel, thus, has to address the following questions:

- (i) Is it mandatory in respect of Article R49 of the CAS Code that the power of attorney is submitted to the CAS within the respective time limit?
- (ii) If this question is to be answered in the negative, is it mandatory that the legal representative is duly authorized by means of a power of attorney at the time of the filing of the appeal, or can the appellant authorize this procedural measure *ex post*?

(i) Is it mandatory to submit the power of attorney within the prescribed time limit?

129. The PILA gives little guidance on the matter. Article 181 of the PILA provides that

> *"the arbitral proceedings shall be pending from the time when one of the parties seizes with a claim either the arbitrator or arbitrators designated in the arbitration agreement or, in the absence of such designation in the arbitration agreement, from the time when one of the parties initiates the procedure for the appointment of the arbitral tribunal".*

130. Article 181 of the PILA, thus, does not deal with the formal requirements of the initiation of arbitral proceedings.

131. Article 182 of the PILA provides:

> *"The parties may, directly or by reference to rules of arbitration, determine the arbitral procedure; they may also submit the arbitral procedure to a procedural law of their choice.*

> *If the parties have not determined the procedure, the arbitral tribunal shall determine it to the extent necessary, either directly or by reference to a statute or to rules of arbitration".*

132. In the case at hand, the Parties – by choosing the CAS as the competent arbitral tribunal – have implicitly submitted their dispute to the rules of the CAS Code. Article R30 of the CAS Code provides that *"any party represented by an attorney or other person shall provide written confirmation of such representation to the CAS Court Office"*. However, Article R30 of the CAS Code is silent on the question when such written confirmation must be submitted to the CAS Court Office. Also, Article R48 of the CAS Code that deals with the (mandatory) requirements of the statement of appeal does not explicitly list the power of attorney. The Panel therefore holds that a power of attorney does not need to be attached to the statement of appeal in order to comply with the 21-day deadline to file the appeal.

(ii) Is it mandatory that the legal representative is duly authorized by the party in whose name the appeal is lodged?

133. In the case at hand the Respondent puts into question that the power of attorney presented by the First Appellant had actually been issued on 26 February 2015, *i. e.* before filing the appeal. The Panel finds that it does not need to decide this question as the First Appellant has duly authorized the filing of the appeal *ex post* in any event. That such authorization has effects *ex tunc* is corroborated by the jurisprudence of the SFT and by Swiss legal literature (SFT 4A_150/2013, E 3.2.; STAEHLIN/SCHWEIZER, in SUTTER SOMM/HANSEBÖHLER/LEUENBERGER (eds.), *Kommentar zur Schweizerischen Zivilprozessordnung*, 2nd ed., Zurich 2013, Article 68 No. 28) in the context of state court proceedings. In taking reference to these sources of law this Panel acts within the limits of its authority (Article 182 para. 2 of the PILA), since neither the agreement of the Parties nor the provisions of the CAS Code provide any guidance on this matter.

3. Exhaustion of legal remedies

134. In accordance with Article R47 of the CAS Code, a party may appeal the decision of a disciplinary tribunal or similar body of a federation, association or sports body, 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 body".*

135. In the present case, the Appealed Decision was rendered by the Single Judge of the FIFA Players' Status Committee. Article 23 para. 3 of the FIFA Regulations for Status and Transfer of Players provides that

> *"decisions reached by the Single Judge or the Players' Status Committee may be appealed before the Court of Arbitration for Sport".*

136. The Panel, thus, concludes that, in compliance with Article R47 of the CAS Code, the Appellants exhausted all legal remedies available to them. This conclusion also applies to the Second Appellant. The Panel has explained above that the Second Appellant – despite not having been a party to the initial proceedings – can rely on the ruling of the FIFA Players' Status Committee as being a "decision" within the meaning of Article R47 of the CAS Code. Therefore, also with regard to the Second Appellant, it suffices for the exhaustion of legal remedies that the decision as such is not subject to any other form of further (internal) review.

J. APPLICABLE LAW

137. Pursuant to Article 187 of the PILA,

> *"the arbitral tribunal shall decide the case according to the rules of law chosen by the parties or, in the absence thereof, according to the rules of law with which the case has the closest connection".*

138. In the case at hand the Parties have not made an explicit choice of law. However, by choosing the CAS as the competent arbitral tribunal the Parties have submitted their dispute to the rules of the CAS Code and, thus, have implicitly chosen the law applicable to the dispute, since Article R58 of the CAS Code provides that the Panel shall decide the dispute

> *"… according to the applicable regulations and the rules of law chosen by the parties or, in absence of such a choice, according to the law of the country in which the federation, association or sports- related body 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".*

139. It follows from the above that these appeals arbitration proceedings shall be decided primarily according to the FIFA regulations. In so far as the FIFA regulations contain a lacuna, the Panel will subsidiarily apply Swiss law, since FIFA as the federation that has issued the Appealed Decision, has its seat in Switzerland. Furthermore, Article 66 para. 2 of the FIFA Statutes provides that in proceedings before the CAS:

> *"the CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".*

140. As a result of the foregoing, the Panel considers the regulations of FIFA to be applicable. In the absence of an express choice of law by the Parties, this Panel will subsidiarily apply Swiss law – insomuch as the FIFA regulations are silent.

K. STANDING TO SUE / STANDING TO APPEAL

141. Article 23 of the Regulations on the Status and Transfer of Players, the FIFA Players' Status Committee is competent to hear cases further specified in Article 22 of said regulation. Article 22 provides:

*"**Competence of FIFA***
Without prejudice to the right of any player or club to seek redress before a civil court for employment-related disputes, FIFA is competent to hear:

a) disputes between clubs and players in relation to the maintenance of contractual stability (articles 13-18) where there has been an ITC request and a claim from an interested party in relation to said ITC request, in particular regarding the issue of the ITC, sporting sanctions or compensation for breach of contract;

b) employment-related disputes between a club and a player of an international dimension, unless an independent arbitration tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs has been established at national level within the framework of the association and/or a collective bargaining agreement;

c) employment-related disputes between a club or an association and a coach of an international dimension, unless an independent arbitration tribunal guaranteeing fair proceedings exists at national level;

d) disputes relating to training compensation (article 20) and the solidarity mechanism (article 21) between clubs belonging to different associations;

e) disputes relating to the solidarity mechanism (article 21) between clubs belonging to the same association provided that the transfer of a player at the basis of the dispute occurs between clubs belonging to different associations;

f) disputes between clubs belonging to different associations that do not fall within the cases provided for in a), d) and e)".

142. The term "standing to sue" describes the entitlement of a party to avail itself of a claim. In general, it suffices for the standing to sue that a party invokes a right of its own. However, regarding the standing to *appeal*, additional requirements apply. In particular, the appealing party must be affected by the decision it appeals.

143. According to settled CAS jurisprudence a party has standing to appeal if it can show sufficient legal interest in the matter being appealed (CAS 2008/A/1674.; see also CAS 2014/A/3744 & 3766, para. 175). In this respect the appealing party must show that it is aggrieved, *i.e.* that it has something at stake (CAS 2009/A/1880-1881, award of I June 2010, at para. 29).

144. In the case at hand, the First Appellant whose claims have been fully rejected by the decision of the FIFA Players' Status Committee dated 23 September 2014, is undoubtedly aggrieved and has sufficient legal interest for the matter being reviewed by CAS. However, it is doubtful that same applies to the Second Appellant. The Respondent claims that the Second Appellant was not and cannot be a party to the proceedings before the FIFA Players' Status Committee and was also not affected by the decision of the latter in any way.

145. The Panel finds that it is, in general, mandatory for a party's standing to appeal that it was also a party to the initial proceedings before the legal body that rendered the appealed decision. This is in line with previous CAS jurisprudence. In CAS 2009/A/1880-1881 at no. 28 the Panel held that

> *"[i]ndeed, if the Panel were to find that [the Club] was not a party to the FIFA proceedings or that, even if it were a party, [the Club] was not affected at all by the ruling ("dispositif") of the Appealed Decision, [the Club] would not have a cause of action or legal interest ("intérêt à agir") to act against the Appealed Decision and to ask (as [the Club] did) to quash it. Accordingly, the First Appellant would have no standing to appeal on the basis of the well-known general procedural principle that if there is no legal interest there is no standing (*"pas d'intérêt, pas d'action*)".*

146. The Panel does not have to decide if an exception to this principle might be appropriate in cases where the Appellant was negatively affected *("aggrieved"*) by the decision despite not having been a party to the initial proceedings (see also CAS 2008/A/1726 *supra* no. 65 *et seq*.). In the case at hand the Second Appellant was not affected by the Appealed Decision as the latter exclusively dealt with the First Appellant's claims against the Respondent. Moreover, the Single Judge of the FIFA Players' Status Committee rejected the First Appellant's request on the grounds that not the First Appellant but *"the company Cruzados was entitled to receive from the Respondent a total compensation of USD 360,000"*. This clearly does not infringe on the Second Appellant's rights. With respect to this the Panel notes, *obiter dictum*, that Universidad only holds 20% of Cruzados' shares whereas 80% of its shares are traded publicly. Thus, the Appellants are not as closely connected as in the cases where a club transfers its commercial activities to a different entity of which it holds 100% of the shares. Cruzados, thus, is not simply an *alter ego* of Universidad. Also, even if the First Appellant transferred any amount obtained in these proceedings to the Second Appellant it would not be sufficient to grant the Second Appellant the standing to sue. An obligation only established individually between two parties can and should not have any effect on the procedural position of a third party.

147. The Second Appellant can also not rely on being the legal successor of the First Appellant. The Panel does not have to decide if and to what extend the Second Appellant is actually the legal successor of the First Appellant as any legal succession that might have been agreed on in the Concession Contract of 1 October 2009 was implemented before the Mandato and the Compraventa were concluded in May 2011 and before the First Appellant filed its first claim with the FIFA Players' Status Committee in October 2012. Therefore, any legal succession that might have been implemented cannot have an impact on the present proceedings from the outset. In particular, it cannot lead to the succession of the Second Appellant into the First Appellant's position as a party to the proceedings before the FIFA Players' Status Committee.

148. Further, the Second Appellant cannot rely on having represented the First Appellant on the occasion of the Contract (Compraventa) and the Mandato. The Panel does not see how this representation could have any effect on the qualification of the Second Appellant as a party to the proceedings before the FIFA Players' Status Committee or how this representation could result in the Second Appellant being aggrieved by the decision of the FIFA Players' Status Committee. Also, it is of no legal relevance that the President of the First Appellant

and General Manager of the Second Appellant are of the opinion that both parties have the right to appeal the decision before CAS.

149. Denying the Second Respondent standing to appeal would also not lead to a general denial of justice. The Panel does not need to decide at this point whether or not the Second Appellant can bring claims arising out of the Mandato or the Compraventa before the FIFA Players' Status Committee. The Panel finds that the better arguments speak in favour of FIFA having acted within its autonomy when making its dispute resolution mechanism only available to the exhaustive list of persons/entities in Article 22 of the Regulations on the Transfer and Status of Players. But even if this was not the case, the Second Appellant could still rely on the arbitration clause in the Mandato (see *supra* no. 102) and bring a claim before the Ordinary Division of CAS – provided that all other prerequisites are fulfilled as well.

L. INTERVENTION

150. In its submission dated 18 May 2015, the Second Appellant submitted the following (new) request:

> *"As an alternative request, in case the Panel understands that Cruzados has no standing to appeal, the company shall be admitted to the case based on the intervention set by art. 41.3 of the CAS Code".*

151. Article R41.3 and R41.4 of the CAS Code provide:

> *"R41.3 Intervention*
>
> *If a third party wishes to participate as a party to the arbitration, it shall file an application to this effect with the CAS Court Office, together with the reasons therefor within 10 days after the arbitration has become known to the intervenor, provided that such application is filed prior to the hearing, or prior to the closing of the evidentiary proceedings if no hearing is held. The CAS Court Office shall communicate a copy of this application to the parties and fix a time limit for them to express their position on the participation of the third party and to file, to the extent applicable, an answer pursuant to Article R39.*
>
> *R41.4 Joint Provisions on Joinder and Intervention*
>
> *A third party may only participate in the arbitration if it is bound by the arbitration agreement or if it and the other parties agree in writing.*
>
> *Upon expiration of the time limit set in Articles R41.2 and R41.3, the President of the Division or the Panel, if it has already been appointed, shall decide on the participation of the third party, taking into account, in particular, the prima facie existence of an arbitration agreement as contemplated in Article R39. The decision of the President of the Division shall be without prejudice to the decision of the Panel on the same matter.*

(…)

Regardless of the decision of the Panel on the participation of the third party, the formation of the Panel cannot be challenged. In the event that the Panel accepts the participation, it shall, if required, issue related procedural directions.

After consideration of submissions by all parties concerned, the Panel shall determine the status of the third party and its rights in the procedure.

After consideration of submissions by all parties concerned, the Panel may allow the filing of amicus curiae briefs, on such terms and conditions as it may fix".

152. According to the above provision, an intervention must be filed by an intervenor *"within 10 days after the arbitration has become known to* [him]*"*. This prerequisite was undoubtedly not fulfilled. Furthermore, an intervention is aimed at conferring upon a person the (procedural) status of a party. However, an intervention cannot heal deficits on the merits regarding the intervenor's claim. Thus, if the Second Appellant lacks standing to sue as a party, this deficit cannot be overcome by admitting the latter as an intervenor.

M. INTERIM FINDINGS AND OPEN QUESTIONS

153. The Panel concludes in the interim that the Second Appellant has no standing to sue / standing to appeal in these proceedings and may therefore not claim any payments neither on behalf of its own, nor on behalf of Universidad. All claims filed by the Second Appellant must, therefore, be dismissed on the merits. The questions left to deal with are, thus, the following:

- Is the First Appellant entitled to claim from the Respondent an amount of USD 360,000 under the THIRD Clause of the Mandato?
- Is the First Appellant entitled to claim from the Respondent an amount of USD 100,000 under the FOURTH Clause of the Mandato?
- Is the First Appellant entitled to claim from the Respondent damages and/or payments for unjust enrichment?

N. THE FIRST APPELLANT'S CLAIM FOR USD 360,000

154. In order for the First Appellant to have a claim in the amount of USD 360,000 according to the THIRD clause of the Mandato, the First Appellant needs to be party to the latter. Whether this is the case here, is questionable, since the First Appellant has not signed the Mandato as a party. Instead, Universidad signed the Mandato *"in acknowledgement and agreement"*. It does not follow from this that Universidad wants to be bound to the Mandato just like a party. Even if one were to assume that Universidad became a party to the Mandato, it does not automatically follow from this that it is entitled to the claim in the amount of USD 360,000 according to the THIRD clause.

155. It is rather obvious to the Panel that – according to the THIRD clause – Universidad is not entitled to claim payment for its own benefit. This follows from the wording in the THIRD clause according to which *"Genoa will pay Cruzados the sum of three hundred sixty thousand dollars"*. This wording is clear and does not leave room for interpretation. According thereto the First Appellant is neither sole nor co-beneficiary of the USD 360,000. Instead this sum is solely to be paid to Cruzados, which is – as previously mentioned – an entity different from the First Appellant.

156. It has been submitted by the Appellants that the Second Appellant represented the First Appellant on the occasion of the execution of the Mandato. Even if this was the case, this would not alter the previous finding. The mere fact that the Second Appellant concluded the Mandato for itself and as an agent for the First Appellant does not automatically grant the First Appellant a right to claim the amounts mentioned in the THIRD clause of the Mandato. In addition to being duly represented by the Second Appellant, the Mandato would also have to grant the First Appellant the entitlement to the contractual claim and the status as a beneficiary. However, the THIRD clause clearly names only the Second Appellant as the sole beneficiary. In addition, it is the Appellants' own submission that the economic purpose of the THIRD clause of the Mandato is that *"the final destination of any amount collected … will be the Cruzado's banking account"*. If this is true, however, the Panel does not see why the Mandato – contrary to its explicit wording – should be interpreted in such a way as to accord also to the First Appellant the entitlement to claim the payments.

157. This is all the more true, since the USD 360,000 according to the THIRD clause of the Mandato are intended as a compensation for the services to be provided by Cruzados on behalf of the Respondent vis-à-vis "Boca Juniors". If however, the services are to be solely provided by the Second Appellant, it is difficult to conceive that – failing any indications to the contrary – the First Appellant should be entitled to claim (alone – in part or in total – or jointly and severally along with the Second Appellant) the remuneration for services rendered by someone else. Any such interpretation would not make any legal or economic sense, considering that – as already previously mentioned, see No. 146 – Cruzados is not an *alter ego* of Universidad. This finding is not contradicted by the Chilean Law 20.019 that allegedly obliges the First Appellant to establish Cruzados SADP in order to manage its commercial activities. Even if one assumed that the First and Second Appellant have a "special relationship" that roots in Law 20.019, the two entities are not identical. Moreover, the First Appellant only holds 20% of the shares of the Second Appellant. Thus, there is no legal ground for the First Appellant to avail itself of claims that undoubtedly belong to the Second Appellant in its own name.

158. To conclude, therefore, the Panel finds that the THIRD clause of the Mandato does not attribute any entitlement to the First Appellant to claim the payment of USD 360,000 either to itself (alone, in part or jointly and severally together with the Second Appellant) or solely for the benefit of the Second Appellant.

O. THE FIRST APPELLANT'S CLAIM FOR USD 100,000

159. The First Appellant requests payment from the Respondent in the amount of USD 100,000 based on the FOURTH clause of the Mandato. The FOURTH clause provides that *"the defaulting party shall pay to the non-defaulting party or the party willing to comply the total lump sum of one hundred thousand dollars"*. Unlike the THIRD clause of the Mandato the provision does not specifically refer to a certain person or entity. However, it is rather obvious to the Panel that this penalty clause provides for a one-time payment of USD 100,000 only. Therefore, even if the First Appellant were a party to the Mandato (what is questionable, see supra nos. 107 and 154 *et seq.*), the Appellants could not claim USD 100,000 each from the Respondent (in case of breach of contract). In addition, the Panel finds that Appellants cannot be assumed to be joined creditors either in relation to the penalty payment, since the FOURTH clause clearly provides that payments shall be made to *"the non-defaulting party*[4]*"* (and not to the non-defaulting parties). It follows from this – and from the interpretation of the THIRD clause of the Mandato [see supra nos. 154 *et seq*] – that the term "party" in the FOURTH clause either refers to the Second Appellant or to the Respondent. To conclude, therefore, the First Appellant cannot avail itself of the claim described in the FOURTH clause of the Mandato.

P. THE FIRST APPELLANT'S CLAIM FOR DAMAGES

160. The First Appellant can also not claim damages for the alleged loss in Cruzados' value. First, it appears already questionable whether the First Appellant can claim compensation from the Respondent for a damage that was – primarily – inflicted on Cruzados and – only on a secondary basis – on Cruzados' shareholders. Whether or not Cruzados seeks liquidation of the (alleged) damage suffered by a third party is an autonomous decision of Cruzados. If Cruzados' shareholders do not want their shares to be devaluated it is up for them to convince or advise the appropriate organs of Cruzados to file a claim and recuperate the damage (in the interest of its shareholder).

161. However, whether or not a shareholder can liquidate a damage that has been inflicted on his company by a third party can be left unanswered here, since in the view of the Panel the First Appellant's claim is – in any event – unsubstantiated. The Appellants have not sufficiently shown that the non-payment of the USD 360,000 caused a drop in the share price by 13,76% in 2011. According to publicly available sources, the Second Appellant's share price on 23 May 2011, the week before the Mandato was concluded, was USD 210,50. It went down in the following months, then back up again to up to USD 233 in November 2011 and then stayed between approx. USD 190 and USD 225 in the year to come. So, the Second Appellant's share price was actually quite stable in the months that followed the conclusion of the Mandato. Also, as changes in market value can have multiple reasons, the Panel holds that there is no evidence that links any changes in the share price in the year 2011 and 2012 to the Mandato or any alleged breach of the Mandato by the Respondent. This is all the more true, as there is no evidence on file what information, if any, was publicly available on the market regarding the transfer of the Player, the contents of the underlying contracts and the alleged behaviour

4 Emphasis added.

of the Respondent. The Appellants have also not submitted any calculation of their alleged losses. It is unclear, on what basis the Appellants calculated their alleged damages.

Q. INTEREST RATES FOR UNJUST ENRICHMENT

162. For the reasons stated at nos. 154 *et seq.* the First Appellant cannot claim payments under the THIRD clause of the Mandato as it was not the beneficiary of said provision. Therefore, the First Appellant may also not make claims for unjust enrichment following from the non-payment of the USD 360,000 under the THIRD clause of the Mandato. There is also no indication elsewhere in the contract that the First Appellant should be entitled to make such claim.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The CAS has jurisdiction to hear the appeals of Fundación Club Deportivo Universidad Católica de Chile and Cruzados SADP.

2. The intervention by the Cruzados SADP is rejected.

3. The appeals filed by Fundación Club Deportivo Universidad Católica de Chile and Cruzados SADP against the decision rendered by the Single Judge of the Players' Status Committee of FIFA on 23 September 2014 are dismissed.

4. The decision rendered by the Single Judge of the Players' Status Committee of FIFA on 23 September 2014 is confirmed.

(…).