



Arbitration CAS 2008/A/1482 Genoa Cricket and Football Club S.p.A. v. Club Deportivo Maldonado, award of 9 February 2009

Panel: Mr Christian Duve (Germany), President; Mr Michele Bernasconi (Switzerland); Mr Hernán Jorge Ferrari (Argentina)

Football

Transfer

New facts and arguments raised in an appeal to the CAS

Applicable law to the merits of the dispute according to the FIFA Statutes

1. According to the scope of CAS panel's review, the parties are free to raise new facts and arguments as the matter is considered *de novo* by the Panel; the prohibition against *venire contra factum proprium*, which is widely recognised under Swiss law and is often compared to the common law principle of estoppel, does not preclude a party from tendering new evidence or raising new arguments in an appeal arbitration proceeding of this type. Therefore, in the absence of specifically agreed limitations on the ability to raise new facts or arguments at the appeal level, the Appellant is free to raise any new arguments.
2. Article 60(2) of the 2001 FIFA Statutes, which provides that the "*CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law*", has consistently been interpreted as to contain a choice of law clause in favor of Swiss law governing the merits of the disputes. According to the CAS case law, since the parties had subjected themselves to the FIFA Statutes and the CAS Code, and since FIFA has its seat in Zurich, the matter would be settled by application of Swiss law.

Genoa Cricket and Football Club S.p.A. (the Appellant, "Genoa"), is a football club in the Italian A series.

Club Deportivo Maldonado (the Respondent, "Maldonado") is a football club in the Uruguayan second division.

In June 2004, R. (the "Player" or "R."), a national of Argentina, had an employment contract with Respondent. He was playing football in Uruguay and was registered as professional football player in that country.

By virtue of a July 9, 2003 contract (the "July 9, 2003 Contract") concluded between several parties, R. had a number of rights assigned to three companies: A., B. and C. (the "Assignees"), all of which

are incorporated and have their head offices in Argentina. The three companies were considered as the “Owner” under the contract of transfer rights.

In particular, the July 9, 2003 Contract, among other provisions, provided:

“[...]”

SECOND: According to this agreement the federative rights of the Player will be transferred as from this date to [Maldonado], which will undertake to immediately [act] in order to formalise all necessary undertakings with the Football Association of Uruguay to this effect. [...]”

[Clarifications made by the Panel]

The Uruguayan Association of Football (“AUF”) included the July 9, 2003 Contract in the August 10, 2005 submission to FIFA as well as in the November 30, 2005 letter from FIFA to the Italian Football Association (“FIGC”) seeking the intervention from the FIFA with its member (Appellant).

On June 16, 2004, Appellant and Respondent entered into an agreement for the transfer of R. (“Transfer Agreement”).

Article 3 of the Transfer Agreement provided that Respondent would commit and engage its best for the release of the International Transfer Certificate (ITC) needed to register R. as a member of Genoa’s professional team in Italy.

Article 4 of the Transfer Agreement provided that Appellant was obliged to pay Respondent a “transfer repayment” (“Transfer Fee”) in the total amount of EUR 750,000.

Article 5 of the Transfer Agreement established that the Transfer fee was payable in six instalments over a period of about one year (from June 17, 2004 to June 1, 2005), according to the following scheme:

- a first instalment of EUR 200,000 shall be paid by means of bank transfer on the bank account indicated in the enclosure “A” of the Transfer Agreement within 24 hours from the signature of the Transfer Agreement.
- a second instalment of EUR 100,000 shall be paid within and no later than October 1, 2004.
- a third instalment of EUR 100,000 shall be paid within and no later than December 1, 2004.
- a fourth instalment of EUR 100,000 shall be paid within and no later than February 1, 2005.
- a fifth instalment of EUR 100,000 shall be paid within and no later than April 1, 2005.
- a final instalment of EUR 150,000 shall be paid within and no later than June 1, 2005.

Article 10 of the Transfer Agreement provided that the applicable law to the contract was the FIFA Regulations for the Status and Transfer of Players (“FIFA Regulations”), in their 2001 version.

On June 15, 2005, Respondent informed the AUF that Appellant had not fully complied with the payment schedule set in the Transfer Agreement, saying that it had only paid the first instalment of

EUR 200,000 and another amount of EUR 50,000 in March 2005. This correspondence will be “Respondent’s first submission to FIFA dated June 15, 2005”.

On July 21, 2004, the ITC for the release of R. was issued by the AUF.

On August 10, 2005, the AUF on behalf of Respondent brought a claim to FIFA against Genoa alleging that the Transfer Fee had not been fully paid and that Appellant had apparently defaulted on the scheduled payment.

On October 25, 2007, after holding a hearing, the FIFA Players’ Status Committee (PSC) rendered a decision.

In its decision dated October 25, 2007, the PSC granted the claim and specifically decided that Appellant should pay the outstanding amount of the Transfer Fee (EUR 500,000) plus interest within 30 days from the date of notification of the decision.

The PSC came to this conclusion after acknowledging that:

“[Maldonado] maintained having received from the totality of the transfer compensation agreed upon with [Genoa] monies in amount of EUR 250,000 only as, apparently, the latter only paid the first instalment of EUR 200,000 as well as 50% of the second instalment (i.e. 50% of EUR 100,000). In other words, the [PSC] acknowledged that [Maldonado] claims outstanding monies in the total amount of EUR 500,000.

In this respect, the [PSC] noted that the [Genoa] admitted not having paid the full transfer compensation amounting to EUR 750,000 to [Maldonado]. In particular, the [PSC] took into consideration that [Genoa] did not contest its obligation to pay the amount claimed by [Maldonado], i.e. EUR 500,000, maintaining not being in position to pay the amount due by reason of financial shortage. In this context, the [PSC] furthermore acknowledged that [Genoa] asked [Maldonado] to be able to fulfil the relevant financial obligation by deferred payments.

Turning its attention once again to [Maldonado], the [PSC] noted that the latter accepted a deferral until 30 June 2006 during the proceedings, however, highlighting that the present matter should be decided without any further delay in case of non-payment by then.

Taking into account the aforementioned, in particular the fact that, in the end, the amount claimed was not paid by [Genoa], the [PSC] unanimously decided that [Genoa] owes to [Maldonado] monies in the total amount of EUR 500,000 on the basis of the relevant transfer agreement signed between the parties in connection with the player R.’s transfer to Italy. Therefore, the [PSC] decided that [Genoa] has to pay the amount of EUR 500,000 to [Maldonado]”.

[Names changed by the Panel to facilitate comprehension]

During the proceedings before the PSC, Appellant did not raise in its pleadings or during the hearing with the PSC any arguments relating to the assignment to third parties of “economic rights” belonging to R. or relating to a contravention of the prohibition against assignment to third parties of a player’s economic interests or rights.

In its decision dated October 25, 2007, the PSC granted the claim and ordered Appellant to pay Respondent the outstanding amount of the Transfer Fee (EUR 500,000) plus interest within 30 days from the date of notification of the decision.

On January 23, 2008 the decision of the PSC was notified to both Respondent and Appellant.

On February 12, 2008, Appellant lodged an appeal to the Court of Arbitration for Sport (CAS).

On February 15, 2008, the CAS Court Office notified FIFA of the present proceedings, requested a copy of the decision taken by the PSC and invited FIFA to participate.

On February 21, 2008, Appellant filed its appeal brief and asked that the CAS to issue:

“a new decision which replaces the one taken by the FIFA Players’ Status Committee. The relevant decision shall:

- *ascertain that Club Deportivo Maldonado [was] never entitled to transfer the player to Genoa Cricket and Football Club and that the Appellant does therefore not owe anything to the Respondent;*
- *establish that the Respondent must reimburse the Appellant the undue amount of EUR 250,000 already paid to the Uruguayan club”.*

[Clarifications made by the Panel]

By virtue of the letter dated February 28, 2008, FIFA notified CAS that it renounced to its right to intervene in the present arbitration proceedings and sent an official copy of the decision taken by the PSC, as requested by the CAS Court Office.

On March 25, 2008, Respondent filed its answer, requesting CAS:

- *To reject the appeal presented by GENOA against the FIFA decision.*
- *To reject the counterclaim presented by GENOA, requesting the refund of the already paid amounts.*
- *To fully confirm FIFA’s decision in this case.*
- *To determine that the cost of the arbitration shall be entirely borne by GENOA and to fix the amount of GENOA’s contribution for the legal fees and expenses incurred by this part in the sum of CHF 10.000”.*

On June 11, 2008, in accordance with Art. R57 of the CAS Code of Sports-related Arbitration (“CAS Code”), and upon request of the Chairman of the Panel, FIFA filed a copy of its file regarding the decision rendered by the PSC in this matter.

On June 12, 2008, the Appellant, upon the Panel’s request, submitted a list of questions to be posed to FIFA. The list covered the issues of whether the FIFA Regulations (Edition 2001) allowed third-party ownership of a player’s economic and federative rights; the object and purpose of the article 18bis on the prohibition against third-party ownership over a club introduced by the 2008 edition of the FIFA Regulations; and procedures, sanctions and burden of proof in cases of alleged third-party ownership.

On June 23, 2008, the list of questions sent by Appellant was submitted to FIFA.

By virtue of the letter dated June 30, 2008, FIFA provided answers to the Appellant's questions. This letter was forwarded to the parties on July 4, 2008 for them to submit comments on it. FIFA grouped the above-mentioned questions and answers in five different sets according to the relevant subject.

The first set dealt with the difference between "economic rights" and "federative rights" under the 2001 edition of the FIFA Regulations. FIFA stated that since September 1, 2001 the concept of "federative rights" to players did no longer exist. It had been replaced by the principle of maintenance of contractual stability between the contracting parties, which entailed, in particular, that compensation for unilateral breach of contract without just cause was to be paid by the party in breach of contract in favour of the counterparty.

The second set addressed the stance of the 2001 FIFA Regulations regarding third-party ownership. FIFA mentioned that as a consequence of the fact that, apart from the relation based on the employment contract no further "rights" (i.e. "federative rights") existed on a player according to the previous and current version of the Regulations, FIFA could not and would not recognise any form of third-party ownership. This was applicable already under the previous Regulations. Congruously, the newly created art. 18bis of the current version of the Regulations that came into force on January 1, 2008 was not speaking about "third party ownership" but about "third-party influence on clubs".

The third set was related to the spirit and interpretation by the FIFA decision-making bodies of article 18bis of the 2008 FIFA Regulations. FIFA indicated that to that day, no case concerning article 18bis of the 2008 FIFA Regulations had been brought before the competent body of decision. Nevertheless, in absence of any jurisprudence, FIFA stated that the relevant provision did not intend to prohibit the investment of third parties into clubs, in particular also not for the aim of financing a specific player. In other words, pure financing tools would remain acceptable. However, it would not be accepted that a third party was put in a position to perform any kind of influence on a club with regard to the negotiation of employment or transfer agreements in relation to the player concerned.

The fourth set concerned the sanctions for the violation of article 18bis of the 2008 FIFA Regulations. FIFA confirmed that sanctions could be imposed by the FIFA Disciplinary Committee but that such infringements would not be prosecuted after a lapse of ten years.

Finally, even though FIFA believed it was difficult to answer the questions in a general manner, FIFA addressed the fifth set of questions regarding the burden of proof in cases of alleged third-party influence. FIFA considered that it would be possible for FIFA to imagine that a club would ignore the interference of a third party in a case where a club signed a transfer agreement with another club and the parties to that contract indicated in the relevant agreement are merely the two clubs, without any reference to a third-party, not even in the remaining wording of the contract. Nevertheless, FIFA stated that in practice normally long and through negotiations precede the conclusion of a transfer agreement. Therefore, FIFA mentioned that one would have to assume that, most probably, reference to the third party would be done in a more or less direct way during the relevant negotiations. Consequently, FIFA believed that it would be reasonably difficult for a club to claim that, although in good faith, it was not aware of the agreement with the third party.

On July 14, 2008, the CAS Court Office received comments made by both parties.

On September 17, 2008, the CAS Court Office sent a letter to the parties asking the following questions:

- For which club did the player R. play after June 2004?
- Did the player R. enter into an agreement with Appellant?

On September 23, 2008, Appellant replied to the letter sent by the CAS Court Office on September 17, 2008 and said that R. had played for Genoa in the season 2004-2005. Furthermore, in summer 2005 (due to undisclosed personal reasons), he had moved to Argentina. From January 2006, he played for FC C. in Argentina for six months. Moreover, in the season 2006-2007, R. returned to Italy and played with FC F. Finally, in August, 2007 he had rescinded his labour contract with Genoa through a contractual resolution.

On September 23, 2008, Respondent replied to the letter sent by the CAS Court Office on September 17, 2008 and answered that R. had played for Genoa after June 2004. Moreover, Respondent answered that, although it did not know the exact terms of the labour agreement between Genoa and R., such an agreement had surely been concluded. Respondent also made further arguments supporting its case and submitted some press releases to support its allegations.

On September 29, 2008, Appellant objected to Respondent's production of new evidence and submission of further defences made on September 23, 2008.

LAW

Admissibility

1. The decision of the PSC was notified to the parties on January 23, 2008; the Appellant, therefore, had under article 61 of the FIFA Statutes until February 13, 2008 to file the appeal statement, which he did on February 12, 2008. Hence, the appeal is admissible as it was filed within the stipulated deadline.

Jurisdiction

2. The jurisdiction of the current CAS Panel as an appeal body of the PSC decision is based on the following reasoning and provisions.

3. Article 60 of the FIFA Statutes states:

“Court of Arbitration for Sport (CAS)

1 FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, clubs, Players, Officials and licensed match agents and players’ agents.

2 The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law”.

4. Article 61 of the FIFA Statutes provides:

“Jurisdiction of CAS

1 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.

2 Recourse may only be made to CAS after all other internal channels have been exhausted.

3 CAS, however, does not deal with appeals arising from:

(a) violations of the Laws of the Game;

(b) suspensions of up to four matches or up to three months (with the exception of doping decisions);

(c) decisions against which an appeal to an independent and duly constituted arbitration tribunal recognised under the rules of an Association or Confederation may be made.

[...]”.

5. Article 62 of the FIFA Statutes adds:

“1 The Confederations, Members and Leagues shall agree to recognise CAS as an independent judicial authority and to ensure that their members, affiliated Players and Officials comply with the decisions passed by CAS. [...]

2 Recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations.

3 The Associations shall insert a clause in their statutes or regulations stipulating that it is prohibited to take disputes in the Association or disputes affecting Leagues, members of Leagues, clubs, members of clubs, Players, Officials and other Association Officials to ordinary courts of law, unless the FIFA regulations or binding legal provisions specifically provide for or stipulate recourse to ordinary courts of law. [...]

The Associations shall also ensure that this stipulation is implemented in the Association, if necessary by imposing a binding obligation on its members. [...]”.

6. The CAS Code also provides guidance on jurisdiction. Article R47 dealing with appeals states:

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

7. As a result, the Panel rules that its jurisdiction, which is not disputed, rests on articles 60, 61 and 62 of the FIFA Statutes. Additionally, article R47 of the CAS Code also gives basis for the jurisdiction of this Panel.

Scope of the Panel's jurisdiction

8. On one hand, Appellant claims that only after the issuance of the PSC decision it had access to the July 9, 2003 Contract. Moreover, Appellant maintains that neither the PSC nor itself were able to examine this document during the PSC proceedings. Consequently, Appellant contends that if the PSC had known the existence of the July 9, 2003 Contract it would have dismissed Respondent's claim on the basis that it was involved in an illegal contract.
9. On the other hand, Respondent denies that Appellant was not aware of the existence of the July 9, 2003 Contract and invokes a due process argument in the sense that if Appellant had arguments to put forward, it should have done so in the initial hearing. Respondent contends that the July 9, 2003 Contract had been brought to the attention of Appellant and was attached as documentary evidence in the proceedings at FIFA's PSC hearing, and as such, Appellant was in possession of the document prior to the current appeal.
10. In order to establish whether Appellant can present new arguments in this appeal if it had the opportunity to raise them before the PSC and did not to do so, the Panel must first examine the provisions contained in the FIFA legal framework.
11. To begin with, articles 60 and 61 (cited above) do not provide rules as to how the appeal shall be conducted. Other provisions of the FIFA Statutes, the FIFA Regulations or the Rules Governing the Procedures of the PSC do not provide any guidance for the conduct of an appeal either.
12. Additionally, article R57 of the CAS Code, applicable by virtue of article 60(2) of the FIFA Statutes, provides the following:
R57 Scope of Panel's Review, Hearing
The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. Upon transfer of the file, the President of the Panel shall issue directions in connection with the hearing for the examination of the parties, the witnesses and the experts, as well as for the oral arguments. He may also request communication of the file of the federation, association or sports-related body, whose decision is the subject of the appeal. Articles R44.2 and R44.3 shall apply. [...]
[Panel's emphasis]
13. According to the scope of panel's review described in article R57 of the CAS Code, the parties are free to raise new facts and arguments as the matter is considered *de novo* by the Panel.

14. This view was supported by CAS jurisprudence in the case CAS 2000/A/274, where the Panel found that the prohibition against *venire contra factum proprium*, which is widely recognised under Swiss law and is often compared to the common law principle of estoppel, did not preclude a party from tendering new evidence or raising new arguments in an appeal arbitration proceeding of this type (CAS 2000/A/274, para. 38). In particular, it concluded the following:
- “Under Art. R57 of the CAS Code, the Panel is expressly granted full power to review the facts and the law. It follows from this broad scope of review that the parties are not restricted to the evidence adduced, or bound by the arguments advanced, in the proceedings below. The Panel must examine the case ab novo and, accordingly, must consider all of the evidence and arguments before it [...]”* (CAS 2000/A/274, para. 39)
15. As a result, the Panel concludes that, in the absence of specifically agreed limitations on the ability to raise new facts or arguments at the appeal level, Appellant is free to raise any new arguments such as its unawareness of the existence of the July 9, 2003 Contract in the current proceedings.

Applicable law

16. Abiding by article R58 CAS Code, the CAS settles the disputes according to the applicable regulations and the rules of law chosen by the parties, or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the CAS deems appropriate.
17. Moreover, article 60(2) FIFA Statute states that the *“provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law”*.
18. Article 60(2) of the FIFA Statutes has consistently been interpreted as to contain a choice of law clause in favor of Swiss law governing the merits of the disputes. For example, the Panel in the case CAS 2004/A/587, ruled that since the FIFA has its seat in Zurich, Swiss law is applicable subsidiarily to the merits of the case (CAS 2004/A/587, para. 8.2). This rule was subsequently supplemented by the Panel in case CAS 2005/A/902-903 which found that since the parties had subjected themselves to the FIFA Statutes and the CAS Code, and since FIFA has its seat in Zurich, the matter would be settled by application of Swiss law (CAS 2005/A/902-903, para. 16 and 36).
19. In addition, in the case CAS 2005/A/983-984 the Panel added:
- “Pursuant to article 60(2) of the FIFA Statutes, the Arbitration Code of Sports of the CAS regulates which the applicable law is. CAS applies first and foremost the various FIFA regulations, and additionally, Swiss Law”* (CAS 2005/A/983-984, para. 37).
- “It is not only desirable but also indispensable that the rules regulating sports at an international level are uniform and coherent all over the world. To guarantee compliance on a global level, such regulations cannot be applied differently in one country from another, particularly due to the interference of domestic law and domestic sports*

rules. The principle of the universal application of the FIFA rules acts in response to the need for legal rationality, security and foreseeability. All members of the Football family are subject to the same standards published and known to everyone, to ensure respect for equality of treatment around the world” (CAS 2005/A/983-984, para. 24).

[Clarifications made by the Panel]

20. More recently, in case CAS 2007/A/1298-1300 the CAS Panel affirmed that:

“Since chapter 12 of the Swiss Private International Law Act (‘PILact’) governs all international arbitrations with their seat in Switzerland and this arbitration constitutes an international arbitration with its seat in Switzerland as defined by article 176 of the PILact, article 187 PILact is the underlying conflict-of-law rule which is applicable in determining the governing rules of law” (CAS 2007/A/1298-1300, para. 71).

“Article 187 of the PILact gives the parties a large degree of autonomy in selecting the applicable rules of law – including the possibility of choosing conflict-of-law rules (to determine the governing substantive law), a national law or private regulations. Moreover, the parties’ choice can be tacit, e.g. result from their conduct during the proceedings” (CAS 2007/A/1298-1300, para. 83).

21. In this case, the parties have argued in their pleadings on the basis of Swiss law in addition to the applicable FIFA Regulations. Furthermore, the parties included in article 10 of the Transfer Agreement a specific provision on the applicable law:

“It is expressly agreed between the parties that the current contract is subject to the FIFA Regulations and in particular as they are in force on September 1, 2001”.

22. Consequently, the Panel deems applicable the 2001 edition of the FIFA Regulations rather than the 2005 or 2008 editions for two reasons: first, that the Transfer Agreement provided that the 2001 version of the FIFA Regulations would be applicable to the contract; and second, that the relevant contracts at the basis of the present dispute were signed in July 2003 and June 2004. Additionally, Swiss law is also applicable.

Merits of the dispute

23. In order to determine whether Respondent is entitled to receive a compensation payment from Appellant for the transfer of the player R. as ordered by the PSC, the Panel must answer the following questions:

- a) Was the Transfer Agreement validly concluded?
- b) If so, was the Transfer Agreement duly performed by the parties? In other words, did the parties fulfil their obligations under the Transfer Agreement?
- c) Depending on the answer to question b), what are the legal consequences for a party’s failure to fulfil its obligations under the Transfer Agreement?

A) *Validity of the Transfer Agreement*

24. The Appellant submits that it is under no obligation to pay the Transfer Fee to Respondent because the Transfer Agreement is null due to the fact that Respondent falsely represented owning the transfer rights over the Player and entered into an agreement for the transfer of the Player without having any rights in that regard. Appellant claims that the Assignees and not Respondent held the transfer rights over the Player. Alternatively, Appellant claims that even if the Panel found that Respondent held “federative rights” over the Player, these would not have been sufficient to confer economic rights over the Player.

25. To determine whether the Transfer Agreement was validly concluded, the Panel has to determine whether Respondent was entitled to transfer the player to Appellant. In this regard, the Panel analyzes the following provisions of the FIFA Regulations which govern the registration and transfer of players between associations.

26. Article 5 of the FIFA Regulations (edition 2001) states:

1 Every player wishing to play as an amateur or non-amateur in any competition organised or recognised by a national association shall be registered with that association.

2 Players may only be registered to play with a national association during one of two registration periods per year, as laid down by the national association for this purpose, with a limit of one transfer of registration per player in the same sports season in a period of 12 months. One of these periods (“registration periods”) is fixed for the end of the season and another period for the middle of the season.

3 National associations can only register players coming from another association subsequent to the receipt of (i) a certificate of transfer of registration from that other association (hereunder referred to as the “international registration transfer certificate”) and (ii), in the case of a non-amateur, a copy of the player’s contract with his new club.

[...]

27. Additionally, article 6 of the FIFA Regulations (edition 2001) provides:

1 An amateur or non-amateur player who has become eligible to play for a club affiliated to a national association may not be registered with a club affiliated to another national association unless the latter has received an international registration transfer certificate issued by the national association which the player wishes to leave.

2 A national association may only request an international registration transfer certificate from the national association which the player wishes to leave if the club which the player wishes to join submits its request for registration in a timely manner, i.e., during a registration period fixed by the national association which is to request the certificate.

3 Upon receiving the request, the national association of the former club shall immediately request that club and the player to confirm whether the contract has expired, whether early termination was mutually agreed, or whether a contractual dispute exists.

[...]

28. From the evidence presented in this case, the Panel makes the following findings:
- a) first, R. signed two employment contracts with Respondent to play as professional player from July 21, 2003 until Dec. 3, 2005 (as shown in Respondent's Exhibit 1);
 - b) second, both employment contracts were validly registered with the AUF (as evidenced by Respondent's Exhibit 1); and
 - c) third, on June 16, 2004, Appellant and Respondent entered into an agreement for the Transfer of the player R. to Genoa (as confirmed by Appellant's Exhibit 2).
29. As a result, the Panel finds that Respondent was entitled to transfer R. to Appellant, due to the fact that R. was a registered player under contract with Maldonado at the time of conclusion of the Transfer Agreement.
30. The Panel does not need to decide whether the July 9, 2003 Contract, was valid. Indeed, the existence itself of such a contract is irrelevant as with regard to the validity of a transfer agreement. For international registration purposes, it is only the club, as employer, that is able to transfer a player under an employment contract to another club. The fact whether further "internal" arrangements may exist between investors, the player and even the club itself, does not matter, as it does not have any legal impact on the validity of the Transfer Agreement.
- B) *Parties' fulfilment of their obligations under the Transfer Agreement*
31. By virtue of the Transfer Agreement, Appellant committed to the payment of a transfer compensation of EUR 750,000 and Respondent committed and engaged its best for the release of the ITC needed under articles 5 and 6 of the 2001 edition of the FIFA Regulations to register R. as a member of Genoa's professional team in Italy (as shown in Appellant's Exhibit 2).
32. From the submissions and all information filed in this case, the Panel makes the following findings:
- a) first, by the correspondence addressed to the AUF and dated July 8, 2004, Respondent gave its authorization for the definitive transfer of R. to Genoa, member of the FIGC (as shown in Respondent's Exhibit 2);
 - b) second, the ITC for the release of R. was issued by the AUF on July 21, 2004 (as confirmed by Respondent's Exhibit 2);
 - c) third, R. concluded an employment contract with Appellant (as recognized by the parties during these proceedings in their submissions dated September 23, 2008);
 - d) fourth, R. played for Genoa during the 2004/2005 season (as recognized by the parties during these proceedings in their submissions dated September 23, 2008);
 - e) fifth, the parties agree that the amount of EUR 250,000 was paid by Appellant to Respondent (according to paragraph 15 of the Appeal Statement, paragraph 5 of the

Appeal Brief, page 3 of the Answer to the Appeal Brief and in the third section of Respondent's first submission to FIFA dated June 15, 2005); and

- f) last, during the proceedings before the PSC, Appellant recognized its obligation to pay the outstanding amount of EUR 500,000 (as it can be seen in the letters sent by Genoa to FIFA and Respondent dated January 16, 2006 and October 7, 2006).
33. Consequently, the Panel rules that Respondent fulfilled its obligations under the Transfer Agreement, as the ITC was issued, R. entered into an employment contract with Appellant, R.'s transfer was validly completed and he played for Genoa during the 2004-2005 season. In contrast, Appellant partially failed to fulfil its obligations under the Transfer Agreement, as it still owes Respondent EUR 500,000 for the transfer of R. under article 4 of the Transfer Agreement.
- C) *Legal consequences of a party's failure to fulfil its obligations under the Transfer Agreement*
34. According to the article 4 of the Transfer Agreement, Respondent should have received a total amount of EUR 750,000 for the transfer of the player R.
35. In the different submissions made by the parties before this Panel, the parties acknowledged that the amount of EUR 250,000 had already been paid to Respondent (see paragraphs 5 and 31 of the Appeal Brief; paragraph 4 of the merits section of the Answer to the Appeal Brief).
36. This acknowledgment by the parties was also made during the proceedings before the PSC (see Respondent's letter dated August 20, 2005 to the AUF; FIFA's letter dated November 30, 2005 to the FIGC).
37. Moreover, the PSC also acknowledged the payment of EUR 250,000 in paragraph 7 of its decision dated October 27, 2007.
38. Since the Transfer Agreement was validly concluded, Respondent fulfilled its obligations under the Transfer Agreement and no evidence of further payments has been submitted to this Panel, the Panel upholds the PSC's conclusion that Respondent is entitled to receive the outstanding amount of EUR 500,000 as payment for the transfer of the player R.

Interests

39. In its Answer to the Appeal Brief, Respondent requested to obtain confirmation of the PSC decision, which had ordered Appellant to pay Respondent EUR 500,000, plus 5% annual interest rate as from the dates that the different instalments became due pursuant to article 5 of the Transfer Agreement, which reads:

“Article 5 – Payment Method

The transfer repayment mentioned under the article above, that the ‘Genoa Cricket and Football Club’ commits to pay, shall be transferred as follows:

- a) a first instalment of EUR 200,000 (euro two hundred thousand) shall be paid by means of bank transfer on the bank account indicated in the enclosure “A” within 24 hours from the signature of this agreement.*
- b) a second instalment of EUR 100,000 (euro one hundred thousand) shall be paid within and no later than October 1, 2004.*
- c) a third instalment of EUR 100,000 (euro one hundred thousand) shall be paid within and no later than December 1, 2004.*
- d) a fourth instalment of EUR 100,000 (euro one hundred thousand) shall be paid within and no later than February 1, 2005.*
- e) a fifth instalment of EUR 100,000 (euro one hundred thousand) shall be paid within and no later than April 1, 2005.*
- f) a final instalment of EUR 150,000 (euro one hundred fifty thousand) shall be paid within and no later than June 1, 2005”.*

- 40. In the translated documents available to the Panel the parties had failed to stipulate the interest rate applicable in case of payment default. Consequently, the Panel applies the principles of Swiss law on interests, according to which the Panel is satisfied that the Respondent is entitled to receive interests at the annual legal rate of 5% for the obligations not performed under the Transfer Agreement as from the date in which the parties had agreed upon for the performance.
- 41. In this regard, article 102 of the Swiss Federal Code of Obligations (“SWISS CO”) provides:
*“Where an obligation is due, the creditor may put the debtor in default by demanding performance.
Where a certain date has been agreed upon for the performance, or where such a date results from a stipulated notice duly given, the debtor is in default on the expiration of such date”.*
- 42. Concerning the legal interest rate applicable, article 104 of the SWISS CO states:
“Where the debtor is in default with the payment of a money debt, he shall pay thereon 5% interest per annum, irrespective of a lower contractual rate of interest. [...]”.
- 43. Consequently, the Panel confirms the PSC decision dated October 25, 2007 and orders Appellant to pay Respondent the outstanding amount of EUR 500,000, plus 5% annual interest rate on EUR 50,000 as from 1 October 2004, plus interests of 5% per annum on EUR 100,000 as from 1 December 2004, interests of 5% per annum on EUR 100,000 as from 1 February 2005, interests of 5% per annum on EUR 100,000 as from 1 April 2005 as well as interests of 5% per annum on EUR 150,000 as from 1 June 2005.
- 44. This conclusion, finally, makes it not necessary for the Panel to consider the other requests submitted by the parties. Accordingly, all other prayers for relief are rejected.

The Court of Arbitration for Sport rules:

1. The appeal filed by Genoa Cricket and Football Club S.p.A. against the decision issued on October 25, 2007 by the Players' Status Committee of FIFA is rejected.
2. The decision issued on October 25, 2007 by the Players' Status Committee of FIFA is confirmed.
3. Genoa Cricket and Football Club S.p.A. is ordered to pay to Club Deportivo Maldonado the amount of EUR 500,000 (five hundred thousand euro) plus interest as established by the PSC decision dated October 25, 2007 as transfer compensation under article 4 of the June 16, 2004 transfer agreement for the professional football player R.
4. (...)
5. (...)
6. All other prayers for relief are rejected.