Arbitration CAS 2010/A/2193 Club Cagliari Calcio S.p.A. v. Club Olimpia Deportivo, award of 15 September 2011

Panel: Mr Efraim Barak (Israel), President; Mr José Juan Pinto (Spain); Mr Michele Bernasconi (Switzerland)

Football
Transfer agreement
Admissibility of a counterclaim/good faith
Validity of the agreement between the parties
New evidence

1. **Under the 2010 edition of the Code it is not any longer possible to submit a counterclaim at the late stage of the filing of the Answer to an Appeal. Even if clearly not admissible, it could be questioned whether the counterclaim should be admitted on the basis of the protection of good faith because the respondent was misled by the content of a document referring to the CAS Rules in force prior to 1 January 2010 (i.e. the "2004 edition"), enclosed with the notification of the appealed decision. However, the protection of good faith ceases when a party or its legal representative could and should have realized that the indication given by the notifying body or authority was incorrect, by simply consulting the regulations in force.**

2. **There is no reason to put into question the conclusions of an independent expert regarding the genuineness of the signature appearing on a contract. As regards the evidence that the signature of a document is genuine, a one hundred percent proof is not always possible. In this respect, even if the expert mentions that the hypothesis of a forgery is not fully excluded, the conclusion of the expert report according to which it is more likely that the questioned signature is genuine should be followed.**

3. **Only exceptional circumstances, according to Art. R56 of the Code, should lead a panel to authorize a party to specify further evidence, after the submission of the Appeal Brief and of the Answer. In this respect, the appointment of another expert should not be authorized especially where the independent expert reports are full and complete and where the party had full opportunity to comment on them.**

Club Cagliari Calcio S.p.A. ("the Appellant" or "Cagliari Calcio") is a football club with its registered office in Cagliari (Sardinia), Italy. It is affiliated to the Federazione Italiana Giuoco Calcio, which in turn has been affiliated with the Fédération Internationale de Football Association (FIFA) since 1905.

FIFA is an association established in accordance with Art. 60 ff. of the Swiss Civil Code and has its seat in Zurich (Switzerland).

Club Olimpia Deportivo ("the Respondent" or "Olimpia Deportivo") is a football club with its registered office in Tegucigalpa, Honduras. It is affiliated to the Federaciòn Nacional Autònoma de Futbol de Honduras, which in turn has been affiliated with FIFA since 1946.

The football player D. ("the Player"), born in 1979, played on a regular basis for the first team of the Respondent, until 1999.

In May 1999 the Respondent has been contacted by a company named X. SA, which has its seat in Montevideo (Uruguay). It appeared to the Respondent that X. SA had some knowledge of the European football clubs, which the Respondent considered as interesting in the view of transferring the Player to Europe. X. SA exposed in that respect that the Italian club of Cagliari Calcio had expressed interest for the acquisition of the Player.

On 23 May 1999, a fax letter has been sent from the Respondent to X. SA, in Uruguay. This fax letter, drafted in Spanish, is entitled *"Mandato"*, which can be translated into English as *"Mandate"* and is signed by the president of the Respondent. It reads, in pertinent parts, as follows:

> *"Club Olimpia Deportivo, (…), give mandate to the firm X. SA (…), represented by the players' agent, P., to negotiate the terms and conditions of the selling of the player D. (born in 1979) to the Club of Cagliari Calcio Spa on behalf of Club Olimpia Deportivo".*

It had furthermore been agreed that the Respondent would pay remuneration to X. SA equal to 10 % of the amount of the transfer fees.

Negotiations took place between the Respondent, the Appellant and the Player. To finalize these negotiations, a trip was organized, in order for representatives of the Respondent to meet representatives of the Appellant, in Cagliari (Italy), and in order for the Player to pass the medical review. The Player, accompanied by O., Sports Director of the Respondent, travelled from Honduras to Miami, where they were joined by P., manager of X. SA and mentioned as a players' agent in the mandate given by the Respondent to X. SA. From Miami, they travelled with P. to Rome, where they were joined by another Player's agent, V. They finally travelled from Rome to Cagliari, where they arrived on 1st June 1999, in the morning.

On 1st June 1999, several meetings took place between the Player, his agents V. and P., O., and M., president of the Appellant.

According to the witness statement of P. filed by the Appellant, a meeting took place on 1st June 1999, in the Appellant's head office, between the respective chairmen of the two clubs involved, that is M., for the Appellant, and J., for the Respondent. The presence of J., in Cagliari, on 1st June 1999, is however denied by other pieces of evidence, namely the witness statement of J. himself and his testimony at the hearing, the witness statement of O. and also the witness statement of V. that was submitted by the Appellant. After due consideration, the Panel is clearly of the opinion that it cannot be retained that J. was physically present in Cagliari, on 1st June 1999. In that respect, the Panel will

rely on the witness statement of V., which has confirmed orally at the hearing on 1st February 2011 that J. was not present in Italy when the deal was closed, on 1st June 1999. The Panel is also of the opinion that the witness statement of P. is not to be taken into account, if not confirmed by other evidence, because P. decided at the last moment not to appear at the hearing held in front of the Panel, and by this surprising even the Appellant and its Counsel. Moreover, the Panel found that there were contradictions between the written witness statement of P., and the testimony of the president of the Appellant, who testified orally at the hearing.

According to V., various agreements were discussed and amended, during the day of 1st June 1999. The discussions turned around the price of the transfer fee, which the Appellant wanted to reduce. At the hearing, V. explained that P. led the negotiations for the Respondent but he also testified that P. seemed to have a previous understanding or agreement with the Appellant, as to his fees in respect of the transaction. V. understood that at one point of the negotiations, P. accepted to reduce the fees which had been agreed with the Appellant, in order to have the deal done between Appellant and the Respondent.

The claim of Olimpia Deportivo was based on a document signed by M., in his capacity of president of Cagliari Calcio, on behalf of the Appellant, and by J., in his capacity of president of Olimpia Deportivo, on behalf of the Respondent. It is indicated under the signature of M. *"Cagliari, 1th (sic) June 1999"*. Under the signature of J., there is no indication as to the date and to the place. This document carries the official letterhead and stamp of Cagliari Calcio and reads, in pertinent parts, as follows:

"AGREEMENT

Between

Cagliari Calcio S.p.A., Via Tuveri, 128-0900 Cagliari – Italy

And

Club Olimpia Honduras

Regarding the transfer of the player D. by mean of this document.

1) *Cagliari Calcio S.p.A. will pay to the club Olimpia the total sum of 2,200,000 USD (two millions US Dollars) free of any additional tax. The payment will be suddivided (sic) in the following way:*

   A) a) 2,000,000 USD (two millions of US Dollars) will be paid to the Club Olimpia for the federation right of the player.

   b) 200.000 USD (two hundred thousand US Dollars) to the Federacion de Football de Honduras for the 10 % tax.

   B) Modality of payment

   a) 1,200,000 USD (one million two hundred thousand US Dollars) will be paid on the 30th July 1999;

   b) 1,000,000 USD (one million US Dollars) will be paid on the 30th July 2000;

   c) Club Olimpia will immediately send the transfer of the player as soon it will receive the total sum guarantee in the form of a stand-by letter of credit in the name of Club Olimpia Deportivo de Futbol de Honduras to be confirmed by Banco Mercantil de Honduras S.A. (BAMER,

S.A.) that will be issued the 30th July 1999 by Banco di Sardenia on behalf of Cagliari Calcio S.p.A.

2) *In case of a future transfer of the player from Cagliari Calcio S.p.A. to a third club, and in case that the revenue will be superior of the sum paid to the Club Olimpia as a transfer fee (point A)a)), Cagliari Calcio S.p.A. will pay to the Club Olimpia the following royalties calculated on the difference between the sum of point A)a) and the sum received by the other club:*

a) 20 % (twenty percent) if the transfer will be less of 7,000,000 USD (seven millions US Dollars);

b) 15 % (fifteen percent) if the transfer will be major of 7,000,000 USD (seven millions US Dollars)".

The Appellant challenges the validity of this document. It has requested the original copy of the document to be submitted to an independent expert. Acceeding to this request, the Panel has commissioned an independent expert, Dr Raymond Marquis, to analyse the authenticity of the document. A first expert opinion has been filed on 12 January 2011. Dr Raymond Marquis has been heard at the hearing held on 1st February 2011. A second expert opinion was requested by the Panel as a result of various arguments raised by the Appellant in respect of the first opinion. The second opinion was also drafted by Dr Raymond Marquis, and filed on 20 April 2011. The conclusions of these expert opinions will be discussed hereunder.

Based on the assumption that J. was not present in Italy on 1st June 1999, the Panel will retain as a matter of fact that the above mentioned agreement between the Respondent and the Appellant has been signed by M. on the 1st of June 1999, although J. signed this document in an unknown date after the 1st of June 1999. As explained convincingly by O. and J., it is only after the return of O. in Honduras that the president of the Respondent put his signature on this document.

Also on 1st June 1999, the date in which M. signed the agreement between the clubs, another agreement has been signed, by Cagliari Calcio and by P. This agreement carries the signature of the president of the Appellant, M., and the signature of P., designated as *"agent"*. This agreement is drafted on a document carrying the official letterhead and stamp of the Appellant and reads, in pertinent parts, as follows:

"AGREEMENT

Between

Cagliari Calcio S.p.A., via Toveri, 128-0900 Cagliari – Italy

And

P.

regarding the transfer of the player D. by mean of this document

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Cagliari Calcio S.p.A. will pay to the Club Olimpia the total sum of 2,200,000 USD (two millions two hundred of US Dollars) free of any additional tax. The payment will be suddivided (sic) in the following way:

A) a) 2,000,000 USD (two millions of US Dollars) will be paid to the Club Olimpia, for the federation right of the player.

b) 200,000 USD (two hundred thousand US Dollars) to the Federacion de Football de Honduras for the 10 % tax.

B) In case of a future transfer of the player from Cagliari Calcio S.p.A. to another club, and in case that the revenue will be superior of the sum plaid to the club Olimpia as a transfer fee (point A) a)), Cagliari Calcio S.p.A. will pay to P. the following royalties calculated on the difference between the sum of point A)a) and the sum received by the other club:

a) 10 % (ten percent) if the transfer will be less of 7,000,000 USD (seven millions US Dollars);

b) 15 % (fifteen percent) if the transfer will be major of 7,000,000 USD (seven millions US Dollars);

c) to complete the economic obligations of which to the point 1), such agreement cancels and replaces every former agreement regarding royalties between the interested parties".

On 26 June 2007, the Appellant and the Italian Club FC Internazionale Milano S.p.A. concluded a transfer agreement in respect of the Player for a total net amount of EUR 14,000,000.

On 12 July 2007, P. requested the Appellant to pay an amount corresponding to 15 % of the amount realized by selling the Player to the club Internazionale Milano. The Appellant refused this request, submitting that no such agreement existed. After various meetings between P. and the president of the Appellant, during which the original document signed on 1st June 1999 between the Appellant and P. was showed, the Appellant accepted to pay to P. an amount of USD 1,000,000. In that respect, an agreement in writing has been signed between the Appellant and P., on 26 July 2007.

On 10 October 2007, the president of the Respondent sent an e-mail to the Appellant in which he mentioned that he had attempted to arrange a meeting with the Appellant club in order to discuss the transfer of the Player to Internazionale Milano and the corresponding obligations deriving from the agreement signed in 1999 and that, as a result of the lack of answer from the Appellant's side, he would be obligated to initiate proceedings with FIFA.

By letter dated 18 October 2007, the Appellant fully rejected the content of the e-mail dated 10 October 2010, as having no basis in fact or in law.

On 1st November 2007, the Respondent lodged a claim at FIFA against the Appellant, claiming a payment of at least USD 2,514,723 for the subsequent transfer of the Player (15 % of the difference between USD 18,964,820 and USD 2,200,000).

On 22 March 2010, the FIFA Single Judge of the Players' Status Committee issued the following decision (the "Decision") on the claim presented by the Respondent:

"1. The claim of the Claimant, Club Olimpia Deportivo, is accepted.

2. The Respondent, Club Cagliari Calcio, has to pay to the Claimant, Club Olimpia Deportivo, the amount of USD 2,514,723 in six instalments as follows:

a. USD 514,723 within 30 days as from the date of notification of this decision;

b. USD 400,000 within 60 days as from the date of notification of this decision;

c. USD 400,000 within 90 days as from the date of notification of this decision;

d. USD 400,000 within 120 days as from the date of notification of this decision;

e. USD 400,000 within 150 days as from the date of notification of this decision;

f. USD 400,000 within 180 days as from the date of notification of this decision.

3. In the event of non-payment of one of the aforementioned instalments within the stated time-limits, the remaining unpaid instalment(s) will fall due immediately and an interest rate of 5 % per year will apply on the total unpaid amount as of the day after the relevant unpaid instalment should have been made. Furthermore, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for its consideration and decision.

4. The Claimant, Club Olimpia Deportivo, is directed to inform the Respondent, Club Cagliari Calcio, immediately and directly of the account number to which the remittances are to be paid and to notify the Players Status Committee of every payment received.

5. The final amount of costs of the proceedings amounting to CHF (…) are to be paid by the Respondent, Club Cagliari Calcio, within thirty days as from the notification of the present decision to the following bank account, with reference to case nr mlt 08- 00227 (…)".

On 20 July 2010, the Single Judge of the Players' Status Committee issued the grounds of the Decision, stating as follows in relevant parts:

"(…)

10. In this respect, the Single Judge recalled that based on the argumentations put forward by the Respondent and upon petition of the latter, the Claimant was requested to provide an original copy of the transfer agreement dated 1 June 1999, with the aim of verifying if such agreement had in fact been destroyed by the parties. In this regard, the Single Judge took due note that the Claimant duly complied with FIFA's request and provided an original copy of the mentioned agreement. Upon examination of such agreement, the Single Judge duly determined that such agreement contained all stipulations described in point II.5 above and also bore the apparent signature of the Presidents of the Claimant and the Respondent.

(…)

14. Due to the aforementioned, the Single Judge started by analysing all of the documentation contained in the file, and in particular the following agreements provided by the Respondent and allegedly concluded with P:

a) agreement dated 1 June 1999 (cf. point II.8 c. above) and by means of which the latter was supposedly assigned all transfer rights by the Claimant relating to a possible subsequent transfer of the player; and,

b) agreement dated 26 July 2007 (cf. point II.8 d. above) by means of which the Respondent and P. supposedly agreed that the latter will receive the payment of USD 1,000,000 in connection with the subsequent transfer of the player, instead of the previously agreed amount.

15. In this regard and after the analysis of the mentioned agreements, the Single Judge duly established that such agreements are not signed by the Claimant nor contained any indication that the Claimant agreed (or authorized) for P. to be assigned any entitlement for the subsequent transfer of the player. Furthermore and from the analysis of all other documentation contained in the file, the single judge also determined that the Respondent did not provide any substantial documentary evidence that P. was entitled to represent the Claimant in the conclusion of

any of the mentioned agreements or authorized to carry out any negotiations with the Respondent in relation to any entitlement of the Claimant in relation to the subsequent transfer of the player.

(…)

19. In this respect, the Single Judge established that, in accordance with the transfer agreement validly concluded between them, the Claimant is entitled to receive from the Respondent an amount for the sell on of the player calculated on the difference between the sum paid as transfer compensation by the third club and the transfer compensation paid to the Claimant as follows: a) 20 % if the transfer amount would be less than USD 7,000,000; and, b) 15 % if the transfer amount would be more than USD 7,000,000. In the present case and in view of the fact that the player was transferred to Internazionale for a transfer compensation of EUR 14,000,000, the Single Judge determined that the Claimant is entitled to receive the 15 % of the difference between the sum paid as transfer compensation by the third club and the transfer compensation paid to the Claimant.

20. Due to the aforementioned, the Single Judge concluded that the Respondent, who acted in breach of the transfer agreement concluded with the Claimant, has to pay the latter the claimed amount of USD 2,514,723. Consequently, the Single Judge decided that the Claimant's claim is accepted".

By a fax dated 20 July 2010, FIFA, on behalf of the Players' Status Committee, served the Decision on the parties. Enclosed with the Decision served by fax was a document entitled *"Directions with respect to the appeals procedure before CAS (Code of Sports-Related Arbitration, 2004 edition)"* (emphasis added). On the second page of this document, under point 5, it was stated that *"Within 20 from the receipt of the appeal brief, the Respondent shall submit to the CAS an answer containing the following elements: (…) any counter-claim (…)".* At the bottom of the second page of this document was also mentioned that *"In case of discrepancy between the present document and the Code, the provisions of the Code shall prevail".*

On 9 August 2010, Cagliari Calcio filed a Statement of Appeal with the Court of Arbitration for Sport (CAS). It challenged the Decision and submitted the following requests for relief:

"1. To fully accept the present Appeal.

2. As consequence, to annul the appealed Decision of the FIFA Single Judge of the Players' Status Committee passed in Zurich, Switzerland, on 5 March 2010 and to state that all claims lodged by the Club Olimpia Deportivo are rejected and, therefore, Cagliari Calcio S.p.A. shall not pay any amount to the Respondent.

3. As consequence, to order the Club Olimpia Deportivo to pay any and all costs of the proceedings before the Single Judge of the Professional Player's Committee (sic) equal to CHF (…) (… Swiss Francs Only).

4. For the effect of the above, to state that the Respondent shall be condemned to pay any and all costs of the present arbitrational (sic) proceedings including, without limitation, attorney's fee as well as any eventual further costs and expenses for witnesses and experts".

On 19 August 2010, Cagliari Calcio filed its Appeal Brief with exhibits.

On 11 October 2010, the Respondent filed its Answer.

By letter dated 26 October 2010, the parties were notified that the Panel had decided to adopt the following procedural measures:

> *"(i) In accordance with Art. R44.3, applied by reference of Art. R57 of the CAS Code, the CAS will commission an independent expert to analyze the authenticity of the document dated 1 June 1999, once such document will be received by the CAS.*
>
> *(…)*
>
> *(ii) The Appellant's request under point 3 of its Appeal Brief (page 43) is rejected. The Panel considers that should the Appellant had wished the agreement of 1 June 1999 to be analysed by its own expert, it should have asked the Panel at first to allow an expert designated by the Appellants to examine the document, and then submit such expertise to the Panel and the other party before requesting the Panel to appoint an independent expert to analyze it.*
>
> *The parties will have the opportunity to file its comments as regards the expert's report and interrogate the expert at the hearing.*
>
> *(iii) The Appellant's request under point 4 of its Appeal Brief (page 43) is rejected. The Panel considers that the conditions set under Art. R44.3 para. 1 of the CAS Code are not met in the present case. The Respondent has expressly stated within its Answer (see Chapter II § 6) that the original requested document does not exist. Hence, the Panel cannot order a party who states that a document does not exist to submit same document unless, of course, the other party convinced the Panel (by any valid and reasonable evidential mean) that the original document does exist and is in the possession of the denying party. These conditions were not met in the present case and the Appellant has not demonstrated that such document exists and is in the possession of the Respondent.*
>
> *(iv) The Respondent's request for the Panel to direct the Appellant to revise its Appeal Brief (Chapter II § 6 of the Answer) is rejected. It is the Panel's view that the Appeal Brief is in full compliance of Art. R51 of the CAS Code and therefore it's admitted".*

On 3 November 2010, FIFA filed a copy of its complete file, upon request of the Panel.

On 22 December 2010, Dr Raymond Marquis, member of the "Institut de police scientifique" of the University of Lausanne, was given the mission, as expert appointed by the Panel in the present proceedings, of establishing whether or not the signature of M., on the agreement between the parties dated 1 June 1999, is genuine or has been forged. Based upon other documents signed by M., provided by the Appellant to the CAS and forwarded by the CAS to the expert, Dr Raymond Marquis issued an expert report, dated 12 January 2011, which concludes as follows:

> *"In conclusion, the findings support the hypothesis that the questioned signature in the name of M. on the questioned agreement with a header and logo from CAGLIARI CALCIO, dated June 1, 1999, was written by the same individual who signed the known documents in the name of M.".*

Upon notification of the expert report of Dr Raymond Marquis dated 12 January 2011, the parties were given the opportunity to file any comments, within a deadline of one week.

On 24 January 2011, the Appellant filed comments on the expert report dated 12 January 2011.

Also on 24 January 2011, the Respondent filed comments on the expert report dated 12 January 2011, stressing that, as an outcome of the expert opinion, the expert stated that according to all circumstances which were considered, that *"Even if the forgery hypothesis is not impossible, the findings are more likely under the hypothesis that the questioned signature was written by M."*.

On behalf of the Panel, the CAS Court Office issued an Order of Procedure dated 19 January 2011, which was returned duly signed by the representative of both parties, on 23 January 2011 for the Appellant and on 25 January 2011 for the Respondent.

A hearing was held on 1st February 2011, in Lausanne. The Appellant was represented by its President, M., assisted by Ettore Mazzilli, attorney-at-law. The Respondent was represented by O., Sporting Director, assisted by Andreas Käser, attorney-at-law.

During the hearing, the Panel appointed expert, Dr Raymond Marquis, has been heard. The expert confirmed that he did not verify the genuinity of the logo and of the stamp of the Appellant on the document allegedly signed by M. and J. The expert also explained that his conclusions are based on a 5 level scale according to which level 1 strongly supports that the signature is genuine and level 5 strongly supports it is not. In the present case, his conclusion is to be qualified as a *"level 2"* conclusion, so that it is not categorical. The expert explained that he observed a tremor at the end of the signature, which is best explained under the hypothesis that the signature is genuine.

During the hearing, the Panel heard V., as a witness. Then, M. was also heard. After the hearing of M., the Panel heard J., via teleconference. O., present at the hearing, was also heard by the Panel. Both J. and O. confirmed the content of their witness statement.

At the end of the hearing of 1st February 2011, it was agreed between the Panel and the parties that a final deadline, on 23 February 2011, would be set to the parties to submit their respective closing statements, in writing.

In its written closing statement dated 23 February 2011, the Appellant confirmed the prayers for relief submitted in the Appeal Brief and requested, alternatively, the CAS to accept its Appeal, annul the appealed Decision and refer the case back to a competent judicial body of FIFA for a new decision.

In its written closing statement dated 23 February 2011, the Respondent asked the Panel to render its Award in accordance with the reliefs sought in its statement of defence.

As already exposed here above, the expert appointed by the Panel, Dr Raymond Marquis, was requested after the hearing held on 1st February 2011 to carry out further examinations on the document signed by M. and J., in order to check whether the said agreement is genuine or not. On 20 April 2011, Dr Marquis issued a second expert report, which concluded as follows:

> *"The letterhead of the questioned agreement is authentic. The signature in the name of M. was signed after the printing toner. The toner differs from the toner found on the reference documents, which show between them different toners, or printing technologies (i.e. laser or inkjet). The paper of the questioned documents was not found to be different, regarding optical properties, to contemporaneous reference documents.*

In summary, no evidence was found to demonstrate that the questioned agreement between Cagliari Calcio S.p.A. and Club Olimpia Honduras, dated the 1st June 1999, is not genuine".

Upon notification of this report, the parties were given the opportunity to file their comments, within one week.

LAW

CAS Jurisdiction

1. The proceedings have been initiated by CAS on 12 August 2010, following the filing of the Statement of Appeal on 9 August 2010. Consequently, according to Art. R67 of the Code of Sports-related Arbitration and Mediation Rules (the "Code"), the provisions of the 2010 edition of the Code are applicable.

2. Art. R47 of the Code provides that 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 if 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. *In casu*, the jurisdiction of CAS is based on Art. 63 para. 1 of the FIFA Statutes and is confirmed by the signature of the Order of Procedure dated 19 January 2011, on 23 January by the Appellant and on 25 January by the Respondent, whereby the parties expressly declared the CAS to have jurisdiction to resolve the dispute. Moreover, in their correspondence with the CAS, the parties have at no time challenged the CAS general jurisdiction.

3. The mission of the Panel follows from Art. R57 of the Code, according to which the Panel has full power to review the facts and the law of the case. Furthermore, Art. R57 of the Code provides that the Panel may issue a new decision which replaces the decision challenged or may annul the decision and refer the case back to the previous instance.

Applicable law

4. Art. R58 of the Code provides that:

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

5. Art. 62 para. 2 of the FIFA Statutes provides for the application of the various regulations of FIFA and, additionally, for Swiss law. In the present proceedings, the Appeal is directed against a decision of FIFA and the jurisdiction of CAS is to be found in the FIFA Statutes, as stated above. The provision of the second sentence of Art. 62 para. 2 of the FIFA Statutes is in consequence to be respected and the rules and regulations of FIFA shall apply primarily and Swiss law shall apply complementarily.

6. The questions raised by the present matter do not concern directly the application of any specific article of the FIFA Regulations. The provisions of Swiss law will in consequence have to be applied. The application of Swiss law is not disputed by the parties. In its Appeal Brief, the Appellant has exposed that the present dispute shall be decided in accordance with all relevant and applicable FIFA Regulations and subsidiarily by Swiss law. In its statement of defence, the Respondent has agreed that Swiss law shall subsidiarily be applicable to this case. Finally, both parties have based their legal submissions on Swiss law.

Admissibility

7. The Statement of Appeal filed by the Appellant was lodged within the deadline provided by Art. 63 of the FIFA Statutes, namely 21 days from the notification of the Decision. The Appellant complied with all the other requirements of Art. R48 of the Code, including the payment of the Court Office fee.

8. It follows that the Appeal filed by the Cagliari Calcio is admissible, which is undisputed.

9. The admissibility of the counterclaim raised by the Respondent in the Statement of Defence is disputed. The Respondent submits that FIFA attached to the Decision an old wording of the Code, which should lead to the conclusion that the counterclaim is admissible. It is however clear that the aim of the amendment of the Code in the 2010 edition, in respect of Art. R55, was to abolish the possibility to file a counterclaim. Art. R55 has been modified and the wording *"Any counterclaim"* has been withdrawn from para. 1 of the said Article. The fact that the 2010 edition of the Code do not literally stipulates that a counter appeal can no longer be submitted does not change the above mentioned conclusion. The possibility to submit a counter appeal within the framework of an already existing appeal is a procedural right which does not exists *per se* unless it is clearly granted under the Regulations or the Code governing the proceedings. Therefore, the amendment of the Code, by abolishing the previous existing possibility to submit a counterclaim, was enough in order to bring about the result embodied in the abovementioned intention, i.e. that under the 2010 edition of the Code it is not any longer possible to submit a counterclaim at the late stage of the filing of the Answer to an Appeal.

10. Even if clearly not admissible, according to the Rules in force, it could be questioned whether the counterclaim should be admitted on the basis that the Respondent was misled by the content of the document entitled "Directions", referring to the CAS Rules in force prior to 1 January 2010 (i.e. the "2004 edition"), enclosed by FIFA with the notification of the Decision. In that respect, it could be alleged that the Respondent acted in good faith and that good faith has to

be protected, as provided by Art. 9 of the Swiss Constitution and by art. 2 of the Swiss Civil Code. According to the case law rendered by the Swiss Supreme Court, the protection of good faith ceases when a party or its legal representative could and should have realized that the indication given by the notifying body or authority was incorrect, by simply consulting the regulations in force (see decision of the Swiss Supreme Court dated 12 March 2009, published in DTF 135 III 374, cons. 1.2.2.1). It furthermore results from the case law that the party which is not assisted by a lawyer or which has no previous procedural experience will, by a contra indication, be deemed to have been more easily misled.

11. In the present case, the document entitled *"Directions with respect to the appeals procedure before CAS"*, sent with the challenged Decision, is a summary of the applicable procedure provided by Art. R47 and following of the Code, albeit its content is out of date and incorrect. It is not an official CAS document. Furthermore, this document states, at its very end, that *"In case of discrepancy between the present document and the Code, the provisions of the Code shall prevail"*. In consequence, it follows that the party wishing to obtain a clear and reliable information on the possibility to challenge the Decision should not only rely on this document but should seek confirmation of the information provided in this document, by checking the relevant provisions of the Code. These provisions are easily available on the website of CAS. It was not difficult to ascertain, firstly, that the 2004 edition of the Code had been replaced by a 2010 edition and, secondly, that the possibility of lodging a counterclaim in the Answer had been withdrawn from Art. R55 of the Code.

12. In the view of the above, the Panel is of the opinion that the Respondent's counterclaim cannot be deemed admissible, even after due consideration of the principle of protection of good faith. It follows that the counterclaim and that the prayer for relief contained in the Answer shall not be admissible and consequently disregarded. Therefore, the Panel, in the case the Appeal is rejected, shall not award to the Respondent any other or supplementary claim than what has been awarded by the challenged Decision, even in respect of the interests.

Main Issues

13. The main issues to be resolved by the Panel are:

    a) Is the agreement signed between the parties to be considered as authentic and genuine?

    b) Is the validity of the agreement signed between the presidents of the two parties, if deemed as authentic and genuine, affected by the agreement signed by the Appellant and the agent P.?

A. Is the agreement signed between the parties to be considered as authentic and genuine?

14. During the proceedings in front of FIFA and also during the present proceedings, the Appellant objected to the authenticity and genuinity of the signature of its president, M., at the bottom of the agreement signed by J., in his capacity as president of the Respondent (hereinafter the *"Agreement between the parties"*). After the notification of a first expert report dated 12 January

2011, the Appellant submitted that the signature of its president on the above mentioned document could be genuine but that it might be that the document had been modified after the signature of M. Therefore, a complementary second expert report was requested by the Panel on this question.

15. The expert reports filed on 12 January 2011 and 20 April 2011 have confirmed that the signature of M. is more likely genuine than not, on the one side, and that nothing indicates that the document has been modified after the said signature or that some parts of this document have been printed after the signature by M.. Even if, according to the expert, the hypothesis of the forgery of the signature cannot be excluded at one hundred percent, the most probable hypothesis is that the document has been drafted originally with the letterhead of the Club Cagliari Calcio and has then been signed by M.

16. The Panel has no reason to put into question the conclusions of the expert. As regards the evidence that the signature of a document is genuine, a one hundred percent proof is not always possible. In the present case, even if the expert mentions that the hypothesis of a forgery is not fully excluded, the conclusion of the expert report is that it is more likely that the questioned signature is the one of M.. As a matter of fact and of evidence, the Panel is convinced by the conclusion of the expert report. The Panel also based its consideration in this respect on the fact that the Appellant denied the existence of the agreement signed with P., when P. claimed his sell on fee after the transfer of the Player. It thus seems that the Appellant does not keep record of the agreements signed, or does not remember the content of these agreements, when future obligations are stipulated. On the other hand, nothing indicates that the Appellant would have had any opportunity or intention to modify an agreement signed between the parties and to adopt a criminal behaviour.

17. In order for the Panel to establish that the Respondent indeed adopted such behaviour or way of conduct – as would have been the case if the Appellants' allegations would have been confirmed – the Appellant would have had to satisfy its burden of proof. However this was not the case. Furthermore, the Panel finds support to its conclusion also in the sincere testimony of M. at the hearing, where he said more than once that he does not remember having signed the agreement however he could not for sure exclude the possibility that indeed he signed the document.

18. It is finally to be stressed that the Appellant, in its final comments dated 4 May 2011, submitted that the outcome of the case at stake would be entirely independent of the genuinity of the Agreement between the parties.

19. Furthermore, in its comments dated 4 May 2011, the Appellant does not repeat its procedural request to be granted the right to appoint another expert for analysis of the documents. The Panel will in consequence deem that this request is withdrawn. Even if not withdrawn, the Panel would have in any way refused to accede to this request. The Panel considers in that respect that the independent expert reports rendered by Dr Raymond Marquis are full and complete, so that there is no reason to appoint another expert. Moreover, the Appellant has had full opportunity to comment on the expert reports filed by Dr Raymond Marquis and did not

submit any element likely to put into question the content of these expert reports or the conclusions of the expert. There are in consequence no exceptional circumstances, according to Art. R56 of the Code, which should lead the Panel to authorize the Appellant to specify further evidence, after the submission of the Appeal Brief and of the Answer, and to request the appointment of another expert.

20. In conclusion, the Panel is convinced that the agreement between the parties, signed by M. on behalf of Cagliari Calcio and by J. on behalf of Olimpia Deportivo, is genuine.

B. Is the validity of the agreement signed by the presidents of the two parties, being authentic and genuine, affected by the agreement signed by the Appellant and the agent P.?

21. The Appellant submits that the agreement signed with P., referred to by the Appellant as the *"second agreement"*, would have for effect to cancel and replace the document signed between the parties, referred to as *"the first agreement"*. According to the Appellant, it should be considered in that respect that P. had the necessary powers to bind the Respondent.

22. The Panel will first address the question of the construction of the agreement signed by P. and consider whether this agreement is to be interpreted as cancelling and replacing the Agreement between the parties.

23. In that respect, it is preliminary to be stressed that it has not been evidenced that the sequence of the signature of the agreements is such as submitted by the Appellant and that the Agreement between the parties would have been signed before the agreement signed between Cagliari Calcio and P. On the contrary, it results from the evidence provided that the Agreement between the parties has been signed by J., in Honduras, after the return of O., which took the agreement from Cagliari to Tegucigalpa, to be signed by the president of the Respondent, which did not travel to Italy. It is undisputed that, on the other hand, P. was in Cagliari on 1st June 1999, so that it is to be accepted that the agreement defined by the Appellant as the *"second agreement"* has in fact been signed before J. added his signature on the "*first agreement"*. It is in consequence questionable whether the agreement signed by M. and P. was able to cancel the Agreement between the parties, which has only been signed later.

24. The Panel is of the opinion that the agreement signed with P. had another subject than the one signed between the parties. The agreement with P. was not intended to cancel the Agreement between the two clubs and therefore had no effect on the Agreement between the parties. In that respect, the Panel notes that the witness V. confirmed, during the hearing of 1st February 2011 and in response to a question addressed by the Panel, that P. seemed to have a previous understanding or contract with Cagliari Calcio as to his fees in respect of the transaction. In the view of the Panel, this supports the understanding and the high probability that the agreement signed between the Appellant and P. was intended to amend a previous agreement or understanding between the agent and the Appellant and was not intended to replace the transfer agreement between the two clubs. This understanding is also supported by the fact that the last paragraph of the agreement signed between the Appellant and P., which provides for the

cancellation and the replacement of *"every former agreement"* mentions the *"interested parties"*. The said *"interested parties"* cannot be any other person or body than those mentioned at the beginning of this agreement, which are Cagliari Calcio on the one side and P., on the other side.

25. The agreement between the Appellant and P. mentions, as a party, P. himself and does not mention that P. would act in the capacity of a representative of the Respondent. The Panel notes in that respect that it is illogical and contradictory to have a first agreement drafted between the Appellant and the Respondent, providing for the signature of the president of the Respondent, and to draft an allegedly second agreement, on the same subject, providing for the signature, on behalf of the Respondent, of P., without mentioning the capacity of P. to act as a representative. This also supports the conclusion that the agreement between Cagliari Calcio and P. has another subject than the agreement between Cagliari Calcio and Olimpia Deportivo. The explanations of the Appellant in that respect, in its closing statement dated 23 February 2011, are not convincing. Contrary to what has been submitted by the Appellant, there is no logical reason to explain why the parties would have decided, during the negotiations, that the transfer agreement should have been signed by P., and not by J., as planned in the beginning. It results, on the contrary, from the witness statement of V., that P. accepted to renounce to the immediate payment of his fees agreed with Cagliari Calcio, which explains and supports the hypothesis according to which Cagliari Calcio and P. entered into a new agreement cancelling and replacing their previous agreement, independently from the transfer agreement signed between the parties.

26. The submissions of the Appellant in its written closing statement dated 23 February 2011, supported by new exhibits, do not lead to a different conclusion. The fact that the Appellant would have transmitted the relevant agreements to the Italian Football League, on 3 June 1999, amongst which a *"Transfer Agreement of the Federative and Economic Rights of the Player"*, does not indicate that the parties wanted the agreement signed between Cagliari Calcio and P. to replace and cancel the agreement signed by the respective presidents of the two clubs. Furthermore, it is possible that the Agreement between the parties has been signed by J. on the day of the return of O. in Honduras and then immediately sent back to Cagliari Calcio, by fax, and then transmitted to the Italian Football League on 3 June 1999. In that respect, it is interesting to stress that Cagliari Calcio firstly transmitted to the Italian Football League the contract signed with the Player, on 2 June 1999, and then the transfer agreement, on the following day. If Cagliari Calcio had considered that the relevant transfer agreement was the document signed with P., of which it had a signed copy as from 1st June 1999, it is likely that this document would have been transmitted to the Italian Football League already on 2nd June 1999. It is also to be stressed that the Appellant filed, as a new exhibit, a letter to the Italian Football League dated 3 June 1999, but not the enclosures to this letter, amongst which the *"transfer agreement"*. Consequently, irrespective of the admissibility of the new exhibits produced by the Appellant with its closing submissions dated 23 February 2011, the Panel considers that these exhibits are not relevant to the matter at stake.

27. In respect of the rejection of the various explanations suggested by the Appellant, the Panel would also remind that not only these explanations were not supported by any reasonable

evidence, but that P. himself, that was supposed to be the key witness of the Appellant, refrained from testifying and did not arrive to the hearing.

28. In view of the above mentioned, the Panel is satisfied that the agreement signed between Cagliari Calcio and P. is not to be considered as cancelling and replacing the transfer agreement signed between the parties.

29. Subsidiarily, the Panel also considers that P. did not have the necessary powers to bind the Respondent. In that respect, the Panel is of the opinion that the mandate given by Olimpia Deportivo to P. has a clear wording and does not authorize the agent to sign or to enter into an agreement on behalf of the principal but only to negotiate such agreement. Furthermore, as rightly pointed out by the Respondent, the relationship between the company X. SA, represented by P., is to be qualified as a brokerage contract according to Art. 412 et seq. of the Swiss Code of Obligations, which only authorizes the broker to indicate to the principal the opportunity to conclude an agreement or to negotiate such agreement. There is no evidence of the existence of an agency contract, according to Art. 418a and following of the Swiss Code of Obligations, which requires a permanent relationship between the agent and the principal. In the present case, it is clear that P. had been instructed to act in respect with the transfer of the Player, and not an agent of the Respondent on a permanent basis.

30. Furthermore, the Panel cannot accept the submission of the Appellant according to which P. would have acted on an apparent authority to represent the Respondent, as provided by Art. 33 para. 3 of the Swiss Code of Obligations. This provision is conditioned upon the fact that the represented party has communicated to a third party the powers of representations given to the agent. In the present case, there is no indication or evidence as to the fact that the Respondent would have communicated to the Appellant that P. had more than the authorization to negotiate an agreement. As regards the principle of good faith, it is clear to the Panel that the Appellant was well aware that the transfer agreement was to be finally signed by the president of the Respondent. As exposed previously, the agreement produced by the Respondent provided for the signature of J. and was given to O. in order to bring it back to Honduras for signature, which indicates beyond doubt that the Appellant had no reason to deem that P. was authorized to sign agreements binding the Respondent, as a representative of this Respondent.

31. In the view of the above mentioned, the Panel is of the opinion that the agreement signed by the president of Cagliari Calcio and by the president of Olimpia is valid and has not been replaced or cancelled by the agreement allegedly concluded later between the president of Cagliari Calcio and P.

32. Moreover, the Appellant did not make other submissions to object the claim of the Respondent in relation with the amount of the transfer or the way the claim of this Respondent has been calculated in the appealed Decision. Therefore and as the counterclaim of the Respondent is not admissible, the Panel shall fully confirm the Decision of the Single Judge of the Players' Status Committee.

Conclusion

33. Based on the foregoing, and after taking into due consideration all evidence produced and all arguments made, the Panel finds that:

- The agreement signed by the president of Cagliaro Calcio and by the president of Olimpia Deportivo, dated 1 June 1999, is authentic and genuine.
- The said agreement has not been cancelled or replaced by the agreement signed by the president of Cagliari Calcio and by P., dated 1 June 1999.
- The Respondent has a claim for payment, by the Appellant, of 15% of the transfer sum of the Player from Cagliari Calcio to Internazionale Milano, which represents an amount of US Dollars 2,514,723.

34. The Appellant's Appeal shall therefore be dismissed. All other motions or prayers for relief are dismissed.

The Court of Arbitration for Sport rules:

1. The Appeal filed on 9 August 2010 by Club Cagliari Calcio S.p.A. against the Decision issued on 5 March 2010 by the FIFA Single Judge of the Players' Status Committee is dismissed.

2. The counterclaims filed by Club Olimpia Deportivo on 11 October 2010 in the Statement of Defence to the Appeal filed by Cagliari Calcio S.p.A. are not admissible.

3. The Decision issued on 5 March 2010 by the FIFA Single Judge of the Players Status Committee is confirmed.

4. (…)

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