Arbitration CAS 2011/A/2449 K.F.C. Germinal Beerschot Antwerpen NV v. FIFA & Club Atlético Chacarita Juniors, award of 23 December 2011

Panel: Mr José Juan Pintó (Spain), President; Mr Rui Botica Santos (Portugal); Mr Hendrik Kesler (The Netherlands)

Football
Transfer
Competence of FIFA to decide on the dispute
Simulation

1. **If to solve a dispute, FIFA has to assess the real nature of a transaction, which implies to analyse the terms of the several contracts of which at least one is a transfer contract, the competence of FIFA to deal with the dispute in its entirety arises out of article 22 lit. f of the Regulations on the Status and Transfer of Players, even assuming that under this provision, FIFA is not competent to deal with contracts which are different from transfers and loans.**

2. **A simulation exists if both parties agree on the fact that the reciprocal declarations shall produce a legal effect which does not correspond to their will, as they want either to feign an agreement or to conceal, by means of the simulated contract, the contract that they really wanted to pass. The concealed contract is in principle totally or partially valid. The fact that it was concealed by a simulated act does not exclude its validity. The concealed contract is valid in the form that was truly wanted by the parties. To be valid, the concealed contract shall constitute a legally coherent unity which meets all the legal conditions.**

K.F.C. Germinal Beerschot Antwerpen ("Germinal" or "GBA" or the "Appellant") is a professional football club with seat in Antwerp (Belgium), affiliated to the Royal Belgian Football Association.

Club Atlético Chacarita Juniors ("Chacarita" or "CACJ") is a professional football club with seat in Buenos Aires (Argentina), affiliated to the Argentinean Football Association.

Fédération Internationale Football Association (FIFA) is an association submitted to Swiss Law governing the sport of football worldwide with seat in Zurich, Switzerland.

On 1 June 2006 Chacarita and Germinal signed an agreement by virtue of which the Argentinean player G. (the "Player") was transferred from Chacarita to Germinal on a loan basis until 30 June 2007 (the "Loan Agreement").

In the referred Loan Agreement Germinal was granted an option right to purchase 80% of the Player's rights in the following terms (paras. 6 ff. of the Loan Agreement in pertinent part):

> *GBA has the right to exercise an option to purchase 80% of the international transfer rights of the Player G. subject to the following conditions:*
>
> *GBA is owner of the exclusive right as from today to buy 80% of the International Transfer Rights of the player G. for € 600.000.*
>
> *(…)*
>
> *The exclusive option from GBA towards CACJ, for purchasing 80% of the International Transfer Rights of the player G. is valid until March 15, 2007.*
>
> *(…).*

In accordance with the Loan Agreement, Germinal accepted to pay the transaction costs resulting from the loan:

> *GBA accepts to pay the transaction costs of this transfer to CACJ 7% + 2% + 0.5% = 9.5%.*

On 14 March 2007 Germinal and Chacarita signed the following agreements:

(i) A transfer agreement, by virtue of which Germinal acquired 100% of the Player's rights for the price of EUR 300.000 (the "Transfer Agreement"), which in pertinent part reads as follows:

> *GBA shall purchase from CACJ 100% of the international transfer rights of the player G. subject to the following conditions:*
>
> *After payment of 300.000 € (three hundred thousand euros) by GBA towards CACJ, GBA is the exclusive owner, without any restriction of 100% of the transfer rights, of the player G..*
>
> *(…)*
>
> *GBA accepts to pay the transaction costs of this transfer to CACJ, towards the bank mentioned above, after receipts of regular invoice.*
>
> *The transaction costs are calculated as follows: 7% + 2% + 0,5% = 9,5% x 300.000€ = 28.500 € (twenty eight thousand five hundred euros)*
>
> *There are no verbal collateral agreements in existence between the parties involved. Collateral agreements are only valid, if established in writing.*
>
> *(…)*
>
> *Parties accept that this agreement is as from today the only existing agreement between parties, regarding the Player G.*
>
> *If contradictory interpretations or disputes arise from this agreement, both parties will be subdued to UEFA and FIFA regulations and arbitration when necessary.*

(ii) A consulting agreement (the "Consulting Agreement"), which in pertinent part reads as follows:

GBA wants to prospect the football market in Argentina, to detect young players, which are capable to play in the Belgian League.

GBA wants to invest in the youth academy of CACJ, to achieve their goals, as from today March 14, 2007 until June 30, 2010.

GBA shall instruct CACJ by written, to follow up players, which are spotted by the scouting department of GBA.

CACJ will organise scouting trips, in favour of GBA scouts, on their demand, around Argentina.

GBA will pay to CACJ on July 31 2007, a total consulting fee as of 260.000 € (two hundred sixty thousand euros), covering the whole period of partnership between both clubs, March 14,2007 until June 30, 2010.

(…)

GBA has the confidence that CACJ, will fulfill their obligations.

An additional consultant fee, can be obtained by CACJ, in case the player G., who was playing for CACJ until July 2006, is transferred by GBA towards another club, in the period of his contract with GBA.

In the case above, CACJ will obtain 20% of the transfer obtained by GBA.

Germinal paid to Chacarita the agreed amounts in accordance with the Transfer Agreement and the Consulting Agreement, *i.e.* EUR 300.000 (three hundred thousand Euros) and EUR 260.000 (two hundred and sixty thousand Euros) respectively.

On 20 September 2007 Germinal sent a fax to Chacarita in which it mentioned the following:

On March 14 2007 we signed a Consulting Agreement in which we expressed our intention to prospect the Argentinean football market.

We immediately instructed you to make a detailed long list of players (± 30) which could be useful for our club.

Unless we are mistaken, we have not received any feedback.

On 15 October 2007 Germinal sent a new fax to Chacarita in the following terms:

With reference to our fax dated 20.08.2007 and our telephone call last week we ask you once again to send us the requested information.

To be able to take the next step in our co-operation we need this information. Please send it to (…)

On 25 November 2007 Germinal sent another fax to Chacarita stating the following:

We are very disappointed in Chacarita's!

On March 14 2007 we signed a Consulting agreement and asked a detailed list of players which could be useful for KFC Germinal Beerschot.

On August 6 2007 we transferred an amount of 260.000€, as foreseen in abovementioned contract.

Two weeks later, August 20, we send you a fax requesting the list of players.

On September 15 we send again a fax with the same request.

Despite our several requests by fax and telephone, we have not received anything.

If we have not received the detailed list of players on December 5 2007, we see no other option than to put this matter on our Board of director's agenda.

This is beginning to look like a breach of trust!

On 5 February 2008 Germinal sent a new communication to Chacarita in the following terms:

We write with reference to our faxes, addressed to you, requesting to provide us with the information according to our consulting agreement of March 14 2007.

We note with much disappointment that our club has not yet received any documentation as outlined in the contract.

It was also pointed out in our former faxes that we would have no other option than to seek a form of redress, had we not received the requested information.

The agreement has been signed on March 14 2007 and it is now February 2008 and we are still awaiting any form of communication or information from your side.

We have therefore to inform you that we will have no other choice than to consider placing the matter in the hands of our lawyer.

On 22 May 2008, Germinal terminated the Consulting Agreement by means of a letter sent to Chacarita which in pertinent part reads as follows:

I write with reference to our various faxes requesting scouting reports, the organization of scouting trips in Argentina in favour of our technical and scouting department and the follow up of several players in your country and note with much disappointment that we have never received any answer as outlined therein.

We also requested additional information regarding our investment of 260.000 € paid to you, but are as yet, still awaiting receipt of your comments or indeed any other form of communication from you.

It was also pointed out recently that we would have no option but to break the Consulting Agreement of March 14, 2007 because you did not meet your obligations foreseen in this contract.

I therefore have to inform you formally of the Board's decision to break the aforementioned agreement and since you are in default to meet your obligations we put you in notice that according to a universal rule of law, we are no more than you bound to any obligation.

Moreover, we are entitled to request you to refund the amount of 260.000 €, this payment with nothing to show for it.

If the amount of 260.000 € is not filed before June 10 2008, we shall consider placing this matter in the hands of our lawyers.

Also on 22 May 2008 Germinal transferred the Player to the Turkish club Trabzonspor Kulübü ("Trabzonspor") for the price of EUR 2.300.000 (two million and three hundred thousand Euros), to

be paid in the following installments: EUR 600.000 on 2 June 2008, EUR 400.000 on 1 January 2009, EUR 400.000 on 1 July 2009, EUR 450.000 on 1 January 2010 and EUR 450.000 on 1 July 2010.

On 30 May 2008 Chacarita asked Germinal for the payment of EUR 120.000 (one hundred and twenty thousand Euros), *i.e.* 20% of the Player's transfer fee's first installment to be paid by Trabzonspor to Germinal.

On 5 June 2008 Germinal sent a fax to Chacarita in which it not only refused the payment of the mentioned EUR 120.000 (one hundred and twenty thousand Euros) to Chacarita but also requested the reimbursement of EUR 260.000 (two hundred and sixty thousand Euros) paid by Germinal to Chacarita in accordance with the Consulting Agreement.

On 7 June 2008 Chacarita answered to Germinal's previous fax in the following terms:

> *Yesterday, we received a fax signed by you mentioning the breach of the Development of Young Players agreement dated May 2007. In connection with what has happened, I would like to clarify the following:*
>
> *1) Such agreement was celebrated with the only purpose of avoiding taxes on your part for the transfer of EUR 260.000 corresponding to the purchase of the player G., in fact it was suggested by GBA.*
>
> *2) Notwithstanding the abovementioned, we have worked for 90 days with Mr. Flepon scouting from G.B.A. to find new players. From such search we have selected a player who was not a member of our team under his exclusive responsibility.*
>
> *3) Every week, we stayed in contact with Mr. Alfredo Ciucio a man of your "absolute confidence" by sending him graphic material, images, D.V.D., statistics of all players of our team, thereby showing on our part great willingness to continue working together.*
>
> *4) In the fax we received yesterday, it was stated that the first installment of the new agreement for the transfer of the player G. to Trabzonspor from Turkey will not be paid. We are of the opinion that if you consider you have the right to request anything, which you already know that it does not exist, you should do it through the relevant means, but you should fulfil the new agreement since these are two different matters.*
>
> *5) Therefore, we have appeared before the Argentine Football Association (Asociación de Fútbol Argentino) and claimed that G.B.A. might fail to fulfil the obligations on its part contained in the agreement. Your club and Football Belgique Belgium Federation will receive a claim signed by the president of our Association and the Vice president of F.I.F.A. Mr. Julio Grondona.*
>
> *I believe that we have always acted correctly with you, we have facilitated the purchase operation of Gustavo to the Turkish club even though, as you know, he did not want to leave G.B.A. Moreover we bore the expenses for the transfer and stay of the player and his representatives in Belgium. We were working together with you on the transfer of the player F., that is why I am surprised of the way you have behaved. Finally I wish you reconsider this and fulfil this operation as we have previously agreed.*

On 26 June 2008 Germinal sent a letter to Chacarita in which it basically stated that (i) the Consulting Agreement was neither signed to avoid taxes nor to be considered an extension of the Transfer Agreement, (ii) Chacarita, in its fax of 9 June 2008, implicitly accepted the existence of the Consulting Agreement, as it did its utmost to justify that it met its obligations under such Agreement, and (iii) the

Consulting Agreement was terminated and thus Chacarita should reimburse EUR 260.000 (two hundred and sixty thousand Euros) to Germinal.

On 26 June 2008 Chacarita filed a claim before FIFA against Germinal requesting the payment of 20% of the fee resulting from the Player's transfer from Germinal to Trabzonspor, plus 20% of the amount of EUR 200.000 (two hundred thousand Euros) as a result of a potential subsequent transfer of the Player from Trabzonspor to a third club in accordance with the transfer agreement subscribed between Germinal and Trabzonspor.

On 5 May 2010, Germinal opposed to Chacarita's claim by contesting FIFA's jurisdiction to enter into the merits of the present dispute and, subsidiarily, by stating that no amount was due to Chacarita as the Consulting Agreement was terminated with just cause and that on the contrary, the sum of EUR 260.000 paid in advance to Chacarita in accordance with the Consulting Agreement was to be reimbursed to Germinal.

FIFA asked Germinal to pay an advance of costs to enter into the merits of its counterclaim (reimbursement of EUR 260.000), which Germinal failed to pay.

On December 2010, Chacarita objected both the challenge of FIFA jurisdiction argued by Germinal and the arguments filed by such club on the merits.

On 26 January 2011, Germinal filed new written submissions to hold its position.

On 5 April 2011, the Single Judge of the FIFA Players' Status Committee decided to partially accept Chacarita's claim, and ordered Germinal to pay the amount of EUR 460.000 (four hundred and sixty thousand Euros) – 20% of EUR 2.300.000 – plus interest. The operative part of the referenced decision reads as follows:

1. *The claim of the Claimant, Club Atlético Chacarita Juniors is partially accepted.*
2. *The Respondent club KFC Germinal Beerschot Antwerpen, has to pay to the Claimant, Club Atlético Chacarita Juniors, the amount of 460.000€ within 30 days as from the date of notification of this decision.*
3. *Within the same time limit, the Respondent club, KFC Germinal Beerschot Antwerpen, has to pay to the Claimant, Club Atlético Chacarita Juniors, default interest of 5% p.a. on the following partial amounts until the effective date of payment as follows:*
   - *on EUR 120,000 as from 3 June 2008;*
   - *on EUR 80,000 as from 2 January 2009;*
   - *on EUR 80,000 as from 2 July 2009;*
   - *on EUR 90,000 as from 2 January 2010; and,*
   - *on EUR 90,000 as from 2 July 2010.*
4. *Any further claims lodged by the Claimant, Club Atlético Chacarita Juniors, are rejected.*
5. *The counter-claim of the Respondent club KFC Germinal Beerschot Antwerpen is inadmissible.*

6. *If the aforementioned sums are not paid within the aforementioned deadline, the present matter will be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.*

7. *The Claimant, Club Atlético Chacarita Juniors, is directed to inform the Respondent club, KFC Germinal Beerschot Antwerpen, immediately and directly of the account number to which the remittance is to be made and to notify the Players' Status Committee of every payment received.*

8. *The costs of the proceedings in the amount of CHF 15,000 are to be paid by the Respondent Club, KFC Germinal Beerschot Antwerpen, within 30 days as from the notification of the present decision to the bank account (…).*

The main considerations of the Single Judge of the FIFA Players' Status Committee in the referred decision (the "Decision") may be briefly summarized as follows:

(i) The Consulting Agreement has two different objects: one referred to the terms of a collaboration between Germinal and Chacarita in relation to the scouting of players in Argentina, and the other referred to the subsequent transfer of the Player to a third club. FIFA is competent to decide on issues related to the latter object, but is not competent to rule on matters related to the first object (provision of consultancy services), as these do not fall within the scope of jurisdiction of FIFA.

(ii) There is no reason why Germinal can disregard the obligation, freely agreed by the parties in the Consulting Agreement, to pay to Chacarita 20% of the Player's transfer fee received from Trabzonspor. Even if a breach of the Consulting Agreement had occurred with regard to the obligations related to the scouting services – which the Single Judge cannot establish as it is not competent to do so –, this breach and subsequent termination of the agreement could not be viewed as affecting the obligations agreed upon with regard to the sell-on of the Player.

(iii) The claim for an additional amount of EUR 40.000 (forty thousand Euros) plus interest filed by Chacarita has no legal basis and is to be rejected.

(iv) In accordance with article 17.5 of the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (edition 2008), the counterclaim of Germinal is not admissible and cannot be heard as said club did not pay the advance of costs of the proceedings.

On 20 May 2011 Germinal decided to appeal the Decision before the CAS and thus filed the relevant Statement of Appeal with the following request for relief:

1. *to accept the present appeal against the challenged decision;*

2. *to set aside the challenged decision;*

3. *to establish that the First Respondent has no competence to decide on the dispute between the Appellant and the Second Respondent;*

4. *to condemn the Respondents to the payment in the favor of the Appellant of the legal expenses incurred;*

5. *to establish that the costs of the arbitration procedure shall be borne by the Respondents.*

Alternatively, only in the event that the above is rejected:

1. *to accept the present appeal against the challenged decision;*
2. *to set aside the challenged decision;*
3. *to establish that the Appellant shall not pay any amount to the Second Respondent;*
4. *to condemn the Second Respondent to reimburse EUR 260,000 to the Claimant plus 5% p.a. starting from 22 May 2008;*
5. *to condemn the Respondents to the payment in the favour of the Appellant of the legal expenses incurred;*
6. *to establish that the costs of the arbitration procedure shall be borne by the Respondents*

On 1 June 2011 Germinal filed its Appeal Brief before the CAS, with the same pleadings made in the Statement of Appeal.

On 4 July 2011 FIFA filed its Answer to the Appeal Brief, in which it requested the CAS:

1. *To reject the present appeal against the decision of the Single Judge of the Players' Status Committee dated 5 April 2011, in so far as it is inadmissible, and to confirm the relevant decision in its entirety.*
2. *To declare the Appellant's request that the second Respondent be ordered to reimburse EUR 260.000 to the Appellant inadmissible.*
3. *To order the Appellant to bear all the costs incurred with the present procedure.*
4. *To order the Appellant to cover all expenses of the first Respondent related to the present procedure.*

On 11 July 2011 Chacarita lodged its Answer to the Appeal Brief, in which it requested the CAS to render an award in the following terms:

1. *Dismissal of the Appeal raised by K.F.C. Germinal Beerschot Antwerpen.*
2. *Confirmation of the decision of the FIFA Dispute Resolution Chamber of 5th April.*
3. *The request for reimbursement of 260.000 € is declared inadmissible.*
4. *That K.F.C Germinal Beerschot Antwerpen NV pays the full costs of the present arbitral proceedings.*
5. *That K.F.C Germinal Beerschot Antwerpen NV reimburses the legal costs and expenses Club Atlético Chacarita Juniors in the amount of EUR 15.000.*

A hearing took place in Lausanne on 24 October 2011.

At the beginning of the hearing, the Panel firstly invited the parties to try to settle the dispute, but no agreement was reached between them. Thus, the hearing went on. In their closing statements, the parties commented, among other issues, on the matter of simulation of contracts under Swiss Law as per express petition of the Panel.

At the end of the hearing, the parties expressly declared that they were satisfied with the way the proceedings had been conducted.

LAW

CAS jurisdiction

1. The jurisdiction of the CAS to decide on the present case arises out of Articles 62 and 63 of the FIFA Statutes and Article R47 of the CAS Code. In addition CAS jurisdiction has been expressly accepted by the parties, which signed the Order of Procedure of the present case.

2. Therefore, the Panel considers that CAS is competent to decide on this case.

Applicable law

3. Article R58 of the CAS reads as follows:

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

4. Article 62.2 of the FIFA Statutes states the following:

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

5. In accordance with these provisions the Panel understands that the present dispute shall be resolved according to the FIFA Regulations and additionally Swiss Law. In particular, given that in accordance with the Decision, the present matter was submitted to FIFA on 26 June 2008 (see para. 1 of Section II "Considerations of the Single Judge of the Players' Status Committee" in the Decision), the Panel shall take into account the FIFA Regulations on the Status and Transfer of Player in its edition 2008 (the "FIFA RSTP") and the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber in its edition 2005 (article 21.1 of these Rules in its edition 2008, which entered into force on 1st July 2008, states that *these rules* – edition 2008 – *are applicable to proceedings submitted to FIFA on or after the date on which these rules came into force*, and article 21.3 *in fine* of such Rules stipulates that *the previous rules* – edition 2005 – *shall apply to cases submitted to FIFA before these rules came into force*).

About the dispute submitted to the Panel by the Parties

A. The object of the dispute

6. According to the parties' written submissions and the arguments raised by them in the hearing, the object of the dispute may be briefly summarized as follows: the Appellant considers that the Appealed Decision shall be revoked as (i) FIFA was not competent to deal with the dispute

and (ii) in the event that the Panel thought otherwise, the Appellant owes no amount to Chacarita and on the contrary, this club shall reimburse EUR 260.000 (two hundred and sixty thousand Euros) to Germinal as it breached its obligations under the Consulting Agreement. On the other hand the Respondents request that the Decision be confirmed and that the request for reimbursement of EUR 260.000 (two hundred and sixty thousand Euros) be declared inadmissible.

B. Germinal's main petition: the competence of FIFA to decide on the dispute

7. In light of the petitions of the Appellant, the Panel shall firstly address the issue of the competence of FIFA to decide on the present dispute, and will do so by checking and analyzing FIFA's relevant provisions on competence applicable to this case and the allegations made by the parties in this respect.

8. The Panel has noticed that the position of the parties with regard to the issue of jurisdiction is basically the following:

   (i) The Appellant is contesting the jurisdiction of FIFA to deal with the dispute by essentially holding that such dispute is based on a commercial contract (the Consulting Agreement) on which FIFA is not entitled to rule. In the Appellant's view, article 22 lit. f of the FIFA RSTP only comprises disputes between clubs arising out of transfer or loan agreements, but does not reach services agreements. Additionally it has also argued that no specific submission of disputes to FIFA's bodies exists in the Consulting Agreement.

   (ii) FIFA holds that in accordance with article 22 of the FIFA RSTP, it cannot enter into disputes referred to services arising out of the Consulting Agreement as this kind of disputes, in its opinion, do not fall within its competence, but it can rule on the request of Chacarita referred to the 20% of the Player's subsequent transfer price as it has to do with a transfer and thus falls within its scope of competence.

   (iii) Chacarita considers that FIFA was competent to decide on the dispute given that it involves two clubs belonging to different associations and the only true nature and object of the Consulting Agreement and of the so-called *sell-on clause* was to rule a transfer.

9. As confirmed by the parties in the allegations made by them in this respect, the relevant provision to be taken into account to determine if FIFA was competent to deal with the dispute is article 22 lit. f of the FIFA RSTP, which reads as follows [emphasis added in pertinent part]:

   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).

10. After the corresponding analysis of the contractual and factual situation surrounding the dispute and, in particular, the nature of the claims involved in it, the Panel considers that in this specific case, FIFA was competent to deal with the dispute between Germinal and Chacarita in its entirety in accordance with article 22 lit. f of the FIFA RSTP, as:

(i) The dispute involves clubs belonging to different associations and does not fall within the cases provided for in lit. a, d and e of the referred article 22 (maintenance of contractual stability, training compensation and solidarity mechanism); and

(ii) Even if it was assumed that under this article 22 lit. f, FIFA is only competent to deal with disputes referred to transfers and loans of players, it is also clear for the Panel that this particular dispute between the parties has to do, even *prima facie*, with a transfer, given that Chacarita mainly grounds its claim in the fact that in its view, the sole, real and global business involved in the agreements of March 2007 is the transfer of the Player from Chacarita to Germinal, being the consultancy relationship concluded between the parties a mere simulation to save costs and thus, the 20% fee foreseen in the Consulting Agreement a part of this unique transfer transaction. In the scenario described, the Panel understands that to resolve the dispute, FIFA had to address the matter of the real nature of the transaction concluded on 14 March 2007, which implies to analyse the terms of the complete transaction (which at least involved a transfer) on the whole, globally and considering both the Transfer Agreement and the Consulting Agreement. In this respect it also becomes absolutely irrelevant that the Consulting Agreement does not provide for an express submission of the disputes to FIFA, as given that the dispute has to do with a transfer (even concerning the Consulting Agreement, as it shall be decided if such Agreement is an independent services agreement or part of a transfer agreement), the competence of FIFA arises out of article 22 lit. f – even in the understanding that such article excluded contracts which are different from transfers and loans.

11. On the basis of the above mentioned, the allegations and petitions of lack of competence of FIFA raised by the Appellant are rejected.

C. The admissibility of the claim for reimbursement of EUR 260.000 filed by Germinal

12. Having made it clear that FIFA was competent to deal with the dispute, and before entering into the subsidiary petitions of Germinal, the Panel shall primarily deal with an issue raised by the Respondents which has a direct impact on such subsidiary petitions: the admissibility or not of the request for reimbursement of EUR260.000 (two hundred and sixty thousand Euros) as regards the termination of the Consulting Agreement.

13. The Single Judge of the FIFA Player Status Committee understood in paras. 23 ff. of the Decision that on the basis of articles 9.1.h and 2., in combination with article 17 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (edition 2008), the counterclaim filed by Germinal (request for reimbursement of EUR 260.000) was inadmissible as Germinal did not pay the relevant advance of costs requested by FIFA for such counterclaim.

14. Indeed article 17.5 of the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (edition 2008) clearly states that *if a party fails to pay the advance of costs when submitting a claim or counter-claim, the FIFA administration shall allow the party concerned ten days to pay the relevant advance and advise that failure to do so will result in the claim or counter-claim not being heard*, and it has been accepted by Germinal that it did not pay such advance of costs despite having been requested to do so by FIFA.

15. However the Panel considers that such edition of 2008 of the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber is not applicable to the present dispute.

16. As mentioned in para. 5 of the present award, the FIFA procedural rules applicable to this dispute are the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber in its edition 2005. The edition 2008 of these Rules entered into force on 1st July 2008, *i.e.* some days after the dispute was entered into FIFA as per the statement made in this respect in the Decision, and such edition 2008 expressly foresees in article 21.3 *in fine* that *the previous rules* – edition 2005 – *shall apply to cases submitted to FIFA before these rules came into force.*

17. The Decision itself confirms the above mentioned understanding in para. 1 of Section II "Considerations of the Single Judge of the Players' Status Committee" of the Decision, where it is literally mentioned that [emphasis added]:

> *First of all, the Single Judge of the Players' Status Committee (hereinafter also referred to as: the Single Judge) analysed which procedural rules are applicable to the matter at hand. In this respect, he referred to art. 21 par. 2 and 3 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (edition 2008). Consequently, and since the present matter was submitted to FIFA on 26 June 2008, the Single Judge concluded that the 2005 edition of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (hereinafter: the Procedural Rules) is applicable to the matter at hand (cf. art. 18 par. 1 and 2 of the Procedural Rules).*

18. Therefore the provisions on which the Single Judge based the inadmissibility of the counterclaim of Germinal (articles 9 and 17 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber in its edition 2008) shall be disregarded as the claim was entered into FIFA some days before these came into force.

19. This being said, the Panel shall analyse if under the procedural rules applicable to these proceedings, i.e. the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (edition 2005), the counterclaim could be declared inadmissible for lack of payment of the advance of costs.

20. The Panel has checked the referred Rules in its edition of 2005 and has not found any provision which entitles FIFA not to hear a counterclaim if the advance of costs is not paid by the counterclaimant. In other words, there is no provision which is even similar to article 17.5 of the cited Rules in its edition of 2008. Therefore, in the absence of such a provision, the Panel is of the opinion that FIFA could not reject *ad limine* the counterclaim for the mere fact that the advance of costs requested from the counterclaimant was not paid, as the relevant procedural rules applicable to the dispute did not enable to do so.

21. Given that (i) this counterclaim was admissible and (ii) Germinal has addressed the same request (reimbursement of EUR 260.000) in the present appeal, having previously exhausted the legal remedies available to it, the Panel is entitled, as per the faculties conferred to it by article R57 of the CAS Code, to decide on it, and in fact will do so in the following section of the present award.

D. Germinal's subsidiary petitions

22. Having made it clear that FIFA was competent to deal with the dispute and that the request for reimbursement of EUR 260.000 (two hundred and sixty thousand Euros) filed – both in FIFA and in the CAS – by Germinal is not to be declared inadmissible, the Panel shall subsequently address the subsidiary petitions of Germinal, which basically are (i) the declaration that Germinal shall not pay any amount to Chacarita and (ii) the order to Chacarita to reimburse to Germinal the sum of EUR 260.000 (two hundred and sixty thousand Euros) plus interest.

23. The examination of these petitions requires that the Panel analyzes the agreements signed between Germinal and Chacarita, the facts which took place and the behaviour of the parties.

24. From the contractual point of view, the situation created can be briefly summarized as follows:

    (i) On June 2006 Germinal and Chacarita signed the Loan Agreement, by virtue of which (a) the Player was transferred on a loan basis from Chacarita to Germinal for one season and (b) Germinal got a purchase option right on 80% of the Player's rights, effective upon the payment of EUR 600.000 (six hundred thousand Euros) on or before 15 March 2007.

    (ii) The referred purchase option right was not formally executed.

(iii) The day before the expiration term of this purchase option right (*i.e.* 14 March 2007), Germinal and Chacarita signed the Transfer Agreement and the Consulting Agreement.

(iv) By virtue of the Transfer Agreement Chacarita sold 100% of the Player's rights, instead of 80% of them as per the purchase option right ruled in the Loan Agreement. However, by virtue of the Consulting Agreement, Chacarita was entitled to receive, as *additional consultancy fee*, 20% of the transfer price obtained by Germinal in case the Player was transferred to another club.

(v) As a result of the Transfer Agreement and the Consulting Agreement, Chacarita received from Germinal the amount of EUR 560.000 (five hundred and sixty thousand Euros) - EUR 300.000 as transfer price and EUR 260.000 as consulting fee.

(vi) In both the Loan Agreement and the Transfer Agreement, the transaction costs were to be borne by Germinal.

25. From the ownership of rights' point of view, the Panel is aware that the effects of both the initial projected transaction and the final transaction executed by the parties are at least very similar. In the initial projected transaction (purchase option right in the Loan Agreement) Germinal could acquire 80% of the Player's rights (and thus Chacarita retained the remaining 20%), while in the final transaction Germinal acquired 100% of such rights, but committed itself to pay to Chacarita 20% of the price of a future transfer (which in practice would have been also obtained by Chacarita if it had retained 20% of the Player's rights and had decided to sell it together with Germinal's remaining 80% to a third party).

26. From the economical point of view, the Panel notes that Germinal's final cost to acquire 100% of the Player's rights was lower than the one it would have had to bear if the initial projected transaction was executed. If such initial transaction had been executed, Germinal should have paid EUR 600.000 (six hundred thousand Euros) plus the transactional costs of the transfer it conventionally committed itself to assume (EUR 57.000 – 9.5% on EUR 600.000), i.e. EUR 657.000 (six hundred and fifty seven thousand Euros), to get 80% of the Player's rights, while in the final transaction Germinal paid only EUR 560.000 (five hundred and sixty thousand Euros) plus the transaction costs of the transfer (EUR 28.500 – 9.5% on EUR 300.000), i.e. EUR 588.500 (five hundred eighty eight thousand and five hundred Euros) and committed to pay 20% of the transfer price as *additional consultancy fee* not subject to transaction costs (as per the info provided by the parties to the proceedings, confirmed at the hearing, under the Argentinean laws and rules these costs only accrue in transfers, but as regards of consulting agreements).

27. This being established the Panel has subsequently analyzed the structure and nature of the final transaction executed by the parties (Transfer Agreement + Consulting Agreement, both signed on the same date), and in particular the content of the Consulting Agreement. In the referred analysis the Panel has found some details which are odd or at least unusual taking into account the practice in the world of football, the following to be highlighted:

(i) The fact that Germinal accepted to make a payment of the whole consulting fee upfront, instead of paying such fees upon provision of the services or at least in instalments.

(ii) The extremely poor and vague description of the services to be rendered by Chacarita, which is to be considered uncommon in the practice of this kind of consultancy contracts.

(iii) The inclusion in the Consulting Agreement of an *additional consultancy fee* related not to the quality or quantity of services rendered, but to the future transfer of the Player to a third club, which at least in abstract neither follows the logic of a consultancy agreement nor has causal link with the other considerations of the Consulting Agreement. This kind of "fees", in the Panel's view, are indeed common in players' transfer agreements, but are at least not so typical for consultancy agreements, especially in those cases in which the participation on the future revenues of a transfer is referred to the transfer of a player not identified thanks to the consultant's scouting activity.

28. The referred rareness of some aspects of the Consulting Agreement, together with the fact that (a) such Agreement and the Transfer Agreement were signed on the same date (which in addition was the day before the expiration of the purchase option right foreseen in the Loan Agreement), (b) the economical and ownership terms of the initial projected transaction and the final transaction were quite similar and (c) no evidence has been brought to the proceedings which ascertains a real interest from Germinal, at the time of the signature of the Consulting Agreement, to receive consultancy services from Chacarita (previous exchange of correspondence between the parties, witness declarations or the like), lead the Panel to consider that:

(i) The sole business that the parties had in mind and wanted to execute was the definitive transfer of the Player from Chacarita to Germinal; and

(ii) The Consulting Agreement was in reality a simulated agreement concluded with the purpose of saving transaction costs (which are payable under a transfer agreement but not payable within the scope of a consultancy agreement), and not of providing/receiving consultancy services.

29. In other words, the Panel is of the view that the parties' real and unique intention was to transfer the Player and that they just "divided" the transaction in two contracts to avoid costs, as none of them really wanted to render or receive consultancy services.

30. With regard to some allegations made by the Appellant to hold the independence of both the Transfer Agreement and the Consulting Agreement and thus to contest the existence of simulation, the Panel shall point out that:

(i) It is indeed true that Germinal, after the signature of the Transfer Agreement and the Consulting Agreement sent some communications to Chacarita asking for the performance of consultancy services, and that these communications remained uncontested by Chacarita. However, given that the Consulting Agreement was a mere apparent contract, the Panel is of the opinion that Chacarita could legitimately not answer to such communications, as no service was to be rendered by Chacarita, so the silence of Chacarita to the referred faxes shall not bring in this case detrimental consequences to such club.

(ii) The letter of Chacarita to Germinal dated 7 June 2008 is not to be considered as an acceptance by Chacarita of the effectiveness (and not mere apparent nature) of the Consulting Agreement and the reciprocal considerations foreseen therein. First of all, because at the very beginning of the letter Chacarita made it clear that *such agreement was celebrated with the only purpose of avoiding taxes on your part for the transfer of EUR260.000 corresponding to the purchase of the player G., in fact it was suggested by GBA.* And secondly, because even if it is true that Chacarita makes reference in the letter to having worked with Germinal to find new players, or to having sent some information and materials to an individual (Mr. Ciucio) apparently related to Germinal, no express reference is made to the execution of the specific services foreseen in the text of the Consulting Agreement, so it is perfectly possible that apart from the real transaction executed in March 2007, Chacarita and Germinal had started other contacts to collaborate in future transactions, and that the cited statements in the letter refer to this collaboration.

(iii) Even if in the Transfer Agreement it was mentioned that *the parties accept that this agreement is as from today the only existing agreement between parties, regarding the player G.*, the Panel understands that this statement cannot by itself override or distort the reality of the transaction (one business, two formal instruments), especially when (a) in the Consulting Agreement, an express reference to an extra fee linked to the future transfer of the Player was made and (b) in addition, the same Transfer Agreement even foresees the possibility of concluding collateral agreements (*collateral agreements are only valid, if established in writing*).

31. At this stage the Panel shall determine the consequences arising out of the above mentioned situation.

32. According to Swiss jurisprudence and scholars, article 18 of the Swiss Code des Obligations (CO) shall be taken as standpoint to examine the nature and effects of the contractual simulation.

33. The Swiss Federal Tribunal defined the concept of simulation in the Decision ATF 123 IV 61 c. 5c/cc as follows: *on est en présence d'une simulation, si les deux parties sont d'accord que les déclarations réciproques doivent produire un effet juridique qui ne correspond pas à leur volonté, parce qu'elles veulent soit feindre un rapport contractuel, soit cacher avec le contrat simulé un autre contrat réellement voulu* (which can be informally translated into English as follows: a simulation exists if both parties agree on the fact that the reciprocal declarations shall produce a legal effect which does not correspond to their will, as they want whether to feign an agreement or to hide, by means of the apparent contract, the contract really wanted by the parties).

34. In accordance with the commentary to article 18 CO (THÉVENOZ/WERRO (ed.), Commentaire Romand, Code des Obligations I, Genève et al. 2003, pages 94 ff.), in the simulation *il s'agit de distinger entre l'acte simulé, qui sera abordé en premier, et l'acte dissimulé qui accompagne souvent l'acte simulé et se cache derrière lui* (in English – informal translation –, it shall be distinguished between the simulated act, which will be primarily faced, and the concealed act which often goes with the simulated act and is hidden behind it), and *la volonté commune des parties porte sur le fait d'une part, de créer une apparence et, d'autre part, de ne pas y attacher la consequence juridique declarée* (in English –

informal translation –, the common will of the parties leads, on one side, to create an appearance and on the other side, not to apply the legal consequence declared).

35. With regard to the effects of the simulation, the Commentaire Romand (*op. cit.*, page 98) states that *le contrat dissimulé en tout ou en partie est en principe pleinement valable. Le fait d'avoir été dissimulé par un acte simulé ne le prive pas de sa validité. Le contrat est valable tel qu'il a réellement été voulu par les parties. Pour être valable, le contrat dissimulé doit former un ensemble juridiquement cohérent qui répond à toutes les conditions légales* (in English – informal translation –, the concealed contract is in principle totally or partially valid. The fact that it was concealed by a simulated act does not exclude its validity. To be valid, the concealed contract shall constitute a legally coherent unity which meets all the legal conditions). In this respect it is also to be noted that the Swiss Federal Tribunal (ATF 85 II 97; ATF 123 IV 61, JT 1999 IV) has stated in this respect that *les parties veulent que leurs actes et déclarations créent une apparence, mais admettent qu'ils n'ont pas de valeur interne; souvent elles se lient en outré part par un accord dissimulé, sérieusement voulu* (in English – informal translation –, the parties want that their acts and declarations create an appearance, but admit that these do not have internal value; they often bind themselves outside by means of a concealed contract seriously wanted).

36. Applying the above mentioned principles to our case and after having examined the facts and evidence brought to the proceedings by the parties, the Panel is of the view that the parties did not internally want to hold a consulting relationship, but only wanted to execute a transfer business. None of them wanted to render or receive consultancy services, but on the contrary wanted to somehow hide or mask (at least partially) a transfer-related business, with the purposes explained in para. 28 (ii) of the present award. Therefore the Player's transfer business, considered on the whole (i.e. including its entire price paid upfront – EUR 560.000 – and also the 20% fee foreseen in the Consulting Agreement), is to be deemed completely valid, as the parties wanted to execute it and agreed on its terms – including the business price (EUR 560.000 plus an extra fee in case of transfer of the Player to a third club). The transfer of a player in exchange of a price is a valid and licit business. This real business shall thus supersede the apparent business, which in our case shall bring the following consequences:

    (i) The request for reimbursement of EUR 260.000 (two hundred and sixty thousand Euros) is to be rejected, as this amount was actually part of the transfer price and there is no reason providing for the mentioned reimbursement.

    (ii) Chacarita is entitled to receive 20% of the price for the transfer of the Player from Germinal to Trabzonspor, plus interest in accordance with the breakdown made in point 3 of the operative part of the Decision (which has not been contested by the Appellant).

37. Finally and just for dialectical purposes, the Panel wishes to briefly point out that even if it had not been considered that contractual simulation exists in this case, Germinal did not have just cause to terminate the Consulting Agreement and thus was not entitled to receive the request for relief claimed in the present appeal. In this respect the Panel shall recall that in accordance with the text of the Consulting Agreement, Chacarita was expected to comply with two kind of obligations: (i) the follow up of Players spotted by the scouting department of Germinal upon written instruction of this last club and (ii) the organisation of scouting trips around Argentina in favour of Germinal's scouts on their demand. It is thus undoubtedly inferred from the text

of the Consulting Agreement that the compliance of Chacarita's obligations required that Germinal took an active prior role to enable such compliance: the spot of players to be followed up by Chacarita, the remittance of written instructions to Chacarita to execute such follow up and the demand to Chacarita of scouting trips to be organised in Argentina. This being clear, the Panel considers that Germinal failed to prove that it performed such previous activities that would have enabled Chacarita to comply with its obligations under the Consulting Agreement. No evidence has been brought on (i) which players would have been spotted by Germinal, (ii) written instructions to Chacarita to follow up players and (iii) requests for organization of scouting trips. It has been noted that Germinal indeed sent some faxes to Chacarita after March 2007 asking this club to perform certain activities, but none of them, in the Panel's opinion, was within the scope or frame of the contractual obligations theoretically assumed by Chacarita under the Consulting Agreement. In this respect, in the successive faxes sent from 20 September 2007 onwards, Germinal repeatedly requested Chacarita, among others, to *make a detailed long list of players (± 30) which could be useful for our club* (fax dated 20 September 2007), or to *send us the requested information* (fax dated 15 October 2007), and complained about the fact that *our club has not yet received any documentation as outlined in contract* (fax dated 5 February 2008). However none of these performances was demandable from Chacarita under the text of the Consulting Agreement if Germinal did not prepare and send the relevant list of players, so the fact that Chacarita did not carry out those performances could not be considered as a just cause to terminate the Consulting Agreement as Germinal did. Therefore none of the consequences that Germinal intends to infer from the termination (refund of EUR 260.000 and removal of the obligation to pay to Chacarita 20% of the transfer price of the Player to Trabzonspor) would be acceptable.

38. On the basis of the foregoing, the Panel considers that the Decision shall be upheld, with the sole exception of para. 5 of its operative part, given that the counterclaim filed by Germinal in FIFA was not inadmissible as per the reasons explained in Section C. of this award, being such counterclaim in any case rejected on the merits.

The Court of Arbitration for Sport rules:

1. The appeal filed by K.F.C. Germinal Beerschot Antwerpen is dismissed.

2. FIFA was competent to deal with the claim filed by Club Atlético Chacarita Juniors against K.F.C. Germinal Beerschot Antwerpen regarding a contractual dispute concerning the player G.

3. The claim for reimbursement of EUR 260.000 (two hundred and sixty thousand Euros) filed by K.F.C. Germinal Beerschot Antwerpen against Club Atlético Chacarita Juniors at FIFA via counterclaim on 5 May 2010, was procedurally admissible at FIFA and is procedurally

admissible (as part of the appeal) in the present proceedings before the CAS, but its merit is dismissed.

4. The Decision of the Single Judge of the FIFA Player Status Committee dated 5 April 2011 on the claim filed by Club Atlético Chacarita Juniors against K.F.C. Germinal Beerschot Antwerpen regarding a contractual dispute concerning the player G. is upheld except for para. 5 of its operative part, and thus K.F.C. Germinal Beerschot Antwerpen has to pay to Club Atlético Chacarita Juniors, in the terms foreseen in points 2 and 3 of the referred Decision of the Single Judge of the FIFA Player Status Committee, the amount of EUR 460.000 (four hundred and sixty thousand Euros) plus default interest of 5% p.a. on the following partial amounts until the effective date of payment as follows:

   - On EUR 120,000 as from 3 June 2008;
   - On EUR 80,000 as from 2 January 2009;
   - On EUR 80,000 as from 2 July 2009;
   - On EUR 90,000 as from 2 January 2010; and,
   - On EUR 90,000 as from 2 July 2010.

(…)

7. All other or further petitions and claims are dismissed.