

**Arbitration CAS 2011/A/2557 FC Dynamo Kyiv v. AS Nancy-Lorraine, award of 4 April 2012**

Panel: Mr José Juan Pintó Sala (Spain), President; Mr Michele Bernasconi (Switzerland); Mr François Klein (France)

Football

Transfer

Interaction of contracts referring to the same transaction but having different terms and parties

There is no novation of contract, with the result of one contract replacing the other, if the parties to one contract are not the same than the ones to the other, if it is not proven that all the parties consented to the novation and if the parties' own conduct reveals that they expressly recognised the existence and validity of both contracts.

Football Club Dynamo Kyiv Ltd. ("Dynamo" or the "Appellant") is a professional football club with seat in Kiev (Ukraine), affiliated to the Ukrainian Football Federation.

SASP AS Nancy-Lorraine ("Nancy" or the "Respondent") is a professional football club with seat in Nancy (France), affiliated to the French Football Federation.

On 17 July 2007, Dynamo, the company Newport Management Ltd (the "Firm") and Nancy signed an agreement (the "Agreement"), drafted in English and Russian, ruling the transfer of the rights of the football player P. (the "Player"), at that time playing for Nancy, for a fixed price of 4.000.000 € net, payable in several instalments.

In accordance with Clause 3 of the Agreement, some additional bonus payments were to be made in favour of Nancy in case the following events took place:

- "3.1 The parties have also agreed that the Firm shall pay to the Club additional bonus payments as follows:*
- in case Dynamo qualifies to the round of 1/8 finals of the UEFA Champions League of 2007/2008 the Club shall be additionally paid 375 000 (three hundred seventy five thousand) Euros within 15 banking days from the moment of such qualification;*
 - in case Dynamo qualifies to the round of 1/4 finals of the UEFA Champions League of 2007/2008 the Club shall be additionally paid 500 000 (five hundred thousand) Euros within 15 banking days from the moment of such qualification);*
 - in case Dynamo wins the final first place (title of the Champions of Ukraine) among the teams of the premier division of the season of 2007/2008, the Club shall be additionally paid 750 000 (seven hundred and fifty thousand) Euros within 15 banking days from the moment of completion of this season.*

- 3.2 *In case of a subsequent transfer of the player from Dynamo to any third club, the Club shall have the right to receive 20% (twenty percent) of the difference between the transfer fee received by the Firm under such transfer and actual expenses of the Firm related to the Player. Hereby the Firm shall be obliged to pay such additional payment in favour of the Club within 15 banking days from the moment of receipt of the transfer fee under such subsequent transfer.*
- 3.3 *Besides, the Firm assumes an obligation to pay 5% (five percents) of the amount of the transfer fee, i.e. 200 000 Euros, personally to the Player, by means of inclusion of this amount into a single payment for signing by the Player of the contract with the Firm”.*

On 18 July 2007 (i.e. the day after the signature of the Agreement) Dynamo and Nancy signed a “Protocole d’accord convention financière de mutation” (the “Convention”), drafted in French, also referred to the transfer of the Player. This Convention reads in the pertinent part as follows:

“Il est convenu entre le FC DYNAMO DE KIEV et la SASP NANCY LORRAINE concernant la mutation définitive du joueur P. du club SASP NANCY LORRAINE au club FC DYNAMO DE KIEV et sous la condition expresse que le club SASP NANCY LORRAINE et le joueur P. résilie amiablement le contrat qui les lie, que:

1. *Le club DYNAMO DE KIEV versera au club de la SASP NANCY LORRAINE concernant la mutation définitive principale de 4.000.000 euros (quatre millions d’euros) hors taxes payable selon les échéances suivantes:*
 - *2.000.000 euros (deux millions d’euros) à la signature*
 - *500.000 euros (cinq cent mille euros) au 01/10/2007*
 - *500.000 euros (cinq cent mille euros) au 01/02/2008*
 - *1.000.000 euros (un million d’euros) au 01/06/2008*
2. *Le club DYNAMO DE KIEV verse au club Entente SOTRAC OUAKAM, club affilié à la Fédération Sénégalaise de Football, une indemnité de 5% (cinq pourcent) du montant de l’indemnité de mutation principale et complémentaire du joueur P. du club SASP NANCY LORRAINE au club DYNAMO de KIEV due en vertu d’une convention de partenariat en date du 4 janvier 2002 entre le club SASP NANCY LORRAINE et le club Entente SOTRAC OUAKAM. Cette indemnité sera versée par le club DYNAMO de KIEV dans les délais prévus à la présente convention.*
3. *Le club DYNAMO DE KIEV prend à sa charge l’indemnité de solidarité de 5% prévue à l’annexe du règlement FIFA en complément de l’indemnité de mutation définitive principale et complémentaire du joueur P.*
4. *Le club DYNAMO DE KIEV versera au club SASP NANCY LORRAINE une indemnité de mutation complémentaire de 20% (vingt pourcent) de la plus value hors taxes réalisée en cas de mutation du joueur P. du club DYNAMO DE KIEV vers un autre club, indemnité payable dans les 15 jours qui suivront la mutation du joueur.*
5. *Le club DYNAMO DE KIEV versera au club SASP NANCY LORRAINE une indemnité de mutation complémentaire de 375.000 euros (trois cent soixante quinze mille euros) hors taxe si le club DYNAMO DE KIEV sa qualifié lors de la saison 2007/08 pour les 16èmes de finale de la Ligue des Champions (matches suivants le 3ème tour préliminaire), payable dans les 15 jours qui suivront la qualification.*

6. *Le club DYNAMO DE KIEV versera au club SASP NANCY LORRAINE une indemnité de mutation complémentaire de 500.000 euros (cinq cents mille euros) hors taxe si le club DYNAMO DE KIEV se qualifie lors de la saison 2007/2008 pour les 8ème de finale de la Ligue des Champions payable dans les 15 jours qui suivront la qualification.*
 7. *Le club DYNAMO DE KIEV versera au club SASP NANCY LORRAINE une indemnité de mutation complémentaire de 750.000 euros (sept cent cinquante mille euros) hors taxe si le club DYNAMO DE KIEV termine premier du championnat d'Ukraine à l'issue soit de la saison 2007/2008, soit de la saison 2008/2009 payable dans les 15 jours qui suivront la fin du championnat de la saison où le club DYNAMO DE KIEV termine premier.*
- (...)
10. *Pour l'interprétation de la présente convention, les parties conviennent de se référer au texte en langue française”.*

The above mentioned provisions can be informally translated into English as follows:

“FC DYNAMO DE KIEV and SASP NANCY LORRAINE have agreed on the definitive transfer of the player P. from the club SASP NANCY LORRAINE to the club FC DYNAMO DE KIEV under the express condition that the player and DYNAMO DE KIEV reach an agreement and that the club SASP NANCY LORRAINE and the player P. amicably terminate their contract, as follows:

1. *The Club DYNAMO de KIEV will pay to the club SASP NANCY LORRAINE a principal transfer compensation of 4.000.000 euros (four million euros) taxes excluded in accordance with the following instalments:*
 - *2.000.000 euros (two million euros) at the signature*
 - *500.000 euros (half million euros) on 01/10/2007*
 - *500.000 euros (half million euros) on 01/02/2008*
 - *1.000.000 euros (one million euros) on 01/06/2008.*
2. *The club DYNAMO de KIEV pay to the club Entente SOUTRAC OUAHAM, affiliated to the Senegalese Football Federation, a compensation of 5% (five percent) of the principal and complementary transfer indemnity of the Player P. from the club SASP NANCY LORRAINE to the club DYNAMO de KIEV, due in virtue of a partnership agreement dated January 4, 2002 signed between SASP NANCY LORRAINE and the club Entente SOTRAC OUAHAM. This compensation will be paid by the club DYNAMO de KIEV within the terms foreseen in the present agreement.*
3. *The club DYNAMO de KIEV will be in charge of the 5% solidarity mechanism stipulated in annex 5 of FIFA regulations complementarily to the principal and complementary compensation for the transfer of the player P.*
4. *The club DYNAMO de KIEV will pay to the club SASP NANCY LORRAINE a complementary transfer compensation of 20% (twenty per cent) on the benefit, taxes excluded, obtained in case the club DYNAMO de KIEV transfers the player P. to a third club, this compensation to be paid within 15 days following the player's transfer.*
5. *The club DYNAMO de KIEV will pay to the club SASP NANCY LORRAINE a complementary transfer compensation of 375.000 euros (Three hundred seventy five thousand euros) taxes excluded in case the club DYNAMO de KIEV qualifies in the season 2007/08 to the 1/16 finals*

round of the UEFA Champions League (matches after the 3rd preliminary round), this compensation to be paid within 15 days following the qualification.

6. *The club DYNAMO de KIEV will pay to the club SASP NANCY LORRAINE a complementary transfer compensation of 500.000 euros (half million euros) taxes excluded if the club DYNAMO de KIEV qualifies during the season 2007/2008 to the 1/8 finals round of the UEFA Champions League, this amount to be paid within 15 days following the qualification.*
7. *The club DYNAMO de KIEV will pay to SASP NANCY LORRAINE a complementary transfer compensation of 750.000 euros (seven hundred fifty thousand euros) taxes excluded if the club DYNAMO de KIEV ends the Ukrainian Championship in first place whether in the season 2007/2008 or in the season 2008/2009, this sum to be paid within 15 days after the end of the championship.*

(...)

10. *For the interpretation of the present agreement, the parties agree to refer to the French version”.*

On 19 July 2007 Nancy sent a letter to Dynamo and the Firm providing its bank details for the execution of the payments arising out of the transfer of the Player.

The Firm made the relevant payments of the fixed price of 4.000.000 €, as well as of an additional bonus of 375.000 €, to Nancy.

On 30 November 2007, Nancy sent a letter to Dynamo, in which it requested the payment of amounts corresponding to (i) the solidarity mechanism deriving from the Player’s transfer and (ii) the compensation due to the Senegalese club Entente Sotrac Ouakam.

On 5 December 2007, Dynamo responded to Nancy’s previous letter stating, among other issues, that:

“(...) our club fully adheres to the reached agreements, which were confirmed by appropriate documents signed by the parties, namely contract dated 17 July 2007 and protocol of financial agreement dated 18 July 2007 concerning the transfer of the player, P., from AS Nancy to FC Dynamo and fulfils its obligations with regard to the mentioned transfer according to the agreed schedule (...)”.

On 4 November 2008, Nancy sent a new request for payment to Dynamo, which in the pertinent part reads as follows:

“We have already sent to your club several letters and given lots of phone calls that remain unsuccessful.

This is the reason why we sum the Dynamo Kyiv to pay the amount of 371.875,00 concerning what follows:

- *218.750,00€ (article 2 of the protocol of agreement: 4.375.000€ × 5%)*
- *153,125,00€ (5% for the solidarity contribution mechanism, see the attached board already sent to you several times)*

(...).”

On 17 November 2008, Dynamo answered to Nancy's previous communication stating again, at the beginning of such response, that:

"(...) our club fully adheres to the agreements, which were confirmed by the appropriate documents signed by the parties, namely contract dated 17 July 2007 and protocol of financial agreements dated 18 July 2007 concerning the transfer of the player, P., from AS Nancy to FC Dynamo and has fulfilled its obligations with regard to the mentioned transfer as per the agreed schedule, (...)"

and afterwards, in the pertinent part, that:

"5% – ESO Ouakam

As we already informed you earlier (cf. to our letter, sent to you on 5 December 2007) we were ready to make payment in favour of Entente Sotrac Ouakam (5% of the transfer fee), however could not do that since we did not have/receive appropriate letter-request from the given Guinean club (...)

Solidarity contribution

In relation to your stated request for solidarity contribution payment, we would like to remind you once again (cf. to our letter, sent to you on 5 December 2007) that all payments executed in favour of AS Nancy included all necessary payments according to the FIFA Regulations for the Status and Transfer of Players. And our obligation for additional payment of the solidarity contribution refers to payment at our cost in favour of the third clubs (and not to AS Nancy, which receives all transfer fee and the additional payment), which contributed to development of the player.

Otherwise, as you know, we would have to deduct, accordingly, 5 % from all the fees paid (as FIFA Regulations for the Status and Transfer of Players require) in order to direct them then for solidarity contributions due to all appropriate training clubs".

Dynamo won the Ukrainian national championship in the season 2008/2009.

Nancy finally decided to start proceedings before FIFA against Dynamo, requesting the payment of certain amounts based on clauses 2, 3 and 7 of the Convention. The present proceedings and the decision appealed hereto only refer to the amounts deriving from clause 7 of the Convention.

On 11 August 2009, Dynamo sent a letter to Nancy, in which it was mentioned again that:

"(...) our club fully adheres to the agreements, which were confirmed by the appropriate documents signed by the parties, namely contract dated 17 July 2007 and protocol of financial agreements dated 18 July 2007 concerning the transfer of the player, P., from AS Nancy to FC Dynamo and has fulfilled its obligations with regard to the main amount of mentioned transfer as per the agreed schedule (...)"

and later on that:

"(...) in relation to your claim for additional payment due to the final first place of our club in the Championship of Ukraine last season, as well as taking into account our agreements in this context (cf. to the cl. 3.1 of the contract dd. 17/07/2007 and cl. 7 of the protocol) and the fact that the player P. took part only in about 40% of our club matches during the season, we are ready to consider option of settlement of the present issue with due consideration of the factual contribution of the player to winning of the championship title in the season of 2008/2009 (...)"

On 27 August 2009, Nancy refused the option of settlement proposed by Dynamo in the referred letter of 11 August 2009, and claimed again for amounts due under clauses 2, 3 and 7 of the Convention.

On 22 September 2009, Dynamo sent a new letter to Nancy, in which it proposed an amicable solution to their disputes in the following terms:

“We would like to advise you once again that we do not fully share your stated position in relation to the additional payments under the transfer of the player P.

At the same time, in order to settle this matter, we would like to reconfirm our will to reach a compromised solution of the present issue. Thus, in relation of the additional payment under the transfer of P. to our club (concerning the final 1st position in the Championship of Ukraine 2009), in spite some controversies in the documents concerning this issue and further to you preliminary agreements with Mr Issenegger, we would propose the following option of possible settlement of the present matter:

- *50% of the mentioned additional payment would be transferred in favour of AS Nancy in the period from 15 November until 5 December 2009;*
- *The rest 50% of the mentioned additional payment would be transferred after termination of the next season.*

We suppose that the above proposal is a reasonable compromised solution of the present disputable situation, which will help us to settle the present issue (...).”

On 28 September 2009 Nancy responded to this last proposal of Dynamo as follows:

“(...) We do agree with the settlement proposed by the FC DYNAMO KIEV concerning the payment modalities, that it is to say 50% of the payment before 5th December 2009, and the balance right after the end of the next season (2009-2010), and this before September 1st, 2010.

However, we would like the FC DYNAMO KIEV to precise the amount of the global debt to SASP NANCY LORRAINE is 1.192.320,24 € (1.185.625€ + 6.695,24€ for the FIFA’s procedure committed)”.

On 29 October 2009 Mr Ralph Isenegger, on behalf of Dynamo, sent an email to Nancy in which among other issues, it requested Nancy’s written confirmation on the last payment schedule offered by Dynamo.

On 6 November 2009, Nancy replied to Dynamo in the following terms:

“(...) Nous vous confirmons:

1) Dossier «Commission du statut du joueur de la FIFA»

La SASP NANCY LORRAINE accorde un délai de paiement au FC DYNAMO KIEV sur l’indemnité complémentaire de 750.000 euros (article 7) et le FC DYNAMO KIEV s’engage à payer cette somme en 2 échéances comme suit:

- *375.000€ avant le 5/12/2009*

- 375.000€ avant le 30/06/2010

Le FC DYNAMO KIEV s'engage à payer à la SASP NANCY LORRAINE l'intégralité des 5% dus initialement au club de OUAKAM (article 2), c'est-à-dire 256.250 €, et ce avant le 05/12/2009.

Le FC DYNAMO KIEV s'engage à payer la somme de 3.347,63 (5000 CHF) correspondant au frais de procédure FIFA engagés par la SASP NANCY LORRAINE.

Pour mémoire: intérêts de retard que nous vous réclamons en cas de non respect de cet accord.

Conclusion: échéancier:

- 634.597, 62 € avant le 05/12/2009

- 375.000,00 € avant le 30/06/2010.

Compte tenu de l'ancienneté de notre créance et de la longueur des procédures FIFA, nous refusons à ce jour votre demande de suspension de la procédure.

Nous ne suspendrons notre procédure qu'à la réception d'un courrier officiel du FC DYNAMO KIEV nous confirmant les dates et les montants indiqués dans ce courrier, confirmant ainsi notre accord sur les montants et les modalités de paiement, et après réception de la première échéance du 5 décembre 2009.

2) Dossier «Chambre de Résolution des litiges de la FIFA»

Nous réitérons notre demande conformément à l'article 3 de notre protocole que nous vous adressons une nouvelle fois.

Nous maintenons notre demande en paiement total de la somme de 179.375€ dus au titre de la solidarité, ainsi que les 3.347,62 € (5000 CHF) correspondant aux frais de procédure de la FIFA engagés par la SASP Nancy”.

The above mentioned paragraphs can be informally translated into English as follows:

“(…) We hereby confirm:

1) File «FIFA Players' Status Committee»

SASP NANCY LORRAINE agree to extend the term of payment to FC DYNAMO KIEV with regard to the complementary compensation of 750.000 euros (article 7) and FC DYNAMO KIEV undertakes to pay this amount in accordance with the following instalments:

- 375.000 euro before 5/12/2009

- 375.000 euro before 30/06/2010

FC DYNAMO KIEV undertakes to pay to SASP NANCY LORRAINE the total 5% initially due to the club OUAKAM (article 2), which amounts 256.250 €, before 05/12/2009.

FC DYNAMO KIEV commits itself to pay the amount of 3.347,63 (5000 CHF) corresponding to expenses incurred by SASP NANCY LORRAINE in the proceedings before FIFA.

For the record: delay interest will be claimed in case this agreement is not respected.

Conclusion: instalments:

- 634.597,62 € before 05/12/2009
- 375.000,00 € before 30/06/2010

Taking into account the seniority of our credit and the length of the proceedings before FIFA, we nowadays refuse your request to suspend the proceedings.

We will only suspend the proceedings after the receipt of an official letter from FC DYNAMO KIEV confirming the dates and amounts foreseen in this letter, thus confirming our agreement with regard to the amounts and the form of payment, and after the receipt of the first instalment on December 5, 2009.

2) File «FIFA Dispute Resolution Chamber»

We reiterate our claim pursuant to article 3 of our protocol, which we address to you once again.

We maintain our claim for the payment of the total amount of 179.375€ due with regard to the solidarity mechanism, as well as for the payment 3.347,62 € (5000 CHF) corresponding to the expenses incurred by SASP Nancy during the FIFA proceedings”.

On 19 November 2009 Dynamo, by means of his counsel Mr Isenegger, reacted to such new proposal of Nancy as follows:

“(…) Sans reconnaissance de droit aucune, et uniquement dans le but de trouver une solution amiable à ce litige, le club de Kiev serait prêt à accepter l'ensemble des points figurant sous le chiffre 1, du courrier du 6 novembre 2009 adressé par votre Président, Monsieur Jacques ROUSSELOT.

Toutefois cet accord suppose l'abandon de vos prétentions sous le point 2 dudit courrier, dans la mesure où l'indemnité de transfert payé par le club ukrainien couvre et inclut le montant dû au titre de solidarité, comme c'est le cas habituellement, dans tous les transferts internationaux.

J'attire votre attention sur le fait qu'il existe une contradiction manifeste entre les documents signés en français et ceux signés en russe et anglais, et que, selon moi, l'issue du litige porté à la FIFA est très incertaine.

Dans l'attente de votre confirmation au sujet de ce qui précède, je vous prie de recevoir, chère Madame, l'expression de mes sentiments les meilleures”.

The above mentioned paragraphs can be informally translated into English as follows:

“(…) Without recognising any right and solely for the purpose of finding an amicable solution to this dispute, the club from Kiev would be ready to accept all the points foreseen under number 1 of your letter dated November 6th, 2009 sent to us by your president Mr Jacques ROUSSELOT.

Nevertheless, this agreement implies the withdrawal of your claims under point 2 of the referred letter, insofar as the transfer compensation paid by the Ukrainian Club covers and includes the amount due with regard to the solidarity mechanism, as usual in all international transfers.

I draw your attention to the fact that there is a clear contradiction between the documents signed in French and those signed in Russian and English, and that, in my opinion, the result of the dispute before FIFA is very uncertain.

I look forward for your confirmation of what is mentioned above. Kind regards”.

On 8 January 2010 Nancy sent a letter to the French Football Federation stating the following:

“Le Dynamo de Kiev (par l’intermédiaire de leur avocat Maître ISSENEGER) nous a proposé entretemps de nous régler en 2 échéances les sommes qui nous étaient dues:

- *1^{ère} échéance au 15/11/2009*
- *2^{ème} échéance avant le 30/06/2010*

Ils nous ont ensuite fait savoir qu’ils nous régleraient les sommes qu’à la condition que nous renoncions à notre droit à l’indemnité de solidarité (confère: demande de saisine de la Chambre des Résolutions de la FIFA, copie courrier du 10/07/2009).

Ce que nous avons évidemment refusé.

Nous vous remercions d’intercéder auprès FIFA pour le suivi de notre demande, le non paiement de notre créance qui s’élève à 1.006.250 euros (...).”

The above mentioned can be informally translated into English as follows:

“Dynamo de Kiev (through its lawyer Mr ISSENEGER) has proposed us to pay the outstanding amounts in two instalments:

- *1st instalment, on 15/11/2009*
- *2nd instalment before 30/06/2010*

Dynamo de Kiev let us know that they will pay these amounts only if we renounce to our right to solidarity indemnity (cfr. claim before the FIFA Dispute Resolution Chamber, copy of the letter dated 10/07/2009).

We obviously refused such proposal.

We would be grateful if you intercede before FIFA for the follow-up of our claim. The sum of our credit raises up to 1.006.250 euros (...).”

On 1 March 2010 Dynamo sent a letter to Nancy in the following relevant terms:

“La présente fait suite aux diverses discussions qui se sont tenues la semaine passée concernant le joueur P.

La proposition exprimée par le club FC DYNAMO KIEV, proposition qui semble à même de mettre fin au litige, est la suivante:

Dès réception d’une facture de l’AS NANCY LORRAINE, versement dans les 5 jours ouvrables de EUR 375.000 (trois cent soixante-quinze mille euros) et versement de ce qui est dû au club africain, à savoir EUR 256’250 (deux cent cinquante six mille deux cents cinquante euros)

La deuxième tranche de EUR 375.000 sera ensuite versée à l’AS NANCY LORRAINE, toujours sous réception d’une facture, le 1^{er} juillet 2010 au plus tard”.

The above mentioned can be informally translated into English as follows:

“Reference is made to the various discussions held last week concerning the player P.

The proposal expressed by the club FC DYNAMO KIEV, that seems to put the present dispute to an end, is the following:

Payment of EUR 375.000 (three hundred seventy five thousand euros) and payment of the sum due to the African club, EUR 256'250 (two hundred fifty six thousand and two hundred fifty euros), within the 5 working days from receipt of an invoice from AS NANCY LORRAINE,

The second instalment of EUR 375.000 will be immediately paid to AS NANCY LORRAINE after the receipt of an invoice, at the latest on July 1st 2010”.

In the meantime, Dynamo opposed to the claim filed by Nancy in FIFA by means of written submissions dated 26 March and 22 June 2010.

On 16 November 2010, the Single Judge of the FIFA Players' Status Committee decided to partially accept Nancy's claim based on clause 7 of the Convention, and ordered Dynamo to pay the amount of 750.000 € plus interest, being the petition for additional damages dismissed. The operative part of the referenced decision (the “Decision”) reads as follows:

- “1. The claim of the Claimant, AS Nancy Lorraine is partially accepted.*
- 2. The Respondent, FC Dynamo Kiev, has to pay to the Claimant, AS Nancy Lorraine the amount of EUR 750.000, as well as 5% interests per year on the said amount as from 15 June 2009 until the date of effective payment, within 30 days as from the date of notification of this decision.*
- 3. Any further claims lodged by the Claimant, AS Nancy Lorraine, are rejected.*
- 4. If the aforementioned sum plus interest is not paid within the aforementioned deadline, the present matter shall be submitted, upon request to FIFA's disciplinary Committee for consideration and a formal decision.*
- 5. The final costs of the proceedings in the amount of CHF 20.000 are to be paid by the Respondent, FC Dynamo Kiev, within 30 days as from the notification of the present decision as follows:*
 - 5.1 The amount of CHF 15.000 has to be paid to FIFA to the following bank account (...).*
 - 5.2 The amount of CHF 5000 has to be paid directly to the Claimant, AS Nancy Lorraine.*
- 6. The final costs of the proceedings in the amount of CHF 20.000 are to be paid by the Respondent, FC Dynamo Kiev, within 30 days as from the notification of the present decision as follows (...)*
- 7. The Claimant, AS Nancy Lorraine, is directed to inform the Respondent, FC Dynamo Kiev, immediately and directly of the account number to which the remittance under point.2 and 5.2 above is to be made and notify to the Players' Status Committee of every payment received”.*

The Single Judge' reasoning in the Decision can be briefly summarized as follows: (i) the Convention, signed the day after the execution of the Agreement, novated and replaced such Agreement, (ii) Dynamo was fully aware of the contractual obligations foreseen in the Convention and expressly recognised it in the exchange of correspondence held with Nancy and (iii) Dynamo failed to comply one of those obligations: the commitment to pay 750.000 € deriving from the fact that Dynamo won the Ukrainian Championship in the season 2008/2009.

On 30 August 2011 Dynamo decided to appeal the Decision before the CAS and thus filed a Statement of Appeal with the following requests for relief:

1. *To accept the present statement of appeal for consideration of the Panel composed of three arbitrators and constituted pursuant to the rules provided by Article R54 of the Code of Sports-related Arbitration (2010 edition, amended on 01/07/2011) [...].*
2. *To cancel the decision of the Single Judge of the FIFA Players' Status Committee passed on 16 November 2010.*
3. *To pass a new decision, rejecting the claims of Nancy for payment of EUR 750.000 as well as 5% interest per year on the said amount”.*

On 2 September 2011, Dynamo filed its Appeal Brief before the CAS, in which it requested the CAS the following:

1. *To accept the present statement of appeal for consideration of the Panel composed of three arbitrators and constituted pursuant to the rules provide by Article R54 of the Code of Sports-related Arbitration (2010 edition, amended on 01/07/2011) [...].*
2. *To cancel the decision of the Single Judge of the FIFA Players' Status Committee passed on 16 November 2010.*
3. *To pass a new decision, rejecting the claims of Nancy for payment of EUR 750.000 as well as 5% interest per year on the said amount.*
4. *An order that AS Nancy Lorraine pays all costs of this arbitration.*
5. *An order that AS Nancy Lorraine shall compensation the Appellant for the legal and other costs occasioned in connection with this arbitration in an amount determined at the discretion of the Panel.*
6. *Any other or opposite conclusions of AS Nancy Lorraine be dismissed”.*

On 23 September 2011, Nancy filed its answer to the Appeal Brief, in which it requested the CAS to render an award in the following terms:

1. *Confirm the decision made by the Single Judge of the Player's Status Committee on November 16, 2010.*
2. *Confirm the judgment ordering the FC DYNAMO KYIV company to pay to SAS NANCY LORRAINE the complementary compensation of € 750.000 plus accrued interests at 5% p.a. from June 2009 up to the day of payment;*
3. *Condemn the FC DYNAMO KYIV to pay all the fees and costs”.*

A hearing took place in Lausanne on 25 January 2012.

At the beginning of the hearing, the parties' counsel made their respective opening statements, after which, with the agreement of all the parties, the witnesses Mr Ralph Isenegger and G. were cross-examined (individually and afterwards together), the parties representatives were also heard and finally the parties' respective counsel made their closing statements. The Panel invited the parties to try to settle the dispute, but after some discussions, they did not reach an agreement. Before closing the

hearing, the Panel requested the parties to allege or comment on the matter of vices of consent raised by the Appellant, which the parties did.

Both at the beginning and at the end of the hearing, the parties expressly declared that they were satisfied with the way in which 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 both 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.

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 Decision shall be revoked as it deems itself not contractually bound to the payment of

750.000 € to Nancy, while the Respondent requests that the Decision and the obligation of Appellant to pay said amount be confirmed.

B. *The contractual situation: the Agreement and the Convention*

7. The Panel shall start its considerations and the examination of the *quaestio litis* by analyzing the general contractual situation in the present case in order to determine the terms that shall rule the relationship between Dynamo and Nancy.
8. In this regard, the Panel is aware that Dynamo and Nancy entered into two different contracts, one of them signed on 17 July 2007 (the Agreement) and the other signed the day after (the Convention), both with the same general object or purpose: the transfer of the Player from Nancy to Dynamo.
9. The fixed price of the transaction was the same in both contracts (4.000.000 €). However the Agreement differed from the Convention in other aspects or terms of the referred transaction, *inter alia*:
 - In the Convention (clause 2), Dynamo commits itself to pay an amount to a Senegalese club (Entente Sotrac Ouakam) deriving from a collaboration agreement between this club and Nancy (*Le club DYNAMO DE KIEV verse au club Entente SOTRAC OUAHAM, club affilié à la Fédération Sénégalaise de Football, une indemnité de 5% (cinq pourcent) du montant de l'indemnité de mutation principale et complémentaire du joueur P. du club SASP NANCY LORRAINE au club DYNAMO de KIEV due en vertu d'une convention de partenariat en date du 4 janvier 2002 entre le club SASP NANCY LORRAINE et le club Entente SOTRAC OUAHAM. Cette indemnité sera versée par le club DYNAMO de KIEV dans les délais prévus à la présente convention*). This is a new issue not mentioned or dealt with in Agreement.
 - The Convention (clause 3) specifically rules on the solidarity mechanism payment (*Le club DYNAMO DE KIEV prend à sa charge l'indemnité de solidarité de 5% prévue à l'annexe du règlement FIFA en complément de l'indemnité de mutation définitive principale et complémentaire du joueur P.*), while no reference to this matter is made in the Agreement.
 - The payment obligation foreseen in clause 3.3 of the Agreement (*Besides, the Firm assumes an obligation to pay 5% (five percent) of the amount of the transfer fee, i.e. 200 000 Euros, personally to the Player, by means of inclusion of this amount into a single payment for signing by the Player of the contract with the firm*) does not exist in the Convention.
 - In the Agreement, a bonus payment of 375.000 € in favour of Nancy is foreseen in case Dynamo achieves the 1/8 finals round in the 2007/2008 UEFA Champions League (clause 3.1), while in the Convention this bonus payment, for the same milestone, is raised up to 500.000 € (clause 6).
 - The Convention also includes a bonus payment of 375.000 € in favour of Nancy in case Dynamo qualifies to the 1/16 finals round in the 2007/2008 UEFA Champions League (clause 5), which does not exist in the Agreement.

- In the Agreement (clause 3.1), the bonus payment of 750.000 € only accrued in case Dynamo won the Ukrainian championship in the season 2007/2008 (*in case Dynamo wins the final first place (title of The Champions of Ukraine) among the teams of the premier division of the season of 2007/2008, the Club shall be additionally paid 750.000 (seven hundred and fifty thousand) Euros within 15 banking days from the moment of completion of this season*), while in accordance with the Convention (clause 7), such payment became due in case Dynamo won the Ukrainian championship in the season 2007/2008 or in the season 2008/2009 (*“Le club DYNAMO DE KIEV versera au club SASP NANCY LORRAINE une indemnité de mutation complémentaire de 750.000 Euros (sept cent cinquante mille euros) hors taxe si le club DYNAMO DE KIEV termine premier du championnat d’Ukraine à l’issue soit de la saison 2007/2008, soit de la saison 2008/2009 payable dans les 15 jours qui suivront la fin du championnat de la saison où le club DYNAMO DE KIEV termine premier”*).
- 10. At this stage and in light of the above, the Panel shall resolve how these contracts, which refer to the same transaction but have slightly different terms, shall interact.
- 11. In para. 12 of the Decision, the Single Judge of the FIFA Players’ Status Committee considered in this respect that *“according to the principle of novation, whenever the parties to a contract substitute a new contract for the old one, the newly agreed contract usually replaces the older one, thereby cancelling the old contract. (...) in the case at hand, the parties had clearly concluded a subsequent agreement, i.e. the convention which had the same object and referred to the same obligations as the previously concluded agreement, i.e. the contract. Thus, the Single Judge held that the parties’ intention was obviously to extinguish the Agreement and to substitute it for the convention”*. In addition, in para. 13 of the Decision, the Single Judge tries to reinforce the prevalence of the Convention over the Agreement on the basis of clause 10 of such Convention, by stating that *“in view of the clear wording of this article [clause 10 of the Convention], the Single Judge found good reason to believe that the parties had explicitly agreed that, in case of a dispute as to the correct interpretation to be given to their contractual relationship, the French text, i.e. the convention signed on 18 July 2007, should prevail over the contract concluded the day before”*.
- 12. After examining the file, the Panel is not satisfied with this approach of the Single Judge on the contractual situation. It is indeed true that two different documents ruling the same general transaction were signed on 17 and 18 July 2007. However, in the Panel’s view this does not necessarily mean that one contract replaces the other. In fact, in the Panel’s opinion, from a strictly legal point of view this replacement is not at all feasible in the present case, mainly for two reasons:
 - a) Because the parties to the Agreement (Dynamo, the Firm and Nancy) are not the same than the ones in the Convention (Dynamo and Nancy), and it is not possible to novate (whether to modify or to extinguish) a contract, in this case the Agreement, unless all the parties to such contract consent to it. In the present case, it has not been proven that the Firm consented to novate the Agreement.
 - b) Because the parties’ own conduct precisely reveals that such a “general replacement of contracts” did not take place. On the contrary, the parties expressly recognised the validity and existence of both contracts. For instance:

- All the payments deriving from the transfer of the Player were made by the Firm, which is not a party to the Convention. Nancy accepts to receive the money from the Firm and didn't complain about it.
 - Nancy, in its letter of 19 July 2007, sent its bank details for payment of the amounts arising out of the transfer of the Player both to Dynamo and to the Firm, which is not a party to the Convention.
 - Dynamo recognised the existence of both contracts in the correspondence exchanged with Nancy, as it will be developed in further detail below.
 - The parties did not include in the Convention a clause stating that the Convention replaced and left the Agreement without effect, when they could have easily done so.
13. Therefore the Panel, far from considering that the Convention substituted the Agreement, is satisfied that in the present case, both the Agreement and the Convention co-exist and shall interact and be applied complementarily to the relationship between Dynamo and Nancy.

C. Dynamo's obligation of payment

14. After having defined the frame of the contractual relationship between the parties, the Panel shall address the key issue of the dispute: is Dynamo obliged to pay the amount of 750.000 € claimed by Nancy?
15. The Panel shall primarily underline in this respect that as mentioned above, the terms of the Agreement (clause 3.1) and the Convention (clause 7) with regard to such obligation of payment are totally different.
16. If the Agreement is isolatedly considered, such payment of 750.000 € would not be due, as clause 3.1 of the Agreement does not foresee, as event giving rise to the referred payment, the fact that Dynamo becomes the champion of the Ukrainian league in the season 2008/2009. However, pursuant to the terms of the Convention, it is unquestionable that Dynamo should be obliged to pay the amount of 750.000 € as the contractual prerequisites leading to it ("*si le club DYNAMO DE KIEV termine premier du championnat d'Ukraine à l'issue soit de la saison 2007/2008, soit de la saison 2008/2009*" [emphasis added]) took place, as Dynamo won the Ukrainian championship in the season 2008/2009.
17. In view of this contractual disparity the Panel shall analyze the facts occurred and the evidences produced by the parties in order to ascertain which of those contractual provisions shall prevail and thus, if the sum of 750.000 € is due by Dynamo or not.
18. In this regard, the Panel has noted that:
- a) It is undeniable that (i) Dynamo signed the Convention, (ii) the Convention was signed after the Agreement and (iii) the Convention provides for the payment of 750.000 € in case Dynamo wins the Ukrainian Championship in the season 2008/2009.

- b) The Convention was “*lu et approuvé*” (“read and approved”) by Dynamo’s President, Mr Igor Surkis, as it is hand-written in the Convention itself next to Mr Surkis’ signature.

This, in the Panel’s view, reveals that Dynamo agreed on the terms of the Convention, as no convincing evidence has been brought by Dynamo to contest the existence and the validity of the consent expressed by its President in the Convention.

In the present case, the fact (i) that Mr Surkis was alone or accompanied by Mr Isenegger at the signature of the Convention (which by the way, is unknown to the Panel especially after the contradictory statements made by Mr Isenegger and G. in this respect at the hearing), or (ii) that Mr Surkis is fluent in French or not, or (iii) that the Convention was not called “contract” or “complement to contract” but “*Protocole d’accord convention financière de mutation*”, or (iv) that the bonus fee related to the national league title in the season 2008/2009 was not specifically highlighted in the Convention, does not make any difference and shall not lead to a different conclusion. The relevant issue is that Dynamo’s President anyway signed the Convention, he freely expressed his consent without (at least proven) vices of any kind. He could have legitimately rejected to sign the Convention if he did not understand its content or if he did not accept any of its terms, but he did not. Mr Surkis, before signing the Convention, had the opportunity to read it or to have it read by a person of his trust. After doing so, he could have decided not to sign the Convention if he had had some concerns on the document’s content, but this was apparently not the case, as Mr Surkis signed the Convention.

Therefore the Panel can only conclude that Mr Surkis was conscious of and assumed what he was signing.

- c) It is not reasonable to believe, as Dynamo suggests, that Dynamo’s President agreed on signing the Convention only in the understanding that the Convention’s terms were identical to the ones foreseen in the Agreement, and that as regards of it and given that such contractual terms were eventually different, his consent to the Convention shall be deemed as not expressed or as invalid. A quick comparison of the structure and content of both documents is enough for any average person (and especially for the President of a football club, probably used to execute transfers of players) to find out that (i) their terms are quite different and (ii) the Convention is not a mere translation into French of the Agreement only without the intervention of the Firm.

In any case, the wording of clause 7 of the Convention is clear and the clause itself was easily recognisable within the body of the whole Convention, composed only of two pages.

- d) Dynamo has expressly acknowledged the existence and effects of the Convention in the correspondence exchanged with Nancy, and in some cases even the existence and effects of clause 7 of the Convention in particular. The following letters of Dynamo clearly reveal so:

- 5 December 2007:

“(…) our club fully adheres to the reached agreements, which were confirmed by appropriate documents signed by the parties, namely contract dated 17 July 2007 and protocol of financial agreement dated 18 July 2007 concerning the transfer of the player, P., from AS Nancy to FC

Dynamo and fulfils its obligations with regard to the mentioned transfer according to the agreed schedule (...)”.

- 17 November 2008:

“(...) our club fully adheres to the agreements, which were confirmed by the appropriate documents signed by the parties, namely contract dated 17 July 2007 and protocol of financial agreements dated 18 July 2007 concerning the transfer of the player, P., from AS Nancy to FC Dynamo and has fulfilled its obligations with regard to the mentioned transfer as per the agreed schedule”.

- 11 August 2009

“In relation to your claim for additional payment due to the final first place of our club in the Championship of Ukraine last season, as well as taking into account our agreements in this context (cf. to the cl. 3.1 of the contract dd. 17/07/2007 and cl. 7 of the protocol) (...)” [emphasis added].

The statements made in these letters are clear, being it irrelevant, in the Panel’s view, that the persons which made the above statements on behalf of Dynamo were not involved in the negotiations of July 2007 which led to the transfer of the Player. In fact, the referred statements are issued on behalf of Dynamo and in documents with the letterhead of Dynamo.

- e) In some of the mentioned letters of Dynamo (i.e. those of 5 December 2007 and 17 November 2008), as well as in others, reference is also made to some amounts due by Dynamo to the Senegalese club Entente Sotrac Ouakam, which is a matter only ruled in the Convention.
- f) As explained in section IV.3.2 of this award, the obligation to pay 750.000 € was not the sole novelty in the Convention with respect to the Agreement. This makes the Panel believe that Dynamo and Nancy, after signing the Agreement, re-negotiated some of the terms of the transfer of the Player, and reflected in the Convention the result of such negotiations and exchange of considerations between them. Therefore, the Panel cannot share the Appellant’s view concerning an alleged inexistence of considerations in exchange of the inclusion, in the Convention, of the bonus fee of 750.000 € in favour of Nancy in case Dynamo won its national championship in the season 2008/2009.
- g) Dynamo offered to Nancy the option to settle the issue of the debt arising out of clause 7 of the Convention. See in this respect the letter of Dynamo dated 11 August 2009:

“In relation to your claim for additional payment due to the final first place of our club in the Championship of Ukraine last season, as well as taking into account our agreements in this context (cf. to the cl. 3.1 of the contract dd. 17/07/2007 and cl. 7 of the protocol) and the fact that the player P. took part only in about 40% of our club matches during the season, we are ready to consider option of settlement of the present issue with due consideration of the factual of the player to winning of the championship title in the season of 2008/2009” [emphasis added].

Or the letter of Dynamo of 22 September 2009:

“Thus, in relation of the additional payment under the transfer of P. to our club (concerning the final 1st position in the Championship of Ukraine 2009), in spite some controversies in the documents concerning

this issue and further to your preliminary agreements with Mr Isseneger, we would propose the following option of possible settlement of the present matter: [emphasis added]

- *50% of the mentioned additional payment would be transferred in favour of AS Nancy in the period from 15 November until 5 December 2009;*
- *The rest 50% of the mentioned additional payment would be transferred after termination of the next season”.*

Or the letter of Dynamo of 1st March 2010:

“La présente fait suite aux diverses discussions qui se sont tenues la semaine passée concernant le joueur P.

La proposition exprimée par le club FC DYNAMO KIEV, proposition qui semble à même de mettre fin au litige, est la suivante:

Dès réception d’une facture de l’AS NANCY LORRAINE, versement dans les 5 jours ouvrables de EUR 375.000 (trois cent soixante-quinze mille euros) et versement de ce qui est dû au club africain, à savoir EUR 256’250 (deux cent cinquante six mille deux cents cinquante euros)

La deuxième tranche de EUR 375.000 sera ensuite versée à l’AS NANCY LORRAINE, toujours sous réception d’une facture, le 1er juillet 2010 au plus tard”.

19. The referred considerations confirm the Panel in its view that Dynamo assumed and accepted the obligations deriving from the Convention, and in particular the obligation of payment of 750.000 € in case it won the Ukrainian championship in the seasons 2007/2008 or 2008/2009, mainly as:
 - a) Dynamo indeed signed the Convention, and did it after and in spite of having previously signed the Agreement.
 - b) Dynamo repeatedly refers to the Convention in the correspondence exchanged with Nancy and explicitly confirms its “adhesion” to such Convention in general and to its clause 7 in particular (*factum proprium*).
 - c) Dynamo even proposed to settle the dispute with Nancy with regard to the payment of the sum of 750.000 €.
 - d) The arguments and grounds raised by the Appellant aiming at denying or contesting its obligation of payment of 750.000 € cannot distort, for the reasons above explained, the (repeated) acceptance of Dynamo of the obligation arising out of clause 7 of the Convention.
20. On the basis of the foregoing, the Panel considers that the appeal filed by Dynamo shall be dismissed, and that the Decision shall be confirmed.
21. This conclusion makes it unnecessary for the Panel to rule on any other request of the Parties.

The Court of Arbitration for Sport rules:

1. The appeal filed by FC Dynamo Kyiv against the Decision of the Single Judge of the FIFA Players' Status Committee dated 16 November 2010 regarding a contractual dispute arisen between such club and SASP AS Nancy-Lorraine relating to the player P. is dismissed.
2. The referred Decision of the Single Judge of the FIFA Players' Status Committee dated 16 November 2010 is confirmed.
- (...)
5. All other motions and/or prayers for relief are rejected.