



Arbitration CAS 2017/A/5213 Genoa Cricket and Football Club v. GNK Dinamo Zagreb, award of 15 December 2017

Panel: Mr Sofoklis Pilavios (Greece), President; Mr Stuart McInnes (United Kingdom); Mr Patrick Lafranchi (Switzerland)

Football

Transfer with sell-on clause

Interpretation of contractual clause

Burden of proof

Possible purpose and mechanism of sell-on clauses

1. **Contractual clauses should be interpreted in accordance with the principles established in Swiss law and the practice of the Swiss Supreme Court. In this respect, the real and common intention of the parties must be first established and the wording of the relevant agreement should be the starting point.**
2. **One party seeking to rely on a subjective interpretation that diverges from the literal interpretation of a contractual clause bears the burden of proof to establish that the real and common intention of the parties is different from what is stated therein.**
3. **A sell-on clause may contain a well-known mechanism in the world of professional football: its purpose is to “protect” a club (the “old club”) transferring a player to another club (the “new club”) against an unexpected increase, after the transfer, in the market value of the player’s services; therefore, the old club receives an additional payment in the event the player is transferred from the new club to a third club for an amount higher than that one paid by the new club to the old club. In transfer contracts, for that reason, a sell-on clause is combined with the provision defining the transfer fee: overall, the parties divide the consideration to be paid by the new club in two components, *i.e.* a fixed amount and a variable/notional amount, payable to the old club in the event of a transfer of the player from the new club to a third club.**

I. PARTIES

1. Genoa Cricket and Football Club (“Genoa CFC” or the “Appellant”) is a football club, with its seat in Genoa, Italy. Genoa is affiliated to the Italian Football Federation, which is a member of the Fédération Internationale de Football Association (FIFA).

2. GNK Dinamo Zagreb (“Dinamo Zagreb” or the “Respondent”) is a football club, with seat in Zagreb, Croatia. Dinamo Zagreb is affiliated to the Croatian Football Federation, which is a member of the Fédération Internationale de Football Association (FIFA).

II. FACTUAL BACKGROUND

A. Background facts

3. Below is a summary of the relevant facts and allegations based on the parties’ written submissions, pleadings and evidence adduced. Additional facts and allegations found in the parties’ written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.
4. On 11 July 2013, Dinamo Zagreb and Genoa CFC concluded a transfer agreement for the transfer of the player S (the “Player”) from Dinamo Zagreb to Genoa CFC (the “Transfer Agreement”).
5. The Transfer Agreement contained, *inter alia*, the following provisions:

“TWO - Economic terms and conditions

- a) For the permanent transfer of the **Player**, Genoa shall pay **Dinamo Zagabria** the total amount of Euro **4.000.000,00** = hereinafter indicated as **Fixed Amount**.
- b) Payments to **Dinamo Zagabria** shall be made according to the following terms and conditions, and anyway upon release of regular invoice:

(...)

- c) In addition to the **Fixed Amount** mentioned under art. a), **Genoa** commits to pay **Dinamo Zagabria** the following **Additional Amounts** listed below under items 1) and 2) and hereinafter indicated as **Variable Amount**:

- 1) € 500.000,00 (Euro five hundred thousand) = if the player makes 25 (twenty five) appearances of at least 45 minutes each with Genoa’s first team in the Serie A TIM League Championship.
- 2) € 500.000,00 (Euro five hundred thousand) = if the player makes 50 (fifty) appearances of at least 45 minutes each with Genoa’s first team in the Serie A TIM League Championship.

(...)

*In case of subsequent definitive transfer of the Player to a third club for a total transfer compensation higher than € 4.000.000,00 (Euro Four Million)=, all (remaining) amounts provided for under points 1) and 2) above become due even if the conditions stipulated therein are not met yet. Furthermore, it is agreed that the Variable Amounts, if due, shall be paid by Genoa to **Dinamo Zagabria** within 90 days from the date on which the condition under which the Variable Amount is due to **Dinamo Zagabria** actually occurs;*

(...)

The Parties agree that in the event of a delay in the payment of any of the amounts mentioned in this Agreement for more than 10 days the remainder will become immediately due and an interest rate of 5 % p.a. (Per Annum) will apply.

(...)

FIVE - Jurisdiction

(...)

The parties also agree that any item or issue anyhow relating to this agreement and not mentioned within it, shall without reserve be regulated in compliance with the provisions stated in the FIFA Regulations on the Status and Transfer of Players”.

6. On 18 July 2014, Genoa CFC and Club U.S. Sassuolo Calcio S.r.l. (“Sassuolo”) concluded a transfer agreement for the transfer of the Player from Genoa CFC to Sassuolo (the “Second Transfer Agreement”) against the payment of transfer compensation in the amount of EUR 3,500,000.
7. In addition, the Second Transfer Agreement contained the following provisions:

“The Transferee Club U.S. Sassuolo Calcio S.r.l. (here below Sassuolo) agrees and undertakes to pay to the Transferor Club Genoa CFC (here below Genoa) a performance bonus amounting to € 1.000.000,00 (Euro one million) + VAT if due to the occurrence of the following conditions in relation to the permanent transfer of the football player [S] born on 10/01/1992, registration number _____ (here below the player) Sassuolo and Genoa (here below the parties)

€ 500.000,00 + VAT if due, at the tenth (10) presence made by the player with Sassuolo first team or in official matches.

Additional € 500.000,00 + VAT if due, at the twentieth (20) presence made by the player with Sassuolo first team or in official matches”.

B. Proceedings before the FIFA Players' Status Committee

8. On 11 August 2016, Dinamo Zagreb lodged a claim with the FIFA Players' Status Committee (the "FIFA PSC") against Genoa CFC, requesting to be awarded EUR 1,000,000 plus 5% interest *p.a.* as of 4 July 2015 corresponding to the alleged outstanding conditional transfer fee, since the total amount paid by Sassuolo to Genoa CFC exceeded EUR 4,000,000, as the Player participated in 22 matches for Sassuolo in the 2014/2015 season.
9. In its reply, Genoa CFC stated that *"In principle and without prejudice to any further position which we may have to adopt in the future, we are making provision to pay the claimant what is contractually due and will hopefully be in a position to make the relevant payment shortly"*.
10. On 8 May 2017, the Single Judge of the FIFA PSC rendered its decision (the "Appealed Decision"), by which it partially upheld Dinamo Zagreb's claim. The operative part of the Appealed Decision reads as follows:
 1. *The claim of the Claimant, GNK Dinamo Zagreb, is partially accepted.*
 2. *The Respondent, Genoa CFC, has to pay to the Claimant, **within 30 days** as from the date of notification of this decision, the amount of EUR 1,000,000 plus 5% interest *p.a.* as of 4 July 2015 until the date of effective payment.*
 3. *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.*
 4. *Any further claim lodged by the Claimant is rejected.*
 5. *The final costs of the proceedings in the amount of CHF 25,000 are to be paid by the Respondent within 30 days of notification of the present decision as follows:*
 - 5.1. *The amount of CHF 20,000 to FIFA to the following bank account with reference to case nr. 16-01450/cpe; (...)*
 - 5.2. *The amount of CHF 5,000 to the Claimant.*
 6. *The Claimant is directed to inform the Respondent immediately and directly of the account number to which the remittances under points 2. and 5.2 are to be made and to notify the Players' Status Committee of every payment received"*.
11. On 21 June 2017, FIFA communicated to the parties the grounds of the Appealed Decision, following a request of Genoa CFC, *inter alia*, determining the following:
 6. *Having established the aforementioned, the Single Judge took note that the Claimant maintained that it was entitled to receive from the Respondent the amount EUR 1,000,000, as the player had been transferred from the Respondent to USS against the payment of EUR 3,500,000, plus a conditional*

payment of EUR 1,000,000 if the player made 20 appearances with USS. According to the Claimant, the conditions relating to this additional payment of EUR 1,000,000 were met, as a result of which the total transfer fee for the subsequent definitive transfer of the player to USS amounted to EUR 4,500,000.

7. *In continuation, the Single Judge observed that the Respondent did not dispute the amounts that according to the Claimant were due by USS to the Respondent on the basis of the player's subsequent definitive transfer to USS or the Claimant's claim that it is entitled to receive the conditional transfer fee of EUR 1,000,000 in accordance with art. 2c of the transfer agreement.*
8. *Consequently, and after having analysed the argumentation and documentation on file in the present matter, the Single Judge concluded that the player was subsequently transferred from the Respondent to USS on a definitive basis against the payment of EUR 3,500,000 plus a subsequent conditional transfer fee. In addition, the Single Judge established that the player participated in at least 20 matches of USS, triggering the obligation of USS to pay the subsequent conditional transfer fee of EUR 1,000,000 to the Respondent. In light of the foregoing, the Single Judge took the view that the total transfer compensation for the subsequent definitive transfer of the player from the Respondent to USS exceeded EUR 4,000,000.*
9. *On account of the above and in accordance with the basic legal principle of pacta sunt servanda, which in essence means that agreements must be respected by the parties in good faith, the Single Judge decided that the Respondent has to fulfil its contractual obligations towards the Claimant and must pay the conditional transfer fee in the amount of EUR 1,000,000 to the Claimant".*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

12. On 26 June 2017, Genoa CFC lodged a statement of appeal in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the "Code") with the Court of Arbitration for Sport (the "CAS"), challenging the Appealed Decision.
13. On 24 July 2017, the Appellant filed its appeal brief, requesting CAS to issue an award:
 - a) *REVIEWING the present case as to the fact and to the law, in compliance with Article R57 of the CAS Code;*
 - b) *SETTING ASIDE the FIFA decision;*
 - c) *ISSUING a new decision, which replaces the decision appealed against, confirming that the Appellant is not obliged to pay the Respondent any amount under the Transfer Agreement;*
 - d) *CANCELLING the Appellant's obligation to pay procedural costs of CHF 20,000 due to FIFA pursuant to the decision appealed against;*
 - e) *CANCELLING the Appellant's obligation to pay procedural costs of CHF 5,000 due to the Respondent pursuant to the decision appealed against;*

- f) *ORDERING the Respondent to bear all procedural costs and expenses relating to the present procedure;*
- g) *ORDERING the Respondent to cover all Appellant's legal costs and expenses relating to the present procedure in the amount that will be deemed appropriate".*
14. On 21 August 2017, the CAS Court Office, on behalf of the President of the CAS Appeals Arbitration Division, informed the parties that the Appellant has paid the advance of costs and that the Panel appointed to decide on this matter was constituted as follows:
- President: Mr Sofoklis Pilavios, attorney-at-law in Athens, Greece;
- Arbitrators: Mr Stuart McInnes, solicitor in London, United Kingdom (nominated by the Appellant);
- Mr Patrick Lafranchi, attorney-at-law in Bern, Switzerland (nominated by the Respondent).
15. On 7 September 2017, the Respondent filed its answer, requesting from CAS:
1. *to reject the appeal and to uphold the Challenged Decision;*
 2. *to condemn the Appellant to pay to the Respondent:*
 - a. *EUR 1,000,000 plus 5% interest p.a. as of 4 July 2015 until the date of effective payment;*
 - b. *CHF 5,000;*
 3. *to condemn the Appellant to the payment in the favor of the Respondent of the legal expenses incurred;*
 4. *to establish that the costs of the arbitration procedure shall be borne by the Appellant".*
16. On 8 September 2017, the CAS Court Office invited the parties to state whether they preferred a hearing to be held in this matter.
17. On 12 September 2017, the Respondent informed the CAS Court Office that no hearing was needed in this matter.
18. On 15 September 2017, the Appellant informed the CAS Court Office that no hearing was necessary.
19. On 19 September 2017, the CAS Court Office informed the parties that the Panel had decided not to hold a hearing in this matter and to render an Award based on the parties' written submissions.

20. On 26 September 2017, the CAS Court Office issued the Order of Procedure, which was signed by both parties.

IV. SUBMISSIONS OF THE PARTIES

21. The following outline of the parties' positions is illustrative only and does not necessarily comprise every submission advanced by the Appellant and the Respondent. The Panel has nonetheless carefully considered all the submissions made by the parties, whether or not there is specific reference to them in the following summary.

22. The Appellant's submissions, in essence, may be summarized as follows:

- In July 2014, the Appellant transferred the Player to Sassuolo against the payment of a permanent transfer compensation of EUR 3,500,000. In addition, the Appellant and Sassuolo agreed to conditional variable bonus in the amount of EUR 1,000,000 in case of 20 appearances of the player for Sassuolo's main team, which do not fall under the "total transfer compensation" stipulated in the Transfer Agreement.
- The Appellant argues that it refused to pay the Variable Amount of EUR 1,000,000 to the Respondent as there was no legal ground for such payment. According to Art. 2 (c) of the Transfer Agreement, the variable amount was due in case of a subsequent transfer of the Player, provided that the total transfer compensation was higher than EUR 4,000,000. In the Second Transfer Agreement, however, the total transfer compensation agreed between the parties was EUR 3,500,000, *i.e.* less than EUR 4,000,000.
- The Appellant maintains that any other payments that are regarded as "variable amounts" do not fall under the definition of "total transfer compensation" agreed in the Transfer Agreement.
- The Appellant refers to Article 2 (a) of the Transfer Agreement, where the parties had expressly defined the term "total" amount as the fixed permanent transfer compensation amount, which was due by the Appellant to the Respondent. As it may be seen from the wording of the Transfer Agreement, which is very clear, the definition of "total" amount excludes any variable amounts that were due according to other clauses. As a result, the condition alleged by the Respondent as the legal basis for the payment of the amount in dispute, needs to be understood in light of the wording of the Transfer Agreement, which excludes any variable or bonus amounts.
- Consequently, the Appellant states that it agreed with Sassuolo the total transfer compensation to be in the amount of EUR 3,500,000, which did not exceed the limit provided for in the Transfer Agreement with the Respondent. The fixed amount of EUR 3,500,000 did not include the extra payments and the condition under the Transfer Agreement for the payment of EUR 1,000,000 as Variable Amount is not met.

23. The Respondent's submissions, in essence, may be summarized as follows:

- Following the transfer of the Player from the Appellant to Sassuolo and since the transfer compensation payable by the latter exceeded the amount of EUR 4,000,000, in conformity to the terms of Art. 2 of the Transfer Agreement, the Respondent issued an invoice for the Appellant with regard to the payment of EUR 1,000,000 of the variable amount due under the Transfer Agreement.
- The Respondent argues that the Appellant initiated the CAS appeal proceedings with the sole objective to delay the payment due to the Respondent.
- The Respondent maintains that the parties to the Transfer Agreement on purpose used the wording "total transfer compensation" for the sole reason that they wanted to consider any and all amounts received by the Appellant for the future transfer of the player as being relevant for establishing the final amount of the transfer compensation.
- The Respondent further submits that the Appellant gave an intentional wrong interpretation of the Transfer Agreement and it violated the rights and entitlements of the Respondent causing to the latter material financial damage.
- Finally, the Respondent argues that it is common practice in the football transfer market that every club transferring the rights of a player against payment of transfer compensation, requests apart from the payment of a fixed guaranteed transfer compensation, the payment of an additional transfer compensation which is usually based on certain sporting performances being achieved by the Player.

V. JURISDICTION

24. The jurisdiction of CAS, which is not disputed, derives from Article 58 para. 1 of the FIFA Statutes (2016 edition) as it determines that "*[a]ppeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of notification of the decision in question*" and Article R47 of the CAS Code.
25. Furthermore, both parties expressly recognized the jurisdiction of the CAS by signing the Order of Procedure. It follows that CAS has jurisdiction to decide on the present dispute.

VI. ADMISSIBILITY

26. The appeal was filed within the 21 days set by Article 58 para. 1 of the FIFA Statutes (2016 edition). The appeal complied with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fees.
27. It follows that the appeal is admissible.

VII. APPLICABLE LAW

28. Article R58 of the Code provides as follows:

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

29. The Panel notes that Article 57 para. 2 of the FIFA Statutes stipulates 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”.

30. The Panel also notes the provision stipulated in section 5 of the Transfer Agreement, according to which *“any item or issue anyhow relating to this agreement and not mentioned within it, shall without reserve be regulated in compliance with the provisions stated in the FIFA Regulations on the Status and Transfer of Players”.*

31. Consequently, the Panel will decide the present dispute primarily in accordance with the FIFA Regulations and, subsidiarily, will apply Swiss law in case of a possible gap in the FIFA Regulations.

32. The present matter was submitted to the FIFA PSC on 11 August 2016, hence after 1 June 2016, which is the date when the 2016 edition of the FIFA Regulations for Status and Transfer of Players (the “FIFA Regulations”) and the 2016 edition of the FIFA Statutes came into force (see Articles 26 and 29 of the FIFA Regulations and Article 87 of the FIFA Statutes). These are the editions of the rules and regulations under which the case shall be assessed.

VIII. MERITS

33. According to Article R57 of the Code, the Panel has *“full power to review the facts and the law”*. As repeatedly stated in CAS jurisprudence, by reference to this provision the CAS appellate arbitration procedure entails a *de novo* review of the merits of the case, and is not confined merely to deciding whether the ruling appealed was correct or not. Accordingly, it is the function of this Panel to make an independent determination as to merits (see CAS 2007/A/1394, para. 21).

34. The Panel notes that the parties concluded a transfer agreement on 11 July 2013 for the transfer of the Player from the Respondent to the Appellant on a permanent basis for the amount of EUR 4,000,000, plus an additional payment of EUR 1,000,000 which was agreed on a conditional basis related to the Player’s appearances with the Appellant or his subsequent definitive transfer to another club for a total transfer compensation exceeding EUR 4,000,000.

35. The Panel also observes that the Player was transferred from the Appellant to Sassuolo in July 2014 on a permanent basis for the amount of EUR 3,500,000, plus a conditional payment of EUR 1,000,000, which was to be paid in the event the Player made 20 appearances with Sassuolo.
36. In addition, the Panel notes that the Player participated in at least 20 matches of Sassuolo and, as a result, the Appellant was entitled to receive the conditional additional amount of EUR 1,000,000 from Sassuolo.
37. Considering the above and in light of the facts of the case and the arguments adduced by the parties, the Panel must examine whether the Respondent is entitled to receive payment pursuant to the sell-on clause of the Transfer Agreement.
38. The Appellant, in essence, claims that the Player was transferred to Sassuolo for the amount of EUR 3,500,000 and that the conditional fee of EUR 1,000,000 from Sassuolo cannot be included to the transfer compensation. The Appellant further argues that any payments are to be regarded as “variable” or “conditional amounts” that do not fall under the definition of “total transfer compensation” according to the interpretation of the Transfer Agreement and the parties’ mutual intention, which is to be inferred by reference to the clear wording of the Transfer Agreement and the definition of “total transfer compensation” included in it.
39. The Panel notes that, in principle, the doctrine of *pacta sunt servanda* (which is enshrined in both the FIFA Regulations and Swiss law), which in essence means that agreements must be respected by the parties in good faith, is the guiding general principle by which the merits of this case will be examined. In this regard, the Panel further notes that when applying the doctrine of *pacta sunt servanda*, the proper interpretation of an agreement is of particular importance.
40. As a result, and in line with previous CAS case law, the Panel holds that the sell-on clause should be interpreted in accordance with the principles established in Swiss law and the practice of the Swiss Supreme Court. In that respect, the real and common intention of the parties must be first established. The wording of the Transfer Agreement should be the starting point here (CAS 2016/A/4379, para. 53).
41. The Appellant submits that the wording used by the parties in the Transfer Agreement clearly reflects the Parties’ intentions, *i.e.* that by “total transfer compensation” the parties meant only the fixed compensation amounts of a subsequent transfer and not the variable amounts stipulated therein.
42. In this context, the Panel points out that a party seeking to rely on a subjective interpretation which diverges from the literal interpretation of the text bears the burden of proof. The Appellant seeks to rely on a subjective interpretation of the Transfer Agreement but submits no evidence that the real and common intention of the parties is anything other than what is stated in it.

43. Moreover, concerning the matter of additional payments, the Panel relies on the holding in the award in CAS 2010/A/2098 concerning the purpose and function of the sell-on clause:

“The Sell-On Clause contains a well-known mechanism in the world of professional football: its purpose is to “protect” a club (the “old club”) transferring a player to another club (the “new club”) against an unexpected increase, after the transfer, in the market value of the player’s services; therefore, the old club receives an additional payment in the event the player is “sold” from the new club to a third club for an amount higher than that one paid by the new club to the old club. In transfer contracts, for that reason, a sell-on clause is combined with the provision defining the transfer fee: overall, the parties divide the consideration to be paid by the new club in two components, i.e. a fixed amount, payable upon the transfer of the player to the new club, and a variable, notional amount, payable to the old club in the event of a subsequent “sale” of the player from the new club to a third club” (para. 20, emphasis added).

44. As a result, the Panel is confident that by “total transfer compensation” the parties, which are established football clubs that are commercially experienced and familiar with transfer agreements and the terms used therein, intended to regard both the fixed transfer fee and the variable amounts stipulated for the subsequent transfer of the Player.
45. Therefore, the Panel finds that the Appellant’s argument lacks legal basis and merit and that Art. 2 (c) of the transfer agreement indicating that “*in case of subsequent definitive transfer of the Player to a third club for a total transfer compensation higher than € 4.000.000,00 (Euro Four Million)=, all (remaining) amounts provided for under points 1) and 2) above become due*” is triggered because: i) the Player was definitively transferred from the Appellant to Sassuolo and ii) the total amount received by the Appellant corresponding to the transfer compensation and the conditional transfer fee exceeds the amount of EUR 4,000,000.
46. The Panel feels itself comforted in this conclusion by the considerations of another CAS Panel: “*In the opinion of the Panel, it is common practice in the world of football that contracting parties deviate from initially agreed fictitious amounts. The Panel considers that a sell-on fee is to be based on the amount actually to be received by a club for selling a player to a subsequent club and not on an indicative amount*” (CAS 2012/A/2875, para. 73, emphasis added).
47. Consequently, the Panel finds that the additional payment of EUR 1,000,000, which was agreed under the Second Transfer Agreement between the Appellant and Sassuolo on condition that the Player makes more than 20 appearances in official matches with Sassuolo, is to be taken into account when calculating the “*total transfer compensation*” which, in turn, triggers the obligation of the Appellant to pay to the Respondent the additional payment of EUR 1,000,000 under the Transfer Agreement.
48. As a result, the Panel decides to confirm the Appealed Decision and to reject the relevant prayer of relief of the Appellant.
49. Any further claims or requests for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Genoa Cricket and Football Club S.p.A. on 26 June 2017 against the decision issued on 8 May 2017 by the Players' Status Committee of the Fédération Internationale de Football Association is dismissed.
2. The decision issued on 8 May 2017 by the Players' Status Committee of the Fédération Internationale de Football Association is confirmed.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.