Arbitration CAS 2013/A/3054 Club Atlético River Plate v. US Città di Palermo, award of 13 September 2013

Panel: Mr Pedro Tomás Marqués (Spain), President; Mr Hernán Jorge Ferrari (Argentina); Mr Efraim Barak (Israel)

Football
Transfer
Duty of information of the club having control of the transfer when two club share the economic rights over a player
Determination of the real intent of a party

1. **In a case, where two clubs share the economic rights over a player and are supposed to share (even if not in equal shares) the sell-on fee, the club which maintains the registration of the player and who is the one actually having the control on the transfer and does transfer a player has a heavy degree of responsibility of information with regard to the terms and conditions of the transfer, in view of the financial profit-sharing rights of the previous club, and the fact that the latter is a remote party to the transfer and thus not being involved in the negotiation with the third club which desires to acquire the player.**

2. **When the mutually agreed real intention of the parties cannot be established, the contract must be interpreted according to the requirement of good faith. The judge has to seek how a declaration or the external manifestation of a party could have been reasonably understood dependent upon the individual circumstances of the case. The requirements of good faith tend to give the preference to a more objective approach. The emphasis is not so much on what a party may have meant but on how a reasonable man would have understood his declaration. In determining the intent of a party or the intent which a reasonable person would have had in the same circumstances, it is necessary to look first to the words actually used or the conduct engaged in. However, the investigation is not to be limited to those words or the conduct even if they appear to give a clear answer to the question. In order to go beyond the apparent meaning of the words or the conduct by the parties, due consideration is to be given to all relevant circumstances of the case. This includes the negotiations as well as any subsequent conduct of the parties and usages.**

INTRODUCTION

1. This appeal is brought by Club Atlético River Plate (hereinafter referred to as "the Appellant" or "River"), against a decision of the Single Judge of the Players' Status Committee (hereinafter also referred to as "the Single Judge") of the Fédération Internationale de Football Association

(hereinafter referred to as "FIFA") dated 11 May 2012 (hereinafter also referred to as "the Appealed Decision") imposing on River the payment of EUR 1,316,500, plus interests, to US Città di Palermo (hereinafter referred to as "the Respondent" or "Palermo") in the context of a sell-on fee related to the transfer of the player E. (hereinafter referred to as "the Player") from River to the Portuguese club FC Porto (hereinafter referred to as "FC Porto").

I. THE PARTIES

A. Club Atlético River Plate

2. River Plate is an Argentinean football club, affiliated with the Asociación del Fútbol Argentino (hereinafter also referred to as "AFA"), which in turn is affiliated with FIFA.

B. US Città di Palermo

3. Palermo is an Italian football club, affiliated with the Federazione Italiana Giuoco Calcio (hereinafter referred to as "FIGC"), which in turn is affiliated with FIFA.

II. FACTUAL BACKGROUND

4. Below is a summary of the main relevant facts and allegations based on the parties' written submissions and evidence adduced in the proceedings. Additional facts and allegations 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 submission and evidence it considers necessary to explain its reasoning.

5. On 20 January 2005, Palermo and River concluded a transfer agreement (hereinafter referred to as "the Transfer Agreement") for the football player E. (hereinafter referred to as "the Player").

6. The most relevant part of the Transfer Agreement are the following (translation from Spanish to English provided by the Appellant):

> *"3. The price for the definitive transfer of the PLAYER consists of EUR 1,600,000 (one million six hundred thousand Euros) plus value added tax (impuesto al valor agregado - IVA), if the payment of that tax should be necessary, RIVER PLATE shall pay PALERMO as follows:*
>
> *(a) EUR 400,000 (four hundred thousand Euros) on 30 January 2005*
> *(b) EUR 400,000 (four hundred thousand Euros) on 30 June 2005*
> *(c) EUR 800,000 (eight hundred thousand Euros) on 30 June 2006*

All instalments should be paid plus IVA (if such tax should be necessary) and through bank transfer to the bank account established by PALERMO.

Once the instalment due on 30 January 2005 and the receipt of the original insurance policy mentioned on Provision N° 8 have been received, and no longer after the second day of receiving such documents, PALERMO is bound to provide the necessary documents for the issuance of the ITC. The PLAYER is informed about this circumstance to its relevance for him.

4. *PALERMO is bound to grant and RIVER is bound to acquire the remaining fifty percent (50%) of the economic rights over the transfer, consisting of EUR 1,200,000 (one million two hundred thousand Euros) plus IVA (if such tax should be necessary). RIVER PLATE is bound to pay such sum as follows:*

   (a) EUR 400,000 (four hundred thousand Euros) on 30 January 2006
   (b) EUR 400,000 (four hundred thousand Euros) on 30 January 2007
   (c) EUR 400,000 (four hundred thousand Euros) on 30 January 2008

   The PLAYER expressly and irrevocably confirms and accepts this circumstance.

5. *Should RIVER PLATE permanently transfer the player to a third club before 31 January 2008, PALERMO will be entitled to receive the sum it is owed within thirty days of the transfer agreement being deposited in the third club.The minimum of EUR 1,200,000 (one million two hundred thousand Euro) guaranteed to PALERMO, which represents fifty percent (50%) of the economic rights over the transfer, will be reduced in accordance with the payments it receives from RIVER PLATE as per the procedure agreed in the Provision N° 4.*

6. *River needs the PALERMO's authorization to transfer the Player to a third club. PALERMO may offer a different transfer agreement with another club for a higher sum of money. RIVER PLATE shall inform PALERMO about the terms and conditions of the offer made by a third club and PALERMO shall have a seven days term to offer a better proposal in terms of price and payment conditions. If following the seven days term PALERMO had not made a better proposal; RIVER PLATE shall be free to accept the first offer and carry out the PLAYER's transfer".*

7. On 30 January 2005 and on 30 June 2005, the Appellant paid the two first instalments (EUR 400,000 each), as per clause 3 of the Transfer Agreement.

8. On 5 December 2006, the Respondent initiated proceedings against the Appellant before FIFA, in relation with the non-payment of the last instalment of the transfer compensation (EUR 800.000) provided in clause 3 of the Transfer Agreement and the first instalment (EUR 400.000) of the part of the Player's economic rights provided in clause 4 of the Transfer Agreement.

9. On 23 July 2007, the Appellant sent a letter to the Respondent informing it of an offer made by FC Porto to acquire the services of the Player. The most relevant part of this letter reads as follows (translation from Spanish to English provided by the Panel):

"Pursuant to and for the purposes of the provisions of the fifth clause, second paragraph of the contract between our clubs dated January 20, 2005, find attached this club´s offer, consisting of the acquisition of the whole (100%) of the federative and economic rights over the player´s transfer, in the sum of € 3.400,000, - net, taking care the acquiring club of the operational costs. Payment: € 1.700,000 - cash, within five days of signing the contract. The remaining amount of € 1.700,000 -, on July 31, 2008, to be documented of a promissory note with a bank guarantee. The celebration of a friendly match between the clubs is expected, according to the offer".

10. Attached to the captioned letter was a letter from FC Porto, addressed to River, whose more relevant are as follows (translation from Portuguese to English provided by the Panel):

"We hereby confirm our interest in acquiring immediately the 100% of the federative and economic rights of the professional football player E., on the following conditions:

a) Transfer price: €3,400,000,-. To be paid in two instalments (…)

b) 15% of the player + 9.5% of AFA (24.5% costs) within the five days after signing the contract".

11. On 24 July 2007, the Respondent notified FIFA of its consent to the Player's transfer to FC Porto. The letter was copied to the Appellant as well as to the AFA and the FIGC. The most relevant part of this letter reads as follows (translation from Spanish to English provided by the Panel):

"We communicate you our acceptance to the sale of the player E. to the Club FC Porto for the total amount set out in the Club Porto´s attached proposal of yesterday, July 23, and we give our consent to the transfer of the player in question, <u>under the only condition that before and immediately</u> the Club River must pay the overdue debt of € 1.600000,- and that the rest of the credit will be paid to us under the terms of the contract of 20 January 2005" (emphasis added by the Respondent).

12. On 24 July 2007, River signed a transfer agreement with FC Porto for the definitive transfer of the Player (hereinafter referred to as the "Second Transfer Agreement"). The most relevant parts of this document reads as follows (translation from Spanish to English provided by the Appellant):

"The transfer price mentioned on Clause No 2 is three millions four hundred thousand Euros (EUR 3,400,000) without deductions or withholdings of any type, payable as follows.

3(a) One million seven hundred thousand Euros (EUR 1,700,000.-) paid in cash within five days of the subscription of this agreement, by bank transfer to RIVER PLATE's bank account (…).

3(b) The sum of EUR 1,700,000 (one million seven hundred thousand Euros) on 31 July 2008 through bank transfer to the indicated bank account or to the bank account established by RIVER PLATE. All costs and expenses from that transfer being borne by PORTO.

(…)

Clause No 4: PORTO shall bear all expenses related to the transfer transaction as well as following expenses,

4(a) 15% (EUR 510,000) to "Futbolistas Argentions Agremiados" [Argentinean Player's Union] *pursuant to Article 9 of the CCT* [Collective Bargaining Agreement] *430/75 AFA-FAA.*

4(b) 2% (EUR 68,000) to the Argentine Football Association (AFA) for the transfer.

4(c) 7% (EUR 238,000) to the Argentine Football Association (AFA) in application of the Government Decree No 1212/2003.

4(d) 0.5% (EUR 17,000) for the tariff which shall be paid to "Futbolistas Argentinos Agremiados [Argentinean Player's Union].

4(e) the total sum of transaction expenses which were detailed above consists of EUR 833,000 (Eight hundred thirty three thousand) which shall be deposited by PORTO in within five days of the subscription of this agreement and prior to the issuance of the player's ITC. Such deposit is a condition for the issuance of the ITC. All expenses and costs of such cash flow transfer shall be borne exclusively by PORTO.

4(f) Any contribution, right, tax, rate, tariff or any other expenses accrued in Portugal which levies the transfer shall be as well borne by PORTO. Hence, RIVER PLATE shall receive the net compensation established on Provision 3 without any type of deduction.

4(g) PORTO shall bear the payment of any commission to Agents designated by the club who take part or may take part in the transfer".

13. On 7 August 2007, the Appellant paid the Respondent a sum of EUR 1,550,000.

14. On 9 August 2007, the Single Judge of the Players' Status Committee condemned the Appellant mainly to pay the sum of EUR 1,600,000, as the outcome of the FIFA proceedings initiated by the Respondent on 5 December 2006.

15. On 13 August 2007 and on 14 September 2007, the Appellant paid the Respondent respectively an amount of EUR 50,000 and an amount of EUR 100,000, related to the instalments due in application of clauses 3 and 4 of the Transfer Agreement.

16. On 17 April 2008, the Respondent filed a claim before FIFA against the Appellant, requesting the payment of the sum of EUR 1,300,000 based on the clause 5 of the Transfer Agreement, plus an interest of 7% per annum (clause 9 of the Transfer Agreement) and legal costs. The Respondent based its claim on a transfer amount between River and FC Porto of EUR 4,200,000 as it was unaware of the final transfer amount of the Player to FC Porto, but requested that FIFA ascertain the exact compensation once received the final transfer agreement between FC Porto and River from the latter.

17. On 11 May 2012, the Single Judge of the Players' Status Committee rendered its decision, with the following operative part:

1. *The claim of the Claimant, US Città di Palermo, is partially accepted.*

2. *The Respondent, Atlético River Plate, has to pay to the Claimant, US Città di Palermo, the amount of EUR 1,316,500,* ***within 30 days*** *as from the date of notification of this decision.*

3. *Within the same time limit, the Respondent, Atlético River Plate, has to pay the Claimant, US Città di Palermo, default interest of 5% p.a. on the following partial amounts as follows:*

   - *on EUR 528,706.4, as from 23 August 2007 until the date of effective payment;*
   - *on EUR 528,706.4, as from 1 August 2008 until the date of effective payment;*
   - *on EUR 259,087.2, as from 23 August 2007 until the date of effective payment.*

4. *Any further claims lodged by the Claimant, US Città di Palermo, are rejected.*

[…]

18. The Appealed Decision was notified to the Parties, with the grounds, on 21 December 2012.

III. SUMMARY OF THE ARBITRAL PROCEEDINGS BEFORE THE CAS

19. On 10 January 2013, the Appellant filed an appeal before CAS against the Respondent with respect to the Appealed Decision.

20. Following a request from the Appellant, and as the Respondent did not object to such request, the Appellant was granted an extension of the time limit to file its appeal brief until 4 February 2013.

21. On 22 January 2013, FIFA renounced its right to request its possible intervention in the present arbitration proceedings.

22. On 4 February 2013, the Appellant filed its appeal brief. In the appeal brief, the Appellant requested the production of new evidence and reserved its rights to call several listed witnesses.

23. On 25 March 2013, the Parties were informed that the Panel was constituted as follows:

President:	Mr Pedro Tomás Marqués, attorney-at-law in Teià, Spain
Arbitrators:	Mr Hernán Jorge Ferrari, attorney-at-law in Buenos Aires, Argentina
	Mr Efraim Barak, attorney-at-law in Tel Aviv, Israel

24. On 5 April 2013, the Respondent filed its answer. In its answer, the Respondent questioned the convincing value of the testimonies of the witnesses proposed by the Appellant.

25. On 29 April 2013, the CAS Court Office informed the Parties that the request for the production of new evidence filed by the Appellant in its appeal brief was denied in accordance with Article R56 of the Code of Sports-related Arbitration (hereinafter the "CAS Code").

26. On 10 May 2013, the CAS Court Office informed the Parties, after consultation of the latter, that a hearing will be held in the present proceedings on 16 July 2013, at CAS Headquarters in Lausanne.

27. On 10 and 13 May 2013, the Appellant, respectively the Respondent, filed the Order of Procedure, duly signed.

28. On 18 and 19 July 2013, after a request by the Panel at the hearing, the Respondent provided the Panel with (a) the letter dated 23 July 2007 from the Appellant to the Respondent and (b) the letter dated 24 July 2007 from the Respondent to FIFA, together with its comments thereto.

29. On 31 July 2013, the Appellant also provided the Panel with the above-mentioned letters, together with its comments thereto.

IV. HEARING

30. A hearing was held on 16 July 2013 at the CAS Headquarters in Lausanne, Switzerland. The following persons attended the hearing:

- For the Appellant: Ms Ana Favier, Ms Marisol Crespo, Mr Daniel Crespo and Mr Cristian Ferrero, attorneys-at-law in Buenos Aires, Argentina;

- For the Respondent: Mr Paolo Lombardi, attorney-at-law in Edinburgh, United Kingdom.

31. At the beginning of the hearing, the Appellant renounced to the examination of any witness.

32. The Parties were then afforded the opportunity to present their case, to submit their arguments, and to answer the questions asked by the Panel.

33. In the course of the hearing, the Panel requested the Parties to provide CAS with all correspondences related to the application of Clause 5 of the Transfer Agreement.

34. The Parties explicitly agreed at the end of the hearing that their right to be heard and to be treated equally in these arbitration proceedings had been fully observed.

V. POSITION OF THE PARTIES

35. The following outline of the Parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the Parties. The Panel, however, has carefully considered all the submissions made by the Parties, even if no explicit reference has been made in what immediately follows.

A. The Appellant's position

36. The Appellant made a number of submissions, in its statement of appeal, in its appeal brief and at the hearing. These can be summarized as follows:

a. The value of the so-called "economic rights" shall be calculated on the transfer compensation, and not on the taxes and rates related to this transfer compensation.

b. According to the Transfer Agreement, the Appellant and the Respondent shared, until 31 January 2008, the Player's economic rights in equal parts. If one would follow the reasoning in the Appealed Decision, the result would be that the Respondent's share (50%) would be *"better"* than the Appellant's share (50%).

c. In the Transfer Agreement, it was not agreed that the Respondent would be entitled to receive its 50% from the total payments made by a third club, but *"50% of the economic rights over the transfer"*.

d. In the Second Transfer Agreement, the following payments were established:

- Transfer price: EUR 3,400,000
- Taxes and other transaction related costs: EUR 833,000

It is also specified in the Second Transfer Agreement that the beneficiaries of those payments of EUR 833,000 are: the Player, the Argentinean Player's Union, the AFA and the Argentinean tax authority and in no case the Appellant.

e. In Argentina, taxes over the transfers of a football players are due in accordance with the following rules:

- AFA's General Rules which set forth the payment to that entity of 2% (for each national club) over the transfer price;
- Government Decree No 1212/2003 which establishes the payment of 7% over the transfer price to Argentinean Social Security System;
- Collective Bargaining Agreement 430/75 which imposes the payment of 15% over the transfer price;
- 0.5% to Argentinean Players' Union ("FAA").

f. The economic rights are, in practice, the benefits or profits obtained by a club as a consequence of the transfer of a player with a valid agreement in force. These rights always consist of benefits or profits. Taxes paid over a transfer price are not benefits or profits of the previous club. The economic rights are rights to a share of the liquid profit over the economic result of transfer agreements between clubs for professional football players.

g. In Argentina, failure to carry out those payments prevents the issuance of the Player's International Transfer Certificate ("ITC") by the AFA. Hence, those payments need to be discharged in full for the effectiveness of the transfer through the issuance of the ITC.

h. Pursuant to Article 1 of the Swiss Code of Obligations ("CO"), a contract requires the mutual agreement of the parties. This agreement may be either express or implied. When the interpretation of a contract is in dispute, the judge seeks the true and mutually agreed upon intention of the parties. When the mutually agreed real intention of the parties cannot be established, the contract must be interpreted according to the requirements of good faith (ATF 129 III 664; 128 III 419 consid. 2.2 p. 422). The judge has to seek how a declaration or the external manifestation of a party could have been reasonably understood dependent upon the individual circumstances of the case (ATF 129 III 118 consid. 2.5 p.122; 128 III 419 consid. 2.2 p. 422). The requirement of good faith tends to give the preference to a more objective approach.

The emphasis is not so much on what a party may have but how a reasonable man would have understood his declaration (ATF 129 III 118 consid. 2.5 p.122; 128 III 419, 2.2 o. 422).

In determining the intent of a party or the intent which a reasonable person would have had in the same circumstances, it is necessary to look first to the words actually used or the conduct engaged in. However, the investigation is not to be limited to those words or the conduct even if they appear to give a clear answer to the question. In order to go beyond the apparent meaning of the words or the conduct by the parties, due consideration is to be given to all relevant circumstances of the case. This includes the negotiations, any subsequent conduct of the parties and usages (CAS 2007/A/1219).

i. In the letter dated 23 July 2007 sent by the Appellant to the Respondent containing FC Porto's offer for the transfer of the Player, the detailed conditions of this offer are described. It is specifically mentioned in this letter that the transfer compensation is EUR 3,400,000 and that FC Porto would bear the taxes (*i.e.* operative costs) related to the transfer.

j. In FC Porto's offer dated 23 July 2007, FC Porto undertakes the payment of the taxes, which are detailed. The offer also referred to the possibility of a friendly match, but this match never took place.

k. In the letter dated 24 July 2007 from the Respondent to FIFA, the latter accepted the amount set out in FC Porto's offer for the transfer of the Player.

l. In the Appealed Decision, the Single Judge of the Players' Status Committee did not take into account a payment of EUR 100,000 made by the Appellant on 14 September 2007.

B. The Respondent's position

37. The Respondent made a number of submissions, in its answer and at the hearing. These can be summarized as follows:

a. The provisions of the Transfer Agreement contradict the Appellant's position with regard to the alleged common intention of the Parties that the share of the Player's economic rights would be shared in equal parts. Indeed, if the Appellant had transferred the Player without compensation, or for a lesser amount than EUR 1,200,000, the Respondent would have anyway received EUR 1,200,000, in accordance with Clauses 4 and 5 of the Transfer Agreement.

b. It was not the Single Judge of the Players' Status Committee who rendered one party's right *"better than the other's"*; it was the Appellant and the Respondent who agreed to such conditions and the effect these conditions would have in different scenarios. In the end, the Parties set forth a fixed percentage for the economic benefits as a sell-on fee based on the value of the Player's transfer to a third club and only *a posteriori*, based on the financial terms agreed between the Appellant and a third party for the Player's transfer, it could be assessed whether this sell-on fee would be more or less beneficial for one or the other.

c. According to Article 18 par. 1 CO, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used.

d. The Transfer Agreement does not restrict the calculation of the sell-on fee to a specific offer or fee, but refers simply to the value of 50% of the Player's economic rights. The Transfer Agreement is very clear when it refers to the economic result of the transfer: this is the payment made by any third party for 100% of the Player's economic rights. Thus, the sell-on fee must consider all monies agreed for the release of the Player, with no deduction or differentiation whatsoever.

e. If FC Porto had paid only the transfer compensation but refused to bear the taxes and costs thereto, it would have been impossible to retain the services of the Player and no transfer could have taken place, as the AFA would not have released the ITC. Hence, the payment of these duties was essential for the release of the Player and his subsequent registration with FC Porto.

f. However, according to the Collective Bargaining Agreement signed by the AFA and the FAA, the transferring club is bound to pay the taxes related to a transfer. Notwithstanding this, the Appellant transferred this obligation to FC Porto as a condition to release the Player. Similarly, all other mandatory taxes in Argentina were also paid by FC Porto.

g. By imposing the burden to pay the taxes on its counterpart and conditioning the issuance of the corresponding transfer documentation, the Appellant increased the total value of

the transaction to EUR 4,233,000 and made these payments essential for the transfer of the Player, thus part of the "fee" paid by FC Porto.

h. Clause 5 of the Transfer Agreement set forth the participation of the Respondent in the economic benefit of the transfer, not the net result of this agreement.

i. Considering that the Transfer Agreement sets forth a sell-on fee of 50% to be calculated on the monies paid for the economic rights of the Player and said rights were only attainable by paying the offered compensations plus the duties levied on the transfer, the additional disbursement imposed on FC Porto of EUR 833,000 (essential for the purpose of engaging the Player) must be incorporated to the basis of calculation of the aforementioned sell-on fee.

j. In its letter dated 24 July 2007 to FIFA, the Respondent expressed its consent to the Player's transfer from FC Porto for the total sum mentioned in the written offer made by FC Porto on 23 July 2007, and under the conditions that the Appellant promptly complied with its outstanding financial obligations.

VI. THE PARTIES' REQUESTS FOR RELIEF

38. The Appellant's requests for relief are the following:

The Appellant respectfully requests the CAS:

I. To accept the appeal against the decision adopted by FIFA on 11 May 2012.

II. To annul the decision issued by FIFA on 11 May 2012 and issue a new decision establishing that:

a. Pursuant to the agreement dated January 20, 2005, Palermo's credit should be calculated exclusively on the transfer price of the player E. to the club Porto (that being EUR 3.4 million), deduction all the transfer's costs and all the payments made previously by River Plate.

b. Considering the result of the claim, half of the costs of the proceedings before FIFA shall be borne by Palermo.

c. The costs related to the present arbitration shall be borne by Palermo.

d. Palermo shall pay the legal fees and other expenses incurred by River Plate in connection with the present arbitration procedure.

39. The Respondent's requests for relief are the following:

1. (...)

2. We request that the Appellant's claims be dismissed and that the decision reached on 11th May 2012 by the Single Judge of the FIFA Player's Status Committee be upheld in its entirety.

3. In any case, we request this Honourable Court to order the Appellant to bear all costs incurred with these proceedings.

4. *In any case, we request this Honourable Court to order the Appellant to cover all legal expenses of the First Respondent related to theses proceedings.*

VII. CAS JURISDICTION

40. The jurisdiction of the CAS to hear this dispute derives from Article 67 par. 1 of the FIFA Statutes and Article R47 of the CAS Code, and was confirmed by the Parties when signing the Order of Procedure. The jurisdiction of the CAS in the present case was not disputed by the Parties.

41. Under Article R57 of the Code, the Panel has the full power to review the facts and the law and may issue a *de novo* decision superseding, entirely or partially, the appealed one.

VIII. ADMISSIBILITY OF THE APPEAL

42. The appeal was filed within the deadline provided by Art. 67 par. 1 of the FIFA Statutes, namely within 21 days after notification of the Appealed Decision. It further complies with the requirements of Article R48 of the CAS Code.

43. It follows that the appeal is admissible, which is also undisputed.

IX. APPLICABLE LAW

44. Article R58 of the CAS Code provides the following:

"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".

45. Pursuant to Article 66 par. 2 of the FIFA Statutes, *"[t]he 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".*

46. Regarding the issue at stake, the Parties have not, in the Transfer Agreement, agreed on the application of any specific national law. As a result, subject to the primacy of applicable FIFA's regulations, Swiss law shall apply complementarily. It can be observed that, in their respective submissions, the Parties adopted the same approach.

X. MERITS

A. Introduction

47. First, the Panel points out that when the Appellant refers to a certain percentage of a player's economic rights, and when the Respondent refers to a sell-on fee, they are actually referring to the same concept, and both terminologies can be used.

48. With respect to the substance of the case, the Parties disagree on which basis the sell-on fee (the percentage of the Player's economic rights) shall be calculated. The Appellant considers that the basis shall be the sole transfer compensation (*i.e.* EUR 3,400,000) proposed by FC Porto, whereas the Respondent deems that the operative costs of the transfer imposed in Argentina and paid by FC Porto shall be included in the calculation (*i.e.* EUR 4,233,000).

B. Clause 5 par. 2 of the Transfer Agreement

49. There is a dispute between the Parties concerning the interpretation of the Transfer Agreement, in particular Clause 5 par. 2.

50. In this regard, the Appellant considers that in Clause 5 of the Transfer Agreement, it was not agreed that the Respondent would be entitled to receive 50% from the total payment made by the third club but only to *"50% of the economic rights over the transfer"*. As to the Respondent, it considers that the Transfer Agreement is very clear when it refers to the economic result of the transfer, and that this corresponds to the payment made by any third party for 100% of the Player's economic rights and thus, the sell-on fee must consider all monies agreed and paid by the acquiring club (in this case FC Porto) for the release of the Player, with no deduction or differentiation whatsoever.

C. Clause 5 par. 1 and 3 of the Transfer Agreement

51. Clause 5 of the Transfer Agreement reads as follows:

> *"Should River Plate permanently transfer the Player to a third club before 31 January 2008, Palermo will be entitled to receive the sum it is owed within thirty days of the transfer agreement being deposited in the third club.*
>
> …
>
> *River needs the PALERMO's authorization to transfer the Player to a third club. PALERMO may offer a different transfer agreement with another club for a higher sum of money. RIVER PLATE shall inform PALERMO about the terms and conditions of the offer made by a third club and PALERMO shall have seven days term to offer a better proposal in terms of price and payment conditions. If following the seven days term PALERMO had not made a better proposal; RIVER PLATE shall be free to accept the first offer and carry out the Player's transfer".*

52. This article actually consists of three different parts, two of which are quoted above, dealing with different aspects of the co-ownership of the economic rights and the consequences of a transfer of the Player to a third club.

53. The first paragraph deals with the right of Palermo to receive its share in the transfer fee paid by the third party. Although the Parties could have chosen a better and clearer wording in drafting their obligations and responsibilities, it is clearly understood that the term *"the sum it is owed"* actually refers to the share that Palermo would have been entitled to receive and reflecting its "ownership" (50%) in the economic rights.

54. The second paragraph reflects the understanding of the Parties that Palermo would always be entitled to the minimum amount of EUR 1,200,000 stipulated in clause 3 of the Transfer Agreement and the fact that this amount will be taken into consideration in the calculation the amount owed to Palermo.

55. The third paragraph deals with the obligations and responsibilities of the Parties in respect of the way to handle third parties' offers. The clear wording of this provision imposes on the Appellant the obligation to inform the Respondent of any offer made by a third club with regard to the transfer of the Player. The Respondent then has the opportunity to propose a better offer from another club, or the initial offer would be considered as accepted after seven days without reaction.

56. The Panel considers that in such a case, where two clubs share the economic rights and are supposed to share (even if not in equal shares) the sell-on fee, the club which maintains the registration of the Player and who is the one actually having the control on the transfer and does transfer a player (here the Appellant) has a heavy degree of responsibility of information with regard to the terms and conditions of the transfer, in view of the financial profit-sharing rights of the previous club (here the Respondent), and the fact that the latter is a remote party to the transfer and thus not being involved in the negotiation with the third club (here FC Porto) which desires to acquire a player.

D. Interim conclusion

57. The Panel considers that in order to decide what was the intention of the Parties in the expression *"the sum it is owed"* it does not have to interpret Clause 5 of the Transfer Agreement in an objective manner as would have been the case if the Panel would have to solve a theoretical question or to issue a declaratory judgment in respect of the intent of the Parties. In order to solve the issue at stake, the Panel is assisted and actually is bound to rely also on the actual behaviour and conduct of the Parties in the specific circumstances of the case.

58. Indeed, Clause 5 par. 3 of the Transfer Agreement assumes the existence of a proposed agreement between River and a third club which calls upon the establishment of notifications and contacts between the Parties (River & Palermo), in the event that the Respondent would receive an offer from a third party. As a consequence of such an offer and the following

correspondence and notifications, Clause 5 par. 3 provides for a subsequent agreement between the Parties in respect of the transfer of the Player to a third club.

59. It is therefore this subsequent contacts between the Parties in respect of the specific circumstances of this case which shall be analysed by the Panel, in order to determine whether it was agreed between the Parties that the sell-on fee would be calculated on the total monies paid by FC Porto in the context of the Player's transfer, or only on the amount paid to River and remaining with River which can be considered as the transfer compensation *per se*. These contacts amount to a specific and subsequent agreement between the Parties which will enlighten the situation and will guide the Panel in its objective to establish what was the Parties' intention and what was, in the circumstances of this case, *"the sum it* [Palermo] *is owed"*.

E. The agreement between the Parties with regard to FC Porto's offer

I. The letters dated 23 and 24 July 2007

60. As seen above, on 23 July 2007, the Appellant sent a letter to the Respondent, informing it of the offer made by FC Porto for the acquisition of the Player's services. The most relevant part of this letter reads as follows (translation from Spanish to English provided by the Panel):

"Pursuant to and for the purposes of the provisions of the fifth clause, second paragraph of the contract between our clubs dated January 20, 2005, find attached this club´s offer, consisting of the acquisition of the whole (100%) of the federative and economic rights over the player´s transfer, in the sum of € 3.400,000, - net, taking care the acquiring club of the operational costs. Payment: € 1.700,000 - cash, within five days of signing the contract. The remaining amount of € 1.700,000 -, on July 31, 2008, to be documented of a promissory note with a bank guarantee. The celebration of a friendly match between the clubs is expected, according to the offer".

61. The offer made by FC Porto to the Respondent was attached to the latter's letter to FIFA. In this offer, FC Porto offered to acquire the Player's services, under the following conditions:

- transfer compensation of EUR 3,400,000 payable in two instalments;
- payment of the taxes (total of 24,5%);
- organization of a friendly match between the Appellant and FC Porto, for which the Respondent would receive the amount of EUR 800,000, to be paid in two instalments.

62. On 24 July 2007, the Respondent notified FIFA of its consent to the Player's transfer to FC Porto. The letter was copied to the Appellant as well as the AFA. The most relevant part of this letter reads as follows (translation from Spanish to English provided by the Panel):

"We communicate you our acceptance to the sale of the player E. to the Club FC Porto for the total amount set out in the Club Porto´s attached proposal of yesterday, July 23, and we give our consent to the transfer of the player in question, under the only condition that before and immediately the Club River must pay the overdue debt of € 1.600000,- and that the rest of the credit will be paid to us under the terms of the contract of 20 January 2005" (emphasis added by the Respondent).

63. As already explained, the Panel considers that this exchange of correspondence between the Parties, FIFA and the AFA established a new agreement (hereinafter referred to as "the Subsequent Agreement"), in accordance with Clause 5 par. 3 of the Transfer Agreement.

II. The interpretation of the Subsequent Agreement

i. In general

64. The Parties do not agree with the meaning of the Respondent's acceptance dated 24 July 2013, in particular with the meaning of the following sentence (translation from Spanish to English provided by the Panel):

"*We communicate you our acceptance to the sale of the player E. to the Club FC Porto for the total amount set out in the Club Porto´s attached proposal of yesterday, July 23, and we give our consent to the transfer of the player in question".*

65. The Appellant is of the opinion that this acceptance relates only to the transfer compensation of EUR 3,400,000, whereas the Respondent asserts that it relates to the transfer compensation, and the operative costs (taxes) of the transfer.

66. At this point, the Panel notes that it is agreed between the Parties that the friendly match referred to in FC Porto's offer never took place. It shall therefore not be considered in the present proceedings.

67. In accordance with CAS jurisprudence (in particular: CAS 2007/A/1219), pursuant to Article 1 CO, a contract requires the mutual agreement of the parties. This agreement may be either express or implied.

68. When the interpretation of a contract is in dispute, the judge seeks the true an mutually agreed upon intention of the parties, without regard to incorrect statements or manner of expressions used by the parties by mistake or in order to conceal the true nature of the contract (Article 18 CO). When the mutually agreed real intention of the parties cannot be established, the contract must be interpreted according to the requirement of good faith (ATF 129 III 664; 128 III 419 consid. 2.2 p. 422). The judge has to seek how a declaration or the external manifestation of a party could have been reasonably understood dependent upon the individual circumstances of the case (129 III 118 consid. 2.5 p. 122; 128 III 419 consid. 2.2 p. 422).

69. The requirements of good faith tend to give the preference to a more objective approach. The emphasis is not so much on what a party may have meant but on how a reasonable man would have understood his declaration (ATF 129 III 118 consid. 2.4 p. 122; 128 III 419 consid. 2.2 p. 422).

70. Together with the CAS panel in the above-mentioned case (CAS 2007/A/1219), the Panel considers that in determining the intent of a party or the intent which a reasonable person would have had in the same circumstances, it is necessary to look first to the words actually used or

the conduct engaged in. However, the investigation is not to be limited to those words or the conduct even if they appear to give a clear answer to the question. In order to go beyond the apparent meaning of the words or the conduct by the parties, due consideration is to be given to all relevant circumstances of the case. This includes the negotiations as well as any subsequent conduct of the parties and usages.

ii. In particular

71. As seen above, the Parties disagree on the meaning of their intent when they entered into the Subsequent Agreement.

72. In view of the above-mentioned consideration with regard to the interpretation of contracts according to Swiss law, the Panel considers that it shall determine how the Parties' declarations would have been reasonably understood dependent on the individual circumstances of the case.

73. The Panel would first like to recall the context of transfers of football players in Argentina. As seen above, the transfer of football players is subject to taxes amounting to 24,5% of the transfer compensation due. The payment of those taxes is mandatory in order for the AFA to issue the Player's ITC. This has not been contested by the Parties.

74. It is the Panel's opinion that the AFA system with regard to those taxes should have been known to Palermo and for sure was known to Palermo already at the time when the Second Agreement and Subsequent Agreement were concluded, since it was reflected in the exchange of letters between River and FC Porto that was sent to Palermo in order to receive its confirmation to the transfer.

75. In this context, the Appellant informed, through his letter dated 23 July 2007, the Respondent of FC Porto's offer. In this letter, the Appellant made a clear distinction between the economic compensation of the transfer and the operative costs of the transfer.

76. The Appellant clearly stated that the transfer compensation was EUR 3,400,000, payable in two instalments, and that the operative costs of the transfer would be borne by FC Porto, the latter costs not even being quantified, neither in the letter dated 23 July 2007, nor in FC Porto's offer.

77. The Panel is of the opinion that the Respondent, a first division club in Italy, was probably aware, as is the case with other clubs in the football family who already experienced transfers from Argentinean clubs, of the various operative costs over transfers in Argentina. Nevertheless, even if the Panel is wrong in this assumption, Palermo for sure became aware of the existence and the need to pay this operative costs at the moment it received the very clear letter from River.

78. In accordance with the above mentioned rules of interpretation, the Respondent's letter dated 24 July 2007, in which the Respondent declared that it accepted FC Porto's offer for the "total sum" indicated in the offer, shall be interpreted as an acceptance that the transfer compensation related only to the amount of EUR 3,400,000, and not to the additional applicable taxes.

79. In view of the above, the Panel, in majority, concludes that according to the communication made by the Appellant, which attached a copy of FC Porto's offer, the transfer compensation was fixed to EUR 3,400,000, and that the Respondent agreed to this sum.

F. The amount to be paid by the Appellant to the Respondent

80. According to Clause 5 of the Transfer Agreement, the amount to be received in relation with the sell-on fee shall be reduced *"in accordance with the payments"* already made by the Appellant on the basis of Clause 4 of the Transfer Agreement. In other words, any payments already made to the Respondent under the Clause 4 of the Transfer Agreement should be deducted from the amount of EUR 1,700,000 (50% of the above-mentioned amount of EUR 3,400,000).

81. In this respect, the Panel points out that in its decision dated 9 August 2007, the Single Judge of the Players' Status Committee had condemned the Appellant to pay the amount of EUR 1,600,000 to the Respondent and that said amount represented three instalments, two of which were due under Clause 4 of the Transfer Agreement. In particular, the Single Judge of the Players' Status Committee underlined that the two instalments that had to be paid as per Clause 4 of the Transfer Agreement represented a total amount of EUR 800,000, an amount composed of the sum of EUR 400,000, originally due on 31 January 2006, and the sum of EUR 400,000, originally due on 31 January 2007.

82. It was further established during the proceedings before CAS that the Appellant paid, on 14 September 2007, an additional amount of EUR 100,000 to the Respondent. The Appellant had therefore, at that time, already paid a total amount of EUR 900,000 in accordance with Clause 4 of the Transfer Agreement.

83. Therefore, the Panel concludes that, based on Clause 5 of the Transfer Agreement, the amount of EUR 900,000, shall be deducted from the sell-on fee of EUR 1,700,000.

84. In view of all the above, the Panel considers that the Appellant owes to the Respondent a total amount of EUR 800,000 as sell-on fee, *i.e.* 1,700,000 minus EUR 900,000, based on the terms of Clause 5 of the Transfer Agreement.

85. On the basis of the submissions of the Parties, which are silent in this regard, and in view of the fact that Clause 9 of the Transfer Agreement does not specifically mention the exact percentage to be applied, the Panel deems that an interest of 5% p.a. (the applicable legal interest rate under Article 104 CO) shall be applied.

86. As agreed between the Appellant and FC Porto in the Second Transfer Agreement, the amount of EUR 3,400,000 was payable in two instalments, the first instalment of EUR 1,700,000 being due within five days of the signing of the Second Transfer Agreement and the second instalment of EUR 1,700,000 being due on 31 July 2008.

87. Therefore, applying the same division schedule for the sum of EUR 800,000, the Panel holds that the interest of 5% p.a. should apply as from 29 July 2007 (*i.e.* five days after the signing of

the Second Transfer Agreement) on the partial amounts of EUR 400,000 (*i.e.* amount due in connection with the first instalment of EUR 1,700,000). Equally, the Panel holds that that an interest of 5% p.a. should apply on the partial amount of 400,000 (*i.e.* the amount due in connection with the second instalment of EUR 1,700,000) as from 1 August 2008, *i.e.* one day after the aforementioned amount of EUR 1,700,000 had become due.

XI. COST RELATED TO THE PROCEEDINGS BEFORE FIFA

88. In addition to its prayers for relief on the merits, the Appellant requested that half of the costs related to the proceedings before FIFA shall be borne by the Respondent.

89. The Panel considers that it is not for CAS to reallocate the costs of the proceedings before previous instances, and that therefore the appeal shall be dismissed in this respect.

XII. CONCLUSION

90. On the basis of the foregoing, the Panel, in majority, considers that:

- The Parties entered into a Transfer Agreement, which included the share of the Player's economic rights;

- Clause 5 par. 3 of the Transfer Agreement imposed obligations and responsibilities of the Parties in respect of the way to handle third parties' offers;

- The Appellant fulfilled its obligations in accordance with Clause 5 par. 3 of the Transfer Agreement, by transmitting FC Porto's offer to the Respondent;

- In the Appellant's letter dated 24 July 2007 to the Respondent, as well as in FC Porto's offer, a clear distinction was made between the transfer compensation per se (EUR 3,400,000) and the operative costs (taxes) related to the transfer (24,5% of the transfer compensation);

- The Respondent, was aware, at the latest after receiving the Appellant's letter, of the various operative costs over transfers in Argentina, agreed to FC Porto's offer, and this agreement related only to the transfer compensation *per se*;

- It is not for CAS to reallocate the costs related to the FIFA proceedings.

91. The Panel therefore concludes, in majority, that the appeal shall be partially upheld.

ON THESE GROUNDS

The Court of Arbitration for Sport hereby rules:

1. The appeal filed by Club Atlético River Plate against the decision of the Single Judge of the FIFA Players' Status Committee dated 11 May 2012 on 10 January 2013 is partially upheld.

2. The decision of the Single Judge of the FIFA Players' Status Committee dated 11 May 2012 is set aside.

3. Club Atlético River Plate is ordered to pay to US Città di Palermo the amount of EUR 800,000, plus 5% interest p.a. on the following partial amounts, until the effective date of the payment, as follows:

   - on EUR 400,000 as from 29 July 2007;

   - on EUR 400,000 as from 1 August 2008.

4. (…).

5. (…).

6. All other prayers for relief are dismissed.