CAS 2023/A/9412 Deportivo Saprissa v. Hapoel Beer Sheva FC

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President:	Prof. Dr. Martin Schimke, Attorney-at-law, Düsseldorf, Germany
Arbitrators:	Mr. José Juan Pintó, Attorney-at-law in Barcelona, Spain
	Dr. Janos Katona, Attorney-at-law in Budapest, Hungary
Ad hoc Clerk:	Mr. Adam Thew, Attorney-at-law, Bonn, Germany

in the arbitration between

Deportivo Saprissa, San Jose, Costa Rica

Represented by Mr. Juan de Dios Crespo Pérez and Mr. Juan Crespo Ruiz-Huerta, Attorneys-at-law, in Valencia, Spain

- Appellant -

and

Hapoel Beer Sheva FC, Beer Sheva, Israel

Represented by Mr. Roi Rozen, Attorney-at-law, in Bnei-Brak, Israel

- Respondent -

I. PARTIES

1. Deportivo Saprissa (the "Appellant") is a professional football club based in San Jose, Costa Rica. It currently plays in the Primera División of Costa Rica, the highest division of professional football in Costa Rica.

2. Hapoel Beer Sheva FC (the "Respondent") is a professional football club based in Beer Sheva, Israel. It currently plays in the Israeli Premier League, the highest division of professional football in Israel.

3. The Appellant and the Respondent are hereinafter referred to as the "Parties".

II. FACTUAL BACKGROUND

4. Below is a short summary of the relevant facts and allegations based on the Parties' written submissions and evidence. 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 this Award only to the submissions and evidence it considers relevant and necessary to explain its reasoning.

5. This case concerns a contractual dispute between the Appellant and the Respondent relating to the terms of the transfer of professional football player Jimmy Marin Vilchez (the "Player") in 2020 from the Respondent to the Appellant and the Player's subsequent departure in 2022 from the Appellant and his move to a third-party club based in Russia – FC Orenburg.

6. The Player played for the Respondent during the 2019/20 season.

7. On 10 June 2020, the Parties entered into a transfer agreement relating to the Player's transfer from the Respondent to the Appellant (the "Transfer Agreement").

8. Article 4 of the Transfer Agreement provided for a transfer fee of USD 1,000 to be paid by the Appellant to the Respondent, set out as follows:

> ***"Article 4***
>
> ***HAPOEL BE'ER SHEVA FC*** *will grant to DEPORTIVO SAPRISSA, who accepts, the right to purchase 100% federative and economic rights related to the Player for the net amount of USD $1.000 (One thousand US dollars) payable in one installment as follows on the account that* ***HAPOEL BE'ER SHEVA FC*** *will communicate in writing. The parties agree that the transfer fee is full and final settlement for the registration of the player.*

- USD $1.000 (One thousand US dollars) payable as soon as the Transfer Agreement is signed.

9. In addition, Article 4 of the Transfer Agreement went on to provide for further amount(s) to be paid by the Appellant to the Respondent in the event that the Player was subsequently *"transferred"* from the Appellant to another football club, set out as follows:

"In addition, if the Player is transferred from DEPORTIVO SAPRISSA, to another football club, ***HAPOEL BE'ER SHEVA FC*** *will be entitled to receive from DEPORTIVO SAPRISSA, the first USD 150.000 (One hundred and fifty thousand dollars of total sale and/or loan/s (regardless the number of times of such sale and/or loans/s); and over the excess of one hundred and fifty thousand dollars, each team will receive 50% of any amount receiving (regardless of the number of times of such sale and/or loans/s), after the payment of any applicable tax. Such amounts shall be paid by DEPORTIVO SAPRISSA to HAPOEL BE'ER SHEVA FC no later than 7 days from actually receiving such amount.*

In case DEPORTIVO SAPRISSA will transfer/loan the Player to another football club on a players swap, such transaction shall be considered as if it was made for USD 600,000, and DEPORTIVO SAPRISSA shall pay HAPOEL BE'ER SHEVA FC an amount of USD 375,000 no later than 7 days of signing such agreement.

This payment agreement for a second international sale and possible player swap, established in this article 4, will only be valid during the duration of the private contract with termination date May, 31, 2023, between the player and Deportivo Saprissa S.A.D."

10. The Player subsequently entered into an employment contract with the Appellant (the "Employment Contract") and played for the Appellant during the 2020/21 and 2021/22 seasons.

11. In the summer of 2022, the Player left the Appellant and joined FC Orenburg. The circumstances of this move are the subject matter of the present dispute.

III. PROCEEDINGS BEFORE THE FIFA PLAYERS STATUS CHAMBER

12. On 6 September 2022, the Respondent filed a claim before the FIFA Players Status Chamber (the "FIFA PSC") on the basis that it was entitled to a sell-on fee relating to the Player's transfer from the Appellant to FC Orenburg. In particular, the Respondent claimed that it was entitled to an amount of USD 375,000 plus interest from the Appellant as an outstanding sell-on fee pursuant to Article 4 of the Transfer Agreement.

13. On 6 December 2022, the Single Judge of the FIFA PSC issued a decision in the case (the "Appealed Decision"), in which he upheld the Respondent's claim.

14. The operative part of the Appealed Decision reads as follows:

"1. The claim of the Claimant, Hapoel Beer Sheva Football Club, is accepted.

2. The Respondent, Deportivo Saprissa, has to pay to the Claimant, ***USD 375,000 as outstanding amount*** *plus 5% interest p.a. as from 19 July 2022 until the date of effective payment;*

3. Full payment (including all applicable interest) shall be made to the bank account indicated in the ***enclosed*** *Bank Account Registration Form.*

4. Pursuant to art. 24 of the Regulations on the Status and Transfer of Players, if full payment (including all applicable interest) is not made ***within 45 days*** *of notification of this decision, the following* ***consequences*** *shall apply:*

> *1. The Respondent shall be banned from registering any new players, either nationally or internationally, up until the due amount is paid. The maximum duration of the ban shall be of up to three entire and consecutive registration periods.*
>
> *2. The present matter shall be submitted, upon request, to the FIFA Disciplinary Committee in the event that full payment (including all applicable interest) is still not made by the end of the three entire and consecutive registration periods.*

5. The consequences ***shall only be enforced at the request of the Claimant*** *in accordance with art. 24 par. 7 and 8 and art. 25 of the Regulations on the Status and Transfer of Players.*

6. The final costs of the proceedings in the amount of USD 25 000 are to be paid by the Respondent to FIFA. FIFA will reimburse to the Claimant the advance of costs paid at the start of the present proceedings (cf. note relating to the payment of the procedural costs below)."

15. The Appealed Decision also stated the following:

"NOTE RELATED TO THE APPEAL PROCEDURE:

According to article 57 par. 1 of the FIFA Statutes, this decision may be appealed against before the Court of Arbitration for Sport (CAS) within 21 days of receipt of the notification of this decision."

16. On 11 January 2023, the grounds of the Appealed Decision were notified to the Parties.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

17. On 31 January 2023, the Appellant filed its Statement of Appeal against the Appealed Decision and directed to the Respondent and FIFA, in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (2022 edition) (the "Code"). The Appellant nominated as arbitrator José Juan Pintó, Attorney-at-law in Barcelona, Spain and requested Spanish to be the language of the present proceedings.

18. On 17 February 2023, and following correspondence with the Parties, the Deputy President of the CAS Appeals Arbitration Division rendered an Order on Language in the present proceedings, in which it was determined that English would be the language of the present proceedings.

19. On 22 February 2023, FIFA confirmed that it was renouncing its right to intervene in the Appeal and requested to be removed as a respondent from the proceedings. On the same date, the Appellant confirmed its agreement to FIFA's request.

20. Also on 22 February 2023, the Respondent requested CAS to appoint an arbitrator from the list of CAS arbitrators on its behalf.

21. On 2 March 2023, and following the granting of a request for an extension to its deadline in this respect, the Appellant filed its Appeal Brief, in accordance with Article R51 of the Code.

22. On 7 March 2023, the CAS Court Office advised the Parties that given that the Respondent had not nominated an arbitrator within the time-limit granted for it to do so, an arbitrator would be nominated by the Division President, or her Deputy, *in lieu* of the Respondent, pursuant to Article R53 of the Code.

23. On 29 May 2023, and following the granting of a request for an extension to its deadline in this respect, the Respondent filed its Answer, in accordance with Article R55 of the Code.

24. On 30 May 2023, in accordance with Article R54 of the Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to decide the present matter was constituted as follows:

    President: Prof Dr Martin Schimke, Attorney-at-Law in Düsseldorf, Germany

    Arbitrators: Mr José Juan Pintó, Attorney-at-law in Barcelona, Spain
    Dr Janos Katona, Attorney-at-Law in Budapest, Hungary

25. On the same date, the Parties were invited to inform the CAS Court Office, by 6 June 2023, whether they preferred an oral hearing to be held in the present matter or for the Panel to issue an award based solely on the Parties' written submissions.

26. Also on 30 May 2023, the Appellant confirmed its preference for an oral hearing to be held in the present proceedings.

27. On 4 June 2023, the Respondent confirmed its preference for an award to be issued based solely on the Parties' written submissions.

28. On 30 June 2023, the CAS Court Office informed the Parties that Mr Adam Thew, Attorney-at-law in Bonn, Germany, had been appointed as *Ad hoc* Clerk in this case, pursuant to Article R54 of the Code.

29. On 21 July 2023, the CAS Court Office informed the Parties that, pursuant to Article R57 of the Code, in light of the circumstances of the case and having considered the Parties submissions on this point, the Panel had decided to hold an oral hearing in the present proceedings remotely by way of video conference and requested the Parties' availability in this respect.

30. On 2 August 2023, the Appellant made a further unsolicited submission of documents in support of its case. The Respondent was given an opportunity to comment on the admissibility of this additional information.

31. On 11 August 2023, the CAS Court Office informed the Parties that the Panel would render a final decision on the admissibility of the additional information submitted by the Appellant at a later stage in the proceedings, and that the Parties would be given the opportunity to comment on this at the oral hearing.

32. On 23 August 2023, and following consultation with the Parties as to their respective availabilities for a hearing, the original Order of Procedure was issued which provided for the oral hearing to be held remotely by way of video-conference on 8 November 2023.

33. On 6 November 2023 (two days before the scheduled hearing), the Respondent's legal representatives contacted CAS requesting a postponement of the oral hearing until a later date, for the reason that the Respondent's counsel had been engaged in reserve military duties and was unavailable to attend the hearing. Following consultation with the Appellant, the Panel agreed to this request.

34. On 27 November 2023, and following consultation with the Parties, the CAS Court Office informed the Parties that the oral hearing was rescheduled for 28 February 2024.

35. On 6 December 2023, the updated Order of Procedure was signed and returned by the Respondent.

36. On 7 December 2023, the updated Order of Procedure was signed and returned by the Appellant.

37. On 28 February 2024, the oral hearing was held remotely by way of videoconference. At the outset of the hearing, both Parties confirmed not to have any objection as to the appointment of the Panel and the way how it conducted the procedure thus far.

38. In addition to the Panel, Ms Lia Yokomizo, CAS Counsel, and Mr Adam Thew, *Ad hoc* Clerk, the following persons attended the hearing:

For the Appellant:

1. Mr Juan de Dios Crespo Pérez (Legal Counsel); and
2. Mr Fausto Gonzalez (Legal Counsel and TMS Manager of the Appellant).

For the Respondent:

1. Mr Roi Rozen (Legal Counsel);
2. Mr Amit Akiva (Legal Counsel); and
3. Mr Nir Katz (CEO of the Respondent).

39. At the closing of the hearing, both Parties confirmed that they did not have any objections as to the procedure adopted by the Panel at the hearing and that their respective rights to be heard had been respected.

V. SUBMISSIONS OF THE PARTIES

A. The Appellant

40. The Appellant's submissions, in essence, may be summarised as follows:

- The Single Judge of the FIFA PSC was wrong to find in the Appealed Decision that a sell-on fee was due from the Appellant to the Respondent pursuant to the Player's move from the Appellant to FC Orenburg.

- While Article 4 of the Transfer Agreement did provide for a sell-on fee to be payable to the Respondent in the event of a transfer of the Player by the Appellant, this Article was not triggered by the Player's move to FC Orenburg, because the requirements of Article 4 were not met.

- In particular, Article 4 has two requirements:

  "1. The contract between the Player and Deportivo Saprissa must be in force or valid.

  2. A second international sale of the Player needs to happen."

- The Employment Contract was not in force at the time of the Player's move to FC Orenburg, as the Player had already formally requested its termination by invoking the payment of compensation for early termination established in the exit clause in that contract. A second international transfer of the Player therefore did not take place during the term of the Employment Contract.

- The money received by the Appellant when the Player left the Appellant and joined FC Orenburg was not from a transfer but from financial compensation for the Player's unilateral termination of the Employment Contract, which the Player made in order to join FC Orenburg voluntarily. The contract was terminated unilaterally pursuant to the terms of the exit clause, without reception of a transfer fee payment for the sale of the Player.

- At the hearing, the Appellant explained that it had initially entered discussions with FC Orenburg in the summer of 2022 regarding a possible transfer of the Player. The Appellant had however rejected a bid of around USD 800,000 from FC Orenburg, and the Appellant's board of directors had ultimately decided that they did not wish to sell the Player to a club in Russia.

- Due to concerns over the Player's welfare and with the Appellant not willing to promote any activity or negotiation with a club whose Football Association had been temporarily suspended, the Board of Directors of the Appellant was unwilling to sanction the Player's move to FC Orenburg or agree to the terms of the transfer. The Appellant therefore did not accept the transfer offer made by FC Orenburg for the Player.

- The Appellant had attempted to convince the Player to stay, including in meetings with the Player and his father. Ultimately, however, the Player decided he wished to leave to play for FC Orenburg and confirmed his activation of the exit clause in his Employment Contract by email (via his agent) on 27 June 2022. The Appellant confirmed at the hearing that it took that email to constitute valid unilateral termination of the Employment Contract by the Player with immediate effect, despite not receiving any payment in that respect until sometime later.

- The Appellant confirmed that the USD 600,000 triggering the exit clause in the Player's Employment Contract had been transferred directly by FC Orenburg to the Appellant.

- An amount established as compensation in relation to the termination of a contract is not the same as an agreement on a sale. The terms *"sale," "compensation,"* and *"payment of damages"* are not synonyms. In the case of a sale, there is a bilateral agreement – *i.e.* a transfer of a right or thing in exchange for a payment of money by mutual consent. Compensation, on the other hand, is applicable in case of a unilateral breach that causes damages.

- The Appellant also characterised some of the common differences between a transfer and a unilateral termination. For example, in the case of a transfer, a player (and/or their agent) is typically entitled to a percentage of the transfer fee, whereas this is not the case with a unilateral termination.

- At the hearing, the Appellant explained that the exit clause in the Employment Contract had been inserted at the Player's request and that this was not a clause which the Appellant typically included in its employment agreements with its players.

- The previous CAS decision in CAS 2010/A/2098 is analogous to the present case, in that it describes a similar situation in which a player's transfer occurred outside any contractual scheme. The player in that case himself exercised a statutory right to terminate his employment contract without the consent of Sevilla FC. In that case, the player's termination fell outside the scope of the sell-on clause.

- CAS 2016/A/4585 similarly provides that a unilateral termination of a contract cannot be seen as a pre-agreed transfer price, as a result of an absence of mutual consent.

- As shown by WhatsApp conversations submitted by the Appellant as evidence, the Appellant did not consent to release the Player. The Appellant only provided its bank information to FC Orenburg as a formality, but under no circumstances, because they agreed with the transfer.

- The Appellant acted at all times in a manner befitting a good employer during the term of the contract and defended the Player's interests in various situations, as attested to by Mr Fausto González Sibaja, a member of the Deportivo Saprissa Legal Department, who appeared as a witness in the proceedings.

41. In its Statement of Appeal, the Appellant requested the following relief:

"1) To annul the FIFA Decision of the Players' Status Chamber and issue a new decision as requested in the Appeal Brief.

2) To reject the claim made by the Club Hapoel Beer Sheva FC, Israel, in all aspects, as it considers said action inadmissible in accordance with the facts set forth and the evidence provided above.

3) In the event the claim made by Club Hapoel Beer Sheva FC, Israel, would not be rejected by this esteemed Panel to reduce the amount of compensation according to the factual background of this case.

4) To determine any other relief, the Panel may deem appropriate.

5) To fix a sum to be paid by the Respondents in order to contribute to the payment of the Appellant's legal fees and costs in the amount of CHF 15,000 and;

6) To condemn the Respondents to the payment of the whole CAS administration costs and arbitration fees."

B. The Respondent

42. The Respondent's submissions, in essence, may be summarised as follows:

- The Respondent argues it is entitled to payment of USD 375,000 plus 5% interest from 19 July 2022 from the Appellant, as the transfer of the Player from the Appellant to FC Orenburg constitutes a transfer for the purposes of the sell-on clause contained in Article 4 of the Transfer Agreement.

- There was no prior unilateral termination by the Player prior to his transfer to FC Orenburg, and in any event, this did not change the nature of the Player's move to FC Orenburg as a transfer, which triggered payment of the sell-on clause agreed between the Parties.

- The Appellant has failed to provide a copy of the Employment Contract to the Respondent. But the Appellant's own submissions make clear that the Employment Contract contained an exit clause as follows:

  "if a club at the international level desires the services of the professional player, this club must provide the actual and formal written offer as well as pay the sum of USD 600,000."

- According to the apparent wording of the exit clause, the exit clause could therefore only be triggered if a *"club at the international level desires to do so"* and not by the Player himself.

- To the best of the Respondent's knowledge, following the exercise of the exit clause in the Employment Contract in June 2022 (through a payment made by FC Orenburg), the Player was transferred from the Appellant to FC Orenburg, for the sum referenced in the exit clause (USD 600,000).

- Further, on 30 June 2022, the Appellant, the Player and FC Orenburg signed an 'Agreement of Execution of Exit Clause' as part of the process of the Player's transfer to FC Orenburg, which stated *(inter alia)*:

  "SAPRISSA is presently party if a valid contract with the professional player Mr. JIMMY MARIN VILCHEZ […] *SAPRISSA owns the player registration and 100% of the federative and economics rights* […]

"FC ORENBURG is interested in paying the exit clause on the player's contract with SAPRISSA for the amount of $600,000 USD DOLLARS."

- During the proceedings before the FIFA PSC, the Appellant deliberately attempted to hide the existence of this agreement. This shows the significant lack of good faith on the Appellant's part.

- The agreement reflects that FC Orenburg provided the USD 600,000 to trigger the exit clause in the Player's Employment Contract. The Appellant is therefore incorrect when it asserts that the Employment Contract between the Player and the Appellant was unilaterally terminated by the Player.

- The Appellant's assertion that "*Deportivo Saprissa received an amount strictly due to damages for the early termination of the contract, which can solely be seen as compensation"* (as stated in paragraph 38 of the Appeal Brief), is both factually and legally incorrect and denied.

- As a result of receiving the transfer fee of USD 600,000 and in accordance with Article 4 of the Transfer Agreement between the Parties, the Appellant was obligated to pay the Respondent an amount of USD 375,000.

- In order to accurately interpret the meaning of the sell-on clause in Article 4 of the Transfer Agreement in question, it is essential to adhere to the concept of a *"transfer"* within the legal framework of football.

- According to the definitions chapter of the FIFA RSTP, a *"transfer"* can be defined in two distinct ways:

  43.1. "International transfer (Art.21): the movement of the registration of a player from one association to another association."

  43.2. "National transfer (Art.22): the movement of the registration of a player at an association from one club to another within the same association."

- Previous CAS cases also support the Respondent's view of the circumstances at hand constituting a *"transfer"* for the purposes of Article 4 of the Transfer Agreement. CAS 2010/A/2098 provides:

  "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".

- Further, the Transfer Agreement was signed during the Covid-19 epidemic, with both parties fully aware of the financial challenges faced by football clubs worldwide during that time. Considering the circumstances regarding the Player's welfare, such as allowing him to return to his homeland in Costa Rica during a global pandemic, the Respondent agreed to sell the Player for a symbolic amount of USD 1,000, on the condition that the Transfer Agreement included a sell-on clause reflecting the actual market value of the Player.

- It is indisputable that the economic objective and legitimate consideration, commonly referred to as the *"additional payment"* as described in the aforementioned CAS 2010/A/2098 ruling to which the Respondent was entitled, originated from the sell-on clause itself, rather than solely from the initial payment of USD 1,000. A professional football club would have no interest in selling a skilled player, acquired at a substantial cost, for a mere USD 1,000. In line with the precedent set by the CAS 2010/A/2098 ruling, the sell-on clause was implemented to protect the Respondent's interests as the selling party.

- Similarly, the CAS Panel in CAS 2019/A/6525, which concerned a similar dispute, stated:

  "In the world of professional football, a "transfer" of a player means in general terms a change of "registration" of a player, or for a professional player, it means a "change of employer." A player, registered to play for a club, becomes eligible to play for a different club, or, when employed with a club, becomes an employee of another club. In that regard, therefore, a "transfer" can be equated to a "movement" in the registration/employment relation."

- A *"transfer"* therefore encompasses both international and national movements of a player's registration, including instances where a player's registration is moved from one association to another or from one club to another within the same association, regardless of whether the transfer occurs within a contractual scheme or outside of such a framework.

- In our case, it is unequivocal that the Player moved from the Appellant to another club – FC Orenburg. Additionally, the Parties do not dispute that as a consequence of the above-mentioned definitive movement, the Appellant received a payment of USD 600,000.

- It would therefore be contradictory to consistent CAS rulings and the fundamental principle of good faith to argue that the consideration received by Saprissa from FC Orenburg does not qualify as the agreed-upon payment in accordance with the sell-on clause in Article 4 of the Transfer Agreement. Further, in the present case, there was no unilateral termination of the Employment Contract by the Player; rather, it

was the exercise of an exit clause by FC Orenburg, as clearly outlined in the agreement between the Appellant and FC Orenburg.

43. In its Answer, the Respondent requested the following relief:

"1) Affirm the ruling of the PSC and consequently dismiss the Appellant's Appeal in its entirety;

2) Order the Appellant to pay the Respondent USD 375,000 as the outstanding amount, along with an annual interest of 5% starting from 19 July 2022, until the date of effective payment;

3) Order the Appellant to: (i) fully bear the arbitration costs, and (ii) contribute to the legal fees and other expenses incurred by the CAS in connection with these proceedings."

VI. JURISDICTION

44. The jurisdiction of CAS derives from Article R47 of the Code and the terms of the FIFA Statutes. Article R47 of the Code provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body."

45. Article 57.1 of the FIFA Statutes provides:

"Appeals 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 receipt of the decision in question."

46. In addition, Article 5 of the Transfer Agreement provided as follows:

"Article 5

Any and all disputes arising out of or in connection with the Transfer Agreement will be submitted exclusively to the FIFA Courts or Court for Arbitration for Sport in Lausanne, Switzerland, and resolved in accordance with the Code of Sports-related Arbitration. The language of arbitration will be English.

This Agreement is subject to the FIFA regulations for the Status and Transfers of Players."

47. CAS' jurisdiction to hear the present appeal is not disputed by the Parties.

48. The jurisdiction of CAS is further confirmed by the Order of Procedure, duly signed and returned by each of the Parties.

49. It follows that CAS has jurisdiction to adjudicate on and decide the present Appeal.

VII. ADMISSIBILITY

50. Pursuant to Article R49 of the Code, "*In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against.*"

51. The Appealed Decision states that "*According to article 57 par. 1 of the FIFA Statutes, this decision may be appealed against before the Court of Arbitration for Sport (CAS) within 21 days of receipt of the notification of this decision.*"

52. Article 57 of the FIFA Statutes provides *inter alia*:

> *"1. Appeals 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 receipt of the decision in question.*
>
> *2. Recourse may only be made to CAS after all other internal channels have been exhausted […]."*

53. The grounds of the Appealed Decision were issued − and notified to the Appellant − on 15 August 2022. The Appellant filed its Statement of Appeal with CAS on 2 September 2022, thereby within the time limit for an appeal to CAS. Furthermore, the Respondent does not contest the admissibility of the appeal.

54. The Panel therefore finds that the present Appeal is admissible.

VIII. APPLICABLE LAW

55. Article R58 of the Code provides 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."

56. In this respect, Article 57(2) of the FIFA Statutes provides:

"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."

57. Beyond the wording of Article 5 as set out at paragraph 46 above, the Employment Contract is silent as to its governing law.

58. The Parties appear to be in agreement that, in accordance with the terms of the Appealed Decision, FIFA's regulations, in particular the FIFA Statutes and the FIFA RSTP, should apply primarily to govern the present arbitration.

59. The Panel has considered the submissions of both the Parties on this point, the wording of the Code, FIFA's regulations and the Transfer Agreement. In accordance with the wording of the Code and the FIFA Statutes, the Panel accepts the primary application of the FIFA regulations, in particular the FIFA Statutes and FIFA RSTP, and subsidiarily Swiss law, should the need arise to fill a possible gap in the applicable regulations of FIFA.

IX. PRELIMINARY MATTER – ADDITIONAL SUBMISSION BY THE APPELLANT

60. As a preliminary matter, the Panel notes that, in addition to the information filed with its Statement of Appeal and Appeal Brief, the Appellant made a further unsolicited submission on 2 August 2023, consisting of English translations of two short news stories in relation to other football transfers of players to clubs in Russia. Following receipt of this submission, the CAS Court Office confirmed to the Parties that the Panel would determine the admissibility of this additional information at a later stage of proceedings.

61. At the hearing, the Parties were given an opportunity to comment on the relevance and admissibility of this additional information. The Appellant confirmed that it maintained this additional submission, while the Respondent agreed that it would not object to the admissibility of this additional information.

62. The Panel therefore finds that the additional information submitted by the Appellant on 2 August 2023 is in principle admissible.

X. MERITS

A. The issues to be addressed by the Panel in this case

63. The Panel first considers the issues which it is required to address in the case and the relevant points of common ground between the Parties.

64. The issue at the heart of the present arbitration is whether the Player's departure from the Appellant and subsequently joining FC Orenburg in the summer of 2022 triggered the sell-on clause contained in Article 4 of the Transfer Agreement between the Parties.

65. As referenced above, the sell-on clause contained in Article 4 of the Transfer Agreement provides as follows:

> *"In addition, if the Player is transferred from DEPORTIVO SAPRISSA, to another football club, HAPOEL BE'ER SHEVA FC will be entitled to receive from DEPORTIVO SAPRISSA, the first USD 150.000 (One hundred and fifty thousand dollars of total sale and/or loan/s (regardless the number of times of such sale and/or loans/s); and over the excess of one hundred and fifty thousand dollars, each team will receive 50% of any amount receiving (regardless of the number of times of such sale and/or loans/s), after the payment of any applicable tax. Such amounts shall be paid by DEPORTIVO SAPRISSA to HAPOEL BE'ER SHEVA FC no later than 7 days from actually receiving such amount.*
>
> *In case DEPORTIVO SAPRISSA will transfer/loan the Player to another football club on a players swap, such transaction shall be considered as if it was made for USD 600,000, and DEPORTIVO SAPRISSA shall pay HAPOEL BE'ER SHEVA FC an amount of USD 375,000 no later than 7 days of signing such agreement.*
>
> *This payment agreement for a second international sale and possible player swap, established in this article 4, will only be valid during the duration of the private contract with termination date May, 31, 2023, between the player and Deportivo Saprissa S.A.O."*

66. Based on the submissions of the Parties, including at the hearing, the following points appear to be common ground between the Parties:

i. Article 4 of the Transfer Agreement contained a sell-on clause which provided for a payment obligation from the Appellant to the Respondent to be triggered in the event of the Player being *"transferred"* from the Appellant to another football club.

ii. The Player left the Appellant in the summer of 2022 and subsequently joined FC Orenburg.

iii. The Appellant received a payment of USD 600,000 in relation to the Player's departure from the Appellant.

iv. The payment was received by the Appellant on or around 11 July 2022.

67. Therefore, considering the above amount and the calculation provided for in Article 4 of the Transfer Agreement, it also appears to be undisputed that, in the event that the Panel finds that sell-on clause was indeed triggered, the amount due to the Respondent pursuant to the sell-on clause would therefore be USD 375,000 plus 5% interest from 19 July 2022 (*i.e.* the amount awarded in the Appealed Decision).

68. Based on the submissions and evidence presented by the Parties, the key question essentially before the Panel is, therefore, whether the Single Judge of the FIFA PSC was correct to determine that the circumstances of the Player leaving the Appellant and joining FC Orenburg triggered the sell-on clause contained in Article 4 of the Transfer Agreement.

69. In order to address this question, the Panel has identified the following points of consideration:

i. How is the key question in this case to be addressed by the Panel?

ii. What is the meaning of a *"transfer"* in professional football?

iii. What is the purpose of a sell-on clause in a transfer agreement between football clubs?

iv. What did the Parties intend the sell-on clause to cover?

v. Did the circumstances of the Player's departure from the Appellant and subsequent joining of FC Orenburg trigger the sell-on clause?

70. The Panel will now address each of these considerations in turn.

B. How is the key question in this case to be addressed by the Panel?

71. As stated in section VII above, the Panel will address the above question and analyse the wording of the Transfer Agreement with reference to the relevant FIFA regulations, in particular, the FIFA Statutes and FIFA RSTP, and subsidiarily Swiss law, should the need arise to fill a possible gap in the applicable regulations of FIFA.

72. In their submissions, the Parties make reference to a number of previous decisions by CAS Panels in other cases. It is well-established that there is no principle of binding precedent (stare decisis) at CAS. The Panel may be guided, however, by the decisions of CAS panels in previous cases which are of relevance, in particular those cited by the Parties in their submissions.

73. In respect of the subsidiarily applicable Swiss law position, Article 18.1 of the Swiss Code of Obligations ("CO"), dealing with the interpretation of contracts, provides as follows:

"In order to evaluate the form and the content of a contract, the real and common intent of the parties has to be investigated, without limiting the investigation to the expressions or words improperly used by the parties, either by mistake or to hide the real nature of the agreement" (English translation by the Panel).

74. As such, the interpretation of a contractual provision in accordance with Article 18 CO aims at assessing the intention the parties had when they concluded the contract. On this basis, Swiss scholars (WIEGAND, in Basler Kommentar, No. 7 et seq., ad Art. 18 CO) and case law (decisions of the Federal Tribunal of 28 September 1999, ATF 125 III 435, and of 6 March 2000, ATF 126 III 119) have indicated that the primary goal of interpretation is to ascertain the true common intentions (consensus) of the parties. Where a factual consensus cannot be proven, the declarations of the parties must be interpreted pursuant to the principle of good faith in the sense in which they could and should have been understood, taking into account the wording, the context, as well as all circumstances.

75. With reference to the above authorities, the Panel's task in this case is therefore to determine the real and common intent of the Parties as to the intended coverage of the sell-on clause in Article 4 of the Transfer Agreement, and to determine whether or not the Player's departure from the Appellant and subsequent joining of FC Orenburg fell within the scope of that intended coverage.

76. Considering the wording of the sell-on clause, it is first helpful to consider the contextual meaning of a *"transfer"* in professional football, which framed the Parties understanding in this respect.

C. What is the meaning of a *"transfer"* in professional football?

77. Analysis of the literal wording of Article 4 of the Transfer Agreement provides that the clause would be triggered *"if the Player is transferred from [the Appellant], to another football club."*

78. A key concept at the heart of the sell-on clause is therefore that of a *"transfer"* in the context of professional football.

79. Considering the relevant FIFA regulations, the FIFA RSTP (October 2022 version) provides the following definitions:

"International transfer: the movement of the registration of a player from one association to another association.

National transfer: the movement of the registration of a player at an association from one club to another within the same association."

80. The relevant definitions provided by FIFA in this respect are therefore relatively broad and focus on the principle of the movement of the registration of a player between clubs and/or associations.

81. Beyond this, the sell-on clause itself provides little guidance as to the meaning of the concept of a *"transfer".* The wording does make clear that a variety of different forms of transfer were envisaged in this respect, including a loan or player swap. There are no apparent specific limitations or restrictions on the form which a *"transfer"* was anticipated to take in this respect. Beyond this, the Parties themselves provide no further definition.

82. The Panel therefore looks to other sources to provide wider contextual meaning of a *"transfer"* in professional football.

83. In this respect, the Parties in this case have made reference to previous CAS decisions which may be informative for the Panel in interpreting the meaning of a "*transfer"* in the context of a sell-on clause such as the one contained in Article 4 of the Transfer Agreement.

84. CAS 2010/A/2098, which was cited by both the Parties in their submissions, concerned a dispute between the Spanish club FC Sevilla and the French club RC Lens over whether a sell-on clause in a transfer agreement between those clubs had been triggered by the player's subsequent move from FC Sevilla to FC Barcelona.

85. In that case, the pivotal question was specifically whether the circumstances of the player's departure from FC Sevilla and move to FC Barcelona constituted a *"resale",* this being the operative word at the heart of the sell-on clause in the transfer agreement between FC Sevilla and the player's previous club RC Lens.

86. The CAS panel's award in that case included the following:

27. In the context of a "sale" contract, a transfer, being object and purpose of the parties' consent, can actually be made in two ways: (i) by way of assignment of the employment contract; and (ii) by way of termination of the employment agreement with the old club and signature of a different employment agreement with the new club. In both cases, the old club expresses its agreement (to the assignment or to the termination of the old employment contract, as the case may be) against the receipt of a payment – which substitutes for the loss of the player's services; the new club accepts the assignment of the existing employment contract or consents to enter into a new contract with the player; and the player consents to move to the new club.

28. At the same time, the Panel recognises that a transfer of a player can also take place outside the scheme of a ("sale") contract, in the event that the player moves from a club to another following the termination of the old employment agreement as a result (i) of its expiration or (ii) of its breach. In both cases, the transfer of the player from one club to another takes place without (or even against) the consent of his old club. Therefore, it takes place without a contract ("sale" or other), because there is no contract (let alone a "sale"

contract) in a situation in which there is no obligation freely assumed by one party towards the other. In the second case (transfer following a breach), an amount is due to the old club, but cannot be defined as a "purchase" price, paid as consideration for the consent to the transfer, since it is of a different character and title: it is compensation for the damage caused by the breach. In other words, the transfer of the player in this case is not a sale, because the old club has not agreed to the transfer (necessary element under Swiss law: § 22 above), even if it implies the payment of an amount to the old club."

87. The CAS panel's reasoning ultimately led them to the conclusion that the sell-on fee clause (which was contingent on there being a *"re-sale"* of the player) was not triggered by the circumstances of the Player's unilateral termination of their employment contract and subsequently joining a new club. As stated above, the specific wording of the sell-on clause in the present case is different, as it is not limited to the circumstances of a *"re-sale"* of the Player, but instead applied in the event of a *"transfer"* from the Appellant to another club. As such, the cases can be distinguished in respect of their specific facts.

88. Nevertheless, the case provides useful reasoning for the Panel in setting out the range of scenarios in which the previous CAS panel considered that a *"transfer"* of a player between professional football clubs may occur in practice. At paragraph 28 of its award, the panel in case CAS 2010/A/2098 included the example which is presented in the present case *i.e.*, that a *"transfer of a player can also take place outside the scheme of a ("sale") contract, in the event that the player moves from a club to another following the termination of the old employment agreement."*

89. The decision in that case therefore makes clear that it is not a prerequisite for a *"transfer"* that the Player was still under contract with the Appellant at the time of the movement of his registration to another football club, and that it is not decisive whether or not there was mutual agreement between the Appellant and the new club as to the terms of the Player's departure.

90. CAS 2019/A/6525 concerned a broadly similar set of facts to the case at hand, in that a transfer agreement regarding the transfer of a player from the French club Nancy to the Spanish club Sevilla FC contained the following sell-on clause:

"SEVILLA FC agrees to pay to ASNL an additional transfer compensation as follows:

In case a definitive transfer of the player is signed, and the player is transferred from SEVILLA FC to another club, allowing SEVILLA FC to realize a capital gain, 12% of this value will be transferred to the club ASNL.

The capital gain must be understood as the difference between the amount received (training compensation included) by the club Seville FC from a third-party club as a result of the player's definitive transfer to that club and the sum of 5,000,000 € paid by the SEVILLE FC in respect of the ASNL final transfer compensation, to the club SEVILLA FC.

For example, in the event of transfer of the player from the SEVILLA FC to a third club for a sum 7,000,000€ (including training compensation), SEVILLA FC would have to pay to ASNL an additional compensation of 12% of 2,000,000€, that's to say 240,000€".

91. The player's subsequent employment contract with Sevilla FC contained an exit clause (also commonly referred to as a buy-out clause), translated as follows:

"For the purposes contemplated by art. 16 of Royal Decree 1.006/85 of 26 June, in the event of early unilateral termination of this contract by the player before the expiration of the agreed term, the player will be obliged to compensate [Sevilla] regardless of the season and the time of the same in which it is exercised, with the sum of EUR 35,000,000, updated upward with the increase in the Index of Consumer Prices (or index that will replace it in the future) as a whole national, counted from the first day of the month prior to its breach."

92. After one and a half seasons playing for Sevilla, FC Barcelona deposited, with the consent of the player, the amount of EUR 35,910,000 in the account of the Spanish Professional Football League, to be paid to Sevilla for the purposes of the exit clause. The player then joined Barcelona by executing an employment contract with such club.

93. Nancy claimed that this movement of the player constituted a *"transfer",* triggering payment of the amount due to it pursuant to the sell-on clause in the transfer agreement with Sevilla FC.

94. Sevilla FC, advancing similar arguments to those made by the Appellant in this case, denied its liability to pay any amount to Nancy, stating that the nature of the Player's departure from Sevilla to Barcelona (by way of unilateral termination through the exit clause) meant that the sell-on clause in the transfer agreement between Nancy and Sevilla was not triggered:

"Seville did not transfer the player but he was him that decided to breach the contract and leave Sevilla FC. Our club did not "sign any transfer" or "transferred the player" as mentioned in the contract but rather was deprived of the player. As you know the rescission clause is a penalty one for breach of contract, which includes the sporting loss of a player but definitively is not a transfer.

Thus, I must say that we do not consider that the conditions of the contract have been fulfilled and that there is no amount to pay to your club".

95. In that case, the FIFA PSC upheld Nancy's claim for the amount due to Nancy pursuant to the sell-on clause. Upon appeal by Sevilla to CAS, the CAS Panel dismissed Sevilla's appeal and confirmed the decision of the FIFA PSC Single Judge.

96. The CAS panel's reasoning in reaching that decision included the following:

"71. The Panel notes (as already underlined in CAS 2010/A/2098) that in the world of professional football a "transfer" of a Player means in general terms a change of "registration" of a player or – to put it in another way – for a professional player it means a "change of employer". A Player, registered to play for a club, becomes eligible to play for a different club, or, when employed with a club, becomes an employee of another club. The FIFA rules, and chiefly the Regulations on the Status and Transfer of Players, in all their editions, are based on such a concept. In that regard, therefore, a "transfer" can be equated to a "movement" in the registration/employment relation.

72. More specifically, and also considering the FIFA provisions, a transfer can be the object and the purpose of the parties' agreement. In that case, it can actually be made in two ways: (i) by way of assignment of the employment contract; and (ii) by way of termination of the employment agreement with the old club and signature of a new employment agreement with the new club. In both cases, the old club expresses its agreement (to the assignment or to the termination of the old employment contract, as the case may be) against the receipt of a payment – which compensates for the loss of the player's services; the new club accepts the assignment of the existing employment contract or consents to enter into a new contract with the player; and the player consents to move to the new club.

73. At the same time, a transfer of a player can also take place outside the scheme of a contract between the old and the new club, in the event that the player moves from a club to another following the termination of the old employment agreement as a result of (i) its expiration or (ii) its breach. In both cases, the transfer of the player from one club to another takes place without (or even against) the consent of his old club. Therefore, it takes place without a contract, because there is no contract (in a situation in which there is no obligation freely assumed by one party towards the other). In the second case (transfer following a breach), an amount is due to the old club, but cannot be defined as a price paid as a consideration for the consent to the transfer, since it is of a different character and title: it is compensation for the damage caused by the breach.

97. The CAS panel's decision in that case therefore also supports the view that a "transfer" in a professional football context refers to the movement of a player's registration from one club to another, and may take place without the consent of the player's previous club, including following unilateral termination or breach of an employment contract by the player.

98. This concept of a "transfer", and the usual meaning of this word in professional football as set out above and in said decision CAS 2019/A/6525, was confirmed without restriction in a more recent CAS decision CAS 2021/A/8099 (see paras. 100 *et seq.*) and was also further confirmed in decision CAS 2016/A/4379 (see paras. 107 *et seq.*) as well as in the literature sources such as "*Sell-on clauses in light of FIFA and CAS jurisprudence*" by Frans de

Weger and Dannick Luckson in Football Legal[1] or *"What's the meaning of a football transfer?"* by John Shea[2].

99. Taken together, the relevant FIFA Regulations and the above-mentioned cases and sources provide clear guidance to the Panel as to the contextual meaning of a *"transfer"* in professional football, being the movement of a player's registration from one football association to another or between clubs within the same association. This movement may occur both within a contractual scheme or outside of it.

100. Having considered the contextual meaning of a *"transfer"* in the sell-on clause in this case, it is now helpful for the Panel to consider the underlying purpose of that sell-on clause in context, so as to assess the real and common intent of the Parties in terms of its coverage.

D. What is the purpose of a sell-on clause in a transfer agreement between football clubs?

101. The Panel notes that the FIFA Regulations do not define or categorise sell-on clauses. However, the above-mentioned CAS decisions cited by the Parties also provide helpful guidance as to the underlying purpose of sell-on clauses in transfer agreements between football clubs, which framed the Parties' understanding of the clause.

102. The CAS panel's award in the aforementioned case CAS 2010/A/2098 provides the following:

"20. 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. […]

103. Similarly, the CAS panel's award in CAS 2019/A/6525 provides the following:

"74. In light of the foregoing, the Panel notes that the wording of the Sell-on Clause is wide enough to cover every kind of transfer, both in a contractual and non-contractual framework, for which Sevilla was to receive a payment, whatever label is put upon it. This point marks a decisive distinction between this case and the dispute decided in CAS

[1] https://bmdw.nl/wp-content/uploads/F.M.-de-Weger-D.-Luckson-Sell-on-clauses-in-light-of-FIFA-and-CAS-jurisprudence-Football-Legal.pdf
[2] https://www.lewissilkin.com/en/insights/whats-the-meaning-of-a-football-transfer

2010/A/2098, where the triggering element was not in general terms a "transfer", but specifically a "resale". This interpretation is confirmed by the definition of "capital gain" in Article 3.2 of the Transfer Contract, which simply makes reference to the difference between the amount paid and the amount received as a result of the Player's transfer(s), without additional qualification, and appears to correspond to the "real and common intent of the parties", as it is consistent with the general purpose of sell-on clauses, which, in the absence of specific limitations, call for their application to all cases where the intended purpose (to allow the old club to share the benefit of a subsequent transfer) can be achieved."

104. These cases, including the sources mentioned in par. 98 above reflect the nature of sell-on clauses as a conditional contractual obligation which both clubs commit to upon an initial transfer of a Player. They are of potential benefit to both parties, as on the one hand, they act as a mechanism to provide the selling club with a continued stake in the future development of a player and provide that selling club with a degree of reward or protection in the event of an increase in the future market value of that player. On the other hand, they often allow a buying club to pay a lower initial transfer fee for a player, which may be especially attractive in the case of a player with as-yet undeveloped potential. For these reasons, sell-on clauses are a common inclusion in transfer agreements between professional football clubs, particularly in circumstances where the initial transfer fee paid for the player by the buying club may be low in comparison to their potential future market value.

105. In the present case, the Respondent highlights in its submissions that the Transfer Agreement was negotiated in the context of the Covid-19 pandemic, with both Parties fully aware of the financial and practical challenges faced by football clubs worldwide during that time.

106. In that context, the Player expressed his desire to be allowed to leave the Respondent and return to his native country Costa Rica. The Respondent allowed the Player to leave and join the Appellant for a nominal transfer fee of USD 1,000, under the condition that the Transfer Agreement included a sell-on clause which would allow the Respondent a share of any future transfer fee when the Player next moved clubs for a fee representing his actual market value.

107. The Respondent therefore viewed the sell-on clause as a form of protection for it in those circumstances, within the context of the *"additional payment"* referred to in CAS 2010/A/2098.

108. The Appellant has not contested the Respondent's explanation of the circumstances behind the inclusion of the sell-on clause in the Transfer Agreement, nor provided an alternative explanation for its purpose.

109. In this context, the Panel notes that the logical purpose of the sell-on clause when it was negotiated between the Parties in the Transfer Agreement was:

(i) to provide the Respondent with a continued stake in the future development of the Player and a degree of reward and/or protection in the event that he was subsequently transferred again by the Appellant for value; and

(ii) to allow the Appellant to pay an initial nominal transfer fee for the Player of USD 1,000 only (*i.e.*, well below his market value), in the circumstances of the global Covid-19 pandemic, which provided for financial difficulties and increased uncertainty for all clubs.

110. With this contextual understanding in mind, the Panel is able to assess the real and common intent of the Parties as to the extent of coverage of the sell-on clause.

E. What did the Parties intend the sell-on clause to cover?

111. Considering the underlying typical purpose of a sell-on clause in transfer agreements (to reward the selling club in the event of an increase in value to the player) and the common understanding within the football industry as to the concept of a *"transfer"*, the Panel therefore finds that, unless given a specific limitation by the parties (such as limiting their activation to a situation of "*re-sale*"), sell-on clauses are typically intended to be activated by any form of movement of the player's registration to a new club for value.

112. In line with the definitions provided in the FIFA Regulations, the common industry understanding and the guidance provided by previous CAS decisions, the concept of a "*transfer*" should be interpreted broadly, and include most scenarios in which a Player's registration moved from the Appellant to another club, unless there is persuasive evidence to explicitly exclude this movement from the broad definition of a "*transfer*".

113. In the absence of any further specification in the wording of the Transfer Agreement to the contrary, the Panel therefore determines that the real and common intention of the Parties was that the sell-on clause in this case was intended to be triggered by any form of *"transfer"* of the Player to another football club. The Panel will now assess whether the circumstances of the Player's departure from the Appellant and joining FC Orenburg fell into the Parties' intended coverage of the sell-on clause.

F. Did the circumstances of the Player's departure from the Appellant and subsequent joining of FC Orenburg trigger the sell-on clause?

114. As summarised in section V above, the Parties advance various arguments in support of their differing positions as to whether the circumstances of the Player's departure from the Appellant and joining of FC Orenburg fell within the scope of coverage of the sell-on clause.

115. In its submissions, the Appellant places much emphasis on the following wording in the sell-on clause:

"This payment agreement for a second international sale and possible player swap, established in this article 4, will only be valid during the duration of the private contract with termination date May, 31, 2023, between the player and Deportivo Saprissa S.A.O."

116. The Appellant, in essence, argues that the sell-on clause had two criteria, neither of which were met:

"1. The contract between the Player and Deportivo Saprissa must be in force or valid.

2. A second international sale of the Player needs to happen."

117. The Appellant argues in particular that the Employment Contract between it and the Player was not in force at the time of the Player's move to FC Orenburg, as the Player had already unilaterally terminated the Employment Contract through an exit clause in that contract. A second international transfer of the Player therefore did not take place during the term of the Employment Contract.

118. In this respect, the Appellant characterises the USD 600,000 it received in relation to the Player's departure as compensation for the Player's unilateral breach of contract, rather than a transfer fee. This, it argues, means such payment falls outside the scope of the sell-on clause.

119. In contrast, the Respondent argues that there was no unilateral termination of the Employment Contract by the Player in this case, and that the Appellant has acted in bad faith in its attempt to convince the FIFA PSC and CAS of this.

120. The Respondent cites the failure of the Appellant to provide a full copy of the Employment Contract in these proceedings as an example of its bad faith in this respect, but that according to the apparent wording of the exit clause cited by the Appellant in its submissions, the exit clause could only be triggered if a *"club at the international level desires to do so"* and not by the Player himself. As such, it was FC Orenburg, rather than the Player, who activated the exit clause in the Player's Employment Contract by providing the USD 600,000 referred to in that clause.

121. The Respondent argues that the Appellant has attempted to conceal the true nature of the transfer of the Player to FC Orenburg, which was by way of activation of the sell-on clause by FC Orenburg while the Player was still under contract to the Appellant, rather than following unilateral termination of the Employment Contract by the Player himself.

122. Further, the Respondent cites the broad definition of a *"transfer"* within professional football and the underlying reasoning for the inclusion of the sell-on clause within the Transfer Agreement in the first place (which it characterises as *"to protect [the*

Respondent's] interests as the selling party") to argue that it would be *"contradictory to consistent CAS rulings and the fundamental principle of good faith"* to argue that the circumstances of the Player's departure from the Appellant and joining FC Orenburg fell outside the scope of the sell-on clause.

123. In considering the Parties' arguments, the Panel notes that it has not been provided with a copy of the Employment Contract in this case, which contained the exit clause relevant to the Player's departure. According to the FIFA PSC Single Judge's summary of the relevant factual background in the Appealed Decision, however, and referring to the information available in the FIFA transfer matching system, the initial term of the Employment Contract was *"valid as from 15 July 2020 until 31 May 2023."*

124. Based on the extracts of the Employment Contract provided by the Appellant, and referred to in the Appealed Decision, the exit clause provided that:

"if a club at the international level desires the services of the professional player, this club must provide the actual and formal written offer as well as pay the sum of USD 600,000."

125. According to the apparent wording of the exit clause, therefore, and as noted by the Respondent, the exit clause could therefore only be triggered if a *"club at the international level"* desired to do so, provided a written offer to that effect and transferred the sum of USD 600,000 to the Appellant. The exit clause was therefore worded so as to be triggered by the actions of a third-party club, not by the Player himself.

126. At the hearing, the Appellant explained that it had initially entered into discussions with FC Orenburg in the summer of 2022 regarding a possible transfer of the Player. The Appellant had, however, rejected a bid of around USD 800,000 from FC Orenburg, and the Appellant's board of directors had ultimately decided that they did not wish to sell the Player to a club in Russia.

127. Further, the Panel notes that, prior to the Player's move to FC Orenburg, the Appellant had drafted, signed and sent a draft 'transfer agreement' (dated 21 June 2022) to transfer the Player to FC Orenburg for the sum of USD 800,000. It is undisputed that this draft transfer agreement remained unsigned by the Player and FC Orenburg and was never fully executed.

128. The Appellant explained that it had attempted to convince the Player to stay, including in meetings with the Player and his father. Ultimately, however, the Appellant explained, the Player decided he wished to leave to play for FC Orenburg, and confirmed his activation of the exit clause in his Employment Contract by email (via his agent) on 27 June 2022. The Appellant confirmed at the hearing that it took that email to constitute valid unilateral termination of the Employment Contract by the Player with immediate effect, despite not receiving any payment in that respect until some time after this date.

129. Despite this, on 30 June 2022, the Appellant, the Player and FC Orenburg entered into an agreement entitled *'Agreement of Execution Clause of the Player Jimmy Marin Vilchez and*

his Club in Costa Rica Deportivo Saprissa by FC Orenburg' (the "Exit Clause Agreement"). This agreement provided (inter alia) as follows:

"SAPRISSA is presently party of a valid contract with the professional player Mr. JIMMY MARIN VILCHEZ (hereafter referred to as "the player") born on October, 8, 1997 In Costa Rica. SAPRISSA owns the player registration and 100% of the federative and economics rights.

FC ORENBURG is interested in engaging the services of the player and to conclude an employment contract with him as from July 1st, 2022, according to the terms of the Agreement.

FC ORENBURG is interested in paying the exit clause on the player's contract with SAPRISSA for the amount of 600,000 USD DOLLARS (USD CURRENCY), The exit clause referring to the "vigesimo octava" #28 on the contract signed between the Player and Saprissa on June 12th, 2020. The page containing this clause is attached.

The player has already agreed on the economic terms and is willing to sign a profesional contract with FK ORENBURG once the exit clause has been paid by FK ORENBURG.

The exit clause must be paid in the upcoming 7 working days after execution of this agreement on the following bank account of SAPRISSA".

130. The Appellant confirmed that it subsequently received a payment of USD 600,000 in relation to this agreement directly from FC Orenburg.

131. Further, according to the extracts from the FIFA TMS submitted by the Respondent, the Player's registration with the Appellant was deregistered on 22 July 2022, and on the same day, registered with FC Orenburg. The FIFA TMS extracts record a payment of EUR 600,000 being made on that date by FC Orenburg to the Appellant in respect of this movement of the Player's registration. The entry field regarding the specific instruction to be processed in the FIFA TMS states *"engage out of contract against payment."* In respect of the entry field regarding the Player's previous employment contract, the TMS extract states *"the contract with the former club* [the Appellant] *was terminated unilaterally".*

132. At the hearing, the Appellant stated that it was FC Orenburg's responsibility to complete the relevant fields in the FIFA TMS entries recording the movement of the Player's registration, and that the Appellant was not accountable for the details entered there. As FC Orenburg was not a party to these proceedings and could not be questioned on the matter, the Panel withholds its view as to the accuracy of the information in the FIFA TMS extracts and considers them of only limited value in determining the true circumstances of the Player's departure from the Appellant.

133. Considering all the above circumstances, the Panel finds it puzzling that the Appellant would claim that it considered the Employment Contract to have been terminated with

immediate effect pursuant to an email received from the Player's agent on 27 June 2022, without it having received any money at that time in accordance with the exit clause in the Player's Employment Contract.

134. First, nothing in the extracts of the Employment Contract disclosed by the Appellant would appear to give the Player the right to unilaterally terminate that agreement without the sum of USD 600,000 first having been received by the Appellant following a formal written offer from a *"club at the international level".* Secondly, the wording of the Exit Clause Agreement entered into by the Appellant, the Player and FC Orenburg on 30 June 2022 states explicitly that the Appellant was, at that time, *"party of a valid contract with [the Player]"* (*i.e.*, the Employment Contract). The actions of the Appellant therefore appear to indicate that it believed it remained in the Employment Contract with the Player at least until the point that the Exit Clause Agreement was executed and it received the USD 600,000 from FC Orenburg, which were required to trigger the exit clause in the Employment Contract.

135. The Panel's view in this respect is not altered by the Appellant's arguments that it drafted the Exit Clause Agreement at the request of FC Orenburg and that it provided its bank account details to FC Orenburg as a "*formality*". Whichever way the Appellant seeks to characterise it, the Exit Clause Agreement represents an apparently binding agreement between the Appellant, FC Orenburg and the Player, providing for the triggering of the exit clause in the Player's Employment Contract with the Appellant for the stated purpose of allowing the Player to sign a new employment contract with FC Orenburg. Pursuant to the terms of the Exit Clause Agreement, the Appellant subsequently received a payment of USD 600,000 directly from FC Orenburg, and the Player's registration moved from the Appellant to FC Orenburg.

136. Based on all the above circumstances, but especially the apparent wording of the exit clause, and the wording of the Exit Clause Agreement entered into between the Appellant, the Player and FC Orenburg on 30 June 2022, it seems more probable that the Employment Contract was in fact terminated only upon the Appellant's receipt of the USD 600,000 it received from FC Orenburg, upon which the Player's registration was then transferred to FC Orenburg.

137. However, ultimately, the Panel considers that it is not dispositive whether or not the Employment Contract was terminated unilaterally by the Player prior to his move to FC Orenburg.

138. As determined by the Panel above, it is clear that, in professional football, a *"transfer"* (which in essence refers to the movement of a Player's registration between clubs and/or associations) may take place either within or outside of a contractual scheme. Indeed, the termination of a player's employment contract with a club and their subsequent joining of another club is expressly identified as a potential form of transfer in similar CAS cases, included those cited by the Parties. This includes the scenario in which a player unilaterally

terminates their employment contract without the consent of their former club in order to join their new club.

139. Further, the sell-on clause is not clearly limited in its activation to the conditions of a *"re-sale"* of the Player (as was the case in CAS 2010/A/2098). While the phrase *"sale"* does appear in Article 4 of the Transfer Agreement, it is used alongside and in addition to the word *"transfer"* alongside other forms of possible player movement – *"loan"* and *"players swap".* Nor is a clear distinction drawn in the Article between the terms of a *"sale"* and a *"transfer"* for the purposes of the sell-on clause. As such, the Panel is not persuaded by the Appellant's fundamental characterisation of the sell-on clause or its composite criteria referred to in paragraph 115 above.

140. It is clear that, in this case, the Player's registration moved from the Appellant to FC Orenburg pursuant to the execution of an exit clause in the Player's Employment Contract. The USD 600,000 required to trigger this exit clause was provided directly to the Appellant by FC Orenburg and was documented in the Exit Clause Agreement signed by the Appellant, the Player and FC Orenburg. If the Player's Employment Contract was terminated prior to his joining of FC Orenburg, it was precisely for the purpose of facilitating his move to FC Orenburg. Such circumstances clearly fall well within the broad definition of a *"transfer"* provided by the relevant FIFA Regulations and further guidance provided by previous CAS decisions, as set out above. In short, the Panel considers that the Player was *"transferred"* from the Appellant to FC Orenburg.

141. It is also clear to the Panel that such a set of circumstances fall well within the scope of the sell-on clause, considering the wording of that clause and the real and common intent of the Parties as to its meaning. When the Parties agreed for the Player to be transferred from the Respondent to the Appellant in the summer of 2020 for a nominal fee of USD 1,000, the Parties also agreed that the Respondent would retain a degree of reward and/or protection in the event that the Player was subsequently transferred again to another club for value. In the summer of 2022, the Player transferred from the Appellant to another club and the Appellant received the sum of USD 600,000 in relation to that transfer. In such circumstances, it would be contrary to the principle of good faith to consider that the Respondent was not entitled to a percentage of that amount, pursuant to the terms of the sell-on clause.

142. As such, the Panel is clear that the circumstances of the Player's departure from the Appellant and joining FC Orenburg constituted a *"transfer"* within the context of professional football. Considering the wording of the sell-on clause contained in Article 4 of the Transfer Agreement and the real and common intent of the Parties as to that clause, this transfer clearly fell within the scope of the sell-on clause, thereby triggering the payment obligation from the Appellant to the Respondent contained within it.

143. As such, the Panel finds that the PSC Single Judge was entirely correct in his decision to uphold the claim of the Respondent before the FIFA PSC and to order the Appellant to pay

the Respondent the sum of USD 375,000 as outstanding amount plus 5% interest *p.a.* as from 19 July 2022 until the date of effective payment.

G. Conclusion

144. For the reasons set out above, the Panel dismisses the Appeal and upholds the Appealed Decision in full.

XI. COSTS

(…)

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ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal dated 31 January 2023 by Deportivo Saprissa against the decision rendered by the Single Judge of the FIFA Players' Status Chamber on 6 December 2022 is dismissed.
2. The decision of the Single Judge of the FIFA Players' Status Chamber dated 6 December 2022 is upheld.
3. (…).
4. (…).
5. All further or different motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland

Date: 1 May 2025

THE COURT OF ARBITRATION FOR SPORT

Martin Schimke
President of the Panel

José Juan Pintó
Arbitrator

Janos Katona
Arbitrator

Adam Thew
Ad hoc Clerk