CAS 2019/A/6594 Cardiff City Football Club Limited v. SASP Football Club de Nantes

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President:	Mr Ulrich Haas, Professor of Law and Attorney-at-Law, Hamburg, Germany
Arbitrators:	Mr Andrew de Lotbinière McDougall QC, Attorney-at-Law, Paris, France
	Mr Nicholas Stewart QC, Barrister, London, United Kingdom
Ad hoc Clerk:	Mr Dennis Koolaard, Attorney-at-Law, Arnhem, The Netherlands

in the arbitration between

Cardiff City Football Club Limited, Cardiff, Wales

Represented by Mr X., […]; Mr Sven Demeulemeester and Mr Gauthier Bouchat, Attorneys-at-Law, ALTIUS, Brussels, Belgium; Mr Chris Nott, Ms Céline Jones, Ms Carrie Gwyther and Mr Wayne Beynon, Solicitors, Capital Law, Cardiff, Wales; Mr Pascal Wilhelm and Ms Sophie Le Grom De Maret, Attorneys-at-Law, Wilhelm & Associés, Paris, France

Appellant

and

SASP Football Club de Nantes, Nantes, France

Represented by Mr David Casserly and Mr Adam Taylor, Barristers, Prof. Edgar Philippin and Mr Anton Sotir, Attorneys-at-Law, Kellerhals Carrard, Lausanne, Switzerland; Mr Jérôme Marsaudon, Mr Louis-Marie Absil, Ms Claire Havet and Ms Raphaëlle Greffier, Attorneys-at-Law, Reinhart Marville Torre, Paris, France; Mr Stephen Sampson and Ms Katie Smith, Solicitors, Squire Patton Boggs, London, United Kingdom

Respondent

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I. PARTIES

1. Cardiff City Football Club Limited (the "Appellant" or "CCFC") is an English company operating a professional football club with its registered office in Cardiff, Wales. CCFC is a former member of the English Premier League and registered with the Football Association of Wales (the "FAW"), which in turn is affiliated to the *Fédération Internationale de Football Association* (the "FIFA").

2. SASP Football Club de Nantes (the "Respondent" or "FC Nantes") is a French company operating a professional football club with its registered office in Nantes, France. FC Nantes is registered with the *Ligue de Football Professionel* (the "LFP") and the *Fédération Française de Football* (the "FFF"), which in turn is also affiliated to FIFA.

3. CCFC and FC Nantes are hereinafter jointly referred to as the "Parties".

II. INTRODUCTION

4. The present appeal procedure concerns a dispute between CCFC and FC Nantes related to the late Mr Emiliano Raúl Sala Taffarel (the "Player"), a professional football player who tragically died in a plane crash across the English Channel in the night between 21 and 22 January 2019 together with Mr David Ibbotson, the pilot of the aircraft (the "Pilot").

5. On 19 January 2019, the Parties had concluded an agreement (the "Transfer Agreement") to transfer the Player from FC Nantes to CCFC, including certain conditions precedent.

6. The key issues to be adjudicated and decided in the present procedure are (i) whether the conditions precedent set forth in the Transfer Agreement have been satisfied, as a consequence of which the transfer was completed, triggering a payment obligation of CCFC to FC Nantes of a transfer fee of EUR 17,000,000; and, only if such payment obligation would be triggered, (ii) whether FC Nantes was (partially) responsible for the circumstances leading to the Player's death; and (iii) whether the financial damages incurred by CCFC as a consequence thereof can be set-off against CCFC's payment obligations.

7. On 25 September 2019, following a claim for payment filed by FC Nantes, the Players' Status Committee of FIFA (the "FIFA PSC") issued a decision (the "Appealed Decision"), determining that the conditions precedent set forth in the Transfer Agreement had been complied with, so that the transfer had been completed and that CCFC was required to pay the first instalment of the transfer fee in an amount of EUR 6,000,000 to FC Nantes. The FIFA PSC considered that it had no jurisdiction to address CCFC's subsidiary set-off claim.

8. CCFC is challenging the Appealed Decision in the present appeal procedure before the Court of Arbitration for Sport ("CAS"), whereas FC Nantes seeks a confirmation thereof.

III. FACTUAL BACKGROUND

9. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although 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 necessary to explain its reasoning.

A. Background facts

10. On 20 July 2015, the Player and FC Nantes entered into an employment contract (the "FC Nantes Employment Contract"), valid until 30 June 2020.

11. On 21 November 2018, FC Nantes and Mr Mark McKay, Managing Director of the company Mercato Sports (UK) Ltd ("Mercato") entered into a contract entitled "*Contrat d'Agent Sportif*" (the "Agency Agreement"), whereby Mr Mark McKay was authorised to "*negotiate the definitive transfer of the Player with clubs in the Premier League football championship*", entitling Mr Mark McKay to a fixed commission of 10% of the amount received by FC Nantes for the definitive transfer of the Player, excluding VAT.

12. On 13 December 2018, CCFC made a first offer to FC Nantes to transfer the services of the Player to CCFC in exchange for a transfer fee.

13. On 17 and 18 January 2019, representatives of CCFC and FC Nantes exchanged emails and text messages with Mr Mark McKay and Mr Willie McKay, the father of Mr Mark McKay, whereby they informally agreed on the broad contractual terms of the Player's transfer to CCFC.

14. On 18 January 2019, the Player travelled to Wales, successfully completed his medical examination with CCFC and signed an employment contract (the "CCFC Employment Contract") for a duration of three and a half seasons, valid until 30 June 2022, providing for a signing-on fee payable as follows:

    - GBP 350,000 on 31 January 2019;
    - GBP 350,000 on 30 June 2019;
    - GBP 350,000 on 31 January 2020; and
    - GBP 350,000 on 31 January 2021.

15. Also on 18 January 2019, FC Nantes provided CCFC with a draft transfer agreement, following which CCFC proposed certain amendments thereto.

16. On 19 January 2019, at 15:24 CET, Mr Meissa Ndiaye, the Player's agent (the "Player's Agent"), provided FC Nantes with a copy of the agreement terminating the FC Nantes Employment Contract (the "Termination Agreement"), signed by the Player, and at 15:27 CET, FC Nantes sent back a countersigned copy. Clause 1 of the Termination Agreement provides as follows:

"*By mutual agreement,* [the Player] *and FC Nantes have decided to terminate the Contract as of 19 January 2019 in order to allow his transfer to* [CCFC].

The Parties understand that the validity of this termination is subject to the following conditions:

(i) [The Player] *shall be transferred permanently to* [CCFC]*;*

(ii) The International Transfer Certificate was issued by the [FFF] *to the English Football Association.*

These conditions must be fully met by no later than 22 January 2019. If these conditions are not met by the time, the addition regarding termination shall be void and the effects of the Contract shall become applicable again ipso jure as of 23 January 2019."

17. On 19 January 2019, at 15:31 CET, FC Nantes returned a countersigned copy of the Transfer Agreement to CCFC, providing for the transfer of the Player from FC Nantes to CCFC for a transfer fee of EUR 17,000,000 (EUR 6,000,000 to be paid "*within five days of the Player registering with* [CCFC]", EUR 6,000,000 on 1 January 2020 and EUR 5,000,000 on 1 January 2021), variable payments and a sell-on fee of 20%. Clause 2 of the Transfer Agreement provides as follows:

"*2.1 This Transfer Agreement is conditional upon:*

2.1.1. the player completing successfully medical examination with [CCFC]*;*

2.1.2. FC Nantes and the Player agreeing all the terms of a mutual termination of FC Nantes contract of employment with the Player;

2.1.3. the mutual termination of FC Nantes contract of employment with the Player is registered by the LFP;

2.1.4. the LFP and the FAW have confirmed to [CCFC] *and FC Nantes that the Player has been registered as a* [CCFC] *player and that the Player's International Transfer Certificate has been released.*

2.2 Both parties shall use all reasonable endeavours to ensure that the conditions are satisfied no later than 22 January 2019. If the conditions are not fulfilled within this period then this Transfer Agreement shall be null and void. In such event:

2.2.1. this Transfer Agreement shall cease to have legal effect;

2.2.2. no payment shall be due from [CCFC] *to* [FC Nantes]*;*

2.2.3. neither party shall have any ongoing obligations or liability in relation to this Transfer Agreement."

18. On 19 January 2019, the Parties uploaded the Transfer Agreement and the CCFC Employment Contract into FIFA's Transfer Matching System ("TMS") for the Player's International Transfer Certificate ("ITC") to be released by the FFF in favour of the FAW.

19. On 19 January 2019, at 17:38 CET, CCFC confirmed in TMS that all information had been entered and that all documents had been uploaded.

20. On 19 January 2019, CCFC submitted the CCFC Employment Contract for registration with the Premier League pursuant to section U of the Premier League Handbook and it received a confirmation of receipt from the Premier League at 18:04 CET.

21. On 19 January 2019, at 18:11 CET, FC Nantes "matched" the information regarding the Player's transfer in TMS, following which the transfer status in TMS changed to "*Waiting for ITC request*". According to FC Nantes, such ITC request had to be filed by the FAW, and as from the change of transfer status, neither CCFC nor FC Nantes were expected to complete any further actions in TMS.

22. On 19 January 2019, around 20:00 CET, both CCFC as well as FC Nantes made public announcements as to the Player's transfer to CCFC.

23. On 21 January 2019, at 11:01 CET, the FAW sent a request to receive the Player's ITC in TMS from the FFF.

24. On 21 January 2019, at 12:00 CET, the Premier League informed CCFC as follows:

> "*Michelle, Unfortunately we are unable to accept your submission as a 'New Registration'. Please create a new application selecting 'Permanent Transfer' as your original application cannot be edited due to the incorrect transaction type being used. Also, after reviewing the Contract we would require the signing-on fee to be amended. It is currently not being payable in equal annual instalments as there appears to be no instalment payable in the player's final contract year (1 July 2021- 30 June 2022).*"

25. On 21 January 2019, at 14:08 CET, the LFP informed the FFF that it had homologated the Termination Agreement.

26. On 21 January 2019, at 14:14 CET, FC Nantes sent an invoice and bank details to CCFC for the first instalment of the transfer fee, in the amount of EUR 6,000,000.

27. On 21 January 2019, at 17:17 CET, the FFF issued the Player's ITC and uploaded the Player's player passport issued by the FFF. One minute later, the FFF also uploaded the Player's player passport issued by the Argentinian Football Federation (the "AFA").

28. On 21 January 2019, at 18:30 CET, the FAW confirmed receipt of the Player's ITC and registered the Player with CCFC, following which the transfer status in TMS changed to "*Closed – awaiting payment*". According to FC Nantes, at that moment the Player had become a CCFC player and all conditions precedent in the Transfer Agreement had been satisfied.

29. On 21 January 2019, CCFC and the Player's Agent reopened negotiations to agree on a new set of terms of the employment relationship that would also be acceptable to the Premier League. At 21:08 CET, the Player's Agent agreed on a series of proposed changes to the CCFC Employment Contract, whereby:

- The Player's signing on fee would be payable by 4 equal annual instalments of GBP 350,000;
- The Player would receive a bonus of GBP 350,000 if he made 7 appearances for CCFC in the remainder of the 2018/19 season; and
- The Player's basic wage for the 2021/22 season would either decrease or increase depending on how many goals he had scored for CCFC by that time.

30. CCFC maintains that it was envisaged that the new terms would be discussed with and offered to the Player at the training ground prior to the Player's first training session with CCFC on 22 January 2019, after he returned from Nantes. According to CCFC, it was open to the Player at that time to either agree the new terms of the CCFC Employment Contract to enable the transfer to complete or bring the negotiations with CCFC to an end and return to play for FC Nantes.

31. On 21 January 2019, at 21:35 CET, CCFC sent the proposed changes to the CCFC Employment Contract in an email to the Premier League. The Premier League did not respond to that email and has since confirmed in writing that the Player was never registered with the Premier League.

32. In the night between 21 and 22 January 2019, but after 21 January 2019 at 21:35 CET, the Player died in a plane crash over the English Channel.

B. Proceedings before the FIFA Players' Status Committee

33. On 26 February 2019, FC Nantes lodged a claim with FIFA against CCFC and claimed the first instalment of the transfer fee in the amount of EUR 6,000,000, plus interest as per 27 January 2019. FC Nantes also requested that sporting sanctions be imposed on CCFC.

34. CCFC objected to the jurisdiction of the FIFA PSC and requested a stay of the proceedings until the publication of (i) the final report of the Air Accidents Investigations Branch (a branch of a UK public government body, Department of Transport, which investigates civil aircraft accidents within the UK – the "AAIB") on the crash; (ii) the conclusion of all criminal investigations and prosecutions in connection with the crash; and (iii) the conclusion of any civil law claim pursued by CCFC in either England or Wales or France against FC Nantes in relation to the organisation of the flight operated by Mr Willie McKay and the company Mercato. CCFC also objected to the substance of the claim filed by FC Nantes and requested that it be dismissed. Finally, CCFC maintained that FC Nantes was responsible for the circumstances leading to the Player's death and that "*in the unlikely event that* [the FIFA PSC] *considered that the transfer had been completed and that* [the Player] *has become a* [CCFC] *player*", FC Nantes was to be held liable for the damages caused to CCFC by the Player's death; and that the amount of those damages (which it considered to be EUR 17,000,000) should be deducted from any sums otherwise due from CCFC to FC Nantes.

35. On 25 September 2019, the operative part of the Appealed Decision was provided to the Parties, providing as follows:

"*1. The claim of* [FC Nantes] *is admissible.*

2. The claim of [FC Nantes] *is partially accepted.*

3. [CCFC] *has to pay to* [FC Nantes] *the amount of EUR 6,000,000, plus 5% interest p.a. from 27 January 2019 until the date of effective payment.*

4. Any further claim lodged by [FC Nantes] *is rejected.*

5. [FC Nantes] *is directed to inform* [CCFC], *immediately and directly, preferably to the e-mail address as indicated on the cover letter of the present decision, of the relevant bank account to which* [CCFC] *must pay the amount mentioned under point 3. above.*

6. [CCFC] *shall provide evidence of payment of the due amount in accordance with point 3. above to FIFA to the e-mail address* […], *duly translated, if need be, into one of the official FIFA languages (English, French, German, Spanish).*

7. In the event that the amount is due, plus interest in accordance with point 3. above, is not paid by [CCFC] ***within 45 days*** *as from the notification by* [FC Nantes] *of the relevant bank details to* [CCFC], [CCFC] *shall be banned from registering any new players, either nationally or internationally, up until the due amounts are paid and for the maximum duration of three entire and consecutive registration periods (cf. art. 24bis of the Regulations on the Status and Transfer of Players).*

8. The ban mentioned in point 7. above will be lifted immediately and prior to its complete serving, once the due amount is paid.

9. In the event that the aforementioned sum plus interest is still not paid by the end of the ban of three entire and consecutive registration periods, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.

10. No procedural costs are imposed on the parties and the advance of costs will be reimbursed to FC Nantes."

36. On 30 October 2019, the grounds of the Appealed Decision were communicated to the Parties, *inter alia*, providing as follows:

- As to CCFC's objection to the jurisdiction of the FIFA PSC, "[…] [t]*he members of the Bureau observed that, according to* [CCFC], *because* [clause 8.2 of the Transfer Agreement] *wrongly indicated the Dispute Resolution Chamber and not the Players' Status Committee* […] *as the competent body to decide over a possible dispute between the parties, such clause was to be considered invalid, and the matter was therefore to be referred to the Court of Arbitration for Sport instead.*
- *In this respect, the members of the Bureau reiterated that – in accordance with art. 22 lit. f) and art. 23 par. 1 and 4 of the Regulations*

– FIFA is competent to hear a claim lodged by a club against another club affiliated to a different association.

- *That being said, the Bureau pointed out that, regardless of any clerical mistakes in the drafting of the clause at stake, or rather of any inaccuracy in indicating the correct deciding body within FIFA's dispute resolution mechanism, it was clear that the real intention of the parties behind the aforementioned jurisdiction clause was to refer any dispute arising from the agreement to FIFA.*
- *Moreover, the members of the Bureau were eager to emphasize that even if the agreement would not contain an invalid and consequently inapplicable jurisdiction clause, the PSC would still have competence to entertain the present matter in accordance with art. 22 lit. f) and art. 23 par. 1 and 4 of the Regulations.*
- *Consequently, the members of the Bureau established that the latter is competent to entertain the claim at hand.*"
- As to CCFC's request for a stay of the proceedings, "*the members of the Bureau deemed it fit to recall that the present dispute operates in a completely different legal realm from that pertaining to criminal and civil liability to which the mentioned investigations relate. The dispute at stake, in fact, only concerns a contractual dispute between the parties. As such, the members of the Bureau pointed out that the outcome of the present dispute would not have any impact on any investigations carried out in respect of the player's fatal accident and vice versa.*
- *In light of the foregoing, the members of the Bureau could not see any reason justifying the suspension of the present proceedings. Consequently, they rejected* [CCFC's] *argumentation on the point.*"
- As to the substance of FC Nantes' claim and the compliance with the conditions precedent set forth in the Transfer Agreement, "*the Bureau remarked that, in accordance with the information included in TMS, the FAW had entered the registration of the player in the system on 21 January 2019 and confirmed the receipt of his ITC on the same day at 17.30 local time in Wales.*
- […] [T]*he Bureau was eager to underline that, despite the tragic passing of the player as well as the criminal and civil liability developments it may possibly trigger, the dispute lodged before FIFA by* [FC Nantes] *remains of a purely contractual nature.*
- *In other words, even though the circumstances surrounding the player's tragic passing in a plane accident may activate criminal proceedings and civil actions regarding* [FC Nantes'] *possible liability before local courts, the Bureau was of the opinion that those proceedings should be settled by the local courts and not by FIFA. If the local courts would determine any criminal or civil liability on the side of* [FC Nantes], *it is also for the local courts to determine the consequences of such liability. The Bureau held that* [CCFC] *had not been able to prove that the*

outcome of those local proceedings would be relevant for the outcome of the dispute pertaining to whether or not a transfer fee is due.

- *In light of the foregoing, the members of the Bureau decided not to take into account any arguments brought forward by* [CCFC] *in front of FIFA in relation to the circumstances surrounding the tragic passing of the player. The Bureau established that it is not in a position to consider the allegations of* [CCFC] *as to* [FC Nantes'] *alleged civil liability towards it as they lie outside of its competence.*"
- As to the first of the four cumulative conditions precedent in the Transfer Agreement, "*the Bureau first agreed that the condition precedent outlined in clause 2.1.1., i.e. the player having completed successfully the medical examinations with* [CCFC]*, had remained undisputed between the parties and therefore was not to be further analysed.*"
- As to the second condition precedent in clause 2.1.2. of the Transfer Agreement, "*the members of the Bureau recalled* [CCFC's] *allegation that such clause was not complied with because two conditions precedent included* [in] *the termination agreement signed between the player and* [FC Nantes] *had not been fulfilled, namely the definitive transfer of the player to* [CCFC] *and the issuance of the player's ITC to the FA* [sic]*. Thus,* [CCFC] *deems that the employment relationship between the player and* [FC Nantes] *was not validly terminated and consequently clause 2.1.2. of the* [Transfer Agreement] *was not fulfilled, the agreement was to be considered as invalid and the transfer fee was not due.*
- *However, the Bureau did not concur with* [CCFC's] *line of reasoning. The Bureau deemed that by the very act of signing a termination agreement* [FC Nantes] *and the player had agreed on all of the terms enshrined therein, regardless of whether the conditions precedent set out in that termination were, at a later stage, complied with or not. The latter is a question that attains to the subsequent efficacy of the termination, not to the – logically antecedent – agreement of its terms. As a side note, the Bureau also stated that evident clerical mistakes in an agreement obviously do not precede over the parties' intention or the correct regulatory, technical procedures.*
- *Consequently, the Bureau dismissed* [CCFC's] *remarks on the point and agreed that the second condition precedent of clause 2.1.2 had been fulfilled as well.*"
- As to the third condition precedent in clause 2.1.3. of the Transfer Agreement, "*the members of the Bureau deemed it worth to preliminary point out that, in light of the peculiarity of its prescription, the said clause required further interpretation of the parties' real intention when they drafted it in order to be able to assess its proper meaning. In doing so, the Bureau assumed that the ratio behind the inclusion of such a clause in the* [Transfer Agreement] *as condition precedent could have only been to provide* [CCFC] *with a safeguard against the risk of being involved in a claim for breach of contract that* [FC Nantes] *might have*

lodged against the player. More specifically, the Bureau assumed that the clause at stake had been included in the [Transfer Agreement] *for the sole purpose of securing* [CCFC] *from the consequences in terms of possible inducement in the player's breach of contract at a later stage in case a dispute would arise between* [FC Nantes] *and the player, however remotely such possibility might have been.*

- *Notwithstanding the aforementioned and for the sake of good order, the Bureau, bearing in mind art. 12 par. 3 of the Procedural Rules, in accordance with which any party claiming a right on the basis of an alleged fact shall carry the burden of proof, found it worthwhile to add that* [FC Nantes] *had produced a copy of the relevant termination agreement, dated 19 January 2019, and that such document bore a stamp with the indication "Homologué le 21/01/2019", i.e. "Ratified on 21/01/2019".*
- *Consequently, the Bureau concurred that also this third condition precedent had to be considered as fulfilled.*"
- As to the fourth condition precedent in clause 2.1.4. of the Transfer Agreement, "*the members of the Bureau observed that* [CCFC] *contested the fulfilment of the said condition precedent, mainly on the basis of the fact that the* [CCFC Employment Contract] *could allegedly not be registered with the Premier League and, as such, had to be considered null and void, which in its opinion further lead to the invalidation of the issuance of the player's ITC.*
- *In this respect, the members of the Bureau firstly observed that the clause at stake did not require the player's* [CCFC Employment Contract] *to be registered with the Premier League as a condition precedent. What is more, the Bureau held that it was clear that it was always the intention of* [CCFC] *to register the player with the Premier League and that the only reason why the contract was not approved was an omission of* [CCFC] *itself.*
- *Moreover, the members of the Bureau pointed out that the registration of an employment contract with the Premier League not only consists of an internal matter between* [CCFC] *and the Premier League and/or the FAW, but it is also a formal requirement over which* [FC Nantes] *has no influence. As a result, from the Bureau's point of view, whether or not* [CCFC] *and the agents representing the player had carried out the required due diligence in drafting the* [CCFC Employment Contract] *that was in conformity with the Premier League's specific rules or not, can in no way affect the validity of the* [Transfer Agreement] *concluded between* [FC Nantes] *and* [CCFC].
- *The foregoing having been established, the Bureau turned its attention to the question of whether the transfer of the player had been completed in TMS.*
- *In this respect, the Bureau reverted to the specificities that govern the system of the international transfers through the TMS platform and first*

recalled that, in order for a transfer to occur on the TMS, a duly signed employment contract between the player and the 'new club' needs to be uploaded therein in the first place. Moreover, the Bureau highlighted that a transfer does not occur automatically in the TMS. On the contrary, the receiving association, i.e. the FAW in the case at stake, has to manually enter the registration date and confirm the ITC receipt from the former association, in casu the FFF. A transfer goes into the status "closed-awaiting payments" in TMS once the new association has entered the registration date and confirmed the ITC receipt. Considering the foregoing and the information contained in TMS, the transfer of the player was concluded in the system on 21 January 2019 at 17.30 local time in Wales, i.e. when the FAW entered all the necessary requirements in the system.

- *With all the foregoing in mind, the members of the Bureau could determine that the transfer of the player in TMS was completed and, therefore, that the player's transfer from* [FC Nantes] *to* [CCFC] *has to be considered as validly concluded between the parties. Hence, the player was a player of* [CCFC]."
- As to the consequences of such conclusion, "*the Bureau turned its attention to the first part of* [FC Nantes'] *claim, i.e. its request for the payment of the first instalment in the amount of EUR 6,000,000, and recalled that its non-payment remained undisputed by* [CCFC].
- *Considering the aforementioned as well as the legal principle of pacta sunt servanda, which in essence means that agreements must be respected by the parties in good faith, the Bureau resolved that* [CCFC] *has to pay to* [FC Nantes] *the outstanding amount of EUR 6,000,000, corresponding to the first instalment of the* [Transfer Agreement], *which was due "within five days of the player registering with* [CCFC]*", i.e. until 26 January 2019.*
- *Additionally, considering* [FC Nantes'] *request, the terms of the* [Transfer Agreement] *and the well-established jurisprudence of the Players' Status Committee, the Bureau decided that interest in the amount of 5% p.a. was to be applied on the outstanding amount of EUR 6,000,000 as of the day after the relevant due date, i.e. 27 January 2019.*
- *In continuation and with regard to* [FC Nantes'] *request related to the payment of the second and third instalment, the Bureau pointed out that, in accordance with the agreement, the amounts in question fall due on 1 January 2020 and 1 January 2021 respectively.*
- *In view of the aforementioned and bearing in mind that the second and third instalment are not yet due, the Bureau determined that, at this point in time, it was not in a position to render a decision on this part of* [FC Nantes'] *request.*
- *Equally and as to* [FC Nantes'] *claim in connection with the future bonuses mentioned in the* [Transfer Agreement], *the Bureau ruled that,*

at this point in time, it was not in a position to render a decision on this subject.

- *In conclusion, the Bureau decided that the claim of* [FC Nantes'] *is partially accepted and that* [CCFC] *has to pay to* [FC Nantes'] *the amount of EUR 6,000,000 plus 5% interest p.a. as of 27 January 2019.*"
- As to the procedural costs of the proceedings, "*the members of the Bureau wished to highlight that, throughout their deliberations and while analysing the content of the dispute at stake, they never lost sight of the tragic and sorrowful circumstances surrounding the present matter.*
- *Consequently, the Bureau unanimously and exceptionally decided not to impose any procedural costs in casu.*"
- Finally, as to FC Nantes' request for sporting sanctions to be imposed on CCFC, "*the members of the Bureau pointed out that, against clubs, the consequence of the failure to pay the relevant amounts in due time shall consist of a ban from registering any new players, either nationally or internationally, up until the due amounts are paid and for the maximum duration of three entire and consecutive registration periods.*
- *Therefore, bearing in mind the above, the Bureau decided that, in the event that* [CCFC] *does not pay the amount due to* [FC Nantes] *within 45 days as from the moment in which* [FC Nantes], *following notification of the present decision, communicates the relevant bank details to* [CCFC], *a ban from registering any new players, either nationally or internationally, for the maximum duration of three entire and consecutive registration periods shall become effective on* [CCFC] *in accordance with art. 24bis par. 2 and 4 of the Regulations.*
- *Finally, the Bureau recalled that the above-mentioned ban will be lifted immediately and prior to its complete serving upon payment of the due amounts, in accordance with art. 24bis par. 3 of the Regulations.*"

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

37. On 20 November 2019, in accordance with Article R47 of the Code of Sports-related Arbitration (the "CAS Code"), CCFC filed its Statement of Appeal with CAS, challenging the Appealed Decision. In its Statement of Appeal, CCFC nominated Mr Andrew de Lotbinière McDougall QC, Attorney-at-Law in Paris, France, as arbitrator.

38. On 27 November 2019, FC Nantes informed the CAS Court Office that the Parties had mutually agreed on extensions of the time limits to file the Appeal Brief and Answer.[1]

[1] Throughout the present proceedings, the Parties mutually agreed to extend time limits on various occasions and for relatively long periods of time, in part related to the COVID-19 pandemic and the resulting difficulties for the Parties in liaising with expert witnesses. For the sake of brevity, the Panel did not consider it pertinent to refer to every such agreement in this section of the Award.

39. On 3 February 2020, in accordance with Article R51 CAS Code, CCFC filed its Appeal Brief with the CAS Court Office. In its Appeal Brief, CCFC, *inter alia*, requested to stay the proceedings pending the outcome of ongoing French criminal investigations.

40. On 11 February 2020, FIFA informed the CAS Court Office that it renounced its right to request its possible intervention in the proceedings pursuant to Article R52.2 and R41.3 CAS Code.

41. On 20 February 2020, FC Nantes informed the CAS Court Office that it nominated Mr Nicholas Stewart QC, Barrister in London, United Kingdom, as arbitrator.

42. On 4 March 2020, the CAS Court Office informed the Parties that pursuant to Article R54 CAS Code and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the Panel had been constituted as follows:

President:	Mr Ulrich Haas, Professor of Law, Zurich, Switzerland
Arbitrators:	Mr Andrew de Lotbinière McDougall QC, Attorney-at-Law, Paris, France
	Mr Nicholas Stewart QC, Barrister, London, United Kingdom

43. On 26 March 2020, the CAS Court Office informed the Parties that Mr Dennis Koolaard, Attorney-at-Law in Arnhem, The Netherlands, would assist the Panel as *Ad hoc* Clerk.

44. On 1 April 2020, the CAS Court Office informed the Parties that the Panel would decide upon CCFC's request for a stay of the proceedings upon receipt of FC Nantes' Answer.

45. On 30 July 2020, in accordance with Article R55 CAS Code, FC Nantes filed its Answer with the CAS Court Office.

46. On 10 August 2020, FC Nantes informed the CAS Court Office that it considered that CCFC's request for a stay of the proceedings was not yet ripe for consideration, as CCFC had made such request in the event that "*the Panel […] would consider that the Transfer Agreement is valid*", which had not been decided by the Panel.

47. Also on 10 August 2020, CCFC requested a stay of the proceedings pending (i) the conclusion of criminal investigations in France following a criminal complaint filed by CCFC concerning the alleged transfer and the fatal flight; (ii) an investigation initiated by the English Football Association ("The FA") into potential regulatory breaches by Mark and Willie McKay; and (iii) concurrent investigations and a coroner's inquest into the circumstances of the alleged transfer and the flight. CCFC also requested that a second round of submissions be granted to the Parties.

48. On 7 September 2020, FC Nantes objected to CCFC's request for a stay of the proceedings and to the filing of a second round of submissions.

49. On 8 September 2020, the CAS Court Office informed the Parties that the Panel had dismissed CCFC's request for a stay of the proceedings and granted CCFC's request for a second round of submissions.

50. On 21 October 2020, CCFC requested the Panel to order FC Nantes to present a written expert report for Prof. Müller, as FC Nantes had indicated that it intended to call Prof. Müller as an expert witness but had not submitted any written statement specifying the content of his expert opinion with its Answer.

51. Also on 21 October 2020, FC Nantes objected to CCFC's request with respect to Prof. Müller, maintaining that the appropriate time to file such a request would be after the exchange of the Parties' written submissions, that it was sufficiently clear which issues Prof. Müller would address and that this was comparable to what CCFC had indicated with respect to its expert witness Mr Bajul Shah.

52. On 26 October 2020, the CAS Court Office informed the Parties that the Panel had decided that CCFC's request with respect to Prof. Müller was premature, but that CCFC was not prevented from filing such request after the exchange of the Parties' written submissions if no report had been filed by FC Nantes in the meantime.

53. On 18 January 2021, CCFC filed its second written submission.

54. On 9 August 2021, FC Nantes filed its second written submission.

55. On 17 August 2021, following an inquiry from the CAS Court Office, FC Nantes indicated that it did not consider it necessary for a hearing to be held, while CCFC requested an extension of its time limit to respond.

56. Also on 17 August 2021, the CAS Court Office informed the Parties that the Panel was already in a position to confirm that a hearing was necessary.

57. On 27 August 2021, CCFC filed a renewed application for a stay of the proceedings pending the conclusion of (i) the prosecution of Mr David Henderson before the criminal courts in England and Wales; (ii) the coroner's inquest into the death of the Player; and (iii) the ongoing French criminal investigation.

58. On 7 September 2021, FC Nantes objected to CCFC's renewed application for a stay of the proceedings.

59. On 10 September 2021, CCFC filed an unsolicited letter with the CAS Court Office, alleging that FC Nantes' letter dated 7 September 2021 contained certain inaccurate factual assertions.

60. On 15 September 2021, FC Nantes reiterated the accuracy of its letter dated 7 September 2021.

61. On 4 October 2021, the CAS Court Office informed the Parties as follows with respect to a bifurcation of the proceedings, specifying the bifurcated issues (the "Bifurcated Issues"):

> "*The Panel has decided to bifurcate the proceedings and, therefore, to preliminarily deal with the following legal issues on the merits:*

(i) If the transfer agreement entered into by the Parties is valid (with all conditions precedent being complied with);

(ii) If the CAS / FIFA PSC is competent to decide on the set-off with a damage claim;

(iii) Under the law applicable – as a matter of principle – a claim for transfer fee can be set-off against a tort claim.

The Panel considers that a 2-day hearing would be sufficient to deal with the bifurcated legal issues."

62. On 7 October 2021, following an enquiry from the CAS Court Office on behalf of the Panel, CCFC indicated that it reserved its right to reiterate its document production requests under para. 307(c) and (d) of its second written submission at a later stage of the proceedings, but confirmed that it wished to maintain its document production requests under para. 307(a) and (b) of its second written submission, providing as follows:

"*a. As requested at paragraph 12(a), the employment contract between* [the Player] *and FC Nantes;*

b. As requested at paragraph 138, copies of the cheques emitted directly before and after the cheque for the Player's wages dated 21 January 2019 so that the date can be verified."

63. On 11 November 2021, upon being invited by the CAS Court Office to comment, FC Nantes objected to CCFC's document production requests, maintaining that the requests were made untimely and lacked a proper basis or relevance to the dispute.

64. On 17 November 2021, the CAS Court Office informed the Parties on behalf of the Panel that CCFC's document production requests were, at that stage, rejected, because "*such documents are not relevant for the bifurcated issues*", indicating that further reasons would be provided by the Panel in the (interim or final) Award.

65. On 15 December 2021, the CAS Court Office issued an Order of Procedure, which was duly signed and returned by FC Nantes and CCFC on 15 and 22 December 2021 respectively. CCFC added two reservations to the Order of Procedure:

"*The Appellant reserves all its rights in connection with the decision of the Panel notified on 17 November 2021 whereby it rejected* [CCFC's] *requests for production of documents made in the Second Written Submission dated 18 January 2021 and reiterated in its correspondence dated 7 October 2021.*

The Appellant reserve its right as to CAS' decision to hold a hearing in person on 3-4 March 2022, including but not limited to not affording the Appellant the right to respond to new alleged factual bases from the Respondent for objecting to it being moved to a date anytime from 5 days later and thereby, as matters stand, depriving the Appellant from advancing its case with its legal representative of its choice as a result of his entitlement to parental leave."

66. On 18 January 2022, CCFC provided the CAS Court Office with an update on the progress of the coroner's inquest following a pre-inquest review hearing held on 13 January 2022, and requested a limitation of the Bifurcated Issues.

67. On 21 January 2022, FC Nantes objected to CCFC's request for a limitation of the Bifurcated Issues.

68. On 25 January 2022, the CAS Court Office informed the Parties that the Panel had decided to reject CCFC's request to limit the Bifurcated Issues, indicating that the reasons for such decision would be communicated in the final Award.

69. On 11 February 2022, following the disagreement of the Parties on a joint tentative hearing schedule and each of the Parties presenting its own schedule, the CAS Court Office informed the Parties that "[t]*he Panel has assessed the various hearing schedules proposed by the Parties and prefers the one suggested by the Respondent, which is herewith confirmed*".

70. On 23 February 2022, CCFC informed the CAS Court Office that one of its expert witnesses, Mr Robert Glancy QC, was unable to attend the hearing for medical reasons, requesting the Panel to adjourn his examination and schedule it once he was medically recovered.

71. On the same date, 23 February 2022, FC Nantes objected to CCFC's request to adjourn the examination of Mr Glancy QC.

72. On 28 February 2022, the CAS Court Office informed the Parties that (i) the Panel had taken note of Mr Glancy QC's unavailability; (ii) the Parties were invited at the hearing to make submissions in relation to Mr Glancy QC's expert report and the fact that he was not made available for the hearing; and (iii) the Parties were invited at the hearing to make submissions as to whether or not the Panel should hear Mr Glancy QC's evidence at another time, following which the Panel would decide.

73. On 2 March 2022, CCFC provided the CAS Court Office with a medical certificate based on which CCFC argued that Mr Glancy QC was unable to give evidence on 3 or 4 March 2022 on medical grounds.

74. On 3 and 4 March 2022, a hearing was held in Lausanne, Switzerland. At the outset of the hearing, both Parties confirmed that they had no objection to the constitution and composition of the Panel.

75. In addition to the Panel, Mr Antonio De Quesada, CAS Head of Arbitration, and Mr Dennis Koolaard, *Ad hoc* Clerk, the following persons attended the hearing:

    For the Appellant:

    1) Mr X., Counsel;
    2) Mr Sven Demeulemeester, Counsel;
    3) Mr Gauthier Bouchat, Counsel;
    4) Mr Christopher Nott, Counsel;
    5) Ms Céline Jones, Counsel;

6) Ms Carrie Gwyther, Counsel;
7) Mr Wayne Beynon, Counsel (by video-conference);
8) Mr Pascal Wilhelm, Counsel;
9) Ms Sophie Le Grom De Maret, Counsel.

For the Respondent:

1) Mr Loïc Morin, Secretary General of FC Nantes;
2) Mr David Casserly, Counsel;
3) Mr Adam Taylor, Counsel;
4) Prof. Edgar Philippin, Counsel;
5) Mr Anton Sotir, Counsel;
6) Mr Jérôme Marsaudon, Counsel;
7) Mr Louis-Marie Absil, Counsel;
8) Ms Claire Havet, Counsel;
9) Ms Raphaëlle Greffier, Counsel (by video-conference);
10) Mr Stephen Sampson, Counsel;
11) Ms Katie Smith, Counsel;
12) Ms Starr Pirot, Interpreter.

76. The following expert witnesses/factual witnesses were examined, in order of appearance:

1) Prof. Antonio Rigozzi, Expert on Private International Law and Swiss Law, expert witness called by CCFC;
2) Prof. Christoph Müller, Expert on Swiss Law, expert witness called by FC Nantes (by video-conference);
3) Mr Neil Selwyn Block QC, Expert on English law of negligence and set-off, expert witness called by FC Nantes (by video-conference);
4) Mr Loïc Morin, Secretary General of FC Nantes, factual witness called by FC Nantes;
5) Mr Andrew Hunter QC[2], Expert on English Contract Law, expert witness called by FC Nantes (by video-conference);
6) Mr Paul Gilroy QC, Senior UK Barrister and Expert on English Contract Law, expert witness called by CCFC (by video-conference).

77. The factual witness and the expert witnesses were invited by the President of the Panel to tell the truth subject to the sanction of perjury under Swiss law. The Parties and the Panel had full opportunity to examine and cross-examine the factual witness and expert witnesses.

78. As discussed in more detail below (see para. 248 *et seq.*), Mr Robert Glancy QC, Expert on English Tort Law, expert witness called by CCFC, was not examined, nor did the Panel agree to hear him at a later stage, but Mr Glancy's expert report remained part of the case file and was duly considered by the Panel.

[2] FC Nantes initially called Lord Wolfson QC as an expert witness on English Contract Law, but he was replaced by Mr Andrew Hunter QC following the former's appointment as a UK government minister in the Ministry of Justice in December 2020.

79. The following persons did not provide substantive witness statements, because FC Nantes had only indicated what they could potentially testify about, without however giving any concrete evidence. Following an agreement of the Parties during the hearing, they were not examined during the hearing:

1) Mr Samuele Lanoë, In-house counsel of FC Nantes, witness called by FC Nantes;
2) Mr Stéphane Bottineau[3], Head of the Legal Department of the LFP, witness called by FC Nantes;
3) Mr Maxime Estienne, TMS Manager of the FFF, witness called by FC Nantes.

80. The following persons provided witness statements and their witness statements remained on file, but, following an agreement of the Parties during the hearing, they were not examined during the hearing:

1) Mr Nicolas Pallois, friend of the Player, witness called by FC Nantes;
2) Ms Madeleine Guillou, Payroll Manager of FC Nantes, witness called by FC Nantes;
3) Ms Blandine Capitaine, Chief Financial Officer of FC Nantes, witness called by FC Nantes.

81. The following persons provided expert reports or witness statements or it was indicated what they could potentially testify about, but their evidence was not heard because the content thereof fell outside the scope of the Bifurcated Issues:

1) Captain Adam Berrington, Aviation Expert, expert witness called by CCFC;
2) Mr Neil Warnock, First Team Manager of CCFC, witness statement submitted by CCFC;
3) Mr Bajul Shah, Aviation Law Barrister, expert witness called by CCFC;
4) Mr John Kimbell QC, Expert on Aviation Law, expert witness called by FC Nantes;
5) Mr Andrew Cubin, Aviation Expert, expert witness called by FC Nantes;
6) Mr Mark McKay, football agent, witness called by FC Nantes;
7) Mr Willie McKay, football agent and father of Mr Mark McKay, witness called by FC Nantes;
8) Ms Laura Taconne, friend of the Player, witness called by FC Nantes;
9) Mr Lucas Hervouet, Community Manager of FC Nantes, witness called by FC Nantes;
10) Mr Simon James Huxter, Detective Inspector of the Dorset Police, witness statement submitted by CCFC;
11) Ms Faith Rose Chmura Al-Egaily, Secretary of Southern Aircraft Consultancy Inc., witness statement submitted by FC Nantes;
12) Mr Evren Fencioglu, Operations Officer at Signature Flight Support at Cardiff Airport, witness statement submitted by FC Nantes;

[3] FC Nantes initially called Ms Emilie Marcheval as a witness, but Mr Bottineau replaced Ms Marcheval as Head of the Legal Department of the LFP during the proceedings.

13) Dr Basil Nigel Purdue, Home Office Pathologist, expert report submitted by FC Nantes.

82. The Parties were given full opportunity to present their cases, submit their arguments in opening and closing statements, and to answer the questions posed by the members of the Panel.

83. Before the hearing was concluded, FC Nantes expressly stated that it had no objection to the procedure adopted by the Panel and that its right to be heard had been respected. CCFC confirmed the same, save for a reservation with respect to Panel's refusal to hear Mr Glancy QC.

84. On 21 March 2022, following a discussion during the hearing and a proposal from FC Nantes to produce additional documentary evidence, the CAS Court Office informed the Parties on behalf of the Panel that, at such stage, no further submissions would be accepted.

85. On 3 May 2022, CCFC informed the CAS Court Office that the inquest into the death of the Player had been heard, that the jury had allegedly come to certain conclusions and it provided its own summary thereof. CCFC also indicated that, following correspondence between the Parties, FC Nantes considered such summary to be misleading and contrary to the procedural rules and the Panel's directions.

86. On 3 May 2022, the CAS Court Office informed the Parties that CCFC's letter dated 3 May 2022 was not admitted on file.

87. The Panel confirms that it carefully heard and took into account in its decision all of the submissions, evidence, and arguments presented by the Parties, even if they have not been specifically summarised or referred to in the present arbitral Award.

V. SUBMISSIONS OF THE PARTIES

A. The Appellant

88. The submissions of CCFC, in essence, may be summarised as follows:

- The Appealed Decision is flawed in a number of respects.
- First, the FIFA PSC did not address the issue of the law(s) applicable to the merits of the dispute. As a direct consequence thereof, the FIFA PSC interpreted the Transfer Agreement in a manner that violates the common intention of the Parties.
- The FIFA PSC also did not directly address certain arguments advanced by CCFC, particularly regarding the fulfilment of the condition precedent at clause 2.1.4 of the Transfer Agreement.
- Furthermore, as far as its competence for civil liability claims is concerned, the FIFA PSC held that "*they lie outside of its competence*" and "*should be settled*

by the local courts". Again, no explanation whatsoever was given of the reasons for these findings.

- FC Nantes' claim is to be analysed from a twofold perspective:

  - From a contractual angle and based on the common intention of the Parties, the Transfer Agreement is not valid as two of the condition precedents were not fulfilled: (i) the Player and FC Nantes failed to validly terminate their employment relationship on the one hand (clause 2.1.2); and (ii) the Player could at no time be deemed a CCFC player as he was never registered with the Premier League, which was the common intention of the Parties (clause 2.1.4).

  - In addition, any contractual claim that FC Nantes might have against CCFC must be set off against the claim for damages CCFC has towards FC Nantes as a result of its liability for the death of the Player.

Clauses 2.1.2 and 2.1.3 of the Transfer Agreement

- Since the conditions precedent in the Termination Agreement were not fulfilled, FC Nantes could not give effect to clause 2.1.2 of the Transfer Agreement.

- Further, and in the alternative, the FC Nantes Employment Contract was not terminated in accordance with the French Labour Code and, accordingly, clause 2.1.2 of the Transfer Agreement was not satisfied, because (i) there is no evidence that FC Nantes ever provided the Player with an "*employment certificate*", which is required by Article L 1234-19 of the French Labour Code; (ii) there is no evidence that FC ever provided the Player with an "*unemployment insurance certificate*", which is required by Article R 1234-9 of the French Labour Code; and (iii) no "*balance of all accounts*" was provided to the Player by FC Nantes, which is required by Article L 1234-20 of the French Labour Code.

Clause 2.1.4 of the Transfer Agreement

- Applying the correct legal approach to contractual interpretation under English law, clause 2.1.4 of the Transfer Agreement provides that the Player was to play for CCFC given the use of the words "*Cardiff City FC player*". However, as of 19 January 2019, i.e. the date on which the Transfer Agreement was signed, the only competition in which CCFC remained entitled to play during that season was the Premier League, and they were, at that time, in 17th position and just one point above the relegation zone. It follows that, as a matter of business common sense, for the Transfer Agreement to have practical effect, the Player had to be registered with the Premier League and, thus, be entitled to play for CCFC upon his transfer in order to assist CCFC retain its Premier League status.

- To suggest that the condition precedent in clause 2.1.4 of the Transfer Agreement would be satisfied by the Player being merely registered at the FAW

is not only absurd but also, for the reasons set out above, also does not make business common sense.

- On 21 January 2019, the registration department of the Premier League considered the CCFC Employment Contract to be invalid and refused to register it. Considering the Premier League's refusal to register, the Player's Agent and CCFC resumed contractual negotiations. The very fact that negotiations resumed is plain, obvious and incontrovertible evidence that there was no concluded employment contract for the purposes of registration with the Premier League, and therefore as of 19 January 2019 clause 2.1.4 of the Transfer Agreement was not (and could not have been) satisfied.

Tort claim: set-off based on FC Nantes' alleged civil liability

- In the unlikely event that the Panel considers that the transfer was completed and that the Player had become a CCFC player by the time of his death, it should:

  a) conclude that FC Nantes is as a matter of civil law liable for damages caused to CCFC by the death of the Player;
  b) assess those damages at not less than the sum claimed from CCFC by FC Nantes as the transfer fee;
  c) conclude that any contractual liability that CCFC might otherwise have to FC Nantes for the transfer fee is extinguished by set-off.

- That is for the following reasons:

  a) The Player's return flight between Nantes and Cardiff during which the Player's death occurred:
     (i) was organised by Mr Willie McKay acting to assist Mr Mark McKay/Mercato in connection with the Agency Agreement that Mr Mark McKay had concluded with FC Nantes for the purposes of arranging the sale of the Player, and so
     (ii) was organised by agents/sub-agents of FC Nantes acting in that capacity.
  b) FC Nantes is civilly liable for acts, omissions and defaults committed by its agents/sub-agents in such regard, in connection with the organisation of the flight itself;
  c) The evidence shows numerous extensive faults committed by Mr Willie McKay, and so by FC Nantes' agent, in connection with the organisation of the flight;
  d) Those faults in all probability resulted in the crash and in the Player's death;
  e) The Player's death caused financial loss to CCFC, namely the loss of a key player;
  f) In order to compensate CCFC for that loss, damages equivalent to the Player's value should be awarded against FC Nantes;
  g) The Player's value should be common ground between FC Nantes and CCFC, namely EUR 17,000,000, i.e. the price at which both FC Nantes and CCFC valued the Player when agreeing his transfer to CCFC.

- Prior to considering the substance of CCFC's civil tort claim against FC Nantes, the Panel needs to consider whether (i) the CAS has jurisdiction to hear CCFC's tort claim; and (ii) whether a tortious liability can be offset against a contractual liability under the applicable law. CCFC maintains that these requirements are met, regardless of the law to be applied.

89. On this basis, CCFC submits the following prayers for relief in its Appeal Brief:

"*In limine litis:*

1. *Suspend the present proceedings pending the outcome of the ongoing French criminal investigations;*

Subsequently, the Appellant requests the Court of Arbitration for Sport to:

2. *Declare this Appeal admissible;*
3. *Annul the Decision under Appeal rendered by the Bureau of the FIFA Players' Status Committee on 25 September 2019;*
4. *Reject the Respondent's claim for the transfer fee;*
5. *Subsidiarily, in the event the Request for Relief n. 3 is not accepted, declare that all claims due by the Appellant to the Respondent are extinguished by set-off;*

In any event

6. *Declare that no amount shall be payable by the Appellant to the Respondent;*
7. *Order the Respondent to bear the costs of proceedings before the Court of Arbitration for Sport;*
8. *Award a contribution to be established at its discretion to cover the legal fees and expenses of the Appellant.*"

B. The Respondent

90. The submissions of FC Nantes, in essence, may be summarised as follows:

- The only matter to be decided by the Panel is whether the FIFA PSC was correct in upholding FC Nantes' contractual claim for EUR 6,000,000 relating to the first instalment of the Player's transfer from FC Nantes to CCFC, i.e. whether the conditions precedent provided for in clause 2.1 of the Transfer Agreement were fulfilled.

- CCFC's tort claim relating to FC Nantes' alleged civil liability (including the set-off defence) is outside the scope of the arbitration clause contained in the FIFA Statutes and has correctly not been dealt with by the FIFA PSC, being outside its competence. Therefore, it shall not be subject to the present appeal proceedings.

Clauses 2.1.2 and 2.1.3 of the Transfer Agreement

- CCFC's argument that FC Nantes failed to comply with its obligations to deliver the "End-of-Contract Documents" is incorrect and is at odds with the facts of the case. In any event, failure to deliver such documents immediately after the final termination of the FC Nantes Employment Contract has no effect on the validity of the Termination Agreement.

- As a consequence, the Termination Agreement was validly concluded, the FC Nantes Employment Contract was validly terminated and the LFP ratified the Termination Agreement on 21 January 2019. Therefore, the conditions set out in clauses 2.1.2 and 2.1.3 of the Transfer Agreement were fulfilled.

Clause 2.1.4 of the Transfer Agreement

- It is obvious that CCFC's position is illogical and based on a misconception. It is not disputed by FC Nantes that CCFC wished to field the Player in Premier League matches. However, the object of the Transfer Agreement was to provide CCFC with a possibility to register the Player with the Premier League for CCFC, not to register him with the Premier League.

- On 21 January 2019, at 18:30 CET, the FAW confirmed the ITC receipt, registered the Player as a CCFC player, and entered the registration date into TMS. There could be no other meaning of the wording "*the Player has been registered as a* [CCFC] *player*" in clause 2.1.4 of the Transfer Agreement. This condition was manifestly fulfilled when the FAW registered the Player.

- There is nothing in the Transfer Agreement that provides (or even suggests) that the Transfer Agreement was conditional upon the Player being also registered with the Premier League. The FIFA PSC's view concurs with the position of FC Nantes. In fact, clause 5.3 of the Transfer Agreement expressly provides that the only party responsible for the Player's registration with the Premier League is CCFC.

- CCFC alleges that the Premier League considered the CCFC Employment Contract invalid and, on this basis, refused to register the Player with the Premier League. However, the Premier League has never held that the CCFC Employment Contract was invalid. The Player and CCFC entered into a valid and enforceable employment contract. Unless the successful registration of the Player with the Premier League was a condition of the CCFC Employment Contract (which it is not), the lack of registration with the Premier League could not affect the validity of the CCFC Employment Contract.

Interim conclusion

- In light of the above, the FIFA PSC correctly applied the legal principle of *pacta sunt servanda* in ordering CCFC to pay to FC Nantes the outstanding amount of EUR 6,000,000. Because the due date of the payment was 26 January 2019,

interest of 5% *per annum* was also correctly awarded by the FIFA PSC, starting from 27 January 2019 until payment.

Tort claim: set-off based on FC Nantes' alleged civil liability

- To the extent CCFC's tort claim falls within the scope of the present appeal proceedings and is admissible, despite that the FIFA PSC ruled that it was not competent to deal with this issue and such ruling has not been challenged by CCFC, the claim should in any event be dismissed.

- CCFC's claim cannot succeed under English law and would not proceed before an English court. That is because the rule in *Baker v Bolton* [1808] 1 Camp. 493 ("*Baker v Bolton*") prevents a party from recovering loss arising from the death of another, save where permitted by statute. This has been the position for over 400 years. However CCFC dresses its case, it is simply a claim for damages arising out of the death of another, the Player. Those with any familiarity with English law could not help but be surprised by the case that is being put forward by CCFC, given the existence of this very well-established rule in *Baker v Bolton*.

- Should the Panel look beyond that rule, a summary of FC Nantes' defence is as follows:

  "*(i) Willie McKay was not authorised to act and did not act as agent for FC Nantes; Mark McKay of Marcato was appointed as agent. Mark McKay was a dual registered agent, in England and France, had worked on transactions involving* [CCFC] *before and was in January 2019 also instructed by OGC Nice in connection with the possible transfer of the player Adrien Tameze to* [CCFC].

  (ii) In any event, Willie McKay was not acting for FC Nantes when he arranged the flight for the Player. The flight was not for FC Nantes' benefit. FC Nantes had no knowledge of the flight and no factual or legal responsibility for it.

  (iii) [CCFC] *fails to distinguish between (a) the purpose of pre-transfer flights arranged by Willie McKay and/or Mark McKay, for the benefit for Mark McKay, Mercato, Neil Warnock and his colleagues at* [CCFC], *the Player and his agent, and further to the interest in concluding a transaction for the transfer of the Player, and (b) the flight after the transfer was agreed and completed. In arranging that flight, Willie McKay was acting only as a consumer intermediary between the Player and the aircraft owner / manager, a long standing acquaintance, or as agent for the Player. The flight was a favour to the Player, for, or for the benefit of, the Player, who had become a team mate of his sons.*

  (iv) This set-off only arises in the event that the transfer was completed, thus the risk in relation to the Player was borne by [CCFC]. *That is why it was* [CCFC] *that sought to make arrangements for his return to Nantes, before Willie McKay arranged the flight.*

(v) Should it be held that Willie McKay was acting as agent for FC Nantes, as a matter of French law FC Nantes is not liable for any breach of duty by its agent, for the reasons set out […] *below.*

(vi) The claim by [CCFC] *is for irrecoverable pure economic loss. The nature of the damage is important for the consideration of whether a duty of care existed. The established position under English law is that there is no duty owed to the employer where one party is responsible for the death of another in a fatal transport incident.*

(vii) The arrangements for the flight did not involve any breach of duty on the part of Willie McKay. A duty of care to take reasonable care in the organisation of a flight does not require any consumer (or organiser in the non-technical sense) of a private flight to make enquiries of the provider of the service as to its legal and regulatory compliance. When hiring a private driver and car a consumer does not and is not required to undertake detailed (or any) enquiry about the licensing of the vehicle to be provided or its fitness for purpose, or about the licence and condition of the driver. The situation with a chartered aircraft is no different. […]

(viii) Causation requires three questions to be answered. First, it must be determined whether the defendant's conduct was a cause of the damage suffered by the claimant. Second, if a factual causal link is shown, it is necessary to consider whether the conduct can be seen as a cause in law; it must be, in some sense, the effective cause of the harm. Third, the conduct must be sufficiently closely connected with the damage so as to justify the imposition of liability. [CCFC's] *claim falls at the first hurdle. The damages was not caused, factually or legally, by any alleged breach of duty by Willie McKay.* [CCFC's] *claim is based upon legal and regulatory failings in the operation of the flight and qualification of the pilot take from the AAIB Preliminary Report, which were not the cause of the accident. The AAIB Final Report found, and as the Aviation Expert, Mr Andrew Cubin confirms, the cause of the accident was the pilot suffering carbon monoxide poisoning.*

(ix) Factually and legally, at each and every stage, [CCFC's] *claim fails.*"

91. On this basis, FC Nantes submits the following prayers for relief in its Answer:

"*(1) To dismiss the appeal filed by Cardiff City Football Club Limited on 20 November 2019 in its entirety.*

(2) To confirm the decision of the Bureau of the FIFA Players' Status Committee (case ref. Iza 19-00561) dated 25 September 2019.

(3) To order Cardiff City Football Club Limited to pay the full CAS arbitration costs.

(4) To order Cardiff City Football Club Limited to make a significant contribution to the legal and other costs of SASP Football Club de Nantes in connection with these proceedings at least in an amount of CHF 50,000."

VI. JURISDICTION

92. Article R47 CAS Code provides the following:

> "*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.*"

93. Article 58(1) FIFA Statutes (June 2019 edition) provides as follows:

> "*Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, members associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question.*"

94. Article 23(4) of the FIFA Regulations on the Status and Transfer of Players (the "FIFA RSTP") (June 2018 edition) provides, *inter alia*, as follows:

> "[…] *Decisions reached by the single judge or the Players' Status Committee may be appealed before the Court of Arbitration for Sport (CAS).*"

95. Clause 8.2 of the Transfer Agreement provides as follows:

> "*Any dispute arising out of or in connection with this Transfer Agreement shall be subject to the jurisdiction of the FIFA Dispute Resolution Chamber ('the FIFA DRC') and on appeal (or in the event that FIFA declines jurisdiction) to the Court of Arbitration of Sport ('CAS') to be finally settled in accordance with the rules of the Code of Sports Related Arbitration, which rules are hereby deemed incorporated. The FIFA DRC and the CAS shall determine the dispute in accordance with the FIFA Regulations and the laws of England and Wales. The CAS proceedings shall be held in the English language.*"

96. The jurisdiction of CAS is not contested by FC Nantes and is further confirmed by the Order of Procedure duly signed by both Parties.

97. It follows that CAS has jurisdiction to adjudicate and decide on the present dispute.

98. The question whether the Panel has a mandate to hear the set-off claim is addressed separately below in chapter VIII (see para. 102 *et seq.*).

VII. ADMISSIBILITY

99. The grounds of the Appealed Decision were communicated to CCFC on 30 October 2019, and the Statement of Appeal was filed on 20 November 2019, i.e. within the 21-day deadline fixed under Article 58(1) FIFA Statutes. The appeal also complied with all other requirements of Article R48 CAS Code, including the payment of the CAS Court Office fee.

100. The admissibility of the appeal is not disputed by FC Nantes.

101. It follows that the appeal is admissible.

VIII. THE MANDATE OF THE PANEL TO ADJUDICATE THE SET-OFF CLAIM

A. The set-off claim

102. The main issue to be resolved in the present arbitration is whether, at the time of the Player's death, the Player had been definitively transferred from FC Nantes to CCFC, triggering a payment obligation of CCFC to FC Nantes of a transfer fee of EUR 17,000,000 (the first EUR 6,000,000 instalment of which has been awarded by the FIFA PSC and which forms the matter in dispute in this appeal). If no payment obligation exists, the case ends there.

103. Whether a payment obligation exists is addressed below (see paras. 312 *et seq.*).

104. However, if a payment obligation exists, CCFC claims that it is still not required to pay any transfer fee to FC Nantes, because CCFC maintains that FC Nantes is liable for the Player's death and that this tort claim is to be set off against any payment obligation with respect to the transfer fee.

105. As set out above, CCFC summarises its tort claim as follows:

a) The Player's return flight between Nantes and Cardiff during which the Player's death occurred:
   (i) was organised by Mr Willie McKay acting to assist Mr Mark McKay/Mercato in connection with the Agency Agreement that Mr Mark McKay had concluded with FC Nantes for the purposes of arranging the sale of the Player, and so
   (ii) was organised by agents/sub-agents of FC Nantes acting in that capacity.
b) FC Nantes is civilly liable for acts, omissions and defaults committed by its agents/sub-agents in such regard, in connection with the organisation of the flight itself;
c) The evidence shows numerous extensive faults committed by Mr Willie McKay, and so by FC Nantes' agent, in connection with the organisation of the flight;
d) Those faults in all probability resulted in the crash and in the Player's death;
e) The Player's death caused financial loss to CCFC, namely the loss of a key player;
f) In order to compensate CCFC for that loss, damages equivalent to the Player's value should be awarded against FC Nantes;

g) The Player's value should be common ground between FC Nantes and CCFC, namely EUR 17,000,000, i.e. the price at which both FC Nantes and CCFC valued the Player when agreeing his transfer to CCFC.

106. According to CCFC, prior to considering the substance of CCFC's civil tortious claim against FC Nantes, the Panel needs to consider whether (i) CAS has jurisdiction to hear CCFC's tort claim; and (ii) whether a tortious liability can be offset against a contractual liability under the applicable law. CCFC maintains that these requirements are complied with, regardless of the law to be applied.

107. FC Nantes, however, submits that such requirements are not fulfilled.

108. While the substance of CCFC's tort claim falls outside the scope of the Bifurcated Issues, the two preliminary issues identified by CCFC in para. 106 above coincide with Bifurcated Issues no. 2 and 3, i.e.:

"*(ii) If the CAS / FIFA PSC is competent to decide on the set-off with a damage claim;*

(iii) Under the law applicable – as a matter of principle – a claim for transfer fee can be set-off against a tort claim."

109. The Panel will address these two preliminary issues in turn below.

B. The Positions of the Parties

a) The Appellant's position

110. The FIFA PSC considered in the Appealed Decision that it was exclusively competent to determine disputes between clubs belonging to different associations which are of a contractual nature and that it did not have jurisdiction to determine claims of a different nature, such as a civil liability claim. CCFC argues that such finding is incompatible with what the Parties had agreed in the Transfer Agreement, and the jurisprudence of the Swiss Federal Tribunal (the "SFT") regarding set-off claims.

111. Primarily, CCFC argues that, based on clause 8.2 of the Transfer Agreement, CCFC's tort claim must be considered to be "*in connection with*" the Transfer Agreement. Therefore, CAS shall have jurisdiction to deal with CCFC's claim for damages raised as a set-off defence, as it is covered by the arbitration clause in the Transfer Agreement.

112. Alternatively, CCFC maintains that CAS shall in any event have jurisdiction to hear the tort claim raised as a set-off defence in the light of the established principle that *le juge de l'action est le juge de l'exception* - literally "the judge of the action is the judge of the exception", meaning that the judge that is competent for the main claim is also competent to decide on objections which may extinguish or reduce that main claim.

113. As to the admissibility of the set-off claim, CCFC submits that its set-off claim must be governed by the law governing FC Nantes' main claim, i.e. the law of England and Wales. On this basis, and because the law of England and Wales discourages a multiplicity of proceedings, B will generally be required to pursue a claim/counterclaim

against A within the confines of the proceedings in which A pursues its claim against B, and B may be able to offset A's liability to it against any liability that B has to A.

114. Out of the various types of set-off claims that may arise, this case concerns an "equitable set-off" (where A has a claim against B and B has a claim/counterclaim against A for unliquidated damages (i.e. not a debt claim)). In such case, whether B is entitled to offset its claim/counterclaim against A's claim will depend on the closeness of the connection between the dealings and the transactions which give rise to the respective claims. Such matters must be sufficiently closely connected that it would be manifestly unjust to allow A to enforce payment against B without taking into account B's counterclaim. It does not matter whether the claims arise out of different, multiple contracts. While a party's right to raise a defence of set-off against another can be validly waived or excluded by the terms of a contract, the Transfer Agreement contains no such provision.

115. Notwithstanding CCFC's reliance on the law of England and Wales, it also argues its case under Swiss law in the alternative.

116. Under Swiss law the concept of set-off is specifically dealt with in Title III of the Swiss Code of Obligations (the "SCO"). From a procedural point of view, set-off is qualified as an objection, which means that it is a defence that must be brought forward by the party and not by the judge or the arbitrator. Besides a declaration to exercise the right to set-off, a set-off is subject to the following requirements under Swiss law:

- Mutuality of claims: each party must be reciprocally creditor and debtor of two or more claims;
- The two obligations are of the same kind: essentially this condition supposes that they both have as their subject matter the payment of an amount of money;
- The absence of the exclusion of set-off: the law (Article 125 SCO) or the parties (Article 126 SCO) may provide that specific claims may not be extinguished by way of set-off;
- The claim to be offset must be due and enforceable.

117. Under Swiss law, the main claim and the claim to be offset do not need to be related or connected.

118. According to CCFC, since all prerequisites are fulfilled, the tort claim is admissible also under Swiss law to be offset in these proceedings.

b) The Respondent's position

119. FC Nantes submits that the FIFA PSC is competent to deal only with contractual disputes between clubs; any claims relating to civil liability of football clubs (that are based not on the contract but on the provisions of the relevant jurisdiction) lie outside the scope of FIFA's competence and shall be settled by local courts.

120. Because the current appeal arbitration proceedings are based on the arbitration clause contained in the FIFA Statutes (and not on the Transfer Agreement, as wrongly argued by CCFC), FC Nantes submits that the only issues that CAS is mandated to deal with

in these appeal proceedings are the ones for which FIFA was competent. This, in turn, excludes any claim that is not based on the football-related (transfer) agreement. Consequently, CAS has no mandate to decide on claims for civil liability.

121. CCFC fails to explain why FIFA's decision not to deal with CCFC's claim for civil liability is wrong. According to CAS jurisprudence, any attempt to circumvent FIFA's lack of jurisdiction and to bring a matter before CAS acting as an appeals body must be dismissed. Since the FIFA PSC refused to deal with extra-contractual claims in the Appealed Decision, CCFC is prevented from invoking such a claim, irrespective of whether said claim is raised by way of an action or as a defence.

122. FIFA is entitled to define autonomously what types of disputes shall be resolved by its dispute resolution bodies. For example, since 1 April 2015, FIFA no longer retains jurisdiction over any claims filed in relation to intermediaries. This remains the case even if parties have made an express provision in their dispute resolution clause in favour of FIFA bodies. This principle also applies to the scope of issues to be decided by FIFA. The FIFA PSC's decision not to deal with CCFC's tort claim is in compliance with the applicable regulations.

123. Alternatively, even if the Panel considers that the scope of these appeal arbitration proceedings is not determined by FIFA's Statutes, but rather by the arbitration agreement in the Transfer Agreement, CCFC's tort claim still cannot be entertained. CCFC's tort claim is not – as provided for in Article 8(2) of the Transfer Agreement – a dispute arising out of or in connection with the Transfer Agreement.

124. According to legal scholars, a claim based on extra-contractual liability may be subject to arbitration, provided that the arbitration agreement does not limit its scope to contractual disputes. Determining the scope of the arbitration agreement is a matter of interpretation.

125. The SFT has ruled that an arbitration agreement stipulating that "*any dispute or disagreement relating to or arising out of any provisions of a contract shall be arbitrated*" only comprises disputes arising from the facts regulated by the contract or directly related to the facts regulated by said contract. The SFT has also ruled that a choice-of-jurisdiction clause covering all disputes relating to a contract only extends to tort claims if there is a connection between the tortious act and the object of the contract. In the case at hand, the object of the Transfer Agreement was to transfer the Player's registration to CCFC in return for compensation. The transportation of the Player was not a contractual obligation arising from the Transfer Agreement.

126. According to FC Nantes, the tort claim arising from the fatal incident involving the Player is not connected with the Transfer Agreement as it (i) neither arises from the performance/non-performance of the Transfer Agreement, nor relates to the latter's formation, validity or termination; (ii) does not simultaneously constitute a breach of the Transfer Agreement; and (iii) only indirectly concerns the matter regulated by the Transfer Agreement.

127. Furthermore, the principle *le juge de l'action est le juge de l'exception* is not applicable in international arbitration. This concept is only recognised for Swiss domestic

arbitrations in Article 377(1) of the Swiss Code of Civil Procedure (the "CCP") and is not foreseen in Switzerland's Private International Law Act (the "PILA"). In the revision project of the PILA, it was deliberately decided to maintain a dual codification system for domestic arbitration and international arbitration, with the PILA maintaining broad flexibility and autonomy of the parties.

128. As to the admissibility of CCFC's tort claim, as a matter of English law, CCFC's claim for negligence cannot be set off against FC Nantes' claim for breach of contract for the following reasons:

- CCFC's set-off claim does not satisfy the relevant test to be applied under the law of England and Wales deriving from *Geldof Metaalconstructie NV v Simon Carves Limited [2010] EWCA Civ 667*, at para. 43(vi) ("*Geldof*"). The claims are not remotely closely connected:
  - FC Nantes' claim is for non-payment of the fee due under a commercial contract, the Transfer Agreement. CCFC's claim only arises if that commercial contract has been performed.
  - CCFC's claim arises from a different set of facts concerning the flight taken by the Player, upon which that prior contract has no significant relevance. The Transfer Agreement did not contain terms concerning the transportation of the Player, and payment under it was not conditional upon such transportation.
  - FC Nantes' claim is a separate claim involving different facts and different witnesses and which may lead to ancillary claims against other parties who cannot be subject to the jurisdiction of CAS.
  - CCFC does not cite a single instance of a claim for damages arising from personal injury or death proceeding by way of counterclaim (or by way of set-off as a defence) to a contract claim.
- Further, there is no manifest injustice in this case, as is required under *Geldof*. No counterclaim has been filed by CCFC, and if it were issued it would be bound to fail as a matter of law.
- Further, the two claims must be capable of being conveniently disposed of in the same action. That is manifestly not the situation with CCFC's set-off claim. In English court proceedings, the two claims would be heard in different courts, with different (or further) witnesses and experts, additional claims and vastly different lengths of trial.
- Further, under the English Civil Procedure Rules there is no procedure for CCFC's damages claim to proceed other than by way of a counterclaim.

C. The Findings of the Panel with respect to the Procedural Framework

129. It follows from the position of the Parties that whether a set-off is covered by the mandate of this Panel is a question of both procedural and substantive law. The Panel will address the procedural questions first.

a) The specifics of appeals arbitration proceedings

130. Whether the Panel has a (procedural) mandate to hear CCFC's set-off claim depends on whether the FIFA PSC had a mandate to decide on the set-off claim. The procedure at hand is an appeal arbitration proceeding. Consequently, the mandate of this Panel cannot, in principle, exceed the mandate of the first instance. This view of the Panel is also backed by the submissions of the Parties. At the hearing, both Parties expressly acknowledged that this Panel is only empowered to decide upon the substance of the tort claim if the FIFA PSC was competent to do so, and *vice versa*, that this Panel cannot adjudicate the substance of the tort claim if the FIFA PSC lacked the requisite mandate.

131. CAS proceedings before the Appeals Arbitration Division are to be distinguished from those before the Ordinary Arbitration Division in the sense that the scope of the former is limited to issues that fell within the competence of the first instance proceedings, while in ordinary arbitration proceedings there has been no previous instance.

132. This principle has been consistently upheld in CAS jurisprudence:

> "*Since it neither is, nor should be possible to circumvent a first-instance judicial body's undisputed lack of jurisdiction to hear and decide on a substantive issue by merely attempting to refer such a decision to the appeals body (in this case the CAS) through a more or less fictitious appeal, the Sole Arbitrator is of the opinion that at the CAS, in its capacity as an appeals body, has no jurisdiction to hear the appeal.*" (CAS 2014/A/3838, para. 5.14 of the abstract published on the CAS website)

b) The autonomy of federations

133. Swiss law provides ample freedom for private associations to determine the content of their Statutes, which is, in principle, only limited by the mandatory provisions of Article 63(2) of the Swiss Civil Code (the "SCC"). Private associations therefore have a wide discretion to determine what types of disputes and between which persons/entities those disputes shall be submitted to its internal dispute resolution bodies.

134. For the avoidance of doubt, it does not follow from the above that this Panel is bound by any conclusion of the FIFA PSC that it is "*not in a position to consider the allegations of* [CCFC] *as to* [FC Nantes'] *alleged civil liability towards it as they lie outside of its competence*". If the Panel finds that the FIFA PSC wrongly applied the applicable provisions in denying its mandate to adjudicate and decide on the substance of CCFC's set-off claim, the Panel is, pursuant to Article R57 CAS Code, free to either adjudicate and decide on the civil liability of FC Nantes itself or to refer the case back to the previous instance, i.e. the FIFA PSC.

c) FIFA's legislative and regulatory framework

135. Neither the FIFA RSTP nor the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (edition 2018) (the "FIFA Procedural Rules") specifically deal with the question whether and to what extent the FIFA adjudicatory bodies have a mandate to decide on set-off claims.

136. The FIFA Procedural Rules foresee the possibility of filing counterclaims without any particular prerequisites (other than jurisdiction), but set-off claims and counterclaims are two distinct concepts. Provisions concerning set-off claims do not apply to counterclaims and *vice versa*. This follows, *inter alia*, from Article 377 CCP, which – in the ambit of domestic arbitration – clearly distinguishes between a set-off (para. 1) and counterclaims (para. 2).

137. At the hearing, both experts on this topic – Prof. Rigozzi and Prof. Müller – confirmed that Article 22 FIFA RSTP only addresses the competence of the FIFA adjudicatory bodies with respect to the main claim (or counterclaim) and not in relation to set-off claims.

d) The principle of "le juge de l'action est le juge de l'exception"

138. The above maxim describes a legal principle whereby the judge that is competent for the main action is also competent to decide on objections thereto, irrespective of whether the issue raised as an objection falls within the competence of another judge. The aforementioned principle applies in court proceedings before Swiss state courts (cf BGE 63 II 133 E. 3c; 124 III 207 E. 3b/bb; BGer 4A_482/2010 E. 4.3.1). As a consequence, a claim can be raised by set-off as a defence against a main action filed in court even if another court would be competent to decide on that claim if the latter was filed separately. The question is whether this principle applicable before state courts also applies to proceedings before the FIFA adjudicatory bodies.

139. CCFC is of the view that the above principle is of a general nature. According to CCFC, the principle not only applies in state court proceedings but also in the context of alternative dispute resolution (including proceedings before association tribunals). CCFC refers insofar to Article 377(1) CCP. This provision – according to CCFC – is not only applicable in domestic arbitration proceedings, but also in international arbitration proceedings by analogy. CCFC argues that since clause 8(2) of the Transfer Agreement provides that the dispute shall ultimately be resolved by arbitration, the contents of Article 377(1) CCP shall apply also before the FIFA PSC.

140. Whether it follows from Article 377(1) CCP that the FIFA PSC is competent to adjudicate CCFC's set-off claim is, however, far from clear.

i. Article 377(1) CCP only applies by analogy

141. Article 377(1) CCP is designed for domestic arbitration proceedings and, thus, in any case only applies by analogy to proceedings before association tribunals such as the FIFA PSC. Any transposing of Article 377(1) CCP to the proceedings before the FIFA

adjudicatory bodies must be made with care, taking due account of the specifics of the proceedings before association tribunals.

ii. The authoritative wording of Article 377(1) CCP

142. The Panel notes that the wording of Article 377(1) CCP is unclear, since the German language version of Article 377(1) CCP differs significantly from the French and Italian wording of the same provision. The German version of Article 377(1) CCP provides as follows:

> "*Erhebt eine Partei die Verrechnungseinrede,* ***so kann das Schiedsgericht die Einrede beurteilen****, unabhängig davon, ob die zur Verrechnung gestellte Forderung unter die Schiedsvereinbarung fällt oder ob für sie eine andere Schiedsvereinbarung oder eine Gerichtsstandsvereinbarung besteht.*" (emphasis added by the Panel)
>
> Free translation: In case a party raises the objection of set-off, **the arbitral tribunal may adjudicate the objection** irrespective of whether the set-off claim falls within the scope of this arbitration agreement or another arbitration agreement or jurisdiction clause.

143. The French version of the provision – contrary to the German version – does not (explicitly) provide the arbitral tribunal with discretion, but reads as follows:

> "***Le tribunal arbitral est compétent*** *pour statuer sur l'exception de compensation même si la créance qui la fonde ne tombe pas sous le coup de la convention d'arbitrage ou fait l'objet d'une autre convention d'arbitrage ou d'une prorogation de for.*" (emphasis added by the Panel)
>
> Free translation: **The arbitral tribunal has jurisdiction** to decide the set-off defence, even if the claim to be set off does not fall within the scope of the arbitration agreement or is subject to another arbitration agreement or an agreement on jurisdiction.

144. The Italian version does not materially differ from the French version above:

> "***Il tribunale arbitrale è competente*** *a statuire su un'eccezione di compensazione sollevata da una parte anche se la pretesa posta in compensazione non soggiace al patto d'arbitrato e anche se per la stessa è stato stipulato un altro patto d'arbitrato o una proroga di foro.*" (emphasis added by the Panel)

145. CCFC is of the view that the French and Italian language versions take precedence or that in the German language version the word "may" shall be read as meaning "must". FC Nantes objects to the above and argues that each language version is equally authoritative, that the legislative history does not support CCFC's reading and that there is support in legal literature for the view that an arbitral tribunal has discretion according to Article 377(1) CCP to decide whether to adjudicate the set-off claim or not.

iii. The view held by the legal literature in relation to Article 377(1) CCP

146. The Panel notes that Swiss jurisprudence has not yet decided which of the different language versions in Article 377(1) CCP shall take precedence. It is clear that there is no formal hierarchy in Swiss law in relation to different language versions of a legal text. The Panel equally observes that little to nothing can be derived from the legislative history of the provision. The Panel also notes that the legal literature is split as to whether or not the arbitral tribunal has discretion to accept jurisdiction over the set-off claim.

147. Authorities in favour of a discretion of the arbitral tribunal are – e.g. – NETZLE, in Sutter-Somm/Haseböhler/Leuenberger, Code of Civil Procedure, 3rd ed. 2016, Art. 377 no. 6 seq.; BSK-ZPO/HABEGGER, Code of Civil Procedure, 3rd ed. 2017, Art. 377 no. 8; BK-OR/ZELLWEGER-GUTKNECHT, Code of Obligation, 2012, no. 299 before Art. 120 et seq. Authorities advocating, in principle, a mandatory competence of the arbitral tribunal are – e.g. – BSK-OR/MUELLER, Code of Obligations, 7th ed. 2020, no 3 before Art. 120 et seq.; BK-ZPO/STACHER, Code of Civil Procedure, 2014, Art. 377 no. 51; KuKo-ZPO/DASSER, 3rd ed. 2021, Art. 377 no. 10.

148. As will be shown subsequently, the Panel need not decide the dispute between the legal scholars, since on either view of Article 377(1) CCP – due to the specifics of this case – this appeal is dismissed.

iv. Assuming Article 377(1) CCP does not accord discretion

149. The Panel first turns to the interpretation advocated by some legal authorities, according to which Article 377(1) CCP does not give discretion to the adjudicatory body to decline jurisdiction over the set-off claim. The Panel notes that – even on this assumption – the FIFA PSC would not be bound to adjudicate the set-off claim. The reason for this is that the legal authorities that wish to apply the principle of "*le juge de l'action est le juge de l'exception*" to set-off claims in arbitration or alternative dispute resolution do still allow for important exceptions to this principle.

1. Exceptions to the principle "*le juge de l'action est le juge de l'exception*"

150. It is generally held that Article 377(1) CCP is not mandatory, i.e. that parties are free to deviate from the principle of "*le juge de l'action est le juge de l'exception*". Such agreement can be entered into explicitly or tacitly, since no specific form is required (cf. BSK IPRG/DASSER, Art. 148 N34 ff.; POUDRET/BESSON, Rz 325; BERGER/KELLERHALS, Rz 525, je m.w.H).

151. Thus, e.g., BSK-OR/MUELLER, 7th ed. 2020, no. 3 before Art. 120 et seq explains as follows:

> *"Richtigerweise muss in Ausnahmefällen von einem impliziten Verrechnungsausschluss … der Parteien ausgegangen werden, z.B. wenn die Schiedsklausel, der die Verrechnungsforderung unterliegt, nach einem Schiedsgericht verlangt, welches über Spezialkenntnisse aus einem anderen Bereich als das urteilende Schiedsgericht verfügt, oder wenn die Parteien für*

> *die Hauptforderung ein beschleunigtes Verfahren mit kurzen Fristen vereinbarten, deren Einhaltung durch die Beurteilung der Verrechnungsforderung verunmöglicht würde."* (BSK-OR/MUELLER, 7th ed. 2020, no. 3 before Art. 120 et seq.)
>
> Free translation: Correctly, in exceptional cases, an implicit exclusion of set-off ... by the parties must be assumed, e.g. if the arbitration clause to which the set-off claim is subject calls for an arbitral tribunal with specialised knowledge of a different field than the adjudicating arbitral tribunal, or if the parties agree on an expedited procedure with short deadlines for the main claim, compliance with which would be rendered impossible by the adjudication of the set-off claim.

152. Likewise, STACHER in BK-ZPO, 2014, Art. 377 no. 42 states that:

> *"Der Abschluss einer Schiedsvereinbarung zieht somit nicht ohne weiteres einen Verrechnungsverzicht nach sich … Eine konkludente Beschränkung der Verrechnungsmöglichkeit ist nur anzunehmen, wenn sich die verschiedenen gewählten Streitbeilegungsmechanismen in nachweisbar wesentlichen Punkten unterscheiden … ; dies kann der Fall sein, (i) wenn aufgrund von Art. 377 Abs. 1 ZPO eine weniger umfassende Möglichkeit zur Ausübung des rechtlichen Gehörs bestünde, bspw. weil die Verrechnungsforderung in einem beschleunigten Schiedsverfahren anstatt in dem – gemäss der für sie anwendbaren Schiedsvereinbarung – vorgesehenen regulären Schiedsverfahren geprüft würde; oder (ii) wenn die Verrechnungsforderung nicht wie vorgesehen von einem Schiedsgericht mit Spezialkenntnissen beurteilt würde."*
>
> Free translation: The execution of an arbitration agreement therefore does not automatically entail a waiver of set-off ... An implied restriction of the possibility of set-off can only be assumed if the various dispute resolution mechanisms chosen differ in demonstrably material respects ... ; this may be the case (i) if, on the basis of Art. 377 para. 1 CCP, e.g. because the set-off claim would be considered in an expedited arbitration rather than in the regular arbitration provided for in the applicable arbitration agreement; or (ii) if the set-off claim would not be assessed by an arbitral tribunal with specialised knowledge as provided for.

153. The relevance of a specialised tribunal (and the rules of procedure applicable before it) for either the main claim or the set-off claim is also acknowledged by PICHONNAZ/GULLIFER when determining whether or not an adjudicatory body has the power to decide on a set-off claim:

> "*The only exception to this solution* [i.e. adjudicating the cross-claim] *might be where a specialised court has jurisdiction of* [sic] *the cross-claim – but this should be left to the discretionary power of the arbitral tribunal.*" (PICHONNAZ/GULLIFER, Set-off in arbitration and commercial transactions, 2014, N. 3.51, p. 59)

2. The FIFA PSC is a specialised adjudicatory body for football-related disputes and not a forum of general jurisdiction

154. The FIFA PSC is a (very) specialised dispute resolution body. This follows when looking at the jurisdiction *ratione materiae* (subject-matter jurisdiction) of the FIFA PSC. The latter is based on Articles 22 and 23 FIFA RSTP. Article 22 provides, *inter alia*, as follows:

> *Without prejudice to the right of any player or club to seek redress before a civil court for employment-related disputes, FIFA is competent to hear:*
>
> […]
>
> *f) disputes between clubs belonging to different associations that do not fall within the cases provided for in a), d) and e).*"

155. In addition, Article 23(1) FIFA RSTP reads as follows:

> "*The Players' Status Committee shall adjudicate on any of the cases described under article 22 c) and f) as well as on all other disputes arising from the application of these regulations, subject to article 24.*"

156. Neither Article expressly limits the competence of the FIFA PSC. However, both provisions must be read in light of Article 1(1) FIFA RSTP which provides as follows:

> "*These regulations lay down global and binding rules concerning the status of players, their eligibility to participate in organised football, and their transfer between clubs belonging to different associations.*"

157. This restricted subject-matter competence of the FIFA adjudicatory bodies is further supported when looking at the purpose of FIFA's dispute resolution mechanism. The latter does not simply serve the interests of parties to get their disputes resolved. Instead, the dispute resolution mechanism provided by FIFA also serves FIFA's own interests. Through its adjudicatory bodies FIFA seeks to enforce its standards in the international football industry. Such interests of FIFA, however, are obviously limited to disputes that have a close connection to the football industry and that are decided in application of its rules and regulations.

158. In view of the above, it does not appear procedurally efficient to entrust the FIFA PSC with the adjudication of a complex tort claim that is governed by domestic law only. The FIFA PSC is not the proper forum for such disputes, since as a free-standing claim CCFC's tort claim would fall outside FIFA's subject-matter (*ratione materiae*) jurisdiction. If CCFC had filed its tort claim separately and not in the context of a set-off defence, the FIFA PSC would have correctly declined its competence to adjudicate the matter. The tort claim would have no connection whatsoever to the areas regulated in the FIFA RSTP. CCFC's claim is based on the application of domestic tort law in which FIFA's specialised adjudicatory bodies have insufficient expertise and in which there is no interest of FIFA in its governing and regulatory capacity.

3. The FIFA Procedural Rules are inadequate

159. The Panel also finds that the procedural rules applicable before the FIFA PSC are not designed to adjudicate CCFC's tort claim. The applicable procedural rules before FIFA seek to resolve the football-related dispute quickly and inexpensively. This purpose would be undermined if the FIFA PSC were competent to adjudicate such a set-off claim. Furthermore, the Panel observes that the costs of the proceedings before the FIFA PSC are capped at CHF 25,000 (Article 18(1) FIFA Procedural Rules); and that the advance of costs to be paid is capped at CHF 5,000 (Article 17(4) FIFA Procedural Rules). Such relatively low amounts correspond to a speedy and not overly complex dispute resolution mechanism and are entirely inadequate to cover the costs of adjudication of a full-fledged cross-border tort claim involving a significant number of legal and aviation experts, not to mention large multi-firm legal teams on each side.

160. Likewise, pursuant to Article 16(10) and (11) of the FIFA Procedural Rules, the time limits for filing an answer and a potential second round of written submissions are 20 days. These deadlines may be extended once only for another 10 days. These procedural rules are wholly inadequate to address a complex set-off defence such as filed by CCFC in these proceedings. This is demonstrated by the numerous requests for significant extensions of the respective filing deadlines before CAS in these proceedings, which in part were necessary to collect relevant expert evidence.

161. Furthermore, while oral hearings are possible before the FIFA PSC (Article 11 FIFA Procedural Rules), the general rule is that proceedings are conducted on written submissions only (Article 8 FIFA Procedural Rules). Such procedure is inadequate to deal with the type of dispute in question here. CCFC acknowledged this and submitted that if its tort claim were filed in the English courts several days, if not weeks, would be set aside to hear that claim.

162. All of the above confirms that the applicable procedural regulations before the FIFA PSC are not designed to deal with CCFC's complex cross-border tort claim. Consequently, it would neither be procedurally efficient nor in the interests of justice to entrust the FIFA PSC with the adjudication of CCFC's tort claim.

4. Applying the above principles to the case at hand

163. In light of the above exceptions it is evident to the Panel that there is an implicit understanding both between the Parties and also by FIFA that the FIFA adjudicatory bodies are not competent to deal with CCFC's tort claim. By agreeing to submit disputes arising out of the Transfer Agreement to FIFA's tribunals the Parties have implicitly accepted that claims outside the jurisdiction of FIFA cannot be submitted to the adjudicatory body by way of set-off.

164. The Panel's view is supported by Article 5(4) FIFA Procedural Rules. The provision reads as follows:

> "*A claim shall be dealt with by the Players' Status Committee and the DRC only if there* ***is a legitimate reason*** *for dealing with the claim.*" (emphasis added)

165. In the view of the Panel there is no legitimate expectation by the Parties that CCFC's complex tort claim, which is unrelated to the Transfer Agreement and would involve the law of England and Wales and of France (and not the FIFA regulations), be adjudicated by FIFA.

166. It is not for this Panel to examine or to conclude what is the competent forum outside the two-stage procedure (FIFA association tribunal, then CAS appeals arbitration procedure), i.e. whether CAS is competent to adjudicate CCFC's alleged tort claim in an ordinary arbitration procedure or whether the claim needs to be filed with a state court. What is relevant for the Panel in the present proceeding is that there is an implicit understanding that in a litigation before the FIFA PSC no set-off claim can be admitted to the proceeding that is not governed by the FIFA rules and regulations.

5. Conclusion

167. The Panel thus concludes that, even under the interpretation of Article 377(1) CCP that is most favourable to CCFC, i.e. assuming that Article 377(1) CCP does not accord discretion to the adjudicatory body, the FIFA PSC is not competent to adjudicate CCFC's alleged set-off claim. By taking recourse to FIFA's specialised association tribunals the Parties have waived the possibility to introduce by way of set-off claims that would otherwise fall outside FIFA's jurisdiction.

v. Assuming the adjudicatory body has discretion

168. Alternatively, if one were to hold that the German language version of Article 377(1) CCP is authoritative, this Panel would have to consider whether the position taken by the FIFA PSC is covered by the procedural discretion accorded to it.

169. Both experts (Prof. Rigozzi and Prof. Müller) explained at the hearing that – in case Article 377(1) CCP provided for discretion – the FIFA PSC should be guided primarily by procedural efficiency and secondarily by principles of procedural fairness (although the Panel makes clear here that procedural efficiency is just one, albeit important, aspect of procedural fairness).

1. There is insufficient connection between the main claim and the set-off claim.

170. Procedural efficiency would be in favour of deciding both claims (contractual and tort) together, if they were legally or factually sufficiently connected. This also follows from a decision of the SFT cited by FC Nantes that provides (in a translation that remained undisputed in the present proceedings) as follows:

> "*Where the choice of court agreement relates to a future dispute and is designed in general terms to apply to 'all disputes relating to the contract in which it is situated', it relates primarily to claims based on that contract; it also relates to claims arising from wrongful acts, where those acts simultaneously constitute a breach of contract or that there is a connection between these claims and the object of the contract.*" (SFT 4C.142/2006, para. 2)

171. The Panel finds that the scope of the jurisdiction clause in the Transfer Agreement ("*Any dispute arising out of or in connection with this Transfer Agreement*") is not fundamentally different from the jurisdiction clause in the SFT proceedings cited above ("*all disputes relating to the contract in which it is situated*"). The above precedent suggests that a claim arising from wrongful acts is sufficiently closely connected with the contract and thus covered by the dispute resolution clause contained therein, provided that (i) it simultaneously constitutes a breach of contract; or (ii) there is a connection between that claim and the object of the contract.

172. In the matter at hand, the tort alleged by CCFC's would not be a breach of the Transfer Agreement. The set-off claim is not linked to the breach of contract. The only arguable nexus is the crude and obvious causal one: if there had been no transfer, then there would not have been a plane crash. However, there is no substantive link between the two matters. Indeed, the tort claim is arguably not even related to sport and can be decided completely independently from the Transfer Agreement, since the Transfer Agreement placed no responsibility on FC Nantes for the transportation of the Player to CCFC during the negotiations or after completion of the transfer.

173. The Panel is aware of precedents of the SFT related to set-off claims (4A_220/2007, c. 6.2) where the SFT held that a tort claim that was raised in defence was linked to the main claim, because the tort claim required an interpretation of the relevant contract. However, the situation at hand is different. In order to determine CCFC's tort claim the Panel would not need to fall back on any aspect of the Transfer Agreement. In other words, the outcome of each claim, the transfer claim on the one hand and the tort claim on the other hand, is independent of the outcome of the other. There are no common preliminary questions, and thus, there is no reason of procedural efficiency dictating that both matters should be dealt with simultaneously.

2. No element of fairness warrants the adjudication of both claims together

174. CCFC claims that there would be an inherent element of potential unfairness or inefficiency if FC Nantes' claim for the transfer fee were upheld, requiring CCFC to pay FC Nantes a transfer fee of EUR 17,000,000 (or the first instalment of EUR 6,000,000) before the tort claim was addressed, and CCFC's tort claim turned out to be successful. However, this is a weak argument. FC Nantes' claim for the transfer fee has been ripe for adjudication since the start of these proceedings in 2019. If it had to be adjudicated together with CCFC's tort claim and the Panel ultimately found that the latter could not be upheld, FC Nantes' claim would end up having been held back by an unsuccessful set-off claim for more than three (and now potentially more than four or five) years. In addition, according to CCFC's own submissions, its tort claim is still far away from being ripe to be adjudicated. Thus, the Panel finds that there is no reason of procedural fairness or efficiency that justifies CCFC's tort claim and FC Nantes' transfer claim being adjudicated together. Instead, FC Nantes's right to justice without undue delay mandates that its claim be decided once it is ripe for adjudication.

3. Conclusions on exercise of discretion under Article 377(1) CCP

175. Assuming Article 377(1) CCP accords discretion to the adjudicatory body whether or not to accept jurisdiction over the set-off claim, arguments of procedural fairness and

efficiency weigh strongly against the FIFA PSC accepting a mandate over the set-off claim. The Panel finds that there is no reason for the FIFA PSC to accept adjudication over the set-off claim. Instead, the Panel observes that if it were to place itself in the shoes of the FIFA PSC whether to exercise jurisdiction over the set-off claim, the outcome of its decision would not differ from the decision taken by the FIFA PSC.

D. The Findings of the Panel with respect to the Substantive Framework

176. On a purely subsidiary level the Panel will also address the question whether the substantive prerequisites for a set-off are fulfilled in the case at hand.

a) The scope of the Panel's Procedural Order dated 4 October 2021

177. On 4 October 2021, the CAS Court Office informed the Parties – *inter alia* – that:

> "*The Panel has decided to bifurcate the proceedings and, therefore, to preliminarily deal with the following legal issues on the merits:*
>
> *…*
>
> *(iii) Under the law applicable – as a matter of principle – a claim for transfer fee can be set-off against a tort claim."*

178. CCFC argued at the hearing that this procedural order does not entitle this Panel to finally dispose of the question whether or not a set-off is possible in the case at hand. Instead – according to CCFC – the Panel is (based on the above procedural order) only entitled to decide whether under the applicable law in the abstract, i.e. theoretically a set-off is possible "as a principle". The Panel does not follow this. The concept of a set-off claim is well-recognised worldwide. Bifurcated Issue no. 3 clearly aims at assessing whether a set-off is possible in the concrete matter as a question of principle, i.e. disregarding whether or not CCFC actually has a substantive claim. Consequently, this Panel was first to assess the law applicable to the set-off and subsequently examine whether or not CCCF could set off its tort claim against FC Nantes' contractual claim.

b) The Law applicable to Set-Off

179. The law applicable to the set-off governs the requirements for set-off, the mechanism for the set-off and the effects of the set-off. The Appellant submits that the law applicable to the set-off shall be determined by the "primary claim approach". Since – according to CCFC – FC Nantes' main claim is governed by the law of England and Wales, the latter is the law applicable to the set-off. FC Nantes has not objected to this, but argues that under the law of England and Walesa set-off of the tort claim is not possible in this case. Thus, the Panel will analyse whether under the law of England and Wales a set-off is possible here.

c) The Prerequisites for a Set-Off according to English Law

180. It is common ground between the Parties (and their experts Mr Glancy QC and Mr Block QC) that in order for a set-off claim to be admissible under English law, the so-called *Geldof* test (see para. 128 above) must be satisfied. According thereto:

> "[The cross claim must be] *so closely connected with [the plaintiff's] demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim.*"

181. The positions of the Parties differ as to whether this test has been satisfied. Whereas Nantes' expert Mr Block QC does not consider that the test is satisfied, Cardiff's expert Mr Glancy QC considers that it is.

182. More specifically, Mr Glancy QC provided the following opinion in his expert report:

> "*If CAS does reach the conclusion that* [FC Nantes] *and/or its agents were guilty of a breach of duty/negligence in the task for which they had assumed responsibility namely returning the player to Cardiff after his trip to Nantes so that he could, finalise his contract, commence his employment with CCFC and then commence his training then in my opinion it is clear beyond doubt that the cross-claim for the loss of the player is so closely connected with* [FC Nantes'] *demand for payment of the transfer fee that it would be manifestly unjust to allow* [FC Nantes] *to enforce payment without taking into account the fact that* [FC Nantes'] *negligence had caused the loss of the player who was the subject of the Transfer Agreement so that he was never able to commence playing for CCFC which was the very object of the Transfer Agreement. The Court would be permitting* [FC Nantes] *to enjoy the benefits of the transfer fee when, through the negligence of* [FC Nantes] *or its agent, it had caused the loss of the very object of the Transfer Agreement. That, in my opinion, would be manifestly unjust and the closeness of the connection between* [FC Nantes'] *demand for the payment of the fee and CCFC's complaint that* [FC Nantes] *by its agent's negligence had caused the loss of the very object of the Transfer Agreement has only to be stated to be seen as obvious and clear.*
>
> *CCFC does not have to rely upon the terms of the Transfer Agreement but, as the Appeal Brief makes clear at paragraph 177, a contrast has to be drawn between something which is "in connection" with the Transfer Agreement or is "purely coincidental".* […]
>
> *If the player was, as a matter of fact, present in Nantes as he was on 21st January 2019, then his return to Cardiff for these purposes was clearly something that needed to happen to give full effect to the Transfer Agreement. It was therefore something that was closely connected to the Transfer Agreement or "in connection" with it.*
>
> […]
>
> *The question which therefore arises is whether the actions of* [Willie McKay] *are within the scope of or the remit of the* [Agency Agreement] *that had been concluded with FCN. In English law, much would depend upon whether the Court took a broad or a narrow view of that* [Agency Agreement]. *Paragraphs 21 and 22 of Mr Block's report set out the very narrow view that once the task of negotiating the transfer of the player to a Premier League club had been concluded then the appointment of* [Mark McKay] *or for that matter* [Willie McKay] *had come to an end. In my opinion, a Court in*

> *England would be unlikely to take such a narrow view of the agent's authority.* […]"

183. In his second expert report, Mr Block QC indicated that Mr Glancy QC had not challenged his assertion that there is no reported case in English Law in which a claim for damages to compensate for personal injury or death has proceeded by way of a counterclaim (or indeed a set-off) to a contract claim. Mr Block QC further maintained, *inter alia*, that "[t]*he central point is that the contractual claim in respect of the transfer fee is in relation to a wholly separate claim to that arising from* [the Player's] *death*". Mr Block QC further indicated that, if CAS agreed to deal with the set-off, this would not avoid a multiplicity of proceedings, as "[the Player's] *estate has recently issued a claim in the High Court of England and Wales, including both CCFC and* [FC Nantes] *as defendants*", indicating that there would be "*a serious risk of inconsistent findings in different tribunals if the proposed set-off were allowed to proceed and were determined by CAS*" and that "[p]*arties who are not before CAS, such as* [the Player's] *executors/family, the pilot, aeroplane owner/operator,* [Mark McKay]*, Marcato,* [Willie McKay] *and others who clearly have an interest in the outcome of any Court decision as to the responsibility for the organisation of the flight, the cause of the crash and other related matters will be rightly concerned that CAS is considering issues that are to be fully litigated in the High Court of England and Wales*".

184. During Mr Block QC's examination at the hearing, a discussion unfolded following certain questions posed by the members of the Panel. One aspect that was debated which the Panel considers relevant, is that Mr Block QC indicated that he would agree with the proposition that, if nothing would have to be known about the transfer claim or the Transfer Agreement in deciding on the tort/negligence claim, there was no sufficiently close connection. The Panel finds Mr Block QC's reasoning convincing.

185. CCFC relies on an example from *The Brede* [1974] 1 QB 233 at 248D ("*The Brede*"):

> "[T]*he cross-claim does not reduce the value of the goods sold or the work done, but causes other damage; such as where goods are delayed in delivery and the buyer has a cross-claim for delay; or where a contractor who is employed to clean windows negligently breaks the leg of a chair.*"

186. The Panel agrees with FC Nantes and Mr Block QC that in the example of the window cleaner the tortious event was clearly sufficiently closely connected, as the damages were sustained in the course of cleaning windows, which was the object of the contract. In the present case, however, the organisation of the fatal flight was not part of FC Nantes' contractual duties under the Transfer Agreement and is, thus, unrelated to the contract.

187. Furthermore, as addressed in more detail below (see paras. 312 *et seq.*), the Panel finds that the Player's transfer was completed by the time the flight was organised. This is another indication that the organisation of the flight was independent of the Transfer Agreement. There is no evidence to support Mr Glancy QC's contention that the Player travelled to Nantes to "*finalise his contract*" as the Termination Agreement between FC Nantes and the Player had already been executed.

188. Consequently, the Panel also finds that under the law of England and Wales the relevant test to be applied for a tribunal to adjudicate and decide on the set-off claim is not satisfied.

d) Conclusion

189. The Panel thus concludes that (i) CCFC is procedurally precluded from availing itself of the alleged set-off claim, and (ii) in answer to question no. 3 of the Bifurcated Issues, the substantive prerequisites for a set-off are not fulfilled. As a consequence of the above findings, which are threshold matters for CCFC's tort claim to be decided in these proceedings, the Panel is not required to adjudicate and decide on the substance of CCFC's tort claim.

190. The Panel was requested by CCFC, should it make the above findings regarding the set-off claim, to record clearly in its Award FC Nantes' submission to the Panel, including in answer to questions from the Panel, that the consequence of FC Nantes' position in the present proceeding is that it would not object to CCFC bringing its set-off claim before the courts. The Panel notes that its findings in this Award do not preclude CCFC from bringing its set-off claim in an ordinary arbitration proceeding before CAS or in a proceeding before a competent national court. In this Award, the Panel makes its findings regarding CCFC's set-off claim only in the context of an appeal arbitration proceeding before CAS.

IX. OTHER PROCEDURAL ISSUES

A. Request by CCFC to stay the CAS proceedings

a) The Parties' Positions

191. In its Appeal Brief, CCFC requested to "[s]*uspend the present proceedings pending the outcome of the ongoing French criminal investigations*". On 10 August 2020, CCFC expanded its request for a stay of the proceedings pending (i) the conclusion of criminal investigations in France following a criminal complaint filed by CCFC concerning the alleged transfer and the fatal flight; (ii) an investigation initiated by The FA into potential regulatory breaches by Mark and Willie McKay; and (iii) concurrent investigations and a coroner's inquest into the circumstances of the alleged transfer and the flight.

192. On 7 September 2020, FC Nantes objected to CCFC's request for a stay of the proceedings.

b) The Conclusions of the Panel

193. On 8 September 2020, the CAS Court Office informed the Parties that the Panel had dismissed CCFC's request for a stay "*for the time being*", pursuant to Article R32 CAS Code. The reasoning behind such decision is set out in this section of the Award.

194. The Panel notes that this arbitration proceeding and the other pending proceedings referred to by CCFC do not have the same subject matter. Furthermore, there is – neither

in the PILA nor in the CAS Code – a provision ordering a mandatory stay of the arbitration proceedings in view of pending concurrent criminal or other proceedings.

195. Article R32 CAS Code provides, *inter alia*, as follows:

> "*The Panel or, if it has not yet been constituted, the President of the relevant Division may, upon application on justified grounds, suspend an ongoing arbitration for a limited period of time.*"

196. Accordingly, Article R32 CAS Code expressly provides the Panel with discretion whether or not to stay an ongoing arbitration. Furthermore, a stay is to be granted only if this is in the interest of good administration of justice and procedural efficiency or, taking Article 126 CCP as a source of inspiration, "*if the decision depends on the outcome of other proceedings*".

197. When rendering its decision on 8 September 2020, the Panel considered that CCFC's application for a stay was premature, given that the Panel informed the Parties by means of the same letter dated 8 September 2020 that a second round of written submissions would be allowed. By stating expressly "*for the time being*", the Panel left open the possibility that it could reach a different conclusion should a further application for a stay be filed at a later stage in the proceedings.

198. Indeed, on 27 August 2021, after completion of the second round of written submissions, CCFC filed a renewed application for a stay of the proceedings pending the conclusion of (i) the prosecution of Mr David Henderson before the criminal courts in England and Wales; (ii) the coroner's inquest into the death of the Player; and (iii) the ongoing French criminal investigation.

199. On 7 September 2021, FC Nantes objected to CCFC's renewed application.

200. On 4 October 2021, the Panel in effect ruled on CCFC's application by bifurcating the proceedings (addressed separately below – see paras. 203 *et seq.*) and determining that a two-day hearing would be held to deal with the Bifurcated Issues.

201. The Panel considered that, while it could not be excluded that the investigations or proceedings relied upon by CCFC to apply for a stay could potentially have an impact on the adjudication of the substance of CCFC's tort claim, it was very unlikely that such investigations or proceedings would have any material impact on the adjudication of the Bifurcated Issues. The Panel therefore did not consider it to be in the interests of good administration of justice or procedural efficiency to stay the entire proceedings, but rather it should decide the Bifurcated Issues first, particularly because all three Bifurcated Issues are threshold matters for CCFC's set-off defence, i.e. the Panel would only be required to adjudicate and decide on the substance of CCFC's set-off claim if all three Bifurcated Issues were decided in CCFC's favour.

202. Neither of the Parties objected at any stage to the Panel's decision to bifurcate the proceedings. Since the Panel concluded that CCFC cannot set off its tort claim against the contractual claim of FC Nantes in these proceedings, any arguments to stay these proceedings has become moot, since the factual and legal questions that need to be

resolved before this Panel differ significantly from those in any of the concurrent proceedings. Consequently, the Panel is of the view that it is not in the interests of procedural efficiency and/or good administration of justice to stay the present CAS proceedings.

B. Bifurcation of the Proceedings

203. On 4 October 2021, the CAS Court Office informed the Parties as follows with respect to a bifurcation of the proceedings, specifying the Bifurcated Issues as follows:

> "*The Panel has decided to bifurcate the proceedings and, therefore, to preliminarily deal with the following legal issues on the merits:*
>
> *(i) If the transfer agreement entered into by the Parties is valid (with all conditions precedent being complied with);*
>
> *(ii) If the CAS / FIFA PSC is competent to decide on the set-off with a damage claim;*
>
> *(iii) Under the law applicable – as a matter of principle – a claim for transfer fee can be set-off against a tort claim.*
>
> *The Panel considers that a 2-day hearing would be sufficient to deal with the bifurcated legal issues.*"

204. The CAS Code does not regulate under what conditions a panel may bifurcate the proceedings. Absent an agreement between the Parties, or indeed a request from either of the Parties, the Panel falls back on Article 182(2) PILA, which provides as follows:

> "*Where the parties have not determined the procedure, the arbitral tribunal shall determine it to the extent necessary, either directly or by reference to a law or to arbitration rules.*"

205. In doing so, the Panel was inspired by Article 125 CCP, which provides as follows:

> "*In order to simplify the proceedings, the court may, in particular:*
>
> *a. limit the proceedings to individual issues or prayers for relief;*
>
> *b. order the separation of jointly filed actions;*
>
> *c. order the joinder of separately filed actions;*
>
> *d. separate the counterclaim from the main proceedings.*"

206. According thereto, a court may – in order to streamline and simplify proceedings – limit the scope of proceedings to specific questions or requests. Guiding principles for exercising this discretion are good administration of justice and procedural efficiency.

207. As indicated above (see para. 201), the Panel considered it to be in the interests of good administration of justice and procedural efficiency to adjudicate and decide on the Bifurcated Issues first before potentially addressing the substance of CCFC's set-off claim at a later stage.

208. The Panel notes that none of the Parties objected to the procedural order to bifurcate the proceedings. Furthermore, the Parties' explicit consent to the bifurcation of the proceedings is evidenced by the signing of the Order of Procedure that listed the Bifurcated Issues under para. 8.6.

C. Document Production Requests

a) The Position of the Parties

209. On 18 January 2021, in its second written submission and pursuant to Article R44.3 CAS Code, CCFC requested FC Nantes to produce the following documents:

> "*a. As requested at paragraph 12(a), the employment contract between* [the Player] *and FC Nantes;*
>
> *b. As requested at paragraph 138, copies of the cheques emitted directly before and after the cheque for the Player's wages dated 21 January 2019 so that the date can be verified;*
>
> *c. As requested at paragraph 196(c), all communications sent by Willie McKay to other football clubs alleging interest in the Player; and*
>
> *d. As requested at paragraph 246(c), all relevant and contemporaneous correspondence FC Nantes had with Mark McKay, Willie McKay, the Player and the Player's agent, Meissa N'Diaye.*"

210. On 7 October 2021, following the conclusion of the second round of written submissions, the bifurcation of the proceedings, and a request from the Panel to CCFC to indicate whether it maintained its document production requests, CCFC informed the CAS Court Office that it maintained requests a. and b. above and reserved the right to reiterate document production requests c. and d. at a later stage of the proceedings.

211. On 11 November 2021, FC Nantes objected to CCFC's remaining document production requests.

b) The Conclusions of the Panel

212. On 17 November 2021, the CAS Court Office informed the Parties on behalf of the Panel that CCFC's document production requests were, at that stage, rejected, because "*such documents are not relevant for the bifurcated issues*", indicating that further reasons would be provided by the Panel in the (interim or final) Award.

213. On 22 December 2021, CCFC added the following remark on the signed Order of Procedure:

> "*The Appellant reserves all its rights in connection with the decision of the Panel notified on 17 November 2021 whereby it rejected* [CCFC's] *requests for production of documents made in the Second Written Submission dated 18 January 2021 and reiterated in its correspondence dated 7 October 2021.*"

214. As to CCFC's request that FC Nantes provides the FC Nantes Employment Contract, the Panel found that it was primarily for FC Nantes to decide whether to submit such document into evidence. The Panel was not convinced by CCFC that the FC Nantes Employment Contract would have any bearing on the Bifurcated Issues to be decided by the Panel or that the non-production thereof posed any material disadvantage to CCFC. Since FC Nantes opted not to submit such document into evidence, its factual allegations with respect thereto, in principle, remain unsubstantiated. The only relevant pleaded facts by FC Nantes with respect to this contract are "*that the contract was agreed, its date of agreement, its five-year period, and its stated end date of 30 June 2020*". These factual allegations were not contested by CCFC and are not material for the outcome of this case.

215. As to the request for copies of the cheques issued by FC Nantes to the Player's heirs, as will be addressed in more detail below, the Panel finds that these documents are immaterial for the outcome of this case. Furthermore, the Panel does not consider that any alleged backdating of such cheques is by itself demonstrative of bad faith on the side of FC Nantes and that such argument, in any event, is not determinative for deciding on the Bifurcated Issues.

216. Furthermore, the issue of the alleged illegal backdating was addressed in the witness statement of Ms Guillou, who confirmed that the relevant cheque was drawn up after the announcement of the Player's death and that "[i]*t is normal and consistent with our accounting department's practice that this cheque is dated 21 January 2019, i.e., the date of the registration ('homologation') of the transfer*". The Panel notes further below that Ms Guillou was one of the witnesses put forward by FC Nantes in the written phase of the proceeding whom FC Nantes chose not to call to testify at the hearing. The Panel also notes further below that the Parties agreed at the hearing that the witness evidence of those not called to testify at the hearing remained on record and could be pointed to by the Parties if they wished to do so. Here, the fact that the relevant cheque was backdated was not in dispute.

217. Finally, the Panel notes that in its procedural decision of 17 November 2021 it only rejected CCFC's request for document production "*at this stage*", thus explicitly leaving open the possibility to decide otherwise should a further application be filed at a later stage in the proceedings. While CCFC reserved its rights in this regard in the Order of Procedure, it did not later renew its request. At the beginning of the hearing in Lausanne, the Panel asked the Parties whether there were any outstanding procedural requests that needed to be addressed. CCFC did not mention the request for document production. Also, CCFC confirmed at the end of the hearing that its right to be heard had been respected and did not raise any objection in relation to the Panel's dismissal of its document production requests.

D. Request to limit the scope of the Bifurcated Issues

a) The Position of the Parties

218. On 18 January 2022, CCFC provided the CAS Court Office with an update on the progress of the coroner's inquiry following a pre-inquest review hearing held on 13 January 2022, requesting a limitation of the Bifurcated Issues.

219. More specifically, CCFC noted that the inquest would commence on 14 February 2022 and would continue for 4 weeks. CCFC submitted that the investigation would focus heavily on the transfer of the Player and that the evidence would touch on the actions of the Player in the days leading up to his death. CCFC stated that "[w]*hilst the content of the evidence given will not be disclosed in advance of the inquest, that evidence undeniably impacts on CCFC's defence to* [FC Nantes'] *claim for the sum allegedly due under the* [Transfer Agreement]". CCFC held that it had always been its view that CAS must allow the coroner's inquest to conclude first before the CAS hearing takes place to ensure unity of the decisions and that, clearly, it cannot be said that FC Nantes' knowledge of the organisation of the flight is irrelevant to the validity and enforceability of the Transfer Agreement: "*if it transpires that* [FC Nantes] *was aware of the illegality of the flight, then this would constitute, inter alia, a contract breach of clause 5.1 of the Transfer Agreement*". On this basis, CCFC requested that the hearing scheduled for 3 and 4 March 2022 be used to deal with the preliminary issues of competence, jurisdiction and applicable laws, while a further hearing could then be listed before the CAS to deal with the validity, enforceability and potential breaches of the Transfer Agreement and any tort claim (subject to CAS considering itself competent to do so in the preliminary hearing).

220. On 21 January 2022, FC Nantes objected to CCFC's request to limit the mandate of the Panel with respect to the Bifurcated Issues. More specifically, FC Nantes maintained that the timing of CCFC's request was inexplicable, as it did not challenge the bifurcation of the proceedings when it was decided upon in October 2021, signed the Order of Procedure and did not raise any objection to the listed Bifurcated Issues therein. FC Nantes further argued that the inquest would not "*focus heavily on the transfer of* [the Player]", as alleged by CCFC. The issue related to the "*arrangements for the flight*" was – according to FC Nantes – only a small part of the inquest. Instead, the focus of the inquest was to be on (i) who the deceased were; (ii) where they died; (iii) when they died; and (iv) how they came by their death. According to FC Nantes the inquest would not be determining the validity of the Transfer Agreement. FC Nantes also submitted that CCFC was not referring to existing evidence in its request, but that it was only speculating what the oral evidence would be. FC Nantes also maintained that clause 5.1 of the Transfer Agreement was not part of CCFC's case: the provision was not referred to in either CCFC's written submissions or its expert reports. FC Nantes also submits that, in any event, there can have been no "*obligations under this* [Transfer Agreement] *in relation to the transportation of the* [Player] *from* [FC Nantes] *to* [CCFC] *after the* [Transfer Agreement] *had been executed*". FC Nantes argues that CCFC was trying to undermine the Panel's order to bifurcate the proceedings and was effectively relitigating its stay application for a third time.

221. At the hearing, CCFC submitted that Bifurcated Issue no. 3 (as opposed to Bifurcated Issue no. 1 to which it had previously objected) was a bespoke issue that would be better heard on another occasion, particularly in view of Mr Glancy QC's unavailability to testify at the hearing held on 3 and 4 March 2022.

b) The Conclusions of the Panel

222. On 25 January 2022, the CAS Court Office informed the Parties that the Panel had decided to dismiss CCFC's above request. The Panel also indicated that the reasons for

such decision would be communicated in the final Award. At the hearing, the Panel also dismissed CCFC's requests made at the outset of the hearing to limit the scope of the Bifurcated Issues.

223. In the view of the Panel there are no good reasons related to good administration of justice or procedural efficiency to limit the Bifurcated Issues. In relation to Bifurcated Issue no. 1, the Panel finds that CCFC failed to demonstrate that the evidence to be produced in the coroner's inquest could reasonably have an impact on the question of whether "*the* [Transfer Agreement] *entered into by the Parties is valid (with all conditions precedent being complied with)*" (i.e. Bifurcated Issue no. 1). A potential breach of the warranty in clause 5.1 of the Transfer Agreement by FC Nantes does not affect the validity and/or entry into force of the Transfer Agreement. The only consequence a breach of the warranties set forth in clause 5 of the Transfer Agreement might potentially have is a claim by CCFC for indemnification of the damages incurred as a result of such breach. However, any breach would not result in the invalidity of the Transfer Agreement.

224. Furthermore, the Panel notes that CCFC's objection was filed late. The Bifurcated Issues were communicated to CCFC long in advance and were reiterated in the Order of Procedure. No objection was raised at that point. If CCFC had an issue with the bifurcation of the proceedings, it should have raised an objection without undue delay. By failing to do so, CCFC waived any objections it might have had. The Panel further notes that the facts on which CCFC based its belated objection on 18 January 2022 were either known or could have been reasonably anticipated a long time before raising the objection. Finally, the Panel finds that nothing in the Transfer Agreement indicates any (contractual) duty of FC Nantes to organise the transportation of the Player to CCFC. This is not to say anything about whether FC Nantes may be liable to CCFC in tort. However, as previously explained any determination as to the substance of such tort claim falls outside the scope of the Bifurcated Issues in the present appeal arbitration proceedings, as opposed to ordinary CAS arbitration proceedings or a national court proceeding.

E. The setting of the Hearing dates

a) The Attempts to find Suitable Hearing Dates

225. On 4 October 2021, the CAS Court Office informed the Parties that the Panel considered a two-day hearing to be sufficient to deal with the Bifurcated Issues, indicating its availability from 18 to 21 January 2022 or during the week of 24 January 2022 and inviting the Parties to confer and reach an agreement on two consecutive days among the suggested dates.

226. On 7 October 2021, FC Nantes indicated its availability on any of the dates in the week of 24 January 2022, but that it was not available from 18 to 21 January 2022 because at least two of its experts were not available.

227. On the same date 7 October 2021, CCFC requested the hearing to be held on 18 and 19 January 2022, indicating that one of its experts was not available in the week of 24 January 2022.

228. On 13 October 2021, the CAS Court Office informed the Parties that the Panel was also available for a hearing on 2 and 3 March 2022 or on 3 and 4 March 2022.

229. On 16 October 2021, FC Nantes indicated that its wish was for the hearing to take place as soon as possible and requested CAS to investigate all options in order to bring the hearing dates forward.

230. On 18 October 2021, CCFC informed the CAS Court Office that one of its counsel, Mr X., was unavailable on 2, 3 and 4 March 2022 due to a long-booked work commitment.

231. On 19 October 2021, the CAS Court Office informed the Parties on behalf of the Panel that the hearing would take place on 3 and 4 March 2022.

232. On 22 October 2021, FC Nantes informed the CAS Court Office that two of its experts were not available on 3 and 4 March 2022. FC Nantes suggested to consider fixing the hearing during any two days of the week of 24 January 2022, given that only one of CCFC's experts was not available in that week.

233. On 26 October 2021, the CAS Court Office informed the Parties as follows:

> "*The Parties are advised that the Panel has carefully considered* [FC Nantes' letter dated 22 October 2021]. *The Parties shall note, however, the following:*
>
> *(i) Several dates for the hearing have been offered by the Panel to the Parties;*
>
> *(ii) The Parties had ample time and opportunities to express their preferences on dates for the hearing;*
>
> *(iii) The Parties had also the opportunity to object to the final dates suggested by the Panel (3 and 4 March 2022);*
>
> *(iv) In the letter of CAS dated 13 October 2021, the Parties were advised that if no (justified) objection was raised within the given time limit, any of the dates suggested would be confirmed by the Panel (3 and 4 March 2022);*
>
> *(v) The Respondent did not object to 3 and 4 March 2022 as hearing dates within the given time limit;*
>
> *(vi) Consequently, the hearing dates have already been fixed by the Panel (3 and 4 March 2022);*
>
> *(vii) Experts should be at the disposal of the Tribunal, not the contrary.*
>
> *In light of the above, the hearing scheduled on 3 and 4 March 2022 is maintained.*"

234. On 3 November 2021, FC Nantes informed the CAS Court Office that the two experts that it had indicated were not available by letter dated 22 October 2021, were now available, albeit with limited availability on 3 and 4 March 2022 respectively, which FC Nantes requested to be accommodated by the Panel.

235. On 26 November 2021, CCFC requested the Panel to reschedule the hearing to 14 and 15 February 2022, indicating that FC Nantes did not object to such rescheduling.

236. On 29 November 2021, the CAS Court Office informed the Parties that the Panel was not available for a hearing on 14 and 15 February 2022, but that the Panel would be available to reschedule the hearing to 28-30 March 2022 or 4 and 5 April 2022.

237. On 2 December 2021, FC Nantes informed the CAS Court Office that it consented to CCFC's request for the February 2022 dates, as these dates were earlier in time than the current 3 and 4 March 2022 dates. FC Nantes indicated that it wished the hearing to take place as soon as possible and was therefore content for the current hearing dates of 3 and 4 March 2022 to be maintained.

238. On 6 December 2021, Mr X. informed the Panel that he was on paternity leave on 3 and 4 March 2022, which was due to end on 8 March 2022, submitting that it would be prejudicial to his client to have to instruct new leading counsel at this very late stage since he was taking his entitlement to parental leave.

239. On 7 December 2021, the CAS Court Office invited FC Nantes to state if it had any compelling reasons, other than those listed in its letter dated 2 December 2021, against a hearing being held on 28 and 29 March 2022 or, alternatively, on 4 and 5 April 2022.

240. On 10 December 2021, FC Nantes, *inter alia*, informed the CAS Court Office that two of its experts were not available on 28 and 29 March 2022, that three of its experts were not available on 4 and/or 5 April 2022 and that one of its counsel was not available on 28 March and 4 April 2022. FC Nantes also highlighted the changing explanation for Mr X.'s unavailability on 3 and 4 March 2022 and that there was no explanation why he would be willing to take two days out of his paternity leave to attend a hearing in February 2022, but not in March 2022, also noting that he was due to run the 2021 Tokyo Marathon on 6 March 2022. Considering also the efforts made by FC Nantes' counsel to make themselves available on 3 and 4 March 2022, FC Nantes requested the Panel to maintain the 3 and 4 March 2022 hearing dates.

241. On 14 December 2021, the CAS Court Office informed the Parties that the Panel had decided to maintain the hearing dates fixed on 3 and 4 March 2022.

242. On 22 December 2021, CCFC added the following remark on the signed Order of Procedure:

> "*The Appellant reserve* [sic] *its rights as to CAS' decision to hold a hearing in person on 3-4 March 2022, including but not limited to not affording the Appellant the right to respond to new alleged factual bases from the Respondent for objecting to it being moved to a date anytime from 5 days later and thereby, as matters stand, depriving the Appellant from advancing its case with its legal representative of its choice as a result of his entitlement to parental leave.*"

b) The Conclusions of the Panel

243. The Panel notes that pursuant to Article R44.2 CAS Code it is within the discretion of the President of the Panel to decide if a hearing is to be held and to set the hearing date:

> "*If a hearing is to be held, the President of the Panel shall issue directions with respect to the hearing as soon as possible and set the hearing date.*"

244. It follows from Article R44.2 CAS Code that the hearing dates shall be fixed "*as soon as possible*" in order to avoid any unnecessary delays.

245. In view of the number of counsels, experts and witnesses involved in this case, it was close to impossible to find a suitable date within the foreseeable future for all persons concerned. The Panel considered it inappropriate to forgo the hearing dates scheduled for 3 and 4 March 2022 solely due to the unavailability of Mr X. Furthermore, the explanation provided by Mr X. was somehow ambiguous considering that he first referred to a "long booked work commitment" (letter 18 October 2021) that prevented him from attending the hearing and later explained that he was on paternity leave until 8 March 2022. Surprisingly, he was not willing to interrupt his parental leave on the March dates, but was available for a two-day hearing during his parental leave in February 2022. The Panel also took note of the post on social media submitted to the Panel by the Respondent according to which Mr X. was proposing to participate in a marathon on 6 March 2022.

246. In any event, the Panel finds that a 5-month notice (i.e. the period between 19 October 2021 and 3 and 4 March 2022) was reasonably long to enable the Parties to make any proper arrangements for their counsel, experts and witnesses to attend the hearing. Furthermore, pursuant to Article R44.2 CAS Code "[e]*ach party is responsible for the availability and costs of the witnesses and experts it has called*".

247. Finally, the Panel considers that CCFC's reservation affixed on the signed Order of Procedure is moot, given that Mr X. finally attended the hearing on 3 and 4 March in person. The same is true for all of CCFC's witnesses and experts (with the exception of Mr Glancy QC, which will be addressed separately below, see paras. 248 *et seq.*).

F. The Examination of Mr Glancy QC

a) The Facts up to the Hearing

248. On 4 October 2021, the CAS Court Office informed the Parties of the bifurcation of the proceedings and of the Bifurcated Issues. No timely objection was raised by any of the Parties. The Parties again confirmed their agreement with the bifurcation of the proceedings and with the Bifurcated Issues to be dealt with in an initial step by signing the Order of Procedure (without making any reservation in that respect).

249. On 19 October 2021, the CAS Court Office informed the Parties that the hearing would take place on 3 and 4 March 2022. At this point CCFC did not inform the Panel that Mr Glancy QC would not be available on those dates.

250. On 4 November 2021, the CAS Court Office invited the Parties to confer and agree on a tentative hearing schedule, to be reviewed and approved by the Panel.

251. On 2 December 2021, FC Nantes provided the CAS Court Office with a tentative hearing schedule, listing, *inter alia*, Mr Glancy QC (CFCC's expert) and Mr Block QC (FC Nantes' expert), to be heard "*on matters of English law re set-off*" on the first day of the hearing. No reaction was received from CCFC; in particular CCFC did not communicate at this point that Mr Glancy QC would not be available on the proposed hearing dates.

252. Two months later, on 1 February 2022, following an invitation from the CAS Court Office to comment on the tentative hearing schedule submitted by FC Nantes on 2 December 2021, CCFC provided the CAS Court Office with its own tentative hearing schedule, without listing Mr Glancy QC and Mr Block QC to be heard. No reasons were provided for deleting both experts from the tentative hearing schedule.

253. On 3 February 2022, FC Nantes noted that CCFC's hearing schedule did not include any expert evidence from Mr Glancy QC and Mr Block QC, indicating that "[w]*hile it is a matter for* [CCFC] *if it does not wish to call Robert Glancy QC, the Respondent cannot be prevented by* [CCFC] *from calling its own expert Neil Block QC*".

254. On 11 February 2022, following the disagreement of the Parties on a joint tentative hearing schedule and each of the Parties presenting their own schedule, the CAS Court Office informed the Parties that "[t]*he Panel has assessed the various hearing schedules proposed by the Parties and prefers the one suggested by the Respondent, which is herewith confirmed*", thus including the examination of the Parties' experts Mr Glancy QC and Mr Block QC.

255. On 16 February 2022, CCFC explicitly took note of the fact that the Panel had ratified the tentative hearing schedule suggested by FC Nantes. Again, CCFC did not raise any issues with the availability of Mr Glancy QC for the hearing. The only matter raised by CCFC in the letter was that the ratified schedule did not provide for Prof. Rigozzi's expert evidence on applicable law. CCFC, therefore, suggested to include a time slot to accommodate Prof. Rigozzi's expert testimony to that effect.

256. On 17 February 2022, FC Nantes informed the CAS Court Office that it had, in principle, no objection to CCFC's request dated 16 February 2022 to accommodate Prof. Rigozzi's expert testimony on the issue of the applicable law in the hearing schedule. FC Nantes submitted that it thought the expert testimony on applicable law was already included in the time slot allocated for the examination of Prof. Rigozzi.

257. On 21 February 2022, the CAS Court Office, on behalf of the Panel, submitted an updated hearing schedule to the Parties that attributed an extra time slot to Prof. Rigozzi giving expert evidence on the issue of the applicable law.

258. On the same date, 21 February 2022, CCFC requested an extension of the time limit to indicate the availability of "*one individual*" for the hearing until 23 February 2022, which request was granted by the CAS Court Office.

259. On 23 February 2022, CCFC informed the CAS Court Office that Mr Glancy QC was unable to attend the hearing for medical reasons, requesting the Panel to adjourn his examination and reschedule his examination to a time in the future once he had medically recovered. CCFC also enclosed a letter from Mr Glancy QC dated 22 February 2022, indicating, *inter alia*, that he was unable to give evidence as an expert during the hearing because of a holiday booked to recuperate from a major surgery. The letter further read that when Mr Glancy QC had booked the holiday his "*diary was clear*" and that he had been "*only given about two weeks' notice of the hearing*".

260. On the same date, 23 February 2022, FC Nantes objected to CCFC's request to adjourn the examination of Mr Glancy QC.

261. On 28 February 2022, the CAS Court Office informed the Parties that (i) the Panel had taken note of Mr Glancy QC's unavailability; (ii) the Parties were invited at the hearing to make submissions in relation to Mr Glancy QC's expert report and the fact that he would not be made available for the hearing; and (iii) the Parties were invited at the hearing to make submissions as to whether or not the Panel should hear Mr Glancy QC's evidence at another time, following which the Panel would decide.

262. On 2 March 2022, CCFC provided the CAS Court Office with a medical certificate based on which CCFC argued that Mr Glancy QC was unable to give evidence on 3 and 4 March 2022 on medical grounds. CCFC also applied for a confirmation from the Panel that Bifurcated Issue no. 3 could not be dealt with during the hearing and should be adjourned.

b) The Parties' Positions at the Hearing

263. At the hearing, CCFC maintained that, as previously indicated, Mr Glancy QC had recently undergone major surgery and was recovering therefrom and that his evidence should therefore be heard separately on another occasion. CCFC suggested dates to hear Mr Glancy QC on 30 March 2022 or the beginning of April 2022, which it submitted would not cause any material delays or prejudice. Initially, counsel for CCFC indicated that Mr Glancy QC had been informed by it to attend the hearing some three weeks before the hearing. Upon being questioned by the Panel, however, counsel for CCFC then stated that Mr Glancy QC's chambers had been informed of the hearing dates already on 20 December 2021, i.e. shortly after receipt of the Order of Procedure from the CAS Court Office. Counsel for CCFC further stated that he had become aware of Mr Glancy QC's unavailability only about two and a half weeks before the hearing. CCFC also acknowledged that Mr Glancy QC's evidence clearly fell within the scope of Bifurcated Issue no. 3 and that it had signed the Order of Procedure listing all of the Bifurcated Issues, without raising any objection. However, CCFC insisted that if Mr Block QC would be heard then Mr Glancy QC should also be heard. Furthermore, CCFC indicated that it wished to cross-examine Mr Block QC.

264. FC Nantes objected to CCFC's suggestion to hear the evidence of Mr Glancy QC separately at a later stage, maintaining that CCFC itself decided not to list Mr Glancy QC in its tentative hearing schedule. FC Nantes also argued that there was obviously some sort of mistake in the communication between CCFC and Mr Glancy QC. FC Nantes reiterated that no exception should be made, that Mr Glancy QC should not be

heard at a later stage, that CCFC was free to make submissions on the content of Mr Glancy QC's expert report, that CCFC could cross-examine Mr Block QC, and that it did not request Mr Glancy QC's expert report be withdrawn or declared invalid or inadmissible. However, FC Nantes requested that Mr Glancy QC's report should be given less weight by the Panel since Mr Glancy QC was not available for cross-examination.

c) The Conclusions of the Panel

265. Subsequent to the Parties' submissions at the hearing, the Panel informed them of its decisions in this regard as follows:

(i) not to adjourn the expert testimony of Mr Glancy QC;
(ii) to hear the expert testimony of Mr Block QC;
(iii) to leave the expert report of Mr Glancy QC on file;
(iv) reserving the right to evaluate the weight of the evidence adduced; and
(v) that the reasons for such decisions would be set out in the final Award.

i. The decision not to adjourn the expert testimony of Mr Glancy QC

266. The Panel is aware that not adjourning Mr Glancy QC's testimony might affect CCFC's right to be heard (Article 182(3) PILA). However, a party's right to be heard is not unconditional and is subject to the applicable procedural rules. Under the CAS Code, it is the responsibility of the Parties to make their experts available at the hearing and advise their experts accordingly. Article R44.2 CAS Code (that applies also in appeals arbitration proceedings) provides as follows:

> "*The parties may only call such witnesses and experts which they have specified in their written submissions. Each party is responsible for the availability and costs of the witnesses and experts it has called.*"

267. Mr Glancy QC indicated in his letter dated 22 February 2022 to the CAS Court Office that he was only informed of the hearing about two weeks in advance. Even if the Panel were to accept this, in the light of CCFC's admission that it informed Mr Glancy's chambers of the hearing many months prior to the hearing, there has clearly been a failure of communication on the CCFC side. What is even more surprising is that apparently there was complete silence between CCFC and Mr Glancy QC during all that time leading up to the hearing, so that Mr Glancy QC was not updated on any of the developments in these proceedings once the Order of Procedure had been signed or the Bifurcated Issues decided by the Panel. Be that as it may, it is clear to the Panel that some mistake must have occurred within CCFC's sphere of control or responsibility under Article R44.2 of the CAS Code. The Panel is also puzzled by CCFC's letter dated 23 February 2022, in which it expressed "surprise" that Mr Glancy QC was to be called as an expert at the hearing and that it had not "anticipated this". This stands in clear contradiction with CCFC's submission at the hearing that it advised Mr Glancy QC on 20 December 2021 to make himself available for the hearing. If that is the case, CCFC must clearly have anticipated that Mr Glancy QC would be heard at the hearing. In addition, Mr Glancy QC is CCFC's nominated expert on Bifurcated Issue no. 3. The Bifurcated Issues had been communicated to the Parties at the latest with the Order of

Procedure on 22 December 2021. As of this date at the latest, it was obvious to CCFC that Mr Glancy QC needed to provide expert testimony. Furthermore, FC Nantes' tentative hearing schedule circulated on 2 December 2021 listed Mr Glancy QC and allocated a time slot for his examination. This was another clear indication that he was to give testimony at the hearing. Also, the Panel formally confirmed FC Nantes' tentative hearing schedule on 11 February 2022 providing for the examination of Mr Glancy QC. Despite all of this, it was another 12 days before CCFC wrote to express its "surprise" that Mr Glancy was to provide expert testimony (without advising the Panel in the meantime of Mr Glancy's QC scheduled major surgery). Thus, the Panel finds that there was not only a mistake in the communication between Mr Glancy QC and CCFC, but also a serious mistake in the communication between CCFC and this Panel, considering that CCFC only notified the Panel of the alleged problems at a very late stage.

268. CCFC's request to adjourn the expert evidence of Mr Glancy QC unnecessarily disrupted the smooth running of these proceedings and is – in light of CCFC's negligent procedural behaviour – not in the interests of good administration of justice. The Panel further recalls the difficulties in finding suitable hearing dates. Postponing the expert testimony of Mr Glancy QC to a later indefinite date would, thus, prolong the proceedings unnecessarily and substantially. The Panel further notes that – at the end of the day – the testimony of Mr Glancy QC is not material for the outcome of this case, since the Panel has found that, for procedural reasons, the FIFA PSC had no mandate to adjudicate CCFC's set-off claim (see above, para. 102 *et seq.*). Consequently, in view of all the above, the Panel decided to dismiss CCFC's request to adjourn Mr Glancy QC's expert testimony to a later time.

ii. The other issues

269. Given that FC Nantes had always indicated that it wished to hear evidence from Mr Block QC, as well as CCFC's request to cross-examine him, the Panel considered it appropriate to hear evidence from Mr Block QC in accordance with the hearing schedule. Since FC Nantes did not request to strike Mr Glancy QC's written expert report from the CAS case file, the Panel decided to keep the report on file and give it such weight as the Panel thought fit.

G. Prof. Müller's Testimony and Expert Report

a) The Position of the Parties

270. At the hearing, CCFC requested that the expert report and testimony of Prof. Müller be struck from the file. CCFC submitted that Prof. Müller violated Article S18 of the (2021 edition) CAS Code. The provision reads as follows :

> "*CAS arbitrators and mediators may not act as counsel* ***or expert*** *for a party before the CAS.*" (emphasis added by the Panel)

271. CCFC submits that Prof. Müller was called in these proceedings as an expert while also being a CAS arbitrator. Consequently, his expert report and testimony must be excluded from the CAS case file. Alternatively, CCFC argued that the Panel should take these

circumstances into account when assessing the value of the evidence. FC Nantes objected to CCFC's request.

b) The Conclusions of the Panel

272. The Panel is puzzled that this issue was brought up by CCFC at the hearing even though it could have been clarified long before. Prof. Müller's expert report had been on file for many months, and it had been clear to all Parties throughout this time that he would be giving expert testimony at the hearing. CCFC had many months to file an objection, but decided for unknown reasons only to raise this objection for the first time at the hearing.

273. CCFC's objection is without merit anyway. The 2021 edition of Article S18 CAS Code entered into force on 1 January 2021. The present proceedings are not governed by these rules, but by the 2019 edition instead. The corresponding provision of the 2019 CAS Code reads as follows:

> "*CAS arbitrators and mediators may not act as counsel for a party before the CAS.*"

274. Evidently, the new Article S18 CAS Code cannot apply retroactively. This Panel endorses the view of the Board of ICAS in a ruling on a petition for challenge filed against a CAS arbitrator:

> "*Finally, contrary to the opinion of the applicant, Article S18 in the new version of the Code, which prohibits the double mandate of an arbitrator and counsel, entered into force on 1 January 2010 and does not have a retroactive effect. In any event, such provision does not give any particular right to a party to request the removal of an arbitrator.*" (CAS 2010/A/2090, ICAS Board decision on a petition for challenge, para. 8 of the abstract published on the CAS website)

275. Thus, under the applicable version of the CAS Code, Prof. Müller was not prevented from acting as expert in these CAS proceedings.

276. On a side note, the Panel observes that the new provision – even if it were applicable, *quod non* – would not back CCFC's conclusions. Nothing in Article S18 (2021 edition) indicates that a violation of such provision should result in the expert report being struck from the file and/or that Prof. Müller should be disallowed to testify.

277. Rather, pursuant to Article S19 CAS Code, the potential consequence of a violation of Article S18 CAS Code would be the temporary or permanent removal of the arbitrator concerned from the list of CAS members:

> "*ICAS may remove an arbitrator or a mediator from the list of CAS members, temporarily or permanently, if she/he violates any rule of this Code or if her/his action affects the reputation of ICAS and/or CAS.*"

278. This, again, is confirmed in CAS jurisprudence:

> "*Regarding the "challenge" of Messrs Lembo and Garbarski, the Panel informed the Parties that Article S18 of the CAS Code is applicable to CAS arbitrators personally and does not extend to CAS arbitrators' law firms. Furthermore, the Panel emphasized that the CAS Code did not entail any 'challenge to appear before CAS' and that any sanction under Article S19 of the CAS Code for a violation of Article S18 only applies to the concerned CAS arbitrator and not to the lawyers of his/her law firm.*" (CAS 2011/O/2574, p. 12 of the abstract published on the CAS website)

279. Moreover, the evidence was that Prof. Müller was retained before the 2021 edition came into effect.

280. Consequently, CCFC's request is ill-conceived and, therefore, must be dismissed.

H. Request to be Assisted by Additional Counsel and Request to Postpone Closing Submissions with respect to Bifurcated Issue no. 2

281. During the first day of the hearing, following the closing submissions of the Parties with respect to Bifurcated Issue no. 2, and more specifically Article 377(1) CCP and the legal doctrine related thereto, the Panel referred the Parties to the fact that there were different language versions of this provision and invited them to address the potential implications thereof.

a) The Position of the Parties

282. CCFC requested permission from the Panel to call in additional Swiss law counsel, notably Prof. Sébastien Besson, to address the matter that had been brought to its attention by the Panel. Prof. Besson is a partner in the same law firm as Prof. Rigozzi, who had been previously called as an independent expert by CCFC. CCFC also requested the Panel to postpone the closing submissions with respect to Bifurcated Issue no. 2 to the second day of the hearing.

283. FC Nantes objected to such requests, arguing that it was not a surprise that questions of Swiss law could arise during the hearing and that CCFC could have anticipated this but opted not to have any Swiss counsel present. FC Nantes indicated that it had itself undertaken precautionary measures by having counsel from all relevant jurisdictions present at the hearing to address any specific issues that could potentially arise, regardless of how remote such possibility was. FC Nantes also argued that it was worrying that two partners from the same law firm would appear as counsel and expert concurrently in the same proceedings.

b) The Conclusions of the Panel

284. The Panel informed the Parties at the hearing that the closing submissions with respect to Bifurcated Issue no. 2 would not be postponed to the second day of the hearing, save for the issue concerning the different languages of Article 377(1) CCP. The Panel also informed CCFC that it was not allowed to bring in Prof. Besson, either as counsel or as expert at this late stage of the proceedings. The Panel had given Prof. Rigozzi, a renowned expert on international arbitration, the possibility to express himself on the

issue related to the different language versions of Article 377(1) CCP. Furthermore, the Panel saw a potential conflict of interest allowing Prof. Rigozzi to testify as an independent expert, while listening to Prof. Besson, a partner in the same law firm, as a co-counsel of CCFC. Having Prof. Besson act as counsel for CCFC would – in the view of the Panel – jeopardise the independence of Prof. Rigozzi's evidence.

285. Furthermore, the Panel found that questions on Swiss law (including issues related to the interpretation of Article 377(1) CCP) could reasonably have been anticipated by CCFC, not least because FC Nantes had Swiss counsel present at the hearing to potentially address issues related to Swiss law on the spot. The Panel therefore did not consider it appropriate to postpone the closing submissions with respect to Bifurcated Issue no. 2 to the second day of the hearing. However, in order to allow the Parties some additional time to examine the issue raised at the hearing by the Panel, it agreed that the Parties would be allowed to make submissions with respect to this limited issue on the second day of the hearing.

286. Be this as it may, the Panel notes that at the end of the hearing CCFC did not make any reservation concerning its right to be heard with respect to not being able to solicit the services of Prof. Besson as co-counsel. Instead, CCFC admitted and agreed that its right to be heard had been fully respected.

I. Time Allocated for the Examinations of Prof. Rigozzi and Prof. Müller

287. On 16 February 2022, CCFC explicitly took note of the fact that the Panel had ratified the tentative hearing schedule suggested by FC Nantes, indicating that such schedule did not provide for Prof. Rigozzi's expert evidence on applicable law and suggesting to include a time slot for this.

288. On 17 February 2022, FC Nantes informed the CAS Court Office that it had no objection to CCFC's request dated 16 February 2022 and that it considered such issue as being included in the time slot already allocated for the examination of Prof. Rigozzi.

289. On 21 February 2022, the CAS Court Office, on behalf of the Panel, submitted an updated hearing schedule to the Parties, accommodating CCFC's request with respect to Prof. Rigozzi.

290. On 22 February 2022, FC Nantes maintained that the hearing schedule enclosed to the CAS Court Office letter dated 21 February 2022 allocated an extra 30 minutes for the examination of Prof. Rigozzi in comparison with Prof. Müller, requesting that the same extra time be afforded to Prof. Müller.

291. On the same date, 22 February 2022, the CAS Court Office informed the Parties that FC Nantes' request would be transmitted to the Panel for its consideration.

292. On 3 March 2022, at the outset of the hearing, the Panel informed the Parties that the same amount of time would be allocated for the examinations of Prof. Rigozzi and Prof. Müller, and no objections were raised by the Parties in this respect subsequently.

J. Factual Witnesses Called by FC Nantes

293. On 3 March 2022, after the first hearing day, FC Nantes informed the CAS Court Office that it would not call factual witnesses Ms Samuele Lanoë, Ms Madeleine Guillou and Ms Blandine Capitaine, and that it did not consider that there was any necessity to hear from the factual witnesses Mr Stéphane Bottineau, Mr Maxime Estienne and Mr Nicolas Pallois, but that they remained available to be called should the Panel wish to hear from them.

294. On 4 March 2022, at the start of the second day of the hearing, CCFC indicated that it understood from discussions with FC Nantes that Ms Lanoë, Ms Guillou and Ms Capitaine were not called by FC Nantes. CCFC requested the Panel to draw any inferences that arise out of that. Furthermore, CCFC indicated that it understood that it was up to CCFC to decide whether or not it wished to cross-examine Ms Bottineau, Mr Estienne and Mr Pallois and indicated that it had no objection to them not being heard.

295. The Panel indicated that FC Nantes had not filed witness statements for Ms Lanoë, Mr Bottineau (who replaced Ms Emilie Marcheval), and Mr Estienne (i.e. FC Nantes had only indicated that these persons would be available to testify about certain factual circumstances), but that witness statements had been filed for Ms Guillou, Ms Capitaine and Mr Pallois. While the first three witnesses could be withdrawn without any problem or consequences, the Panel asked the Parties how they considered the witness statements of Ms Guillou, Ms Capitaine and Mr Pallois should be treated by the Panel.

296. FC Nantes indicated that this had not been discussed with CCFC. CCFC indicated that there were some *lacunae* in these witness statements and that, in closing submissions, it was going to address this and suggest that inferences should be drawn from their non-appearance.

297. Following these remarks from CCFC, the Panel indicated that it was therefore understood that FC Nantes did not object to the witness statements of Ms Guillou, Ms Capitaine and Mr Pallois remaining on file, as CCFC would otherwise not be able to point out such alleged *lacunae*, which interpretation CCFC confirmed to be correct.

298. Consequently, the witness statements of Ms Guillou, Ms Capitaine and Mr Pallois remain on file, but the credibility and weight thereof is to be assessed in the light of the alleged *lacunae* as argued by CCFC and their non-appearance at the hearing.

K. Request to File Additional Evidence

299. Towards the end of the Parties' closing submissions, CCFC argued that the amount paid to the Player by FC Nantes following the alleged termination of the employment relationship was not in accordance with the amount owed to the Player, i.e. that there was a discrepancy between net and gross.

300. Following such comment, FC Nantes offered to produce a document allegedly showing that the amount paid to the Player was in accordance with the amount owed to him.

301. Following such proposal, CCFC indicated that, if FC Nantes would be permitted leave to produce such document, it required an opportunity to comment.

302. The Panel indicated during the hearing that the Panel would decide on this issue after the hearing.

303. On 21 March 2022, the CAS Court Office informed the Parties on behalf of the Panel that, at that stage, no further submissions would be accepted.

304. The reasoning behind the Panel's decision was that the Panel considered such evidence immaterial for its conclusion as to whether or not the Player's employment relationship with FC Nantes had terminated.

L. CCFC's submission dated 3 May 2022

305. On 3 May 2022, i.e. approximately two months after the hearing, CCFC informed the CAS Court Office that the inquest into the death of the Player had been heard and that the jury had allegedly come to certain conclusions, and it provided its own summary thereof. CCFC also indicated that, following correspondence between the Parties, FC Nantes considered such summary to be misleading, contrary to the procedural rules and the Panel's directions that no further submissions would be accepted.

306. On 3 May 2022, the CAS Court Office informed the Parties that CCFC's letter dated 3 May 2022 was not admitted on file. The reasoning behind the Panel's decision is that it found that the content of CCFC's letter did not establish that the outcome of the coroner's inquest could be material to adjudicate and decide on the Bifurcated Issues for the same reasons as set out above with respect to, *inter alia*, CCFC's request to stay the proceedings pending certain ongoing proceedings (see para. 191 *et seq.*).

X. APPLICABLE LAW

307. Article R58 CAS Code provides the following:

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

308. Article 57(2) FIFA Statutes provides the following:

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

309. Clause 8.1 of the Transfer Agreement provides as follows:

"*This Transfer Agreement shall be governed by and construed in accordance with the laws of England and Wales and the FIFA Regulations.*"

310. Clause 8.2 of the Transfer Agreement provides, *inter alia*, as follows:

"[…] *The FIFA DRC and the CAS shall determine the dispute in accordance with the FIFA Regulations and the laws of England and Wales.* […]"

311. The applicable law with respect to the Panel's mandate to adjudicate and decide on CCFC's set-off claim has already been addressed above, and the Panel's specific findings with respect to the law applicable to FC Nantes' contractual claim are set forth below.

XI. MERITS

A. The Main Issues

312. The remaining issue to be resolved by the Panel is Bifurcated Issue no. 1, i.e. if the Transfer Agreement entered into by the Parties is valid (with all conditions precedent being cumulatively complied with).

a) The Contractual framework

313. Clause 2.1 of the Transfer Agreement provides as follows:

"*This Transfer Agreement is conditional upon:*

2.1.1. the player completing successfully medical examination with [CCFC]*;*

2.1.2. FC Nantes and the Player agreeing all the terms of a mutual termination of FC Nantes contract of employment with the Player;

2.1.3. the mutual termination of FC Nantes contract of employment with the Player is registered by the LFP;

2.1.4. the LFP and the FAW have confirmed to [CCFC] *and FC Nantes that the Player has been registered as a* [CCFC] *player and that the Player's International Transfer Certificate has been released.*"

314. The consequences of non-fulfilment of any of such conditions precedent are set forth in clause 2.2 of the Transfer Agreement:

"*Both parties shall use all reasonable endeavours to ensure that the conditions are satisfied no later than 22 January 2019. If the conditions are not fulfilled within this period then this Transfer Agreement shall be null and void. In such event:*

2.2.1. this Transfer Agreement shall cease to have legal effect;

2.2.2. no payment shall be due from [CCFC] *to* [FC Nantes]*;*

2.2.3. neither party shall have any ongoing obligations or liability in relation to this Transfer Agreement."

315. It is not contested that clause 2.1.1 of the Transfer Agreement is complied with, but CCFC disputes that the conditions precedent in clauses 2.1.2, 2.1.3 and 2.1.4 are satisfied. The Panel will assess these three conditions precedent in turn below. Before doing so, the Panel will address the law applicable to the interpretation of the conditions precedent.

b) The Law Applicable to the Interpretation of Clause 2.1 of the Transfer Agreement

i. The Positions of the Parties

316. CCFC argues that the dispute concerns the validity of the Transfer Agreement, and in particular the conditions under which such agreement may subordinate the validity of the transfer and thus the payment of the agreed transfer fee. With the exception of the condition under which an ITC is to be released (i.e. clause 2.1.4), the FIFA RSTP do not contain any provision governing these issues. Therefore, in line with Article R58 CAS Code, the dispute related to FC Nantes' claim for the transfer fee shall be governed by the law chosen by the Parties, i.e. the law of England and Wales, except for the issue of whether an ITC has been validly released, which is governed by the FIFA RSTP and Swiss law.

317. FC Nantes rejects CCFC's contention that the present dispute should primarily be decided in accordance with the law of England and Wales. It submits that any transfer-related matter arising out of the Transfer Agreement should be subject to the FIFA RSTP and subsidiarily Swiss law. The potential application of the law of England and Wales to other provisions of the Transfer Agreement, if that were to be accepted, would have no relevance to the present proceedings, because the only dispute between the Parties relates to the application and interpretation of clause 2.1 of the Transfer Agreement. This provision relates to transfer-related matters and, therefore, is subject to the FIFA regulations and, subsidiarily, Swiss law.

ii. The Findings of the Panel

318. The Parties put great emphasis on the question what law applies to the interpretation of the conditions precedent in the Termination Agreement.

319. CCFC provided the following summary of English law on the interpretation of commercial contracts:

- "*When interpreting a written contract, the Court is concerned to identify the intention of the parties. It does so by focusing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in light of: (i) the natural and ordinary meaning of the clause; (ii) any other relevant provisions of the contract; (iii) the overall purpose of the clause and the contract; (iv) the facts and circumstances known or assumed by the parties at the time the document*

was executed; and (v) commercial common sense, but (vi) disregarding subjective evidence of the any party's intentions; [reference omitted]

- *Where the parties have used unambiguous language, the Court must apply it;* [reference omitted]
- *Save in a very unusual case, the meaning of the contract is most obviously to be gleaned from the language of the provision;* [reference omitted]
- *A Court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed. When interpreting a contract, a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party;* [reference omitted]
- *When a contract has been negotiated and prepared with the assistance of skilled professionals (e.g. lawyers) the contract should be interpreted principally by textual analysis;* [reference omitted]
- *An iterative process involving textualism and contextualism is to be applied to ascertain the objective intention of the parties under the exercise of contractual construction, with rival constructions determined in favour of the one which is more consistent with business common sense.* [reference omitted]"

320. FC Nantes confirmed that these statements of CCFC are accurate, save for the final statement, which it considers misleading. FC Nantes maintains that CCFC bases its claim on this misstatement, relying on business common sense to persuade the Panel that it should rewrite the conditions precedent in issue.

321. As held in the UK Supreme Court judgment in *Financial Conduct Authority v Arch Insurance & ors* [2021] UKSC 1, [2021] 2 WLR 123, para 47 ("*FCA v Arch*"), "[…] *The core principle is that* [a contract] *must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean*".

322. According to Swiss law, on the contrary, Article 18 SCO seeks first and foremost to establish the subjective intention of the parties and – in case the latter cannot be determined – falls back on an objective interpretation of the contract.

323. The Panel finds that the differences between contractual interpretation under the law of England and Wales and Swiss law, however, do not come into play in the case at hand, since the Panel finds that no clear subjective intention can be inferred and, thus, also from a Swiss law perspective, the objective interpretation prevails. While the nuances in contractual interpretation obviously differ, the rationale is the same.

324. A concrete difference between both laws relates to the question of whether or not drafts of a contract may be taken into account when interpreting and assessing the contents of the contract. Under English law this is not permitted, while under Swiss law this is, as a matter of principle, permissible.

325. CCFC provided certain drafts of the Transfer Agreement, while also FC Nantes made submissions on the basis of changes made between circulation of the first draft of the Transfer Agreement and the eventual definite Transfer Agreement.

326. Such submissions notwithstanding, the Panel considers that, even under Swiss law, the various draft versions of the Transfer Agreement are irrelevant for present purposes, as the various drafts exchanged do not provide much clarity as to the subjective intention of the Parties with the conditions precedent.

327. The Panel further finds that the regulatory matrix in light of which the interpretation takes place – independently of the law applicable – is the RSTP, since – obviously – the conditions in clauses 2.1.2 - 2.1.4 of the Transfer Agreement more or less mirror the various steps to be taken according to the FIFA RSTP (Articles 5 and 13 FIFA RSTP and Articles 4 and 8 of Annexe 3 FIFA RSTP) in order to transfer a player.

328. Furthermore, the purpose of the Transfer Agreement is described in clause 1 of the Transfer Agreement, which provides as follows:

> "*In consideration of payment by* [CCFC] *to* [FC Nantes] *of the Transfer fee and the other sum set out in clause 3 and its agreement to be bound by the terms and conditions of the Transfer Agreement, FC Nantes will immediately transfer the Player's registration to* [CCFC] *on a permanent basis upon the terms set out therein.*"

329. Potentially, different laws may be applicable to different legal aspects in the same dispute arising from the same contract, i.e. *dépeçage*, depending primarily on the question of whether the issue addressed in the clause concerned is governed by the FIFA RSTP. If it is, Swiss law may be applied on a subsidiary basis. If it is not, the law of England and Wales may be applied, following the Parties' choice of law. Both Parties rely on a publication of the President of the Panel in this respect (HAAS, Applicable law in football-related disputes – The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law, CAS Bulletin 2015/2).

330. Because the Panel finds that the question of whether the interpretation of clauses 2.1.2 and 2.1.3 of the Transfer Agreement is governed by Swiss law or the law of England and Wales is not decisive, the Panel leaves this issue open. Both Parties agree that the outcome should be the same regardless of the law to be applied.

331. Both Parties agree that the issuance of ITC as referred to in clause 2.1.4 of the Transfer Agreement is clearly addressed in the FIFA RSTP and is therefore subsidiarily governed by Swiss law. However, both Parties nonetheless also make submissions on the interpretation of clause 2.1.4 of the Transfer Agreement under the law of England and Wales, particularly with respect to the reference to the Player being a "[CCFC] *player*". Also in this respect, the Panel finds that the outcome would be the same.

332. Consequently, the Panel finds that, irrespective of whether Swiss law or the law of England and Wales are applied to clauses 2.1.2 - 2.1.4 of the Transfer Agreement, the

Panel reaches the same conclusion on the interpretation of the conditions precedent set out therein.

c) Is the Condition Precedent in Clause 2.1.2 of the Transfer Agreement Fulfilled?

333. As set forth above, the condition precedent set forth in clause 2.1.2 of the Transfer Agreement provides as follows:

> "*FC Nantes and the Player agreeing all the terms of a mutual termination of FC Nantes contract of employment with the Player;*"

334. Clause 5 of the Transfer Agreement provides as follows:

> "*REPRESENTATIONS AND WARRANTIES*
>
> *5.2* [FC Nantes] *hereby represents and warrants to* [CCFC] *that:*
>
> […]
>
> *5.2.3 It shall, and it shall procure that the Player shall, do all things necessary to transfer the Player's registration to* [CCFC], *subject to and in accordance with the rules of the LFP, including but without limitation cancelling the registration of the Player and any employment contract between the Player and* [FC Nantes], *promptly entering all relevant details into the FIFA Transfer Matching System (TMS) and completing and lodging any necessary regulatory forms and documents;*"

335. On 19 January 2019, i.e. the date the Transfer Agreement was concluded, the Player and FC Nantes also concluded the Termination Agreement. Clause 1 of the Termination Agreement provides as follows:

> "*By mutual agreement,* [the Player] *and FC Nantes have decided to terminate the Contract as of 19 January 2019 in order to allow his transfer to* [CCFC].
>
> *The Parties understand that the validity of this termination is subject to the following conditions:*
>
> *(i)* [The Player] *shall be transferred permanently to* [CCFC]*;*
>
> *(ii) The* [ITC] *was issued by the* [FFF] *to the English Football Association.*
>
> *These conditions must be fully met by no later than 22 January 2019. If these conditions are not met by the time, the addition regarding termination shall be void and the effects of the Contract shall become applicable again ipso jure as of 23 January 2019.*"

336. Clause 2 of the Termination Agreement provides as follows:

> "*The balance of any account established by FC Nantes to the benefit of* [the Player] *shall comprise entirely of the following for transactional purposes:*

- *The monthly fixed salary of* [the Player] *for the period from 1 January 2019 to 18 January 2019.*

Subject to the proper settlement of this amount., [the Player] *hereby declares that his rights are entirely fulfilled for the purpose of the execution of his Contract with FC Nantes; as a result of which, he understands that on the day of the execution of this addition regarding termination, FC Nantes has fulfilled all its obligations and has settled all amounts, of any nature whatsoever and for any reason whatsoever, with regard to the performance as well as the termination of his Contract (and particularly with regard to his fixed compensation, variable compensation, individual and collective bonuses, and any remaining compensation of any kind whatsoever, the payment of additional hours, match bonuses, target bonuses, and any other bonuses, any compensation payment by way of indemnification for paid leave, compensation payments for reduced hours, etc)*

[The Player] *understands that by way of the effect of this termination, his relationship with FC Nantes shall end permanently on the effective date of this addition regarding termination.*"

i. The Positions of the Parties

337. CCFC maintains that the obvious business common sense interpretation of clause 2.1.2 of the Transfer Agreement is not that the clause could be satisfied by the Player and FC Nantes merely agreeing terms of a termination agreement but, self-evidently, that they gave effect to those terms. Since the conditions precedent in the Termination Agreement were not fulfilled by 22 January 2019 or at all, FC Nantes could not give effect to clause 2.1.2 of the Transfer Agreement.

338. CCFC further maintains, in the alternative, that the FC Nantes Employment Contract (to which French law applies) was not terminated in accordance with the French Labour Code (the "FLC") and, accordingly, that clause 2.1.2 of the Transfer Agreement was not satisfied by 22 January 2019 or at all. Under French law, it is mandatory for the employer to provide the employee with several documents at the time of termination of the contract, in particular (i) an "employment certificate" pursuant to Article L 1234-19 FLC; (ii) an "unemployment insurance certificate" pursuant to Article R 1234-9 FLC; and (iii) a "balance of all accounts" pursuant to Article L1234-20 FLC.

339. CCFC argues that there is no evidence that FC Nantes ever provided the Player with an "employment certificate" or an "unemployment insurance certificate" at the purported termination of his employment relationship with FC Nantes, or at all. Failure of the employer to comply with these obligations is punishable under French criminal law, and will invalidate the termination of the employment contract. As to the "balance of all accounts", the French Supreme Court has ruled that the employer is strictly obliged to issue and deliver such document evidencing all the sums to be paid to the employee at the termination of the contract.

340. According to CCFC, in light of the wording of clause 2 of the Termination Agreement, the Player agreed to waive all sums and claims against FC Nantes under the FC Nantes Employment Contract, upon satisfaction of the express condition precedent that FC

Nantes issued a "*proper settlement*" of the "*balance of all accounts*". As such "balance of all accounts" was not provided to the Player, FC Nantes had not fulfilled that condition precedent, thereby rendering the Termination Agreement null and void. CCFC maintains that FC Nantes' failure to issue such documents supports CCFC's contention that the Player had not yet transferred to CCFC. Since the condition precedent in the Termination Agreement was not satisfied, the condition precedent in clause 2.1.2 of the Transfer Agreement was also not satisfied, with the consequence that the Player remained an employee of FC Nantes at all material times.

341. During the hearing, CCFC put significant emphasis on clause 5.2.3 of the Transfer Agreement, which clause deals with warranties and representations. CCFC inferred from this clause that FC Nantes not only had to agree on a mutual termination agreement, but to effectively terminate the FC Nantes Employment Contract before 22 January 2019.

342. FC Nantes maintains that it agreed all the terms of a mutual termination of the FC Nantes Employment Contract with the Player. CCFC claims that clause 2.1.2 of the Transfer Agreement also requires that the termination of the FC Nantes Employment Contract came into force, but this is clearly not what clause 2.1.2 of the Transfer Agreement provides. Such interpretation would also render the Player's transfer impossible, because the Termination Agreement and the Transfer Agreement would be conditional upon each other.

343. FC Nantes further submits that, in any event, even assuming that the Transfer Agreement had to come into force in order for the condition precedent in clause 2.1.2 of the Transfer Agreement to be fulfilled, *quod non*, both conditions provided for in clause 1(2) of the Termination Agreement had occurred by 22 January 2019. This is confirmed by the TMS report evidencing that on 21 January 2019, at 18:30 CET, the FAW confirmed receipt of the ITC from the FFF and registered the Player with CCFC.

344. As to CCFC's alternative reasoning that the FC Nantes Employment Contract was not terminated in accordance with the FLC, FC Nantes maintains that also this argument must be dismissed for four reasons:

> "*(i) Firstly, as a preliminary point,* [CCFC] *has no standing to challenge the validity of the Termination Agreement* […], *pursuant to the privity of contracts doctrine* […].
>
> *(ii) FC Nantes complied with its obligation to issue said documents, which have to be collected by the employee* […].
>
> *(iii) The absence or late delivery of end-of-contract documents does not affect the validity of the termination of an employment contract in any way* […].
>
> *(iv) Contrary to what is asserted by* [CCFC], *the Termination Agreement may not be qualified as a settlement within the meaning of the French Civil Code and labour law jurisprudence* […]."

345. Finally, as to CCFC's reliance on the warranty in clause 5.2.3 of the Transfer Agreement, FC Nantes submits that this clause is to be interpreted against the background of the LFP regulations, i.e. the LFP had to register/homologate the

Termination Agreement, which is only a formal check, but not a confirmation that the employment relationship is terminated.

ii. The Findings of the Panel

346. The Panel finds that the wording of clause 2.1.2 of the Transfer Agreement is – objectively – clear in that the condition precedent requires that there is an agreement between FC Nantes and the Player on all the terms of a mutual termination of the FC Nantes Employment Contract. CCFC wishes to read into this provision that the termination – in addition – must have been validly executed according to French law. The Panel does not agree with such contention.

347. Nothing in the text of clause 2.1.2 of the Transfer Agreement points in this direction, and CCFC's reading requires additional wording to be read into clause 2.1.2 of the Transfer Agreement.

348. The Panel notes that the text in clause 2.1.2 of the Transfer Agreement coincides with the wording of Article 8(2)(3) of Annex 3 to the FIFA RSTP:

> "*Upon receipt of the ITC request, the former association shall immediately request the former club and the professional player to confirm whether the professional player's contract has expired, whether early termination was mutually agreed or whether there is a contractual dispute.*"

349. FC Nantes' consent to the transfer was obviously required, and the mutual termination of the FC Nantes Employment Contract was a relevant aspect in this respect. The FIFA RSTP do not require that the mutual termination agreement is validly enforced, but simply that it is agreed upon.

350. As to CCFC's reliance on the warranties in clause 5 of the Transfer Agreement, the Panel finds that such warranties have a different purpose and entail different consequences compared to the conditions precedent in clause 2.1 of the Transfer Agreement. While the non-satisfaction of the conditions precedent would result in the Transfer Agreement being null and void, non-compliance with the warranties leaves the Transfer Agreement intact, but entitles the counterparty to indemnification of the damages incurred as a result of the breach of a contractual warranty.

351. The Panel agrees with FC Nantes' position that the warranty in clause 5.2.3 of the Transfer Agreement is indeed to be interpreted against the background of the LFP regulations. Thus, it is not required that the Player and FC Nantes effectively terminate their employment relationship by 22 January 2019. Instead, it suffices that both reach an agreement to such effect and have such agreement registered with the LFP.

352. Insofar as CCFC maintains that the conditions precedent in clause 1 of the Termination Agreement were not fulfilled and that, as a consequence, the condition precedent in clause 2.1.2 of the Transfer Agreement was also not fulfilled, the Panel finds that the Player was transferred permanently to CCFC, the FFF issued the Player's ITC to the FAW, and the FAW registered the Player as a CCFC player, as a consequence of which

the conditions precedent in the Termination Agreement were fulfilled on 21 January 2019.

353. In light of the above, the Panel is not required to rule on the question of whether the termination of the FC Nantes Employment Contract was validly exercised under French law. If and to what extent certain conditions needed to be fulfilled according to French law was immaterial. The Panel considers that the Player and FC Nantes had reached a mutual agreement on the terms of the termination of their employment relationship, which was required under clause 2.1.2 of the Transfer Agreement (and Article 8(2)(3) of Annex 3 to the FIFA RSTP), and that the Player was a CCFC player as from issuance of the Player's ITC by the FFF to the FAW and the FAW's registration of the Player as a CCFC player.

354. In any event, should there have been any problem concerning the valid termination of the Player's employment relationship with FC Nantes, this would have been a matter between FC Nantes and the Player (or his heirs).

355. For these reasons, the Panel also considers it irrelevant whether or not certain end-of-contract documents were drafted and/ or exchanged after the issuance of the Player's ITC and/or whether or not such documents were backdated.

356. To sum up, the Panel finds that the condition precedent in clause 2.1.2 of the Transfer Agreement is fulfilled.

d) Is the Condition Precedent in Clause 2.1.3 of the Transfer Agreement Fulfilled?

357. As set forth above, the condition precedent set forth in clause 2.1.3 of the Transfer Agreement provides as follows:

> "[T]*he mutual termination of FC Nantes contract of employment with the Player is registered by the LFP;*"

i. The Positions of the Parties

358. Besides indicating that the conditions precedent in clauses 2.1.2 and 2.1.3 go hand in hand, CCFC makes no specific submissions with respect to clause 2.1.3 of the Transfer Agreement.

359. FC Nantes maintains that CCFC is perhaps claiming that, because the FC Nantes Employment Contract was allegedly not validly terminated, the LFP could not have ratified the Termination Agreement. FC Nantes maintains that any such contention of CCFC would be incorrect, because all the terms of the Termination Agreement were agreed upon and because the LFP ratified the Termination Agreement.

360. Clause 2.1.3 of the Transfer Agreement makes the Transfer Agreement conditional upon the mutual termination of the FC Nantes Employment Contract being "*registered by the LFP*". FC Nantes considers it undisputable that, on 21 January 2019, at 14:08 CET, the FFF received a confirmation from the LFP that the LPF had homologated (approved) the Termination Agreement (so had registered it in accordance with clause

2.1.3 of the Transfer Agreement) and that the Player was successfully de-registered from FC Nantes, therefore allowing the FFF to proceed with issuing the ITC. FC Nantes submits that, on this basis, there can be no doubt that the condition precedent in clause 2.1.3 of the Transfer Agreement was fulfilled.

ii. The Findings of the Panel

361. The Panel finds that also the wording of clause 2.1.3 of the Transfer Agreement is clear: the agreement to mutually terminate the employment relationship between FC Nantes and the Player was to be registered/homologated by the LFP, i.e. the LFP was to verify the legality of the Termination Agreement. It is not required that LFP assess or examine whether the terms of the Termination Agreement were actually complied with.

362. It is undisputed that the LFP registered/homologated the Termination Agreement. Whether such registration was correct or not, is immaterial, since it is the registration that was provided for under the Transfer Agreement, and no more. This is logical, as it provided CCFC with the legal certainty that when contracting with the Player it would not be facing any claims from the Player and/or FC Nantes for allegedly inducing the Player to breach the FC Nantes Employment Contract.

363. The Panel agrees with the reasoning of the FIFA PSC in the Appealed Decision:

> "[T]*he Bureau assumed that the clause at stake had been included in the* [Transfer Agreement] *with the sole purpose of securing* [CCFC] *from the consequences in terms of possible inducement in the player's breach of contract at a later stage in case a dispute would arise between* [FC Nantes] *and the player, however remote such possibility might have been.*"

364. Consequently, the Panel finds that the condition precedent in clause 2.1.3 of the Transfer Agreement is satisfied.

e) Is the Condition Precedent in Clause 2.1.4 of the Transfer Agreement Fulfilled?

365. As set forth above, the condition precedent set forth in clause 2.1.4 of the Transfer Agreement provides as follows:

> "[T]*he LFP and the FAW have confirmed to* [CCFC] *and FC Nantes that the Player has been registered as a* [CCFC] *player and that the Player's International Transfer Certificate has been released.*"

i. The Positions of the Parties

366. CCFC maintains that, applying the correct legal approach to contractual interpretation under English law, clause 2.1.4 of the Transfer Agreement provides that the Player was to play for CCFC given the use of the words "[CCFC] *player*". However, as of 19 January 2019, i.e. the date of the Transfer Agreement, the only competition in which CCFC remained entitled to play during the 2018/19 season was the Premier League, which was known to the Parties at the time the Transfer Agreement was executed. According to CCFC, it follows that, as a matter of business common sense, for the

Transfer Agreement to have practical effect, the Player had to be registered with the Premier League and, thus, be entitled to play for CCFC upon his transfer in order to assist CCFC retain its Premier League status.

367. According to CCFC, the whole meaning, effect and purpose of the Transfer Agreement is centred on the Player playing immediately in the Premier League. This also follows from the CCFC Employment Contract as well as the bonus provisions in the Transfer Agreement. CCFC also submits that its interpretation is supported by the Agency Agreement between Mr Mark McKay and FC Nantes. According thereto it was FC Nantes' intention for the Player to play in the Premier League. Finally, it was also the Player's wish to play in the Premier League, as can be derived from messages sent by him.

368. At the time of the Player's death, the latter was not registered with the Premier League. According to CCFC, the Player's Agent was well aware that the CCFC Employment Contract had to be renegotiated following the Premier League's refusal to register the CCFC Employment Contract.

369. Finally, and in the alternative, CCFC maintains that, even on a literal interpretation of clause 2.1.4 of the Transfer Agreement, (i) the LFP did not confirm to CCFC and/or FC Nantes that the Player had been registered as a CCFC player by 22 January 2019; and (ii) the FAW did not confirm to CCFC that the Player had been registered as a CCFC player by 22 January 2019. Accordingly, CCFC submits that, on an alternative (as opposed to commercial common sense) reading of that clause, the condition precedent has not been fulfilled.

370. FC Nantes submits that it is not disputed that CCFC wished to field the Player in Premier League matches. However, the object of the Transfer Agreement was to provide CCFC with a possibility to register the Player with the Premier League for CCFC, not to register him with the Premier League. As the Player was registered as a CCFC player on 21 January 2019, the condition precedent in clause 2.1.4 of the Transfer Agreement was fulfilled.

371. Following a detailed step-by-step analysis of Annex 3 to the FIFA RSTP and the guidelines published by the TMS Help Centre, FC Nantes argues that based on such documents, the new association, as the last and final step, (i) confirms the ITC receipt; (ii) registers the player; and (iii) indicates the registration date. FC Nantes maintains that the Parties' intention could only have been that the Player be transferred in accordance with this procedure. On 21 January 2019, at 18:30 CET, the FAW confirmed the ITC receipt, registered the Player as a CCFC player, and entered the registration date into TMS. CCFC never denied these facts or objected to the validity of the instructions made by the FAW in TMS. According to FC Nantes, there could be no other meaning of the wording "*the Player has been registered as a* [CCFC] *player*" in clause 2.1.4 of the Transfer Agreement. This condition was manifestly fulfilled when the FAW registered the Player.

372. FC Nantes also contends that the Parties never made the Transfer Agreement conditional upon the Player being registered with the Premier League. Clause 2.1 of the Transfer Agreement does not include any express provision that the Player had to be

registered with the Premier League in order for the transfer to be completed. The object of the Transfer Agreement was the transfer of the Player from FC Nantes to CCFC. Furthermore, FC Nantes maintains that clause 5.3 of the Transfer Agreement expressly provides that the only party responsible for the Player's registration with the Premier League is CCFC:

> "[CCFC] *hereby represents and warrant to* [FC Nantes] *that it is duly entitled as at the date hereof to register the Player under the* [CCFC] *Playing Contract and secure his right to immediately commence playing professional football;*"

373. FC Nantes contends that it is contrary to the principle of good faith that the Transfer Agreement should be deemed null and void because the CCFC Employment Contract did not comply with the Premier League Handbook and had to be amended in order for CCFC to register the Player when, at the same time, CCFC assured FC Nantes that it was able to register the Player based on the CCFC Employment Contract. CCFC cannot rely on this argument in view of the well-known principle of *venire contra factum proprium*, when CCFC induced legitimate expectations in another party.

ii. The Findings of the Panel

374. The Panel notes that both Parties acknowledge that the wording of clause 2.1.4 of the Transfer Agreement is not entirely clear and requires interpretation.

375. The Panel finds that CCFC's business common sense interpretation of clause 2.1.4 of the Transfer Agreement is flawed. CCFC is relying on an interpretation that makes business common sense to it (after the death of the Player), but not to FC Nantes. From FC Nantes' perspective the most business common sense is to transfer the Player to CCFC and leave it to the latter to decide in which competitions the Player shall be registered. This is all the more so considering that FC Nantes had no influence whatsoever where and when CCFC would register the Player with a specific national league.

376. From a regulatory standpoint (i.e. the FIFA RSTP), a transfer is considered executed and finalised once a player is registered with the new association. This is only possible when the new association has received the player's ITC from his former association. The Panel finds that the Parties to the Transfer Agreement did not deviate from this approach. The Panel interprets the word "registered" in clause 2.1.4 as referring to registration by the FAW. Being registered with a national association, however, is the prerequisite for a player to play in national competitions. Thus, clause 2.1.4 does not provide any basis to suggest that the Player was to be registered by the Premier League as well as by the FAW. The Panel need not decide whether it is possible within the regulatory framework of the FIFA RSTP to condition the transfer of a player upon the latter being registered with a specific national league. The Transfer Agreement does not contain any such condition precedent, either explicitly or implicitly. Nothing on file and even less so in the wording of the Transfer Agreement indicates that FC Nantes accepted the risk of the Player potentially not being registered by the Premier League after the completion of the transfer.

377. There is no reasonable objective construction of clause 2.1.4 of the Transfer Agreement that the completion of the transfer required the registration of the Player with the Premier League. It is undisputed that the Player was registered with the new association on 21 January 2019, i.e. before the Player's death. Upon registration, the Player was at the disposal of the CCFC (and no longer at the disposal of FC Nantes). It is telling that CCFC did not inform or contact FC Nantes when the Premier League refused to register the CCFC Employment Contract. It would have been business common sense for CCFC to do so, if such registration had been a condition precedent to the Transfer Agreement. Although not relevant to the interpretation of the contract, the Panel further notes that until FC Nantes lodged its claim before FIFA, CCFC never claimed that the Transfer Agreement was conditional upon the Player being registered with the Premier League. Only once the player had passed away and the claim was filed was this objection raised, which indicates that such understanding is less a consequence of business common sense but rather an interpretation employed for legal reasons.

378. This interpretation is not contradicted by the fact that the requirement for registration is followed by the wording "*and that the Player's ITC has been released*". The release of the ITC and the registration of a player are two sides of the same coin. The same approach is applied in Article 8(2)(5) of Annex 3 to the FIFA RSTP, which provides as follows:

> "*Once the ITC has been delivered, the new association shall confirm receipt and complete the relevant player registration information in TMS.*"

379. The Panel notes that the language used in clause 2.1.4 of the Transfer Agreement reflects the relevant provision in the FIFA RSTP. Since both Parties are experienced stakeholders in the world of football, it is reasonable and fair to interpret objectively that clause 2.1.4 of the Transfer Agreement refers to the factual matrix and the standing practice of the football industry.

380. The view of the Panel is further supported when looking at clause 5.3 of the Transfer Agreement. The latter provides as follows:

> "[CCFC] *hereby represents and warrant to* [FC Nantes] *that it is duly entitled as at the date hereof to register the Player under the* [CCFC] *Playing Contract and secure all his right to immediately commence playing professional football.*"

381. This provision qualifies the right to commence playing professional football as a warranty of CCFC and not as a condition precedent of the Transfer Agreement. This makes sense in the view of the Panel, since FC Nantes had no control over the CCFC Employment Contract and the registration of the Player in the various competitions.

382. Furthermore, although CCFC was not scheduled to participate in FA Cup matches or UEFA competitions at the time of or shortly after the transfer, it remained undisputed between the Parties that CCFC could hypothetically have fielded the Player in such competitions, even if the Premier League would not register the CCFC Employment Contract. While it was clearly CCFC's intention to field the Player also in Premier League matches, the Panel considers the possibility of fielding the Player in FA Cup

matches and UEFA competitions a clear indication that the Player had become a "[CCFC] *player*".

383. Consequently, the condition precedent in clause 2.1.4 of the Transfer Agreement has also been satisfied.

f) What are the consequences of the above findings?

384. Since the Player's transfer from FC Nantes to CCFC was completed and because all conditions precedent in clause 2.1 of the Transfer Agreement were satisfied prior to the Player's death, CCFC's payment obligations towards FC Nantes are triggered, as recorded in the Transfer Agreement.

385. The present proceedings only concern the first instalment of the transfer fee in the amount of EUR 6,000,000 out of the total transfer fee of EUR 17,000,000.

386. FC Nantes' claim for the first instalment of the transfer fee in the amount of EUR 6,000,000, plus 5% interest *per annum* as from 27 January 2019 until the date of effective payment, is upheld.

g) Other arguments

387. The Panel notes that CCFC also alluded to different arguments that would allegedly render the Transfer Agreement void, such as potential illegal bribing in order to procure CCFC's agreement to the transfer, the alleged existence of third-party ownership, the illegality of the Transfer Agreement or alleged breaches of the regulations governing transfers. These arguments were raised in the context of CCFC's request for a stay of the proceedings (and then again shortly in CCFC's Appeal Brief). However, insofar as it concerns the substance of the case, the Panel finds that such allegations remained insufficiently substantiated and dismisses them on such basis.

B. Conclusion

388. Based on all the above, and after taking into due consideration all the evidence produced and all arguments made, the Panel finds that:

- Since the Player's transfer from FC Nantes to CCFC was completed and because all conditions precedent in clause 2.1 of the Transfer Agreement were fulfilled prior to the Player's death, FC Nantes' claim for the first instalment of the transfer fee in the amount of EUR 6,000,000, plus 5% interest *per annum* as from 27 January 2019 until the date of effective payment, is upheld.

- FIFA's rejection to adjudicate and decide on CCFC's set-off claim is upheld, because either FIFA had no mandate over that claim irrespective of whether it had discretion to reject jurisdiction over such claim.

- Consequently, also this CAS Panel has no mandate to adjudicate and decide on the set-off claim.

- Since this Panel will not decide on CCFC's set-off claim, this dispute is ripe for final adjudication. Consequently, the Panel issues a final Award.

- The Appealed Decision is confirmed.

389. All other and further motions or prayers for relief are dismissed

XII. COSTS

390. Article R64.4 CAS Code provides the following:

> "*At the end of the proceedings, the CAS Court Office shall determine the final amount of the cost of arbitration, which shall include:*
>
> - *the CAS Court Office fee,*
> - *the administrative costs of the CAS calculated in accordance with the CAS scale,*
> - *the costs and fees of the arbitrators,*
> - *the fees of the ad hoc clerk, if any, calculated in accordance with the CAS fee scale,*
> - *a contribution towards the expenses of the CAS, and*
> - *the costs of witnesses, experts and interpreters.*
>
> *The final account of the arbitration costs may either be included in the award or communicated separately to the parties. The advance of costs already paid by the parties are not reimbursed by the CAS with the exception of the portion which exceeds the total amount of the arbitration costs.*"

391. Article R64.5 CAS Code provides the following:

> "*In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule and without any specific request from the parties, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties.*"

392. Having taken into account the outcome of the arbitration, in particular the fact that CCFC's appeal is dismissed, the Panel finds it reasonable and fair that the costs of the arbitration, in an amount that will be determined and notified to the Parties by the CAS Court Office, shall be borne in full by CCFC.

393. Furthermore, pursuant to Article R64.5 CAS Code, the Panel has discretion to grant the prevailing party a contribution toward its legal fees and other expenses incurred in connection with the proceedings.

394. In this respect, the Panel considers the following circumstances of particular relevance:

- Two rounds of voluminous written submissions were filed, substantiated by a significant number of expert reports.

- The proceedings were very lengthy by CAS standards due to several requests for extensions of time limits filed and agreed upon by the Parties.

- An extensive list of procedural issues was addressed to the Panel, which resulted in a significant number of letters and submissions being filed, in particular with respect to CCFC's repeated requests for a stay of the proceedings, CCFC's document production requests and CCFC's continued requests to change the scope of the Bifurcated Issues, all of which were eventually dismissed.

- In the absence of more detailed submissions on costs and/or an overview of the specific expenses incurred, the Panel cannot determine the amounts of costs incurred by FC Nantes or whether the costs incurred by FC Nantes were reasonable, but it finds that FC Nantes legitimately incurred significant legal fees and costs related to expert witnesses in order to – out of precaution – defend itself against the substance of CCFC's set-off claim.

- While the Panel considered a hearing necessary regardless of any preference indicated by the Parties, FC Nantes indicated that it did not consider it necessary for a hearing to be held, whereas CCFC asked for a hearing to held. Given that the 2-day hearing required the presence (either virtually or in person) of an impressive number of counsel and experts from various jurisdictions, the costs related thereto must have been significant.

- The present proceedings were conducted as a full-fledged international commercial arbitration and, at least insofar as CCFC's set-off claim is concerned, raised complex legal issues.

- All together, the complexity of the legal issues at stake and the volume of the case file was significantly larger than the average CAS proceeding, justifying also a significantly higher contribution towards the costs incurred by the prevailing party.

- While the legal regime applicable to appeals arbitration proceedings as set forth in the CAS Code provides for a contribution to legal fees and expenses only, i.e. not all costs are recoverable, taking into account the special characteristics of these proceedings, the Panel finds that a symbolic contribution is not appropriate and that a substantial contribution towards the necessarily significant costs incurred by FC Nantes is warranted.

395. In the light of the above considerations, the Panel finds it reasonable and fair that CCFC shall bear its own costs and pay a contribution towards the legal fees and other costs incurred by FC Nantes in connection with these arbitration proceedings in the amount of CHF 110,000.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 20 November 2019 by Cardiff City Football Club Limited against the decision issued on 25 September 2019 by the Players' Status Committee of the *Fédération Internationale de Football Association* is dismissed.

2. The decision issued on 25 September 2019 by the Players' Status Committee of the *Fédération Internationale de Football Association* is confirmed.

3. The costs of the arbitration, to be determined and served on the Parties by the CAS Court Office, shall be borne in full by Cardiff City Football Club Limited.

4. Cardiff City Football Club Limited shall bear its own costs and pay a contribution of CHF 110,000 (one hundred and ten thousand Swiss Francs) towards the legal fees and other expenses incurred by SASP Football Club de Nantes in connection with these arbitration proceedings.

5. All other and further motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 26 August 2022

THE COURT OF ARBITRATION FOR SPORT

Ulrich Haas
President of the Panel

Andrew de Lotbinière McDougall QC
Arbitrator

Nicholas Stewart QC
Arbitrator

Dennis Koolaard
Ad hoc Clerk