CAS 2023/A/9963 Santos FC v. Unión Deportiva Almería SAD & FIFA

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Wouter Lambrecht, Attorney-at-law, Geneva, Switzerland

Arbitrator: Mr Rui Botica Santos, Attorney-at-law, Lisbon, Portugal

Arbitrator: Prof. Miguel Cardenal Carro, Professor, Madrid, Spain

in the arbitration between

Santos Futebol Clube, São Paulo, Brazil

Represented by Mr Cristiano Cáus, Mr Raphael Paçó Barbieri, Ms Helena Resstel Meirelles e Silva and Mr Leonardo Franco Belloti, Attorneys-at-law, CCLA Advogados, São Paulo, Brazil

- Appellant -

and

Unión Deportiva Almería SAD, Almería, Spain

Represented by Mr Luís Cassiano Neves, Ms Matilda Costa Dias, Mr Frederico Bensimon, Mr Gabriel Eguinoa and Mr Kosmas Mitsios, Attorneys-at-law, 14 Sports Law, Lisbon, Portugal

- First Respondent -

and

Fédération Internationale de Football Association, Zurich, Switzerland

Represented by Mr Miguel Liétard Fernández-Palacios, FIFA Director of Litigation and Mr Alexander Jacobs, FIFA Senior Legal Counsel, Zurich, Switzerland

- Second Respondent -

I. PARTIES

1. Santos Futebol Clube ("Santos" or the "Appellant") is a professional football club with registered offices in Santos, Brazil. Santos is registered with the Brazilian Football Federation which in turn is affiliated to the *Fédération Internationale de Football Association* ("FIFA").

2. Unión Deportiva Almería SAD ("Almería" or the "First Respondent"), is a professional football club with registered offices in Almería, Spain. Almería is registered with the Spanish Football Federation which in turn is affiliated to FIFA.

3. The *Fédération Internationale de Football Association* (the "Second Respondent" or "FIFA") is an association under Swiss law with registered office in Zurich, Switzerland. FIFA is the governing body of international football exercising regulatory, supervisory and disciplinary functions over national associations, clubs, officials and football players at worldwide level.

4. Hereinafter, Santos and Almería are jointly referred to as the "Contracting Parties", Almería and FIFA are jointly referred to as the Respondents and Santos, Almería and FIFA are jointly referred to as the "Parties".

II. FACTUAL BACKGROUND

A. Introduction

5. The summary below contains the main relevant facts, established based on the written and oral submissions of the Parties, and the evidence examined during these proceedings. The background information contained herein is given solely for the purpose of providing a summary of the matter in dispute. Where relevant, additional facts may be set out in connection with the legal discussion.

B. Background Facts

6. Somewhere at the beginning of July 2022, the Contracting Parties started negotiating the possible transfer of the player Kaiky Fernandes Melo (the "Player") from Santos to Almería.

7. Santos' initial position during the transfer negotiations was that it wanted to receive the amount of EUR 7,000,000.00 in one single instalment. Almería on the other hand made it clear that it would only be able to pay a transfer fee over a longer period of time in different instalments.

8. In order to find an agreement that would work for both Contracting Parties, Almería proposed to work with an assignment of receivables with Almería agreeing that it would cover the interests and the administrative fees for such financial operation up to a certain maximum. The assignment would allow Santos to receive a substantial upfront payment on the transfer fee whilst allowing Almería to make payments in instalments.

9. At this point in time, Santos indicated that due to "*the reputation of Brazilian clubs and that of Santos*" it did not know if the assignment of receivables would work which is why it sought an additional protection in the transfer agreement in case it would be unable to secure such assignment.

10. On 18 July 2022, and in light of the above considerations, the Contracting Parties entered into a transfer agreement for the permanent transfer of the Player from Santos to Almería (the "Transfer Agreement").

11. The relevant parts of the Transfer Agreement read as follows:

*"**SECOND CLAUSE – TRANSFER FEE AND PAYMENT CONDITION***

Fixed Transfer Fee

*2.1. In consideration of the transfer of the **PLAYER**'s rights, **ALMERIA** shall pay to **SANTOS FC** the Fixed Transfer Fee in the amount of **€7.000.000,00 (Seven Million Euros)**, which shall be inclusive of Solidarity Mechanism and Training Compensation due to **SANTOS FC** and other football clubs (if applicable) to be paid in five installments, as follows:*

(i) €1.500.000,00 (One Million and Five Hundred Thousand Euros) to paid until 30th October 2022;

(ii) €1.500.000,00 (One Million and Five Hundred Thousand Euros) to paid until 30th October 2023;

(iii) €1.500.000,00 (One Million and Five Hundred Thousand Euros) to paid until 30th October 2024;

(iv) €1.500.000,00 (One Million and Five Hundred Thousand Euros) to paid until 30th October 2025;

(v) €1.000.000,00 (One Million Euros) to paid until 30th October 2026;

[…]

*2.10. In the event that **SANTOS FC** decides to assign receivables to a certain bank and/or financial institution, **ALMERIA** will acknowledge and countersign the relevant sale and assignment of accounts receivable, after having been revised by its legal advisors, and will confirm that the payment shall be effected into the stated account of the bank by signing the Notification of Assignment once **SANTOS FC** has notified the sale and the assignment of receivables to **ALMERIA,** subject to not having any liability towards the bank. In any event **ALMERIA** shall not bear any costs with such assignment that exceeds the total amount of interest of 5.1% referring to the payment set forth in clause 2.1 point (i), (ii) and (iii) above. **ALMERIA** shall not pay for, or bear, any additional costs, such as restructuring fees, legal fees, etc. attached to the assignment.*

*2.11. If **SANTOS FC** is unable to secure the assignment set forth in 2.10. above within 30 (thirty) says* [sic] *as of the signature of this Agreement, the instalments set forth*

*in Clause 2.1. (i), (ii) and (iii) above shall become due and payable by **ALMERIA** within 15 days as of notification by **SANTOS FC** of its inability to secure the assignments, but such notification shall never occur before 30 (thirty) days have passed as of the signature of this Agreement.*

2.12. In the event, ALMERIA fails to make payment set out in Clause 2.1 or 2.11, if applicable, on the due date agreed herein, a interest at the rate of five percent (5%) per year shall be applied from the due date until the date of the complete payment.

[…]

NINETH CLAUSE – GOVERNING LAW AND JURISDICTION:

9.1. This Agreement shall be governed by and interpreted in accordance with FIFA Regulations, as well as the complementary rules enacted by FIFA from time to time and, subsidiary, the Swiss Law.

9.2. Any and all claim or dispute arising out of or related to this Agreement shall be directly and exclusively submitted to the competent bodies of the FIFA Football Tribunal (Players' Status Chamber / Dispute Resolution Chamber) with the possibility to appeal said decision to the Court of Arbitration for Sport (CAS), in accordance with the rules of the Code of Sports-related Arbitration. Before CAS, the language of the arbitration shall be English.

12. Following the conclusion of the Transfer Agreement, Almería reached out to various brokers that it had worked with in the past for the assignment of transfer receivables and connected them with Santos.

13. On 3 August 2022, Santos signed a document entitled "Indicative Term Sheet" with SUPERFUTE, a Dublin based company, which followed discussions between Ms Carla Della Bona and the latter company, "*concerning the possibility of SUPERFUTE purchasing on behalf of our investors the following transactions we are pleased to provide you with our indicative offer, made subject to our internal approvals for the transaction, to satisfactory documentation and to completion of our usual due diligence and onboarding procedures, as follows. Please note that the following is indicative only and is not binding on SUPERFUTE Trade Finance Partners Limited at this stage.* ("the Indicative Term Sheet").

14. The Indicative Term Sheet contained the following relevant elements:

3.	***SELLER***	*SANTOS FC*
4.	***PURCHASER***	*BHP ASSETS MANAGEMENT SLP and/or another member of BHP LUXEMBOURG group of companies or funds managed by the general partners ("the Funds" alongside investment by other venture capital funds or*

		financial institutions (together the "Investors")
5.	***DEBTOR***	*UNION DEPORTIVA ALMERIA SAD*
6.	***CLOSING DATE***	*14 days following the signing of the term sheet*
9.	***TOTAL RECEIVABLE VALUE***	*EUR 4.500.000,00*
10.	***RECEIVABLE INSTALMENTS***	*EUR 1,500,000.00 – 10 OCTOBER 2022* *EUR 1,500,000.00 – 10 OCTOBER 2023* *EUR 1,500,000.00 – 10 OCTOBER 2024*
11.	***PURCHASE PRICE***	*EUR **4,190,700.00***
12.	***STRUCTERING FEE***	*EUR; 30,000 of the Total Receivable Value (payable by SELLER to PURCHASER at closing)*
17.	***COMMITMENT & CONDITIONS TO CLOSING***	*[…] Subject to the foregoing, this Term Sheet is subject to contract and only contains a summary of indicative terms and conditions purely for discussion purposes, and therefore does not constitute a commitment on the part of the SELLER and is not binding upon PURCHASER.* *In addition, all terms described herein are subject to (amongst other things) to PURCHASER having access to all necessary due diligence information and satisfaction of customary and/or relevant conditions precedent including (without limitation);* *KYC and AML checks on all involved parties including English language versions of* *[…]* *This Letter of Interest sets forth our indictive terms of support based upon the transaction information we have received to date.* *The limited nature of our review of a request for a Letter of Interest does not include evaluation of all issues that may arise in our consideration of financial support. We will complete a thorough review of policy and*

creditworthiness issues at the time of the Final Commitment application.

[…]

This offer will expire at 5.00 pm central time on 12th August 2022 unless you execute this letter and return them to us prior to that time (which may be by facsimile transmission), where upon this letter which may be signed in one or more counterparts) shall become binding agreements.

*(**NB:** The signature page foresees for Indicative Term Sheet to be signed by Santos FC, as SELLER, SUPERFUTE TRADE FINANCE PARTNERS LIMITED, as placement/administrative agent for the PURCHASER, and by BHP ASSETS MANAGEMENT (BVI) LIMITED, as the PURCHASER. The case file only contains a signed version of the Indicative Term Sheet by Santos, no signed version by the placement/administrative agent and/or the Purchases is on file).*

15. On 12 August 2022, and following the signing of the Indicative Term Sheet, the Contracting Parties signed an amendment to the Transfer Agreement (the "Amendment") pursuant to which Almería undertook to pay Santos a total amount of € 274.772,00 (Two Hundred and Seventy-Four Thousand Seven Hundred and Seventy-Two Euros) to cover for the interests and fees resulting from the terms indicated in the Indicative Term Sheet.

16. The Amendment reads as follows in its relevant parts:

"WHEREAS

[…]

3. After the signature of the Transfer Agreement, SANTOS FC has expressed its intention to anticipate the first three (3) instalments of the Transfer Fee in a financial institution, which will entail for SANTOS FC the payment of interests amounting to € 274.772 (two hundred and seventy four thousand seven hundred and seventy two euros) while SANTOS FC and ALMERIA have agreed that said amount shall be anticipated by ALMERIA, irrespective of the terms of the Clause 2.10 of the Transfer Agreement, subject to the terms of the present Agreement.

4. In parallel, on August 10, 2022, SANTOS FC and ALMERIA entered into a Transfer Agreement for the permanent transfer of the Player Leonardo Carrilho Baptistao from SANTOS FC to ALMERIA;

[…]

NOW, THEREFORE, the Parties to this agreement hereby agree on executing the present Amendment to the Transfer Agreement by the inclusion of a new Clause SECOND BIS, which shall read as follows:

*"**SECOND BIS CLAUSE – EXTRA PAYMENT***

*In addition to the Transfer Fee agreed upon the SECOND CLAUSE of the Transfer Agreement, SANTOS FC has expressed its intention to anticipate the first three (3) instalments of the Transfer Fee in a financial institution, which will entail for SANTOS FC the payment of interests amounting to €274.772 (**two hundred seventy four thousand seven hundred seventy two euros**), irrespective of the terms of Clause 2.10 of the Transfer Agreement and subject to the terms of the present Clause.*

*In accordance with the negotiations carried out between ALMERIA and SANTOS FC, ALMERIA undertakes to anticipate SANTOS FC the amount of €274.772 (**two hundred seventy four thousand seven hundred seventy two euros**), which will be payable subject to and within ten (10) days since the effective issuance and receipt by ALMERIA of the International Transfer Certificate (ITC) of the Player Leonardo Carrilho Baptistao.*

[…]

In the event that, for whatever reason, the ITC of the Player Leonardo Carrilho Baptistao is not issued and received by ALMERIA, then the parties agree that ALMERIA will not be obliged to anticipate the amount of €274.772 (two hundred seventy four thousand seven hundred seventy two euros), and ALMERIA will only be obliged to pay interests in the terms and conditions agreed upon clause 2.10 of the Transfer Agreement.

For the sake of clarity, in the event the mentioned payment is to be considered as part of the Transfer Fee of the PLAYER, all the Parties agree that the amount of €274.772 (two hundred seventy-four thousand seven hundred seventy two euros) shall be inclusive of Solidarity Mechanism and Training Compensation due to SANTOS FC and/or any other football clubs (if applicable).

17. By means of a document dated 22 August 2022 (***NB**: The Panel notes that no proof was provided by the Parties as to the actual date the document was shared and by whom*) entitled "*Notification of Assignment of Accounts Receivable/Deed of Assignment*", Santos informed Almería as follows ("Notification of Assignment"):

"This DEED OF ASSIGNMENT relating to the Receivables due by Union Deportiva Almería, SAD, in favour of Santos FC ("accounts receivable") is made on, and is effective from, the date of Assignment between the Santos FC ("Assignor(s)" and Superfute Trade Finance Partners Ltd "(Assignee(s)" in the capacity in which the Assignee(s) receive the Debt "accounts receivable".

18. This Notification of Assignment further reads "*Santos FC has assigned its claims for payment in the amount of EUR 4,500,000"* and "*All moneys payable by you to us*

pursuant to the Agreements shall be paid to the Assignee's account unless and until you receive notice from the Assignee to the contrary […].

19. As confirmation of receipt of the above-mentioned Notice of Assignment, Almería was requested to sign the thereto attached Notice of Acknowledgement by means of which Almería acknowledged the accounts receivable indicating that "*we will transfer this amount at maturity to the bank account by Superfute Trade Finance Partners Limited.* Almería signed said Notice of Acknowledgement (***NB****:The Panel notes that no proof was provided by the Parties as regarding the actual date the document was signed by Almería and to whom it was sent*).

20. On 26 August 2022, Almería paid Santos the amount set forth in the Amendment together with a payment of EUR 1,050,000.00 in relation to the player *Leonardo Carrilho Baptistão*, whose registration rights had also been sold by Santos to Almería during the first half of August 2022.

21. On 2 September 2022, Santos sent an email to Almería informing it as follows:

"*Topic: Invoice Kaiky*

[…]

Unfortunately, we still haven't managed to complete the operation to bring forward the instalments of the contract and this is causing a lot of problems for Santos FC.

We need to activate clause 2.11 of the contract, but considering payment next Monday, 05/09.

Do you think that is possible? Can we send the invoice?"

22. On 5 September 2022, and following earlier answers from Almería, Santos sent new emails to Almería, insisting to be paid for "*Kaiky's contract*", adding a screenshot of the instalments and clause 2.11 of the Transfer Agreement and clarifying "*what we need to do is bring forward the payment of the 30 October instalment, as per cls 2.11*."

23. Finally, on 6 September 2022, Almería sent a new email to Santos indicating that "*it is not possible to make this advance. It will be done on the date indicated".*

24. On 22 September 2022 and lacking a counter-signed version of the Indicative Term Sheet or any payment pursuant thereto, Santos sent a termination letter to Superfute Trade Finance Partners Limited and BHP Asset Management Limited (the "Assignees").

25. In said letter (the "Termination Notice"), Santos *inter alia* indicated that *50 days after signing the Term Sheet, Santos has not yet received the Purchase and Assignment Contract and still pending documents and information related to said contract (Conditions Precedent for Payment of the Price of the Assignment) representing a breach of the Term Sheet*".

26. On the same day, Santos also forwarded the Termination Notice by email to Almería indicating in the email that because of this all documents signed in relation to the advance payment of the transfer contract of the player Kaiky "*are hereby cancelled*".

27. On 23 September 2022, BHP Asset Management Limited replied to the Termination Notice stating *inter alia* that "*the reason behind your decision "to cancel or issue a notice of termination" are not substantial enough ignoring or avoiding the indemnity given by Santos FC*" and that "*in order for the termination legally, both parties must sign the Notice in order to be enforceable and release Union Deportivo Almería, SAD*".

28. On 26 September 2022, Santos replied to the above correspondence ratifying in full its Termination Notice. More specifically, in its correspondence, Santos indicated the following:

"*With all due respect to your representative's knowledgeability on credit assignment basics, we must point out that his statements would be true and accurate in connection with the Term Sheet and the companies you represent only if there were an actual assignment of credits/receivables among Santos Futebol Clube ("Santos FC"), Unión Deportiva Almería, S.A.D. ("UD Almería"), Superfute Trade Finance Partners Limited ("Superfute") and any of the companies belonging to the BHP Luxemburg Group (including but not limited to BHP Asset Management (BVI) Limited and BHP Assets Management SLP) ("BHP Group").* ***As you are aware, such assignment has never occurred.***

Having made this initial and essential clarification, we hereby counter notify BHP Group and Superfute of the following:

1. Santos FC ratifies all the terms of its Termination Notice. Nonetheless, for the sake of clarity and good faith, we remind you that, although the term sheet signed among Santos FC, Superfute and BHP Group is a non-binding document indicating the main terms and conditions for the assignment and purchase of certain receivables by Santos FC, arising out of that certain Transfer Agreement (such receivables assignment and purchase being referred to as "Transaction"), Santos FC endeavored its best commercial efforts, since the execution of the Term Sheet through the date of the Termination Notice, to reach an agreement with BHP Group and Superfute on a final, binding and acceptable agreement to rule the Transaction and allow its closing.

2. You should note that the BHP Group and Superfute have not acted with the same degree of diligence as Santos FC. For your recollection, we enumerate some relevant examples that illustrate the preceding statement:

(i) BHP Group, as the purchaser set forth in the Term Sheet, failed to approve the Transaction contemplating all, and nothing less than all the receivables installments set forth in section 10 of the Term Sheet, in the total amount set forth in section 9 of the Term Sheet. Needless to say that

this failure directly and materially affects the proposed purchase price (section 11 of the Term Sheet).

(ii) Since August 3, 2022 (signing date of the Term Sheet) to the date of the Termination Notice, neither BHP Group nor Superfute requested one single document or information for purposes of customary due diligence process (as mentioned in the Term Sheet).

(iii) BHP Group failed to return to Santos FC a redraft of the definitive agreement for the Transaction, redlined and fairly negotiated by Santos FC. For instance, the 14 days' term established for the closing of the Transaction and for the exclusivity period (sections 7 and 16 of the Term Sheet, respectively) expired on August 17, 2022 – more than a month ago.

(iv) BHP Group has not made one single disbursement to Santos FC as demonstration of its firm commitment to conclude the Transaction – to the contrary, it has unilaterally excluded the amount of EUR 1,500,000.00 from the outstanding receivables being discussed under the allegation that the maturity date (October 10, 2022) was not aligned with BHP Group policies. In other words, it took almost two months from the signing of the Term Sheet for BHP Group to inform us of such internal policy rule.

[…]

7. Still in connection with BHP Group piece of advice on the indemnity section of the Term Sheet, we acknowledge those statements as BHP Group and Superfute's full admission that (i) the intended Transaction has not been closed and never came to effect, to the extent that BHP Group and Superfute understand that Santos FC will no longer sell you the receivables arising from the Transfer Agreement, and (ii) due to the non-conclusion of the Transaction, BHP Group and Superfute have no rights on such receivables and no rights towards Santos FC and UD Almería, in any capacity […]".

29. Still on the same day, Santos also sent a formal notice to Almería asking it to sign a document attached thereto acknowledging the cancellation of the assignment operation.

30. On 28 September 2022, Almería informed and shared with Santos a letter it had, as per its own admission, received from the Spanish fiscal authorities (the "*Agencia Tributaria*) on 15 September 2022, by means of which the *Agencia Tributaria* "embargoed" the amount of EUR 3.374.099,48 relating to a debt Santos had vis-à-vis the *Agencia Tributaria* ("the Embargo Notice").

31. Pursuant to this Embargo Notice, Almería was prohibited from making payments or signing any assignment of receivables in favour of third parties until Santos had regularized its debt with the *Agencia Tributaria*.

[**NB:** *The Panel notes that Almería did not submit the filled-out annexe it had to return to the Agencia Tributaria as per the letter it received on 15 September 2022, which at its point A1 requested Almería to inform the latter as follows:*

"In connection with the seizure of credits of the following obligor (debtor):

[…]

A: on the date of the notification of the diligence the situation of the seized credits is as follows:

[...]

Notification/s of the assignment of such claims has/have been received, which affects: All receivables.....][1]

32. On 29 September 2022, Mr Jorge Rubenstein, a director at BHP, sent an email to Santos challenging the Termination Notice, *inter alia* writing as follows:

"[…] Regarding the remaining comments I will not waste a single minute further because it is of very poor contents and fails to provide any reliable argument and YOUR CLIENT FAIL EVEN TO PROVIDE A SIMPLE INVOICE – 3 weeks after long efforts from our side is when a invoice was produced therefore put your facts rights before making silly statements. If saying the indemnity is not valid due to nonsense excuses, allow me to highlight to you the indemnity is enforceable therefore, is NO the money but your attitude patronising behaviour […]".

[**NB:** *The Panel notes that the Parties did not submit any further exchanges between Santos and BHP Asset Management Ltd and/or Superfute Trade Finance Partners Limited regarding Santos' termination of the Indicatiev Term Sheet, neither was any information regarding a possible complaint from the latter mentioned companies against Santos and/or Almería filed by the Parties.*]

33. On 3 October 2022, Santos sent a default notice to Almería in which it *inter alia* indicated that (i) "*75 days after signing the Transfer Agreement, Santos was not able to assign receivables of the Transfer Agreement to any bank and/or financial institution*". In the same letter, Santos acknowledged receipt of the notification that Almería had received from the *Agencia Tributaria* and shared with it, requesting Almería to pay the embargoed amount directly to the *Agencia Tributaria* and the remaining amount of EUR 851.128.52 to Santos within 15 days from receipt of the email.

[1] Translated from original "En relación con la diligencia de embargo de créditos del siguiente obligado al pago (deudor):
[…]
A: En la fecha de la notificación de la diligencia la situación de los créditos embargados es la siguiente:
[...]
Se ha/n recibido comunicación/es de la cesión de tales créditos, que afecta/n a: A todos los créditos…"

34. On 18 October 2022, Almería exchanged emails with its external counsel in which it wrote as follows:

"*As commented this morning, I enclose:*

1) Transfer contract between Santos and UD Almería, for the player KAIKY FERNANDEZ, for the amount of SEVEN MILLION EURO
2) Embargo notification. In the amount of THREE MILLION THREE HUNDRED SEVENTY FOUR EURO

As you will see in the contract and as anticipated, we undertook to pay first three instalments corresponding to the amount of FOUR MILLION AND A HALF EURO if we did not find a financer.

Deducting what SANTOS owes to the Spanish tax authorities, we owe them the amount of: ONE MILLION ONE HUNDRED TWENTY FIVE THOUSAND NINEHUNDRED EUROS, as we made them an advance payment of TWO HUNDRED SEVENTY FOUR THOUSAND SEVEN HUNDRED SEVENTY TWO EUROS).

As such we are looking for financing in the amount of EIGHT HUNDRED FIFTY ONE THOUSAND ONE HUNDRED TWENTY EIGHT EURO"[2].

35. On 20 October 2022, Almería's external counsel shared an offer they had received from a firm called GCS Funding regarding the sought after financing "*for the Santos credit discount*".

36. On 2 November 2022, Almería's external counsel shared the offer made by GCS Funding with Santos, an offer which foresaw a payment of EUR 665,000.00 for the factoring of the Santos credit of EUR 851,128.00, excluding legal fees and other costs.

37. On 4 November 2022, Santos, in reply to the offer of GGS Funding that Almería had shared, informed Almería that the amount it was owned as per article 2.11 of the Transfer Agreement was EUR 851,128.00 and that it would not pay any commissions

[2] Translated from: "Tal y como hemos conversado esta mañana te adjunto.
1) CONTRATO DE TRANSFERENCIA entre SANTOS y la UD Almería, del jugador KAIKY FERNANDEZ MELO, por un importe de SIETE MILLONES DE EUROS,
2) NOTIFICACION DE EMBARGO DE HACIENDA. Por importe de TRES MILLONES TRESCIENTOS SETENTA Y CUATRO EURO
Como te he comentado y veras en el contrato nos comprometimos a pagarle la cantidad las 3 primeras cuotas que corresponden al importe de CUATRO MILLONES Y MEDIO DE EUROS, si no encontrábamos una financiera,
Descontando lo que el Santos le adeuda a hacienda, le deberíamos abonar la cantidad de:
UN MILLÓN CIENTO VEINTICINCO MIL NOVECIENTOS EUROS, como le hicimos un adelanto de DOSCIENTOS SETENTA Y CUATRO MIL SETECIENTOS SETENTA Y DOS EUROS,
Por lo que queremos buscar financiación por importe de OCHOCIENTOS CINCUENTA Y UN MIL CIENTO VEINTIOCHO EUROS, en la fecha de vencimiento el 30/10/2024".

or taxes over the due balance. On the same day, Santos also asked Almería to share the proof of payment of the amounts that had been paid to the *Agencia Tributaria*.

38. On 7 November 2022 and later on 31 October 2023, Almería paid the amount of EUR 1,500,000.00 each to the *Agencia Tributaria*, corresponding to the first and second instalment of the transfer fee as contained in clause 2.10 of the Transfer Agreement.

39. No further communication took place between the Contracting Parties between the 4th of November 2022 and the date of Santos filing its complaint with FIFA.

C. Proceedings before the FIFA Players' Status Chamber ("FIFA PSC")

40. On 17 February 2023, Santos filed a claim against Almería with the FIFA PSC.

41. In its claim, Santos argued that Almería had breached the Transfer Agreement by not paying EUR 4,500,000.00 and had failed to comply with its financial obligations without cause within the given deadlines. Santos requested the FIFA PSC to order Almería to (a) present the proof of payment in the amount of EUR 3,374,099.48 to the *Agencia Tributaria* and to pay Santos the remaining amount of EUR 851,128.52 plus interests or (b) in case no payment had been made to the *Agencia Tributaria*, to pay Santos the amount of EUR 4,425,728.00 plus interests.

42. In its reply, Almería submitted that Santos had acted in bad faith by withholding information about its debt to the Spanish tax authorities in order to deceive it into accepting article 2.11 of the Transfer Agreement. According to Almería, it accepted the acceleration foreseen in clause 2.11 of the Transfer Agreement without knowing of such debt and without knowing that the assignment would never be feasible or possible. As a result, Almería submitted that article 2.11 of the Transfer Agreement must be considered null and void and that, consequently, the payment of the fixed fee had to follow the deadlines established under article 2.10 of the Transfer Agreement.

43. On 4 July 2023, a Single Judge of the FIFA PSC rendered a decision (the "Appealed Decision"), with the operative part reading as follows:

> "*1. The claim of the Claimant, Santos Futebol Clube, is premature.*
>
> *2. The final costs of the proceedings in the amount of USD 25,000 are split between the parties and shall be paid to FIFA in the following manner:*
>
> *a) USD 12,500 by the Claimant. As the Claimant already paid the amount of USD 5,000 to FIFA as advance of costs at the start of the proceedings, the residual amount of USD 7,500 is still to be paid as procedural costs.*
>
> *b) USD 12,500 by the Respondent, UD Almería.*"

44. On 17 August 2023, the grounds of the Appealed Decision were communicated to the Contracting Parties, and they determine, *inter alia*, as follows:

"*8. Nevertheless, and as confirmed by both parties, the Judge noted that, ultimately, this assignation failed to materialize. In particular, the Judge observed that, although the parties tried to implement this provision, the implementation of art. 2.10 of the agreement was unsuccessful.*

9. As a result, the Judge understood that he should first and foremost determine the legal consequence of this failure to assign the payments to a third party, as foreseen in clause 2.10 of the transfer agreement.

10. In particular, the parties did not agree to the assignment of the receivables. As a result, the agreement to assign the receivables became void due to the parties' lack of agreement as how clause 2.10 should be implemented. The Single Judge then determined that there was a the lack of agreement on this point. As a result, clause 2.11 is applicable and the "first three instalments would become due immediately". Nevertheless, the Single Judge understood from the remarks of both parties that this point was not challenged and the both Parties considered, and then agreed, that the original payment schedule, as stipulated in the transfer agreement remains in effect. The Judge therefore concluded that the Respondent needs to comply with the original payment schedule, as indicated in point I. 1 above.

[…]

17. The Judge also noted that it does appear that the Respondent fundamentally acknowledged the existence of debt towards the AEAT, in the amount of EUR 3,374,099.48. The Single Judge noted that the Claimant, in its duplica, contests said debt but provides no substantive argument in this regard. Therefore, the Judge verified that, based on the information on file, that the Respondent appears to be liable to cover the aforementioned debt towards the AEAT (in accordance with the current state of the alleged proceedings before the AEAT).

18. Therefore, given that, as explained above, (1) the original payment schedule needs to be respect (2) the AEAT seized all due amounts up to the settlement of a debt EUR 3,374,099.48, the Judge therefore understood that the Respondent shall pay to the Claimant the agreed transfer fee of EUR 7,000,000 in accordance with the original schedule, i.e. five instalments of EUR 1,500,000 between 30 October 2022 until 30 October 2026. However, in compliance with the applicable tax legislation, the single Judge considered that he shall determine said payments within the parameters established by the AEAT, up until said debt is settled.

[…]

23. Thus, given that the next payable instalment would be due on 30 October 2024, the Single Judge determined that he is not in a position to order a payment that is not yet outstanding. In addition, the Single Judge underlined that, based on the information on file, the decision rendered by the AEAT might be susceptible to

appeal, rendering it non-final at this stage. As a result, the Single Judge could only determine that the claim of the Claimant is premature".

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

45. On 6 September 2023, Santos filed a Statement of Appeal with the CAS against the Appealed Decision, in accordance with Articles R47 and R48 of the February 2023 edition of the CAS Code of Sports-related Arbitration (the "CAS Code").

46. In its Statement of Appeal, accompanied by 10 exhibits, Santos *inter alia*, nominated Mr Rui Botica Santos, Attorney-at-law in Lisbon, Portugal as arbitrator.

47. On 11 September 2023, the CAS Court Office acknowledged receipt of the Statement of Appeal and notified the same to Almería and FIFA, communicating several procedural instructions.

48. On 14 September 2023, and following a request thereto by the Appellant, the CAS Court Office sent a further letter to the Parties confirming *inter alia* that the Appellant's deadline to file its Appeal Brief was extended until 28 September 2023.

49. On 21 September 2023, the First Respondent nominated Mr Kepa Larumbe, Attorney-at-law in Madrid, Spain as arbitrator. Said nomination was accepted by the Second Respondent on the same day.

50. On 29 September 2023, the CAS Court Office acknowledged receipt of the Appeal Brief filed by the Appellant on 28 September 2023 and pursuant to Article R55 of the CAS Code, the Respondents were invited to file their Answer within 20 days from receipt the email and this in compliance with Article R31 (3) of the CAS Code.

51. On 29 September and 2 October 2023, the First and Second Respondent, pursuant to Article R55.3. of the CAS Code, requested that their time-limit to file their Answer would be fixed once the advance of costs had been paid. This request was confirmed by the CAS Court Office on 29 September and 4 October 2023 respectively.

52. On 26 October 2023, the CAS Court Office drew the Parties' attention to a further disclosure of Mr Kepa Larumbe, who had started a new position as Director of the Sports Legal Department of LaLiga, the Spanish League.

53. On 3 November 2023, the CAS Court Office informed the Parties that following a challenge by the Appellant, Mr Kepa Larumbe had decided to step down and invited the Respondents to jointly nominate a new arbitrator failing which an arbitrator would be appointed pursuant to Article 53 of the CAS Code.

54. On 8 November 2023, Santos paid the entire advance of costs of the proceedings.

55. On 10 November 2023, the Respondents jointly nominated Prof. Miguel Cardenal Carro, Professor in Madrid, Spain, as arbitrator.

56. On 13 November 2023, the CAS Court Office invited the Respondents, pursuant to Article R55 of the CAS Code, to file their Answer within 20 days from receipt the email and this in compliance with Article R31 (3) of the CAS Code.

57. On 12 and 29 December 2023, and in line with the extensions granted by the CAS Court Office, the Second Respondent and First Respondent filed their respective Answers.

58. On 29 December 2023, the CAS Court Office notified the Answers to the Appellant and informed the Parties that unless the President of the Panel ordered otherwise on the basis of exceptional circumstances, that they, pursuant to Article 56 of the CAS Code, were no longer authorized to supplement or amend their requests or their argument nor to produce new exhibits. In the same letter, the Parties were asked to inform the CAS Court Office (i) whether they wanted to celebrate a case management conference with the Panel and (ii) whether they preferred a hearing to be held or for the Panel to issue an award based solely on the Parties' written submissions.

59. On 9 January 2023, and as per the above instructions, FIFA informed the CAS Court Office that it did not consider a hearing nor a case management to be necessary. On 9 and 10 January 2023, Almería and Santos respectively, informed the CAS Court Office that they did consider a hearing to be necessary but did not require a case management.

60. On 10 January 2023, the CAS Court Office confirmed receipt of the Parties' input regarding the need for a hearing and case management conference and informed the Parties that pursuant to Article R54 of the CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the Panel appointed to hear the appeal was constituted as follows:

President:	Wouter Lambrecht, Attorney-at-law, Geneva, Spain.
Arbitrators:	Rui Botica Santos, Attorney-at-law, Lison, Portugal.
	Miguel Cardenal Carro, Professor in Madrid, Spain.

61. On 24 January 2024, the CAS Court Office, informed the Parties that, pursuant to Article R57 of the CAS Code, the Panel had decided to hold a hearing.

62. On 21 February 2024, following numerous exchanges with the Parties regarding their availabilities, the CAS Court Office confirmed that an in-person hearing had now been fixed for the 3rd of May 2023, and invited the Parties and their witnesses to appear on said date at the hearing.

63. On 26 February 2024, the CAS Court Office shared the Order of Procedure with the Parties, which was duly signed and returned by the First Respondent, the Second Respondent and the Appellant on respectively 27 February, 28 February and 4 March 2024.

64. On 3 May 2024, the in-person hearing took place in the present procedure. In addition to the Panel and Ms Lia Yokomizo, Counsel to the CAS, the following persons attended the hearing:

For Santos	-	Mr Cristiano Caús, legal counsel.
	-	Mr. Raphael Paçó Barbieri, legal counsel.
For Almería	-	Mr Luis Cassiano Neves, legal counsel.
	-	Mr Gabriel Eguinoa, legal counsel.
	-	Mr. João Gonçalvés, witness, sports director – external consultant to the Board for Almería.
	-	Mr Jorge Rubenstein, witness.
	-	Ms Mariana Villas-Boas, interpreter.
For FIFA	-	Mr Miguel Liétard Fernández-Palacios, Director of Litigaton
	-	Mr Alexander Jacobs, Senior Legal Counsel.

65. At the outset of the hearing, the Parties confirmed that they had no objections to the constitution of the Panel and to the way the procedure had been conducted up until then. Subsequently, and prior to opening statements, Almería informed the Panel and the other parties that Ms Carla Della Bona, due to a last-minute event, would most likely not be participating in the hearing in which case Almería would waive said witness. Santos from its side opposed the participation of both other witnesses put forward by Almería, namely Mr João Gonçalves and Mr Jorge Rubenstein. For what concerned Mr João Gonçalves, Santos indicated that he was an employee of Almería, and could therefore not be impartial and that if the Panel were to take his testimony, it would have to be taken with caution due to his partiality. For what concerned Mr Jorge Rubenstein, Santos indicated that he was a partner at BHP Asset Management and had threatened to sue Santos for damages as Santos allegedly caused the non-execution of the assignment of receivables. This issue was also put to this Panel and since Mr Rubenstein could take an advantage thereof, he had a direct interest in the outcome of the case. Faced with such challenge, and after having given the opportunity to Almería to express its point of view, the Panel, following a recess, informed the Parties that it agreed with Almería to the extent that both witnesses proposed by Almería, Mr João Gonçalves and Mr Jorge Rubenstein, were duly identified in its Answer, and that, if anything, the issue was not so much about them testifying – which they would be allowed to do – but about the relevant weight that could be given to their declaration, keeping in mind their relationship with Almería (Mr João Gonçalves) and their possible direct/indirect interest in the outcome of the case (Mr Jorge Rubenstein).

66. The Parties then went on to make their opening statements after which the witnesses put forward by Almería were heard.

67. Mr João Gonçalves, after having been invited by the Panel, pursuant to Article R44.2. of the CAS Code, to tell the truth, subject to the sanctions of perjury, made his witness statement and the Parties, as well as the Panel, had the opportunity to question to him.

68. In his witness statement, Mr João Gonçalves confirmed the dynamics of the negotiation as set out in the factual elements (cfr. *supra* para 6-7), confirmed that Almería could not pay a big sum upfront and that the assignment of receivables, put on the table by Almería was the only way to make the deal happen. He explained that it would be a joint effort between Almería and Santos to obtain such financing with Almería agreeing to cover the costs in relation thereto. Mr João Gonçalves then went on to confirm that offers were sought from different parties but that only one party, opposed to banks for which the timeframe was too short, was also able to factor the 1st instalment of the transfer fee. Mr João Gonçalves also confirmed that it was Almería that had drafted Article 2.11 of the Transfer Agreement and explained that Santos wanted such surety *inter alia* because of its own bad reputation and that of Brazilian clubs in general in that Santos had doubts that it would be able to assign the receivables. Almería accepted to give such surety since it had previously done similar financial operations and its credit rating had never been a problem. Finally, he also stated that Santos never mentioned its debt or the possible issue with the *Agencia Tributaria*.

69. Following Mr João Gonçalves' witness statement, Mr Jorge Rubenstein was to be heard. However, considering the difficulties that existed in correctly identifying and examining Mr Jorge Rubenstein, the Respondent finally withdrew his testimony. Considering these circumstances, Almería was then offered to possibility to call the third witness, Ms Carla Della Bona, at which point it was indicated that she had not been cooperative leading up to the hearing and that Almería preferred to move to closing.

70. The Parties then went on to make closing arguments and at the end of the hearing, the Parties indicated that no additional evidentiary measures were considered necessary and they expressly stated that their right to be heard and to be treated equally in the proceedings had been fully respected.

IV. SUBMISSIONS OF THE PARTIES

71. The following section summarises the Parties' main arguments in support of their respective requests for relief with respect to the merits of the case. The Panel confirms that, in reaching its decision, it carefully considered all the submissions and evidence presented by the Parties, even if they have not been specifically summarised or referred to in the present arbitral award. More precisely, only those arguments which the Panel considers relevant to decide the matter under appeal have been summarised herein.

A. The Appellant

72. In its Appeal Brief, Santos submitted the following requests for relief:

> *"i. Declare that the Court of Arbitration for Sports has jurisdiction to hear the Appellant's claims against the Respondents;*
>
> *ii. Set aside the Decision rendered by the FIFA Players' Status Chamber on 17 August 2023, reference number FPSD-9347, in its entirety;*
>
> *iii. Declare that Clause 2.11 of the Transfer Agreement should apply and that the first three installments of the transfer fee became due after 15 (fifteen) days from the notification by the Appellant;*
>
> *iv. Determine that the First Respondent has to pay 2.725.728,00 (two million seventy thousand twenty-five hundred seventy hundred and twenty eight) plus interest of 5% per year as from 19 October 2022. From that, €1.874.099,48 (one million eight hundred and seventy four thousand ninety-nine euros and forty-eight cents) shall be paid directly to the Spanish Tax Authority and the remain balance to the Appellant;*
>
> *v. Determine that the Respondents shall bear all the arbitration costs pertaining to these CAS proceedings; and shall pay the Appellant a contribution for its legal costs incurred in an amount of CHF 20,000 (twenty thousand Swiss francs)*".

73. Santos' submissions in support of its requests for relief may, in essence, be summarised as follows:

- Santos started the negotiations with Almería seeking to be paid the amount of EUR 7,000,000.00 in one single instalment and Santos never wanted to be paid in five instalments as was finally reflected in the Transfer Agreement.
- Almería on the other hand had indicated that it could not pay the entire amount in one single instalment but that the *impasse* between the Contracting Parties could be solved with the assignment of receivables for which Almería would cover the costs, be it with a maximum of up to 5.1% of the amount to be assigned.
- It was Almería that suggested the possibility to assign the receivables and accepted that if Santos was not able to secure the assignment, it would have to pay the full amount of EUR 4,500,000.00 directly.
- As such, the common intention of the Contracting Parties had never been for Almería to pay Santos the amount of EUR 4,500,000.00 in three instalments as now claimed by Almería and as decided in the Appealed Decision.

- The Appealed Decision and its reasoning is contradictory in and by itself in that it held that "*article 2.11 is applicable and the first three instalments would become due immediately*" whilst then holding, and without any such agreement actually existing that "*from the remarks of both parties that this point was not challenged and both parties considered, and then agreed, that the original payment schedule, as stipulated in the transfer agreement remains in effect*".

- Article 2.10 of the Transfer Agreement provided the discretion to Santos to decide on whether or not to assign the receivables, and Santos in good faith tried to do so, which is evidenced by the fact that it signed the Indicative Term Sheet and negotiated with the financial partner proposed by Almería.

- Whilst Santos signed the Indicative Term Sheet, the Assignees never returned a signed copy of the same document, did not approve the transaction, did not send a final agreement nor did they request any other document that they needed according to the terms of the Indicative Term Sheet for the purposes of a customary due diligence process. Assignees also did not make any payment to Santos.

- Due to this situation, on 2 September 2022, Santos informed Almería of the impossibility of completing the assignment as per the Indicative Term Sheet and the need to trigger the application of article 2.11 of the Transfer Agreement, and finally following a negative answer from Almería and lacking any progress with the financial institutions, even 50 days after the signing of the Indicative Term Sheet, Santos was forced to send the Termination Notice to the financial institutions and Almería due to the breach of contract by the Assignees. This termination notice was sent well after the "*30-day minimum period that Santos had to complete before triggering clause 2.11 of the Transfer Agreement*".

- Santos at all times acted in good faith to successfully conclude the assignment of credits but such transaction did not occur due to the fault of the Assignees.

- Almería from its side never had the intention to honour article 2.11 of the Transfer Agreement and when formally requested to pay the balance between the first three instalments and the amount embargoed by the *Agencia Tributaria*, it disregarded such notice and started to seek other companies willing to acquire Santos' credit, be it without the knowledge nor authorization of Santos.

- Article 2.11 of the Transfer Agreement is valid and binding and in order for the first three instalments to be anticipated, three conditions had to be met: *(i) Santos was not able to assign the credits as per Clause 2.10, (ii) it should notify Almería about this giving it a fifteen-days deadline to*

pay the full amount, and (iii) the notice should not have been sent before thirty days from the execution of the Transfer Agreement.

- All conditions for the application Article 2.11 of the Transfer Agreement were met and 15 days after Santos' official request to Almería to pay, Almería should have paid the remaining balance, and this pursuant the principle of *pacta sunt servanda*.

- Santos always acted in good faith but this was not reciprocal in that Almería should not have made Santos believe that it would pay the first three instalments should Santos not be able to complete the assignment of receivables.

- Pursuant to the principle of *venire contra factum proprium* the Respondent should be prevented from refuting the application of article 2.11 of the Transfer Agreement, a clause which moreover had been drafted and included in the Transfer Agreement meaning that any ambiguity should be interpreted in favour of Santos.

- In the end, Almería managed to achieve what it was aiming for, *i.e.*, to acquire the Player on permanent basis without having to pay the Appellant a transfer fee in advance. This was never the intention of Santos, and the Appealed Decisions should be overturned.

B. The First Respondent - Almería

74. In its Answer, Almería submitted the following requests for relief:

I. ***Reject the Appeal*** *submitted by Santos Futebol Clube in its entirety;*

II. ***Confirm the Appealed Decision****, by determining that the Parties shall abide by the original payment schedule of the Transfer Fee established under Clause 2.1 of the Transfer Agreement, and, consequently, that Clause 2.11 of the aforesaid agreement shall not be applicable to the present dispute; or, in the alternative,* ***Amend the Appealed Decision****, by determining that the Parties shall abide by the original payment schedule of the Transfer Fee established under Clause 2.1 of the Transfer Agreement, and, consequently, that Clause 2.11 of the aforesaid agreement shall not be applicable to the present dispute;*

III. Order the Appellant to pay all the arbitration costs of the present proceedings, in addition to a contribution towards the First Respondent's legal expenses in the amount of ***€6.000, 00 (Six Thousand Euros)****".*

75. Almería's written and oral submissions in support of its requests for relief may, in essence, be summarised as follows:

- It is not disputed between the Contracting Parties that the assignment of receivables was a necessary condition as such assignment was deemed to be the only feasible alternative to successfully address both

Contracting Parties' needs and limitations to make the transfer happen, *i.e.*, Almería could not make a large payment upfront, and the assignment of receivables would allow Almería to pay the transfer fee in instalments to the financial institution as per article 2.10 of the Transfer Agreement with Santos receiving a substantial amount upfront due to the assignment.

- Against this background, articles 2.1, 2.10 and 2.11 of the Transfer Agreement were agreed upon, with article 2.1. containing the payment schedule that Almería was comfortable with, article 2.10 granting the possibility to Santos to assign the first three instalments as mentioned in the payment schedule and article 2.11 detailing the consequences in case Santos would be unable to conclude the assignment.

- Articles 2.10 and 2.11 need to be looked at systematically and together in that Article 2.11 does not exist in by itself nor does it constitute a *carte blanche* for Santos.

- In fact, Articles 2.10 and 2.11 are mutually exclusive in the sense that article 2.10 governs the circumstance where Santos decides to undertake the assignment of the receivables and it is able to do so, whereas article 2.11 governs the circumstance where Santos decides to undertake the assignment of the receivables but is unable to do so.

- In fact, article 2.11 cannot apply because its application was voided upon the issuance of the Notification of Assignment & Acknowledgement as per article 2.10, therefore completing and perfecting the assignment in the sphere of Almería, Santos thus waiving its right to seek the application of article 2.10 because it accepted that it was able to secure the assignment.

- If not voided, the inability of Santos to secure the assignment was the direct result of the *mala fide* actions of Santos and Santos must be estopped from benefiting from the terms established therein.

- First, article 2.11 was not a *carte blanche* and it was only included as a last resort, to be applicable only in the event the assignment of receivables by Santos was impossible after Santos had endeavoured its best efforts to complete such assignment with Santos having an obligation of means.

- Santos was never unable and never had the inability to assign the receivables, rather its sudden change of heart and unilateral termination of the Indicative Term Sheet was given in by the seizure of assets undertaken by the *Agencia Tributaria* and was done in complete disregard of the binding effects of the Notification of Assignment, a termination which was moreover rejected and disputed by the Assignees.

- Moreover, Santos never provided any kind of evidence whatsoever to support its contentions and justification for the termination in that no proof of Assignees inertia or lack of diligence was submitted nor was any proof submitted demonstrating Santos' attempts to expedite the completion of the assignment.

- Santos knew the assignment would be a necessary condition for the transfer and in spite of this it never cared to mention its debt towards the *Agencia Tributaria* in that if Santos did not settle its debt with the *Agencia Tributaria*, Almería could be ordered to settle Santos' debt, meaning that Santos would have never been able to assign the instalments i) to iii) due to Almería's inability to perform payments to third parties.

- Santos' deliberate omission of its debt to the *Agencia Tributaria* had the sole purpose of deceiving Almería into accepting articles 2.10 and 2.11 of the Transfer Agreement as it knew that if Almería would have been aware thereof, it would never have accepted them due to the risks involved.

- Santos willingly mislead Almería during the negotiations and allowing Santos to claim the enforcement of article 2.11 to the detriment of Almería would be tantamount to abusive and unlawful conduct, which cannot be admitted.

C. The Second Respondent – FIFA

76. In its Answer, FIFA submitted the following requests for relief:

> *"42. Based on the foregoing, should the Panel agree that Clause 2.11 of the Transfer Agreement does not apply, FIFA respectfully requests the Panel to reject the appeal and confirm the Appealed Decision.*
>
> *43. Alternatively, should the Panel consider Clause 2.11 of the Transfer Agreement applicable, and that the first three installments became due at the time of Santos' claim, FIFA leaves it to the Panel, when exercising its de novo power of review, to determine the appropriate consequences of this horizontal dispute.*
>
> *44. In any event, FIFA respectfully requests the Panel to order that the procedural costs shall be borne by Santos and/or Almería, but not by FIFA*".

77. FIFA's submissions in support of its requests for relief may, in essence, be summarised as follows:

- The matter at stake fundamentally resolves around a horizontal dispute and whether article 2.11 of the Transfer Agreement became applicable and whether the instalments i) to iii) became due immediately.

- The FIFA Single Judge correctly analysed articles 2.10 and 2.11 of the Tranfer Agreement and concluded that, based on the written submissions of the Contracting Parties, they had agreed to maintain the original payment schedule, and that therefore the claim of Santos was inadmissible as premature.

- Nevertheless, Almería and Santos are in a better position to address how the Transfer Agreement is to be interpreted and the issue of the admissibility of the claim is entirely dependent on such interpretation.

- Should the Panel conclude that article 2.11 of the Transfer Agreement was not applicable, the Appealed Decision must be confirmed. Conversely, if the Panel were to find that article 2.11 of the Transfer Agreement did apply, and as result the first three instalments fell due, then the Panel would be in a position to exercise its *de novo* power of review and issue a new decision on the matter.

V. JURISDICTION

78. The jurisdiction of CAS derives from Article R47 para. 1 of the CAS Code and Article 57(1) of the FIFA Statutes (May 2022 edition).

79. Article R47 para. 1 of the CAS Code provides as follows:

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

80. Article 57(1) of the FIFA Statutes determines that "*Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question*".

81. In line with the above, Article 9.2. of the Transfer Agreement equally provides an appeal possibility to the CAS against the decisions issued by the FIFA Football Tribunal in relation to any dispute stemming from the Transfer Agreement.

82. The jurisdiction of CAS was accepted by the Parties in their legal briefs and was further confirmed in the Order of Procedure duly signed by all three of them.

83. It follows that CAS has jurisdiction to adjudicate and decide the present dispute whilst, according to Article R57 para. 1 of the CAS Code, the Panel has full power to review the facts and the law and can hence decide the dispute *de novo* (cfr. infra para. 98).

VI. ADMISSIBILITY

84. Article R49 of the CAS Code provides as follows:

"*In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after considering any submission made by the other parties.*"

85. The grounds of the Appealed Decision dated 4 July 2023 were communicated to the Contracting Parties on 17 August 2023. Santos filed its Statement of Appeal with the CAS on 6 September 2023, *i.e.* within the time limit of 21 days set by Article 57(1) of the FIFA Statutes.

86. Besides, the appeal complied with all other admissibility requirements contained in Article R48 *et seq.* of the CAS Code, including the payment of the CAS Court Office fee.

87. Hence, it follows that the appeal is admissible.

VII. APPLICABLE LAW

88. Article R58 of the CAS Code provides as follows:

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

89. Article 56(2) of the FIFA Statutes provides as follows in relation to CAS procedures:

"*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.*"

90. Article 9.1 of the Transfer Agreement *inter alia* reads as follows:

"*This Agreement shall be governed by and interpreted in accordance with FIFA Regulations, as well as complimentary rules enacted by FIFA from time to time and, subsidiary, the Swiss Law* ."

91. Article 26 para. 1 of the FIFA Regulations on the Status and Transfer of Players (the "FIFA RSTP") reads as follows:

"*Any case that has been brought to FIFA before these regulations come into force shall be assessed according to the previous regulations* […]".

92. In accordance with Article 9.1. of the Transfer Agreement, Article R58 of the CAS Code, Article 56(2) of the FIFA Statutes and Article 26 para. 1 of the FIFA RSTP, the Panel shall primarily apply the regulations of FIFA, namely the October 2022 edition of the FIFA RSTP, with Swiss law subsidiarily applicable should there be a need to fill a possible gap in the various rules of FIFA.

VIII. MERITS

93. In order to adjudicate the case under review, the Panel needs to consider the following questions:

A. What is the relationship between articles 2.10 and 2.11 of the Transfer Agreement and can article 2.10 void the application of article 2.11?

B. If not voided, how should article 2.11 of the Transfer Agreement be read and was Santos able or unable to secure the assignment of receivables?

and

C. If Santos was unable to secure the assignment, should it be prevented from relying on article 2.11 of the Transfer Agreement for other reasons?

94. Now, before addressing these questions, the Panel deems it useful recall the basic principles of the burden and standard of proof.

95. For what concerns the burden of proof, Article 8 of the Swiss Civil Code ("SCC") provides that "*Unless the law provides otherwise, the burden of proving the existence of an alleged fact shall rest on the person who derives right from that fact*".

96. For what concerns the standard of proof, the Panel observes that neither the CAS nor the FIFA regulations set a standard of proof and lacking such a provision in the in regulations of FIFA, from which the Appealed Decision stems, it is well established jurisprudence of the CAS that it is up to the Panel to determine the applicable standard of proof. In light of the same jurisprudence, CAS Panels have regularly applied the standard of "*comfortable satisfaction*" which sits between the standard of the "*balance of probabilities*" and the standard of "*beyond any reasonable doubt*" (CAS 2015/A/3981 at para. 69)

97. Keeping in mind the above, as well as the legal discussion regarding the "*inability of Santos to secure the assignment*", the Panel finds that the applicable standard of proof in the present case is that of "*comfortable satisfaction*".

98. Finally, the Panel also considers its useful to recall that pursuant to Article R57 of the CAS Code and the therein contained *de novo* principle, the Panel has the full power to examine all the facts and legal issues of the dispute and that it is not limited to merely reviewing the legality of the decision challenged. Namely, "*The power of the CAS Panels to go beyond the establishment of the legality of the previous decisions and to issue an independent and free-standing decision has been confirmed in numerous cases. Accordingly, the CAS must be able to not only examine the formal aspects of the appealed decision, but also, above all, to evaluate all facts and legal issues involved in the dispute*" (D. MAVROMATI & M. REEB, *The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials*, R57: Scope of Panel's Review, pag. 507 *et seq*, with further references to CAS awards).

99. The Panel deems it important to mention this principle since it disagrees with the reasoning of the FIFA Single Judge in reaching his conclusion and decision, to the extent that the Panel has not seen any document on file from which one could conclude "*[…] that both Parties considered, and then agreed, that the original payment schedule, as stipulated in the transfer agreement remains in effect*". This has been correctly pointed out by the Appellant in its Appeal Brief whilst also the First Respondent, in its Answer, indicated that whilst it agrees with the outcome of the Appealed Decision, it disagrees with the remarks of FIFA regarding the alleged failure to secure the assignment and the potential applicability of article 2.11 of the Transfer Agreement.

100. Keeping in mind the above, the Panel shall render a new decision by fully reviewing the facts and legal issues submitted to it and shall do so by addressing the questions highlighted at para. 93 in said order.

A. What is the relationship between articles 2.10 and 2.11 of the Transfer Agreement and can article 2.10 void the application of article 2.11 ?

101. To answer this question, the Panel wishes to start by recalling the wording of the relevant articles, which read as follows (emphasize added):

"*2.10. In the event that **SANTOS FC** decides to assign receivables to a certain bank and/or financial institution, **ALMERIA** will acknowledge and countersign the relevant sale and assignment of accounts receivable, after having been revised by its legal advisors, and will confirm that the payment shall be effected into the stated account of the bank by signing the Notification of Assignment once **SANTOS FC** has notified the sale and the assignment of receivables to **ALMERIA,** subject to not having any liability towards the bank. In any event **ALMERIA** shall not bear any costs with such assignment that exceeds the total amount of interest of 5.1% referring to the payment set forth in clause 2.1 point (i), (ii) and (iii) above. **ALMERIA** shall not pay for, or bear, any additional costs, such as restructuring fees, legal fees, etc. attached to the assignment.*

*2.11. If **SANTOS FC** is unable to secure the assignment set forth in 2.10. above within 30 (thirty) says [sic!] as of the signature of this Agreement, the instalments set forth in Clause 2.1. (i), (ii) and (iii) above shall become due and payable by **ALMERIA***

*within 15 days as of notification by **SANTOS FC** of its inability to secure the assignments, but such notification shall never occur before 30 (thirty) days have passed as of the signature of this Agreement".*

102. According to Almería, both articles are interlinked and mutually exclusive, in that Santos would have voided article 2.11 of the Transfer Agreement by triggering article 2.10 and issuing the Notification of Assignment to Almería on 22 August 2022, by means of which the assignment was perfected in the sphere of Almería.

103. Whilst the Panel agrees with Almería that articles 2.10 and 2.11 of the Transfer Agreement are interlinked, the Panel, as will be set out below, does not agree with Almería's contention that the decision of Santos to assign the receivables and/or the issuance of Notification of the Assignment & Acknowledgement, voids the possible application of article 2.11 of the Transfer Agreement.

104. In fact, according to the Panel, the plain wording of articles 2.10 and 2.11 of the Transfer Agreement does not support such a contention nor conclusion, in that Article 2.10 provides Santos with the discretion to decide to assign the receivables and the steps to be taken vis-à-vis Almería and Almería's obligation in respect thereof **once** Santos decides to initiate the assignment of receivables, whilst article 2.11 actually serves as a fallback provision in case Santos, after having decided to assign the receivables *as set forth* in *article 2.10 above*, is unable to secure the assignment.

105. Article 2.10 does not indicate that once Almería signs the Notification of Assignment & Acknowledgement, article 2.11 is automatically voided nor does the signing of the Notification of Assignment & Acknowledgement by Almería mean that Santos was actually able to secure the assignment.

106. On the contrary, for the Notification of Assignment & Acknowledgement to resort effects, it would, according to the Panel, require a valid and binding agreement on the assignment and purchase of receivables between Santos on the one hand and BHP Asset Management and Superfute on the other hand. However, from the documents available to the Panel, it appears that such a binding and final document was not concluded. More precisely, the Indicative Term Sheet, of which no counter-signed copy by Superfute and BHP Asset Management is on file, is clearly worded as a conditional document in that it reads as follows in its relevant parts:

"*concerning the possibility of SUPERFUTE purchasing on behalf of our investors the following transactions we are pleased to provide you with our indicative offer, made subject to our internal approvals for the transaction, to satisfactory documentation and to completion of our usual due diligence and onboarding procedures, as follows. Please note that the following is indicative only and is not binding on SUPERFUTE Trade Finance Partners Limited at this stage*. ("the Indicative Term Sheet" – emphasis added)

17.	***COMMITMENT & CONDITIONS TO CLOSING***	*[…] Subject to the foregoing, this Term Sheet is subject to contract and only contains a summary of indicative terms and conditions purely for discussion purposes, and therefore does not constitute a commitment on the part of the SELLER and is not binding upon PURCHASER.* *In addition, all terms described herein are subject to (amongst other things) to PURCHASER having access to all necessary due diligence information and satisfaction of customary and/or relevant conditions precedent including (without limitation);* *KYC and AML checks on all involved parties including English language versions of* *[…]* *This Letter of Interest sets forth our indictive terms of support based upon the transaction information we have received to date.* *[…] ".*

107. It would be counter-intuitive to conclude that, lacking a final agreement between Santos and BHP Asset Management / Superfute for the assignment and purchase of the receivables, a document which is not on file, the assignment of receivables in the sphere of Almería was perfected in that, according to the Panel, the Notification of Assignment & Acknowledgement cannot exist in isolation nor can it exist without a final agreement between Santos and BHP Asset Management for the assignment and purchase of the receivables, a document which is not on file, it being reminded that the Indicative Term Sheet is "*subject to contract*, *not binding on the Purchasers*, *subject to our internal approvals for the transaction, to satisfactory documentation and to completion of our usual due diligence and onboarding procedure*."

108. Hence, according to the Panel, rather than being mutually exclusive, Article 2.11 of the Transfer Agreement serves as fallback in case, after Santos decided to trigger the assignment as per article 2.10 of the Transfer Agreement, the assignment of receivables did not come to fruition.

109. In this respect, it is common knowledge that an assignment and purchase of receivables follows a sturdy process, mainly on the part of the purchasing entity in terms of AML & KYC and financial solvency checks, and it is not because Santos had the intention and the will to assign the receivables, that such assignment would be successful. The signing of the Notification of Assignment & Acknowledgement by Santos and Almería does not change such finding keeping in mind the conditionality of the Indicative Term Sheet, even though, *in casu*, maybe it was

circulated by Santos and signed by Almería too early on in the process of assigning the receivables. However, if anything, the Panel considers that this demonstrates that Santos was actually actively pursuing the assignment of the receivables.

B. If not voided, how should article 2.11 of the Transfer Agreement be read and was Santos able or unable to secure the assignment of receivables?

110. As held above, the Panel finds that article 2.11 of the Transfer Agreement was not voided once Santos indicated its intention to pursue the assignment of its receivables nor was the same article voided by means of the signing of the Notification of Assignment and the Acknowledgement thereof.

111. Hence, the question arises whether Santos was able/unable *to secure the assignment set forth in 2.10. above within 30 (thirty) says [sic!] of signing the Transfer Agreement.*

112. It is not disputed between the Contracting Parties that the Transfer Agreement was signed on the 18th of July 2022, meaning that the assignment, if article 2.10 of the Transfer Agreement is applied strictly, would have to have been secured by no later than the 17th of August 2022. It is clear that such did not happen.

113. In similar fashion, if the 30 days deadline to secure the assignment would be counted as from the date on which the Indicative Term Sheet was signed by Santos, *i.e.*, 3 August 2022, such condition was not met either.

114. Therefore, as a first initial conclusion, the Panel must find that Santos was not able to secure the assignment within the timeframe and deadline agreed upon by the Contracting Parties in the Transfer Agreement; securing, according to the Panel, meaning having a final and binding agreement in place with a financial institution for the purchase of the receivables.

115. Nevertheless, according to Almería, article 2.11 of the Transfer Agreement did not provide Santos with a *carte blanche* and Santos had to exhaust all feasible means of securing such an assignment in good faith once it decided to initiate the assignment process. Still according to Almería, Santos had not been "*unable to secure the assignment*". Rather it was Santos that in effect prevented the conclusion of the assignment deal negotiated with the Assignees without any reasonable justification to supports its "non-sensical decision", the actual reason for such decision being the seizure of assets by the *Agencia Tributaria*.

116. Analysing these arguments, the Panel observes that the language of article 2.11 of the Transfer Agreement, which was drafted by Almería as was confirmed at the hearing, remained top line. Said article and specific sentence merely refers to Santos "*being unable to secure the assignment*" without adding any further wording in relation to the reasons for such inability.

117. Keeping this wording in mind, the Panel observes that Almería's contentions in effect mean that article 2.11 of the Transfer Agreement would/should be read as follows: "*if Santos is unable to secure the assignment set forth in 2.10 above for reasons not*

attributable to itself and after having pursued such assignment in good faith" meaning that, according to Santos, only in such a situation would the instalments set forth in Clause 2.1. (i), (ii) and (iii) become due and payable by Almería.

118. The Panel, considering said arguments, understands Almería's position and could agree that Santos might not have been able to rely on article 2.11 of the Transfer Agreement if it had been the financial institution that had terminated the Indicative Term Sheet due to Santos' lack of due diligence, for example, because Santos would have failed to return a signed copy of the Indicative Term Sheet within the set deadlines by the financial institution, or in cases where Santos would have failed to provide any other document required by the financial institution as per the processes described in the Indicative Term Sheet for them to conduct their customary KYC, AML and solvency checks. However, the Panel does not find this to be case in *casu*.

119. Rather, the Panel observes that the reason for Santos not being able to secure the assignment within the 30 days deadlines set by article 2.11 of the Transfer Agreement does not appear to be due to Santos' failure to diligently follow up on the assignment process. No such information or evidence is on file to support such conclusion and the witnesses proposed by Almería who could have potentially have testified to Santos' lack of diligence or follow up, namely Mr Carla Della Bona and Mr Jorge Rubenstein, were finally not made available at the hearing.

120. Hence, the Panel cannot consider article 2.11 to have been voided or to be non-applicable for this reason.

121. Turning now to Almería's contention that the real reason for Santos' alleged non-sensical decision to terminate the deal with the financial institution was in effect the embargo by the *Agencia Tributaria*, the Panel considers the following.

122. First of all, the Panel observes that the 30-day deadline to secure the assignment expired either on the 17th of August 2022 or the 2nd of September 2022, depending on whether one would calculate the 30-day period from the signing of the Transfer Agreement or the signing of the Indicative Term Sheet. In either case, Santos did not secure the assignment by the relevant deadline and said deadline had in fact expired before (i) Almería received the Embargo Notice from the *Agencia Tributaria* on the 15th of September 2022 and (ii) well before Almería informed Santos of the same on the 28th of September 2022.

123. In fact, the Panel recalls that, prior to the 15th of September 2022, being the date on which Almería received the notice from the *Agencia Tributaria*, Santos had already informed Almería on the 2nd of September of its inability to secure the assignment whilst on the 22nd of September 2022, it had also sent the Notice of Termination regarding of the Indicative Term Sheet to Almería and the Assignees, and thus prior to Almería notifying to Santos the Embargo Notice it had received from the *Agencia Tributaria*. Put differently, the Panel considers that it cannot read into facts that occurred after the expiration of the 30 days deadline to secure the assignment of receivables.

124. In effect, considering the above timeline of events and Santos' communications, this taken together with the deadline contained in article 2.11 of the Transfer Agreement and the obvious need for Santos to have the assignment done as expeditiously as possible considering the "solution" the Contracting Parties agreed upon to satisfy both their needs, the Panel finds, on the balance of comfortable satisfaction, that Santos' decision to send its Notice of Termination was due to the passage of time and its urgent cash need, as also indicated in its email dated 2 September 2022, rather than because of the embargo by the *Agencia Tributaria*, something which only came into play later. Again, the Panel observes that the witnesses who could have testified to the contrary, and on whose statement Almería relied when alleging what it considered to be the real reason for Santos sending the Termination Notice, were not made available during the hearing.

125. In fact, be that as it may, and irrespective of what the aforementioned witnesses may have said, the Panel observes that even if the Embargo Notice would have been the real reason for Santos sending the Termination Notice, and ignoring that said notice was sent well after the 30 day deadline to secure the assignment, the wording of article 2.11 would not necessarily mean that Santos would have been prevented from relying on article 2.11 of the Transfer Agreement.

126. More specifically, the Panel observes that it is common knowledge for anyone involved in financial transactions such as the assignment of receivables, Almería admitting that it had been involved in several before, that a successful assignment of receivables not only depends on the analysis made by the financial institution of the debtor, *in casu* Almería, but also on the analysis made by financial institution of the seller, *in casu* Santos. The Panel also recalls that Mr João Gonçalves, who gave a credible witness statement, also indicated that Santos had expressed its doubts towards the feasibility of the assignment of receivables, due to its reputation and that of Brazilian football in general. Notwithstanding this, article 2.11 of the Transfer Agreement does not contemplate nor differentiate between the situation where the assignment would not be possible for reasons attributable to Santos or the situation where such would not have been possible for reasons attributable to Almería. On the contrary, article 2.11 of the Transfer Agreement merely refers to Santos being unable to secure the assignment and stops short of attributing the corresponding consequences in case the inability was due to one or the other party.

127. The above finding is important, since even if the Panel would not have reached the conclusion that Santos was unable to secure the assignment within the contractually set deadline of 30 days for reasons other than its own negligence, even if the contrary would be true, in such case the failure of Almería to draft the clause more carefully to cover both situations would have to be considered and interpreted from the standpoint of an objective onlooker. In such hypothesis, and keeping in mind the criteria of an objective onlooker,the Panel would have to conclude that lacking a contractual provision to the contrary, Almería accepted the risk of both situations, meaning that the inability of Santos to secure the assignment, be it for reasons attributable to Santos or Almería, and except for its own negligence, would also have triggered the consequences set out in article 2.11 of the Transfer Agreement.

128. Moreover, **and for the sake of completeness**, the Panel is not convinced, and it has not been proven, that the debt of Santos towards the *Agencia Tributaria* and the embargo or a potential threat thereof by the *Agencia Tributaria* actually made it impossible for Santos to assign the receivables. This specific premise on which Almería's case centres, has not been proven. In fact, the Panel cannot accept nor take for granted, that Santos' debt towards the *Agencia Tributaria* made any assignment definitely impossible, as alleged by Almería.

129. In this regard, the Panel observes that the Embargo Notice received by Almería and which Almería was requested to return to the *Agencia Tributaria*, provided as follows at its point A1:

"In connection with the seizure of credits of the following obligor (debtor):

[…]
A: on the date of the notification of the diligence the situation of the seized credits is as follows:

[…]
Notification/s of the assignment of such claims has/have been received, which affects: All receivables......][3]

130. The *Agencia Tributaria* in its Embargo Notice was thus asking Almería whether any prior assignment had taken place and the Panel considers that such wording in the notice of the *Agencia Tributaria* actually indicates that if a an assignment of receivables would have taken place (within the 30 days as set by the Transfer Agreement) prior to the *Agencia Tributaria* issuing its Embargo Notice, that the amount embargoed by the *Agencia Tributaria* would not have extended to nor would it have covered the first three instalments of the Transfer Agreement, in that they would have already been validly assigned, sold to and purchased by a third party.

131. The Panel also observes that Almería did not submit the actual filled-out copy of the document it sent back to the *Agencia Tributaria*, a document which, depending on how it has been filed out, would either have confirmed the above finding of the Panel or would have confirmed that Almería did not consider the assignment to have been validly concluded or perfected in its sphere, thus undermining its own argumentation as to how article 2.10 voided article 2.11 of the Transfer Agreement.

132. Therefore, and in conclusion, the Panel finds that Santos was unable to secure the assignment of the receivables within the 30 days from signing the Transfer Agreement

[3] Translated from original "
En relación con la diligencia de embargo de créditos del siguiente obligado al pago (deudor):
[…]
A: En la fecha de la notificación de la diligencia la situación de los créditos embargados es la siguiente:
[…]
Se ha/n recibido comunicación/es de la cesión de tales créditos, que afecta/n a: A todos los créditos……

and the Indicative Term Sheet and that therefore article 2.11 of the Transfer Agreement was triggered.

133. The Panel is also comforted in this finding, keeping in mind Almería's exchange with its external counsel directly after it was notified the embargo, an exchange from which it shows that, notwithstanding the embargo, Almería considered it had to pay the delta between the embargoed amounts and the first three instalments, said exchange reading as follows:

"*As commented this morning, I enclose:*

1) Transfer contract between Santos and UD Almería, for the player KAIKY FERNANDEZ, for the amount of SEVEN MILLION EURO

2) Embargo notification. In the amount of THREE MILLION THREE HUNDRED SEVENTY FOUR EURO

As you will see in the contract and as anticipated, we undertook to pay first three instalments corresponding to the amount of FOUR MILLION AND A HALF EURO if we did not find a financer.

Deducting what SANTOS owes to the Spanish tax authorities, we owe them the amount of: ONE MILLION ONE HUNDRED TWENTY FIVE THOUSAND NINE HUNDRED EUROS, as we made them an advance payment of TWO HUNDRED SEVENTY FOUR THOUSAND SEVEN HUNDRED SEVENTY TWO EUROS).

As such we are looking for financing in the amount of EIGHT HUNDRED FIFTY ONE THOUSAND ONE HUNDRED TWENTY EIGHT EURO.

134. The above exchange does not align with Almería's legal submission during these proceedings and it indicates that Almería, which at the end will actually have paid the large majority of the three instalments as per the payment schedule foreseen in article 2.1. of the Transfer Agreement, considered it actually had to settle the delta between the embargoed amount and the first three instalments, and was looking for a financial partner who could facilitate the same.

135. In fact, it can also be added that, in practice, Santos accepted that the debt claimed by the *Agencia Tributaria* would be paid according to the instalment scheme desired by Almería (as it is being paid) and, as such, the financing could be limited to the difference in value, which is the amount claimed here *in casu* by Santos. In this respect, it is also important to emphasise that Santos did not claim nor ask Almería to not comply with the order of the *Agencia Tributaria*, but is *inter alia* seeking payment of the delta between the embargoed amount and the first three instalments. In any event, by awarding the delta amount, **it is difficult to understand what damage would be caused to Almería** by the frustration of article 2.10, and consequently the application of article 2.11 of the Transfer Agreement. Indeed, if pursuant to article 2.10, Almería accepted to carry the financial costs of up to 5.1% interest of the total amount assigned (i.e. EUR 4,500,000.00) under clause 2.12 of the Transfer Agreement, Almería accepted

to pay default interest at a rate of 5% p.a.; an amount which at the end, keeping in mind the moment in time this Award will be notified, will be substantially less than the costs Almería was willing to cover in case of a successful assignment of receivables.

C. If Santos was unable to secure the assignment, should it be prevented from relying on article 2.11 for other reasons?

136. As a last point, Almería submitted that it would have never accepted article 2.11 of the Transfer Agreement would it have known of Santos' debt towards the *Agencia Tributaria* and that it was willingly mislead in that Santos knew or could reasonably be expected to have known that it held a significant debt towards the *Agencia Tributaria* which made the assignment impossible.

137. As such, Almería, without referring to the corresponding provisions under Swiss law, seems to allege that it acted in error (article 23 SCO) or was induced to enter into the Transfer Agreement by fraud (article 28 SCO).

138. Pursuant to article 8 of the SCC, Almería carried the burden of proof to establish either and *in casu* it did not do so.

139. For what concerns the fundamental error under article 23 SCO, and without accepting that such would qualify as a fundamental error, it can be understood that Almería argued that it would have not signed the Transfer Agreement, or at least not article 2.11 of the Transfer Agreement, had it known of Santos' debt, as this would have made the assignment impossible.

140. As to this point, the Panel refers to its previous remarks where it indicated that it has not been proven that the assignment of receivables was impossible. Rather, from the payments made by Almería to Santos on the 26th of August 2022 and the notice letter issued by the *Agencia Tributaria*, a notice which specifically inquires about previous assignments, the Panel understands that such assignment was perfectly possible, if secured within the 30 days from the signing of the Transfer Agreement and/or prior to the Embargo Notice being received by Almería.

141. For what concerns the inducement by fraud under article 28 SCO, according to the jurisprudence of the Swiss Federal Tribunal and Swiss private law commentators, a fraud within the meaning of art. 28 par. 1 SCO can only exist if the following three conditions are simultaneously met: (i) the existence of an intentional deception, (ii) the existence of an error and (iii) a causal link between the intentional deceptive behaviour and the conclusion of a contract.

142. Pursuant to article 8 SCC, the party who alleges such a fraud (*i.e.*, Almería) has to prove that all the above-mentioned conditions are cumulatively met, and as already indicated above, Almería did not meet such requirement.

143. More specifically, for what concerns the element of intentional deception, this implies the existence of an intentional fraudulent behaviour on the side of Santos aiming at either

(i) causing Almería to have a false representation of the reality or (ii) taking advantage of a pre-existing false representation of the reality by the other party.

144. An act of fraud may thus be committed either by intentionally affirming false facts ("*dol par commission*") or by intentionally concealing true facts ("*dol par omission*").

145. In the case at hand, the Panel understands that Almería did not allege that Santos committed a "*dol par commission*" but that it intentionally concealed true facts and thus allegedly committed a "*dol par omission*".

146. In this respect, it should be noted that an intentional concealment of true facts ("*dol par omission*") can only exist, if there is an obligation for a party to reveal certain facts.

147. Indeed, as acknowledged by the Swiss Federal Tribunal (ATF 116/1990 II p. 431, JdT 1991 I p. 45.):

« *Le silence n'est dolosif qu'en raison d'un devoir d'information. Ce devoir peut découler de la loi, du contrat ou des règles de la bonne foi. Le juge en décide d'après les particularités de l'espèce*. »

Translated as :

"*Silence can be deceptive only when there is a duty to inform. Such duty may derive from the law, a contract or the principle of good faith. The judge decides according to the peculiarities of the case*." (emphasis added)

148. Regarding as to how one' duty to inform is to be interpreted, reference is made the Swiss author Pierre ENGELS who stated as follows in TERCIER / PICHONNAZ, *Traité des obligations en droit suisse - Dispositions générales du CO*, 2e éditions, 1997, p. 351-352:

«*notre loi est muette sur le dol par omission: il n'existe pas de règle générale qui oblige à détromper autrui ou à déclarer un fait qu'il ignore. (...) Chacun en principe est le gardien de ses propres intérêts et doit se renseigner sur les chances et périls de son commerce juridique.*»

Translated as:

"*our* [Swiss] *law is silent on the fraud by omission: there is no general rule that obliges to disabuse others or to reveal a fact that someone ignores. (...) Everyone is in principle the guardian of his own interests and must enquire on the opportunities and risks of his legal business*". (emphasis added)

149. Hence, it appears that Swiss law does not provide for a general duty to inform the other party of all the elements surrounding the conclusion of a contract. In application of the principle of good faith (art. 2 SCC), the duty to inform does not concern, for example, the circumstances that the other party is supposed to know itself. (ATF 92 II 328, par. 3b, JdT 1968 I P. 34, 39; KUONEN, op. cit., §1498).

150. What is more, in relation to the "pre-contractual" duties of the parties negotiating a contract, the duty to inform one-self has been defined as follows (TERCIER / PICHONNAZ, op. cit., § 636-637):

«Celui qui entre en négociations doit de son côté récolter toutes les informations que l'on peut attendre de lui, et agir avec prudence et attention. Ce devoir trace la limite aux devoirs qu'à l'autre partie de le renseigner et le conseiller. (...) Lorsque le contrat est conclu, celui qui ne s'informe pas suffisamment et conclut néanmoins le contrat ne devra s'en prendre qu'à lui-même et ne pourra invoquer son erreur (...).»

Translated as:

"*Whoever enters negotiations must gather all the information that can be expected from him and act with caution and attention. This duty sets the limit to the duties of the other party to inform and advise. (...) When the contract is concluded, the person who does not inquire sufficiently and nevertheless concludes the contract, shall only blame himself and cannot invoke his error (...).*"

151. From the above, it appears clear that Almería had a duty to collect the relevant information and to require further information before signing a contract. Assuming that the absence of tax debts (either in Spain or Brazil) was a fundamental prerequisite of the transaction, Almería should have taken the diligence to demand that Santos provided a negotiating declaration to this effect. A negotiating declaration that was not requested nor even discussed.

152. In this respect, whilst the Panel agrees with Almería that Santos knew or could reasonably have known of its debt towards the *Agencia Tributaria*, the Panel understands that this was a public case and that an appeal was still under way against the corresponding decision which established such debt, and that therefore, when the Contracting Parties negotiated the transfer in July 2022, there was no final and binding decision regarding such debt.

153. As such, whilst Santos was and should have been aware of its "debt" – which however was still subject of a pending appeal – the Panel does not find that Santos should have been aware that such debt could have impacted the possibility to assign the receivables within the next 30 days, let alone that it intentionally mislead Almería by concealing said debt, tricking it into agreeing to article 2.11 of the Transfer Agreement.

154. The good faith of the Contracting Parties should be presumed and whilst Santos did make Almería aware of its concerns regarding the possibility to assign the receivables due to its reputation and that of Brazilian football, as confirmed by Mr João Gonçalves, Almería apparently did not make any further inquiries regarding such statement and drafted the language of article 2.11 of the Transfer Agreement the way it did, albeit that it could have known, having been involved in similar transactions in the past, as also indicated by Mr João Gonçalves, that it actually takes two parties to successfully tango the word of assigning receivables, in that an assignment can fall through for reasons attributable to the seller and/or the debtor.

D. Conclusion

155. Based on all the foregoing, and after having given due consideration to the specific circumstances of this case, the evidence produced and the arguments submitted by the Parties, the Panel finds, on the basis of its comfortable satisfaction, that Santos was unable to secure the assignment set forth in article 2.10 of the Transfer Agreement within 30 (thirty) of the signing of the Transfer Agreement and/or the Tentative Term Sheet and that such inability was not due to Santos' own lack of diligence or negligence.

156. Consequently, the amount of EUR 851,628.52, corresponding to the delta between the instalments set forth in article 2.1. (i), (ii) and (iii) of the Transer Agreement (*i.e.*, EUR 4,500,000.00) and the amount embargoed by the *Agencia Tributaria* (*i.e.*, EUR 3,374,099.48) minus the anticipated payment as per the Amendment (*i.e.*, 274,272.00), became due and payable by Almería within 15 days as of Santos' notification of its inability to secure the assignment.

157. The Panel finds that such notification formally took place on 3 October 2022, when Santos formally requested Almería to pay it the amount of EUR 851,128.52 with the difference between the latter mentioned amount and the delta identified in the preceding paragraph, *i.e.*, EUR 500.00, only being requested by Santos by means if its claim filed in front of FIFA on 17 February 2023.

158. Consequently, having established the due payment date and the dates on which actual payment was requested by Santos, default interests shall be payable pursuant to article 104 of the SCO *iuncto* article 2.12 of the Transfer Agreement. This means that default interests at a rate of 5% *per annum* started to accrue as of the 19th of October 2022 over the amount of EUR 851,128.52 and as of the 17th of February 2023 over the amount of EUR 500.00. These default interests shall continue to accrue until the day of effective payment.

159. Conversely, the Panel finds that no interests are payable by Almería over the amounts it paid to the *Agencia Tributaria* on behalf of Santos as per the Embargo Notice nor over this amounts which remain payable by Almería to the *Agencia Tributaria* on behalf of Santos as per the Embargo Notice, if any at the moment in time when this Award is notified.

160. As to this last point, the Panel understands, and this has not been challenged by Santos, that on 7 November 2022 and 31 October 2023 respectively, Almería paid the amount of EUR 1,500,000.00 each to the *Agencia Tributaria*. This second payment of 1,500,000.00 was made by Almería after Santos filed its Appeal Brief with CAS, which in its requests for relief *inter alia* contained a request that the Panel determines that Almería has/had to pay Santos on 19 October 2022 the amount of EUR 2,725,728.00 of which EUR 1,874,099.48 shall be be paid directly to the *Agencia Tributaria* on behalf of Santos, with the delta, i.e. EUR 851,628.52.00 to paid directly to Santos, both .

161. The Panel partially upholds such request, as it finds that the payments to the *Agencia Tributaria* shall follow the procedure set out in the Embargo Notice, whilst the Panel, in determining the aforementioned, is mindful that out of the amount of EUR 1,874,099.48 that Santos requested be paid by Almería to the *Agencia Tributaria*, the amount of EUR 1,500,000.00 was already paid by Almería to the *Agencia Tributaria* on 31 October 2023 while the remainder of this amount, keeping in mind the instalment schedule foreseen in article 2.1. of the Transfer Agreeement, may also already have been paid by Almería to the *Agencia Tributaria* pursuant to the Embargo Notice and thus prior to the notification of this Award. The latter also means that it is possible that the delta amount of EUR 851,628.52 awarded by means of this Award has also already been paid by Almería to Santos prior to the notification of this Award.

162. All other motions and requests for relief are rejected.

IX. COSTS

(…)

* * * * * * * * *

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 6 September 2023 by Santos Futebol Clube against the decision issued by the Players' Status Chamber of the *Fédération Internationale de Football Association* dated 4 July 2023 is partially upheld.

2. The decision dated 4 July 2023 by the Players' Status Chamber of the *Fédération Internationale de Football Association* is set aside in full.

3. Unión Deportiva Almería SAD shall pay the amount of EUR 2,725,728 as follows:

    a. EUR 1,874,099.48 directly to the *Agencia Tributaria* and this on behalf of Santos Futebol Clube and pursuant to the terms of the Embargo Notice;

    b. EUR 851,628.52 directly to Santos Futebol Club

4. Unión Deportiva Almería SAD shall pay interests over the amount of EUR 851,628.52 payable to Santos Futebol Club as follows:

    a. 5% p.a. as of 19 October 2022 until the date of effective payment for what concerns the amount of EUR 851,128.52.

    b. 5% p.a. as of 17 February 2023 until the date of effective payment for what concerns the amount of EUR 500.00.

5. (…).

6. (…).

7. (…).

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

Seat of arbitration: Lausanne, Switzerland
Date: 2 May 2025

THE COURT OF ARBITRATION FOR SPORT

Wouter Lambrecht
President of the Panel

Rui Botica Santos
Arbitrator

Prof. Miguel Cardenal Carro
Arbitrator