CAS 2022/A/9248 Joris Gnagnon v. Sevilla Football Club and Fédération Internationale de Football Association (FIFA)

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Panel: Mr Jacopo **Tognon**, Professor and Attorney-at-Law in Padova, Italy

Mr Ulrich **Haas**, Professor in Zurich, Switzerland and Attorney-at-Law in Hamburg, Germany

Mr José Manuel **Maza Muriel**, Attorney-at-Law in Madrid, Spain

in the arbitration between

Joris Gnagnon, Paris, France

Represented by Mr Alexandre Zen-Ruffinen, Advocate, INLAW Associés, Neuchâtel, Switzerland

Appellant

and

Sevilla Football Club, Sevilla, Spain

Represented by Mr Juan de Dios Crespo Pérez, Ruiz-Huerta & Crespo Sports Lawyers, Valencia, Spain

First Respondent

Fédération Internationale de Football Association (FIFA), Zurich, Switzerland

Represented by Mr Saverio Paolo Spera, Senior Legal Counsel, FIFA, Zurich, Switzerland

Second Respondent

I. PARTIES

1. Joris Gnagnon (the "Appellant" or the "Player") is a professional football player of French nationality.

2. Sevilla Football Club (the "First Respondent", "Sevilla" or the "Club") is a professional football club based in Sevilla, Spain. It is a member of the Real Federatión Española de Fútbol ("RFEF") which in turn is affiliated with the Féderation Internationale de Football Association ("FIFA").

3. FIFA (the "Second Respondent") is the international governing body of football with its headquarters in Zurich, Switzerland.

4. The First Respondent and the Second Respondent shall hereinafter be jointly referred to as the "Respondents", where applicable.

5. The Appellant and the Respondents shall hereinafter be jointly referred to as the "Parties", where applicable.

II. FACTUAL BACKGROUND

6. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced at the hearing on 19 September 2023. Additional facts and allegations found in the Parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

A. Background Facts

7. On 24 July 2018, the Appellant and the First Respondent entered into an employment relationship. It was based on two documents: the employment contract for professional football player executed in the standard form of contract of the RFEF and an annex determining specific terms and conditions of the Appellant's employment (the "Annex") (hereinafter jointly referred to as the "Contract").

8. The Contract was concluded for five football seasons, i.e., for a period between 24 July 2018 and 30 June 2023. The Appellant's remuneration, including the basic salary and bonuses, were determined in Article 2 of the Annex. The Annex further specified other rights and obligations of the Appellant and the First Respondent (Articles 4-11) and contained provisions related to the termination of the Contract (Articles 3 and 12).

9. The Contract contained a clause determining the law chosen by the parties thereto as well as jurisdiction for resolution of disputes that may arise from the Contract. According to Article 13 of the Annex:

"*El presente contrato se interpretara de conformidad con la legislación laboral española y la Reglamentación FIFA, sometiendo cualquier controversia a las instancias*

federativas nacionales e internacionales (FIFA) sin perjuicio que podran acudir ante los tribunales laborales de la ciudad de Sevilla".

Freely translated to English as:

"*The present contract shall be interpreted in accordance with Spanish labour law and FIFA Regulations, with any dispute being submitted to the bodies of national and international federations (FIFA), without prejudice to the possibility of going before the labour courts of the city of Sevilla.*"

10. On 16 September 2020, the First Respondent notified the Appellant of the opening of the first disciplinary proceedings against the latter. The alleged disciplinary infringements concerned the Appellant's return from vacation with an excessive overweight (105 kg), with his optimum weight being 91 kg. This would result in a non-compliance with the training and nutrition plan provided to the Appellant, and therefore fulfilment of his contractual obligations without the diligence required by the applicable regulations, i.e., Article 7.1 of the Royal Decree 1006/85 of 26 June 1985 regulating specific employment relationship of professional athletes (the "Royal Decree 1006/85"). The Appellant was granted a deadline of 10 days to file his position.

11. On 2 October 2020, after the deadline granted to the Appellant expiring to no avail, the First Respondent rendered the first disciplinary decision, imposing on the Appellant a pecuniary sanction equal to 19% of his monthly salary in accordance with Article 7.3.2.2 of the Annex V to the collective bargaining agreement concluded between the National Professional Football League and the Spanish Footballers' Association (the "CBA"), i.e. amounting to EUR 34,833.33 gross (the "First Disciplinary Decision").

12. The Appellant has not filed an appeal against the First Disciplinary Decision.

13. On 21 October 2020, the First Respondent notified the Appellant of the opening of the second disciplinary proceedings against the latter, with the alleged disciplinary infringements revolving around the Appellant remaining in excessive overweight (100,8 kg) in comparison to his optimum weight (90 kg), not complying with the training and nutrition plan, arriving 20 minutes late for the training session on 6 October 2020 and 40 minutes late for the training session on 16 October 2020, and consequently fulfilling his contractual obligations without the diligence required by Article 7.1 of the Royal Decree 1006/85. In addition, due to the Appellant having been sanctioned by means of the First Disciplinary Decision, his alleged misconduct related to his excessive overweight was considered as an act of recidivism. The Appellant was granted a deadline of 10 days to file his position.

14. On 5 November 2020, after the deadline granted to the Appellant expiring to no avail, the First Respondent rendered the second disciplinary decision, imposing on the Appellant a pecuniary sanction equal to 25% of his monthly salary in accordance with Article 7.3.2.2 of Annex V to the CBA, i.e., amounting to EUR 33,333.33 gross. Furthermore, in relation to the Appellant's late arrivals to training sessions, the First Respondent imposed on the Appellant an additional pecuniary sanction of 2,66% of his monthly salary in accordance with Article 7.1 of Annex V to the CBA, i.e., in the amount of EUR 4,876.67 gross (the "Second Disciplinary Decision").

15. The Appellant did not file an appeal against the Second Disciplinary Decision.

16. On 13 July 2021, the First Respondent notified the Appellant of the opening of the third disciplinary proceedings against the latter. The alleged disciplinary infringements concerned the Appellant's return from vacation in excessive overweight (98,6 kg), with his optimal weight remaining not more than 90 kg, having his Body Mass Index ("BMI") doubling the average of 5 players examined in the period between 7 and 13 July 2021 (21,6% in comparison to 10,4% average), his non-compliance with the training and nutrition plan and lack of contact with the Club's nutritionist, as well as fulfilment of the Appellant's contractual obligations without the diligence required by Article 7.1 of the Royal Decree 1006/85. The fact that the Appellant had already been sanctioned for similar infringements by means of the First Disciplinary Decision and the Second Disciplinary Decision had been considered as aggravating circumstance as per Article 3.3 of Annex V to the CBA. The Appellant was granted a deadline of 10 days to file his position.

17. On 28 July 2021, after the deadline granted to the Appellant expiring to no avail, the First Respondent rendered the third disciplinary decision, imposing on the Appellant a pecuniary sanction equal to 25% on the first EUR 100,000 received by the Appellant and an additional sanction of 10% of the excess of the Appellant's monthly salary in accordance with Article 7.3.7.3 and Article 7.3.2.6 of Annex V to the CBA, i.e., in the total amount of EUR 34,166. Moreover, the Appellant was obliged to reach his optimum weight before the start of league competitions of LaLiga (13 August 2021) and to maintain it throughout the football season (the "Third Disciplinary Decision").

18. The Appellant did not file an appeal against the Third Disciplinary Decision.

19. On 21 August 2021, the First Respondent notified the Appellant of the opening of the fourth disciplinary proceedings against the latter. The alleged disciplinary infringements consisted of the following:

- On 31 July 2021, during a pre-season camp taking place in Lagos, Portugal, the Appellant failed to attend breakfast and a mandatory weighting afterwards.

- Between 3 and 16 August 2021, the Appellant repeatedly arrived late to the scheduled meetings, i.e., training sessions, COVID-19 tests and mandatory weighing.

- On 16 August 2021, i.e., after the expiry of the deadline granted in the Third Disciplinary Decision, the Appellant weighed 92,7 kg in a fasting state, therefore still above his optimum weight (90 kg).

20. As a precautionary measure, on the basis of Article 9.7 of Annex V to the CBA the First Respondent suspended the Contract of the Appellant. Furthermore, the First Respondent informed the Appellant that it would proceed with the cancellation of the Appellant's registration to LaLiga in the 2021/2022 football season. The Appellant was granted a deadline of 10 days to file his position.

21. By letter dated 30 August 2021, the Appellant submitted his position in the fourth disciplinary proceedings. The Appellant firmly denied having violated the diet that had

been communicated to him by the nutritionist and argued that he applied it strictly and consistently. The Appellant further argued that he participated in all compulsory daily weigh-ins. Given his weight tendencies, the Appellant requested the First Respondent to undertake additional analyses of the former in order to establish the reasons for him remaining overweight. As regards the Appellant's late arrivals, he acknowledged arriving a few times after the half hour before the training session, at the same time noting that nobody ever remarked on this fact, that his colleagues tended to arrive at the same time and that he was always on time for the training sessions.

22. By letter dated 3 September 2021, the First Respondent informed the Appellant that it would carry out some examinations related to the latter's overweight problem.

23. On 6 September 2021, the Appellant arrived at the training facilities of the First Respondent where examinations conducted by the nutritional officer and the medical officer took place. The examinations did not reveal any metabolic or physiological impediments for the Appellant's inability to lose weight.

24. On 13 September 2021, the First Respondent issued the fourth disciplinary decision (the "Fourth Disciplinary Decision"). As the disciplinary sanction, on the basis of Article 7.3.3. of Annex V to the CBA, the First Respondent terminated the Contract with immediate effect.

25. In the period between 1 January 2022 and 30 June 2022, the Appellant was employed by the professional football club based in France, AS Saint Etienne.

26. Following the expiry of the employment contract with AS Saint Etienne, the Appellant remained unemployed.

B. Proceedings before the FIFA Dispute Resolution Chamber and the Spanish labour court

27. On 12 October 2021, the Appellant lodged a claim against the First Respondent before the FIFA Dispute Resolution Chamber ("FIFA DRC") which was registered under the ref. no. FPSD-3965 (the "FIFA Claim"). By virtue of the FIFA Claim, the Appellant requested *inter alia* payment of compensation for the breach of contract in the amount of EUR 4,634,131.26 gross as well as imposition of sporting sanctions. Furthermore, in his claim the Appellant provided that:

"*As a purely precautionary measure and in a very subsidiary alternative, the Claimant informs FIFA that he will also bring the case before the ordinary court in Seville – after the case has been brought before FIFA – and will request the suspension of the proceedings in favour of the proceedings before FIFA's DRC. Consequently, by virtue of the principle of litispendence, FIFA – which was the first to be seized – will remain competent to rule on the case*".

28. On 13 October 2021, the Appellant filed a conciliation request against the First Respondent before the Mediation, Arbitration and Conciliation Centre of Sevilla. By means of this conciliation request, the Appellant claimed that the termination of the Contract by the First Respondent be considered null and void and therefore the First Respondent be ordered to pay the Appellant the amount of EUR 187,515.00 as

compensation or, alternatively, that the termination of the Contract by the First Respondent be considered unlawful and therefore the First Respondent be ordered to pay the Appellant the amount of EUR 4,627,567.33 as compensation (the "Conciliation Request"). As a result of the Conciliation Request, a mandatory conciliation hearing, under Spanish labour law, was scheduled to take place on 10 November 2021.

29. On 19 October 2021, the FIFA General Secretariat requested the Appellant to complete the FIFA Claim, since some mandatory documents were missing. The Appellant completed the Claim on 26 October 2021.

30. On 27 October 2021, within the statutory time limit, the Appellant filed his claim against the First Respondent before the Labour Court of Sevilla. In essence, the Appellant's prayers for relief corresponded with the requests submitted in the Conciliation Request. For ease of reference, the Conciliation Request and the abovementioned claim, which constitutes a continuation of the former, will be jointly referred to as the "Spanish Claim".

31. On 10 November 2021, the conciliation hearing was postponed until 30 November 2021.

32. On 26 November 2021, the FIFA General Secretariat forwarded the FIFA Claim to the First Respondent, inviting it to file its position by no later than 16 December 2021.

33. On 30 November 2021, the mandatory conciliation hearing took place. Both the Appellant and the First Respondent attended the hearing. However, no agreement was reached therein. In addition, the First Respondent filed a counterclaim against the Appellant.

34. On 16 December 2021, the First Respondent informed the FIFA General Secretariat *inter alia* that the Appellant referred the dispute at hand also to the relevant Spanish court, that a hearing in the case took place on 30 November 2021 and that it filed a counterclaim against the Appellant in the context of the Spanish proceedings. The First Respondent argued that the Appellant has applied *forum shopping* and therefore the proceedings before FIFA shall be terminated. In case FIFA decided not to terminate the proceedings, the First Respondent requested an extension of the time limit to file its position.

35. On 3 February 2022, the FIFA General Secretariat granted the First Respondent an extension of the time limit to file its position until 10 February 2022.

36. On 9 February 2022, the First Respondent filed its position.

37. On 18 March 2022, the Labour Court of Sevilla scheduled the main hearing to be held on 25 April 2022.

38. On 23 March 2022, the FIFA General Secretariat informed that the present matter would be submitted to the chairperson of the FIFA DRC for a preliminary decision only on competence. Therefore, the Appellant was asked to provide by 29 March 2022 with his comments exclusively as to the alleged lack of competence of the FIFA Football Tribunal. This deadline was subsequently extended until 4 April 2022.

39. On 30 March 2022, the First Respondent informed the FIFA General Secretariat about the main hearing scheduled in the context of the Spanish Claim.

40. On 4 April 2022, the Appellant filed his position as to the issue of the competence of FIFA to hear the present dispute.

41. By letter dated 22 April 2022, the Appellant submitted a writ stating its withdrawal of the Spanish Claim.

42. On 25 April 2022, the Appellant failed to attend the main hearing before the Labour Court of Sevilla.

43. On 26 April 2022, the Labour Court of Sevilla issued the "Decreto 322/2022" by means of which, considering that the Appellant failed to attend the hearing, it closed the Spanish proceedings and deemed the Spanish Claim withdrawn ("Decreto 322/2022").

44. On 28 April 2022, the First Respondent filed a separate claim against the Appellant before the Labour Court of Sevilla, seeking compensation for the breach of the Contract.

45. On 29 April 2022, the Appellant informed FIFA about his withdrawal of the Spanish Claim and asked for the First Respondent to be granted "*an appropriate time-limit to make its comments on the merits of the case*".

46. On 4 May 2022, the Appellant sent to FIFA a copy of the decision of the Labour Court of Sevilla about closing the proceedings.

47. On 9 May 2022, FIFA informed the Appellant and the First Respondent "*that there is no longer the need to submit the present matter for a preliminary decision on the competence*" and invited the First Respondent to provide its position by no later than 19 May 2022. This deadline was ultimately extended until 8 July 2022 due to *inter alia* irregularities in delivery of the FIFA's correspondence dated 9 May 2022.

48. The First Respondent provided its position within the granted time limit, essentially arguing that FIFA did not have competence to hear the dispute at hand. As to the merits, the First Respondent asserted that the termination of the Contract was made with just cause.

49. On 29 September 2022, the FIFA DRC passed the Decision in the case ref. no. FPSD-3965 (the "Appealed Decision"). The Appealed Decision provided in its relevant part that:

"1. The claim of the Claimant, Joris Gnagnon, is inadmissible."

50. On 14 October 2022, upon the Appellant's request, the FIFA DRC notified the grounds of the Appealed Decision.

51. In its grounds, the FIFA DRC noted that while the Appellant grounded its position on admissibility of the FIFA Claim on the principle of *lis pendens*, the Respondent argued that the FIFA Claim shall be found inadmissible due to the fact that the Appellant engaged in *forum shopping*. In this respect, the FIFA DRC observed that although the

FIFA was seized first in the case at hand, the Appellant decided to later file the Spanish Claim, prompting the First Respondent to file a counterclaim, to later withdraw the Spanish Claim in the hope that FIFA would retain its jurisdiction over the FIFA Claim.

52. On this basis, the FIFA DRC found that the Appellant indeed engaged in a sophisticated form of *forum shopping*:

> "*[...] he filed the FIFA Claim first, admittedly hoping that this would create lis pendens vis-à-vis the Spanish Claim and its particularities. The Spanish Claim however followed its course, and the club filed its defence and the Spanish Counterclaim there. Subsequently, and likely because of the effect that the withdrawal of the Spanish Claim would have on the Spanish Counterclaim, the player failed to attend the mandatory hearing, and his case was closed together with the club's counterclaim*".

53. The FIFA DRC further noted that the Appellant had not followed the steps he argued he would have taken, i.e., he had not asked for suspension of the Spanish Claim. The FIFA DRC found this circumstance to be fundamental in the case at hand, given that the Appellant "*deliberately acted in a manner to conduct two identical proceedings only to determine, later and at his convenience, which proceedings he preferred to carry on with*". In the FIFA DRC's opinion, it was easier for the Appellant to drop the Spanish Claim since the First Respondent had not filed a counterclaim in the FIFA proceedings. The FIFA DRC was comforted to rule that the Appellant's attempt to manipulate the system would not subsist.

54. The FIFA DRC therefore concluded that once the Appellant filed the Spanish Claim, he *de facto* renounced to have the FIFA Claim heard. Withdrawal of the Spanish Claim did not affect the FIFA DRC's ability to decline jurisdiction to hear the dispute because of the Appellant engaging in *forum shopping*.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

55. On 4 November 2022, the Appellant lodged the Statement of Appeal in accordance with Article R48 of the Code of Sports-related Arbitration (the "CAS Code") against the First Respondent and the Second Respondent before the Court of Arbitration for Sport (the "CAS") with respect to the Appealed Decision, requesting that the proceedings be conducted in English and nominating Prof. Dr Ulrich Haas as the arbitrator.

56. On 11 November 2022, the CAS Court Office acknowledged receipt of the Statement of Appeal. The CAS Court Office noted that the Appellant should file an Appeal Brief within 10 days following the expiry of the time limit for the appeal or to inform within the same deadline that the Statement of Appeal was to be considered as the Appeal Brief. Furthermore, the CAS Court Office requested the Respondents to jointly nominate an arbitrator within 10 days as from receipt of this letter by courier and informed that unless the Respondents objected within 3 days from the receipt of the same, the language of the proceedings shall be English. Finally, the CAS Court Office invited the Parties to inform it whether they were interested in the submission of the dispute to CAS mediation.

57. On the same date, the Second Respondent informed the CAS Court Office that it agreed to conduct the present proceedings in English, however, given that the case file of the first instance contained documents filed by the Appellant and the First Respondent in French and Spanish, asked to be allowed – should the need arise – to file documents also in these languages without the need to translate them to English.

58. On 14 November 2022, the First Respondent informed the CAS Court Office that it wished to proceed in Spanish and requested that if Spanish is not chosen as the main language of the proceedings, it is nonetheless used as the language of the proceedings at the same level as English. The First Respondent requested that the time limit to file its Answer be fixed once the advance of costs has been paid by the Appellant and informed that it did not wish to submit the case to CAS mediation.

59. On the same date, the CAS Court Office acknowledged receipt of the Respondents' respective submissions and invited all Parties to comment, by 21 November 2022, on the Respondents' requests regarding the language of the proceedings. The CAS Court Office informed that in the meantime, the Parties were invited to proceed in English.

60. Again, on 14 November 2022, the Appellant requested a 20-day extension of the time limit to file the Appeal Brief.

61. On 15 November 2022, the CAS Court Office confirmed the 10-day extension of the Appellant's deadline to file his Appeal Brief and invited the Respondents to indicate by 18 November 2022 whether they objected to an additional extension of 10 days, noting that the Respondents' silence would be considered as their acceptance of the Appellant's request.

62. On the same date, the First Respondent informed that it agreed to the requested extension.

63. On 18 November 2022, the First Respondent informed the CAS Court Office that the Respondents had decided to jointly nominate Mr José Manuel Maza Muriel as their arbitrator.

64. On the same date, the CAS Court Office acknowledged receipt of the First Respondent's correspondence and reiterated that until further notice, the Parties were invited to proceed in English.

65. On 21 November 2022, the Appellant confirmed that he requested the proceedings to be conducted in English. However, the Appellant agreed with the Second Respondent's request that documents issued in Spanish need not be translated to English.

66. On the same date, the CAS Court Office granted the Appellant's request for an additional 10-day extension of the deadline to file the Appeal Brief and acknowledged the Appellant's position as to the language of the proceedings. Accordingly, the CAS Court Office invited the First Respondent to indicate on or before 29 November 2022 whether it would agree that the proceedings be conducted in English but that documents in Spanish should not be translated to English.

67. On 28 November 2022, the First Respondent informed the CAS Court Office that it agreed that the proceedings be conducted in English without the need to translate Spanish documents into English.

68. On the same date, the CAS Court Office acknowledged receipt of the First Respondent's correspondence and informed that in view of the Parties' agreement, the proceedings would be conducted in English, but that documents in Spanish need not be translated to English.

69. On 5 December 2022, the Appellant requested a further extension of the time limit to file the Appeal Brief until 5 January 2023.

70. On 6 December 2022, the CAS Court Office acknowledged receipt of the Appellant's request and informed that unless the Respondents indicated to the contrary on or before 8 December 2022, the Appellant's request would be granted without any further notice from the CAS.

71. On 13 December 2022, the CAS Court Office informed the Parties that Mr Jacopo Tognon has been appointed by the Deputy President of the CAS Appeals Arbitration Division as the President of the Panel.

72. On 5 January 2023, the Appellant requested a further extension of the time limit to file the Appeal Brief until 9 January 2023.

73. On 6 January 2023, the CAS Court Office acknowledged receipt of the Appellant's request and informed that unless the Respondents indicated to the contrary on or before 6 January 2023 04:00 p.m. CET, the Appellant's request would be granted without any further notice from the CAS.

74. On 9 January 2023, the Appellant filed its Appeal Brief in accordance with Article R51 of the CAS Code.

75. On 11 January 2023, the CAS Court Office acknowledged receipt of the Appeal Brief and informed that, pursuant to Article R55 of the CAS Code, the Respondents shall submit their respective Answers within 20 days from receipt of that letter by email.

76. On 16 January 2023, the Second Respondent requested a 56-day extension of the deadline to file its Answer.

77. On 17 January 2023, the CAS Court Office acknowledged receipt of the Second Respondent's request and invited the other Parties to state whether they consented to such extension no later than 20 January 2023, noting that the Party's silence would be deemed as acceptance of the Second Respondent's request.

78. On 20 January 2023, the First Respondent requested a 20-day extension of the deadline to file its Answer.

79. On the same date, the CAS Court Office acknowledged receipt of the First Respondent's request and invited the other Parties to state whether they consented to such extension

no later than 24 January 2023, noting that the Party's silence would be deemed as acceptance of the First Respondent's request.

80. On 1 February 2023, the CAS Court Office noted that the Parties did not object to the Second Respondent's request for a 56-day extension and the First Respondent's request for a 20-day extension of the deadline to submit their respective Answers, and therefore confirmed that the Respondents' respective requests were granted.

81. On 16 February 2023, the First Respondent requested an additional 36-day extension of the deadline to file its Answer.

82. On the same day, the CAS Court Office acknowledged receipt of the First Respondent's request and invited the other Parties to state whether they consented to such extension no later than 23 February 2023, noting that the Party's silence would be deemed as acceptance of the First Respondent's request.

83. On 2 March 2023, the First Respondent requested a suspension of the present proceedings.

84. On the same date, the CAS Court Office acknowledged receipt of the First Respondent's request for suspension and invited the other Parties to provide their comments on such request no later than 9 March 2023.

85. On 9 March 2023, the Appellant requested an extension of the deadline to provide his comments on the First Respondent's request for suspension.

86. On the same date, the CAS Court Office confirmed, on behalf of the CAS Director General, that the Appellant's request was granted and that its deadline to provide his comments was extended until 15 March 2023.

87. On 15 March 2023, the Appellant requested a further extension of the time limit to submit his comments to the First Respondent's request for suspension until 17 March 2023. The Appellant also informed that it contacted the First Respondent in this respect and that it agreed to the said extension.

88. On 16 March 2023, the CAS Court Office acknowledged receipt of the Appellant's request for further extension and informed that unless the Second Respondent objected on or before 16 March 2023 03:00 p.m. CET, the Appellant's request would be granted automatically.

89. On 17 March 2023, the Appellant submitted his comments on the First Respondent's request for suspension of the present proceedings.

90. On 20 March 2023, the CAS Court Office acknowledged receipt of the First Respondent's submission and noted that the Second Respondent did not submit any comments within the granted deadline.

91. On 27 March 2023, the Second Respondent filed its Answer pursuant to Article R55 of the CAS Code.

92. On 11 April 2023, the CAS Court Office informed the Parties that the Panel has decided to dismiss the First Respondent's request to suspend the present proceedings. At the same time, the CAS Court Office invited the Parties to inform it by 21 April 2023 whether they preferred a hearing to be held in this matter or for the Panel to issue an award based solely on the Parties' written submissions.

93. On 13 April 2023, the CAS Court Office confirmed that the First Respondent's request for extension of the deadline to file the Answer was granted.

94. On 21 April 2023, the Appellant requested that the time limit for providing his position on whether or not a hearing was necessary be set after the Answers of the Respondents have been notified, otherwise requested a hearing to be held.

95. On the same date, the Second Respondent informed that it considered a hearing not necessary.

96. On 25 April 2023, the CAS Court Office acknowledged receipt of the Parties' respective submissions and additionally noted that the First Respondent did not file its position within the granted deadline.

97. On the same date, the First Respondent informed that it considered a hearing necessary.

98. On 28 April 2023, the CAS Court Office acknowledged receipt of the First Respondent's letter. At the same time, the CAS Court Office informed that the Appellant's time limit for providing his position on whether or not a hearing was necessary in this matter would be reset after receipt of the First Respondent's Answer.

99. On 7 May 2023, the First Respondent filed its Answer by e-mail pursuant to Article R55 of the CAS Code.

100. On 11 May 2023, the First Respondent filed its Answer on the CAS e-filing platform.

101. On the same date, the CAS Court Office acknowledged receipt of the First Respondent's Answer and informed the Parties that unless they agreed or the President of the Panel ordered otherwise, they shall not be authorized to supplement or amend their requests or their argument. Furthermore, the CAS Court Office invited the Appellant to inform by 15 May 2023 whether it preferred a hearing to be held in this matter or for the Panel to issue an award based solely on the Parties' written submissions. The CAS Court Office also noted that in consideration of the complexity of the matter, the First Respondent requested the hearing to be held in person.

102. On 15 May 2023, the Appellant challenged the admissibility of the First Respondent's Answer.

103. On 16 May 2023, the CAS Court Office acknowledged receipt of the Appellant's letter and invited the other Parties to provide their respective comments by 23 May 2023.

104. On 16 May 2023, the First Respondent provided its comments on the Appellant's challenge on the admissibility of the Answer.

105. On 17 May 2023, the Second Respondent provided its comments on the Appellant's challenge on the admissibility of the Answer.

106. On 24 May 2023, the CAS Court Office informed the Parties that the Panel has decided that the Answer filed by the First Respondent was admissible. Furthermore, the CAS Court Office advised the Parties that the Panel has decided to hold a hearing in this matter, which would be held in Lausanne. The Parties were invited to inform by 30 May 2023 whether they would be available for the hearing on 27 June 2023.

107. On 26 May 2023 and 30 May 2023, the Respondents informed the CAS Court Office that they would not be available for the hearing on 27 June 2023.

108. On the same date, the CAS Court Office informed the Parties that the Panel would be available for a hearing on 26 and 27 July 2023. The Parties were invited to inform it by 2 June 2023 whether they would be available for the hearing on that date.

109. On 30 May 2023, the Respondents provided their comments, while the Appellant provided his comments on 2 June 2023.

110. On 2 June 2023, the CAS Court Office acknowledged receipt of the Parties' correspondence and noted that the Respondents would not be available in July for a hearing.

111. On 5 June 2023, the CAS Court Office advised the Parties that the Panel would be available for a hearing on 19, 28 or 29 September 2023. The Parties were invited to inform by 8 June 2023 whether they would be available for the hearing on those dates.

112. On the same date, the Appellant and the Second Respondent informed, respectively, that they would be available for the hearing on 19 September 2023.

113. On 7 June 2023, the CAS Court Office informed the Parties that the hearing would be held on 19 September 2023 in Lausanne. The CAS Court Office invited the Parties to provide, on or before 14 June 2023, with the names of all persons who would be attending the hearing.

114. On 14 June 2023, all Parties provided the names of all persons who would be attending the hearing.

115. On 8 August 2023, the First Respondent informed that he would like to substitute one witness.

116. On 10 August 2023, the CAS Court Office acknowledged receipt of the First Respondent's letter and invited the other Parties to provide their comments on the First Respondent's request by 17 August 2023.

117. On 11 August 2023, the Second Respondent filed its comments on the First Respondent's request.

118. On 17 August 2023, the Appellant requested an extension until 21 August 2023 of his deadline to provide his comments on the First Respondent's request.

119. On 18 August 2023, the CAS Court Office acknowledged receipt of the Appellant's request for extension and informed, on behalf of the Director General, that such request was granted.

120. On 21 August 2023, the Appellant objected to the First Respondent's request for witness substitution.

121. On 25 August 2023, the CAS Court Office informed the Parties that the Panel has decided to dismiss the First Respondent's request to replace the witness. At the same time, the CAS Court Office requested the Parties to sign and return a copy of the Order of Procedure by 31 August 2023.

122. On 30 August 2023, the Appellant provided the CAS Court Office with a signed copy of the Order of Procedure.

123. On 31 August 2023, the CAS Court Office acknowledged receipt of the Appellant's submission and invited the Parties to agree on a hearing schedule by 7 September 2023.

124. On the same date, the First Respondent and the Second Respondent provided the CAS Court Office with their respective signed copies of the Order of Procedure.

125. On 1 September 2023, the Appellant and the Second Respondent provided their respective positions as to the hearing schedule.

126. On 13 September 2023, the CAS Court Office informed the Parties that the Panel agreed with the Parties' joint proposal of the hearing schedule.

127. On 19 September 2023, the hearing took place. In addition to the Panel and Ms Sophie Roud, Counsel to the CAS, the following persons attended the hearing:

On behalf of the Appellant:

- Mr Joris Gnagnon (Appellant)
- Mr Moussa Sissoko (Witness)
- Mr Alexandre Zen-Ruffinen (Counsel)
- Ms Emilie Weible (Counsel)

On behalf of the First Respondent:

- Mr Juan de Dios Crespo (Counsel)
- Mr Agustin Amoros Martinez (Counsel)
- Mr Jesus Arroyo Sanchez
- Mr Ramon Rodriguez Verdejo (Witness)

- Mr Juan Jose Jimenez Barroca (Witness)
- Mr Daniel Espartero Fernandez (Witness)
- Mr Felipe del Valle Pascual (Witness)

On behalf of the Second Respondent:

- Mr Miguel Lietard Fernandez-Palacios (Lawyer)
- Mr Saverio Paolo Spera (Lawyer)
- Mr Pierre Llamas (Observer)

128. At the outset of the hearing, the Parties confirmed that they had no procedural objections as to the conduct of the proceedings and the appointment of the Panel. During the hearing, the Parties made submissions in support of their respective arguments. Furthermore, the Panel heard several witnesses called by the Appellant and the First Respondent.

129. The testimony of the witness, Mr Moussa Sissoko, may be summarised as follows:

- The witness knows the Appellant for a very long time since he was in the academy in Rennes (a football club competing at the relevant time in Ligue 1). According to the witness, the player was very good, he performed well in Rennes, he was also playing with the French young national team. As of the day of the hearing, the witness remains the agent of the Appellant.

- According to the witness, the problems that ultimately resulted in the termination of the Contract started during the second half of the Appellant's first season playing for the First Respondent. However, the witness does not mention the exact year. When the second (yet unspecified) year started, the First Respondent informed the witness of the Player's overweight issues. From this moment, the witness claims to have been in constant contact with the Sporting Director of the First Respondent in order to find a solution for the Appellant. The Club proposed the witness to loan the Player to Cadice (a football club competing at the relevant time in LaLiga) but the Player allegedly refused to be transferred since he was unhappy with the offer.

- The witness also remained in constant contact with the Player during his vacation and pre-season preparations. In the opinion of the witness, the Appellant tried his best to reduce his weight. He hired a personal chef who was preparing his meals and was in touch with the Club's team manager.

- The witness asserts that on an unspecified date at the beginning of the season, the Sporting Director of the Club contacted him saying the Player weighed 98 kgs. The witness was at that time with the Player and he weighed 95 kgs. The Appellant mentioned to the witness that the First Respondent measured his weight after he had breakfast, and this is where the difference was coming from. The Club's Sporting Director undertook to measure the Appellant's weight again but never did.

After a few weeks, the Club's Sporting Director contacted the witness again and complained that there was constantly the weight problem with the Appellant.

- The witness was not aware of any issues related to the late arrivals of the Player.

- In the opinion of the witness, the Club terminated the Contract because of the Player's overweight issue. The First Respondent never complained about the Player's behaviour or late arrivals, they only talked about the overweight problem and the need to find a solution. According to the witness, at that time there were two other players in the Club with weight problems.

- In the contacts with the Club, the witness was clear that the Appellant would not leave the Club just because of the weight problems and that everyone needed to find a way to help the Player. According to the witness, the Club expected the Player to lose weight without allowing him to do his training or to play the games. Moreover, after the Club's public declaration regarding the Player's overweight problems, it was very difficult for the witness to find a good club for the Appellant.

- The witness became aware of the disciplinary proceedings against the Appellant when the latter received the letter from the Club and also when the Club's Sporting Director notified him of this fact via message. However, the witness knew only about one disciplinary proceeding (regarding the weight issue). The witness was not involved with the legal aspects of the disciplinary proceedings. The witness's lawyer took over from there, with the witness doing only the follow-ups.

- After termination of the Contract, in January 2022 the Player went to Saint-Etienne (a football club competing at the relevant time in Ligue 2). However, this contract was terminated in May 2022 (after 5 months). According to the witness, the reason for termination was because after termination of the Contract by the Club, it was very difficult for the Player to rebuild his career, considering the fact that he did not play for two years because of the COVID-19 pandemic. Furthermore, after termination of the Contract by the Club, the Player was not in a good shape, both mentally and physically.

130. The testimony of the witness, Mr Juan José Jiménez Barroca, may be summarised as follows:

- The witness joined the First Respondent as the Head Doctor in October 2021. Therefore, he was in touch with the Appellant in the football season 2021/2022 when the issue of his overweight existed.

- According to the witness, during the weight checks in the football season 2021/2022, the Appellant was outside his optimal weight. For this reason, the Head Doctor gave him instructions to reduce his weight, yet the Appellant never followed them and never reached the optimal weight. The witness claims that after the first disciplinary proceedings, the Appellant started to follow his instruction, however he still failed to reach the optimal weight. The Appellant was under observation of the Club; however, he was unable to maintain a stable optimal weight. According to the witness, the Appellant gained weight because of his unhealthy eating habits.

- The Club consulted the endocrinologist who confirmed that the Appellant had no metabolic problems and that he showed good response to weight loss when he was following the instructions of the Head Doctor. As per the recommendations of the endocrinologist, the Club recommended the Player to be treated with some sort injections in his abdomen. According to the Head Doctor, it only helped a bit but it could not be a permanent solution. The Head Doctor was not fully aware of the type of injections. It was not his area of expertise.

- In August 2021, the Appellant arrived late 5 times for training at the Club premises. On 13 August 2021, the day of the first match of LaLiga in this season, he arrived 40 minutes late, therefore the Club was unable to do the weight check. The times the Appellant was late, they were unable to perform the weight checks and COVID-19 tests.

- According to the witness, an overweight player is prone to high risk of injury as he overuses his joints, knees and ankles. His movements with the extra weight become difficult. Hence, overweight is an important risk factor to be considered.

131. The testimony of the witness, Mr Felipe del Valle Pascual, may be summarized as follows:

- The witness has been a nutritionist and a dietician of the First Respondent and its first team for the past 14 years.

- The witness states that the Appellant had weight issues in both the 2020/2021 and 2021/2022 football season. In the 2020/2021 season he weighed 105 kgs (meaning extra 15 kgs) and in the 2021/2022 season he weighed 98 kgs (meaning extra 8 kgs). The Club estimated the Appellant's optimal weight to be at 90 kgs. He had previously reached such weight and performed well under it. According to the witness, the Appellant reached his optimal weight neither in the 2020/2021 nor in the 2021/2022 football season. The witness claims that it is due to the Appellant's negligence with his eating habits.

- During vacation and pre-seasons, the Appellant like all other players was supposed to respect his diet and follow the nutritionist's recommendations, so that the weight would not be a problem for the regular dynamic of the team. Before the Appellant joined the pre-season, the witness asked him to send pictures of his weight and of the food he was eating, but he did not comply.

- When the Appellant joined the 2021/2022 pre-season, he weighed 98 kgs. Hence, on 28 July 2021, he should have already lost 3-4 kgs. That's why the Club gave him the instructions to decrease his weight to 90kgs. During the pre-season, the Club's team was in a controlled environment where the players were served breakfast, lunch and dinner. In this period, the Appellant was able to lose weight, he lost 300-400 grams a day, so in a week he could have easily lost 2.5 kgs.

- Even after the pre-season, the Club used all the tools at its disposal to help the Appellant reduce his weight. They made him have breakfast at the training facility and carry dinner back home. The witness was personally involved with the

Appellant's situation. However, in his 14 years of experience, he has never come across any footballer or athlete with this sort of weight issue as in the case of the Appellant. According to the witness, the Club performed on the Appellant different procedures, took external opinions, did a metabolic test in order to assess his metabolism. Yet the endocrinologist's report ruled out any metabolic incapacity of the Appellant which was preventing him to lose weight. Together with the weight checks, the Club also used a picometer to measure the fat percentage. The picometer takes different creases at different body parts and based on these creases, one can ascertain the level of body fat. According to the witness, the picometer was unable to measure the abdomen crease of the Appellant because it reached its maximum opening, confirming the fact that he was indeed obese. The average fat percentage of the entire team was 10.3%, while the Appellant had 16.24% of fat. He had a body mass index (BMI) with an obesity degree (31.7). He was 182 cm tall and weighed 105 kgs, which made him clinically obese (class 1).

- The Appellant also had the issue of late arrivals. The Club was often unable to perform weight checks or COVID-19 tests on the Appellant since he was late. Nonetheless, the witness claims that the Appellant was aware of the importance of these checks, yet chose to avoid them. For instance, on 13 August 2021 (the date of the first match of LaLiga in the season), i.e., the day the Appellant was supposed to perform, he got rid of the weight check by purposely arriving late. The Appellant often gave excuses such as that he just had breakfast before the weight check and hence, he was appearing overweight. However, according to the witness, in order to calculate weight or fat percentage, it does not matter if one has eaten before or not. Consumption of food does not affect these checks. The Appellant was weighed along with his teammates, sometimes having breakfast before doing the weight check. The witness claims that it is perfectly normal to eat before the weight check and it does not make a major difference in calculation.

- Regarding the injections, the witness, on the endocrinologist's recommendation, proposed the Appellant a drug called *Saxenda* which contains liraglutide (an active ingredient) to help reduce weight. The drug is for obese patients (a criterion that the Appellant fulfilled) and essentially controls hunger. The drug is authorised by the Spanish sports authorities and the Appellant accepted to use it.

132. The testimony of the witness, Mr Ramón Rodríguez, may be summarised as follows:

- The witness was the Sporting Director of the First Respondent until June 2023.

- The Appellant was contracted by the First Respondent before the witness came in. According to the witness, on competitive conditions the Appellant was an amazing midfielder, he had good projections and was one of the talented midfielders from French football. The witness was very happy when he heard the news about his transfer to the Club.

- During the pre-season of the 2021/2022, the Appellant was 15 kgs overweight, and during the next preseason, he was 8 kgs overweight. The witness claims it was hard to forget as he never came across such a case in 30 years of his career. It is normal for players to gain 1-2 kgs above their optimal weight e.g. after vacation. However,

in the case of the Appellant it was not just the overweight that was concerning the Club, it was the fat percentage which confirmed that the Player was obese.

- The Club opened four disciplinary proceedings against the Appellant, two in the 2021/2022 football season and two in the 2022/2023 football season. Unfortunately, these proceedings had no effect since the behaviour of the Player never changed.

- According to the witness, the Club gave him a lot of chances because it genuinely believed he could reach his optimal weight. The witness had conversations about the Player's weight issue many times with him and his agent in order to find a viable solution. The witness kept the agent constantly updated; however, he was gradually less and less involved in the Player's case.

- Another issue of the Appellant was his late arrivals. According to the witness, the Appellant was at least 4-5 times late. He believes that the Player was deliberately late to avoid being weighed.

- According to the witness, the Club terminated the Contract with the Appellant due to his overweight and his inability to compete at the minimum level.

- The Club protects all its players and it did its best to help the Appellant. They did a metabolic test on the Appellant to see if he had a metabolic condition, however the test resulted negative. The Club would have been happy to maintain the Player on competitive conditions but unfortunately, he never achieved it in the last couple of years. This is the reason for his career's downfall.

- The witness states that in football, all information is available to everyone. Therefore, a mere press release by the Club could not have affected the Player's career. According to the witness, the Player's constant overweight issue was known to everyone.

133. The testimony of the witness, Mr Daniel Espartero Fernández, may be summarised as follows:

- The witness has been the Team Manager of the Club for the past 5 years. His role is to help the players adapt to the city and to the Club. He was in charge of handing out the weekly plans to all the players and he had a close relationship with them all.

- According to the witness, the Appellant's issue with overweight and late arrivals both arose in the pre-season period of 2021/2022.

- The witness was the one who first notified the Appellant of the disciplinary proceedings. The witness claims there were two disciplinary proceedings during the pre-season of the 2020/2021 and other two during the pre-season of the 2021/2022.

- On 28 July 2021, the witness personally delivered to the Appellant the letter with certain instructions in order to reach the optimal weight before the 13 August 2021 (i.e. the date of the first match of LaLiga in the 2021/2022 football season).

- According to the witness, the players of the Club were required to arrive 30 minutes before the training starts. He was taking notes of the Player's late arrivals. According to his notes, the Appellant arrived late for 8 days (30, 20, 15 minutes late) and on 13 August 2021, he arrived more than 30 minutes late, therefore was unable to do the weight check and the COVID-19 test.

- Also on 11 August 2021, the Club was unable to do the COVID-19 test on the Appellant.

134. During the hearing, the Appellant made an oral statement, which may be summarised as follows:

- The Appellant is a professional football player, he is an ex-football player of the First Respondent. He previously played for Rennes. His position is the centre back. At the time of the hearing, the Appellant was 26 years old.

- The Appellant states that he was very satisfied with his transfer to Sevilla. He would describe himself as a strong centre back who makes good passes, is strong and has good technique. When he played for Rennes, he weighed 95 kgs. When he joined Sevilla, he was around the same weight.

- The Appellant recalls that his first season with the First Respondent was not bad, he played a few games. After a few months, he noticed a change in the First Respondent's attitude towards him, which became visibly colder. The First Respondent demanded that the Appellant loses weight. He was confused because since the signing of the Contract his weight had remained the same. He did not understand why the Club wanted him to lose weight. Yet, he was ready to work for it and follow the Club's instructions. The First Respondent's nutritionist communicated to the Appellant that his optimal weight was 90 kgs. The Appellant claims that he never was at that weight and in fact in Rennes he played weighing 95 kgs and it worked out well for him. Hence, weighing 90 kgs was hard to achieve for him in spite of all his efforts.

- During the second half of the season, the Player was mostly on the bench or out of the playing pool. According to him, there were other players in a similar situation.

- The Appellant was then loaned back to Rennes. He claims to have had a good season there. The team qualified for the UEFA Champions League, finished 3rd in Ligue 1 and played in the UEFA Europa League.

- The following season the Appellant returned to the First Respondent, weighing 105 kgs. It was also the post-COVID-19 period and that was according to the Appellant the main possible reason for him being overweight at that time. However, the Appellant claims that he did not change his eating habits during the pandemic and regularly worked out at home.

- The Appellant denies having been late to training practices. One time he was late; he informed the First Team Manager accordingly and the latter did not complain about it.

- According to the Appellant, he received two warning letters for overweight and late arrivals. He was shocked about it but was willing to work hard and do his best. After he received those letters, his Agent and lawyer took over the case. The First Respondent started weighing the Appellant every morning. The Club did some injections to the Appellant and it was a difficult period for him.

- The Appellant trained with the first team of Sevilla but did not play. He felt unwanted by the Club. The Appellant claims that Sevilla pushed him and his Agent to find for the former another club for loan.

- The Appellant claims that the First Respondent performed medical examination on him on 3 September 2021.

- The Appellant was informed about the termination of the Contract by the Sporting Director of Sevilla. He was shocked. He remembers the Director telling him that he was happy when he heard that the Appellant was signing the Contract but at that point, he simply could not stay at the Club due to his weight issues.

- Following the termination, the Player joined AS Saint Etienne. However, he did not play any matches with this club because, according to the Appellant, he was not mentally prepared for it after what happened at the Club.

- The Appellant claims that he filed two separate claims because he was advised so by his lawyers. His Swiss lawyer advised him to file a claim before FIFA and so they did, while his Spanish lawyer advised him to file a claim before the Spanish Court to not lose his right to file a claim, as there was a time limit of 20 days to do so. For this reason, the Appellant filed another claim before the Labour Court of Sevilla as he was worried about losing his right.

135. At the closing of the hearing, the Parties confirmed that they had no objections in respect of their right to be heard and that they had been given the opportunity to fully present their cases.

IV. SUBMISSIONS OF THE PARTIES

136. The following outline of the Parties' positions is illustrative only and does not necessarily comprise every argument advanced by the Parties. The Panel has nonetheless carefully considered all claims made by the Parties, whether or not there is a specific reference to them in the following summary.

A. The Appellant's submissions

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

- As regards the FIFA jurisdiction, the Appellant argues that FIFA was competent to decide the dispute between the Appellant and the First Respondent. The FIFA competence derived from Article 13 of the Annex which granted jurisdiction to sports bodies in a primary way, being only reserved as an alternative the possibility for the parties to refer to the Labour Court of Sevilla. According to the Appellant,

it was also clear from the wording of Article 13 of the Annex that the parties did not wish to establish the exclusive jurisdiction of national courts. The Appellant also contends that a clause providing for the primary jurisdiction of FIFA is valid from the legal point of view, as no imperative provision of Spanish law and no public policy reason required the parties to bring a labour dispute before the Spanish courts. Therefore, by virtue of both the principle of *pacta sunt servanda* and the relevant CAS case law, FIFA was competent to resolve the case at hand.

- Furthermore, the Appellant asserts that the FIFA Claim was admissible, as he did not engage in the practice of *forum shopping*. In this respect, the Appellant argues that his right to refer the dispute to the Labour Court of Sevilla derives from Article 13 of the Annex. Accordingly, the Appellant first filed his FIFA Claim, expressly stating that he deemed the sports adjudication body to have jurisdiction over the case, and then filed the Spanish Claim with the sole purpose of protecting his rights, since such claim would become time-barred 20 days after dismissal of an employee. The Appellant also contends that he did not try to game the system and to act contrarily to good faith. His actions were transparent from the outset since he informed FIFA about his will to file the Spanish Claim subsidiarily and as a purely precautionary measure already in his statement of claim. His conduct was not contradictory within the meaning of the concept of the abuse of rights and, in any event, did not amount to creation of legitimate expectations which would subsequently be disappointed.

- The Appellant argues that his actions should be interpreted in accordance with the principle of *lis pendens*, the general applicability of which was acknowledged by FIFA in the *Regulations on the Status and Transfer of Players* ("RSTP") Commentary, as well as in the relevant CAS case law. Accordingly, a claimant who has chosen to bring proceedings before two different courts in a chronological order so as not to lose his rights, should be able to decide to abandon one of the two proceedings without losing the right to have such claim judged by FIFA. The withdrawal of the Spanish Claim which was filed second only occurred because it had become clear that the Labour Court of Sevilla was ignoring the FIFA proceedings and the principle of *lis pendens*. In addition, the First Respondent was using the Spanish Claim in order to challenge the FIFA jurisdiction. The Appellant therefore decided to withdraw the Spanish Claim, not to avoid the First Respondent's counterclaim but to maintain his primary jurisdiction choice. Moreover, the Appellant argues that the withdrawal of the Spanish Claim did not in any way prejudice the rights of the First Respondent who subsequently filed a separate claim against the Appellant before the Labour Court of Sevilla and who, despite being entitled to do so on several occasions, decided not to file a counterclaim in the FIFA proceedings. The Appellant acted in good faith and should have the dispute resolved by FIFA after withdrawal of the Spanish Claim.

- With respect to the merits of the case, the Appellant argues that the First Respondent terminated the Contract without just cause. The alleged overweight of the Appellant was not due to his fault. The First Respondent imposed an exaggerated weight loss target that the Appellant could not have normally achieved. He did perform before weighting 95 kgs and it worked well. Moreover, the First Respondent failed to determine the cause of the overweight, which presumably was also connected to the

Player's health. The Appellant denies having changed any eating habits during COVID-19. He also regularly worked out at home. The Appellant admits that the Club performed his medical examination on 3 September 2021.

- The Appellant denies having missed any mandatory weigh-ins and having been late to the training sessions. The only two times he was late, he reported to the Club's officials. The Appellant admits being late with respect to the arrival time in the dressing room however notes that such later arrival was exercised by other teammates as well and was tacitly accepted by the First Respondent. Nonetheless, if these facts were true, they are not of sufficient gravity to constitute just cause for termination of contract. The Appellant further argues that he received no warning prior to such termination and that initiation of the fourth disciplinary proceedings on 21 August 2021 could not in any way constitute such warning. Therefore, the Appellant asserts he has not had a chance to modify his behaviour. The Appellant argues to have been informed about two disciplinary proceedings.

- Anyway, the Appellant contends that the First Respondent exceeded the so-called *reflection period* (of maximum two to three working days) for any termination of contract to be executed. In the case at hand, the First Respondent waited so long with the termination that it could not be concluded that the continuation of contractual relationship was unbearable to it. According to the Appellant, the true reason for termination of the Contract was that he no longer fitted the First Appellant's plans and constituted a significant financial burden. The Appellant felt unwanted at the Club. This is corroborated *inter alia* by the fact that the First Respondent deregistered the Appellant already three weeks before the termination of the Contract and that in the weeks before such termination, Sevilla continuously pressured the Player's agent to find a new club for him.

- The Appellant claims that he did not play any matches for his subsequent club, AS Saint Etienne, because he was not mentally ready for it after what happened in the Club.

- The Appellant argues that he filed two separate claims before FIFA and the Labour Court of Sevilla, because he was advised so by his Swiss and Spanish lawyer, respectively. He filed the Spanish Claim in order not to have this claim time-barred and to protect his rights.

- Given the fact that the termination of the Contract was made without just cause, the Appellant claims being entitled to compensation as per Article 17 of the RSTP, equal to the residual value of the Contract decreased by the salaries earned by the Player in AS Saint Etienne.

138. The Appellant's request for relief is the following:

"In view of the above, Mr Gnagnon respectfully requests that the Panel:

1. The Appeal is upheld and the Decision of the FIFA Dispute Resolution Chamber dated 29 September 2022 is annulled;

2. Sevilla Football Club S.A.D is ordered to pay EUR 4,466,131.26 to Mr. Joris Gnagnon, plus 5 % interest per annum from 14 September 2021 until the effective date of the payment.

3. Alternatively, the appealed Decision is returned to the FIFA Dispute Resolution Chamber for a new decision;

4. To charge all costs of the procedure to Sevilla Football Club S.A.D.

5. To fix a sum to be paid by the Respondents in order to contribute to the Appellant's legal fees."

B. The First Respondent's submissions

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

- As regards the jurisdiction of FIFA to hear the present dispute, the First Respondent argues that the clause contained in Article 13 of the Annex shall be found null and void as it runs contrary to the mandatory jurisdiction of Spanish labour courts over sports employment disputes established in Article 19 of the Royal Decree 1006/85. The exclusion of arbitration in labour disputes is also confirmed in Article 92.2 letter d) of the Bylaws of La Liga Nacional de Fútbol Profesional. The First Respondent asserts that the present dispute concerns a Spanish employment relationship, governed by Spanish law and within Spanish territory. Therefore, labour courts of Sevilla shall have the exclusive jurisdiction of the case at hand. All the more, the First Respondent argues that as long as the exclusive competence to adjudicate conflicts arising from an employment relationship that took place in a territory other than Switzerland is not respected, a decision taken by FIFA or CAS could indeed contravene the Swiss public policy in light of Article 190 of the Swiss Private International Law Act ("PILA").

- Subsidiarily, the First Respondent argues that the Appealed Decision should not be overturned, as it is based on correct premises – involvement of the Appellant in the practice of *forum shopping*. The First Respondent notes in principle that for approximately 6 months, the Appellant left two claims, with the same subject matter and therefore seeking the same purpose, running at the same time. Moreover, despite his declaration formulated in the FIFA Claim, the Appellant never requested suspension of the proceedings before the Labour Court of Sevilla. By withdrawing the Spanish Claim at the last moment, the Appellant prejudiced the First Respondent's counterclaim so that the latter had to file a new claim against the Appellant before the Labour Court of Sevilla. By such conduct, the Appellant intended to "game the system" to check which jurisdiction would be more favourable to him. Because of such manipulation, the principle of *lis pendens* should not be applicable to the case at hand, as it serves different purpose.

- As a further procedural alternative, the First Respondent asserts that the CAS should not examine the merits of the case, as they were not analysed by the first instance body – the FIFA Football Tribunal. Therefore, by resolving the merits of the dispute, the CAS would in fact become an organ of the first instance and not of the appeal. The power of review of a CAS panel provided for in Article R57 of the CAS

Code is limited by the parties' right to have their dispute adjudicated on two levels. Thus, the CAS shall refrain from ruling on the merits of the dispute at hand.

- With regard to the merits of the dispute, the First Respondent argues that in view of the circumstances of the case, it had a just cause under Spanish law to terminate the Contract. Such just cause should result from joint analysis of Article 13, Article 15 para. 2 and Article 7 of the Royal Decree 1006/1985, supplemented by the relevant provisions of the CBA and the Royal Decree no. 2/2015 of 23 October 2015 (the "Royal Decree 2/2015"). The First Respondent asserts that such just cause is to be found in the Appellant's repeated serious breaches of the Contract, who persisted in his illegitimate behaviour, abused trust of the First Respondent and acted in bad faith. Such behaviour consisted of the Appellant remaining overweight for two consecutive years despite the First Respondent's numerous instructions and training plans and despite several disciplinary proceedings conducted for this reason, evasion of compulsory weigh-ins and COVID-19 testing, as well as persistent delays to training sessions. The First Respondent argues that the responsibility for the Appellant's physical situation is exclusively related to his negligence and lack of commitment and professionalism. Therefore, the Appellant's dismissal in the last disciplinary proceedings was justified in light of both the facts of the case and the regulations applied.

- Lastly, the First Respondent argues that its termination of the Contract would still be justified in light of Article 14 of the RSTP, as well as Article 337 and Article 337b of the Swiss Code of Obligations (the "SCO"). In this respect, the First Respondent notes that when notifying the Appellant of the commencement of the third disciplinary proceedings, it has warned the latter that charges against him were very serious and could lead to his dismissal. From that moment, the relationship of trust between these Parties was at risk. Finally, that trust was broken by the Appellant and this led to termination of the Contract with just cause.

140. The First Respondent's request for relief was the following (emphasis original):

"In light of the above matters of fact and law, considering all the foregoing reasoning and arguments, the First Respondent requests the Panel to accept and allow its answer to the Appeal Brief and, subsequently, to issue an award declaring:

1. That FIFA did not have jurisdiction to hear the case at hand, therefore, the Player's appeal should be dismissed.

2. Alternatively, in the hypothetical scenario where the request no. 1 is not accepted by the Panel, that the appealed decision correctly confirmed the Player's claim as inadmissible due to the practice of forum shopping. Therefore, Mr. Gnagnon's appeal should be dismissed.

3. Alternatively, in the hypothetical scenario where the request no. 1 and no. 2 are not accepted by the Panel, that it should refrain from ruling on the merits of the dismissal and grants the Appellant's request to return the case to the FIFA DRC for a new decision.

*4. Alternatively, in the hypothetical scenario where the request no. 1, no. 2 and no. 3 are not accepted by the Panel, that **under Spanish Law**, Sevilla terminated the Employment Contract **with just cause** and, consequently, no amount should be paid to the Player as a result of the dismissal.*

*5. Alternatively, in the hypothetical scenario where the request no. 1, no. 2, no. 3 and no. 4 are not accepted by the Panel, that **under Swiss Law**, Sevilla terminated the Employment Contract **with just cause** and, consequently, no amount should be paid to the Player as a result of the dismissal."*

C. The Second Respondent's submissions

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

- The Second Respondent argues that by means of his procedural behaviour, the Appellant engaged in the practice of *forum shopping*. According to the Second Respondent, the Appellant only apparently elected FIFA as the forum to hear his claim and the chronology of submitting the respective claims shall not be decisive in this case. Notwithstanding, the Second Respondent observes that although the FIFA Claim was submitted one day earlier, the Spanish Claim was in fact lodged before the First Respondent was notified of the FIFA Claim. Moreover, the Appellant actively participated in the proceedings related to the Spanish Claim, attending the conciliation hearing without any reservations or requests for suspension of the proceedings. The Second Respondent asserts that the only explanation for the Appellant's behaviour could be that he tried to seize FIFA with the dispute at hand due to more favourable treatment for football disputes it guaranteed, at the same time filing the Spanish Claim in order not to lose the possibility of obtaining redress before the Spanish court.

- The Second Respondent further contends that the Appellant violated the principle of *venire contra factum proprium*. In this respect, the Second Respondent again observes that the First Respondent was notified of the FIFA Claim only after it had been made aware of the Spanish Claim and summoned to the mandatory conciliation hearing. In the context of the local proceedings, the First Appellant even filed a counterclaim. Therefore, the Appellant has induced the First Respondent to legitimately rely on the assumption that the chosen forum was the Labour Court of Sevilla. By the same token, after the withdrawal of the Spanish Claim by the Appellant, the First Respondent filed a separate claim before the Labour Court of Sevilla materially the same as its previous counterclaim.

- The Second Respondent therefore asserts that the FIFA DRC rightfully declined jurisdiction in view of the Appellant's procedural stance constituting *forum shopping*. Moreover, the Appellant created legitimate expectations of the First Respondent that his chosen forum was the Labour Court of Sevilla and thus, by changing course of action, violated the principle of *venire contra factum proprium*.

- For the reasons set out above, FIFA refrains from addressing the Appellant's arguments related to termination of the Contract and declines to comment on all

other topics related to the contractual dispute between the Appellant and the First Respondent.

142. The Second Respondent's request for relief was the following:

"Based on the foregoing, FIFA respectfully requests CAS to:

(a) Reject the Appellant's appeal in its entirety;

(b) Confirm the decision rendered by the FIFA Dispute Resolution Chamber on 28 March 2022;

(c) To order the Appellant to bear all costs incurred with the present procedure;

(d) Alternatively, to send the matter back to FIFA for evaluation."

V. JURISDICTION

143. 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."

144. Article 57 para. 1 of the FIFA Statutes (May 2022 edition) provides as follows:

"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."

145. Similarly, the Appealed Decision provides for an appeal to CAS.

146. The jurisdiction of the CAS derives from Article 57 para. 1 of the FIFA Statutes, Article R47 of the CAS Code and is confirmed in the Appealed Decision itself. Furthermore, the jurisdiction of the CAS is not contested by the Respondent and is confirmed by the Order of Procedure duly signed by the Parties.

147. Therefore, the Panel finds that the CAS has jurisdiction to decide on the present dispute.

VI. ADMISSIBILITY

148. Article R49 of the CAS Code provides in its relevant part 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."

149. Article 57 para. 1 of the FIFA Statutes quoted above provides for a time limit to lodge an appeal against a decision of the FIFA DRC of 21 days as of receipt of the decision in question.

150. The grounds of the Appealed Decision were notified to the Appellant on 14 October 2022. The Appellant filed its Statement of Appeal on 4 November 2022.

151. The Panel also notes that the admissibility of the appeal is not, in principle, contested by the Parties.

152. The Panel thus concludes that the present appeal is admissible.

VII. APPLICABLE LAW

153. With respect to the applicable law, the Panel notes the Parties' respective positions.

- The Appellant argues that the regulations primarily applicable in the case at hand are the FIFA regulations, with Swiss law serving as the additional law (including for interpretation of concepts of the burden of proof, just cause and the way of calculating the compensation within the meaning of Article 17 of the RSTP) and Spanish law as subsidiary law, applicable for possible *lacunae* in the RSTP.

- The First Respondent contends that Swiss law shall be applicable in present case within the FIFA-CAS procedural universe. However, the merits of the contractual termination, including the concept of just cause, should be interpreted in accordance with Spanish law. In any case, Spanish law should be applicable for matters not addressed in the FIFA regulations.

- The Second Respondent asserts that the FIFA regulations constitute the applicable law to the matter at hand and that Swiss law shall be applied subsidiarily when necessary to fill a possible gap of the FIFA regulations.

154. The starting point for determining the applicable law on the merits is – first and foremost – the *lex arbitri*. According to Article 176 para. 1 of the PILA, the provisions of Chapter 12 of the PILA for international arbitration proceedings shall apply if the place of residence and/or domicile of at least one party was outside Switzerland at the time of conclusion of the arbitration agreement. It is undisputed that this prerequisite is fulfilled in the case at hand. Furthermore, Article 187 para. 1 of the PILA provides that:

"*The arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the case has the closest connection.*"

155. Such choice of law by the parties can be made directly (by referring to a specific law) or indirectly, i.e., by referring to a "conflict-of-law" provision designating the applicable law to the merits (KAUFMANN-KOHLER/RIGOZZI, Arbitrage International. Droit et

pratique à la lumière de la LDIP, 2nd ed., Berne 2010, p. 400). In addition, since a choice of law is not required to take a particular form, it can be entered into either expressly or tacitly (CAS 2008/A/1517, CAS 2017/A/5111).

156. The Panel recalls that Article 13 of the Annex provides that:

"*El presente contrato se interpretara de conformidad con la legislación laboral española y la Reglamentación FIFA, sometiendo cualquier controversia a las instancias federativas nacionales e internacionales (FIFA) sin perjuicio que podran acudir ante los tribunales laborales de la ciudad de Sevilla*".

Freely translated to English as:

"*The present contract shall be interpreted in accordance with the Spanish labour law and FIFA Regulations, with any dispute being submitted to the bodies of national and international federations (FIFA), without prejudice to the possibility of going before the labour courts of the city of Sevilla.*"

157. This Panel adheres to the view held consistently by the CAS that in agreeing to an arbitral institution the parties also tacitly subject the dispute to the conflict-of-law rules for determining the applicable law contained in the rules of said institution, is also in line with the predominant view in Swiss legal doctrine (BSK-IPRG/KARRER, 3rd ed. 2013, Art. 187 no. 124; KAUFMANN-KOHLER/RIGOZZI, Arbitrage International, 2nd ed., 2010, no. 618 et seq.; ARROYO/RIGOZZI/HASLER, Arbitration in Switzerland, The Practitioner's Guide, 2013, Art. R58 nos. 3, 7; BERGER/KELLERHALS, Domestic and International Arbitration in Switzerland, 3rd ed. 2015, no. 1393; ARROYO/BURCKHARDT, Arbitration in Switzerland, The Practitioner's Guide, 2013, Art. 187 nos. 22, 35).

158. The conflict-of-law provision is to be found in Article R58 of the CAS Code which provides that:

"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."

159. The Parties have also signed the Order of Procedure which makes explicit reference to Article R58 of the CAS Code, without any reservation.

160. Article R58 of the CAS Code provides that the dispute shall be decided first and foremost according to the "applicable regulations". These "regulations" shall be applied irrespectively of the will of the parties. The term "applicable regulations" within the meaning of Article R58 of the CAS Code refers to the rules of the association that made the first-instance decision which is being contested in the appeals arbitration procedure. In the case at hand, the applicable regulations are the FIFA regulations, in particular the RSTP. Furthermore, the Panel notes that according to Article 56 para. 2 of the FIFA Statutes:

"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."

161. It therefore explicitly follows from the abovementioned provision that the law that should be applied in addition to the FIFA regulations is Swiss law.

162. Subsidiarily, meaning in case the "applicable regulations" do not provide for a solution of the matter, Article R58 of the CAS Code instructs to apply the law chosen by the Parties. Consequently, the margin of application for the choice-of-law contained in the Annex is small. It only comes into play if the relevant questions of the dispute are not dealt with or covered by the "applicable regulations", i.e., the FIFA regulations, interpreted in accordance with Swiss law.

163. Having established the foregoing, the Panel will first revert to the FIFA regulations as the "applicable regulations" within the meaning of Article R58 of the CAS Code. The Panel will apply Swiss law for interpretation of the respective FIFA regulations. Only subsidiarily, and for questions not covered by the FIFA regulations interpreted as indicated above, the Panel will consider Spanish law.

VIII. OTHER PROCEDURAL ISSUES

164. Having established that the FIFA Claim was admissible, and before entering the merits of the dispute, as a preliminary manner the Panel shall address several procedural issues that arose during the present arbitration, namely:

- The First Respondent's request for suspension of the proceedings,
- Admissibility of the First Respondent's Answer,
- The First Respondent's request for replacement of the witness.

A. The First Respondent's request for suspension of the proceedings

165. On 2 March 2023, the First Respondent requested suspension of the present proceedings. The Club argued that the arbitration at hand should be suspended in line with the *lis pendens* principle, because of the proceedings pending before the Labour Court of Sevilla commenced by the Club on 28 April 2022, i.e., after the Appellant withdrew the Spanish Claim and before the Appellant lodged the present appeal. On 17 March 2023, the Appellant filed his comments to the First Respondent's request in which he strongly opposed thereto. In this respect, the Appellant argued that he has never been notified of any proceedings allegedly commenced by the First Respondent against him, therefore in line with the provisions of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Lugano Convention"), any judgement rendered in such proceedings could not be recognized in Switzerland. Furthermore, the Appellant argued that the *lis pendens* principle was not applicable, because the FIFA Claim was lodged before the First Respondent allegedly filed its claim before the Spanish Court, and because said claim

did not cover the same matter and was premature. The First Respondent's request for suspension of the proceedings was dismissed by this Panel for the following reasons.

166. The Panel recalls its general remarks as to the application of the principle of *lis pendens* set forth in points [206 – 207] of this Award. Furthermore, since the request for suspension of the proceedings was filed before the CAS, which is a Swiss arbitral tribunal, the Panel wishes to refer to Article 9 para. 1 of the PILA, according to which:

"*If an action having the same subject matter is already pending between the same parties abroad, the Swiss court shall stay the case if it is to be expected that the foreign court will, within a reasonable time, render a decision capable of being recognised in Switzerland.*"

167. Similarly, Article 186 para. 1bis of the PILA applicable to international arbitration provides that:

"[The arbitral tribunal] *shall decide on its jurisdiction without regard to any action having the same subject matter that is already pending between the same parties before a state court or another arbitral tribunal, unless there are substantial grounds for a stay in proceedings.*"

168. Having noted all the Parties' respective arguments, the Panel found it fundamental to examine whether these proceedings and the proceedings allegedly commenced by the First Respondent before the Labour Court of Sevilla concerned the same subject matter. In this respect, the Panel observed that the present arbitration had its roots in the FIFA Claim, by means of which the Appellant requested payment by the First Respondent of compensation for the breach of contract, as well as imposition on the Club of sporting sanctions. The First Respondent never filed a counterclaim before the FIFA DRC. The appeal has been filed by the Player against the Appealed Decision, in which the FIFA Claim was found inadmissible. In turn, by means of the claim allegedly filed by the First Respondent before the Labour Court of Sevilla on 28 April 2022, the Club requested payment of compensation for damages by the Appellant. Therefore, the Panel notes that not only the claims in question are directed against different entities (the FIFA Claim is a claim of the Player against the Club and the new Sevilla's claim is a claim of the Club against the Player), but also have a different substance (the FIFA Claim concerns the compensation for the First Respondent's alleged breach of contract in a certain amount and imposition sporting sanctions, while the new Sevilla's claim concerns the compensation for damages allegedly caused by the Appellant, in a different amount).

169. On the basis of the foregoing, the Panel found that the conditions for application of the *lis pendens* principle were not met. Consequently, it became moot to address further argumentation of the Parties in this respect and the First Respondent's request for suspension of the arbitration proceedings was dismissed.

B. Admissibility of the First Respondent's Answer

170. On 15 May 2023, the Appellant challenged the admissibility of the First Respondent's Answer. The Appellant argued that the First Respondent's ultimate time limit to file the Answer expired on 8 May 2023 (and on 9 May 2023 for its submission through the CAS e-filing platform), therefore its filing on 7 May 2023 by e-mail and on 11 May 2023

through the CAS e-filing platform should be found late and thus inadmissible. On 16 May 2023, the First Respondent provided its comments in which it essentially argued that its Answer was filed in a timely manner. On 17 May 2023, the Second Respondent provided its comments, in which it informed that FIFA would leave it to the Panel to decide on the said matter. Having noted the Parties' respective positions, the Panel found that the Answer filed by the First Respondent was admissible.

171. The Panel observes the following sequence of events:

- On 11 January 2023, the CAS invited the Respondents to submit their respective Answers within 20 days from receipt of that letter by email.
- On 20 January 2023, the First Respondent requested a 20-day extension of the deadline to file its Answer.
- On 1 February 2023, the First Respondent was granted with the requested extension.
- On 16 February 2023, the First Respondent requested a further 36-day extension of its deadline to file the Answer. On the same date, the CAS Court Office informed the Parties of suspension of the First Respondent's deadline to file its Answer.
- On 2 March 2023, the CAS Court Office confirmed that (emphasis in original): "*the First Respondent's deadline to file the Answer remains suspended*".
- On 11 April 2023, the CAS Court Office informed the Parties that the suspension of the First Respondent's deadline to file the Answer was lifted with immediate effect.
- On 13 April 2023, the CAS Court Office confirmed that the First Respondent's request for extension of the deadline to file the Answer was granted.
- The First Respondent filed its Answer on 7 May 2023 by e-mail and on 11 May 2023 through the CAS e-filing platform.

172. On the basis of the foregoing, the Panel notes that until 16 February 2023, i.e., the date of suspension of the First Respondent's deadline to file its Answer, the First Respondent used 16 days out of 20 days of its first extension. Contrary to what is claimed by the Appellant, said deadline remained suspended all along until 11 April 2023, when the suspension was explicitly lifted with immediate effect. On 13 April 2023, the First Respondent was granted an additional extension of 36 days.

173. Therefore, the First Respondent's Answer filed on 7 May 2023 by e-mail and on 11 May 2023 through the CAS e-filing platform should be considered as submitted in a timely manner and hence admissible.

C. The First Respondent's request for replacement of the witness

174. On 8 August 2023, the First Respondent informed the CAS Court Office that it wished to replace the previously indicated witness, Mr Ramón Rodríguez, with a new witness,

Mr Fernando Navarro Corbacho. As a reason for such replacement, the First Respondent indicated the fact that Mr Rodriguez no longer worked for the Club, started an engagement in another football club, and thus was reluctant to participate in the hearing. The Appellant objected to such witness replacement, while the Second Respondent had no objection concerning the First Respondent's request.

175. According to Article R44.2 of the CAS Code, applicable to the appeals proceedings on the basis of Article R57 of the CAS Code:

"[...] *Each party is responsible for the availability and costs of the witnesses and experts it has called.*"

176. Furthermore, as provided in Article R57 of the CAS Code:

"*If any of the parties, or any of its witnesses, having been duly summoned, fails to appear, the Panel may nevertheless proceed with the hearing and render an award.*"

177. The Panel has decided to dismiss the First Respondent's request to replace Mr Ramón Rodríguez by Mr Fernando Navarro Corbacho as witness. In the Panel's view, Mr Rodríguez's reliability as a witness was not *per se* compromised by the mere fact that he was no longer under the First Respondent's control. The change of employment by Mr Rodríguez equally did not render him being called as a witness inadmissible. According to the foregoing provisions, the Parties are primarily responsible for the availability of their witnesses. Should they fail to appear, the Panel may nevertheless proceed with resolution of the dispute. Thus, the Panel found no valid legal argument for the requested replacement of Mr Rodríguez and dismissed the request accordingly.

IX. MERITS OF THE CASE

178. The present appeal would have to be dismissed in case FIFA was right to reject the Appellant's claim. The latter would be the case if either FIFA had no jurisdiction to decide on the case or if the Appellant's claim before FIFA was inadmissible. In case FIFA erred in rejecting the Appellant's claim for lack of jurisdiction or admissibility the question arises whether this Panel has the mandate to decide on the Appellant's claim. This question will be addressed below.

A. The jurisdiction of FIFA

179. The Panel notes that the First Respondent and FIFA challenge the FIFA DRC jurisdiction to hear the present dispute. In this respect, the First Respondent essentially argues that the clause contained in Article 13 of the Annex shall be found null and void in light of mandatory jurisdiction of Spanish labour courts over sports employment disputes established under Spanish law.

180. The Panel does not share the First Respondent's position in this respect.

181. As a preliminary matter, the Panel notes that the competence of FIFA to hear football employment-related disputes of an international dimension derives from Article 22 para. 1 let. b) of the RSTP, according to which:

"*Without prejudice to the right of any player, coach, association, or club to seek redress before a Labour Court for employment-related disputes, FIFA is competent to hear:*

[…]

b) employment-related disputes between a club and a player of an international dimension; […]"

182. The present case is, indisputably, a football employment-related dispute of an international dimension, as it concerns the consequences of termination of a contract concluded between a Spanish club and a French player.

183. The foregoing has been confirmed by the Appellant and the First Respondent by means of Article 13 of the Annex which contains a clause providing that (emphasis added):

"*El presente contrato se interpretara de conformidad con la legislación laboral española y la Reglamentación FIFA, sometiendo cualquier controversia a las instancias federativas nacionales e internacionales (**FIFA**) sin perjuicio que podran acudir ante los tribunales laborales de la ciudad de Sevilla.*"

Freely translated to English as:

"*The present contract shall be interpreted in accordance with the Spanish labour law and FIFA Regulations, with any dispute being submitted to the bodies of national and international federations (**FIFA**), without prejudice to the possibility of going before the labour courts of the city of Sevilla.*"

184. The parties to the Contract have therefore explicitly envisaged jurisdiction of FIFA bodies for any disputes resulting from the Contract. The fact that such jurisdiction is established "without prejudice" to the possibility of the same parties to confer a dispute upon a national court does not render the jurisdiction clause null and void. The wording of Article 13 of the Annex in fact corresponds with the wording of Article 22 para. 1 of the RSTP, which similarly established the competence of FIFA "without prejudice" to the right of the parties to seek redress before a labour court.

185. The Panel therefore finds that the Contract contains, in principle, a valid jurisdiction clause in favour of FIFA bodies.

186. Turning to the First Respondent's argumentation regarding the nullity of this clause, the question arises what law to apply. The Swiss federal Tribunal ("SFT") has dealt with two-tier dispute resolution clauses and decided as follows (in a case of mediation at a first stage and arbitration proceedings subsequently):

"*En l'espèce, le Tribunal arbitral a opté souverainement pour l'application du droit suisse à la convention d'arbitrage, écartant ainsi la lex causae, à savoir le droit … . Seule demeure en suspens la question de l'applicabilité de l'art. 178 al. 2 LDIP aux modes alternatifs de règlement des différends en général et, singulièrement, au système du DAB mis en place par la FIDIC. En dépit des objections soulevées par la recourante, cette question doit être tranchée par l'affirmative. Il paraît, en effet, artificiel de vouloir traiter de manière distincte, sous le rapport considéré, la procédure*

d'arbitrage proprement dite, d'une part, et la procédure de médiation lato sensu qui la précède, d'autre part, à plus forte raison lorsqu'il s'agit de déterminer si celle-ci constitue un préalable obligatoire à l'ouverture de celle-là. Du reste, jurisprudence et doctrine ne font pas non plus le départ entre ces deux procédures, pour ce qui est de l'application de la disposition citée (cf. les arrêts cités au consid. 3.2; voir aussi, parmi d'autres : Gränicher, in op. cit., n° 44 ad art. 178 LDIP). Il en va également ainsi des conditions générales de la FIDIC incluses dans les deux contrats litigieux, lesquelles rangent sous la même clause 20 la procédure du DAB (sous-clauses 20.2 à 20.4), la procédure de conciliation (sous-clause 20.5) et la procédure d'arbitrage (sous-clause 20.6). Soumettre la phase préalable et l'arbitrage subséquent à deux droits distincts serait sans doute peu opportun, voire propre à compliquer inutilement la liquidation des litiges entre parties, dans la mesure où le tribunal arbitral perdrait le bénéfice du choix prévu à l'art. 178 al. 2 LDIP s'il était contraint de tenir compte, en statuant sur sa propre compétence, de dispositions procédurales impératives de la lex causae relatives à l'étape préliminaire de la médiation. Le faire serait d'autant plus discutable lorsque, comme en l'espèce, le tribunal arbitral se voit forcé d'appliquer une disposition tirée du code de procédure civile du pays dont le droit régit l'objet du litige - pays qui est de surcroît celui où l'une des parties a son siège social - pour décider du caractère impératif ou facultatif d'un mode alternatif de règlement des différends à vocation universelle établi par une fédération internationale. On y renoncera donc."

Freely translated to English

"In the present case, the Arbitral Tribunal opted in its sole discretion to apply Swiss law to the arbitration agreement, thereby setting aside the lex causae, i.e. the law ... . The only outstanding issue is the applicability of Art. 178 para. 2 PILA to alternative dispute resolution in general and, in particular, to the DAB system set up by FIDIC. Despite the objections raised by the appellant, this question must be answered in the affirmative. In fact, it seems artificial to seek to treat separately, in the context under consideration, the arbitration procedure proper, on the one hand, and the mediation procedure lato sensu which precedes it, on the other, especially when it comes to determining whether the latter is a mandatory prerequisite to the initiation of the former. Moreover, the case law and the legal literature do not distinguish between these two procedures, as far as the application of the aforementioned provision is concerned (cf. the judgments cited in recital 3.2; see also, among others: Gränicher, op. cit. at no. 44 on art. 178 of the PILA). The same is true of FIDIC's General Terms and Conditions included in the two contracts at issue, which include under the same clause 20 the DAB procedure (sub-clauses 20.2 to 20.4), the conciliation procedure (sub-clause 20.5) and the arbitration procedure (sub-clause 20.6). Subjecting the preliminary stage and subsequent arbitration to two separate laws would undoubtedly be inappropriate, and might even unnecessarily complicate the resolution of disputes between the parties, insofar as the arbitral tribunal would lose the benefit of the choice provided for in art. 178 para. 2 PILA if it were forced to take into account, in ruling on its own jurisdiction, mandatory procedural provisions of the lex causae relating to the preliminary stage of mediation. To do so would be all the more questionable when, as in the present case, the arbitral tribunal is forced to apply a provision taken from the code of civil procedure of the country whose law governs the subject-matter of the dispute - a country which is, moreover, the one in which one of the parties has its registered office - in order to decide on the mandatory or optional nature of a universally applicable alternative dispute

resolution method established by an international federation. We will therefore give up."

187. Following the above, the Panel shall assess this question according to the *lex arbitri*, i.e., the arbitration law at the seat of arbitration. Since the CAS has its seat in Switzerland (Article S1 and Article R28 of the CAS Code), Swiss arbitration law applies. In this respect, the Panel notes that Article 177 para. 1 of the Swiss Private International Law Act ("PILA") provides that "*Any claim involving an economic interest may be submitted to arbitration*". The present case undoubtedly involves an economic interest, as by it means the Appellant seeks financial compensation for an allegedly unjust termination of the Contract. Therefore, the matter at hand is, in principle, arbitrable not only before the CAS, but also before the FIFA bodies.

188. This Panel shares the view of the Panel in the case CAS 2015/A/3896, whereby the possibility to deny arbitrability of a dispute (which is otherwise arbitrable) based on a foreign provision providing for the mandatory jurisdiction of state courts may only be taken into consideration within the scope of public policy, which is considered to be the only restriction to arbitrability in such case. Accordingly, the Panel is not convinced either that in the matter at hand, which is a football-related dispute of an international dimension, conferring jurisdiction upon FIFA and the CAS would result in a violation of legal principles belonging to public policy. On the contrary, considering on one hand their specialization in sports-related disputes and considerable efficiency of the proceedings, and on the other the need to provide equal treatment and relative jurisdictional consistency, both FIFA and the CAS are often found to be better equipped to resolve football-related disputes of an international dimension than national ordinary courts (e.g. BOISSON DE CHAZOURNES L. & COUTURIER S., "*CAS procedures and their efficiency*", CAS Bulletin 2019/02). The First Respondent has not proven the contrary.

189. It is true that the Panel in the case CAS 2015/A/3896 has ultimately accepted jurisdiction of Spanish courts as an exception to FIFA's jurisdiction. However, the basis of such acceptance was found in the jurisdiction clause contained in the contract in question (which established an exclusive jurisdiction of Spanish courts), and not in the public policy principles as argued by the First Respondent. The jurisdiction clause contained in the Contract does not provide for such exclusive jurisdiction of Spanish courts. Rather, it explicitly envisaged the competence of FIFA to hear disputes resulting therefrom.

190. Therefore, the Panel finds that the FIFA DRC had jurisdiction to hear the present dispute.

B. Admissibility of the FIFA Claim

191. The Parties are in dispute whether the Claim filed by the Appellant before FIFA was admissible. While the Appellant argues that the FIFA Claim was admissible, both the First Respondent and the Second Respondent contest its admissibility predominantly due to the Appellant's alleged engagement in the practice of *forum shopping*, and, as argued by the Second Respondent, due to an alleged violation of the principle of *venire contra factum proprium*.

192. The issue of admissibility of the FIFA Claim will be addressed by the Panel by answering the following questions:

- Did the Decreto 322/2022 cause a *res iudicata* effect?
- Is the principle of *lis pendens* applicable to the Appealed Decision?
- Did the Appellant engage in unlawful *forum shopping?*
- Did the Appellant violate the principle of *venire contra factum proprium*?

1. Did the Decreto 322/2022 cause a *res iudicata* effect?

193. For the sake of good order, the Panel notes that it is not determined whether the question of *res iudicata* is a question of jurisdiction or admissibility. As underlined in the Swiss legal literature, the "*distinction between jurisdiction and admissibility is complex*" (GIRSBERGER/VOSER, International Arbitration, 4th ed. 2021, no. 1182a; cf. also STACHER, Jurisdiction and Admissibility under Swiss Arbitration Law – the Relevance of the Distinction and a New Hope, Bull-ASA 2020, 55 ff.). As proposed therein, the questions of whether the competence to decide a dispute in a binding way was transferred from the state-court system to arbitration and whether the matter before the arbitral tribunal is within the scope of the arbitration agreement are issues of jurisdiction, whereas all procedural issues that are non-jurisdictional and that may for procedural reason cause the end of the arbitration are admissibility issues (GIRSBERGER/VOSER, International Arbitration, 4th ed. 2021, no. 1182). The legal literature is split on the question whether the issue of *res judicata* is in fact a matter of jurisdiction or admissibility.

194. So does the relevant jurisprudence. While in its decision of 14 May 2001, the SFT qualified the issue of *res iudicata* as a matter of jurisdiction ("*compétence*" in French) (SFT 127 III 279, 283), in another decision rendered on 13 April 2010, the SFT qualified *res iudicata* as a procedural issue and examined the matter in light of the public-policy exception provided for in Article 190 para. 2 of the PILA (SFT 136 III 345, 2.1). The SFT stated insofar as follows:

"Das Schiedsgericht verletzt den verfahrensrechtlichen Ordre public, wenn es bei seinem Entscheid die materielle Rechtskraft eines früheren Entscheids unbeachtet lässt oder wenn es in seinem Endentscheid von der Auffassung abweicht, die es in einem Vorentscheid hinsichtlich einer materiellen Vorfrage geäussert hat."

Freely translated to English as:

"The arbitral tribunal violates procedural public policy if, in its decision, it disregards the substantive legal force of an earlier decision or if, in its final decision, it deviates from the opinion it expressed in a preliminary decision with respect to a substantive preliminary issue."

195. In light of the foregoing, the Panel is of the view that, in the present case, the question of the nature of the issue of *res iudicata* can be left open.

196. Consequently, without determining its procedural nature, the Panel will address the issue of *res iudicata* as part of admissibility of the FIFA Claim.

197. Whether the decision of the Labour Court of Sevilla to close the proceedings triggered by the Spanish Claim, i.e., the Decreto 322/2022, resulted in *res iudicata* effect is an important point of departure for the further reasoning of the Panel regarding admissibility of the FIFA Claim.

198. The Panel observes that Swiss law does not provide a definition of the *res iudicata* effect of state court decisions or arbitral awards. Nonetheless, the relevant jurisprudence of the Swiss Federal Tribunal ("SFT") provides useful guidance in that regard (SFT 4A_394/2017, 4.2.3):

"L'autorité de la chose jugée interdit de remettre en cause, dans une nouvelle procédure, entre les mêmes parties, une prétention identique qui a été définitivement jugée."

Freely translated to English as:

"*Res judicata prohibits an identical claim that has been finally adjudicated from being challenged in a new proceeding between the same parties.*"

199. The effect of *res iudicata* therefore arises when the claim in dispute is identical to that which was already the subject of a previous judgement. This is the case when in different proceedings the same party submits the same claim based on the same facts. The identity must be understood from a substantive and not from a grammatical point of view, so that a new claim, no matter how it is formulated, will have the same object as the claim already adjudicated (ATF 140 III 278, 3.3; ATF 139 III 126, 3.2.3). That being said, for a *res iudicata* effect to occur, it is necessary that the claim is previously adjudicated. In other words, only a judgement deciding on the merits of such claim can prevent another judicial authority from adjudicating the dispute on the basis of *res iudicata* principle.

200. However, the *res judicata* effect is attributed to a judicial decision by the law of the state in which the decision was rendered. Considering that the decision in question is the Decreto 322/2022 issued by the Spanish Labour Court, the Panel shall examine which judicial decisions are able to cause the effect of *res iudicata* also through the prism of Spanish law. Accordingly, the Panel notes that, similarly to what has been determined above, under Spanish law only the decisions on the merits of a claim can be attributed with a *res iudicata* effect. On the contrary, decisions of a mere procedural nature which do not adjudicate the merits of the dispute, do not cause the *res iudicata* effect.

201. On 26 April 2022, the Labour Court of Sevilla issued the Decreto 322/2022, by means of which it closed the proceedings and considered the Spanish Claim withdrawn. It based its decision on Article 83 para. 2 of the Law 36/2011 of 10 October 2011 – Reguladora de la Jurisdicción Social ("L.R.J.S."), according to which:

"*Si el actor, citado en forma, no compareciese ni alegase justa causa que motive la suspensión del acto de conciliación o del juicio, el secretario judicial en el primer caso y el juez o tribunal en el segundo, le tendrán por desistido de su demanda.*"

Freely translated to English as:

"*If the claimant, summoned in due form, does not appear or allege just cause which justifies the suspension of the conciliation act or of the trial, the judicial secretary in the first case and the judge or court in the second will consider him to have withdrawn his claim.*"

202. In this respect, the Panel notes that by means of the Decreto 322/2022, the Labour Court of Sevilla has not resolved the merits of the case. On the contrary, it has not to any extent entered into the discussion of such merits, limiting the scope of its adjudication only to the formal closure of the proceedings in light of the withdrawal of the claimant in the Spanish Claim. The Panel additionally notes that despite the Appellant's withdrawal of the Spanish Claim by means of the letter dated 22 April 2022, the Decreto 322/2022 did not indicate this fact as the reason for the closure of the proceedings. Nevertheless, this has no decisive importance for the present considerations, as what the Panel is bound to examine is the factual (and not hypothetical) content and nature of the Decreto 322/2022.

203. The Panel therefore finds that the Decreto 322/2022 is purely procedural in nature, and as such, cannot cause the *res iudicata* effect. Consequently, rendering a decision on the merits of the case by the FIFA DRC would not have violated the *res iudicata* effect possibly under Swiss law.

2. Is the principle of *lis pendens* applicable to the Appealed Decision?

204. Having established the foregoing, the Panel will now turn to examine whether the principle of *lis pendens* was applicable to the first instance proceedings in light of the proceedings held before the Labour Court of Sevilla.

205. The principle of *lis pendens* and its consequences for the proceedings held before FIFA have not been directly addressed in the FIFA regulations. However, as also referred to by the CAS Panels in the cases CAS 2007/A/1301 and CAS 2019/A/6626, FIFA has developed, in the exercise of its freedom of association, a principle of coordination between the state and the sporting adjudication systems. Accordingly, if a party decides to start proceedings before a State court, such case cannot be submitted (at the same time or thereafter) to a FIFA adjudication body. This rule of "*alternativity*" has been described by FIFA as based on the principle of "*litispendency*". Its effects, however, appear to be more properly the consequence, established within the FIFA system, of the choice by the relevant party of the remedy for contractual disputes, so that *electa una via non datur recursus ad alteram*. Thus, FIFA acknowledges the possibility for a party to opt for adjudication of state courts but establishes the principle according to which once such option is exercised, the possibility to refer the same case to sport adjudication bodies is precluded.

206. The *lis pendens* principle is therefore related to contemporaneous pending of the same dispute before two different adjudication *fora* (ref. CAS 2004/A/635). Furthermore, it is pertinent in the present case to note that notification of the claim is not a strict requirement under Swiss law in order to establish whether or not there is a matter of *lis pendens* (CAS 2019/A/6626, cit. BOHNET/ HALDY/JEANDIN/SCHWEIZER/TAPPY, *Code*

de procédure civile commenté, Basel 2011, n. 5 *et seq.* ad article 62 CPC, p. 200; n. 5 ad article 63 CPC, p. 204; n. 3 ad article 220 CPC, p. 818).

207. In this respect, the Panel notes the following sequence of events:

- The FIFA Claim was lodged on 12 October 2021.
- Subsequently, on 13 October 2021 the Appellant filed the Spanish Claim.
- By letter dated 22 April 2022, the Appellant withdrew the Spanish Claim.
- Independently, considering the Appellant's absence at the hearing scheduled for 25 April 2022, by means of the Decreto 322/2022 the Labour Court of Sevilla closed the Spanish proceedings.
- On 29 September 2022, the FIFA DRC passed the Appealed Decision.

208. The foregoing leads the Panel to two conclusions. Firstly, the Panel is inclined to find that the proceedings that were commenced first were in fact the FIFA proceedings, triggered by lodging the FIFA Claim on 12 October 2021. Therefore, if anything, the *lis pendens* principle could have been considered in the context of the proceedings held by the Labour Court of Sevilla. However, since this appeal is directed against the Appealed Decision and not the Decreto 322/2022, the present Panel's scope of review revolves around the possible occurrence of *lis pendens* in the context of FIFA proceedings. Notwithstanding, the Panel additionally finds that at the time the Appealed Decision was rendered, there were no concurrent proceedings pending. The Spanish proceedings were closed on 26 April 2022 for formal reasons, i.e., due to the Appellant's non-appearance at the mandatory hearing. As has been established above, the Decreto 322/2022 which was of pure procedural nature has not produced the effect of *res iudicata*. Therefore, irrespectively of which of the proceedings have been commenced first, the Appealed Decision could not have been rendered based on the principle of *lis pendens*, as there were no concurrent proceedings pending at that time.

209. The Panel thus concludes that the principle of *lis pendens* was not applicable to the Appealed Decision. As a consequence, it would not have restrained rendering a decision on the merits of the case.

3. Did the Appellant engage in unlawful *forum shopping*?

210. The question whether the Appellant engaged in unlawful *forum shopping* lies at the heart of the dispute between the Parties. While the Appellant asserts that his conduct did not amount to *forum shopping*, both Respondents argue to the contrary.

211. As a preliminary matter, the Panel notes that introduction of alternative dispute resolution *fora* in contracts and jurisdiction clauses, especially in favour of ordinary courts of law, is generally permitted in light of the provision of Article 22 para. 1 let. b) of the RSTP and confirmed in the relevant CAS jurisprudence. In case a provision provides several *fora* in the alternative, it is – absent any indications to the contrary – up to the party filing a claim to choose among the agreed *fora* (CAS 2007/A/1301, CAS 2017/A/5111, CAS 2018/A/5664). Therefore, when different *fora* are available to a

party seeking protection of its rights, it should be able to make the choice at its own discretion, taking into consideration also (should it wish so) which forum suits its interests best.

212. However, parties should not be allowed to engage in the so-called *forum shopping* practice which could be understood as a situation where a party brings the same dispute before multiple *fora* in order to seek the most favourable judgement. The concept of *forum shopping*, although widely accepted in sports-related dispute resolution system, has not been regulated or defined. It is closely connected to the principle *electa una via non datur recursus ad alteram.* In other words, once the choice of competent dispute resolution forum is made, it should become binding on both parties with respect to the dispute in question (ref. CAS 2007/A/1301, CAS 2017/A/5111, CAS 2018/A/5664).

213. The Panel notes that the concept of *forum shopping* has been addressed by FIFA in the Commentary to the RSTP (the "RSTP Commentary"). While this document does not constitute *per se* the applicable regulation, it provides useful guidelines as to which practice could be regarded as unlawful *forum shopping* within football-related dispute resolution system. In this respect, the Commentary provides that:

"*The final considerations concern the practice known as "forum shopping" – a party taking the same matter to multiple for a in the hope of obtaining the result that suits its purposes. The relevant jurisprudence is designed to prevent such behaviour, which is viewed as illegitimate. A party should not be able to game the system by having multiple fora hear the same argument in the hope one of them will hand down the judgment it wants. For example, a party should not be allowed to ask a national body to confirm that a contract has been breached without just cause, and then, having obtained a favourable decision at national level, ask the DRC to set the compensation payable in the case. The principle that a party that has chosen to have a case heard under one competent jurisdiction cannot then have recourse to another (known colloquially as "forum shopping") is consistently applied.*"

214. Taking the above into account, the Panel is of the view that the unlawful *forum shopping* practice is characterized by the intent of the claimant and his/her purposeful conduct aimed at "gaming the system" to the detriment of the opponent. Its inherent element is therefore bad faith of the party initiating the dispute.

215. Having determined the foregoing and considering the established facts of the case, the Panel is not convinced that the Appellant indeed engaged in inadmissible *forum shopping*. In particular, the Panel does not find it sufficiently proven that the Appellant acted in bad faith when filing the FIFA Claim and subsequently the Spanish Claim. The Appellant's intention to file the Spanish Claim, as well as the reason behind it, have been openly expressed already in the FIFA Claim as follows:

"*Notwithstanding the foregoing, as a purely precautionary measure and in a very subsidiary alternative, the Claimant informs FIFA that he will also bring the case before the ordinary court in Seville - after the case has been brought before FIFA - and will request the suspension of the proceedings in favour of the proceedings pending before FIFA's DRC. Consequently, by virtue of the principle of litispendence, FIFA – which was the first to be seized - will remain competent to rule on the case.*"

216. A corresponding declaration has been included in the Spanish Claim which provided that:

"*Adicionalmente, la presente demanda de conciliación se presenta ad cautelam, en la medida en que he presentado, a título individual, una reclamación por esta materia ante el órgano competente de la FIFA a tal efecto, de conformidad con lo previsto en el Contrato de Trabajo. Se acompaña copia de esta reclamación como Documento nº 5.*"

Freely translated to English as:

"*Additionally, the present request for conciliation is submitted ad cautelam, to the extent that I have submitted, on an individual basis, a claim in this matter before the competent FIFA body for this purpose, in accordance with the provisions of the Employment Contract. A copy of this claim is attached as Document No. 5.*"

217. Therefore, the Panel finds that the Appellant has upfront stated his intentions to both judicial authorities and thus to his opponent – the First Respondent.

218. The Panel additionally notes that while the statute of limitations under the applicable FIFA regulations is of two years (Article 23 para. 3 of the RSTP), the Appellant's claim before the national court would have become time-barred already 20 working days after the termination of the Contract by the First Respondent under Article 103 para. 1 of the L.R.J.S., which provides that:

"*El trabajador podrá reclamar contra el despido, dentro de los veinte días hábiles siguientes a aquél en que se hubiera producido. Dicho plazo será de caducidad a todos los efectos y no se computarán los sábados, domingos y los festivos en la sede del órgano jurisdiccional.*"

Freely translated to English as:

"*The employee may file a claim against the dismissal within twenty business days following the day on which it occurred. Said period will expire with all effects, and Saturdays, Sundays and holidays at the seat of the jurisdictional body will not be counted.*"

219. As a consequence, should the Appellant not have filed the Spanish Claim within the abovementioned time limit, he would have been permanently prevented to do so, even in case in which the FIFA DRC, for any reason whatsoever, would decline its jurisdiction.

220. Combining the foregoing with the fact that the jurisdiction clause contained in Article 13 of the Annex provided for several competent dispute resolution *fora*, the Panel is of the view that the Appellant may have filed the Spanish Claim with the purpose of protecting his rights. At the end of the day, notwithstanding this Panel's finding that Article 13 of the Annex contained a valid jurisdiction clause, the Appellant may have had a reasonable doubt whether the FIFA DRC would accept its jurisdiction on the basis of this provision. Filing a subsequent claim before the national court appears therefore justified.

221. It is true that the Appellant participated in the proceedings before the Labour Court of Sevilla, including the mandatory conciliation hearing on 30 November 2021. However, the Panel notes that should the Appellant missed this hearing, it could have had the same procedural consequences as his absence in the hearing of 25 April 2022, i.e., closure of the proceedings on the basis of Article 83 para. 2 of the L.R.J.S.

222. In such case, the Appellant's rights would not have been duly preserved, considering that the FIFA Claim was notified to the First Respondent only on 26 November 2021, three days before the mandatory conciliation hearing. At the same time, the Panel recalls that the Appellant revealed in the Spanish Claim the fact of previous submission of the FIFA Claim, as well as his position that the FIFA DRC was primarily competent to resolve the dispute.

223. Lastly, the Panel notes that even in situation in which there were parallel proceedings pending before the Labour Court of Sevilla and the FIFA DRC, nothing prevented the First Respondent from filing a corresponding counterclaim before the latter.

224. Taking into consideration the foregoing, the Panel finds that the Appellant did not engage in unlawful *forum shopping*. It could not have been established that the Appellant's intent was to "game the system" to the detriment of the First Respondent in order to check which forum would bring a more favourable judgment. The Panel is not convinced that the Appellant's actions were characterized by bad faith. Rather, it is reasonable to assume that by filing (and upholding to a certain point) the Spanish Claim, the Appellant wanted to preserve his rights deriving from his dismissal by the First Respondent.

225. Consequently, the FIFA DRC erred in finding that the FIFA Claim was inadmissible because the Appellant engaged in *forum shopping*.

4. Did the Appellant violate the principle of *venire contra factum proprium*?

226. For the sake of good order, the Panel will also address the Second Respondent's allegation whereby the Appellant violated the principle of *venire contra factum proprium*. In this respect, the Second Respondent essentially argues that the fact the First Respondent was effectively notified of the FIFA Claim after it was made aware of the Spanish Claim and after it was summoned to the mandatory conciliation hearing, induced a legitimate expectation of the Club that the forum chosen by the Appellant was in fact the Labour Court of Sevilla.

227. *Venire contra factum proprium* is a legal principle, recognized by Swiss law, providing that where the conduct of one party has induced legitimate expectations in another party, the first party is estopped from changing its course of action to the detriment of the second party (e.g., CAS 2008/O/1455, CAS 2015/A/4195, CAS 2020/A/7252). In other words, a party violates the principle of *venire contra factum proprium* if it has induced the other party (through its previous behaviour) to legitimately rely on certain assumptions (CAS 2020/A/6861).

228. In this regard, the Panel recalls that the Appellant filed the FIFA Claim on 12 October 2021. The day after, on 13 October 2021, the Appellant submitted the Spanish Claim. On 19 October 2021, the Appellant was requested by the FIFA General Secretariat to

complete the FIFA Claim, which the Appellant did on 26 October 2021. The FIFA Claim was notified to the First Respondent by the FIFA General Secretariat on 26 November 2021. In the meantime, on 27 October 2021 the Appellant filed his definitive claim against the First Respondent (as part of the Spanish Claim).

229. The Panel thus observes that the Appellant's relevant conduct consisted of – first, filing the FIFA Claim, and second, filing the Spanish Claim. When requested to complete the FIFA Claim, the Appellant has done so within the prescribed time limit.

230. At the same time, the Panel is not convinced that the Appellant's conduct led to notification of the FIFA Claim to the First Respondent subsequently to notification of the Spanish Claim. Notification of the respective claims is the prerogative and obligation of the respective judicial bodies, i.e., FIFA and the Labour Court of Sevilla. The party to the proceedings does not have a substantial influence over the judicial body with regard to when the claim will be notified by this body to the opponent. Therefore, the Panel is of the view that the time of notification of the FIFA Claim to the First Respondent cannot be considered as "conduct" of the Appellant. On the other hand, the mere fact that the Spanish Claim was submitted only one day after the FIFA Claim cannot amount to inducing a legitimate expectation of the First Respondent that the forum chosen by the Appellant was the Labour Court of Sevilla. In addition, the sequence of events established in the present case demonstrates that should the Appellant have waited with submitting the Spanish Claim until the First Respondent is notified of the FIFA Claim, he might have had his claim time-barred pursuant to Article 83 para. 2 of the L.R.J.S.

231. Violation of the principle of *venire contra factum proprium* necessarily requires that the expectation that the party has results from the conduct of the other party. It therefore calls for certain activity (or, in some instances, lack of action) of this other party. In the Panel's opinion, in the present case it cannot be concluded that the alleged expectation of the First Respondent was induced by the Appellant's conduct.

232. The fact that the First Respondent filed its counterclaim in the proceedings before the Labour Court of Sevilla does not change the foregoing. As already indicated by the Panel, nothing prevented the First Respondent from filing a corresponding counterclaim in the FIFA proceedings.

233. At last, the Panel notes that, remarkably, the First Respondent did not claim in its written submission to have had a legitimate expectation that the Appellant chose the Labour Court of Sevilla as the appropriate dispute resolution forum.

234. Therefore, the Panel finds that the Appellant did not violate the principle of *venire contra factum proprium*.

235. Having established all the foregoing, the Panel concludes that the FIFA Claim was admissible.

C. Adjudicating the Appellant's claim

1. The mandate of this Panel

236. The Panel found that the Appealed decision was wrong for rejecting the Appellant's claim for lack of jurisdiction / admissibility. The question arises whether – in view of this – the Panel must refer the case back to FIFA to adjudicate it on the merits. Article R57(1) of the CAS Code provides as follows:

"The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance."

237. According to well-recognised and consistent CAS jurisprudence, a hearing before a CAS Panel is a hearing *de novo* (e.g., CAS 2022/A/8651). As rightly determined by the CAS Panel in the case CAS 2010/A/2235: "*Under this provision, the CAS Panel's scope of review is unrestricted. It may even request ex officio the production of further evidence. In other words, the CAS Panel not only has the power to establish whether the decision of the first instance was or was not lawful, but to issue an independent and free-standing decision (CAS 2004/A/607; CAS 2004/A/633; CAS 2005/A/1001; CAS 2006/A/1153). Accordingly, the CAS must be able to examine the formal aspects of the appealed decisions but also, above all, to evaluate all facts and legal issues involved in the dispute (CAS 2008/A/1515)*" (see also: MAVROMATI/REEB, The Code of the Court of Arbitration for Sport: Commentary, cases and materials, 2015, p. 508, para. 14).

238. It is also pertinent to quote the following output of the CAS jurisprudence on this matter: "*Under article R57 of the CAS Code, the Panel's scope of review is fundamentally unrestricted (...). The CAS Code contemplates a full hearing de novo of the original matter and grants the CAS Panel the authority to render a new decision superseding that rendered by the previous instance. The "full power" granted the deciding Panel under the CAS Code precludes any notion that the Panel must abide by restrictions on evidence which may or may not have been adduced in previous proceedings before a national or international disciplinary tribunal. National or international sports organizations may freely decide to accept or not to accept the arbitral jurisdiction of the CAS; however, when they do accept the CAS's jurisdiction, they necessarily accept the application of the basic principles of the CAS Code, including the principle of a de novo review of the case. The CAS must, therefore, be accorded the unrestricted right to examine not only the procedural aspects of an appealed decision, but also, and above all, to review and evaluate all facts and legal issues involved in the dispute*" (CAS 2008/A/1700 & 1710, CAS 2015/A/3896).

239. This Panel fully adheres to this well-established CAS jurisprudence. Pursuant to Article R57 of the CAS Code, the Panel is empowered to issue a new decision which replaces the Appealed Decision or annul it and refer the case back to the FIFA DRC. The Panel notes that the Parties had the unrestricted right to present their cases in the present arbitration proceedings before the CAS and that their submissions, both written and oral, were duly considered by the present Panel. Therefore, the Panel finds that it serves

procedural efficiency and justice better, if it decides on the Appellant's claim and not to refer the case back to the adjudicatory bodies of FIFA.

2. Existence of just cause to terminate the Contract

240. At the core of the present dispute lies the question of whether the First Respondent terminated the Contract with just cause. In that regard, the Panel notes the Parties' respective positions and observes that the Appellant strongly contests the existence of just cause on the side of the First Respondent to terminate the Contract, the First Respondent defends its existence, while the Second Respondent refrains from addressing the merits of the dispute.

241. The Panel notes that contractual stability is one of the underlying principles of the FIFA legal framework. In this context, Article 13 of the RSTP establishes that:

"A contract between a professional and a club may only be terminated upon expiry of the term of the contract or by mutual agreement."

242. However, the applicable regulations provide for a number of derogations from this principle. One of them has been established in Article 14 para. 1 of the RSTP which provides that:

"1. A contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause."

243. The RSTP does not provide for a definition of "just cause" to terminate the contract. However, the Panel finds it useful to refer to the RSTP Commentary which reads, *inter alia*, that:

"Whether there is just cause for the early termination of a contract signed between a professional player and a club must be assessed in consideration of all the specific circumstances of the individual case.

[...]

When required to assess whether a valid reason existed for a unilateral contract termination, the following principles should be applied, while considering the specific circumstances of each individual matter:

- *Only a sufficiently serious breach of contractual obligations by one party to the contract qualifies as just cause for the other party to terminate the contract.*
- *In principle, the breach is considered sufficiently serious when there are objective circumstances that would render it unreasonable to expect the employment relationship between the parties to continue, such as a serious breach of trust.*
- *The termination of a contract should always be an action of last resort (an 'ultima ratio' action)."*

244. Given the lack of statutory definition of just cause, the Panel shall seek its meaning by referring to the relevant provisions of Swiss law. Accordingly, as commonly referred to in the CAS jurisprudence in relation to termination of contracts concluded between clubs and players (e.g., CAS 2006/A/1180; CAS 2014/A/3626; CAS 2020/A/6889), Article 337 para. 2 of the Swiss Code of Obligations ("SCO") provides that *"in particular, good cause is any circumstance which renders the continuation of the employment relationship in good faith unconscionable for the party giving notice"*. Pursuant to Article 337 para. 3 of the SCO, whether there is a good cause to terminate an employment contract shall be determined by the court at its own discretion.

245. According to Swiss case law, whether there is a good cause for termination of a contract depends on the overall circumstances of the case (ATF 108 II 444, 446; ATF 2 February 2001, 4C.240/2000 no. 3 b aa). Particular importance is thereby attached to the nature of the breach of obligation. The SFT has ruled that the existence of a valid reason must be admitted when the essential conditions, whether of an objective or personal nature, under which the contract was concluded are no longer present (ATF 101 Ia 545).

246. Furthermore, as rightly determined by other CAS Panels, only material breaches of an employment contract constitute just cause for its termination. The breach must be material in the sense that, in the circumstances of the breach at stake, the party cannot be expected in good faith to continue the contractual relationship (e.g., CAS 2006/A/1100; CAS 2006/A/1180; CAS 2014/A/3626; CAS 2013/A/3091 & 3092 & 3093). Indeed, only a particularly severe breach of the employment contract may result in its immediate termination (CAS 2017/A/5182).

247. Finally, it shall be observed that according to the jurisprudence of the CAS and in compliance with Swiss law (ATF 127 III 153; ATF 121 III 467; ATF 117 II 560; ATF 116 II 145 and ATF 108 II 444, 446) for a party to be allowed to validly terminate an employment contract it must, in principle, have warned the other party in order to give the latter the chance to remedy and comply with its obligations (e.g. CAS 2013/A/3091, 3092, 3093; CAS 2013/A/3398; CAS 2015/A/4327; CAS 2018/A/6605; CAS 2019/A/6626).

248. The Panel considers it important to deal with the issue of a prior *warning* since it has been contented by the Appellant that the First Respondent failed to issue a formal *warning* involving the threat of a dismissal before unilaterally terminating the Contract. In this regard, the Panel notes that, according to Swiss Law, for a *warning* to serve as a basis for a termination, it must include the threat of dismissal in the event of a repeated offence. The SFT ruled that only a particularly serious breach of contract may justify the immediate dismissal of the employee. In the case of a less serious breach, it can lead to immediate dismissal only if it has been repeated despite a *warning*. Failure by one of the parties to fulfil an obligation under the contract is generally understood to mean a breach of an obligation imposed by the contract, but other facts may also justify immediate termination (ATF 130 III 28, consid. 4.1, p. 31; 129 III 380, consid, 2.2, p. 382).

249. The Panel takes note of the Appellant submissions' indicating that none of the grounds cited by the First Respondent - taken individually or together - are of sufficient gravity to constitute just cause for termination without prior formal *warning*. In this regard, the

Panel observes that the initiation of the First and Second disciplinary proceedings by the First Respondent did not in any way constitute a *warning* with the threat of dismissal as the notifications merely stated that the breaches were considered "very serious" resulting in possible sanctions including "suspension of employment and salary of eleven to thirty days or a monetary fine of up to 25% of the monthly salary". However, the Panel observes that in the Third and Fourth disciplinary proceedings, the First Respondent clearly stated that the breaches were yet again "very serious" resulting in possible sanctions including "suspension of employment and salary of eleven to thirty days or a monetary fine of up to 25% of the monthly salary or a *disciplinary dismissal*". Therefore, the Panel is in the view that the First Respondent duly warned the Appellant of the possibility of a dismissal in case of non-compliance of his obligations under the Contract.

250. Furthermore, the Panel observes the following commentary in line with the relevant SFT case law (ATF 4C. 348/2000) where the Federal Tribunal scrutinizes the issuance of a *warning* before a party unilaterally terminates the contract:

> *"Staehelin (Zurich Commentary, n. 10 ad art. 337 CO) teaches that the warning fulfils two functions: on the one hand, it contains a reproach made by the employer, regarding the criticized behaviour (Rügefunktion); on the other hand, it expresses the threat of sanction (Warnfunktion). It is not necessary for the employer to expressly threaten the worker with immediate dismissal: it is sufficient if it is clear from the warning and the circumstances that the person concerned is not simply exposed to ordinary dismissal, but to immediate dismissal. Furthermore, the employer may refrain from issuing a warning when it appears from the attitude of the other party that such a step would be useless.*
> *For Rehbinder (Bern Commentary, n. 2 ad art. 337 CO), the warning must in principle include the threat of immediate dismissal in the event of a repeat offense; however, depending on the case, the employer can be expected to issue several warnings before considering that the relationship of trust has been broken; conversely, several successive breaches may justify immediate dismissal, even without warning.* ***The warning must therefore include, as a general rule, the threat of immediate dismissal. However, depending on the circumstances, the employer may be satisfied with a less precise warning.***
> *Brühwiler (Kommentar zum Einzelarbeitsvertrag, 2nd ed., n. 9 ad art. 337 CO) recalls, for his part, that the requirement for a warning is linked to the rule according to which immediate dismissal is only justified if the continuation employment relations can no longer be expected from the employer. Generally speaking, for this condition to be met in cases where the breaches are not particularly serious, the warning must contain the threat of immediate dismissal in the event of a repeat offense. Often, warnings without the threat of immediate dismissal do not provide grounds for such dismissal. According to Rapp (Die fristlose Kündigung des Arbeitsvertrages, in BJM 1978 p. 172/173 and 176), being an ultima ratio, immediate dismissal is only justified if it appears that a warning would not be enough to remedy the situation; this author*

does not require that the warning in all cases include the threat of immediate dismissal.
Finally, according to Schweingruber (Commentary on the employment contract, n. 10 ad art. 337 CO), certain breaches only justify immediate dismissal if they recur despite repeated warnings; the warning may include a threat of immediate dismissal, but this author does not appear to require it"

251. Similarly, the SFT in the above case additionally observed that in some Federal Court judgments in the past, immediate dismissal is only justified if it is preceded by the clear threat of immediate dismissal (ATF 108 II 301 consideration 3b p. 303). However, in other judgments, the SFT has only indicated that, if the breaches were not particularly serious, they only justified immediate dismissal after vain warnings from the employer. It does not follow that the *warning* should necessarily include the threat of immediate dismissal (ATF 117 II 560 at 3b p. 562, 116 II 145 at 6a p. 150; 112 II 41 at 3a, 108 II 444 consideration 2 p. 446, 104 II 28 consideration 2b, 101 Ia 545 consideration 2c p. 549). Finally, according to a more recent judgment, the *warning* is nothing other than a formal notice to correctly execute the contract, accompanied by the setting of a suitable deadline for execution within the meaning of art. 107 CO, a necessary step unless it appears from the attitude of the debtor that such a summons would have no effect (art. 108 ch. 1 CO; unpublished judgment of January 3, 1995, in case 4C.327/ 1994, consideration 2b/aa). Therefore, the SFT concluded that when ruling on the existence of just grounds, the judge decides in light of all the circumstances. Case law cannot therefore lay down rigid rules on the number and content of warnings, failure of which by the employee is likely to justify immediate dismissal. Decisive, in each particular case, among other circumstances, are the nature, seriousness, frequency or duration of the breaches of which the employee is accused, as well as his/her attitude towards injunctions, warnings or threats formulated by the employer.

252. The Panel is convinced that regardless of a formal *warning* or not, the breaches committed by the Appellant were serious in nature and moreover, they were repetitive in spite of the initiation of three disciplinary proceedings against the Appellant. Therefore, the Panel finds that in this case there are other more decisive circumstances from which it follows that the Appellant was duly warned of possible consequences.

253. Having carefully considered the facts of the present case, the Panel shares the view of the First Respondent that it had just cause to terminate the Contract. In this respect, the Panel considers that the optimal weight determined by the Club was not excessive or unreasonable and that moreover, the required weight is an important criterion for the sporting performance of athletes thus creating an implied obligation on the Player to stay fit and to be in his optimal playing conditions. Therefore, the Panel notes that the Player's persistent incompliance with the optimal weight and his repeated late arrivals constituted a breach of his obligations under the Contract.

254. The Panel observes that the Player's overweight issues started already in the pre-season of 2020/2021 and continued throughout the term of the Contract until its termination. The excess of the Player's optimal weight determined by the Club was considerable, reaching as much as 15 kgs in the first pre-season and 8 kgs in the second one. The Player's BMI and fat tissue indeed fairly exceeded the levels presented by other players

of the Club. At the same time, it has been evidenced that the Club performed medical examinations of the Player to verify the potential internal cause of his overweight, and that such examinations revealed no metabolic or physiological impediments for the loss of weight by the Appellant. The Appellant did not prove that he followed the diet instructions of the First Respondent's nutritionist and could not discharge his burden of proof that he was primarily responsible for this situation. Therefore, given the results of the medical examinations referred to above, the fact of the Player remaining considerably overweight should be attributed to himself.

255. As regards the Player's late arrivals, the Panel is convinced that they occurred repeatedly. It is not of decisive importance whether the Appellant was late to the main training session or to the pre-training preparations or briefings. It has been established in the course of these proceedings that such late arrivals indeed occurred which in itself constitutes a violation of contractual obligations. In addition, the Panel notes that these late arrivals at some instances prevented the Club from performing weight checks on the Player, including on 13 August 2021 which was the date of the first match of LaLiga in the 2021/2022 football season and the Player's deadline to reach the optimal weight.

256. It has also been established that the First Respondent conducted four disciplinary proceedings related to the Player's overweight, three of which additionally concerned the Player's late arrivals. The Appellant should therefore have been fully aware of the incorrectness and the reprehensible nature of his conduct, as well as of the First Respondent's dissatisfaction in that regard. The Appellant's behaviour, with respect to both his overweight and late arrivals, has thus been correctly considered as occurring in conditions of recidivism. What is remarkable, up until the fourth disciplinary proceedings the Appellant did not contest the First Respondent's allegations and did not provide his comments within the granted deadline. It was only when the fourth disciplinary proceedings were initiated that the Appellant provided his position, as a result of which the First Respondent performed medical examinations of the Appellant in order to verify potential medical causes of the latter's overweight. The First Respondent therefore acted with necessary diligence in order to clarify the situation, given the recurrence of the Appellant's overweight problem. As mentioned above, the Panel observes that in the respective letters notifying the Appellant of the opening of the third and the fourth disciplinary proceedings, the First Respondent informed the Appellant that his conduct amounted to serious infringement which could lead *inter alia* to a termination of the Contract pursuant to the provisions of Annex V to the CBA, thereby the Panel does not consider the issuance of a prior *warning* to be a necessary procedure for the unilateral termination in question. . Notwithstanding, the sole fact that there were four (or three, respectively) disciplinary proceedings related to the same infringements already gave the Appellant the chance to remedy and comply with his obligations. Therefore, the Panel is satisfied that the First Respondent duly warned the Appellant of the possibility to terminate the Contract.

257. The Panel therefore finds that, in the circumstances of the present case, the Appellant's conduct related to his persistent incompliance with the optimal weight determined by the Club and his repeated late arrivals to the training sessions amounted to a just cause for the First Respondent to terminate the Contract.

3. The *Reflection* Period

258. Notwithstanding the foregoing, the Panel acknowledges the Appellant's allegations whereby the First Respondent did not communicate to the former the termination of the Contract in due time, exceeding the so-called *reflection period.* Consequently, the Appellant argues that termination of the Contract by the First Respondent should be considered unjustified.

259. The Panel notes that neither the FIFA regulations nor Swiss law (in particular provisions of the SCO) determine the maximum time limit to communicate termination of a contract without notice. It is therefore pertinent to refer to the relevant case law. Accordingly, the CAS Panel in the case CAS 2014/A/3643 provided that "[t]*he party prepared to put an immediate end to the employment agreement on the grounds of a just cause has only a short period of reflection, after which it must be assumed that the said party chose to continue the contractual relationship until the expiry of the agreed period. A period of reflection of two to three business days is a maximum. An extension of a few days is tolerated only under exceptional circumstances (ATF 130 III 28 consid. 4.4; 123 III 86 consid. 2a; decision of the Swiss Federal Court of 24 August 2004, 4C.348/2003, consid. 3.2; Rémy Wyler, Droit du Travail, Stämpfli, Berne 2008, p. 502; Gabriel Aubert, Du contrat individuel de travail, in Commentaire Romand, Code des obligations I, Bâle, 2012, ad art. 337, N. 11, p. 2098)*".

260. In line with the relevant SFT case law (4A_251/2015, 4A_253/2015, 3.2.2) (emphasis added):

> "*The circumstances of the specific case determine the period of time within which the person concerned may reasonably be expected to take the decision to terminate the contract with immediate effect. Generally speaking,* ***the case law considers that a cooling-off period of two to three working days is sufficient for reflection and legal advice****. An additional period is tolerated if it is justified by the practical requirements of daily and economic life;* ***an extension of a few days may thus be accepted when the decision must be taken by a multi-headed body within a legal entity****, or when the employee's representative must be heard (BGE 138 I 113 rec. 6.3.2 and the decisions cited; 130 III 28 rec. 4.4 p. 34).*
>
> *A distinction must also be made between situations that are clear and those that require clarification.* ***In the latter case, the time required to clarify the facts must be taken into account****, it being specified that an employer who has a concrete suspicion of the existence of just cause must immediately and continuously take all measures that may reasonably be required of him to clarify the situation. In some cases, it may be necessary to conduct investigations in secret (BGE 138 I 113, para. 6.3.3; judgment 4A_236/2012, para. 2.4; judgment 4C.188/2006 of 25 September 2006, para. 2).*"

261. Similarly, the SFT judgement in the case 138 I 113 8C_294/2011 (6.3.3) provided that *"in the case of clear facts, a different approach must be taken than in cases where clarifications are necessary first or where misconduct only comes to light slowly (judgments 4A_238/2007 of 1 October 2007 E. 4.1; 4C.188/2006 of 25 September 2006 E. 2; 4C.348/2003 of 24 August 2004 E. 3.2; 4C.345/2001 of 16 May 2002 E. 3.2). If*

the purpose of the clarification is first to be able to assess the extent of the misconduct, the reflection period will necessarily follow the clarification period."

262. Finally, the Panel notes that a longer period of reflection should be granted in more complex cases, also in case of weekends without work (4C_345/2001, 3.2).

263. The Panel additionally observes that in his Appeal Brief (point 101), the Appellant acknowledged the "standard" *reflection* period of two to three working days may be extended in exceptional circumstances.

264. Transposing the foregoing to the context of the present dispute, the Panel recalls the following sequence of events:

- On 28 July 2021, the First Respondent rendered the Third Disciplinary Decision, by means of which certain sanctions were imposed on the Appellant. In addition, the Appellant was obliged to reach his optimum weight before the start of league competitions of LaLiga (13 August 2021) and to maintain it throughout the football season.

- On 13 August 2021, the Appellant was late 40 minutes which made it impossible to check the Appellant's weight.

- On 16 August 2021, the First Respondent performed a weigh check on the Appellant which resulted in the latter exceeding the optimal weight by 2,7 kgs.

- On 21 August 2021, the First Respondent opened the fourth disciplinary proceedings. The Appellant was granted a statutory time limit of 10 days to provide his position.

- On 30 August 2021, the Appellant filed his position in which he denied having violated the diet that had been communicated to him by the nutritionist and argued that he applied it strictly and consistently. The Appellant requested the First Respondent to undertake additional analyses of the former in order to establish the reasons for him remaining overweight.

- On 3 September 2021, the First Respondent notified the Appellant of the scheduled medical examination.

- On 6 September 2021, the First Respondent performed medical examination of the Appellant.

- On 13 September 2021, the First Respondent rendered the Fourth Disciplinary Decision, by means of which the Club terminated the Contract with immediate effect.

265. On this basis, the Panel finds that the First Respondent did not exceed the permissible *reflection* period to terminate the Contract.

266. The Panel considers it appropriate that after the Appellant's failure to meet his optimal weight by 13 August 2021, the First Respondent opened the next (and the last)

disciplinary proceedings, warning the Appellant that it may result in termination of the Contract. The Panel is of the view that it would have been unjustified to terminate the Contract during the Appellant's statutory time limit to file his position in the disciplinary proceedings, therefore this period should not be taken into consideration for this purpose. Unlike during the previous disciplinary proceedings, on 30 August 2021 the Appellant submitted his position in which he requested the First Respondent to perform his medical examinations to seek possible internal causes of his overweight problems. The Panel finds it justified that the First Respondent accepted this request and accordingly notified the Appellant of the scheduled examination on 3 September 2021. The medical examination took place on the afternoon of 6 September 2021. After the analysis of its results, on 13 September 2021, i.e., 7 calendar days after the examination took place, the First Respondent terminated the Contract.

267. The Panel notes that, according to the relevant case law referred to above, the "standard" *reflection* period amounts to two to three working days. However, this period may be extended in particular in cases which require clarification, in cases where said period includes a weekend or in cases where the decision has to be taken by a multi-headed body of a legal entity.

268. The Panel is convinced that the foregoing conditions have been met in the present case. When requested to perform medical examination of the Appellant in order to verify possible internal causes of his overweight issue, the First Respondent rightly decided to perform such examination. The permissible period of termination of the Contract thus got extended by the necessary clarification period, in which the First Respondent was able to assess the extent of the Appellant's misconduct. Such clarification period was then followed by the reflection period, in order to allow the First Respondent to evaluate whether it was willing to undertake the *ultima ratio* measure, which was the termination the Contract. As the First Respondent is a legal entity, the decision on termination of the Contract had to be taken by a multi-headed body, which is the Club's Board of Directors. The Panel is therefore convinced that in the circumstances of the present case, the *reflection* period may, in principle, have exceeded three working days.

269. Even if the Panel was to apply the "standard" *reflection* period of three working days, considering that the medical examination took place on 6 September 2021 (Monday), and according to the report, the results were issued on the same day or even if it is presumed that the concerning decision-making body received the results the following day on 7 September 2021 (Tuesday), the said *reflection* period would have expired on 9 September 2021 (Thursday). The Contract was, however, terminated on 13 September 2021 (Monday). The Panel observes that termination of the Contract was preceded by a weekend, thus two non-working days (11-12 September 2021). Therefore, the First Respondent might have been expected to terminate the Contract on 10 September 2021 (Friday). Instead, it did so on the following working day.

270. On the basis of the foregoing, the Panel finds that termination of the Contract by the First Respondent was made in due time. The First Respondent did not exceed the *reflection* period, which in this case might have been inconsiderably longer than two to three working days. The established sequence of events demonstrates that the First Respondent departed from the "standard" *reflection* period by as little as one working day. Such extension should be regarded as permissible.

271. Taking into consideration the Panel's findings regarding the existence of just cause on the side of the First Respondent to terminate the Contract and the *reflection* period, the Panel concludes that the First Respondent had just cause to terminate the Contract and executed such termination in a timely manner. Therefore, the present appeal shall be rejected in its entirety.

X. COSTS

272. Article R64 para. 4 of the CAS Code provides in its relevant part that:

"At the end of the proceedings, the CAS Court Office shall determine the final amount of the cost of arbitration, which shall include:

- *the CAS Court Office fee,*
- *the administrative costs of the CAS calculated in accordance with the CAS scale,*
- *the costs and fees of the arbitrators,*
- *the fees of the ad hoc clerk, if any, calculated in accordance with the CAS fee scale,*
- *a contribution towards the expenses of the CAS, and*
- *the costs of witnesses, experts and interpreters.*

The final account of the arbitration costs may either be included in the award or communicated separately to the parties."

273. Article R64 para. 5 of the CAS Code provides that:

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

274. In light of the outcome of the present proceedings, in particular of the fact that the appeal was dismissed in its entirety, the Panel considers that the costs of this arbitration, to be determined by the CAS Court Office and communicated separately to the Parties, shall be borne entirely by the Appellant.

275. Furthermore, the Panel considers that the Appellant shall pay a total amount of CHF 5,000 (Five thousand Swiss francs) to the First Respondent as the contribution towards the expenses incurred in connection with these arbitration proceedings.

276. As to the contribution towards FIFA's legal fees and expenses, the Panel considers that, since FIFA was represented by its in-house legal counsel, the Second Respondent shall bear its own costs incurred in connection with these proceedings.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 4 November 2022 by Joris Gnagnon against the decision rendered on 29 September 2022 by the FIFA Dispute Resolution Chamber in the case ref. no. FPSD-3965 is rejected.

2. The costs of the arbitration, to be determined and served to the parties by the CAS Court Office, shall be borne by Joris Gnagnon.

3. Joris Gnagnon is ordered to pay Sevilla Football Club a total amount of CHF 5,000 (Five thousand Swiss francs) as contribution towards the legal fees and expenses incurred in connection with these arbitration proceedings.

4. The Second Respondent shall bear its own costs as contribution towards the legal fees and expenses incurred in connection with these arbitration proceedings

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

Seat of arbitration: Lausanne, Switzerland
Date: 17 January 2024

THE COURT OF ARBITRATION FOR SPORT

Jacopo **Tognon**
President of the Panel

Ulrich **Haas**
Arbitrator

José Manuel **Maza Muriel**
Arbitrator