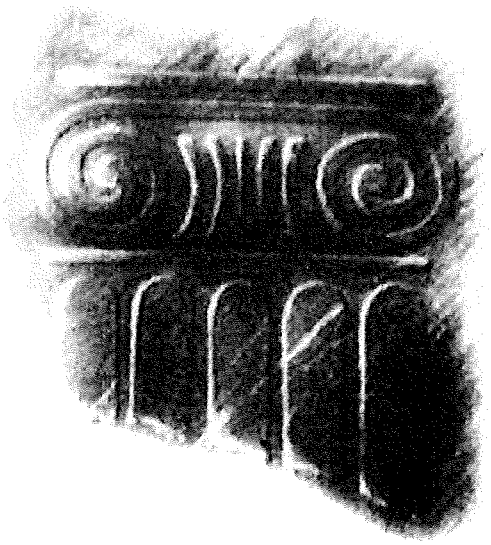
TAS / CAS

Tribunal Arbitral du Sport
Court of Arbitration for Sport
Tribunal Arbitral del Deporte



ARBITRAL AWARD

Huddersfield Town Association Football Club Limited

v.

RCD Espanyol de Barcelona

&

FIFA

CAS 2023/A/9404 - Lausanne, November 2023

CAS 2023/A/9404 Huddersfield Town Association Football Club Ltd. v. RCD Espanyol de Barcelona & FIFA

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr. Ulrich Haas, Professor in Zurich, Switzerland and Attorney-at-Law in Hamburg, Germany

Arbitrators: Mr. Lars Hilliger, Attorney-at-law in Copenhagen, Denmark

Ms. Anna Peniche, Attorney-at-law in Mexico City, Mexico

in the arbitration between

Huddersfield Town Association Football Club Ltd., Huddersfield, United Kingdom

Represented by Centrefield LLP, Manchester, United Kingdom

- Appellant -

and

RCD Espanyol de Barcelona, Barcelona, Spain

Represented by Álvaro Gómez de la Vega, Attorney-at-Law, Barcelona, Spain

- Respondent 1 -

Fédération Internationale de Football Association, Zurich, Switzerland

Represented by Mr Roberto Nájera Reyes, senior legal counsel, FIFA litigation department, Zurich, Switzerland

- Respondent 2 -

I. THE PARTIES

1. Huddersfield Town Association Football Club Ltd. (the "Appellant" or "HTAFC") is a professional football club based in Huddersfield, United Kingdom and is affiliated to the English Football Association (the "FA").

2. RCD Espanyol de Barcelona ("First Respondent" or "RCDE") is a professional football club based in Barcelona, Spain and is affiliated to the Real Federación Española de Fútbol (the "RFEF").

3. Fédération Internationale de Football Association ("Second Respondent" or "FIFA") is the world governing body of football. It exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials and players, worldwide. FIFA is an association under Articles 60 et seq. of the Swiss Civil Code ("CC") with its headquarters in Zurich, Switzerland; RCDE and FIFA are hereinafter jointly referred to as the "Respondents" and together with HTAFC as the "Parties", where applicable.

II. FACTUAL BACKGROUND

4. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced in the course of the present proceedings and at the hearing. Additional facts, allegations and evidence may be set out, where relevant, in other parts of this award. 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

5. On 4 September 2020, HTAFC and RCDE entered into an agreement (the "Transfer Agreement") for the permanent transfer of the football player Mr. Gonzalo Ávila Gordon (the "Player") from RCDE to HTAFC. The Transfer Agreement contained, *inter alia*, the following clauses:

> *"2. In consideration of the permanent transfer of the Player's registration from RCDE to HTAFC, HTAFC agrees to pay to RCDE, via the accounts of The FA, subject to receipt of a valid invoice and subject to and in accordance with the other terms and conditions of this Agreement, including but not limited to the satisfaction of the Registration Conditions (defined below), the sum of € 680,000 (Six Hundred and Eighty Thousand Euros) (the "Transfer Fee") payable as follows:*
>
> *€ 100,000 (One Hundred Thousand Euros) within 5 business days of the satisfaction of the condition in clause 3 (b);*
>
> *€ 240,000 (Two Hundred and Forty Thousand Euros) on 25 June 2021; and*

€ 340,000 (Three Hundred and Forty Thousand Euros) on 25 June 2022.

The parties agree an interest rate of five per cent (5%) per year in case of a delay in the payment of any instalment of the Transfer Fee owed where there is a delay in the payment that exceeds 10 days from the agreed dates for payment contained herein. [...]

4. In addition to the sums potentially payable under clause 2 above and subject to and in accordance with the terms of this Agreement, in the event that HTAFC shall enter into a mutually agreed transfer to transfer the Player's registration (whether on a temporary or permanent basis) to another football club (save in respect of any transfer to RCDE) (the 'Subsequent Transfer'), HTAFC shall pay to RCDE such sum or sums as represent 20% (twenty percent) of the compensation actually received by HTAFC from the Subsequent Transfer. [...]

9. RCDE hereby undertakes, represents and warrants to HTAFC that: [...]

(d) it accepts the sums payable to it hereunder in full and final settlement of any and all claims it may have against HTAFC in respect of HTAFC's registration of the Player;

(e) no other football club, team, national association, league, individual, or any other legal entity shall be entitled to bring a claim against HTAFC in respect of its registration of the Player;

(f) it shall, at its own cost, do execute and perform, and shall use all reasonable endeavours to procure that any necessary third parties shall do and execute and perform, such further agreements, assurances, acts and things as may be required to give effect to the terms, intent and purposes of this Agreement; [...]

10. It is acknowledged that HTAFC has entered into this Agreement and has agreed to make payments to RCDE under this Agreement in reliance on the representations and warranties given by RCDE hereunder and RCDE has entered into this Agreement in reliance on the representations and warranties given by HTAFC. In the event of a breach of any representation or warranty hereunder, the breaching party shall indemnify the non-breaching party on demand against all liabilities, costs, expenses, damages and losses (including but not limited to any direct, indirect or consequential losses, loss of profit, penalties and legal costs (calculated on a full indemnity basis) and all other professional costs and expenses) suffered or incurred by the non-breaching party arising out of or in connection with any breach of the representations and/or warranties given by the breaching party and in the case of RCDE, the foregoing indemnity shall also extend to any claim made against HTAFC in respect of the Player's registration with HTAFC."

6. On the same day, the Player was registered with HTAFC.

7. On 10 September 2020, HTAFC paid the first instalment of the Transfer Fee less a 5% deduction towards solidarity contribution in accordance with the terms of the Transfer Agreement.

8. From 15 October 2020 to 2 November 2020, several emails were exchanged between HTAFC and RCDE:

8.1. On 15 October 2020, Mr. Alvaro Gómez de la Vega, Sports Legal Manager

of RCDE sent an email to Mr. Leigh Bromby, Head of Football Operations of HTAFC, stating that:

"... I am sending this email with regards to the training compensation of Gonzalo 'Pipa' Ávila Gordon. Said compensation is due under current FIFA Regulations on the Status and Transfer of Players. In this context, please find attached the following documents...

... The full training is due since the player was on loan with both Damm and Nástic de Tarragona. I kindly ask you to let us know when can we expect the payment and I remain at your fullest disposal for any issue arising from this."

8.2. On 23 October 2020, Mr. Gómez de la Vega sent a further email to Mr. Bromby stating that his previous email remained unanswered and asking again when they can expect the payment.

8.3. On 23 October 2020, Mr. Bromby replied to Mr. Gómez de la Vega stating that:

"... You're initial email has been a surprise to us all at the club and received with distaste. The letter has been sent to our lawyers who have ensured us this is not a payment due and this is outlined in the transfer agreement. The transfer fee is the full and final amount we agreed, to suggest we owe extra payments makes us feel you are trying to take advantage."

8.4. On 27 October 2020, Mr. Gómez de la Vega responded to Mr. Bromby stating that:

"... As for the statement your lawyers made, we disagree with their analysis. In our opinion, training compensation is not mentioned in the contract and, consequently, is not included in the price. We kindly ask you to share your analysis with us and if you do not intend to pay to let us know in advance to take the corresponding actions."

8.5. On the same day, Mr. Bromby responded quoting "section 9d" and stating that this stated that RCDE accepts that nothing is payable on top of the transfer fee agreed.

8.6. On 30 October 2020, Mr. Gómez de la Vega replied stating that:

"... I'm sorry but I do not agree with that point of view and I am afraid we have no other choice but to present this matter to FIFA's DRC for a decision. We will present the case next week and please let us know if you think we can find a solution in the meanwhile..."

8.7. On the same day, Mr. Bromby sent an email stating that:

"... We wouldn't have entered into an agreement if we believed that extra payments were due. Again you never mentioned these payments during any negotiation regarding the player and that leaves us confused at this point and disappointed. The transfer agreement was put in place for this exact reason to state the figure we paid as a transfer was the full and final payment to your club."

8.8. On 2 November 2020, Mr. Gómez de la Vega sent an email to Mr. Bromby

stating that:

> *"... I will try to explain myself better. I don't agree because, in order to waive the training compensation, it has to be an express mention in the contract. Said concept is not even mentioned in the final document and it is not expressly included in the price (which varies since the initial offer).*
>
> *It is my opinion that we are entitled to this amount and I will lodge the claim during the day..."*

1. The Proceedings before the FIFA DRC

9. On 17 November 2020, RCDE submitted a statement of claim before the FIFA Dispute Resolution Chamber ("FIFA DRC") claiming EUR 396,166.67 from HTAFC as outstanding training compensation in respect of the transfer of the Player.

10. On 8 December 2020, the FIFA issued a proposal (the "FIFA Proposal") in respect of RCDE's claim which required HTAFC to pay the sum of EUR 342,246.57 along with 5% interest per annum as of the due date, to RCDE towards training compensation and requested the parties to accept or reject the said proposal by 9 January 2021. The FIFA Proposal also mentioned that "*In case a proposal is accepted by all parties or the parties fail to provide an answer to the FIFA Player Status Department within stipulated deadline, the proposal will become binding.*"

11. On 9 December 2020, RCDE informed the FIFA DRC that it accepted the FIFA Proposal.

12. HTAFC did not reply within the time limit as set forth in the FIFA Proposal. According to HTAFC, it initially had become aware of the FIFA Proposal upon its review of the FIFA Transfer Matching System ("TMS") on 8 December 2020. However, HTAFC claims that at the said date, it did not feel obliged to read and study the FIFA Proposal because the "Home Tab" (respectively, the "Dashboard") of its TMS account (which displays open tasks on the TMS system) showed the date of 24 January 2021. HTAFC claims that it relied on the date shown in the TMS. Well before 24 January 2021, i.e., on 14 January 2021, HTAFC studied the FIFA Proposal in detail and noticed that the deadline to reject the FIFA Proposal was until 9 January 2021 (and not 24 January 2021). HTAFC claims that still on 15 January 2021, it immediately informed FIFA via email and TMS that it did not agree with the FIFA Proposal and that it was misled by the date shown on the TMS.

13. On 18 January 2021, FIFA sent a letter (the "Confirmation Letter") to HTAFC and RCDE stating that the FIFA Proposal had become binding and consequently, HTAFC has to pay to RCDE, within 30 days from the date of the said letter, the amount of EUR 342,246.57 plus 5% interest per annum as of the due date until the date of effective payment. The letter also stated that if the said sum is not paid within the stated time limit, the present matter shall be submitted, upon request to FIFA's Disciplinary Committee (the "FIFA DC") for consideration and a formal decision.

2. The Proceedings before the FIFA DC

14. On 2 February 2021, RCDE forwarded a copy of the FIFA Proposal to HTAFC stating "*the Proposal is binding and, therefore, Huddersfield has to pay to our club, RCDE, the amount of EUR 342,246.57 plus 5% interest p.a. as of the due date*".

15. On 17 February 2021, HTAFC advised FIFA that the FIFA Proposal and the subsequent suggestion that the FIFA Proposal had become binding constitute an "obvious mistake" and that it requests FIFA to correct the "obvious mistake" in an application ("Application") under Article 14 (5) of the FIFA Rules Governing the Procedures of the Players' Statute Committee and the Dispute Resolution Chamber ("Procedural Rules"). FIFA did not reply to this letter.

16. On 22 February 2021, RCDE requested the opening of disciplinary proceedings as HTAFC had not paid the outstanding amount.

17. On 25 March 2021, the FIFA DC rendered its decision (the "FIFA DC Decision"), the operative part of which reads as follows:

> *"1. Huddersfield Town FC is found guilty of failing to comply in full with the decision passed by the FIFA secretariat on 18 January 2021 (in accordance with Article 13 Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber).*
>
> *2. Huddersfield Town FC is ordered to pay to RCD Espanyol as follows:*
>
> *- EUR 342,246.57 plus 5% interest p.a. as of the due date until the date of effective payment.*
>
> *3. Huddersfield Town FC is granted a final deadline of 30 days as from notification of the present decision in which to settle said amount. Upon expiry of the aforementioned final deadline and in the event of persistent default or failure to comply in full with the decision within the period stipulated, a transfer ban will be pronounced until the complete amount due is paid or the non-financial decision is complied with. The transfer ban will be implemented automatically at national and international level by The Football Association and FIFA respectively, without a further formal decision having to be taken nor any order to be issued by the FIFA Disciplinary Committee or its secretariat. In addition, a deduction of points or relegation to a lower division may also be ordered in addition to a transfer ban in the event of persistent failure, repeated offences or serious infringements or if no full transfer could be imposed or served for any reason.*
>
> *4. Huddersfield Town FC is ordered to pay a fine to the amount of CHF 20,000. The fine is to be paid within 30 days of notification of the present decision."*

18. On 15 April 2021, HTAFC wrote to RCDE, *inter alia*, that RCDE's claim for training compensation as well as the decision of the FIFA DC were unlawful, RCDE had breached the terms of the Transfer Agreement and that HTAFC would rely on the indemnity provision of the Transfer Agreement to recover any and all losses it incurs arising in connection with RCDE's breach of warranty. Furthermore, HTAFC informed RCDE that it had received claims from the clubs C.F. Damm and Nastic regarding the registration of the Player. As both clubs' claims were valid under the FIFA Regulations on the Status and Transfer of Players ("FIFA RSTP") and in accordance with the terms of the Passport of

the Player, HTAFC informed that it would make the respective payments and deduct the sums from the amount that remains payable to RCDE under clause 2 of the Transfer Agreement according to clause 5 thereof.

19. On the same day, RCDE responded to HTAFC stating, in essence, that it did not agree with the interpretation of the mentioned clauses of the Transfer Agreement and that the FIFA Proposal had become final and binding. Regarding the claims of the two clubs, RCDE informed that none of them was related to the registration of the Player and that the claims were separate issues.

20. On 23 April, 24 April and 6 May 2021, further correspondence was exchanged between HTAFC and RCDE whereby both reiterated their positions, and no consensus could be found.

21. On 11 June 2021, HTAFC requested FIFA to respond to its Application and rectify the "obvious mistake" made with the FIFA Proposal by no later than 16 June 2021, as according to HTAFC, its Application remained outstanding and undetermined by any FIFA body. FIFA did not reply to this letter.

3. The claim for training compensation by Nastic

22. On 2 November 2020, HTAFC received correspondence from lawyers representing Gimnástic de Tarragons ("Nastic"), with regard to a claim of solidarity contribution and training compensation arising from HTAFC's registration of the Player. The Player had spent the period between 4 January 2019 and 30 June 2019 on loan with Nastic from RCDE as confirmed by the Player Passport of the Player.

23. On 3 March 2021, HTAFC exchanged emails with lawyers representing Nastic, in which it was confirmed that the sum of training compensation due to Nastic was EUR 29,260 based on the Player Passport and the accompanying calculations set out in an email from the lawyers representing Nastic.

24. On 6 April 2021, HTAFC entered into a settlement agreement with Nastic in which HTAFC agreed to pay the sum of EUR 1,659.20 towards the solidarity contribution that Nastic was entitled to receive, subject to the sell-on fee falling due for payment in the future. It was further agreed that HTAFC shall pay an amount of EUR 29,260 towards the training compensation that Nastic was entitled to receive.

4. The First CAS Proceeding

25. On 24 June 2021, HTAFC filed a Statement of Appeal against RCDE and FIFA with the Court of Arbitration for Sport ("CAS") against the decision of the FIFA DC dated 25 March 2021 and FIFA's failure to deal with the Application ("the First CAS Proceeding"). The appeal came to be numbered as "CAS 2021/A/8078 Huddersfield Town FC v. RCD Espanyol de Barcelona & FIFA". HTAFC filed the following requests for relief in the said appeal:

"122. The Appellant requests that the Panel decides in an award that:

122.1 the Appeal is admissible and well-founded; and

122.2 the FDC Decision is annulled and replaced in the sense that: the Appellant has no liability to pay Training Compensation to the First Respondent and, therefore, the Appellant is not guilty of failing to comply the Proposal as notified by the FIFA secretariat on 18 January 2021 and is released from any sanction; or in the alternative;

122.3 the FDC Decision is annulled and the matter is remitted to the appropriate body of FIFA for it to render a new decision on the First Respondent's claim for Training Compensation; and

122.4 The First Respondent shall pay in full, or in the alternative a contribution towards:

122.4.1. the costs and expenses, including the Appellant's legal costs and expenses, pertaining to these appeal proceedings before the CAS; and

122.4.2. the costs and expenses, including the Appellant's legal costs and expenses, pertaining to the proceedings before the Second Respondent."

26. On 10 June 2022, CAS issued an award in CAS 2021/A/8078 (the "First CAS Award"), the operative part of which read as follows:

"1. The appeal filed by Huddersfield Town Association Football Club Limited on 24 June 2021 against Reial Club Deportiu Espanyol de Barcelona and Fédération Internationale de Football Association with respect to the Decision passed on 25 March 2021 by the Single Judge of the Disciplinary Committee of the Fédération Internationale de Football Association is dismissed.

2. The Decision passed on 25 March 2021 by the Single Judge of the Disciplinary Committee of the Fédération Internationale de Football Association is confirmed.

3. The appeal filed by Huddersfield Town Association Football Club Limited on 24 June 2021 against Reial Club Deportiu Espanyol de Barcelona and Fédération Internationale de Football Association with respect to the Fédération Internationale de Football Association's refusal to decide on its application of 17 February 2021 and 11 June 2021 is dismissed.

4. The costs of this procedure, as determined by the CAS Court Office, shall be borne by Huddersfield Town Association Football Club Limited.

5. Huddersfield Town Association Football Club Limited is ordered to pay CHF 8,000 as contribution towards the expenses incurred in connection with these arbitration proceedings to Reial Club Deportiu Espanyol de Barcelona. The Fédération Internationale de Football Association and Huddersfield Town Association Football Club Limited shall each bear their own legal fees and expenses incurred in these proceedings.

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

5. The incidents following the First CAS Proceeding

27. On 17 June 2022, HTAFC paid EUR 342,246.57 to RCDE as per the First CAS Award and the FIFA Proposal.

28. On 20 June 2022, HTAFC paid EUR 6,141.68 to RCDE with respect to the interest that had accrued on the training compensation between 10 October 2020 and 17 February 2021 at a rate of 5% per annum. On the same day, HTAFC paid EUR 22,691.42 to RCDE with respect to the interest that had accrued on the training compensation between 18 February 2021 and 16 June 2022 at the rate of 5% per annum.

29. On 21 June 2022, HTAFC paid CHF 20,000 to FIFA in respect of the fine imposed by the FIFA DC.

30. On 23 June 2022, HTAFC entered into a transfer agreement with the Greek football club, Olympiakos Sýndesmos Filáthlon Peiraiós ("Olympiakos") for the permanent transfer of the Player from HTAFC to Olympiakos ("Olympiakos Transfer Agreement"). As per clause 4 of the Olympiakos Transfer Agreement, Olympiakos agreed to pay to HTAFC, the guaranteed net sum of GBP 750,000 in two equal instalments payable on 31 October 2022 and 31 October 2023.

31. On 24 June 2022, RCDE sent an email to HTAFC requesting information regarding the transfer of the Player to Olympiakos since RCDE has "*a percentage on that sale*". This request was reiterated on 30 June 2022.

32. On 1 July 2022, HTAFC sent an email to RCDE stating:

> *"[...]*
>
> *Whilst HTAFC is not able to confirm the precise terms of the Olympiakos Transfer at this time (it is currently awaiting Olympiakos' consent to do so), for present purposes we can confirm the following:*
>
> *1. HTAFC understands the Player will be registered with Olympiakos today but in any event by no later than 5 July 2022.*
>
> *2. HTAFC is yet to receive any monies in respect of the Olympiakos Transfer, as a result of which it has not "received" any monies for the purposes of clause 4 of the Transfer Agreement.*
>
> *3. Once the requisite consent has been received from Olympiakos, HTAFC will be able to confirm the amount that would have fallen due to Espanyol pursuant to clause 4 of the Transfer Agreement as a consequence of the Olympiakos Transfer (the 'Sell-On Payments'). In the interim and for the avoidance of doubt, we hereby notify Espanyol of HTAFC's intention to exercise its right to set-off its countervailing claim against Espanyol (as confirmed in this firm's letter of 24 June 2022 and which will be further confirmed in the claim HTAFC will file against Espanyol before the FIFA Football Tribunal) against any sums that may become payable to Espanyol in respect of the Olympiakos Transfer, including the Sell-On Payments as appropriate.[...]"*

B. The Proceedings before the FIFA Players' Status Chamber

33. On 15 July 2022, HTAFC filed a claim before the FIFA Players' Status Chamber of the FIFA Football Tribunal ("FIFA PSC") for compensation in respect of the losses and damages suffered and the costs and expenses incurred as a result of RCDE's breach of certain

representations and warranties contained within the terms of the Transfer Agreement. The following were the requests for relief contained in the said claim:

> *"131. The Claimant therefore respectfully requests that the PSC orders as follows:*
>
> *131.1. The Claimant's claim is admissible and well-founded;*
>
> *131.2. The Respondent acted in breach of the Clause 9(d) Representation and Warranty by commencing the FIFA TC Claim;*
>
> *131.3. The Respondent has acted in breach of the Clause 9(e) Representation and Warranty by virtue of the Nastic Training Compensation Claim;*
>
> *131.4. The Respondent must indemnify the Claimant for all losses suffered arising from its breaches of the aforementioned Representations and Warranties in the sum of EUR 589,022.45 – to be adjusted as appropriate in light of the currently undetermined CAS procedural fees and further liabilities and costs incurred as a result of these proceedings;*
>
> *131.5. In the alternative, the Respondent must pay to the Claimant damages for all losses suffered arising from its breaches of the aforementioned Representations and Warranties in the sum of EUR 589,022.4562 – to be adjusted as appropriate in light of the currently undetermined CAS procedural fees and further liabilities and costs incurred as a result of these proceedings; 131.6. In the further alternative, the Respondent must pay to the Claimant such other compensation amount that the PSC deems appropriate in the circumstances;*
>
> *131.7. Interest is payable on the compensation award at a rate of 5% per annum from 15 July 2022 (the date of this submission);*
>
> *131.8. The Claimant is entitled to set-off the compensation award granted to it against the sums owed to the Respondent pursuant to the Transfer Agreement, namely the Third Instalment of the Transfer Fee and the Respondent's entitlement under the Sell-On Clause in respect of the Olympiakos Transfer;*
>
> *131.9. That the consequences of Article 24 of the FIFA Regulations shall apply if the Respondent fails to make payment of the aforementioned sums; and;*
>
> *131.10. The Respondent is liable to pay the procedural costs in relation to these proceedings."*

34. On 15 August 2022, RCDE filed a reply and counterclaim against HTAFC under Article 12bis of the FIFA RSTP, referring to the First CAS Award and claiming, *inter alia*, that HTAFC's claim had been affected by *res iudicata.*

35. On 8 November 2022, the Single Judge of the FIFA PSC passed a decision on HTAFC's claim (the "Appealed Decision"), which, in its operative part, stated as follows:

> *"1. The claim of the Claimant/Counter-Respondent, Huddersfield Town FC, is inadmissible.*
>
> *2. The counterclaim of the Respondent/Counter-Claimant, RCD Espanyol de Barcelona, is partially accepted.*
>
> *3. The Claimant/Counter-Respondent has to pay to the Respondent/Counter-Claimant EUR*

340,000 as outstanding remuneration plus 5% interest p.a. as from 26 June 2022 until the date of effective payment.

4. Any further claims of the Respondent/Counter-Claimant are rejected.

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

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

1. The Claimant/Counter-Respondent shall be banned from registering any new players, either nationally or internationally, up until the due amount is paid. The maximum duration of the ban shall be of up to three entire and consecutive registration periods.

2. The present matter shall be submitted, upon request, to the FIFA Disciplinary Committee in the event that full payment (including all applicable interest) is still not made by the end of the three entire and consecutive registration periods.

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

8. The final costs of the proceedings in the amount of USD 25,000 are to be paid by the Claimant/Counter-Respondent to FIFA. As the latter already paid the amount of USD 5,000 to FIFA as advance of costs at the start of the proceedings, the residual amount of USD 20,000 is still to be paid as procedural costs (cf. note relating to the payment of the procedural costs below). The Respondent/Counter-Claimant is entitled to a reimbursement of the amount it paid as advance of costs in these proceedings."

36. On 16 January 2023, RCDE sent an email to HTAFC asking when the payment can be expected since the grounds of the decision were notified 11 days ago. On the same day, HTAFC responded stating that it will be appealing the Appealed Decision before CAS and that HTAFC will request for the suspension of any payments due to RCDE as per the Appealed Decision.

37. On 24 January 2023, RCDE sent an email to HTAFC providing it with a "10-day final deadline" in order to make the payment and that if the payment was not made within the said deadline, RCDE will initiate legal action against HTAFC. RCDE also sought an update on the solidarity payment owed to RCDE by HTAFC. On 27 January 2023, HTAFC responded stating that it has initiated appeal proceedings before CAS against the Appealed Decision and that any payments due will be suspended whilst the CAS proceedings are ongoing. It was also mentioned that they will provide a response on RCDE's claim of solidarity payments, at a later time.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

38. On 26 January 2023, the Appellant filed a Statement of Appeal against the Appealed Decision with the CAS in accordance with Article R47 et seq. of the Code of Sports-related Arbitration (the "Code"). The Appellant nominated Mr. Lars Hilliger, Attorney-

at-law in Copenhagen, Denmark as arbitrator.

39. On 9 February 2023, the Second Respondent informed the CAS Court Office that the Respondents jointly wished to appoint Ms. Anna Peniche, Attorney-at-law in Mexico City, as arbitrator. This was confirmed by the First Respondent in its email to the CAS Court Office on 10 February 2023.

40. On 15 February 2023, in accordance with Article R51 CAS Code, the Appellant filed its Appeal Brief.

41. On 8 March 2023, the Parties were informed that Mr. Ulrich Haas, Professor in Zurich, Switzerland has been appointed as President of the Panel by the Division President.

42. On 22 March 2023, in accordance with Article R54 CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to decide the present matter was constituted as follows:

President:	Prof. Dr. Ulrich Haas, Professor in Zurich, Switzerland and Attorney-at-Law in Hamburg, Germany
Arbitrators:	Mr. Lars Hilliger, Attorney-at-law in Copenhagen, Denmark Ms. Anna Peniche, Attorney-at-law in Mexico City, Mexico

43. On 6 April 2023, after having been granted an extension, the First Respondent filed its Answer in accordance with Article R55 of the CAS Code.

44. On 20 April 2023, after having been granted extensions, the Second Respondent filed its Answer in accordance with Article R55 of the CAS Code.

45. On 21 April 2023, the CAS Court Office invited the Parties to indicate whether they prefer a hearing to be held in this matter and whether they request a case management conference. While the Respondents indicated that they did not prefer a hearing to be held in this matter, the Appellant stated that it preferred that a hearing be conducted in this case.

46. On 2 May 2023, the CAS Court Office informed the Parties that the Panel has decided to hold a hearing, by video-conference, in this matter.

47. On 5 May 2023, the Appellant submitted a new document and sought the permission of the Panel to rely on the said document for the purposes of this arbitration. The Appellant also requested a copy of the award in CAS 2017/A/5417 which was referred to in the First Respondent's Answer.

48. On the same day, the CAS Court Office invited the Respondents to comment on the new document submitted by the Appellant and provided a copy of the award in CAS 2017/A/5417 to the Parties.

49. On 9 May 2023, both the First and the Second Respondent objected to the filing of the new document by the Appellant.

50. On 15 May 2023, the CAS Court Office advised the Parties on behalf of the Panel that the Appellant's new document filed on 5 May 2023 was not admitted on file.

51. After some exchange of correspondence, the Parties, on 19 May 2023, agreed to hold a hearing by video-conference on 17 August 2023.

52. On 24 May 2023, the CAS Court Office issued an Order of Procedure, which was duly signed by the Parties.

53. On 15 August 2023, the CAS Court Office advised the Parties of the Panel's instructions regarding the hearing to be held on 17 August 2023. Furthermore, the letter contained a list of questions that the Panel invited the Parties to address in their oral submissions at the hearing.

54. On 17 August 2023, a hearing was held via videoconference starting at 14:00 CET. Besides the members of the Panel, who were assisted by Ms Lia Yokomizo, legal counsel of the CAS, the following persons attended the hearing:

Appellant:

Ms Ann Hough, Operations Director with the Appellant;
Mr Sébastien Besson, legal counsel;
Mr Matthew Bennet, legal counsel;
Mr Phil Bonner, legal counsel;
Ms Alice Skupski, legal counsel.

First Respondent

Mr Álvaro Gómez de la Vega, Sports Legal Manager;
Mr Daniel Sobreroca, legal assistant.

Second Respondent

Roberto Nájera Reyes, senior legal counsel, FIFA litigation department.

55. The Parties declared at – at the outset of the hearing – that they had no objection to the composition of the Panel and – at the end of the hearing – that their right to be heard had been fully respected.

IV. PARTIES' POSITIONS AND RESPECTIVE PRAYERS OF RELIEF

57. This section of the award does not contain an exhaustive list of the Parties' contentions, its aim being to provide a summary of the substance of the Parties' main arguments. In considering and deciding upon the Parties' claims in this award, the Panel has accounted for and carefully considered all of the submissions made and evidence adduced by the Parties, including allegations and arguments not mentioned in this section of the award

or in the discussion of the claims below.

A. The Appellant

58. In its Statement of Appeal, HTAFC sought the following relief:

> *"3.2.1 the Appeal is admissible and well-founded; and*
>
> *3.2.2 the Appealed Decision is annulled in its entirety and replaced with a new decision stating that:*
>
> *a. the First Respondent acted in breach of the Clause 9(d) Representation and Warranty by commencing the RCDE TC Claim;*
>
> *b. the First Respondent has acted in breach of the Clause 9 (e) Representation and Warranty by virtue of the Nastic Training Compensation Claim;*
>
> *c. the First Respondent must indemnify the Appellant for all losses suffered arising from its breaches of the aforementioned Representations and Warranties pursuant to Clause 10 of the Transfer Agreement and pay the Appellant the amount of EUR 617,2073.41 – to be adjusted as appropriate in light of the currently unqualified CAS advance of costs and further liabilities and costs incurred as a result of these proceedings;*
>
> *d. in the alternative to 3.2.2.c., the First Respondent must pay to the Appellant damages for all losses suffered arising from its breaches of the aforementioned Representations and Warranties, including but not limited to the legal costs and procedural costs incurred by the Appellant before FIFA and the CAS arising from and in connection with the RCDE TC Claim, the FDC Proceedings, the HTAFC FIFA Claim and the CAS Appeal;*
>
> *e. in the further alternative to 3.2.2.c., the First Respondent must pay to the Appellant such other compensation amount that the CAS deems appropriate in the circumstances;*
>
> *f. interest is payable on the damage or compensation award at a rate of 5% per annum from 26 January 2023 (the date of this submission);*
>
> *g. the Appellant is lawfully entitled to set-off the sums due to it pursuant to its countervailing claim against the Respondent for its breaches of the Representations and Warranties, against any sums potentially due to the First Respondent pursuant to the Transfer Agreement, including but not limited to the Third instalment of the Transfer Fee and any potential payment under the Sell-On Clause in respect of the Olympiakos Transfer; and*
>
> *h. the First Respondent shall pay in full, or in the alternative a contribution towards:*
>
> *i. the costs and expenses, including the Appellant's legal costs and expesens pertaining to these appeal proceedings before the CAS; and*
>
> *ii. the costs and expenses, including the Appellant's legal costs and expenses pertaining to these appeal proceedings before the Second Respondent.*
>
> *3.3 The Appellant reserves the right to amend and/or expand on these requests for relief in its Appeal Brief."*

59. In its Appeal Brief, HTAFC requested as follows:

> *"145.1 the Appeal is admissible and well-founded; and*
>
> *145.2 the Appealed Decision is annulled in its entirety and replaced with a new decision stating that:*

a. the First Respondent has been in breach of clause 9(d) of the Transfer Agreement (in which it agreed to accept payment of the agreed transfer fee in full and final settlement of any and all claims it may have had against the Appellant in respect of the Appellant's registration of the Player) as from the moment when it demanded payment of Training Compensation from the Appellant;

b. the First Respondent acted in breach of clause 9(e) of the Transfer Agreement (in which it promised the Appellant that no other football team would be entitled to bring a claim against the Appellant arising from its registration of the Player) because it knew or should have known that Gimnastic de Tarragons would be entitled to bring a claim for Training Compensation against the Appellant as a result of the loan of the Player between 4 January 2019 and 30 June 2019;

c. the First Respondent must pursuant to Clause 10 of the Transfer Agreement indemnify the Appellant for all liabilities, costs, expenses, damages and losses it has suffered and incurred arising out of or in connection with the First Respondent's breaches of clause 9(d) and clause 9 (e) of the Transfer Agreement;

d. the First Respondent must pay the Appellant the following sums: EUR 400,339.67 and CHF 102,000 and GBP 103,749.86 and USD 25,000, or such other amount the CAS Panel deems appropriate in the circumstances, together with interest at a rate of 5% per annum from 26 January 2023 until full payment;

e. the Appellant is entitled to set-off any sums awarded to it by the CAS Panel pursuant to the prayers for relief at paragraph (d) above, against any sums due or potentially due by the Appellant to the First Respondent pursuant to the Transfer Agreement; and

f. the First Respondent shall pay in full, or in the alternative a contribution toward the costs and expenses, including the Appellant's legal costs and expenses pertaining to these arbitral proceedings together with interest on such sums at a rate of 5% per annum from 26 January 2023 until full payment.

146. Finally the Appellant reserves its right to increase, amend or update these prayers for relief in particular to reflect any further liabilities, costs, expenses, damages or losses it has suffered and incurred arising out of or in connection with the First Respondent's breaches of clause 9 (d) and clause 9 (e) of the Transfer Agreement, between the date of this submission and the final hearing in these arbitral proceedings."

60. In support of the above prayers for relief HTAFC submits as follows:

a) CAS' *de novo* power of review:

- Pursuant to the power of review bestowed on it by Article R57 of the CAS Code, the Panel has "full power to review the facts and the law". The Panel thus has the power to undertake a *de novo* review of the merits of the case and in those circumstances, it is not confined merely to deciding whether the ruling appealed was correct or not. HTAFC submits that the mandate of this CAS Panel is very broad and the Panel's power of review is not limited to the facts and legal arguments of the previous instance and may even examine new evidence and arguments that were not raised before the lower instance. Further that it allows, in principle, violations of procedural rights at lower instance to be "*cured*" by CAS in appeal proceedings. The Panel is referred in this regard to the case of CAS 2019/A/6621.

- CAS has the power to determine the following issues in these proceedings:
  - whether the Single Judge of the FIFA PSC was wrong to conclude that HTAFC's claim before it was inadmissible; if so,
  - whether RCDE acted in breach of the representations and warranties provided in the Transfer Agreement; and if so,
  - what are the legal consequences of RCDE's actions;

b) Admissibility of HTAFC's claim before the FIFA PSC:

- *Res judicata*:
  - HTAFC's claim before the FIFA PSC is an entirely new claim that has not yet been the subject of a binding decision in any forum or jurisdiction and therefore cannot possibly be inadmissible on the basis of the principle of *res judicata*.
  - *Res judicata* is a well-established principle under Swiss law, which is part of Swiss procedural public policy. The Swiss *res judicata* doctrine is essentially based on case law (and the writings of legal scholars). Swiss law follows a narrow approach in the sense that only the dispositive part of the judgment (or award) has *res iudicata* effect in subsequent proceedings.
  - According to the Swiss Federal Tribunal ("SFT") (as adopted by the CAS in numerous previous decisions), the principle of *res judicata* applies "*when the claim in dispute is identical to that which was already the subject of an enforceable judgment (identity of the subject matter in dispute). This is the case when both proceedings involve the same parties and the same matter in dispute. The identity must be understood from a substantive and not grammatical point of view, so that a new claim, no matter how formulated, will have the same object as the claim already adjudicated*" (ATF 140 III 278 at 3.3; ATF 139 III 126 at 3.2.3).
  - Swiss law has adopted the so-called "triple identity" test which has been noted and relied upon in many previous CAS cases, including CAS 2010/A/2091 in which the Panel confirmed that: "*If arbitral proceedings in Switzerland involve the same subject matter, the same legal grounds and the same parties as previous* foreign *arbitral proceedings terminated with an award, the so-called "triple identity" test – used basically in all jurisdictions to verify whether one is truly confronted with a res judicata question – is thus indisputably met.*".
  - *Res judicata* exists when there is a further proceeding: (i) between the same parties; (ii) arising from identical causes of action; and (iii) seeking identical relief.
  - It has been expressly confirmed in CAS jurisprudence (CAS

2019/A/6483) that the "*res judicata effect only goes as far as the panel (that issued the decision in question) wanted to decide on the matter in dispute*" and that issues a first panel deliberately left undecided are not covered by the *res judicata* effect. There is no *res judicata* when the decision appealed before the CAS has not been previously reviewed by a judicial court or body, and in which no previous proceedings involving the same object, the same legal grounds and the same parties have been substantiated (CAS 2018/A/5888).

- The identity of the subject matter implies that the second proceedings involve the same set of facts. If new facts have arisen after the moment when the party could have validly invoked such facts in the first proceedings, there is no identify of subject matter under Swiss law and the claim (based on such new facts) is not precluded in the second proceedings.
- A comparison of the proceedings that resulted in the First CAS Award ("First CAS Proceedings") and HTAFC's claim before the FIFA PSC demonstrates that the subject matters of these proceedings are entirely different. Specifically:
    - In the First CAS Proceedings, the panel clearly identified the two subject matters of those proceedings (First CAS Award, para. 123), namely (i) whether the appealed decision (in the First CAS Proceedings) "*complies with the prerequisites of Article 15 FDC*" and (ii) whether FIFA's refusal to correct a mistake in the Confirmation Letter was in breach of Article 14(5) of FIFA Procedural Rules.
    - In respect of the first aspect, related to the application of Article 15 FIFA Disciplinary Code, the panel stressed that the appealed decision (in the First CAS Proceedings) "*is of a purely disciplinary nature*" and has "*no civil / horizontal limb*", in particular because the FIFA DC "*is not competent to decide horizontal disputes between indirect members of FIFA*" (First CAS Award, para. 126). It also stressed that RCDE (in the First CAS Proceedings) "*was not a party to the proceeding before the FIFA DC*" (First CAS Award, para. 126). The panel in the First CAS Proceedings only examined if the conditions of Article 15 FIFA Disciplinary Code were met and if the disciplinary sanction was appropriate (First CAS Award, para. 127 to para. 170).
    - In respect of the second aspect (related to the application of Article 14(5) of the FIFA Procedural Rules), the panel merely examined if FIFA's refusal to apply this provision was justified in the circumstances. It concluded that "*this provision is not applicable to the case at hand*" (First CAS Award, para. 173).

- In the dispositive section of the First CAS Award, the panel in the First CAS Proceedings dismissed the appeals filed by HTAFC and confirmed the "*purely disciplinary*" decision made by the FIFA DC on the basis of Article 15 FIFA Disciplinary Code (First CAS Award, para. 126).
- It is therefore manifest that the First Panel in the First CAS Proceedings did not address HTAFC's claim against RCDE on the basis of the representations and warranties contained in the Transfer Agreement. The panel expressly stated that "*All other questions – in particular whether or not the Appellant has damage claims against the First Respondent based on the latter's breach of warranties in the Transfer Agreement fall outside of the Panel's mandate and cannot be entertained...*" (First CAS Award, para. 123).
- In the present proceedings, HTAFC has filed an appeal against the Appealed Decision rendered by the FIFA PSC. It is immediately apparent that these proceedings have a subject matter which is entirely different from the First CAS Proceedings (which was related to different decisions made by a different body, namely the FIFA DC). In addition, the Appealed Decision itself is related to a different subject matter, namely HTAFC's "*civil / horizontal*" claim against RCDE based on breaches of the representations and warranties and the indemnity contained in the Transfer Agreement.
- In these circumstances, the subject matter of the two separate CAS proceedings is fundamentally distinct and HTAFC's claims in the present proceedings cannot be precluded as a result of *res judicata*.

▪ In addition to the above, the claims at stake in the present proceedings are based at least partly on new facts, which did not exist and which could not be invoked in the First CAS Proceedings. More specifically, the pending claims now before this Panel (that were wrongly denied in the Appealed Decision) are the result of RCDE's behaviour in the context of the First CAS Proceedings, in particular the filing of a claim for training compensation that was manifestly not due. It is because of such behaviour and related procedural circumstances that HTAFC has now claimed based on the representations and warranties and indemnity under the Transfer Agreement, and that it can now seek and quantify its damages against RCDE having expressly reserved its right to do so at the oral hearing in the First CAS Proceedings. There are hence new facts that occurred after the hearing in the First CAS Proceedings (including the First CAS Award itself and the payments made to both RCDE and FIFA) that are part of the basis of the pending claims in the

present proceedings. For this second reason, the claims in the present proceedings cannot be precluded as a result of *res judicata*.

- There is no *res judicata* or preclusion effect with respect to the Confirmation Letter:
  - Pursuant to the Confirmation Letter, FIFA informed HTAFC that it had to pay to RCDE training compensation in the sum of EUR 342,246.57. In the First CAS Proceedings, the panel considered in its reasoning that the Confirmation Letter "*contains a ruling*" and is a "*decision by a body*" (First CAS Award, para. 131 and para. 135).
  - Irrespective as to whether such legal characterization is legally correct and/or has itself *res judicata*, and irrespective as to whether the Confirmation Letter is susceptible of *res judicata* (in view of its non-judicial nature), it is clear that the subject matter of the Confirmation Letter is different from the subject matter of the claims pending in the present proceedings. The Confirmation Letter was limited to the training compensation claimed by RCDE. It did not (and could not) address HTAFC's present claims against RCDE based on the representations and warranties and indemnity contained in the Transfer Agreement and which were the subject of HTAFC's claim before the FIFA PSC. In addition, the present claims against RCDE are based (at least partly) on new facts that did not exist at the time of the Confirmation Letter.
- In holding that the HTAFC's claim is precluded by the *res judicata* effect of the First CAS Award or of the Confirmation Letter, the FIFA PSC has deprived HTAFC of any legal remedy for the significant financial loss and damage it has suffered as a direct consequence of RCDE's actions in breaching the representations and warranties under the Transfer Agreement in bad faith. HTAFC thus stands to suffer serious prejudice if the Appealed Decision is upheld.

o *HTAFC's preclusion from bringing the claim*

- The Single Judge of the FIFA PSC also found that even if it was not subject to the principle of *res judicata* the outcome would be the same since HTAFC accepted to "settle" the claim for training compensation of RCDE by means of the FIFA Proposal and the ensuing Confirmation Letter and the same cannot be re-visited, in that HTAFC has waived its right to file its position in the proceedings regarding the RCDE's claim for training compensation and is now precluded from doing so.
- First, it cannot sensibly be said that in not responding to the FIFA Proposal within the deadline set to accept or reject it, HTAFC therefore

"consented" or "accepted" to pay training compensation to RCDE to "settle" RCDE's claim for training compensation. As the facts of this matter clearly show, in no way did HTAFC accept to settle such claim or consent to make payment to it. Nor did the FIFA Proposal itself suggest that the failure to respond within the stipulated deadline would mean that this was the case, with the FIFA Proposal drawing a distinction between the parties accepting it or not providing an answer to it. No reference was made to deemed acceptance or consent in the event that either party did not respond to it within the deadline;

- Secondly, even if there could be said to have been "deemed consent" on the part of HTAFC in not rejecting the FIFA Proposal within the stipulated deadline, that consent cannot be interpreted so broadly as to encompass the causes of actions that form the subject matter of HTAFC's claim before the FIFA PSC (namely, the breaches of the representations and warranties and the consequences of the indemnity that are now the subject of the present proceedings); and
- Thirdly, as noted above, para. 123 of the First CAS Award made it clear beyond any doubt that the First CAS Proceedings (and the decisions that were the subject of those appeal proceedings) had left entirely open any claims HTAFC may subsequently choose or wish to bring against RCDE for its breaches of the representations and warranties. As stated above, the cause of action and the object of HTAFC's claim before the FIFA PSC are entirely different to any submissions made by HTAFC before any competent arbitral body in relation to this matter.

c) Breach of the representations and warranties in the Transfer Agreement

- *Breach of clause 9(d)*
  - Clause 2 of the Transfer Agreement recorded the payment of the transfer fee was to be made by HTAFC to RCDE in consideration of the transfer, subject to and in accordance with all the other terms and conditions of the Transfer Agreement, including that such payment was made in "*full and final settlement of any and all claims*" against HTAFC for its registration of the Player (namely, the clause 9 (d) of the Transfer Agreement).
  - Nowhere in the Transfer Agreement did the parties record that training compensation would be payable in addition to the guaranteed and contingent sums under the Transfer Agreement. The absence of such wording reflected HTAFC's understanding that, having agreed to pay RCDE the sums under the Transfer Agreement (namely, the transfer fee and any payments that fell due under the sell-on clause), it would have no further financial liability to RCDE arising from its registration of the Player.

- That understanding was further reflected and recorded in both clause 9(d) and clause 10 of the Transfer Agreement. In the former clause, RCDE represented and warranted to HTAFC that it accepted the sums under the Transfer Agreement in full and final settlement of any claim against HTAFC in respect of HTAFC's registration of the Player. The latter clause (the indemnity) recorded the parties' agreement that HTAFC had only entered into the Transfer Agreement and agreed to pay RCDE the transfer fee having relied on the representations and warranties that RCDE provided at clause 9 of the Transfer Agreement, including the clause 9(d).
- The wording of clause 9(d) is clear and unequivocal from a literal reading that RCDE accepted the sums payable under the Transfer Agreement in "*full and final settlement of any and all claims against Huddersfield in respect of the registration of the Player*", recording the true and common intention of the parties when doing so.
- Clause 9(d) extends to cover any and all claims that RCDE had (or purported to have had) against HTAFC arising from HTAFC's registration of the Player and, in turn, any liabilities that HTAFC would otherwise have had to RCDE upon registering the Player (including to pay training compensation pursuant to the FIFA RSTP). There is no ambiguity in the drafting which lends itself to any doubt and there can be no question of any alternative interpretation.
- In correspondence, RCDE had sought to justify its actions on the basis that, because training compensation was not mentioned in the Transfer Agreement, it was not included in the "price".
- However, it was entirely unjust, in bad faith and in breach of clause 9(d) for RCDE to have demanded payment of training compensation in respect of the Player from HTAFC (in addition to the sums payable under the Transfer Agreement) given: the established FIFA and CAS jurisprudence on the payment of training compensation and the express provisions of the Transfer Agreement (namely clause 9(d) and clause 10) which recorded the agreement reached by HTAFC and RCDE on this important issue.
- FIFA and CAS jurisprudence says:
    - if two parties enter into a transfer agreement which provides, inter alia, for the financial conditions of the relevant transfer (i.e., the payment of transfer compensation), then training compensation is considered as being included in the agreed transfer compensation; and
    - if parties wish to stipulate that training compensation is due in addition to the agreed transfer compensation, then this must be explicitly made clear in the transfer agreement by reference to

a specific amount – distinct from the agreed transfer compensation – which would be due as training compensation.

- Reference is made, in this regard to CAS 2004/A/785 and CAS 2011/A/2455.
- In addition to the aforementioned jurisprudence, the FIFA Commentary on the FIFA RSTP, Edition 2021 expressly states that "*According to case law, unless expressly indicated in the relevant transfer agreement that training compensation will be paid in addition to transfer compensation, it is presumed that any agreed transfer compensation includes the training compensation that was due*"
- In the present case, the Transfer Agreement did not expressly or explicitly indicate that training compensation was payable to RCDE by HTAFC in addition to the sums agreed in the Transfer Agreement and nor did RCDE request suitable wording was included in the Transfer Agreement if it intended to seek training compensation in respect of the Player. Quite to the contrary, RCDE went so far as to:
  - give a representation and warranty to HTAFC – in the form of the clause 9(d) – that it was accepting the Transfer Fee in "*full and final settlement of any and all claims it may have against HTAFC in respect of HTAFC's registration of the Player*", expressly waiving its right to training compensation when doing so;
  - positively declare that "0.00" training compensation was payable for the Player when submitting the details of the transfer into TMS; and
  - acknowledge, in the indemnity at clause 10 of the Transfer Agreement, that HTAFC had entered into the Transfer Agreement in reliance on the clause 9(d) and promised to indemnify HTAFC in respect of inter alia "*all liabilities, costs, expenses, damages and losses*" arising from any breach of the same.

- RCDE's demand for training compensation from HTAFC in respect of the Player clearly falls within the scope of the clause 9(d) given that:
  - training compensation is only payable upon the registration of a player within the parameters of Article 20 and Annexe 4 of the FIFA RSTP, including when a player is transferred before the end of the calendar year of his 23rd birthday, as was the case when the Player's registration was acquired by HTAFC; and

- any claim that RCDE may have had against HTAFC in respect of training compensation for the Player would be captured by the words "*...any and all claims it may have against HTAFC in respect of HTAFC's registration of the Player*".

- Taking RCDE's stated position to date to its logical conclusion, the contractual protection afforded to HTAFC by the clause 9(d) (and upon which RCDE knew HTAFC had explicitly relied) would be rendered entirely worthless unless every single potential claim RCDE may have against HTAFC arising from the registration of the Player was expressly referred to within the Transfer Agreement. This was clearly not the true and mutually agreed upon intention of the parties at the time of entering into the Transfer Agreement and agreeing the wording of clause 9(d).
- Clause 9(d) was intended to encompass any and all claims that RCDE may have had against HTAFC arising from HTAFC's registration of the Player, including its prima facie entitlement to claim training compensation pursuant to the FIFA RSTP.
- Despite this, RCDE demanded payment of training compensation from HTAFC in respect of the Player, in breach of the clause 9(d), which in turn led to: (i) the FIFA Proposal; (ii) the FIFA DC Proceedings; (iii) the Article 14(5) Application; (iv) the First CAS Proceedings; (v) the First CAS Award; and (vi) HTAFC's claim before the FIFA PSC, all of which have, in turn, caused HTAFC to suffer significant liabilities, costs, expenses, damages and losses that would not have been suffered or incurred if RCDE had honored the contractual promise it gave to HTAFC in the form of the clause 9(d).
- HTAFC is thus entitled to be fully indemnified by RCDE against those liabilities, costs, expenses, damages, and losses pursuant to the indemnity clause.
- As stated above, in previous correspondence RCDE has claimed that it did not agree with HTAFC's interpretation that a claim for training compensation would fall within the scope of the clause 9(d), on the basis that RCDE had not expressly waived its right to claim training compensation in the Transfer Agreement.
- HTAFC submits that RCDE's reliance on CAS 2017/A/5277 is misplaced and indeed entirely unhelpful to its own case. The facts in CAS 2017/A/5277 are markedly different to the present case, given that it concerned a dispute over the former club's written declaration in respect of its purported waiver of training compensation after the player's contract had expired and no transfer agreement was entered into. The present case concerns a mutually agreed transfer agreement (which was the result of negotiation between the two clubs) that contains a clause whereby RCDE accepted the sums payable under the

Transfer Agreement in full and final settlement of any and all claims it had against HTAFC in respect of its registration of the Player. In addition, para. 86 of award in CAS 2017/A/5277 expressly acknowledges that when parties enter into a transfer agreement, training compensation is typically deemed waived.

- It is well established in Swiss contract law that a waiver of rights need not take a particular form. As such the waiver given by RCDE that it waived its right to bring a claim for training compensation against HTAFC was three-fold:
    - First, in accordance with para. 86 of CAS 2017/A/5277, in failing to expressly refer to training compensation being payable in addition to the sums payable under the Transfer Agreement, RCDE waived its right to seek training compensation in respect of the Player following his registration with HTAFC;
    - Secondly, by way of RCDE expressly accepting the sums under the Transfer Agreement, in full and final settlement of any and all claims it had or may have had, against HTAFC arising from HTAFC's registration of the Player; and
    - Thirdly, when RCDE completed and submitted the declaration on FIFA TMS in respect of the transfer and confirmed that training compensation was not payable in respect of the Player (with those details subsequently being agreed to and matched by HTAFC).

- *Breach of clause 9(e)*
    - The existence of the training compensation claim by Nastic also puts RCDE in further breach of the clause 9(e). This claim is further evidence of RCDE's disingenuous approach to the transfer, as it must have known that Nastic had the right to bring such claim (being in possession of the relevant player passport) when it chose to give the clause 9(e). RCDE would have therefore been in immediate breach of the c9(e) as soon as it entered into the Transfer Agreement.
    - In correspondence, RCDE suggested that Nastic's claim did not fall within the scope of the clause 9(e), on the basis that this claim was not "related to the registration" of the Player and was instead independent of HTAFC's registration of the Player. RCDE's position not only:
        - ignores the words "*no other football club...shall be entitled to bring a claim against HTAFC in respect of its registration of the Player*"; but also
        - displays a fundamental misunderstanding of the basis upon which training compensation become payable pursuant to Article 21 of the FIFA RSTP, given that such right can only arise

upon the registration of a professional player in certain circumstances.

- In the circumstances and given its knowledge of the Player's career history, RCDE could have chosen to qualify the clause 9(e) in order to make it clear that no football team (other than Nastic) may have had a claim against HTAFC arising from HTAFC's registration of the Player (including any claim for training compensation).
- However, RCDE did not choose to do so and instead gave the clause 9(e) which recorded its acknowledgement that HTAFC agreed to pay the sums under the Transfer Agreement on the basis that "no other football club" was entitled to bring a claim against it arising from its registration of the Player, including any claim for training compensation, and the indemnity.
- As confirmed at para. 51 of the Appealed Decision, the Single Judge of the FIFA PSC at lower instance found that HTAFC was, in principle, entitled to set-off the EUR 29,260 paid to Nastic in respect of Nastic's claim against the third instalment of the transfer fee under the Transfer Agreement. However, the Single Judge felt unable to allow HTAFC to set-off the EUR 29,260 on the basis that insufficient evidence had been provided by HTAFC to satisfy the burden of proof upon HTAFC.
- In so doing, the Single Judge accepted and approved the basic premise of HTAFC's case, namely that:
    - in the event that RCDE had acted in breach of any of the representations and warranties it provided to HTAFC in the Transfer Agreement; and
    - any such breach caused HTAFC to have to incur costs and expenses or suffer damages and losses, including those arising from any claim made against HTAFC in respect of the Player's registration with HTAFC (in accordance with the terms of the indemnity); then
    - HTAFC was entitled to set-off any such costs, expenses, damages and losses against any sums potentially due to RCDE pursuant to the terms of the Transfer Agreement.
- In circumstances where RCDE has not commenced a separate appeal before CAS of the Appealed Decision to challenge the Single Judge's in principle conclusions at para. 51 in respect of Nastic's claim, that "in principle" finding at lower instance is now binding on the parties.
- Further, HTAFC submits that the evidence enclosed provides more than sufficient evidence to confirm the basis on which: (i) Nastic's claim first came to HTAFC's attention; (ii) the regulatory basis on

which the EUR 29,200 was calculated; and (iii) the payment that was subsequently made to Nastic.

- This Panel has the power to examine new evidence that was not adduced at the lower instance and therefore there is no remaining impediment (evidential or otherwise) preventing this Panel from finding that HTAFC is entitled to set off (as a minimum) the sum of EUR 29,200 against any sums potentially due to RCDE pursuant to the terms of the Transfer Agreement.

- *Contractual Interpretation*
  - As set out in its correspondence dated 15 and 24 April 2021, HTAFC understands that RCDE disputes HTAFC's interpretation of clause 9(d) and alleges that it did not waive its right to bring a claim for training compensation against HTAFC.
  - In doing so, RCDE is seeking to adopt an interpretation of clause 9(d) which is at odds with the clear wording of the clause and the established principles of FIFA and CAS jurisprudence. Yet it has not, to date, provided any sensible or rational arguments to support the meaning and interpretation of the clause that it has previously contended for in correspondence with HTAFC and its legal representatives.
  - Additionally, whilst RCDE has asserted that HTAFC's interpretation of the clause 9(e) is "just wrong" and in its email dated 15 April 2021 averred that "*training compensation and solidarity contribution rights…are separate/independent issues*" and not related to the registration of the Player, it has yet to provide any other logical interpretation of the clause.
  - HTAFC respectfully suggests that when considering the scope and wording of the representations and warranties at issue in this case, the Panel should adopt the approach previously adopted by CAS panels when asked to consider the interpretation of contractual clauses.
  - In the submissions made by RCDE to date during the course of both the First CAS Proceedings and before the FIFA PSC, it has not come close to discharging such burden and thus its previously contended interpretation for each of the representations and warranties can be safely disregarded.
  - In order to determine this matter in relation to contractual interpretation, the Panel is required to apply the principles established under Swiss law to ascertain:
    - the scope and meaning of the representation and warranties that RCDE chose to give to HTAFC in the Transfer Agreement and upon which HTAFC expressly relied; and
    - the "liabilities, costs, expenses, damages and losses" that

HTAFC is entitled to recover from RCDE and which RCDE agreed to pay to HTAFC, pursuant to the Indemnity in respect of RCDE breach of the representations and warranties.

- HTAFC submits that this is a straightforward task which leads to the conclusion that:
  - RCDE has breached each of the representations and warranties; and
  - is therefore liable to reimburse HTAFC for the liabilities, costs, expenses, damages and losses that HTAFC has suffered and incurred, and which have arisen out of or in connection with RCDE's aforementioned breaches.
- The position on contractual interpretation under Swiss law requires it to ascertain "the true and common intention of the parties" in respect of each of the representations and warranties. There is established CAS jurisprudence which confirms that the starting point for the Panel in doing so is to consider the literal meaning of the language used in the relevant clause.
- Indeed, the CAS has previously held that where the literal meaning of the language of a clause is clear on its face, there is no requirement to look beyond such language to ascertain the intentions of the parties. This doctrine has been applied in CAS jurisprudence in which it was held that "*the language of a provision governs its interpretation where the language is clear and explicit and does not involve an ambiguity or absurdity*".
- The language of the clause 9(d) is clear that the parties agreed that the payment of the Transfer Fee by HTAFC to RCDE was in full and final settlement of any and all claims RCDE may have in respect of HTAFC's registration of the Player. This is clear from the use of the terms such as "full and final" and "any and all claims" (including any prima facie claim for training compensation), as opposed to the clause only identifying particular claims that RCDE was agreeing to settle/waive in consideration for it receiving the sums under the Transfer Agreement.
- Had the parties intended for training compensation to be payable in addition to the sums under the Transfer Agreement or for RCDE to have retained the right to seek payment of the same from HTAFC pursuant to the FIFA RSTP, training compensation would have been expressly excluded in the representations and warranties provided under the Transfer Agreement.
- It is respectfully submitted that this is therefore a paradigm case of *in claris non fit interpretatio*, in which the common intention of the parties is reflected in the wording of the representations and warranties,

such that the Panel is required to interpret those clauses on the basis of their wording alone.

- *Indemnity*
  - HTAFC submits that RCDE's flagrant breach of the representations and warranties has caused it to suffer loss and damage and incur costs and expenses and HTAFC is thus entitled to be fully reimbursed and compensated pursuant to the indemnity at clause 10 of the Transfer Agreement against the loss and damages suffered and the costs and expenses incurred.
  - In clause 10 of the Transfer Agreement, the parties agreed to the indemnity provision that:
    - was broad in scope and which entitled the non-breaching party (here, HTAFC) to be indemnified by the breaching party (here, RCDE) against "*all liabilities, costs, expenses, damages and losses (including but not limited to any direct, indirect or consequential losses, loss of profit, penalties and legal costs (calculated on a full indemnity basis) and all other professional costs and expenses) suffered or incurred*". In the case of RCDE, this was explicitly stated to "*extend to any claim made against HTAFC in respect of the Player's registration with HTAFC*" thereby including any claim from a football club seeking to be paid training compensation by HTAFC and, in turn, both the RCDE TC Claim and Nastic's claim;
    - was mutually enforceable by both parties in the event of a breach of a representation or warranty given to one another in the Transfer Agreement; and
    - expressly confirmed that each of the parties had entered into the Transfer Agreement "*in reliance on the representations and warranties*" they had given to one another.
  - It was therefore the contractual will of the parties that HTAFC would be fully indemnified and be entitled to recover all "*liabilities, costs, expenses, damages and losses*" (which the parties agreed would include any penalties, legal fees and professional costs) it suffered or incurred as a result of any breach by RCDE of any one of representations and/or warranties that RCDE was prepared to give to HTAFC in the Transfer Agreement, including the representation and warranties.
  - Article 97(1) of the Swiss Code of Obligations ("SCO") confirms: "*An obligor who fails to discharge an obligation at all or as required must make amends for the resulting loss or damage unless he can prove that he was not at fault.*" Under Article 99(1) of the SCO, the fault of the obliger is presumed.

- In this case, the parties clearly agreed on certain warranties and representations relating to the permanent transfer of the Player's registration at clause 9 and established the consequences of non-performance in agreeing upon the indemnity provision at clause 10 of the Transfer Agreement.
- Those consequences were that RCDE must indemnify HTAFC "*against all liabilities, costs, expenses, damages and losses*" which arise out of or in connection with RCDE's breach of the representations and warranties, "*(including but not limited to any direct, indirect or consequential losses, loss of profit, penalties and legal costs (calculated on a full indemnity basis) and all other professional costs and expenses)*". The wording of the indemnity is thus unambiguous. The consequence of a breach of the representation and warranties was clearly agreed upon by the parties at the time the Transfer Agreement was negotiated and signed. Not least given the further confirmation contained in clause 10 that the indemnity from RCDE specifically extended to any claim against HTAFC in respect of its registration of the Player, which reflected the particular importance of the clause 9(d) Representation and Warranty to HTAFC and its reliance on the various representations and warranties in clause 9.
- It thus follows that RCDE must compensate HTAFC for "*all liabilities, costs, expenses, damages, and losses*" which arise out of or in connection with RCDE's breach of the representations and warranties.

d) HTAFC's claim for losses

- *Compensation*
  - As noted above, in the event that the Appealed Decision is overturned by the Panel, the Panel is subsequently requested to consider the substance of the matter and determine the breach of the Transfer Agreement by RCDE and its consequences in accordance with its powers under Article R57 of the CAS Code.
  - HTAFC would not have entered into the Transfer Agreement had it known that, following the permanent transfer of the Player's registration and notwithstanding the clause 9(d) and the indemnity, RCDE would have then sought payment of training compensation in addition to the sums payable under the Transfer Agreement.
  - Similarly, HTAFC would have reduced the amount payable by way of the Transfer Fee to take into consideration the sums that were payable pursuant to Nastic had it been provided with the full and honest disclosure, to which it was entitled to, in respect of the clause 9(e) in respect of Nastic's claim.
  - Furthermore, the RCDE TC Claim was brought vexatiously and in bad

faith by RCDE in the full knowledge that it had only recently agreed that payment of the sums under the Transfer Agreement was in full and final settlement of any claims it had (or may have) against HTAFC in relation to the Player's registration with HTAFC. In those circumstances, HTAFC had no option but to commence the claim before the FIFA PSC in an attempt to rectify the adverse and unjustified financial consequences imposed on HTAFC as a result of the FIFA Proposal, the FIFA DC Decision and the First CAS Proceedings, having specifically reserved its right to do so before the panel in the First CAS Proceedings.

- HTAFC is thus entitled to be indemnified (reimbursed and compensated) by RCDE for all the liabilities, costs, expenses, damages and losses arising out of or in connection with RCDE's breach of the representations and warranties. Alternatively, HTAFC is entitled to be compensated for those same liabilities, costs, expenses, damages and losses, given that they flow directly from RCDE's breach of the representations and warranties.
- The particulars of HTAFC's liabilities, costs, expenses, damages and losses (to date) are set out below:

Category of liability/cost/expense/damage/loss	**Sum**
Training compensation paid to RCDE in accordance with the FIFA Proposal and following the First CAS Award	EUR 342,246.57
Accrued interest paid to RCDE following the First CAS Award	EUR 28,833.10
Training Compensation paid to Nastic	EUR 29,260
FIFA DC Fine	CHF 20,000
CAS Court Office Fees in the First CAS Proceedings	CHF 1,000
CAS Advance of Costs in the First CAS Proceedings	CHF 46,000
Contribution to RCDE's expenses in the First CAS Proceedings	CHF 8,000
CAS Advance of Costs in the present proceedings	CHF 27,000

HTAFC's legal fees in connection with and arising from RCDE's claim for training compensation and the First CAS Proceedings	GBP 75,629.66
HTAFC's legal fees in connection with and arising from the claim before the FIFA PSC	GBP 28,120.20
FIFA Advance of Costs in the FIFA PSC claim	USD 5,000
FIFA Procedural Costs in the FIFA PSC claim	USD 20,000
TOTAL	**EUR 400,339.67** **CHF 102,000** **GBP 103,749.86** **USD 25,000**

- Alternatively, in the event the Panel does not agree with HTAFC's position that HTAFC shall be fully indemnified in accordance with the indemnity, HTAFC submits that it should receive compensation for RCDE's breach of contract. When establishing the amount of compensation due, HTAFC submits that the Panel should be led by the principle of "positive interest", to determine an amount which shall put HTAFC in the position it would have been if the Transfer Agreement had been performed properly, without RCDE's breach occurring.
- Moreover, there is clearly a causal connection between RCDE's breach of the representations and warranties and the liabilities, costs, expenses, damages and losses claimed. Not only was RCDE's aforementioned breach the natural cause of those liabilities, costs, expenses, damages and losses (the *conditio sine qua non*) but was also the adequate cause, given that the breach was likely to lead to a result of the same kind as that which actually occurred in this instance.
- HTAFC also claims interest on the sums claimed at the rate of 5% per annum in accordance with Swiss law and as well established by CAS jurisprudence from the date of this submission.

e) Right to set off

- Clause 22 of the Transfer Agreement records the parties' agreement that its terms should be governed both by the FIFA RSTP and also Swiss law, with the latter being the procedural law governing these Second CAS Proceedings.

- Pursuant to Article 120 par. 1 of the SCO, the right of set-off is available as a matter of substantive Swiss law "*Where two persons owe each other sums of money or performance of identical obligations, and provided that both claims have fallen due, each party may set off his debt against his claim.*"
- Article 124 par. 1 of the SCO provides "*A set-off takes place only if the debtor notifies the creditor of his intention to exercise his right to set-off*".
- Further, the principles and conditions for set-off established in CAS 2013/A/3109 are of relevance to the present case and have been satisfied, namely that:
  - the parties to the debt are the same;
  - there are similarities to the debt (i.e. both debts are monetary); and
  - HTAFC has provided sufficient evidence that the amount of its set-off is due and owing to it from RCDE.
- In circumstances where:
  - pursuant to clause 2(c) of the Transfer Agreement, the third instalment of the transfer fee – in the sum of EUR 340,00071 – fell due for payment by HTAFC to RCDE on 25 June 2022; and
  - HTAFC has a countervailing claim against RCDE as a result of RCDE's breach of the representation and warranties in the greater sum of EUR 400,339.67, CHF 102,000, GBP 103,749.86 and USD 25,000,72

  HTAFC has exercised its right to set-off its countervailing claim against RCDE against the third instalment of the transfer fee.
- Further, on 23 June 2022, HTAFC entered into the Olympiakos Transfer Agreement in respect of the Player. Accordingly, pursuant to clause 4 of the Transfer Agreement, HTAFC is liable to pay to RCDE the sum of 20% of the compensation actually received by it from Olympiakos in accordance with the payment terms set out at clause 2 of the Transfer Agreement. To date, HTAFC has received £375,000 from Olympiakos, such that RCDE would typically have been entitled to receive £75,000.
- However, given the quantum of its claim in these proceedings, HTAFC also exercises its right to set-off its countervailing claim against RCDE against any sums that may fall due for payment under clause 4 of the Transfer Agreement. HTAFC notified RCDE of its intention to exercise this right in the email to RCDE dated 1 July 2022 and re-confirmed this to RCDE in a separate email dated 27 January 2023, in response to RCDE's threat to commence Article 12bis proceedings.

B. The First Respondent

61. In its Answer, RCDE sought the following relief:

"- To inadmit the Appeal presented by the Appellant;

In case the previous point is not accepted:

- to reject the Appeal presented by the Appellant;

- to confirm the decisions issued by FIFA governing bodies

In any case:

- To impose the costs of the arbitration to the Appellant;

- To provide RCD Espanyol de Barcelona the amount of 20,000 CHFs in legal costs taking into account:

(i) the amounts involved on this matter,

(ii) the complexity of these proceeding being hold in English which is not our mother-tongue,

(iii) the negligence and insistence in a matter already decided, and

(iv) the amount of time spent by RCD Espanyol de Bacelona's employees on this matter for almost a year since the first claim via e-mail."

62. In support of the above prayers for relief RCDE submits as follows:

a) *Res judicata*

- HTAFC is attempting to obtain a second chance regarding a claim they already lost in the First CAS Award. This case, in accordance with FIFA's and CAS' jurisprudence, as a clear example of *res judicata* and the current proceedings should be about why HTAFC has still not paid.
- HTAFC did not appeal against the FIFA Proposal or the Confirmation Letter making the FIFA Proposal final and binding by all means. The decision of the FIFA DC is in connection with the lack of payment not about whether the training compensation is owed or not (an analysis that was previously and duly done by FIFA).
- Any analysis of the dispute that goes beyond the reasons about why HTAFC has not paid to this date would go against the principles of legal certainty and legal security (para. 52 of CAS 2017/A/5417).

b) No contractual breach

- There has been no contractual breach as alleged by HTAFC. The Player's registration was done peacefully, and the Player has been an active member of HTAFC for two sporting seasons.
- There is no express agreement regarding RCDE covering the expenses for the claims of third parties for the concept of training compensation.
- The estimated damages of HTAFC come mostly from a legal claim already solved by both FIFA and CAS' deciding bodies/panels.
- HTAFC's argument that it was allegedly misled by FIFA's TMS makes no

sense when the person responsible for managing the TMS of HTAFC downloaded 4 times the letter containing the FIFA Proposal in two different days: the day the letter was issued i.e., 8 December 2020 and the last day on which HTAFC could have replied i.e., 9 January 2020. This was presented as evidence by FIFA in the hearing in the First CAS Proceedings.

- RCDE's position was clearly stated in the grounds of the claim it lodged in front of the FIFA DRC in November 2020 and the position requested by CAS in August 2021. RCDE understood the Transfer Agreement in one way and HTAFC in another. During all these months, RCDE has tried to reach an amicable solution, but HTAFC has continuously rejected it.
- Moreover, HTAFC has unilaterally decided that it will continue to break the terms and conditions of the Transfer Agreement, even though they were warned about the consequences.
- Consequently, after notifying HTAFC of its intentions, RCDE decided that FIFA should take a decision in order to claim the training compensation as defined in Article 20 of the FIFA RSTP.
- RCDE recalls that a claim has been lodged regarding the sell-on fee mentioned in the Appeal Brief that remains also unpaid to this date.
- RCDE still maintains its position and deems it was entitled to training compensation.
- HTAFC cannot be serious when it says that it was never given the chance to respond to the RCDE TC Claim before FIFA. There is no legal support to HTAFC's claim that it did not have the opportunity to answer the claim.
- HTAFC does not accept its own negligence while dealing with this matter.

c) Regarding the alleged "obvious mistake" in the FIFA Proposal

- CAS 2020/A/7252 is applicable to the present case. In this case, it was held that FIFA's proposal has *animus decidendi* making its contents mandatory or a final legal decision. Reference is also made to CAS 2017/A/5417.
- FIFA provided HTAFC enough time to express its position. The only party guilty is HTAFC itself since it did not read a simple letter that contained the details of the proposal and the relevant deadlines.
- FIFA had all the relevant information from the very beginning, as provided by RCDE in its claim, since the only things needed for the case were: (i) the grounds of the case, (ii) a copy of the transfer agreement and (iii) a copy of the Player's Passport issued by the RFEF. This information and documents were available to FIFA from the moment the claim was presented to it. FIFA had all elements to proceed with a proposal and made an analysis based on true and complete information.
- The proceedings were duly opened, and all the information was shared with HTAFC for it to present its own position in case of rejection.

- Lack of response is to be deemed as an acceptance. CAS jurisprudence has made this clear considering Article 13 of FIFA Procedural Rules and FIFA Circular 1689.
- The FIFA Proposal which HTAFC acknowledges to have received, specifies the consequences of not replying to the FIFA Proposal.
- In para. 90 of the First CAS Award, it is stated that the data on the TMS reveals that TMS users of HTAFC accessed the system on numerous occasions between 8 December 2020 and 9 January 2021 and more particularly, downloaded the FIFA Proposal on both those dates. Consequently, the right to be heard has been fully respected by FIFA. In addition, RCDE has acted in good faith notifying HTAFC about its intentions and warning HTAFC about the consequences of not fulfilling the payments.

d) Alleged damages suffered by HTAFC

- With the exception of the claim made by Nastic, the alleged damages that have been claimed by HTAFC in its claim are based on a matter that has already been judged and therefore is *res judicata*.
- By virtue of principles of security and legal certainty, something on which there is already a firm, final and binding decision cannot be re-judged.

e) Alleged breach of the Transfer Agreement

- HTAFC has presented an erroneous, selfish and incredibly vague interpretation of the Transfer Agreement.
- The Transfer Agreement mentions the registration of the Player and that said registration was made by HTAFC without any type of disruption or claim, becoming effective in September 2020.
- The Transfer Agreement never mentioned that RCDE had to answer for claims by third parties in relation to solidarity contribution or training compensation.
- The Transfer Agreement was in English and it is the boilerplate language used by HTAFC in its transactions, which gives HTAFC an advantage over RCDE.
- With no specific mention and taking into account that the Transfer Agreement was provided and drafted by HTAFC, in case of a doubt in the interpretation of any term of the Transfer Agreement, the interpretation shall be done in favour of the party that was not part in the drafting, i.e., RCDE in this case.
- There was no breach of the Transfer Agreement by RCDE as no club has claimed the registration of the Player and his transfer to HTAFC was made without interference from third parties.

C. The Second Respondent

63. In its Answer, FIFA sought the following relief:

"113. Based on the preceding, FIFA respectfully requests CAS to issue an award on the merits:

(a) rejecting the reliefs sought by the Appellant and dismissing the appeal in full;

(b) confirming the Appealed Decision;

(c) ordering the Appellant to bear the full costs of these arbitration proceedings.

(d) ordering the Appellant to make a contribution to FIFA's legal costs."

64. In support of the above prayers for relief FIFA submits as follows:

a) According to the Appeal Brief, HTAFC requests certain sums as "damages". These claimed amounts can be split into three categories – 1. The training compensation amount ("TC Amount") i.e., EUR 342,246.57; 2. The expenses derived from not paying the TC Amount ("TC Expenses"); and 3. The training compensation allegedly paid to Gimnastic de Tarragona ("TC Nastic") i.e., EUR 29,260.

b) The claim related to the TC Amount is inadmissible:

- *Res judicata*
  - In the Appealed Decision, the FIFA PSC established that the matter was affected by *res judicata* since "*the duty of Huddersfield to pay training compensation has already been determined [by the Confirmation Letter] and cannot be re-examined by the Single Judge, even if Huddersfield frames it differently as a tort claim or by its petition seeking reparation of damages allegedly suffered. Admitting the claim of Huddersfield would open a door entitling clubs to engage in attempts to circumvent decisions and duties of the same clubs to timely follow the required procedural steps in any FIFA or CAS proceeding.*" As a result, HTAFC's claim in this regard was declared inadmissible.
  - The *res judicata* principle is a general legal principle that prevents a judgment involving the same parties and the same object from being discussed repeatedly by a court or tribunal. Furthermore, the application of the *res judicata* principle avoids the occurrence of two contradicting decisions, which would be contrary to public policy.
  - The issue of *res judicata* has already been dealt with by different CAS panels (CAS 2016/A/4408, para. 81). In short, there is a *res judicata* situation when there is (i) a claim identical (from a substantive and not a grammatical point of view) to another that has already been decided, (ii) the same parties were involved in such outcome, and (iii) the matter was solved based on the same facts existing at the time of the first judgment.
  - The FIFA PSC correctly found that it was prevented from analyzing HTAFC's claim in this regard and rebuts HTAFC's allegations as follows:

- FIFA notes that HTAFC does not contest that the parties to the Confirmation Letter (and the subsequent CAS Award) and the parties to the Appealed Decision are HTAFC and RCDE. Hence, there is an identity of parties and that the first element of a situation of res judicata is met.
- The second relevant element concerns the identity of object, being the relevant subject matter involves the same issues under dispute. In other words, "*the matter at issue in both proceedings ought to be identical*". In casu, the "objects" in both the TC Claim and the Appealed Decision (insofar as the TC Amount is concerned) are identical since both are focused, substantively, on determining whether or not RCDE was entitled to the amount of EUR 342,246.57 as training compensation in accordance with the Transfer Agreement. HTAFC claims the very same amount under the very same concept. It seems HTAFC is still in denial and refuses to accept that the "civil/horizontal" issue related to the TC Amount was already decided by the Confirmation Letter.
- The CAS Award not only addressed the Disciplinary Decision as HTAFC alleges but also confirmed that the Confirmation Letter was a valid decision which "*disposed of and put an end to the dispute on training compensation between the Appellant and the First Respondent*". The CAS Award confirmed the lawfulness of the Confirmation Letter and clearly established that it was a final and binding decision that ended the dispute of the TC Amount.
- No matter how hard HTAFC tries to make false, misleading or grammatical distinctions between the objects, according to the Swiss jurisprudence, "*the identity must be understood from a substantive and not 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 even if it appears to be its opposite or if it was already contained in the preceding action (ATF 139 III 126 3.2.3 i.f.), such as a claim decided on the merits in the first litigation and presented as a preliminary issue in the second* (ATF 123 III 16 at 2a, p. 19)."
- HTAFC can file several claims requesting the TC Amount and grammatically change its requests as it pleases; however, this will not change the fact that, substantially speaking, it is claiming a sum that has already been decided by the Confirmation Letter (confirmed by the subsequent CAS Award).
- If the FIFA PSC (or the Panel in this case) finds that RCDE should pay back EUR 342,246.57 to HTAFC, there would be

two contradicting and nonsensical decisions. On the one hand, we would have a Confirmation Letter stating that Espanyol is entitled to the TC Amount given the Parties' consent to the Proposal but, on the other hand, we would have a PSC Decision (or Award) establishing that the same TC Amount shall be paid to Huddersfield because it suffered "damages" when it complied with the payment of the Confirmation Letter. This situation would not only contradict the core principles of law but also allow debtors to claim back the amounts sentenced by FIFA and CAS, which would render the entire justice system moot and unreliable.

- Hence, there exists identity of object since HTAFC's claim regarding the TC Amount is the same as the TC claim already solved by the Confirmation Letter and confirmed by the CAS Award.
- An identity of the cause of action or transaction exists between the Confirmation Letter (and the subsequent CAS Award) and the Appealed Decision. Both claims come from the very same facts. HTAFC has failed to establish what are the "new" facts in this case. Following HTAFC's flawed argumentation would open the door to all debtors to re-litigate issues already resolved by the relevant tribunal solely based on the "new" fact that they complied with the decision/award and, therefore, they have the "right" to claim back the amounts as "damages". Hence, it shall be ruled that the Confirmation Letter (and the CAS Award that confirmed its validity) was issued with the same facts and cause of action that HTAFC portrayed before the FIFA DRC.

- The *res judicata* effects have also been assessed by the CAS jurisprudence in different awards (CAS 2013/A/3256 para. 138). The Panel shall consider that the Confirmation Letter (and the CAS Award), (i) prevented the FIFA PSC from re-assessing the TC Amount and (ii) bound it to the outcome of the Confirmation Letter. The same effects apply to the Panel at the CAS appeal level.

- HTAFC cannot claim the TC Amount for reasons of preclusion
  - That silence is deemed acceptance has a regulatory basis in the applicable regulations and is also expressly confirmed in CAS jurisprudence (CAS 2020/A/7252 para. 159 to 164). It is not disputed that HTAFC remained passive when the FIFA Proposal was notified to it. In fact, the CAS Award clearly established that HTAFC was properly notified of the FIFA Proposal and had the possibility to reject it – due to the particularities of the case within a long deadline of 32 days (from 8 December 2020 until 9 January 2021).

- HTAFC tacitly consented to the FIFA Proposal and the TC Amount described therein. That document (along with the Confirmation Letter) is akin to concluding a settlement agreement and, once completed, HTAFC cannot withdraw its consent since this would be against the principle *venire contra factum proprium* i.e., by failing to object to the FIFA Proposal or appeal the Confirmation Letter in time, HTAFC induced legitimate expectations on RCDE and FIFA that it accepted to pay the TC Amount. Claiming the amounts back, based on a misconstrued concept of "damages", goes against what HTAFC accepted and therefore, shall deserve no protection from this Panel.
- HTAFC tries to allege that the FIFA Proposal is not binding because the TMS dashboard had contradictory information regarding the deadline to reject it; thus, it deserves protection due to "excessive formalism". These arguments were already dismissed by the First CAS Award.
- HTAFC's arguments regarding an alleged manifest error by the FIFA administration are of no avail. Even if FIFA would have erroneously considered that the TC Claim had no complex facts or legal issues (*quod non*), HTAFC should have appealed the Confirmation Letter to annul it (just as in case CAS 2021/A/7636). In this regard, it is undisputed that Huddersfield had the chance to appeal the Confirmation Letter but, once again, decided to remain passive. By not appealing that decision "which disposed of and put an end to the dispute on training compensation" between HTAFC and RCDE, HTAFC confirmed its acceptance of the Proposal and the amounts it had to pay to RCDE regardless of any mistake FIFA could have made when assessing the TC Claim (*quod certe non*). In fact, the First CAS Award also addressed this issue and dismissed HTAFC's argument.

c) The TC Expenses should be rejected

- HTAFC claims that the TC Expenses should be paid by RCDE since it breached the Transfer Agreement. The narrative of HTAFC is evidently mistaken. FIFA recalls that according to Article 99 of the Swiss Code of Obligations "the obligor is generally liable for any fault attributable to him". In particular, it is patent that each and all the TC Expenses were not caused by RCDE but directly produced by the inactions and actions of HTAFC itself.
- HTAFC had at least five concrete moments to avoid those expenses/damages:
  - If HTAFC had paid the TC Amount in time, the TC Expenses would not have been disbursed.
  - If HTAFC had rejected the Proposal in time, the TC Expenses would not have been paid.

- If HTAFC had paid the amounts fixed in the Confirmation Letter before the opening of the disciplinary proceedings all those amounts would not have been expended.
- If HTAFC had paid the amounts fixed in the Confirmation Letter before the issuance of the Disciplinary Decision, all those amounts would not have been expended.
- If HTAFC had not appealed the Disciplinary Decision most of these amounts would not have been paid.

- HTAFC made several decisions that produced all the TC Expenses and no one can be liable for those amounts but HTAFC itself. HTAFC shall face the consequences of having made its own decisions. Upholding HTAFC's narrative would open the door to all debtors to relitigate the same matter and even request the expenses they paid for having failed to comply with its obligations in the first place.
- HTAFC's claim that the TC Expenses were caused because RCDE filed the TC Claim in bad faith, has already been rejected in the CAS Award.

d) HTAFC did not prove the payment of the TC Nastic before the previous instance:

- The Panel shall not consider the "new" evidence presented by HTAFC that was available to it in the first instance proceedings as per Article R57 of the CAS Code. HTAFC's appeal should be limited to its arguments and considerations disregarding all "new" evidence that could have been presented before the FIFA PSC.
- FIFA refrains from commenting more deeply on this issue as it is strictly horizontal, in nature and trusts the Panel to decide (i) whether HTAFC indeed paid the TC Nastic and (ii) whether it can set off those amounts from the sums it owes to RCDE.
- Should the Panel find that HTAFC is to succeed in (part of) its appeal and given that the reasoning thereof is the "new" evidence filed in these CAS proceedings, FIFA requests to be exonerated from paying any arbitration costs or contribution to legal expenses since HTAFC could have provided more evidence of the alleged payment of TC Nastic during the first instance proceedings.

e) The counterclaim of RCDE shall be confirmed:

- HTAFC does not contend that it owes the third instalment of the Transfer Agreement to RCDE and therefore, the Panel shall also confirm the Appealed Decision in this regard. FIFA deems this issue strictly horizontal and refrains from commenting more deeply on it.

V. JURISDICTION

65. Article R47 of the Code provides as follows:

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

66. The jurisdiction of CAS derives from Article 57 par. 1 of the FIFA Statutes which states that:

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

67. Furthermore, clause 22 of the Transfer Agreement states as follows:

> *"... Any dispute arising from or relate to the Agreement will be submitted either to the competent body of FIFA and the Court of Arbitration for Sport in Lausanne, Switzerland as the appealing body. The parties expressly waive recourse to ordinary courts of law in the case of any dispute arising from or related to this Agreement. In the event the dispute is submitted to the Court of Arbitration for Sport, acting as a court of appeal, the arbitration panel shall consist of three members and the language of arbitration shall be English."*

68. The jurisdiction of CAS is not contested and is further confirmed by the Order of Procedure duly signed by all Parties.

69. The Panel notes, however, that the Respondents have raised the plea of *res judicata*. The Respondents submit that the present dispute – at least partially – has been adjudicated and confirmed in the First CAS Proceedings and/or the Confirmation Letter and that for this reason the Appellant is barred from re-litigating this matter.

70. It is not clear whether the objection of *res judicata* pertains to jurisdiction or to the admissibility of a claim. The Swiss legal literature is of the view that 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 a rule of thumb, 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 issues 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 plea of *res judicata* is a jurisdictional matter or an issue of admissibility.

71. The Panel also notes that the jurisprudence of the SFT on this matter is far from clear. In its decision of 14 May 2001 the SFT qualified the issue of *res judicata* as a matter of jurisdiction (*"compétence"* in French) (SFT 127 III 279, 283). The decision states in its relevant parts as follows:

> *"Quant à l'autorité de chose jugée, ce principe interdit au juge de connaître d'une cause qui a déjà été définitivement tranchée; ce mécanisme exclut définitivement la compétence du second juge"*
>
> **Free translation**: With regard to *res judicata*, this principle precludes a judge from entertaining a case that has already been finally decided; such mechanism definitively excludes the jurisdiction of the second judge.

72. In SFT 136 III 345 (consid. 2.1) the Tribunal, on the contrary did not qualify the plea of *res judicata* as a jurisdictional issue, but as a procedural issue and – in the context of an appeal against an arbitral award – examined the matter in light of the public-policy exception in Article 190(2) lit. e of the Private International Law Act ("PILA") only. 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."*
>
> **Free translation**: 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

73. At the end of the day, the Panel can leave the above question open. It is clear that this Panel must address the question whether it is barred from looking at the merits of this dispute because of alleged *res judicata* effects of the award rendered – e.g. – in the First CAS Proceedings be it under the heading "jurisdiction" or "admissibility". The distinction whether a matter pertains to jurisdiction or admissibility is only important when an appeal is filed against an award according to Article 190 PILA. Here, the party appealing and the SFT must decide, which of the limited grounds in Article 190(2) PILA they wish to apply. The SFT has stated that not all matters related to admissibility can be revisited under Article 190(2) lit. b PILA (lack of jurisdiction) and that lack of jurisdiction is only one of the elements defining the mandate of a panel. Other elements delimiting the mandate of a court or a panel should therefore not be read into Article 190(2) lit. b PILA and can only be taken into account in the context of other subsections of Article 190 PILA:

> *"Sur un plan plus général, il ne faut pas perdre de vue que la compétence à raison de la matière et du lieu du tribunal saisi ne constitue qu'une condition de recevabilité parmi d'autres, comme l'existence d'un intérêt digne de protection, la capacité d'être partie et d'ester en justice ou encore l'absence de litispendance et de force de chose jugée (cf. l'art. 59 al. 2 CPC, qui énumère, à titre exemplatif, six conditions de recevabilité, dont la compétence du tribunal [let. b], que l'on désigne communément, sous l'angle négatif, par le terme de fins de non-recevoir). Si une ou des conditions de recevabilité ne sont pas remplies, le tribunal n'entrera pas en matière sur le fond mais prononcera un jugement d'irrecevabilité (HOHL, op. cit., n. 585).*
>
> *On veillera donc à ne pas assimiler toutes les conditions de recevabilité à l'une d'entre elles - en l'occurrence, la compétence -, sauf à vouloir étendre indûment le pouvoir d'examen de l'autorité de recours dans l'hypothèse, qui se vérifie en droit suisse de l'arbitrage international, où la loi énonce limitativement les griefs susceptibles d'être invoqués dans un recours en matière civile visant une sentence et ne prévoit qu'un seul motif de recours tiré d'une fin*

> *de non-recevoir, à savoir le fait pour le tribunal arbitral de s'être déclaré à tort compétent ou incompétent (art. 190 al. 2 let. b LDIP).*" (SFT 4A_394/2017, consid. 4.2.4)
>
> **Free translation** : On a more general level, it should be borne in mind that jurisdiction by reason of the subject-matter and the place of the court seized is only one condition for admissibility among others, such as the existence of an interest worthy of protection, capacity to be a party and to institute proceedings, or the absence of *lis pendens* and *res judicata* (cf. art. 59 para. 2 CPC, which lists, by way of example, six conditions of admissibility, including the court's jurisdiction [subpara. b], which are commonly referred to, in negative terms, as 'grounds for dismissal'). If one or more of the conditions for admissibility are not met, the court will not enter into the merits of the case but will rule that the claim is inadmissible (HOHL, op. cit., n. 585).
>
> Care must therefore be taken not to assimilate all the conditions of admissibility to one of them - in this case, jurisdiction -, without wishing to unduly extend the review authority's power of review in the event, as is the case in Swiss international arbitration law, where the law sets out an exhaustive list of the complaints that may be raised in an appeal in civil matters against an award and provides for only one ground of appeal based on a plea of inadmissibility, namely the fact that the arbitral tribunal has wrongly declared itself competent or incompetent (Art. 190 al. 2 let. b PILA).

74. In view of the above, the Panel will address the issue of *res judicata* not under the heading jurisdiction, but in light of admissibility. It follows that CAS has jurisdiction to adjudicate and decide on the present dispute.

VI. ADMISSIBILITY

A. Article R56 of the CAS Code

75. At the hearing – following the CAS Court Office letter dated 15 August 2023 – the Appellant made submissions on whether or not the concept of *res judicata* is applicable to the Confirmation Letter. The Respondents objected to such submissions on the grounds of Article R56 of the CAS Code arguing that the Appellant in its written submissions never contested that the concept of *res judicata* was also applicable to decision of an association tribunal.

76. Article R56(1) of the CAS Code provides as follows:

> *"Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument, to produce new exhibits, or to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer."*

77. The Panel in this specific case had submitted – prior to the hearing – a series of questions to the Parties that it wished the latter to address at the hearing. The Appellant adhered to the directions given by the Panel and, thus, acted in conformity with the authorization granted by the President of the Panel when answering to the questions at the hearing. Consequently, the Appellant's submissions at the hearing are admissible.

B. The Plea of *Res Judicata*

78. The *res judicata* effects are awarded to a judicial decision by the law of the state in which the decision was issued. Whether the decisions referred to by the Respondents are vested with *res judicata* effects is, thus, a question of Swiss law, since both, the First CAS Award as well as the Confirmation Letter were issued within the legal framework of Swiss law.

79. There is no provision in Swiss law defining the *res judicata* effect of state court decisions or arbitral awards. According to the SFT the effects of *res judicata* are, however, as follows (SFT 4A_394/2017, consid. 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."*
>
> **Free translation**: *Res judicata* prohibits an identical claim that has been finally adjudicated from being challenged in a new proceeding between the same parties.

80. The ratio behind the *res judicata* principle is to ensure the finality of judgments and, thus, serves – *inter alia* – public interests, i.e. legal security.

1. The decisions vested with *res judicata* effects

81. Swiss statutory law confers the above effects only to certain types of decisions. In SFT 4A_486/2022 (consid. 6.4) the Tribunal stated as follows:

> *"Il faut en effet rappeler que les décisions rendues par les organes juridictionnels d'une association, à l'instar de la yyy, ne sont pas des décisions judiciaires ni des sentences arbitrales et ne bénéficient ainsi pas de l'autorité de la chose jugée (ATF 119 II 271 consid. 3b; arrêt 4A_476/2020, précité, consid. 3.2 et les références citées)."*
>
> **Free translation**: It should be remembered that decisions handed down by the judicial bodies of an association, such as the yyy, are not judicial decisions or arbitration awards and therefore do not have the force of res judicata (SFT 119 II 271, para. 3b; judgment 4A_476/2020, cited above, para. 3.2 and the references cited).

82. Furthermore, it is accepted in Swiss law that the statutory concept of *res judicata* is not dispositive. The parties to a dispute, consequently, cannot agree – e.g. – that a state court decision shall not have any *res judicata* effects or other effects than the ones foreseen by Swiss law. The parties, also, cannot extent the statutory effects of *res judicata* to other types of dispute resolution mechanisms. Consequently, only the award rendered in the First CAS Proceedings (and not the Confirmation Letter) enjoy the statutory effects of *res judicata*.

2. The award in the First CAS Proceedings

83. There is *res judicata* when the claim in dispute is (partially) identical to that which was already the subject of a previous judgment (identity of the subject-matter of the dispute). This is the case when in both litigations the same party submitted the same claim to the court on the basis of 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, consid. 3.3; ATF 139 III 126, consid. 3.2.3).

84. In the case at hand the *res judicata* effects attributed to the award in the First CAS Proceedings are no impediment for this Panel to look into the merits of the Appellant's claim in these proceedings.

85. The matter in dispute in the First CAS Proceeding was as follows (cf. no. 121 of that decision):

> *"The Panel notes that the present procedure is an appeal arbitration procedure. Thus, this Panel must examine whether or not the Appealed Decision is factually and / or legally correct and whether the Appellant has a claim that FIFA acts according to its Application* [within the meaning of Article 14(5) Procedural Rules][1]. *The mandate of the Panel is limited by the requests filed by the Parties and the decisions forming the subject matter of the appeal. It is only within these boundaries that the Panel is entitled to review the matter."*

86. The matter of the "appealed decision" in the First CAS Proceedings, is described by the panel in CAS 8078 (no. 126) as follows:

> *"The Panel finds that the Appealed Decision is of a purely disciplinary nature. The Panel notes that the Appealed Decision seeks to enforce Article 15 FDC, i.e. a provision enshrined in the Disciplinary Code. Furthermore, the competent adjudicatory body to decide on the application of Article 15 FDC is the FIFA DC, i.e. the Disciplinary Committee. That is a further indication that the nature of these proceedings is disciplinary, since – in principle – the FIFA DC is not competent to decide horizontal disputes between indirect members of FIFA. A further indication that there is no civil / horizontal limb to the Appealed Decision follows from the simple fact that the First Respondent was not a party to the proceeding before the FIFA DC. It was only entitled to initiate such proceedings and was notified of their final outcome according to Article 15(2) FDC. However, the First Respondent did not have the status of a party in these "vertical" disciplinary proceedings opposing FIFA and the Appellant only. The latter is yet another clear indication that the proceedings before the FIFA DC are purely disciplinary."*

87. It is clear when comparing the matter in dispute in this proceeding with the one in CAS 8078 that both are different. The matter in dispute in these proceedings is purely horizontal and not disciplinary in nature. Consequently, no issues of *res judicata* arises here with respect to the First CAS Award.

C. The binding character of decisions by association tribunals

88. Proceedings before association tribunals are a means of alternative dispute resolution. Differently from arbitration, Swiss law does not provide for a legislative framework for these kinds of proceedings. However, it is undisputed in Swiss law that adjudication by association tribunals – as long as they are agreed upon by the parties – are an admissible and legitimate means of (alternative) dispute resolution. It is further accepted in Swiss

[1] Inserted for better understanding.

law that in case a party to this dispute resolution mechanism has not exhausted the internal instances of recourse within the prescribed deadlines or in case a party has failed to lodge a timely appeal against the last instance decision of an association tribunal, the decision becomes "binding", i.e. it can no longer be appealed to state courts or arbitral tribunals (BGE 85 II 525, 535 seq.; BK-ZGB/Riemer, 1990, Art. 72 N. 83). The SFT in 71 II 194, 198 stated as follows:

> *"Solche Beschlüsse können durch Klage vor dem Richter gemäss Art. 75 ZGB angefochten werden. Wer von diesem Rechtsbehelf nicht bzw. nicht rechtzeitig und formrichtig Gebrauch macht, bleibt den Beschlüssen unterworfen; mangels erfolgreicher Anfechtung werden sie verbindlich und können nicht mehr als die Statuten verletzend angesehen werden."*
>
> **Free translation**: Such resolutions may be challenged by action before the judge in accordance with Art. 75 CC. Anyone who does not make use of this legal remedy, or does not do so in due time and form, remains subject to the resolutions; in the absence of a successful challenge, they become binding and can no longer be regarded as violating the Articles of Association.

89. Such binding character attributed to decision of association tribunals cannot be circumvented by the party who missed the deadline for lodging the appeal according to Art. 75 CC by now dressing his or her claim differently, for example as a claim for damages (within the meaning of Article 28 CC or Articles 41 et seq of the Swiss Code of Obligations – "CO"). This clearly follows from the jurisprudence of the SFT. The latter stated in 5C.9/2005, consid. 2.1 as follows:

> *"Effektiv liegt in der Nichtanfechtung der Ausschliessung ... durch das ausgeschlossene Mitglied eine Anerkennung oder Bestätigung der gesetzlich (Art. 72 Abs. 1 ZGB) zulässigen Persönlichkeitsverletzung seitens des Vereins, was die Annahme einer entsprechenden Widerrechtlichkeit (Art. 28 ZGB, Art. 41 Abs. 1 und 49 Abs. 1 OR) ausschliesst."*
>
> Free translation: Effectively, the non-challenge of the exclusion ... by the excluded member is an acknowledgement or confirmation of the legally (Art. 72 para. 1 CC) permissible violation of personality on the part of the association, which excludes the assumption of a corresponding illegality (Art. 28 CC, Art. 41 para. 1 and 49 para. 1 CO

90. The FIFA Procedural Rules Governing the Football Tribunal ("PRGFT") (ed. 2022) follow this approach. Article 15(5) (7) and Article 20(4) of the PRGFT provides as follows:

> Article 15(5) PRGFT
>
> *"Where no procedural costs are ordered, a party has ten calendar days from notification of the operative part of the decision to request the grounds of the decision. Failure to comply with the time limit shall result in the decision becoming final and binding and the party will be deemed to have waived its right to file an appeal. The time limit to lodge an appeal begins upon notification of the grounds of the decision."*
>
> Article 15(7) PRGFT
>
> *"Failure to comply with the time limit referred to in paragraph 6 of this article shall result in the request for the grounds being deemed to have been withdrawn. As a result,* ***the decision will become final and binding*** *and the party will be deemed to have waived its right to file an appeal."* (emphasis added)

Article 20(4) PRGFT

> *"Where a proposal is accepted, a confirmation letter will be issued by the FIFA general secretariat. The confirmation letter* ***shall be considered a final and binding decision*** *pursuant to the relevant FIFA regulations."* (emphasis added)

91. Whether the loss of the right to appeal – in case the internal remedies have not been exhausted – is a matter of admissibility or the merits is unclear. The jurisprudence is contradictory (admissibility: SFT 85 II 525, 535 seq.; SFT 4A_682/2012, consid. 4.4.3.2; merits: BezGer ZH, Causa Sport 2005/3, 254, 257 seq.). The CAS tends to treat questions related to the exhaustion of legal remedies according to Article R47 of the CAS Code as questions of admissibility (CAS 2007/A/1259, para. 7.4; cf. also RIGOZZI/HASLER, in Arroyo (ed.) Arbitration in Switzerland, 2nd ed. 2018, Art. R47 no. 37; MAVROMATI/REEB, Code of the Court of Arbitration for Sport, 2015, Art. R47 no. 42). This Panel follows this approach and, consequently, will discuss if and to what extent the Appellant is bound by the Confirmation Letter as an admissibility issue.

1. Is the Confirmation Letter a decision by an association tribunal?

a) The position of the Parties

92. At the hearing the Appellant explained that the Confirmation Letter cannot be qualified as a decision of an association tribunal and, therefore, cannot have any binding effects. According to the Appellant in order for a decision to enjoy binding effects it must have been issued by a jurisdictional body and – in addition – must be the result of a procedure that respects minimum procedural requirements. In case these requirements are not fulfilled, the Appellant submits that the decision cannot be regarded as binding. The Appellant submits that the Confirmation Letter was issued by Ms Laura Römer-Zantonelli, Group Leader Case Management with FIFA, i.e. not by a jurisdictional body and consequently cannot benefit from any binding effects (attributed to decisions of association tribunals).

93. The Respondents object to the above. They submit that the binding character of the Confirmation Letter follows from Article 20(4) of the PRGFT and that such concept was already present in the previous rules, i.e. the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber ("Procedural Rules") applicable at the time the Confirmation Letter was issued. Therein, Article 13 provided as follows:

> *"In disputes relating to training compensation and the solidarity mechanism without complex factual or legal issues, or in cases in which the DRC already has clear, established jurisprudence, the FIFA administration (i.e. the Players' Status Department) may make written proposals, without prejudice, to the parties regarding the amounts owed in the case in question as well as the calculation of such amounts. At the same time, the parties shall be informed that they have 15 days from receipt of FIFA's proposals to request, in writing, a formal decision from the relevant body, and that failure to do so* ***will result in the proposal being regarded as accepted by and binding on all parties.***" (emphasis added)

94. The Second Respondent further submits that – unlike the statutory concept of *res judicata* – it is within FIFA's autonomy to regulate if and under what conditions a decision may become final and binding for the parties involved.

b) The findings of the Panel

95. The Panel concurs with the view of the Respondents. The Panel finds that there is a sufficient legal basis to assume that the Confirmation Letter has – in principle – a binding effect. The confirmation letter is issued in the course of a transparent judicial proceeding that offers the parties sufficient judicial guarantees. The fact that the Appellant did not make use of these judicial guarantees, does not alter the qualification of the decision that was issued at the end of this process. In this regard the Panel reiterates its finding in CAS 2021/A/8078 (no. 140) where it found as follows:

> *"The Panel furthermore wishes to highlight that – as determined already in CAS 2020/A/7252 – Article 13 Procedural Rules provides a regulatory basis for the FIFA administration to issue a proposal in disputes related to training compensation. Article 13 FIFA Procedural Rules is furthermore a sufficient legal basis to qualify a failure of a party to timely respond to the proposal as an acceptance. Finally, the Panel finds that a deadline of 15 days is, in principle, appropriate and sufficient for a party to assess and evaluate the proposal. Thus, the Panel finds that the system put in place in no way prevents access to justice for a party."*

96. The panel in the First CAS Proceeding, thus, found that FIFA did not abuse it regulatory powers when enacting Article 13 of the Procedural Rules and thereby granting a binding effect to a confirmation letter. The Panel in these proceedings has heard and carefully assessed the Appellant's arguments, but sees no reasons to depart from its previous position.

97. The Panel is of the view that – when considering the specific circumstances of this case – there is no reason to allow for an exception from the clear wording in Article 13 of the Procedural Rules. The Panel refers to its findings in CAS 2021/A/8078, where it found that the Confirmation Letter was not null and void, that no grave violations had been committed in the course of the procedure (no. 136 et seq.) and that FIFA did not exercise excessive formalism or violated the Appellant's right to be heard (no. 138 et seq.). The Panel has carefully assessed its previous finding in light of the Appellant's arguments, but sees not reasons to depart from it. Consequently, the Panel finds that the Confirmation Letter is a decision by an association tribunal that is vested with binding effects (based upon the rules and regulations agreed upon by the Parties).

2. How to determine the scope of the binding nature of the Confirmation Letter?

a) The position of the Parties

98. The Appellant submits that even if the Confirmation Letter was binding, it does not prevent the Appellant from filing its claim for damages. The Appellant submits that the scope of the binding effect of decisions of an association tribunal must be determined based on the applicable law to the merits. The question is – according to the Appellant – governed

by Swiss law. The latter, however, does not deal with the issue specifically. Thus, recourse must be made to general principles of law, i.e. to principles of contract law more specifically. It follows from these principles that a party may contest the binding nature of a legal act on the ground of error, or any other defect related to consent. In such case – according to the Appellant – a party is entitled to rescind the contract (and the binding effects following from it). The Appellant submits that it erred in relation to the deadline within which it needed to reject the proposal and request a decision by the relevant body, since it was misled by the TMS Home tab.

99. The First Respondent submits that the law applicable for determining the scope of the binding character of the Confirmation Letter is the law applicable to the merits. The latter refers – primarily – to the rules and regulations of the sports governing body that issued the decision. In the matter at hand, it is, thus, the FIFA regulations that primarily apply (and Swiss law only subsidiarily). According to the Second Respondent the binding effect of a decision of an association tribunal is a procedural question. According to the Second Respondent Article 182(1) of the PILA refers first and foremost to the rules agreed upon by the Parties. The Second Respondent submits that the Parties have referred to the dispute resolution mechanism of FIFA and the rules applicable to it. Consequently, there is no room to fall back on Swiss law.

100. The Respondents admit that the FIFA regulations do not define how to determine the scope of the binding effect of decisions of an association tribunal. For this reason, they want to take recourse to general principles of law such as the principle of good faith, ven*ire contra factum proprium* and *pacta sunt servanda*. They follow from these principles and from the functions performed by association tribunals (dispute resolution) that the scope and the finality of a decision of an association tribunal must be determined according to principles similar to *res judicata*. Decisions of judiciary organs of FIFA must have – according to the Respondents – similar effects as CAS awards, because they all serve the exact same purpose, i.e. to finally and bindingly resolve a dispute.

b) The finding of the Panel

101. The Panel tends to qualify the activity of an association tribunal – at least in the context of horizontal disputes – as a matter of procedural law rather than substantive law, since proceedings before association tribunals are a means of (alternative) dispute resolution. Adjudication, however, is rather a procedural than a substantive matter. Be it as it may, the Panel can leave this question open, since both Article R58 of the Code or Article 182(1) PILA primarily refer to the legal framework agreed upon by the Parties, which are the rules and regulations of FIFA.

102. The Panel notes that association tribunals and arbitral tribunals perform similar functions. Both seek to resolve a dispute between the parties in a court-like procedure. Because of these similar functions it appears obvious to determine the extent of the binding effect of both dispute resolution mechanisms in a similar way. This is all the more true, considering that *res judicata* not only serves a public interest. Instead, the concept also intends to protect the private interests of the parties involved in the litigation. Without the "finality"

of a dispute resolution mechanism, a dispute would never end. It is, however, the common intention of the parties when submitting to a dispute resolution mechanism, to have their contentious relationship finally and bindingly resolved by the adjudicator. The private interests involved do not differ in proceedings before an association tribunal from other forms of dispute resolution such as arbitration. Consequently, when looking at the similar functions and the similar interests involved, the better arguments speak in favour of determining the scope of the binding effects of the respective decisions in an identical manner, i.e. to determine the extent of the finality of a decision of an association tribunal by applying the concept of *res judicata* by analogy.

103. This finding is not contradicted by the fact that – as previously stated – the statutory provisions and principles related to *res judicata* are mandatory and cannot be altered through an agreement of the parties (see supra no. 82). Unlike the statutory concept of *res judicata*, the extent of the binding effect of decisions of an association tribunal is within the autonomy of the parties or the autonomy of the federation concerned. Thus, it is for the FIFA rules and regulations to determine the extent of the binding effects of the decisions of the FIFA adjudicatory bodies. It is perfectly legitimate for the parties to agree among themselves that they want a decision of an association tribunal to be treated akin to a state court decision or an arbitral award. Of course, such an agreement only binds the parties involved and not third parties or state authorities.

104. The Panel also notes that the Transfer Agreement (in clause 22) describes the role of CAS as that of court of appeal. The clause reads as follows:

> *"... In the event the dispute is submitted to the Court of Arbitration for Sport, acting as a court of appeal, the arbitration panel shall consist of three members and the language of arbitration shall be English."*

105. If the above, however, is the intention of the Parties, then the better arguments speak in favour of determining the scope of the binding effect of the decisions in both instances according to identical criteria.

106. Not only the adjudicatory function performed by an association tribunal and its position in the "court system" speaks in favor of an analogous application of the *res judicata* principle. The intention to grant (final) decisions of FIFA adjudicatory bodies similar effects as CAS decisions (i.e. decisions of arbitral tribunal) also follows from Article 21 of the FIFA Disciplinary Code. The provision is at the hearth of FIFA's so-called (alternative) enforcement system. The latter makes it a disciplinary (sanctionable) offense for anyone:

> *"... who fails to pay another person (such as a player, a coach or a club) or FIFA a sum of money in full or part, even though instructed to do so by a body, a committee, a subsidiary or an instance of FIFA or a CAS decision (financial decision), or anyone who fails to comply with another final decision (non-financial decision) passed by a body, a committee, a subsidiary or an instance of FIFA, or by CAS."*

107. It follows from the above provision that – within FIFA – arbitral awards issued by CAS and final decisions from internal bodies of FIFA are treated exactly alike when it comes to the enforcement stage. If, however, a final (because non-appealable) decision of an

association tribunal and an arbitral award are treated the same at the enforcement stage, then it appears logic, to treat both dispute resolution mechanisms alike when other (procedural) effects related to decisions are at stake (such as the scope and extend of the binding character).

108. The above finding of the Panel is also supported by jurisprudence of the SFT. The latter has applied in the past procedural concepts before state court proceedings to proceedings before association tribunals, because of their similar adjudicatory functions. Thus, the SFT – e.g. – has applied the concept of joint defendants (according to Article 71 of the Swiss Code of Civil Procedure) to proceedings before association tribunals (e.g. SFT 140 III 520). In said decision, the Tribunal stated as follows:

> *"Le 17 janvier 2008, le recourant a assigné conjointement le joueur et l'intimé devant la ... [Chambre de Résolution des Litiges (CRL) de la Fédération Internationale de Football Association (FIFA)]. Par décision du 15 juin 2011, les codéfendeurs ont été condamnés solidairement à lui payer la somme de ... Dans cette procédure de première instance, l'intimé et le joueur ont formé une consorité matérielle simple passive. ... Selon la jurisprudence et la doctrine, la consorité simple laisse subsister la pluralité des causes et des parties. Les consorts simples restent indépendants les uns des autres. L'attitude de l'un d'entre eux, notamment son désistement, son défaut ou son recours, est sans influence sur la situation juridique des autres (arrêt 4P.226/2002 du 21 janvier 2003 consid. 2.1; HOHL, op. cit., n. 525; ...). Quant'au jugement à rendre, il pourra être différent d'un consort à l'autre (JEANDIN, op. cit., n° 11 ad art. 71 CPC). Cette indépendance entre les consorts simples persistera au niveau de l'instance de recours ..."*
>
> **Free translation** : On 17 January 2008, the appellant summoned the player and the respondent jointly before the ... [Dispute Resolution Chamber (DRC) of the Fédération Internationale de Football Association (FIFA)]. By decision of 15 June 2011, the co-defendants were jointly and severally ordered to pay him the sum of ... In these first-instance proceedings, the respondent and the player formed a simple passive material consortium. ... According to case law and doctrine, a simple consortium allows the plurality of causes and parties to survive. The simple consorts remain independent of each other. The attitude of one of them, in particular its withdrawal, default or appeal, has no influence on the legal situation of the others (judgment 4P.226/2002 of 21 January 2003, section 2.1; HOHL, op. cit. n. 525; ...). As for the judgment to be rendered, it may differ from one consort to another (JEANDIN, op. cit., no. 11 ad art. 71 CPC). This independence between the simple consorts will persist at the level of the appeal instance.

109. Consequently, the Panel finds that the function performed, the interests of the parties involved and FIFA's applicable legal framework all point to an analogous application of the principles of *res judicata* in order to determine the extent of the binding nature of a decision of an association tribunal.

3. The analogous application of the *res judicata* principles to the case at hand

110. The concept of *res judicata* applies if an action (e.g. for performance) is repeated by a claimant. The concept, however, also applies, if the former respondent now brings the action again in its reversal; because the binding determination of a legal consequence contains at the same time the determination of the non-existence of the opposite (i.e. non-existence of a legal consequence).

111. The principle of *res judicata* requires that the subject matter of the dispute in the first and second proceedings is (partially) identical. In Swiss law, the subject matter of the dispute – in connection with *res judicata* – is defined by the claimant's requests for relief and the facts of life underlying the requests, as stated in SFT 4A_449/2020 (consid. 3):

> *"Die Identität von Streitgegenständen beurteilt sich im Hinblick auf diese sogenannte negative Wirkung der materiellen Rechtskraft nach den Klageanträgen und dem behaupteten Lebenssachverhalt, das heisst dem Tatsachenfundament, auf das sich die Klagebegehren stützen"*
>
> **Free translation**: The identity of the subject-matters in dispute is assessed with regard to the so-called negative effect of substantive res judicata according to the relief sought and the facts of life alleged, i.e. the factual foundation on which the relief sought is based". (see also SFT 4A_525/2021, consid. 3.3)

112. Furthermore, whether there is identity of the matter in dispute must be assessed based on the overall contents and not purely by looking at the wording. In this respect the SFT has held (4A_525/2021, consid. 3.3):

> *"Dabei ist der Begriff der Anspruchsidentität nicht grammatikalisch, sondern inhaltlich zu verstehen. Der neue prozessuale Anspruch ist deshalb trotz abweichender Umschreibung vom beurteilten nicht verschieden, wenn er in diesem bereits enthalten war oder wenn im neuen Verfahren das kontradiktorische Gegenteil zur Beurteilung gestellt wird (BGE 142 III 210 E. 2.1; 139 III 126 E. 3.2.3). Auf den 'Rechtsgrund' - verstanden als 'angerufene Rechtsnorm' -, auf den die Klagebegehren gestützt werden, kommt es nicht an (BGE 139 III 126 E. 3.2.3). Lautet das Rechtsbegehren auf eine Geldleistung, ist für die Prüfung der Anspruchsidentität die Klagebegründung beizuziehen (Urteil 4A_177/2018 vom 12. Juli 2018 E. 4.1)."*
>
> **Free translation**: The concept of identity of claim is not to be understood grammatically but substantively. The new procedural claim is therefore not different from the adjudicated claim despite a different description if it was already contained in the adjudicated claim or if the adversarial opposite is put forward for adjudication in the new proceedings (BGE 142 III 210 E. 2.1; 139 III 126 E. 3.2.3). The 'legal ground' - understood as the 'invoked legal norm' - on which the claims are based is irrelevant (BGE 139 III 126 E. 3.2.3). If the legal claim is for a monetary benefit, the statement of the grounds for the action must be included in the examination of the identity of the claim (Judgement 4A_177/2018 of 12 July 2018 E. 4.1).

a) The identity of the relief sought

113. In the matter at hand the analogous application of *res judicata* only concerns a part of the Appellant's claim, i.e. the claim to "pay back" the training compensation (including interests). The Panel must examine whether this part of the Appellant's claim is identical to the claim underlying the Confirmation Letter.

114. In its request underlying the Confirmation Letter, the First Respondent requested that the Appellant be ordered to pay training compensation in the amount of EUR 396,166.67. The Conformation Letter granted this request in the amount of EUR 342,246.57. In the present proceedings, the Appellant is claiming damages from the First Respondent in the amount of EUR 342,246.57. In other words, the Appellant is claiming back the exact same amount paid by him as training compensation by way of an action for damages. Thus – as far as the prayers for relief are concerned – the present case is about the negatory

opposite of the first proceedings. The relief sought in both proceedings is, therefore, identical.

b) The identity of the facts of life

115. At first sight, the facts of life underlying the Confirmation Letter and the present proceedings appear to be different; for in the present proceedings the Appellant pleads a breach of the warranty clauses (clause 9 of the Transfer Agreement) by the First Respondent, which played no role in the first proceedings before the FIFA DRC. When assessing whether the proceedings are based on "identical" facts of life, it is not possible, however, to rely solely on which facts were presented in the first and second proceedings. In other words, a second action is not excluded on the basis of *res judicata* only if it is limited to attacks against the facts presented in the first action. If one wanted to decide otherwise, the goal of a court proceeding, to establish legal peace, could not be achieved; because with every actual addition (in the second trial) to the facts of the first trial, the decision rendered in the first proceeding could be called into question again. For this reason, the factual foundations of the first proceedings do not only include the facts that were actually presented, but also all facts that already existed at the time of the first proceedings (but that were not presented before the adjudicatory body). Therefore, reliance on facts that occurred prior to the first decision, but that were not presented, do not entitle the second tribunal to deviate from the legal consequence established in the first proceedings. Facts that were not presented in the first proceeding are, therefore, precluded by *res judicata* in a second proceeding. The SFT has consistently followed these principles. For example, in SFT 4A_449/220, consid 3) it stated as follows:

> *"Daraus folgt, dass sich die materielle Rechtskraft nicht nur auf die vom Gericht geprüfte Anspruchsgrundlage bezieht. Auch wenn die Klage infolge einer unvollständigen Prüfung abgewiesen wird, kann der Kläger zufolge der materiellen Rechtskraft des Entscheids später an kein anderes Gericht gelangen, um die noch nicht geprüfte Rechtsgrundlage anzurufen (so ausdrücklich Urteil 4A_84/2020 vom 27. August 2020 E. 5.2). Ausserdem bezieht sich die Rechtskraft nach dem Grundsatz der Präklusion auf den individualisierten Anspruch schlechthin und schliesst Angriffe auf sämtliche Tatsachen aus, die im Zeitpunkt des Urteils bereits bestanden hatten, unabhängig davon, ob sie den Parteien bekannt waren, von diesen vorgebracht oder vom Gericht beweismässig als erstellt erachtet wurden (BGE 145 III 143 E. 5.1; 142 III 210 E. 2.1; 139 III 126 E. 3.1 S. 129 mit weiteren Hinweisen). "*
>
> **Free translation**: It follows that *res judicata* does not only refer to the basis of the claim examined by the court. Even if the claim is dismissed as a result of an incomplete examination, the plaintiff cannot, due to the *res judicata* of the decision, subsequently reach another court to review the legal basis that has not yet been examined (thus expressly judgment 4A_84/2020 of 27 August 2020 E. 5.2). Moreover, according to the principle of preclusion, *res judicata* refers to the individualised claim per se and excludes attacks on all facts that already existed at the time of the judgment, irrespective of whether they were known to the parties, raised by them or considered by the court to have been established in terms of evidence (BGE 145 III 143 E. 5.1; 142 III 210 E. 2.1; 139 III 126 E. 3.1 p. 129 with further references).

116. The question in the case at hand is whether the reliance of the Appellant on the alleged breach of the contractual warranty in clause 9(d) of the Transfer Agreement (because the

First Respondent availed itself of a claim for training compensation) constitutes an amendment or an addition of the facts forming the factual foundations of the proceeding leading to the Confirmation Letter or whether these facts constitute a completely separate and new set of facts. According to the correct view, the preclusion (based on *res judicata*) affects all facts that would have belonged to the facts of life submitted for decision in the first proceedings if viewed naturally from the point of view of the parties (cf. KuKo-ZPO/OBERHAMMER, 3rd ed. 2021, Art. 236 no. 45). If, for example, in a medical malpractice suit the action against the doctor is dismissed for lack of medical malpractice, then a new action concerning the same treatment event based on an alleged breach of the doctor's duty of disclosure is excluded, because both submissions belong – when viewed naturally – to the same facts of life.

117. When applying the above principles (by analogy) to the case at hand, it follows that the Appellant is barred from (re-)claiming the EUR 342,246.57 paid to the First Respondent as training compensation, since what the Appellant in essence seeks here is the re-litigation of the dispute decided by the Confirmation Letter. The facts underlying the Confirmation Letter and the facts underlying the above claim in the present matter belong to the same facts of life. The same is true insofar as the Appellant claims the repayment of the interests awarded by the Confirmation Letter. Consequently, the Panel rejects as inadmissible the Appellant's damage claim for training compensation paid to RCDE in accordance with the Confirmation Letter in the amount of EUR 342,246.57 and for the accrued interests paid to RCDE in the amount of EUR 28,833.10. All other damage heads claimed by the Appellant are not affected by the binding and final resolution contained in the Confirmation Letter, because these damage heads are to be considered different matters in dispute.

D. Timeliness of the Appeal

118. Article R49 of the Code provides as follows:

> *"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late."*

119. The Appealed Decision constitutes a "decision" within the meaning of Articles R47 and R49 of the Code. As for the deadline to file an appeal, in accordance with Article R49 of the CAS Code and Article 57 of the FIFA Statutes, the time limit for filing the appeal is 21 days. The present appeal was filed within this deadline since HTAFC received the grounds of the Appealed Decision on 5 January 2023. The appeal complied with all other requirements of Article R48 of the CAS Code, including payment of the CAS Court Office fee, and is therefore admissible.

E. Admissibility of the new Evidence

120. On 5 May 2023, the Appellant submitted a new document ("RCDE Invoice") and sought permission of the Panel to include it into the case file (cf. supra no. 48). The Respondents

objected to the filing of the new document and by letter dated 15 May 2023, the Panel rejected the Appellant's request. The Panel did so because the document was available already at the time the Appellant filed its Appeal Brief and the Appellant did not provide any grounds for the late filing of the document. In addition, when being asked at the outset of the hearing whether there were outstanding procedural issues, the Appellant neither reiterated its request nor did the Appellant provide any exceptional circumstance which would permit the Panel to accept the document filed late.

VII. APPLICABLE LAW

121. Article R58 of the Code provides as follows:

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

122. Article 56 par. 2 of the FIFA Statutes states that:

> *"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."*

123. Furthermore, clause 22 of the Transfer Agreement states as follows:

> *"This Agreement shall be governed and construed in accordance with the FIFA Regulations and Swiss law."*

124. Accordingly, the applicable regulations in the present case are the various regulations of FIFA and subsidiarily, Swiss law.

VI. MANDATE OF THE PANEL

125. According to Art. R57 of the Code, the Panel has full power to review the facts and the law of the case. Furthermore, the Panel may issue a new decision which replaces the decision challenged or may annul the decision and refer the case back to the previous instance.

VII. MERITS

126. The main substantive questions in these proceedings are whether the Appellant is to be awarded the various amounts claimed as damage heads and whether RCDE is entitled to the amounts claimed in the counterclaim.

A. The Various Damage Heads claimed by the Appellant

1. The training compensation due to Nastic (in the amount of EUR 29,260)

127. The damage claim for an alleged breach of the warranty contained in clause 9(e) of the Transfer Agreement is not barred by the binding character of the Confirmation Letter, since this issue was not part of the matter in dispute decided in the Confirmation Letter.

128. Clause10 of the Transfer Agreement provides that in case of breach of a warranty, "*the breaching party must indemnify the non-breaching party on demand against all liabilities, costs, expenses, damages ...*". The question at stake before the Panel is, whether RCDE has breached the warranty contained in Article 9(e) according to which RCDE warrants that "*no other football club ... shall be entitled to bring a claim against HTAFC in respect of its registration of the Player.*"

129. The clause in question does not explicitly refer to claims pertaining to training compensation by other clubs. Thus, the article is unclear and needs to be interpreted according to the law applicable to the dispute (cf. supra nos. 151 et seq.). Since the FIFA regulations do no foresee provisions on contract interpretation, the Panel falls back on Swiss law. According to Article 18 CO the common subjective will of the parties takes precedence. In the absence of such a common intention of the Parties or in case the common subjective will of the Parties cannot be determined, the contract must be construed objectively taking account of the principle of trust and good faith ("Vertrauensgrundsatz"). Since the common intentions of the Parties at the time of the execution of the Transfer Agreement cannot be ascertained, the contract must be construed objectively.

130. Thus, the question arises whether a claim for training compensation by a third club (Nastic) is a claim falling under the scope of clause 9(e) of the Transfer Agreement, i.e. "*a claim ... in respect of the registration of the registration of the Player*". The Panel is of the view that the better arguments support that reading. It appears from the Transfer Agreement that the remuneration agreed upon in clause 2 was meant to be the total amount payable with respect to the transfer of the Player. The amount agreed upon was intended to also include all other costs of the transfer. Thus, e.g., clause 5 of the Transfer Agreement entitles HTAFC to deduct all solidarity amounts due (by third clubs) from the amounts payable under clause 2 of the Transfer Agreement. Furthermore, clause 9(d) provides that RCDE "*accepts the sums payable to it hereunder in full and final settlement of any and all claims it may have against HTAFC in respect to HTFC's registration of the Player.*" The intention of the provision is clear. It intends to settle once and for all the amounts payable under the Transfer Agreement. This provision is widely worded and – in the view of the Panel – certainly also includes claims by RCDE for training compensation. If, however, the warranty in clause 9(d) of the Transfer Agreement includes claims for training compensation, the better arguments speak in favour of including these types of claims also into the warranty in clause 9(e) of the Transfer Agreement. Thus, the Panel understands RCDE to have guaranteed under clause 9(e) of the Transfer Agreement that no other club will file any claim (including a claim for training compensation) against HTAFC and therefore needs to hold the latter harmless, in case a third club legitimately does so. The view held here is also supported by the Appealed Decision that found as follows:

> "*51. For the sake of completeness, the Single Judge noted that it would appear, in*

> *principle, that Huddersfield could deduct from the cited amount the training compensation allegedly paid to Gimnastic de Tarragona. However, Huddersfield did not present the proper calculation and evidence that it paid said amounts to said – the only evidence on file for payment of EUR 29,400 is a bank receipt of a transfer to The Football Association, without any other supporting documentation – for instance, an agreement with the training club, the relevant calculation, and the like. Consequently, the Single Judge found that that Huddersfield did not meet its burden of proof and therefore no deductions shall apply."*

131. The Second Respondent submitted that the evidence relied upon by the Appellant in these proceedings that the payment actually was made should not be admitted in view of Article 57(3) of the Code. The Panel does not agree with FIFA. This is a *de novo* proceeding and therefore, in principle all evidence is admitted. Furthermore, the provision grants a wide margin of discretion to the Panel. In addition, the Panel notes that CAS jurisprudence is rather restrictive with regard to Article 57(3) of the Code (cf. the analysis of RIGOZZI/HASLER, in Arroyo (ed.) Arbitration in Switzerland, 2nd ed. 2018, Art. 57 no. 12) and only excludes evidence that was available before the first instance where a party "*is making a mockery out of the FIFA proceedings*". This, however, is not the case here.

132. It follows from the above that HTAFC has a damage claim against the First Respondent in the amount of EUR 29,260.

2. The fine imposed by the FIFA DC Decision

133. The panel in the First CAS Proceedings found that the FIFA DC Decision rightfully imposed a fine in the amount of CHF 20,000 by dismissing the Appellant's appeal against the FIFA DC Decision. Consequently, the damage incurred by HTAFC before the FIFA instances is the consequence of the (rightful) FIFA DC Decision and not the consequence of an alleged breach of any warranty by RCDE. Thus, the Panel finds that the there is no adequate causality between an alleged breach of the Transfer Agreement by RCDE on the one hand and the damage incurred by the Appellant on the other hand. Instead, the "damage" incurred by the Appellant is solely due to the Appellant's behaviour not to object to the Proposal in a timely manner and not requesting a decision by the FIFA DRC.

3. The costs and fees incurred in connection with the First CAS Proceedings

134. Similarly, to the findings in no. 133, the Panel finds that there is no adequate causality between an alleged behaviour of the First Respondent and the damage incurred by the Appellant. The "damage" in the form of costs and fees as a result of the First CAS Proceedings is solely due to the Appellant's behaviour, i.e., not objecting to the Proposal and requesting a decision of the FIFA DRC within the prescribed deadlines. The damage incurred in the context of the First CAS Proceedings is, thus, the consequence of the Appellant's misinterpretation of the FIFA rules and regulations.

4. The costs and fees incurred in connection with the present arbitration proceedings

135. At the time this Panel decides upon the dispute, the costs of the present proceedings are not yet determined. They will only be determined and calculated by the CAS financial

department once the award is issued. In addition, the amounts that a party is entitled to claim as legal expenses and costs in a CAS proceeding is finally and exhaustively dealt with in section F of the Code. These provisions are mandatory and cannot be circumvented by filing a claim for damages. Consequently, there is no room for a damage claim in this respect and the claim must be dismissed.

5. The costs and fees incurred in the proceedings underlying the Appealed Decision

136. Whether the costs and fees incurred before previous instances can be claimed before the CAS is debatable. There are no special provisions dealing with this question in the FIFA regulations. Also, section F of the Code does not deal with such matter. The Panel notes that there appears to be a long-established CAS jurisprudence according to which "*it is not for the CAS to reallocate the costs of the proceedings before previous instances*" (CAS 2013/A/3054; CAS 2016/A/4387; CAS 2017/A/4994). The Panel is not sure whether such jurisprudence is to be followed, considering that – in case the previous instance decided wrongly – it is not immediately understandable why the succeeding party in front of CAS would not be entitled to recuperate its expenses illegitimately suffered before the previous instance. Be it as it may, the Panel does not need to decide this question, since the Appellant – in essence – failed to succeed with its appeal, but for the amount of EUR 29,260. However, this fact does not entitle the Appellant to any partial damage claim in relation to the fees and expenses before the Players' Status Chamber, since the Appellant failed to provide the respective evidence to back its claim before the previous instance and through this procedural failure self-inflicted all of the respective costs.

B. The Counterclaim by the RCDE

137. The Appellant did not dispute, in principle, that the First Respondent is entitled to the counterclaim. At the hearing the Appellant explained that it wished to set-off RCDE's counterclaim (for outstanding remuneration) in the amount of EUR 340,000 with any claims for damages granted to it by the Panel in these proceedings. As previously stated, the Appellant has succeeded with his damage claim in the amount of EUR 29,260. The Panel finds that the prerequisites for a set-off according to Article 120 CO are fulfilled.

C. Summary

138. In summary, the Panel finds that the appeal of the Appellant is partially upheld and that no. 3 of the dispositive of the Appealed Decision must be amended as follows: HTAFC has to pay to RCDE EUR 310,740 (=340,000 – 29,260). All other requests must be either rejected as inadmissible or dismissed on the merits.

VIII. Costs

139. Article R64.4 of the CAS Code provides:

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

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

The final account of the arbitration costs may either be included in the award or communicated separately to the parties. The advance of costs already paid by the parties are not reimbursed by the CAS with the exception of the portion which exceeds the total amount of the arbitration costs."

140. In addition, Article R64.5 of the CAS Code establishes:

> "*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.*"

141. Considering the outcome of this proceedings, in which for the most part the Appellant failed with its appeal, the Panel finds that the Appellant shall bear the costs of this arbitration proceeding. Furthermore, considering the complexity and outcome of the proceedings, the conduct and the financial resources of the Parties, the Panel deems it fair and reasonable to award a contribution to the First Respondent in the amount of CHF 5,000 to cover the legal fees and other expenses incurred in connection with these proceedings. The Second respondent not being represented by outside counsel is – in light of CAS practice – not entitled to a contribution to its legal fees and expenses.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Huddersfield Town Association Football Club Ltd against the decision by the FIFA Player's Status Chamber passed on 8 November 2022 is partially upheld.

2. The decision by the FIFA Player's Status Chamber passed on 8 November 2022 is confirmed, with the exception of point 3 of its operative part, which is amended as follows:

   "Huddersfield Town Association Football Club Ltd has to pay to RCD Espanyol de Barcelona EUR 310,740 plus 5% interest p.a. as from 26 June 2022 until the date of effective payment.

3. The costs of the arbitration, to be determined and served to the parties by the CAS Court Office, shall be borne by Huddersfield Town Association Football Club Ltd.

4. Huddersfield Town Association Football Club Ltd is ordered to pay CHF 5'000 to RCD Espanyol de Barcelona as a contribution to its legal fees and other expenses incurred in connection with this procedure.

5. FIFA shall shall bear its own costs and other expenses incurred in connection with this arbitration.

6. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 6 November 2023

THE COURT OF ARBITRATION FOR SPORT

Ulrich Haas
President of the Panel

Lars Hilliger
Arbitrator

Anna Peniche
Arbitrator