CAS 2022/A/8959 Futebol Clube do Porto v. Club de Fútbol América & FIFA

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Mr Edward Canty, Solicitor, Manchester, United Kingdom

in the arbitration between

Futebol Clube do Porto, Portugal

Represented by Mr David Casserly and Mr Anton Sotir, Attorneys-at-Law, Lausanne, Switzerland

- Appellant -

and

Club de Fútbol América, Mexico

Represented by Mr Javier Ferrero Muñoz, Mr Luis Torres-Septién Warren and Mr José Maria Zayas Prado, Attorneys-at-Law, Madrid, Spain

- First Respondent -

and

Fédération Internationale de Football Association, Switzerland

Represented by Mr Miguel Liétard, Director of Litigation, Zurich, Switzerland

- Second Respondent -

I. PARTIES

1. Futebol Clube do Porto (the "Appellant" or "Porto") is a football club with its registered office in Porto, Portugal. Porto is registered with the Portuguese Football Federation (the "FPF"), which in turn is affiliated with the Fédération Internationale de Football Association and is currently participating in the Primeira Liga, the first division in the Portuguese football league system.

2. Club de Fútbol América (the "First Respondent" or "Club América") is a football club with its registered office in Mexico City, Mexico. Club América is registered with the Mexican Football Federation (the "MFF"), which in turn is affiliated with FIFA and is currently participating in the Liga MX, the first division in the Mexican football league system.

3. Fédération Internationale de Football Association (the "Second Respondent" or "FIFA") is an association under Swiss law (Articles 60 et seq. of the Swiss Civil Code (the "SCC")) and has its registered office in Zurich, Switzerland. FIFA is the world governing body of international football. It exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials and football players worldwide.

II. FACTUAL BACKGROUND

4. Below is a summary of the main relevant facts, as established on the basis of the Parties' written submissions and the evidence examined in the course of the present appeals arbitration proceedings.[1] This background is made for the sole purpose of providing a synopsis of the matter in dispute. Additional facts and allegations found in the Parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal analysis that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, this Award refers only to the submissions and evidence considered necessary to explain its reasoning.

A. Background Facts

5. On 30 July 2019, Porto and Club América signed a transfer agreement in respect of the transfer of the player, Agustin Federico Marchesin ("Marchesin") from Club América to Porto (the "Marchesin Agreement") in which it was agreed, *inter alia*, as follows:

> "*2) In consideration of such transfer of the **PLAYER**, the Parties agree that **FC PORTO** shall pay the fixed **NET** amount of **$ USD 8.500.000** (eight million five hundred thousand dollars) to **CLUB AMÉRICA**, as follows:*
>
> *a) $ USD 2.125.000 (two million one hundred twenty-five thousand dollars) until 30th August 2019;*

[1] Several of the documents submitted by the Parties and referred to in this Award contain various misspellings: for the sake of efficiency and to facilitate the reading of this Award, not all of the misspellings have been identified with a [sic] or otherwise.

b) $ USD 2.125.000 (two million one hundred twenty-five thousand dollars) until 25th November 2019;
c) $ USD 2.125.000 (two million one hundred twenty-five thousand dollars) until 31st January 2020;
d) $ USD 2.125.000 (two million one hundred twenty-five thousand dollars) until 29th May 2020.

*The above mentioned amount is including solidarity contribution and **FC PORTO** shall make the payment hereunder after deduction of solidarity and/or training compensation as set under article 21 and Annex 5 of the FIFA Regulations on the Status and Transfer of Players.*

3) Additionally, the Parties further agree on the following conditional payments, cumulative until a maximum of $USD 2.500.000 (two million five hundred thousand dollars):

*a) $ USD 500.000 (five hundred thousand dollars) if **FC PORTO** enters in Champions' League Group Stage;*
*b) $ USD 500.000 (five hundred thousand dollars) if **FC PORTO** enters in Europa League Round of Sixteen;*
*c) $ USD 500.000 (five hundred thousand dollars) if **FC PORTO** becomes Portuguese League Champion;*
*d) $ USD 500.000 (five hundred thousand dollars) if **FC PORTO** becomes Portuguese Cup Champion.*

*§ All conditional payments are valid during all the period the **PLAYER** is under registered contract with **FC PORTO** and conditional payments set forth under subparagraphs c) and d) are additionally subject to **PLAYER** participates in 75% of the matches of the corresponding competition.*

4) […]

*If **FC PORTO** fails to make any of the payments set forth in the previous paragraph, an interest shall be payable by **FC PORTO** into the above designated account on any late payments more than 30 (thirty) days after the due date and after being notified by **CLUB AMÉRICA** of any amount due hereunder at the rate of five percent (5%) above the 3-month LIBOR rate for United States dollars applicable on the due date for the relevant payment.*" (emphasis in original)

6. On 3 August 2019, Porto and Club América signed a transfer agreement in respect of the transfer of the player, Andrés Mateus Uribe Villa ("Uribe") from Club América to Porto (the "Uribe Agreement") in which it was agreed, inter alia, as follows:

"*2) In consideration of such transfer of the **PLAYER**, the Parties agree that **FC PORTO** shall pay the **NET** amount of € EUR 9.500.000 (nine million and five hundred thousand euros) to **CLUB AMÉRICA**, as follows:*

a) € EUR 3.000.000 (three million euros) on or before 30th August 2019;
b) € EUR 1.000.000 (one million euros) on or before 29th November 2019;
c) € EUR 3.000.000 (three million euros) on or before 31st January 2020; and

d) € EUR 2.500.000 (two million five hundred thousand euros) on or before 30th August 2020.

*The above mentioned amount is including solidarity contribution and **FC PORTO** shall make the payment hereunder after deduction of solidarity and/or training compensation as set under article 21 and Annex 5 of the FIFA Regulations on the Status and Transfer of Players.*

*3) Also in consideration of such transfer of the **PLAYER**, the Parties agree that in case **FC PORTO** transfers the **PLAYER** on permanent or temporarily basis to a third club in the future, **FC PORTO** shall pay to **CLUB AMÉRICA** the amount corresponding to 15% (fifteen percent) of the transfer fee agreed between **FC PORTO** and the third club [herein defined and understood as all the revenues and credit rights resulting from the definitive transfer of the sporting rights of the **PLAYER** from **FC PORTO** to any third football club, after deducting (i) any amounts regarding training compensation and/or solidarity deductions, if applicable ; and (ii) as well as possible mediation fee to be paid to the intermediaries making viable the transfer of the Player to a third Club up to 10% (ten percent)] – ("**Sell-on Fee**").*

[…]

4) […]

*If **FC PORTO** fails to make any of the payments set forth in the previous paragraph, an interest shall be payable by **FC PORTO** into the above designated account on any late payments more than 30 (thirty) days after the due date and after being notified by **CLUB AMÉRICA** of any amount due hereunder at the rate of five percent (5%) above the 3-month LIBOR rate for United States dollars applicable on the due date for the relevant payment.*" (emphasis in original)

7. On 24 September 2020, Club América filed a claim against Porto before FIFA, in respect of the Marchesin Agreement (the "Marchesin FIFA Proceedings"), in which it claimed, *inter alia*, as follows:

"*6. Notwithstanding foregoing, and despite the fact that the Respondent was well aware of, and repeatedly acknowledged and confirmed, (i) its freely and voluntarily acquired payment obligations, and (ii) the payment schedule for the satisfaction thereof – combined with to the numerous payment reminders and requests provided by Club America to Porto FC, as well as the communications exchanged by and between Club America and FC Porto (as well be accredited throughout this claim for payment) -, the Respondent has simply decided to ignore its essential payment obligations by failing to comply with the payment of:*

*(i) the fixed consideration's (transfer fee) fourth and final installment amounting to **USD$2,125,000.00 (TWO MILLION ONE HUNDRED AND TWENTY FIVE THOUSAND DOLLARS 00/100)**, net, that is free of any taxor withholding whatsoever (hereinafter, the "**Fourth Installment**"), which Fourth Installment should have been, in any case,*

satisfied by FC Porto on or before May 29th, 2020, quod non, as per Clause 2 of the Transfer Agreement.

*(ii) the variable consideration (conditional payments) amounting to **USD$1,500,000.00 (ONE MILLION FIVE HUNDRED THOUSAND DOLLARS 00/100**), net, that is free of any tax or withholding whatsoever (hereinafter, the "**Variable Consideration**"), which Variable Consideration should have been, in any case, satisfied by FC Porto on or before August 10th, 2020, quod non, as per Clause 3 of the Transfer Agreement and Porto's Acceptance Letter (as defined below).*

(iii) *the applicable default interests at the rate of 5% (five percent) above the 3-month LIBOR rate for United States Dollars applicable since (i) May 29th, 2020 over the outstanding Fourth Installment, and (ii) since the date in which Variable Consideration payments fell due and became payable (as per Clause 3 of the Agreement) over the outstanding Variable Consideration as a result of Porto's failure to timely comply with its essential payment obligation as per Clause 4 of the Agreement.*" (emphasis in original)

8. On 30 October 2020, Club América filed a claim against Porto before FIFA, in respect of the Uribe Agreement (the "Uribe FIFA Proceedings"), in which it claimed, *inter alia*, as follows:

"*12. As of the date hereof, the Respondent has failed to comply with its freely and voluntarily acquired payment obligation as per Article 2 of the Agreement, thus, **breaching the legal principle of pacta sunt servanda and violating Article 12bis of the FIFA Regulations,** by deliberately failing to comply with the payment of:*

*(i) the fixed consideration's (transfer fee) Fourth Installment amounting to **TWO MILLION AND FIVE HUNDRED THOUSAND EUROS (EUR 2,500,000.00**), net, that is free of any tax or withholding whatsoever, which Fourth Installment should have been, in any case, satisfied by FC Porto on or before August 30th, 2020, quod non, as per Clause 2 of the Agreement.*

(ii) the applicable default interests at the rate of 5% (five percent) above the 3-month LIBOR rate for United States Dollars applicable since August 30th, 2020 over the outstanding Fourth Installment as a result of Porto's failure to timely comply with its essential payment obligation as per Clause 4 of the Agreement." (emphasis in original)

9. On 20 November 2020, Porto and Club América entered into a settlement agreement (the "Settlement Agreement") in which it was agreed, *inter alia*, as follows:

"***1. PURPOSE OF THIS AGREEMENT***

This Agreement's main purpose is to reflect the agreement which has been

reached freely, expressly and without any reservation whatsoever between FC Porto and Club America, in accordance to which they intend to regulate the way and terms according to which:

(i) FC Porto shall timely and fully pay the Indebted Amount to Club America.

(ii) the Parties shall request the temporary suspension of the FIFA Proceedings (subject to the provisions set forth herein).

(iii) the Parties shall request the completion and closing of the FIFA Proceedings, if and only if, the Indebted Amount has been timely and fully paid by FC Porto to Club America in accordance herewith.

2. INDEBTED AMOUNT'S ACKNOWLEDGMENT AND PAYMENT TERMS

FC Porto hereby expressly and irrevocably acknowledges and accepts owing Club América the Indebted Amount, that is to say, the total amount of ***€5.650.152,41 (FIVE MILLION SIX HUNDRED FIFTY THOUSAND FIFTY-TWO EUROS AND FORTY-ONE CENTS)*** *NET, that is free of any taxes, charges or withholding whatsoever.*

FC Porto hereby undertakes to pay to Club América, who hereby expressly and irrevocably agrees to receive in payment, the Indebted Amount in two (2) installments as follows:

a) ***€ 3.390.091,45 (THREE MILLION THREE HUNDRED NINETY THOUSAND NINETY-ONE EUROS AND FORTY-FIVE CENTS)*** *NET, that is free of any taxes, charges or withholding whatsoever no later than November 30th, 2020 (hereinafter, the "**First Installment Payment Date**").*

b) ***€ 2.260.060,96 (TWO MILLION TWO HUNDRED SIXTY THOUSAND SIXTY EUROS AND NINETY-SIX CENTS)*** *NET, that is free of any taxes, charges or withholding whatsoever no later than June 30th, 2021 (hereinafter, the "**Second Installment Payment Date**", and jointly with the First Installment Payment Date, the "**Payment Dates**").*

[…]

The Parties expressly represent and agree that the aforementioned Indebted Amount as well as the payment method are fair and just, and, consequently, FC Porto undertakes and agrees not to dispute them before of any authority whatsoever or to attempt to denounce or annul, for any other reason, different than those, and only those, mentioned and provided herein.

THIS CLAUSE 2 CONSTITUTES AN ESSENTIAL AND DETERMINING REASON WITHOUT WHICH THE PARTIES WOULD NOT HAVE EXECUTED THE PRESENT SETTLEMENT AGREEMENT.

3. SUSPENSION AND TERMINATION OF THE FIFA PROCEEDINGS

The Parties hereby acknowledge and agree that, if and only if, FC Porto fully and timely complies with the payment of the first installment referred to in Clause 2 a) hereof (on or before the First Installment Payment Date), then, they immediately will carry out all acts and actions necessary to request the temporary suspension of the FIFA Proceedings before the competent FIFA Bodies up until the Second Installment Payment Date.

Likewise, the Parties hereby acknowledge and agree that, if and only if, FC Porto fully and timely complies with the payment of the first and second installments referred to in Clause 2 a) and b) hereof (on or before the applicable Payment Dates), to Club America satisfaction, then, they immediately shall carry out all acts and actions necessary to request the completion and closing of the FIFA Proceedings within the next five (5) days following complete payment thereof.

For avoidance of any doubt, the Parties expressly and irrevocably agree in that if FC Porto fails to comply with:

(i) the payment of the first installment referred to in Clause 2 a) hereof (on or before the First Installment Date), then, the temporary Suspension of the FIFA Proceedings shall never be requested and said proceedings shall continue as if this Agreement had never been executed.

(ii) the payment of the second installment referred to in Clause 2 b) hereof (on or before the Second Installment Payment Date), then, the closing and termination of the FIFA Proceedings shall not be requested and said proceedings shall resume as if this Agreement had never been executed.

THIS CLAUSE 3 CONSTITUTES AN ESSENTIAL AND DETERMINING REASON WITHOUT WHICH THE PARTIES WOULD NOT HAVE EXECUTED THE PRESENT SETTLEMENT AGREEMENT.

4. LIQUIDATION SETTLEMENT

The Parties hereby acknowledge and agree that, if and only if, the entire Indebted Amount has been paid by FC Porto and received by Club America in the manner and terms set forth herein, it shall be considered as having been completely and absolutely settled and liquidated for any and all legal effects which may arise, for any payment obligations hereunder or for any payments obligations requested or otherwise demanded through the FIFA Proceedings.

Subject to the full and timely performance of this Agreement, Club América accepts that the Indebted Amount payable to it hereunder in full and final settlement of the FIFA Proceedings initiated against FC Porto.

For avoidance of any doubt, FC Porto hereby expressly acknowledges and

accepts that regardless of the prospective liquidation of the Indebted Amount, and resulting settlement of the FIFA Proceedings subject matter hereof, Club America's rights to collect or otherwise request FC Porto to comply with the due and timely payment of any and all other conditional payments and/or Sell-on-Fee which may result (as per any or both of the Transfer Agreements) shall subsist and continue being fully and completely enforceable.

5. PENALTY

If FC Porto fails to comply with the payment of any of the installments referred to in Clause 2 hereof, then, FC Porto will also be obliged to pay Club América a once-off penalty equivalent to 10% (ten per cent) of such installment, that is to say, € 339.0091,1 [sic] *(THREE HUNDRED THIRTY NINE THOUSAND NINETY ONE EUROS AND TEN CENTS) in case of the first installment, € 229.006,1 (TWO HUNDRED TWENTY NINE THOUSAND SIX EUROS AND TEN CENTS)* [sic] *in case of the second installment and* ***€565.015,24*** [sic] ***(FIVE HUNDRED SIXTY FIVE THOUSAND AND FIFTEEN EUROS AND TWENTY-FOUR CENTS)*** *in case of the both installments, all the amounts being NET, that is free of any taxes, charges or withholding whatsoever (hereinafter, the "**Penalty**").*

Where applicable, FC Porto shall pay Club America the Penalty through wire transfer of immediately available funds to Club America's Bank Account no later than five (5) days after FC Porto's failure to comply with any installment on or before any of the Payment Dates.

THIS CLAUSE 5 CONSTITUTES AN ESSENTIAL AND DETERMINING REASON WITHOUT WHICH THE PARTIES WOULD NOT HAVE EXECUTED THE PRESENT SETTLEMENT AGREEMENT.

6. ADDITIONAL COSTS

In addition to the foregoing, FC Porto hereby expressly and irrevocably agrees to pay Club America any and all attorneys' fee, costs, expenses and disbursements in which Club America may have incurred, or may hereafter have to incur, in order to initiate the FIFA Proceedings or any other proceedings so as to be able to collect the Indebted Amount or any other amounts requested in terms of the FIFA Proceedings.

For avoidance of any doubt, the Parties hereby acknowledge and accept that, as of the date hereof, Club America has effectively incurred in attorneys' fee, costs, expenses, and disbursements amounting to ***€30.000,00 (THIRTY THOUSAND EUROS) NET****, that is free of any taxes, charges or withholding whatsoever (hereinafter, as the same may be amended, from time to time, the "**Additional Costs**").*

FC Porto shall pay Club America the Additional Costs through wire transfer of immediately available funds in Club America's Bank Account no later than on

the First Installment Payment Date.

THIS CLAUSE 6 CONSTITUTES AN ESSENTIAL AND DETERMINING REASON WITHOUT WHICH THE PARTIES WOULD NOT HAVE EXECUTED THE PRESENT SETTLEMENT AGREEMENT.

[…]" (emphasis in original)

10. On 4 December 2020, Porto and Club América jointly wrote to FIFA to inform it that Porto had paid the first instalment set out in the Settlement Agreement and therefore requested that FIFA suspend the Marchesin FIFA Proceedings and the Uribe FIFA Proceedings pending payment of the second instalment set out in the Settlement Agreement. The joint letter set out, *inter alia*, as follows:

"*Having said this, and since FC Porto did in fact effectively carry out the complete payment of the first installment amounting to* ***€3.390.091,45 (THREE MILLION THREE HUNDRED NINETY THOUSAND NIENTY-ONE EUROS AND FORTY-FIVE CENTS)*** *NET, that is free of any taxes, charges or withholding whatsoever on or before the First Installment Payment Date (as defined in the Settlement Agreement) as per Clause 2. of the Settlement Agreement, then, consequently, we appear before you, as per Clause 3. of the Settlement Agreement, to respectfully request that you:*

i. ***Please note and acknowledge that this joint communication has been made in the name and on behalf of both FC Porto and Club America for all legal purposes.***

ii. Acknowledge the truthfulness and accuracy of contents hereof, specially emphasizing on the parties' agreement reached to execute the Settlement Agreement (a duly signed copy of which is attached hereto as ***Exhibit "1"****).*

*iii. Order the immediate and temporary suspension of the FIFA Proceedings, starting from the date hereof, and until FC Porto complies with the timely and complete payment of the second installment amounting to €2.260.060,96 (TWO MILLION TWO HUNDRED SIXTH THOUSAND SIXTY EUROS AND NINETY-SIX CENTS) NET, that is free of any taxes, charges or withholding whatsoever (hereinafter, the "****Second Installment****") which will in any case have to be made no later than June 30th, 2021, as per Clauses 2. and 3. of the Settlement Agreement.*

iv. Take into account that once, and only if, the Second Installment is timely and completely paid by FC Porto and received by Club America in the manner set forth in the Settlement Agreement; then, (A) Club America shall be considered itself as having been completely and absolutely settled and liquidated for any and all legal effects which may arise, for any payment obligations under the Transfer Agreements or for any payments obligations requested or otherwise demanded through the FIFA Proceedings, and (B) Club America shall promptly thereafter request the closing and termination of the FIFA Proceedings." (emphasis in original)

11. On 18 June 2021, Porto wrote to Club América to confirm it had paid an amount of EUR 1,616,718.82 which it claimed was the correct amount due in respect of the second instalment because the amount set out in the Settlement Agreement had been incorrectly calculated. The letter set out, *inter alia*, as follows:

"*We deducted the amount of 5% for solidarity contribution purposes as we have been doing before, in accordance with the transfer agreements and the credit notes sent by you. Unfortunately, such was not addressed in the Settlement Agreement signed and we need to correct it since we have already being paying the training clubs the corresponding share of solidarity.*

Further, with regard to Marchesin, America (surely by mistake) have also included in its claim the conditional amount set out in subparagraph d) of clause 3 of the Transfer Agreement. Though, considering the sole paragraph of such clause, the amounts set out under subparagraphs c) d) are "subject to PLAYER participates in 75% of the matches in the corresponding competition". Given the fact that it was Diogo Costa (second goalkeeper) that played all the matches of that competition in 19-20, the conditional amount of USD 500,00 shall not be due to America regarding season 19-20.

We apologize for not having noticed this slip before but, as you also are aware, FC Porto was under Financial Fair Player pressure as well as dealing with all the pandemic related issues.

In light of the above we corrected this situation by deducting the corresponding amounts on this last instalment of the Settlement Agreement. Considering that this may cause you some constraint for which we hereby apologize, ***besides paying this amount in advance of the due date we keep the interest due to America in its original calculated amount***

[…]

So, in summary and in order to clarify the above:

The original amount of 2,260k is less 643k because:

1. ***FC Porto deducted 5% of solidarity from the last instalments and conditional payments (which was not taken into account in the Settlement Agreement);***
2. ***USD 500k is also excluded (its equivalent in EUR 427k); and***
3. ***FC Porto does not exclude interest (though they it could be excluded in view of the updated amounts)***

Therefore, America receives everything are entitled to based on the transfer agreements plus interest (as if the proceedings before FIFA would go on)." (emphasis in original)

12. On 19 July 2021, Club América wrote to Porto, *inter alia*, as follows:

"*Pursuant to the foregoing, it is undeniable that Porto undertook to pay America the Indebted Amount in two (2) installments as follows:*

- ***€3.390.091,45 (Three Million Three Hundred Ninety Thousand Ninety-One Euros and Forty-Five Cents) Net****, that is free of taxes, charges or withholding whatsoever no later than November 30th, 2020 (hereinafter, the "**First Installment**").*

- ***€2.260.060,96 (Two Million Two Hundred Sixty Thousand Sixty Euros and Ninety-Six Cents) Net****, that is free of any taxes, charges or withholding whatsoever no later than June 30th, 2021 (hereinafter, the "**Second Installment**").*

In addition, in Clause 2 of the Settlement Agreement (an extract of which is copied hereinafter), the Parties clearly established that the Indebted Amount and the abovementioned payment method were fair and just: therefore, Porto undertook and agreed not to dispute it before any authority whatsoever or to attempt to denounce or annul, for any other reason not provided in the Settlement Agreement.

[…]

*As of this date, America expressly acknowledges having received timely and complete payment of the First Installment; however, it also expressly acknowledges having only received [2] a **partial payment** from Porto amounting to **€1.616.718,82 (One million Six Hundred and Sixteen Thousand Seven Hundred and Eighteen Euros and Eighty-Two Cents) regarding the Second Installment**.*

*Therefore, it is more than obvious that Porto intends to unilaterally deduct, without being entitled to do so according to the Settlement Agreement, and in clear violation to the fundamental principle of pacta sunt servanda, the amount of €643.342,14 (Six Hundred Forty-Three Thousand Three Hundred Forty-Two Euros and Fourteen Cents), Net, from the Second Installment to which America is entitled in fact and in law as per the Settlement Agreement (hereinafter, the "**Outstanding Amount**[3]").*

The foregoing despite the various email communications[4] which have been exchanged between Porto and America, whereby America has repeatedly (i) informed Porto of its failure to comply with its freely acquired payment obligations under the Settlement Agreement, (ii) put Porto in default and requested the complete payment of the Second Installment, including, without limiting to the Outstanding Amount, and (iii) warned Porto of the consequences which would result in case of failure in doing so.

*Additionally, under Clause 5 (Penalty) of the Settlement Agreement, the Parties agreed that, if Porto failed to comply with the complete payment of any of the Indebted Amount's installments referred to in Clause 2 of the Settlement Agreement, then, Porto shall also be obliged to pay America a one-off penalty equivalent to **ten percent (10%)** of such installment, in this particular case ten percent of the Second Installment, so*

[2] "*America acknowledges received partial payment regarding the Second Installment on **June 18th, 2021**.*
[3] "*For the avoidance of doubt, the Outstanding Amount shall be understood as Net, that is free of any taxes, charges or withholding whatsoever.*"
[4] "*Several email communications have been exchanged between Porto and America, among which are the email communications dated April 14th, 2021, June 18th, 2021, and July 2nd, 2021.*"

Porto is hence also obliged to pay America the amount of ***€229.006,10 (Two Hundred Twenty Nine Thousand Six Euros and Ten Cents) Net*** [sic]*, that is free of any taxes, charges or withholding whatsoever (hereinafter, the "****Penalty****[5]", and jointly with the Outstanding Amount, the "****Requested Settlement Amount****") as a result of its failure to comply with the complete payment of the Second Installment as per the Settlement Agreement.*

Accordingly, as of this date, and as per the express provisions set forth in the Agreement, Porto now has the obligation to pay, and America has the right to collect, the Requested Settlement Amount amounting to €872.348,24 (Eight Hundred and Seventy-Two Thousand Three Hundred and Forty-Eight Euros and Twenty-Four Cents) Net, that is free of any taxes, charges or withholding whatsoever." (emphasis in original)

13. On 2 August 2021, Club América wrote to Porto in very similar terms to its letter of 19 July 2021, putting it in default of payment again.

14. On 3 August 2021, Porto wrote to FIFA, *inter alia*, as follows:

"*By this letter, FC Porto respectfully requests FIFA to resume and immediately close two proceedings with ref. no. 20-01382/jaa and 20-01545/jaa in view of the fact that FC Porto has fully complied with its obligations under the relevant transfer agreements.*

[…]

Because FC Porto has already paid in full the amounts that were due under the transfer agreements relating to the transfer of the player Agustín Federico Marchesin ("Marchesin Agreement") and the player Andrés Mateus Uribe Villa ("Uribe Agreement"), there is no legitimate reason for the Players' Status Committee to proceed with the claims of Club América and, therefore, the proceedings should be closed.

[…]

As of today, FC Porto has paid in total EUR 5,006,810.27 with respect to the Marchesin Agreement and the Uribe Agreement:

i) EUR 3,390,091.45 on 26 November 2020; and

ii) EUR 1.616,718.82 on 16 June 2021.

FC Porto submits that the above amount settles everything that Club América claimed before FIFA and was actually due by FC Porto under the transfer agreements. In this respect, FC Porto states the following:

i) With respect to the Marchesin Agreement, Club América claimed three variable payments of USD 500,000.00 each based on article 3 paras. a),

[5] "*For the avoidance of doubt, the Penalty shall be understood as Net, that is free of any taxes, charges or withholding whatsoever.*"

c) and d) of the Marchesin Agreement. In particular, para. d) refers to a conditional payment of USD 500,000 "if FC Porto becomes Portuguese Cup Champion".

Article 3 also provides that "conditional payments set forth under subparagraphs c) and d) are additionally subject to [Agustín Federico Marchesin] participates in 75% of the matches of the corresponding competition". Agustín Federico Marchesin did not play 75% matches in the Portuguese Cup in the season 2019/2020 and, therefore, this condition was not fulfilled.

Therefore, only two (out of three) variable payments were due to Club América.

ii) The amounts claimed by Club América within FIFA proceedings are without deduction of the solidarity contribution that FC Porto had to distribute to other clubs in accordance with the FIFA RSTP. Article 2(2) in the Marchesin Agreement and the Uribe Agreement also provides that the amounts include solidarity contribution and are payable to Club América after its deduction, which corresponds to the general rule provided for in Article 1 of Annexe 5 of the FIFA RSTP.

Please also note that with respect to the first three installments under both transfer agreements, FC Porto deducted 5% as solidarity contribution and it was accepted by Club América.

iii) When entering into the settlement agreement, the parties agreed that the exchange rate of EUR/USD to be used for calculations should be 1.169594279 that corresponds to the rate as of 5 November 2020.

In view of the above, the actual amount that was due to Club América under the transfer agreements was EUR 4,989,018.82 […].

Because FC Porto has paid more that was due to Club América, i.e. EUR 5,006,810.27, there should be no legitimate reason for the Players' Status Committee to proceed with the claims of Club América and, therefore, both proceedings should be closed.

Alternatively, in the unlikely event that FIFA does not fully agree with the above calculations of FC Porto, we respectfully request the FIFA administration, in accordance with Article 15 of the Procedural Rules, to make a written proposal to the parties regarding the amounts owed in the case in question and the calculation of such amounts, which would allow a swift and cost-efficient resolution of the matter." (emphasis in original)

15. On 4 August 2021, FIFA sent a letter to Club América which set out, *inter alia*, as follows:

"*In this respect, we acknowledge receipt of the correspondence submitted to our services by FC Porto, dated 3 August 2021, by means of which it informed our services that FC Porto has fully complied with its obligations as per the amicable settlement reached between the parties on 20 November 2020 in connection with the disputes of the reference (cf. correspondence and settlement agreement enclosed hereto).*

In this respect, we hereby kindly ask you to confirm to our services, ***within the following 5 days****, whether the present dispute can be considered as amicably settled in the sense of the content of the enclosed correspondence.*

Should we not hear from you within the following 5 days, we will assume that the present dispute has been amicably settled and, consequently, we will proceed to the closure of the present matter." (emphasis in original)

16. On 9 August 2021, Club América wrote to FIFA, *inter alia*, as follows:

"*As a result of the foregoing, America hereby informs this Hon. FIFA's PSC that:*

1. *Porto has failed to fully comply with its essential payments obligations as per the Settlement Agreement, therefore:*

   (i) ***the FIFA Proceedings shall NOT be closed nor terminated as maliciously suggested in Porto's Correspondence****.*

   (ii) ***the present dispute cannot be considerable as amicably settled in the sense of the content of Porto's Correspondence or in any other sense for that matter****.*

   For avoidance of any doubt, and contrary to what is requested in Porto's Correspondence, please note that according to Clauses 1, 3 and 4 of the Settlement Agreement, ***the FIFA Proceedings shall remain suspended until Porto fully complies with its freely acquired payment obligations as per the Settlement Agreement****.*

2. *If Porto is unable or simply decides not to voluntarily comply with its freely acquired payment obligations as per the Settlement Agreement, that is to say, to comply with the complete and timely payment of the* ***currently outstanding Requested Settlement Amount amounting to €872.348,24 (Eight Hundred and Seventy-Two Thousand Three Hundred and Forty-Eight Euros and Twenty-Four Cents), NET, that is free of any taxes, charges or withholding whatsoever by wire transfer to the bank account referred to in the Second Formal Payment Request (within the final non-renewable ten (10)calendar day-term granted therein, that is to say, NO LATER THAN AUGUST 12TH, 2021);*** *then, America shall have no other alternative but to initiate a new claim for payment application under article 12 Bis of FIFA's RSTP against Porto, so as to request this Hon. FIFA PSC's aid in constraining Porto to*

comply with its freely and voluntarily acquired payment obligations." (emphasis in original)

B. Proceedings before the FIFA Players' Status Chamber

17. On 3 September 2021, following the above, Club América lodged a claim against Porto before the FIFA Players' Status Chamber (the "FIFA PSC"), requesting that Porto be ordered to pay to Club América the amount of EUR 643,342 relating to the unpaid part of the second instalment due under the Settlement Agreement, plus 5% interest per annum from 1 July 2021 until the date of effective payment, and EUR 229,006 [sic] as contractual penalty relating to 10% of the second instalment due under the Settlement Agreement, plus 5% interest per annum from 6 July 2021. Club América noted that the terms of the Settlement Agreement were clear in both the amounts payable and the confirmation from both parties that such amounts were fair and just, and there was an assurance that they would not dispute the same in any forum.

18. Porto disputed Club América's claim stating that the fact of entering into the Settlement Agreement did not supersede the terms agreed in the Marchesin Agreement or the Uribe Agreement by the parties and that in the event of any default, the original FIFA proceedings should be reinstated because these had been suspended following the Settlement Agreement, not terminated. In any event, Porto disputed that any amount was outstanding to Club América because it had complied with all payments due under the Marchesin Agreement and Uribe Agreement, however there was an error in the Settlement Agreement whereby an additional contingent payment had been included which had not fallen due for payment and also Club América had failed to deduct the relevant solidarity payments due to third party clubs. Therefore, Porto had no legal basis to claim such amounts because the original FIFA proceedings should be reinstated, as opposed to a new dispute over the terms of the Settlement Agreement, and it was clear that Porto had complied with its payment obligations under the Marchesin Agreement and Uribe Agreement.

19. On 17 December 2021, the FIFA general secretariat wrote to Porto and Club América in connection with the positions set out above and confirmed that the original FIFA proceedings would not be reopened but would proceed under the current FIFA proceedings for the sake of procedural efficiency. Therefore, the original FIFA proceedings were closed and would not be reopened.

20. On 7 January 2022, Porto filed two appeals before CAS challenging the conclusion reached by the FIFA general secretariat in its letter of 17 December 2021.

21. On 12 January 2022, the FIFA general secretariat wrote to Porto and Club América to confirm its position that due to the close links between the various FIFA proceedings, for the sake of good procedural order and to avoid the risk of conflicting decisions, there would be a single decision in connection with the three proceedings. The proceedings were not consolidated but would be treated jointly under the same reference.

22. On 17 January 2022, following Porto's withdrawal of the two appeals, CAS rendered the relevant termination order.

23. On 22 March 2022, the FIFA general secretariat informed the Appellant and the First Respondent that the case would be submitted to the FIFA PSC for a decision.

24. On 5 April 2022, the FIFA PSC rendered its decision (the "FIFA PSC Decision" or the "Appealed Decision"), with the following conclusion and operative part:

> "*56. The settlement agreement -which subject-matter was the settlement of the disputes originated due to the Respondent's lack of payment of amounts due as per both transfer agreements-, was the last contract concluded between the parties, which already generates a presumption of novation of the financial obligations due by the Respondent to the Claimant.*
>
> *57. What is more, the said presumption is confirmed by clause 2 of the settlement agreement, which explicitly provides that the amount thereunder payable is fair and just as settlement for the amounts due by the Respondent in connection with the first and second transfer agreements, the Respondent not being able to dispute it.*
>
> *58. Considering the wording of clause 3 of the settlement agreement, which states -inter alia- that in case of non-payment of the second instalment thereof, the closing and termination of the FIFA Proceedings shall not be requested and said proceeding shall resume as if the settlement agreement had never been executed, one could argue that the non-payment of the said second instalment shall lead to the nullity of the settlement agreement; however, that would not only contradict clause 2 of the settlement agreement, but also clause 5 thereof, which only purpose was to foresee the specific consequences of the Respondent's non-payment.*
>
> *59. In view of the aforesaid, the Single Judge concluded that: A.) the effects of nullity foreseen by clause 3 would suppose the non-application of both, clauses 2 and 5 of the settlement agreement, which leads to the interpretation -in balance, considering all the clauses that conform the settlement agreement- that it is clause 3 the one that contains an error or what the Single Judge considered a pathological expression when it referred to the nullity of the agreement in case of non-payment; B.) the Respondent expressly admitted that, by mistake, the amount payable as per the settlement agreement was higher, since it contained conditional payments which conditions were not fulfilled and did not foresee deductions due to solidarity contribution, the said mistake apparently being the main basis for the Respondent now challenging the validity of the settlement agreement.*
>
> *60. In view of the above, after an interpretation of the spirit of the settlement agreement and an analysis of the argumentations wielded by the parties, the Single Judge decided that the settlement agreement did novate and supersede the debts of the Respondent in connection with the transfers of the players involved.*

61. *Furthermore, considering the amount payable as per the settlement agreement, which was higher than the amounts individually payable as per the transfer agreements, the Single Judge concluded that either the parties decided that the Respondent would pay a higher amount as a consequence of its delay in the payment or that the Respondent, negligently -as seems to be the case-, failed to include therein its entitlement to reduce the amount thereunder payable in case of non-achievement of specific goals that would lead to the non-payment of some conditional payments and for the payment of solidarity contribution.*

62. *In any which way, continued the Single Judge, the parties explicitly agreed that the amount payable in order to settle the debts of the Respondent towards the Claimant in connection with the transfers of the players involved was EUR 5,650,152 net, out of which -as acknowledged by both parties – the Respondent paid EUR 5,006,810. Thus, the Single Judge concluded that the Respondent is liable to pay to the Claimant the difference between the amount due and the amount paid, i/i/ EUR 643,342 net, in accordance with the legal principle pacta sunt servanda.*

63. *Concerning the amount requested by the Claimant as penalty, clause 5 of the settlement agreement states that, in case of non-payment of any of the instalments payable, a penalty of an amount equal to 10% of the outstanding instalment(s) would be payable to the Claimant by the 5th day after the default of payment. It remained undisputed that the Respondent failed to timely pay the second instalment of the settlement agreement, since the latter only proceeded with a partial payment thereof after its due date.*

64. *Thus, the Single Judge decided that the penalty contemplated under clause 5 of the settlement agreement was activated. As per the wording of the relevant clause, in case of non-payment of the second instalment of the settlement agreement, the Respondent shall pay to the Claimant the amount of EUR 229,006* [sic]*, which should represent 10% of the second instalment.*

65. *However, the Single Judge noted that 10% of EUR 2,260,061 (the second instalment) amounts to amounts to EUR 226,006 and not to EUR 229,006* [sic]*. Thus, considering the latter a clerical mistake included in the relevant clause, after interpreting the whole spirit of the clause, the Single Judge determined that the Respondent undertook to pay a penalty in an amount of EUR 226,006 net in case of non-payment of the second instalment in a timely manner.*

66. *Consequently, the Single Judge concluded that the Respondent shall pay a penalty of EUR 226,006 to the Claimant, which is to be considered a fair and reasonable amount, not only in compliance with the terms of clause 5 of the settlement agreement, but also in coherence with the jurisprudence of the Players' Status Chamber. In the present case, considering that the amount of EUR 226,006 net does not exceed the percentage of 50% of the principal outstanding amount of EUR 643,342, the Single Judge decided that the said amount shall be awarded to the Claimant as contractual penalty as it is proportionate.*

ii. Consequences

67. Having stated the above, the Single Judge turned his attention to the question of the consequences of such unjustified breach of contract committed by the Respondent.

68. In this context, the Single Judge stressed that, in accordance with the general legal principle of pacta sunt servanda, the Respondent is liable to pay to the Claimant the difference between the principal amount due as per the settlement agreement and the amount effectively paid by the Respondent for this consideration, i.e. EUR 643,342 net as principal outstanding amount and EUR 226,006 net as contractual penalty.

69. In addition, taking into consideration the Claimant's request as well as the constant practice of the Players' Status Chamber in this regard, the Single Judge decided to award the Claimant interest at the rate of 5% p.a. on the amount of EUR 643,342 net as from the date following the due date of the second instalment, i.e. as from 1 July 2021, until the date of effective payment, as requested by the Claimant.

70. As to the request of the Claimant to be granted default interest in connection with the contractual penalty, despite clause 5 of the settlement agreement stipulating a concrete due date on which the penalty was payable, i.e. by the 5th day following the non-payment of the second instalment due as per the settlement agreement, no interest can be awarded on penalties in accordance with the legal principle: non bis in idem.

[…]

IV. Decision of the Single Judge of the Players Status Chamber

1. The claim of the Claimant, Club América, is partially accepted.

2. The Respondent, FC Porto, has to pay to the Claimant outstanding remuneration in the amount of EUR 869,348, plus 5% interest p.a. on the amount of EUR 643,342 as from 1 July 2021 until the date of effective payment.

3. Any further claims of the Claimant are rejected.

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

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

> *1. The Respondent shall be banned from registering any new players, either nationally or internationally, up until the due amount is paid. The maximum duration the ban shall be of 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.*
>
> *6. The final costs of the proceedings in the amount of USD 20,000 are to be paid by the Respondent to FIFA.*" (emphasis in original)

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

25. On 14 June 2022, the Appellant lodged an appeal with the Court of Arbitration for Sport (the "CAS") against the Appealed Decision, pursuant to Article R48 of the CAS Code of Sports-related Arbitration (edition 2021) (the "CAS Code") and requested that the case be submitted to a sole arbitrator.

26. On 17 June 2022, the CAS Court Office provided a copy of the Statement of Appeal to the Respondents.

27. On 20 June 2022, the First Respondent confirmed its agreement to the case being submitted to a sole arbitrator.

28. On 22 June 2022, the Second Respondent filed submissions that it should be excluded from the proceedings.

29. On 24 June 2022, the Appellant maintained its position that the appeal should be directed towards the Second Respondent.

30. On 30 June 2022, the Second Respondent confirmed its agreement to the case being submitted to a sole arbitrator.

31. On 4 July 2022, after having been granted an extension further to Article R32 of the CAS Code, the Appellant filed its Appeal Brief pursuant to Article R51 of the CAS Code.

32. On 28 July 2022, in accordance with Article R54 of the CAS Code, and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to this case was constituted as follows:

Sole Arbitrator: Mr Edward Canty, Solicitor in Manchester, United Kingdom

33. On 17 August 2022, the First Respondent filed its Answer pursuant to Article R55 of the CAS Code.

34. On 7 September 2022, the Second Respondent, after having been granted an extension further to Article R32 of the CAS Code, filed its Answer pursuant to Article R55 of the CAS Code.

35. On 9 September 2022, the CAS Court Office invited the Parties to indicate their preference for a hearing to be held or for the matter to be determined based on the written submissions filed.

36. On the same day, the Second Respondent indicated that it did not wish to have a hearing and was content to have the case determined on the basis of the written submissions.

37. On 13 September 2022, the First Respondent indicated that it did not wish to have a hearing and was content to have the case determined on the basis of the written submissions.

38. On 21 September 2022, the Appellant indicated it did not wish to have a hearing and was content to have the case determined on the basis of the written submissions. In the same letter, the Appellant confirmed as follows that it did not "*dispute the debt of EUR 707,676.35 (comprising EUR 643,342.14 as outstanding remuneration and EUR 64,334.21 as a penalty). Indeed, FC Porto has already paid this amount to Club América (a copy of the relevant payment confirmation is enclosed).*

Therefore, the only issue for the Sole Arbitrator to consider remains the penalty clause provided for in the Settlement Agreement."

39. On 23 September 2022, the CAS Court Office wrote to the Parties requesting that the Appellant supplied copies of two documents which had not been included in the exhibits to the Appeal Brief (copies of the First Formal Payment Request, dated 19 July 2021, and the Second Formal Payment Request, dated 2 August 2021) and requesting the First Respondent to provide its position with regard to the proof of payment sent by the Appellant on 21 September 2022.

40. On 28 September 2022, the Appellant supplied copies of the requested documents.

41. On 30 September 2022, the First Respondent confirmed receipt of the payment of EUR 707,676.35 (comprising EUR 643,342.14 as outstanding remuneration and EUR 64,334.21 as contractual penalty) but stated that the following amounts remained outstanding:

"*a. 5% (five percent) interest per annum on the amount of EUR 643,342.14 (Six Hundred Forty-Three Thousand Three Hundred and Forty-Two Euros and Fourteen Cents) as from July 1st, 2021, until the date of effective payment;*

b. The amount of ***EUR161,671.89 (One Hundred Sixty-One Thousand Six Hundred Seventy-One Euros and Eighty-Nine Cents) net****, as contractual penalty; and*

c. All legal costs and all other expenses which Club America may incurred, or which may arise because of these proceedings." (emphasis in original)

42. On 4 October 2022, the CAS Court Office wrote to the Parties to confirm the Sole Arbitrator's decision that it was not necessary to hold a hearing and the case would be determined based on the Parties' written submissions.

43. On 5 October 2022, 4 October 2022 and 5 October 2022 respectively, the Appellant, the First Respondent and the Second Respondent returned duly signed copies of the Order of Procedure to the CAS Court Office.

IV. SUBMISSIONS OF THE PARTIES

44. The following summaries of the submissions of the Parties is illustrative only and does not necessarily comprise every contention put forward by the Parties. The Sole Arbitrator has, however, carefully considered all the submissions and evidence filed by the Parties with the CAS, even if there is no specific reference to those submissions or evidence in the following summaries.

A. The Appellant

45. The Appellant's submissions, in essence, may be summarized as follows:

- The FIFA PSC was incorrect in deciding in the Appealed Decision that the amount outstanding to the First Respondent was EUR 869,348 (made up of EUR 643,342 as outstanding remuneration and EUR 226,006 as contractual penalty) and was also incorrect in its calculation of the penalty which should be reduced to EUR 64,331.21.

- The FIFA general secretariat issued a proposal to the Appellant and the First Respondent on 7 September 2022, when notifying of the claim brought by the First Respondent before the FIFA PSC, which suggested the Appellant pay EUR 643,342 plus interest as outstanding remuneration and EUR 64,334 as penalty. This suggests that the FIFA general secretariat considered the latter as the appropriate amount as being 10% of the outstanding amount and not the fixed amount of EUR 226,006.

- The Appealed Decision misapplied clause 5 of the Settlement Agreement by interpreting it against the true intention of the Appellant and the First Respondent; it should not be interpreted as a fixed amount of 10% of the second instalment but should instead be 10% of any outstanding element.

- The Swiss Code of Obligations determines that when the interpretation of a contract is in dispute, it is necessary to identify the true and mutually agreed intention of the contracting parties, ignoring incorrect expressions used by mistake; where this is not possible, then principles of good faith should be applied and what a reasonable person would have understood in the circumstances, a position supported by CAS jurisprudence.

- The Appellant argues that the true intention of the Appellant and the First Respondent was for the penalty to be calculated based on 10% of the outstanding amount and not a fixed amount of EUR 226,006 (if the outstanding amount was less than the total of the second instalment of EUR 2,260,060.96). This can be demonstrated by the following:

- the clause states that it is "*a once-off penalty equivalent to 10% (ten per cent)*" of the instalment that it did not pay and the only instalment technically due after 30 June 2021 was the amount of EUR 643,342.14 so the penalty can only be based on this amount;

- there would be no need to refer to 10% if the intention of the Appellant and the First Respondent was for a fixed amount of EUR 339,091.10 to be paid as penalty if any part of the first instalment was not paid and/or EUR 226,006.10 if any part of the second instalment was not paid. Furthermore, this could lead to an absurd situation where a very small amount was outstanding, far less than the full fixed penalty, but this full amount would still be payable;

- the drafting process for the Settlement Agreement demonstrates that the intention of the Appellant and the First Respondent was for the penalty to be based on a percentage (and not a fixed amount), as shown by the Appellant's request for this to be reduced to 5% which was rejected by the Respondent on the basis that it did "*not agree to reduce it given that it is not a fixed payment and it would only be executed in case of breach*". Furthermore, the principle of *venire contra factum proprium* should be applied to prevent the Respondent from changing its course of action and acting contrary to the assurances given to the Appellant.

- The Appellant acted transparently with both Respondents with regard to the reason why it did not pay part of the second instalment (EUR 643,342.14) by paying the amount it deemed was due (EUR 1,616,718.82) two weeks before the due date and shortly after making the payment, sending a correspondence to the First Respondent explaining the reason for the difference in payment, which was followed by a similar explanation sent to the Second Respondent.

- Furthermore, the Appellant relied on clause 3 of the Settlement Agreement which provided that if the second instalment was not paid on time, it should be deemed as if the Settlement Agreement had never been executed and the original FIFA proceedings would be resumed, following which it would be expected that FIFA would determine whether the First Respondent was entitled to the disputed amount of EUR 643,342.14.

- The First Respondent has acted in an opportunistic manner by bringing fresh proceedings before the FIFA PSC based on breaches of the Settlement Agreement, as opposed to allowing the original FIFA proceedings to resume and determine if such amount was payable. Furthermore, the First Respondent is aware that the penalty was to be 10% of any outstanding amounts, rather than a fixed amount, but is arguing to the contrary to suit its own position.

46. Accordingly, the Appellant submitted the following requests for relief:

"***VI. <u>Requests for relief</u>***

73. The Appellant hereby respectfully requests the CAS to rule that:

1. *The decision rendered by the FIFA Players' Status Chamber on 5 April 2022 is set aside and replaced by an arbitral award holding as follows:*

   "FC Porto shall pay Club América:

   a. *EUR 643,342.14 as outstanding remuneration plus 5% interest per annum as from 1 July 2021 until the date of effective payment; and*

   b. *EUR 64,334.21 as penalty;*

   Any further claims of Club América are rejected."

2. *Club América and FIFA are ordered to bear the full CAS arbitration costs.*

3. *Club América and FIFA are ordered to pay to FC Porto a significant contribution towards its legal fees and other expenses.*" (emphasis in original)

B. The First Respondent

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

- The Appellant seeks to delay compliance with its payment obligations in relation to the contractual penalty and to distort the Appellant's and the First Respondent's true intentions based on an arbitrary interpretation of Swiss law and CAS jurisprudence. The basic principle of *pacta sunt servanda* must be respected and, therefore, the terms of the Settlement Agreement must be respected.

- After lengthy negotiations, which came about due to the Appellant's multiple and recurrent failures to comply with the payment obligations in the Marchesin Agreement and the Uribe Agreement, the Appellant and the First Respondent entered into the Settlement Agreement on 20 November 2020. The Settlement Agreement was drafted by the Appellant and reflected the agreement that the Appellant was indebted to the First Respondent in the sum of EUR 5,650,152.41. This was not just the amounts owed under the Marchesin Agreement and the Uribe Agreement but also additional amounts to cover the damage suffered by the First Respondent, interest, costs, expenses and the risk to place trust in a debtor which had already defaulted in payment.

- In accordance with clause 2 of the Settlement Agreement, the Appellant "*expressly and irrevocably acknowledges and accepts owing*" the indebted amount which was "*fair and just and … undertakes and agrees not to dispute them before of any authority whatsoever*".

- It was also expressly set out that the terms of both clause 2, and clause 5 setting out the penalty (as well as others), "***CONSTITUTES AN ESSENTIAL AND DETERMINING REASON WITHOUT WHICH THE PARTIES WOULD NOT HAVE EXECUTED THE PRESENT SETTLEMENT AGREEMENT***" (emphasis in original).

- The Appellant has sought to unilaterally deduct an amount of the second instalment without agreement and in violation of the principle of *pacta sunt servanda*, based apparently on a mistake it made which needed correction. This was in clear violation of Article 81, paragraph 2 of the Swiss Code of Obligations which stated that "*the obligor is not entitled to apply a discount unless that discount has been agreed or is sanctioned by custom*".

- The First Respondent sent two formal requests for payment of the outstanding amounts to the Appellant (on 19 July 2021 and on 2 August 2021), which as evidence of its bad faith were not referred to by the Appellant, requesting payment of the outstanding amount of EUR 872,348.24 (EUR 643,342.14 of the outstanding amount and EUR 229,006.10 [sic] as contractual penalty). Despite this, the Appellant failed to make payment and instead tried to re-start the original FIFA proceedings, requiring the First Respondent to start a new proceeding before the FIFA PSC based on the Appellant's breaches of the Settlement Agreement. The Appellant is seeking to further delay and/or avoid complying with its payment obligations through the CAS proceedings.

- With regard to the agreed terms of the Settlement Agreement, in particular the penalty set out at clause 5, it should be highlighted that the Appellant was fully aware of the consequences of any failure to comply with its payment obligations and, therefore, has not been surprised by this. Furthermore, a possible breach was taken into account, and it was decided to determine the contractual penalty payable in the event that the Appellant, once again, failed to comply with its payment obligations. This is supported by both CAS jurisprudence and the Swiss Code of Obligations, specifically Article 163 paragraph 1, "*parties are free to determine the amount of the contractual penalty*" and Article 161, paragraph 1, "*penalty is payable even if the creditor has not suffered any damage*".

- Furthermore, the principle of *pacta sunt servanda* is well-established in CAS and FIFA jurisprudence and demands that agreements must be respected and complied with in good faith. Therefore, the freely and voluntarily negotiated and executed Settlement Agreement must be entirely respected and fulfilled.

- Turning to the interpretation of the terms of the Settlement Agreement, the starting point should be the literal interpretation and if the same is clear, unambiguous and represents the contracting parties' common intention, as is the case here, then there is no need to depart from the plain text. This is supported by the principle *in claris non fit interpretatio* which confirms that where the meaning is clear and unambiguous, there is no need for any interpretation.

- It is clear from clause 5 of the Settlement Agreement that the Appellant and the First Respondent expressly, clearly and unequivocally agreed that if the Appellant failed to comply (as indeed happened) with the payment of any of the instalments referred to in clause 2 of the Settlement Agreement then it would be obliged to pay the First Respondent a penalty equivalent to 10% of the such instalment, which in respect of the second instalment, amounted to EUR 229,006.10 [sic]. It was clear that the Appellant's and the First Respondent's true intention was to agree a penalty equivalent to 10% of any of the instalments referred to in clause 2 of the Settlement Agreement which may

have not been paid, in full or in part. Indeed, it was set out in clause 5 specifically that if the Appellant failed to fully comply with its payment obligations under the first instalment, a penalty of EUR 339,091.10 would be payable, if it failed to fully comply with its payment obligations under the second instalment, a penalty of EUR 229,006.10[sic] would be payable and if it failed to fully comply with its payment obligations under both the first and second instalment, a penalty of EUR 565,014.24 would be payable.

- Therefore, despite what the Appellant now seeks to argue, it was never the Appellant's and the First Respondent's intention that the penalty should be calculated as 10% of any outstanding amounts unpaid, but instead the Settlement Agreement was clear in specifying the actual amounts (and the basis for the amounts) in case of any default by the Appellant in its payment obligations.

- If the Appellant's and the First Respondent's true intention for the penalty had simply been 10% of any outstanding and unpaid amounts, that would have been a simple way of expressing it and there would have been no need to refer to the specific figures in the Settlement Agreement; this is an important point to demonstrate their true intention at the time of entering into the Settlement Agreement.

- Further, in the alternative, if the Appellant's and the First Respondent's true intention is not confirmed by the arguments above, then the Settlement Agreement should be interpreted in accordance with the principle *in dubio contra stipulatorem*, which is supported by CAS jurisprudence, and provides that if the content of a contract cannot be determined or if there is any unclear wording, then it must be interpreted against the party who drafted the contract, and supported by correspondence filed by the Appellant, it was the Appellant which prepared the draft Settlement Agreement. Therefore, any ambiguity should be interpreted against the drafting party, in this case the Appellant.

- As further evidence of the Appellant's bad faith, the original intention was for the penalty to be 10% of the full amount payable in case of default, however the Appellant requested it was split into three scenarios; default in respect of either instalments and default of the entire amount payable. It therefore appears that the Appellant's intention was to make this deduction from the second instalment and then to attempt to reduce the penalty to just 10% of this deducted amount (EUR 64,334), thereby meaning it would end up paying a smaller amount in total, including the penalty, than had been agreed in the Settlement Agreement.

- It should also be noted that the Appealed Decision concluded that the penalty of EUR 226,006 was a "*fair and reasonable amount, not only in compliance with the terms of clause 5 of the settlement agreement, but also in coherence with the jurisprudence of the Players' Status Chamber. In the present case, considering that the amount of EUR 226,006 net does not exceed the percentage of 50% of the principal outstanding amount of EUR 643,342, the Single Judge decided the said amount shall be awarded to the Claimant as contractual penalty as it is proportionate.*" It is notable that the penalty of EUR 226,006.10 is equivalent to 10% of the second instalment and only 4% of the total amount payable under the Settlement Agreement.

- In conclusion, there are no grounds or basis for any reduction of the contractual penalty of EUR 226,006.10 and the Appealed Decision should be upheld.

48. Accordingly, the First Respondent submitted the following requests for relief:

"***-VIII-***

PETITIONS

We hereby request the ***COURT OF ARBITRATION FOR SPORT*** *to deem this* ***ANSWER TO THE APPEAL BRIEF*** *as having been filed on behalf of* ***CLUB DE FÚTBOL AMÉRICA, S.A. DE C.V.****, and respectfully request this Hon. Sole Arbitrator to deliver an Award, in due time which:*

A. ***Completely dismisses the appeal made by FUTEBOL CLUBE DO PORTO – FUTEBOL, SAD.***

B. ***Entirely confirms the Appealed Decision passed by the Single Judge of the FIFA Players' Status Chamber on April 5th, 2022, with respect to the procedure identified as: Ref. FPSD-3536; and hence order FC Porto to pay Club America the Requested Settlement Amount comprised by:***

- ***the Outstanding Amount (EUR 643.342,14 (Six Hundred Forty-Three Thousand Three Hundred Forty-Two Euros and Fourteen Cents)), net, that is free of any taxes, charges or withholding whatsoever; and***

- ***the Penalty (EUR 226.006,10 (Two Hundred and Twenty-Six Thousand Six Euros and Ten Cents)), net, that is free of any taxes, charges or withholding whatsoever.***

C. ***Order the Appellant to pay all legal costs and all other expenses which Club America may incurred, or which may arise because of these proceedings, at least in the amount of CHF30,000.00 (Thirty Thousand Swiss Francs)*** [Footnote].

[Footnote] *Equivalent to what was previously agreed by the Parties as per Clause 6 of the Settlement Agreement.*" (emphasis in original)

C. The Second Respondent

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

- The substance of the dispute revolves exclusively around the Settlement Agreement entered into by the Appellant and the First Respondent and, specifically, whether the Appellant has to pay a contractual penalty of EUR 226,006 or EUR 64,334.21.

- The Second Respondent does not have standing to be sued and the Appellant has failed to explain why the Second Respondent was called as a party to the arbitration. It does not have standing to be sued because:

    - the case exclusively relates to a horizontal dispute between the Appellant and the First Respondent as it relates to the contractual dispute that arose between them both;

    - none of the Appellant's requests for relief concern the Second Respondent;

    - there is no scope of discretion for the FIFA PSC with regard to the imposition of the consequences in case of non-compliance provided for in Article 24 of the FIFA Regulations on the Status and Transfer of Players (the "FIFA RSTP").

- According to Swiss law and the well-established jurisprudence of CAS, in an arbitration proceeding a party has standing to be sued ("*legitimation passive*") only if it has some stake in the dispute, because something is sought against it, and it is personally obliged by the disputed right. It is clear that none of these apply to the Second Respondent; it simply acted, as the FIFA PSC, as a decision-making body as requested and accepted by the Appellant and the First Respondent. The FIFA PSC is a dispute resolution system in which the Second Respondent is not a party but instead is a neutral entity requested to settle a contractual dispute between its indirect members (the Appellant and the First Respondent).

- The position is clear in respect of the different types of disputes which is relevant in terms of the Second Respondent's standing to be sued. In vertical disputes, the decision of the Second Respondent "*shapes, alters or terminates*" the membership relationship between itself and the member concerned, compared with horizontal disputes which "*originate in a legal relationship amongst individual members*".

- The appeal turns on the dispute between the Appellant and the First Respondent as to whether the 10% penalty is based on the entire second instalment or just the amount outstanding; the Appellant has given no explanation as to why the Second Respondent has been included and it is evident that the Second Respondent does not have anything directly at stake. Furthermore, the Appellant's requests for relief directly concern the contractual relationship between the Appellant and the First Respondent and the consequences arising from the breach thereof; the Second Respondent only has an indirect involvement due to its performance as a first-instance decision-making body.

- It is clear, therefore, that the Second Respondent does not have standing to be sued. Even though the Appealed Decision makes a reference to potential disciplinary measures in case of non-compliance (in terms of Article 24 of the FIFA RSTP), this cannot affect the Second Respondent's standing to be sued, as this remains purely a contractual dispute. The inclusion of the disciplinary consequences is an automatic mechanism via Article 24 of the FIFA RSTP which cannot be altered by the FIFA PSC and their subsequent imposition, where appropriate, is carried out without discretion, provided certain specific circumstances occur:

- there is an ongoing order to pay (and no pending appeal);
- the debtor failed to pay within 45 days;
- the creditor must request the implementation of the consequences; and
- another decision must be issued by the Second Respondent ordering the implementation of the consequences.

- It follows that the Appellant has the ability to appeal the implementation before CAS, for instance, if it has already paid the debt or the creditor has waived its entitlement. What it cannot do is challenge its inclusion as a possible consequence in the Appealed Decision because this is automatically included in accordance with Article 24 of the FIFA RSTP. It follows, therefore, that the Appellant would only have something to claim against the Second Respondent after the implementation of the consequences. The Appellant does not have standing to sue the Second Respondent because the Appellant does not have an interest worthy of protection or a legitimate interest (at least as far as the Second Respondent is concerned) since it is not sufficiently affected by the Appealed Decision and there is no tangible interest at stake because the relevant consequences remain purely hypothetical at this stage.

- The Second Respondent set out its position in this regard at the outset of the proceedings and reserved its right to claim the costs generated from its participation therein, yet the Appellant decided to maintain its appeal against it, without providing an explanation. Accordingly, the Second Respondent maintains its request for its costs to be paid by the Appellant due to its lack of standing to be sued.

- With regard to the contractual dispute, notwithstanding that it does not relate to the Second Respondent for the reasons set out above, it is clear that the Settlement Agreement does not leave any doubt or ambiguity. The wording of clause 5 of the Settlement Agreement clearly sets out the agreement of the Appellant and the First Respondent that if the Appellant failed to pay the full amount of any of the instalments, the penalty would be an additional 10% of the relevant instalment and not 10% of the outstanding amount.

- It is undisputed that the Appellant failed to pay the complete amount of the second instalment and, therefore, the penalty stipulated under clause 5 of the Settlement Agreement was activated and the amount was correctly determined in the Appealed Decision as EUR 226,006.

50. Accordingly, the Second Respondent submitted the following requests for relief:

> "***B. <u>Prayers for Relief</u>***
>
> *78. Based on the foregoing, 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; and

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

V. JURISDICTION

51. The jurisdiction of CAS, which is not disputed, derives from Article R47 of the CAS Code which states "[a]*n appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body*".

52. Article 57(1) of the FIFA Statutes (2021 edition) then provides that "[a]*ppeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS […]"*.

53. The Parties do not dispute the jurisdiction of the CAS and further confirmed it by signing the Order of Procedure.

54. It follows that the CAS has jurisdiction to decide on the present dispute.

VI. ADMISSIBILITY

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

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document."

56. According to Article 57(1) of the FIFA Statutes (2021 edition), appeals *"shall be lodged with CAS within 21 days of receipt of the decision in question"*.

57. The Appealed Decision was passed on 5 April 2022 and notified to the Parties on 24 May 2022. The time limit to file an appeal runs from receipt of the notification of the decision with grounds, *i.e.*, 24 May 2022. Therefore, given the appeal was filed on 14 June 2022, the appeal was filed within the deadline of 21 days set by Article 57(1) of the FIFA Statutes (2021 edition). The appeal complied with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fee.

58. It follows that the appeal is admissible.

VII. APPLICABLE LAW

59. Article R58 of the CAS Code provides the following:

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

60. Article 56(2) of the FIFA Statutes (2021 edition) stipulates the following:

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

61. The Sole Arbitrator is satisfied that primarily the various regulations of FIFA are applicable to the substance of the case, and additionally Swiss law, should the need arise to fill a possible gap in the various regulations of FIFA.

VIII. MERITS

62. The main issues to be determined are:

(i) Is interest payable to the First Respondent on the balance of the outstanding amount paid by the Appellant on 21 September 2022?

(ii) What is the appropriate contractual penalty to be applied?

(iii) Does the Second Respondent have standing to be sued?

A. Is interest payable to the First Respondent on the balance of the outstanding amount paid by the Appellant on 21 September 2022?

63. By way of reminder, on 21 September 2022, during the course of these appeal proceedings, the Appellant notified the CAS Court Office that it had paid the sum of "*EUR 707,676.35 (comprising EUR 643,342.14 as outstanding remuneration and EUR 64,334.21 as a penalty)*" on the same day, enclosing a bank transfer record for the same amount to an account in the name of the First Respondent, dated 21 September 2022.

64. Further to a request from the CAS Court Office, on 30 September 2022, the First Respondent confirmed receipt of the payment of EUR 707,676.35, but maintained that the following amounts remained outstanding:

"*(a) 5% (five percent) interest per annum on the amount of EUR 643,342.14 (Six Hundred Forty-Three Thousand Three Hundred and Forty-Two Euros and Fourteen Cents) as from July 1st, 2021, until the date of effective payment;*

(b) The amount of ***EUR161, 671.89 (One Hundred Sixty-One Thousand Six Hundred Seventy-One Euros and Eighty-Nine Cents) net****, as contractual penalty;" (emphasis in original)*

65. As noted, the amount outstanding (being the balance of the second instalment set out at clause 2 b) of the Settlement Agreement), which was originally part of the dispute, was EUR 643,342.14, and, therefore, upon payment of the same on 21 September 2022, the only issue in relation to the outstanding amount was the question of the payment of interest on that amount. The question of the penalty that should be payable will be addressed at the appropriate section of this Award.

66. The Appellant did not comment on interest when confirming the payment, but it was clear that its intention when making the payment was to cover what was agreed to be the full amount outstanding under the Settlement Agreement.

67. The First Respondent, as noted above, reiterated its claim for interest to be awarded at the rate of 5% *per annum* from the day following the date the amount fell due for payment (1 July 2021) until the date of effective payment, by which it is taken to mean calculated up to the date the Appellant makes payment of the outstanding interest.

68. The Sole Arbitrator notes that the Appealed Decision states that interest is payable and sets the rate as 5% *per annum* as from 1 July 2021. The Sole Arbitrator further notes that this is, in turn, accepted by the Appellant given that the requests for relief in its Appeal Brief states, *inter alia*, as follows:

"*1. The decision rendered by the FIFA Players' Status Chamber on 5 April 2022 is set aside and replaced by an arbitral award holding as follows:*

"FC Porto shall pay Club América:

a. EUR 643,342.14 as outstanding remuneration ***plus 5% interest per annum as from 1 July 2021 until the date of effective payment****; and*

b. EUR 64,334.21 as penalty;

Any further claims of Club América are rejected."

[…]" (emphasis added)

69. It follows, therefore, that there is no dispute between the Appellant and the First Respondent that interest at the rate of 5% *per annum* over the amount of EUR 643,342.14 is owed as from 1 July 2021. The question therefore arises as to the date interest should run to.

70. In this regard, the Sole Arbitrator does not agree that interest should run until the date of effective payment of the sum of interest by the Appellant, because the principal sum has now been paid (on 21 September 2022) and therefore the First Respondent's entitlement to interest ceases at that point.

71. Therefore, the Appellant has to pay interest at the rate of 5% *per annum* on the sum of EUR 643,342.14 which is calculated from 1 July 2021 until 21 September 2022 and amounts to the sum of EUR 39,481.82.

B. What is the appropriate contractual penalty to be applied?

72. The Sole Arbitrator now turns to the next issue to be determined, which remains a matter of dispute between the Parties, and that is what is the appropriate contractual penalty to be applied.

73. By way of reminder, clause 5 of the Settlement Agreement (the "Penalty Clause") sets out the following:

> "***5. PENALTY***
>
> *If FC Porto fails to comply with the payment of any of the installments referred to in Clause 2 hereof, then, FC Porto will also be obliged to pay Club América a once-off penalty equivalent to 10% (ten per cent) of such installment, that is to say, € 339.0091,1* [sic] *(THREE HUNDRED THIRTY NINE THOUSAND NINETY ONE EUROS AND TEN CENTS) in case of the first installment, € 229.006,1* [sic] *(TWO HUNDRED TWENTY NINE THOUSAND SIX EUROS AND TEN CENTS) in case of the second installment and* ***€565.015,24*** [sic] ***(FIVE HUNDRED SIXTY FIVE THOUSAND AND FIFTEEN EUROS AND TWENTY-FOUR CENTS)*** *in case of the both installments, all the amounts being NET, that is free of any taxes, charges or withholding whatsoever (hereinafter, the "**Penalty**").*
>
> *Where applicable, FC Porto shall pay Club America the Penalty through wire transfer of immediately available funds to Club America's Bank Account no later than five (5) days after FC Porto's failure to comply with any installment on or before any of the Payment Dates.*
>
> ***THIS CLAUSE 5 CONSTITUTES AN ESSENTIAL AND DETERMINING REASON WITHOUT WHICH THE PARTIES WOULD NOT HAVE EXECUTED THE PRESENT SETTLEMENT AGREEMENT.***" (emphasis in original)

74. The position of the Parties is clear in respect of the interpretation of the Penalty Clause. The Appellant maintains that the penalty which should be applied, consistent with the intention of the Appellant and the First Respondent at the time of entering into the Settlement Agreement, was 10% of any outstanding amounts which, in the present case, would correspond to a penalty of EUR 64,343.21. In contrast, the First and Second Respondents both maintain that the wording of the Penalty Clause is clear and unambiguous; if the Appellant failed to comply with the payment in full of either of the

two instalments (or both), then it would be compelled to pay a penalty of 10% of such instalment (or instalments), in the amounts specified in the Penalty Clause.

75. By way of reminder, Article 8 of the Swiss Civil Code states that a party has the burden of proving the facts underlying its claim(s) as follows:

"*Unless the law provides otherwise, the burden of proving the existence of an alleged fact shall rest on the person who derives rights from that fact.*"

76. This position is further supported by the provisions of Article 13 para. 5 of the FIFA Procedural Rules Governing the Football Tribunal (2021 edition) which is referenced in the Appealed Decision and states:

"*A party that asserts a fact has the burden of proving it.*"

77. It follows therefore that each Party must fulfil its burden of proof to the required standard by providing and referring to evidence to convince the Sole Arbitrator that the facts it pleads are established.

78. The standard of proof which applies to proceedings of the FIFA judicial bodies is that the members of FIFA's judicial bodies decide on the basis of their "personal conviction" and CAS jurisprudence has consistently equalled this standard to the standard of "comfortable satisfaction". It is a standard that is higher than the standard of "balance of probability" but lower than the criminal standard of "proof beyond a reasonable doubt" (see CAS 2010/A/2172; CAS 2009/A/1920).

79. This is supported by and consistent with the Swiss Civil Code as set out in CAS 2014/A/3562:

"*The Panel observes that according to Swiss Civil procedure law the standard of proof to be applied is in line with such jurisdiction (see STAEHELIN / STAEHELIN / GROLIMUND, Zivilprozessrecht, § 18, N 38) and fully adheres to the above-mentioned reasoning in CAS 2011/A/2426 and will therefore also give such meaning to the applicable standard of "personal conviction"/"comfortable satisfaction"*."

80. Based on the foregoing, the Sole Arbitrator is content to adopt the standard of comfortable satisfaction, commonly adopted in CAS jurisprudence, as the standard of proof to apply in this case.

81. Finally, in accordance with Article R57 of the CAS Code, "[t]*he Panel has full power to review the facts and the law*", which means that the CAS appeals arbitration procedure provides for a *de novo* review of the merits of the case. Accordingly, as is well-established in CAS jurisprudence, a panel is not limited to deciding if the appealed decision is correct or not but, rather, its function is to make an independent determination as to the merits of the case.

82. The Sole Arbitrator has considered the various arguments put forward by all Parties and concluded, firstly, that the Appellant's suggestion that the Penalty Clause was clearly intended to mean that a penalty of 10% would be applied to any outstanding amount, as

opposed to the full instalment (or instalments), is not supported by any additional evidence. Therefore, a view must be taken based upon the drafting and interpretation of the Penalty Clause. In this regard, the Sole Arbitrator is satisfied that the wording of the Penalty Clause should not be interpreted as meaning that a penalty of 10% should be applied against any outstanding amounts. In this regard, a penalty is deemed payable if "*FC Porto fails to comply with the payment of any of the installments referred to in Clause 2*". This is not qualified to say in full or in part, which it could easily have been had that been the intention, and, therefore, it is reasonable to assume that any underpayment is a failure to comply with the payment of any of the instalments.

83. Secondly, the argument that there was no need to refer to 10% if the intention was for the penalty to be certain fixed amounts fails to recognise that the exact argument in reverse can also be applied; there would be no need to refer to the fixed amounts if the intention was for the penalty to simply be 10% of any outstanding amounts. Indeed, the fact that both the percentage and the fixed amounts are mentioned can be explained as demonstrating the basis for the amounts set out as penalty in the Penalty Clause. The Sole Arbitrator considers that the Appellant's argument is again undermined due to the lack of reference to 'outstanding amounts' in the Penalty Clause and finds that the penalty is clearly connected to a fixed amount referable to either instalment (or both).

84. The Appellant put forward an argument that the inter-party correspondence which dealt with the negotiation of the Settlement Agreement demonstrated that the Penalty Clause was not supposed to be linked to the fixed amounts because, in rejecting the Appellant's proposal to reduce it to 5%, the First Respondent made reference to the fact that the amount was "*not a fixed payment and it would only be executed in case of breach*". However, it appears a more convincing argument that the First Respondent's reference to it not being "*a fixed payment*" was because, in the context, it would seem to indicate that it was not a payment that would simply arise from the conclusion of the Settlement Agreement, but rather that it was conditional, not fixed, as it "*would only be executed in case of breach*". Alternatively, the fact that it was not a "*fixed payment*" can be just as easily explained as reflecting the fact that there was a reference to three different amounts, depending on whether the first or second instalments, or both instalments, were not paid.

85. The Sole Arbitrator finds that the drafting of the Penalty Clause is clear and unambiguous; the Appellant seeks to argue that there is a lack of clarity based on the set of circumstances it then puts forward, but the fact remains that there is no reference anywhere to 'outstanding amount' in the Settlement Agreement.

86. In light of the above, the Sole Arbitrator has taken into account the respective arguments and supporting evidence put forward by the Parties and has found, to his comfortable satisfaction, that the Penalty Clause determines that the Appellant must pay certain fixed amounts to the First Respondent, in the event it fails to satisfy the payment of the first, second or all instalments set out in clause 2 of the Settlement Agreement.

87. It follows, therefore, that the Sole Arbitrator finds, to his comfortable satisfaction, that, in relation to the Appellant's failure to pay the full amount of the second instalment set out in clause 2 b) of the Settlement Agreement, in the sum of EUR 2,260,060.96 by 30

June 2021, then a penalty of EUR 226,006 is deemed payable by the Appellant to the First Respondent.

88. Accordingly, the Appellant is found to have breached the Settlement Agreement in failing to pay the agreed sums to the First Respondent when the same fell due for payment and, therefore, the appeal is dismissed.

89. The Sole Arbitrator notes that the Appellant paid the amount of EUR 707,676.35 on 21 September 2022, made up of EUR 643,342.14 of outstanding remuneration (being the balance of the second instalment set out at clause 2 b) of the Settlement Agreement) and EUR 64,334.21 which relates to the amount of penalty it considered due.

90. Accordingly, the Sole Arbitrator further finds that the balance of the penalty in the sum of EUR 161,671.79 (EUR 226,006 less EUR 64,334.21 paid on 21 September 2022) is payable by the Appellant to the First Respondent.

C. Did the Second Respondent have standing to be sued?

91. The Second Respondent maintained that it did not have standing to be sued because the case exclusively related to a horizontal dispute between the Appellant and the First Respondent, none of the Appellant's requests for relief concern the Second Respondent and there is no scope for discretion for the FIFA PSC with regard to sanctions for non-compliance provided for in Article 24 of the FIFA RSTP. Furthermore, despite being asked to justify its inclusion, the Appellant has failed to provide any explanation or basis for why the Second Respondent has standing to be sued.

92. The Appellant does not provide any basis for the Second Respondent having standing to be sued, with its submissions limited to simply arguing that the Appealed Decision of the FIFA PSC was incorrect. Its main request for relief is confined to the horizontal dispute with the First Respondent (at paragraph 1), and the only requests directed at the Second Respondent (at paragraphs 2 and 3) are for the payment, together with the First Respondent, of the CAS arbitration costs and the Appellant's legal fees.

93. On 22 June 2022, the Second Respondent wrote to the CAS Court Office requesting to be excluded from the appeal proceedings due to a lack of standing to be sued, summarizing the points above.

94. On 24 June 2022, the Appellant responded to the CAS Court Office's request for its position on the Second Respondent's request to be excluded, *inter alia*, as follows:

"*Thank you for your letter of 22 June 2022, whereby the Appellant was invited to provide its position as to whether FIFA should be maintained as a party to the above-referenced proceedings.*

In this respect, the Appellant hereby confirms that it maintains its appeal against inter alia FIFA."

95. The First Respondent does not address the Second Respondent's standing to be sued.

96. Firstly, the Sole Arbitrator notes that there is no specific rule that defines standing to be sued in the FIFA Statutes, any other FIFA Regulations or the CAS Code. Therefore, it is necessary to turn to Swiss law.

97. Article 75 of the Swiss Civil Code provides as follows:

"*Any member who has not consented to a resolution which infringes the law or the articles of association is entitled by law to challenge such resolution in court within one month of learning thereof.*"

98. The question of standing to be sued is a matter which is regularly addressed in CAS jurisprudence, and there is a consensus that the party must have an interest in the dispute because something is sought against it. In CAS 2007/A/1329 & 1330, the panel held as follows:

"*Under Swiss law, applicable pursuant to Articles 60.2 of the FIFA Statutes and R58 of the CAS Code, the defending party has standing to be sued (légitimation passive) if it is personally obliged by the "disputed right" at stake (see CAS 2006/A/1206). In other words, a party has standing to be sued and may thus be summoned before the CAS only if it has some stake in the dispute because something is sought against it (cf. CAS 2006/A/1189; CAS 2006/A/1192).*"

99. The CAS jurisprudence consistently draws a distinction between vertical and horizontal disputes. A vertical dispute is categorised as a dispute in which a member association (such as the Second Respondent) has an interest in the dispute because it is of a nature which directly affects the membership relationship. These are often disputes regarding a disciplinary sanction imposed on a member, and the association has "*some stake in the dispute because something is sought against it*" (CAS 2007/A/1329 & 1330), often because a party challenges the imposition of a disciplinary sanction, and the association has a direct interest in the upholding of its disciplinary rules and processes. In contrast, horizontal disputes are routinely disputes between the members themselves, for instance, a contractual dispute between two contracting parties (for example, two clubs or a club and a player) in which there is an underlying decision of the association's arbitral body (in the context of the Second Respondent, the FIFA PSC or the FIFA Dispute Resolution Chamber). The question arises whether the association has an interest in the dispute if its only involvement is that there is a challenge against a decision taken by its arbitral body.

100. The Sole Arbitrator has considered the CAS jurisprudence carefully and finds that panels have generally found that an association does not have standing to be sued in an exclusively horizontal dispute. Such justification for finding that the Second Respondent does not have standing to be sued in horizontal disputes can be found in CAS 2015/A/3910 (paragraphs 141-142), *inter alia*, as follows:

"*… it appears to the Panel that FIFA in horizontal disputes is not best suited to defend the interests of its indirect members, since the outcome of the dispute between the indirect members will – in principle – not adversely affect FIFA. This being said, the Panel does not ignore a general interest of FIFA that its rules and regulations be*

applied consistently, uniformly and correctly vis-à-vis its (indirect) members. However, this general (and abstract) interest of FIFA in the correct application of its rules and regulations does not justify awarding it the standing of a party, since such interest will be – in most instances – be taken care of (and effectively be represented) by the Respondent in this procedure.

The criteria for awarding legal standing to be sued should not differ in vertical or horizontal disputes. In vertical disputes the association has (sole) standing to be sued because it is the party primarily concerned and the best representative of the interests of all other stakeholders affected by the dispute. The other stakeholders – in principle – only have a general and abstract interest that the associations' rules and regulations be applied to their respective co-member in an equal, consistent and correct way. This general interest – in principle – will be represented and taken care of by the association. Thus, there is no need – in vertical disputes – to direct the appeal against any other party than the association. Applying the same principles to horizontal disputes leads inevitably to the conclusion that the (sole) party having standing to be sued is the Respondent."

101. Simply criticising a decision under appeal and setting out where it is incorrect is not sufficient to establish a standing to be sued, the appeal must go further and indicate specific claims against the association (CAS 2005/A/835 and CAS 2005/A/942).

102. It is well established CAS jurisprudence, in cases relating to the Second Respondent, that it does not have standing to be sued where its role was simply to act as the adjudicating body that issued the decision under appeal and no actual claim is brought against it (CAS 2006/A/1192, CAS 2008/A/1517, CAS 2008/A/1708).

103. There is a very helpful commentary in CAS 2015/A/3999 and CAS 2015/A/4000 (paragraphs 76 – 83) which addresses these issues, in particular the application of Article 75 of the Swiss Civil Code in relation to the different categories of disputes, *inter alia*, as follows:

"*According to Swiss legal doctrine, article 75 of the Swiss Civil Code "does not apply indiscriminately to every decision made by an association (…). Instead, one has to determine in every case whether the appeal against a certain decision falls under Art. 75 Swiss Civil Code, i.e. whether the prerequisite of Art. 75 of the Swiss Civil Code are met in a specific individual case. If, for example, there is a dispute between two association members (e.g. regarding the payment for the transfer of a football player) and the association decides that a club (member) has to pay the other a certain sum, this is not a decision which can be subject to an appeal within the meaning of Art. 75 Swiss Civil Code. (…). A dispute between two football clubs, i.e. two association members, therefore, is not a dispute which can be appealed against under Art. 75 Swiss Civil Code. The sports association taking a decision is not doing so in a matter of its own, i.e. in a matter which concerns its relationship to one of its members, rather it is acting as a kind of first decision making instance, as desired and accepted by the parties" (BERNASCONI/HUBER, Appeals against a Decision of a (Sport) Association: The Question of the Validity of Time Limits stipulated in the Statutes of an Association, SpuRt, 2004, Nr. 6, p. 268 et seq.).*

When FIFA merely exercises its jurisdictional function, under the terms of article 22 of the FIFA Regulations, adjudicating disputes between two or more of its members, there is no place for FIFA's standing to be sued pursuant to the applicable Swiss law.

From another point of view and according to the consistent jurisprudence of the CAS, the Panel considers that decisions rendered by FIFA bodies acting like a court of first instance over disputes between two or more of its members, cannot be considered "resolutions" of an association within the scope of article 75 of the Swiss Civil Code.

In this respect, in fact, the Panel observes that article 75 of the Swiss Civil Code is intended to protect members of the association from any unlawful infringement by the association itself which is committed through "resolutions" adopted by the association in violation of the law or its bylaws. Conversely, CAS arbitration is meant to ensure a second level of jurisdiction against decisions rendered by FIFA decision-making bodies at first instance in disputes between individual members of FIFA.

It is within this meaning that the Panel shares the opinion of the consistent jurisprudence of the CAS that the application of article 75 of the Swiss Civil Code shall be limited to the socalled membership-related disputes. This is also consistent with Swiss legal doctrine according to which in matters covered by article 75, the party having standing to be sued is "only" the association, as pointed out by the panel in CAS 2008/A/1639, quoted by the Player.

In fact, CAS jurisprudence is unanimous in stating that in cases where FIFA imposes disciplinary sanctions (for example on a player or a club) or in all other cases where the matter concerns a membership related decision, FIFA would have capacity to be sued, according to article 75 of the Swiss Civil Code, as the association which passed the opposed decision.

Ultimately, the Panel believes that a decision by FIFA may be subject to challenge under the provisions of article 75 of the Swiss Civil Code when the relevant decision may be considered the expression of FIFA's administrative function, provided that the other requirements of article 75 are also met.

In consideration of the foregoing, the Panel has reached the conclusion that regarding the appeal filed by the Club, concerning a contractual dispute of employment-related nature between the Player and the Club, irrespective of any given definition of "membership-related decision", FIFA has no specific interest at stake in the sense clarified above nor is the Club seeking any judicial remedy "against" FIFA, nor does the dispute concern any administrative function by FIFA, since FIFA is only involved in the proceedings before CAS regarding the appeal filed by the Club as the adjudicating body in first instance."

104. Finally, the inclusion of the potential sanctions for non-compliance with the Appealed Decision does not, of itself, mean that the Second Respondent has some stake in the outcome of the proceedings. This is automatically included, pursuant to Article 24 of the RSTP, in decisions rendered by the FIFA arbitral bodies and is not based on any

discretion. Further, the Sole Arbitrator notes that the Appellant does not raise this as a ground of its appeal against the Second Respondent.

105. Therefore, given that the Appellant's requests for relief, at least as far as the appeal on the substantive matters, relate exclusively to the contractual dispute between the Appellant and the First Respondent, then the Sole Arbitrator finds, to his comfortable satisfaction, that the Second Respondent has no standing to be sued and, therefore, the appeal shall be dismissed with regard to the Second Respondent.

D. Conclusion

106. Based on the above, and having taken into account all the arguments put forward and the evidence supplied, the Sole Arbitrator finds that:

(a) the Appellant breached the Settlement Agreement in failing to make part of the payments due to the First Respondent set out therein;

(b) the Appellant has to pay to the First Respondent the following amounts:

i. EUR 643,342.14 as outstanding remuneration plus 5% interest per annum as from 1 July 2021 to 21 September 2022 (amounting to EUR 39,481.82); and

ii. EUR 161,671.79 as the balance of the amount owed under the Penalty Clause in the Settlement Agreement; and

(c) the Second Respondent does not have standing to be sued in the present proceedings.

107. Accordingly, the Appellant's appeal against the Appealed Decision is dismissed and the Appealed Decision is modified as set out above, noting that the Appellant has made some payments to satisfy part of its liability to the First Respondent during the course of these appeal proceedings which has also had the effect of stopping the entitlement to interest at the date of such payment.

IX. COSTS

108. Pursuant to Article R64.4 of the CAS Code, which is applicable to this proceeding:

"*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."

109. In addition, Article R64.5 of the CAS Code provides as follows:

"*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.*"

110. Following the outcome of these proceedings, the Sole Arbitrator finds that, in accordance with Article R64.4 of the CAS Code, the arbitration costs of these proceedings, in an amount to be subsequently notified to the Parties by the CAS Court Office, shall be borne by the Appellant.

111. For the reasons above, the Sole Arbitrator is also of the view that, pursuant to Article R64.5 of the CAS Code, the Appellant shall pay CHF 6,000 (six thousand Swiss francs) to the First Respondent as a contribution towards the legal costs and other expenses incurred in relation to these proceedings.

112. Finally, the Sole Arbitrator determines that the Second Respondent is not entitled to a contribution to its legal fees and expenses based on the standing practice of the CAS not to grant an international federation a contribution to its legal costs when it is not represented by external counsel. Therefore, the Appellant and the Second Respondent shall bear their own legal fees and other expenses incurred in relation to these proceedings.

****

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 14 June 2022 by Futebol Clube do Porto against the decision issued on 5 April 2022 by the FIFA Players' Status Chamber is dismissed.

2. Paragraph 2 of the decision issued on 5 April 2022 by the FIFA Players' Status Chamber is modified as follows:

   2. The Respondent, FC Porto, has to pay the following amounts to the Claimant [Club de Fútbol América]:

   a. *EUR 643,342.14 as outstanding remuneration plus 5% interest per annum from 1 July 2021 to 21 September 2022 (amounting to EUR 39,481.82); and*

   b. *EUR 161,671.79 as the balance of the amount owed under the Penalty Clause in the Settlement Agreement.*

3. The costs of the arbitration, to be determined and served to the Parties by the CAS Court Office, shall be borne by Futebol Clube do Porto.

4. Futebol Clube do Porto shall pay to Club de Fútbol América CHF 6,000 (six thousand Swiss francs) as a contribution towards the legal fees and expenses incurred in connection with these arbitration proceedings.

5. Futebol Clube do Porto and Fédération Internationale de Football Association shall bear their own legal fees and other expenses incurred in connection with these arbitration proceedings.

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

Seat of arbitration: Lausanne, Switzerland
Date: 5 April 2024

THE COURT OF ARBITRATION FOR SPORT

Edward Canty
Sole Arbitrator