TAS / CAS
TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

CAS 2022/A/8967 Red Bull New York, Inc. v. Alejandro Sebastián Romero Gamarra, Al-Taawoun Football Club & FIFA

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Lars Hilliger, Attorney-at-Law in Copenhagen, Denmark

Arbitrators: Mr Ulrich Hass, Law Professor in Zurich, Switzerland and Attorney-at-Law in Hamburg, Germany

Ms Anna Peniche, Attorney-at-Law in Mexico City, Mexico

in the arbitration between

Red Bull New York, Inc., New York, USA

Represented by Mr Matthew Bennett, Mr Stuart Baird and Ms Jennifer Norris – Centrefield LLP, Manchester, England

Appellant

and

Alejandro Sebastián Romero Gamarra, Argentina

Represented by Mr Ariel Reck and Gustavo Casasola – Reck Sportslaw, Buenos Aires, Argentina

First Respondent

and

Al-Taawoun Football Club, Saudi Arabia

Represented by Mr Mohamed Rokbani – R&A Sports Law Firm, Tunisia

Second Respondent

and

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

Represented by Mr Alexander Jacobs and Mr Roberto Nájera Reyes, Litigation Department at FIFA

Third Respondent

I. THE PARTIES

1. Red Bull New York, Inc. ("Red Bull New York, Inc.", the "Club" or the "Appellant") is the team operator of the New York Red Bulls (the "Red Bulls"), which is a professional football club participating in Major League Soccer, LLC ("MLS" or the "League"). MLS is affiliated with the United States Soccer Federation (the "USSF"), which in turn is affiliated with the Fédération Internationale de Football Association ("FIFA").

2. Alejandro Sebastián Romero Gamarra (the "Player" or the "First Respondent") is a professional football player of Argentinian nationality born on 11 January 1995. The Player is currently under contract with Al-Taawoun Football Club.

3. Al-Taawoun Football Club ("Al-Taawoun", the "New Club" or the "Second Respondent") is a professional Saudi Arabian football club affiliated with the Saudi Arabian Football Federation (the "SAFF"), which in turn is affiliated with FIFA.

4. FIFA (the "Third Respondent") is the world governing body of football, based in Zürich, Switzerland.

5. Collectively, the Player, Al-Taawoun and FIFA are referred to as the "Respondents". Red Bull New York, Inc., the Player, Al-Taawoun and FIFA are referred to as the "Parties".

II. FACTUAL BACKGROUND

6. The facts set out below are a summary of the main relevant facts as established by the Panel on the basis of the decision rendered by the Dispute Resolution Chamber of the FIFA Football Tribunal (the "FIFA DRC") on 28 March 2022 (the "Appealed Decision") and based on the Parties' written and oral submissions and evidence. Additional facts and allegations found in the Parties' submissions and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in its award only to the submissions and evidence it considers necessary to explain its reasoning.

7. MLS operates and runs the major professional association league in the USA and Canada and holds the playing registrations of all the players who play for teams affiliated with MLS. MLS enters into transfer agreements, loan agreements and playing contracts for and on behalf of the teams participating in MLS.

8. On 16 February 2018, the Player and MLS concluded a Standard Player Agreement valid as from 9 February 2018 until 31 December 2020 (the "Contract"). The Contract, stated, *inter alia*, as follows:

"*This Player Agreement, including any riders hereto, is subject to the terms of, and amendment by, the Collective Bargaining Agreement between MLS and the Major League Soccer Players Union (the 'CBA'). The terms of the CBA shall prevail over any conflicting term in this agreement except that the parties to this agreement may agree upon terms over and above the minimum requirements established in the CBA. […]*

3. Extensions. The Player agrees that he shall provide his services as a skilled soccer player during the Term of this agreement. The Parties to this Agreement have also agreed that MLS may, at its sole option, extend this Agreement pursuant to the attached Schedule.

[…]

9. *Player´s Unique Skill and Breach of Agreement; Dispute Resolution*
[…]
(b) The player and MLS agree that it is the specific intent of both parties that this Player Agreement remains valid and enforceable during entire Term of this Agreement (including by extension thereto set forth in the Schedule).The Player further agrees that he hereby waives any right he may otherwise have had pursuant to the FIFA Regulations Governing the Status and transfer of Football Players (including without limitation the Application regulations referenced therein) to unilaterally breach or terminate this Agreement pursuant to such Regulations (including without limitation any right he may have to so breach or terminate this agreement for sporting just cause or otherwise) prior to the end of the Terms of his Agreement, including options periods, if any.

(c) Expedited Arbitration

i. Expedited arbitration hearings under this Paragraph shall be held within Forty-eight (48) hours of the filling of a demand for such arbitration. No prior grievance steps shall be required.

ii. The arbitration shall take place in New York. Each party shall bear its own costs.

iii. MLS shall notify the Impartial Arbitrator, the Union and the Player and/or his agent, if any, in writing of the demand for an expedited arbitration as well as of the time and place for the hearing as soon as practicable,

iv. The failure of any party to attend the hearing as scheduled shall not delay the hearing, and the impartial Arbitrator shall proceed to take evidence and issue an award as though such party were present,

v. The impartial arbitrator shall issue a decision as soon as possible, but in no event more than twelve (12) hours after the hearing has been completed.

vi. If the Impartial Arbitrator finds that the player has breached this Agreement, the Impartial Arbitrator shall order that the Player not play, attempt to play or threaten to play soccer for any team other than a Team in the League.

vii. The decision of the Impartial Arbitrator shall be final and binding on the parties and may be immediately entered as a judgment in any court of competent jurisdiction and/or communicated to FIFA.

viii. The Player and MLS understand and agree that once a judgment has been entered pursuant to this Paragraph 9(c), such judgment may be immediately taken by either party to the relevant FIFA body or tribunal to be entered and enforced. It is further agreed that such a judgement may be submitted to any court having jurisdiction for the purpose of obtaining such equitable relief as may be appropriate, including but

not limited to a decree enjoining the Player from any further breach of this Agreement and from playing soccer -for any other person, firm, corporation of organ ration during the Term of this Agreement, without MLS posting a bond or other security or proving actual damages.

(d) All disputes arising under this agreement are disputes under the DBA. Except for a proceeding pursuant to the provisions of this paragraph 9, the parties agree that all disputes, relating to or arising out of this agreement shall be subject to the grievance procedures set forth in article 21 of the CBA.

(e) The Player and MLS hereby expressly waive all rights to bring for resolution onthe merits any claim, action, dispute or grievance to any FIFA body or tribunal, including any right(s-) either may have pursuant to the FIFA Regulations Governing the Status and "transfer of Football Players (Including without limitation the Application Regulations referenced therein and the dispute resolution, disciplinary and arbitration system set forth in Chapter XIV). The Player and MLS agree that once a judgment has been rendered pursuant to this Paragraph 9, either party may immediately take such judgment to the relevant FIFA body or tribunal to be entered and enforce.

10. Non applicability of FIFA Regulations:
(a) The Player hereby agrees that the following provisions in the FIFA Regulations Governing the Status and Transfer of Football Players (including the Application Regulations referenced therein) shall not apply to this Agreement:

i. *Chapter II. Non-Amateur Players, Article 4, Paragraph 2. The Player agrees and understands that this Agreement shall be for the Term of this Agreement set forth herein (which may be for less than one year and/or longer than five years, and which shall include any extensions thereto as set forth in the Schedule)*

ii. *Chapter VIII Maintenance of Contractual Stability, Article. 21, Paragraphs 1 and 2. The Player agrees that he hereby waives any right he may have pursuant to Chapter VIII, Article. 21, Paragraphs l and 2 of the FIFA Regulations Governing the Status and Transfer of Football Players to terminate this Agreement prior to the conclusion of the Term of this Agreement (as defined in Paragraph l, above.*

iii. *Chapter VIII, Maintenance of Contractual Stability, Article 24. The Player agrees that he hereby waives any right he may have pursuant to Chapter VIII Article 24 of the FIFA Regulations Governing the Status and Transfer of Football Players to terminate this Agreement for sporting just cause.*

iv. *Chapter XII. Special Provisions, Article 35. The Player agrees that the hereby waives any right he may have had pursuant to Chapter XII, Article 35 of the FIFA Regulations Governing the Status And Transfer of Football Players, and that such provision shall not apply to this Agreement. The. Player understands and agrees that this agreement shall be for the Term of this Agreement set forth herein, which may be longer Than three years, and which shall include any options set forth in the Schedule.*

v. *Chapter XIV. Dispute resolution, disciplinary and arbitration system, Article 42. The Player agrees that the sole and exclusive dispute resolution procedures available for*

resolving any dispute between himself and MLS are as set forth in the CBA and this Agreement. The Player therefore hereby waives any right to bring for resolution on the merits any claim, action, dispute or grievance to any FIFA body or tribunal, including any right(s) he may have pursuant to Chapter XIV, Article 42 of the FIFA Regulations Governing the Status und Transfer of Football Players. As set forth above, the Player Understands and agrees that once a judgment has been rendered pursuant to the mechanism and appeals process provided for above, either MLS or the Player may immediately take such judgment to the relevant FIFA body or tribunal or any court having jurisdiction to be entered and enforced.

…

11. Interpretation of this Agreement:
(a) This Agreement shall be construed in accordance with federal common labor law under Section 301 of the National Labor Relations Act and in accordance with generally accepted interpretive principles applicable in labor arbitration in the United States. The Parties agree that in the event there is a conflict between the terms of this Agreement and the rules, regulations and/or guidelines of FIFA, the terms of this Agreement shall prevail. The parties further agree that in the event a provision in this Agreement is inconsistent with or in contravention of a rule, regulation and/or guideline of FIFA, the provision shall be deemed valid and enforceable. Finally, the parties agree that the language of this Agreement shall be constructed neutrally and without regard for which party drafted the Agreement.

[…]"

9. Moreover, the Schedule to the Contract stated, inter alia, as follows:

" Compensation:
For performance of your services under this agreement we shall pay you the rate of:
1. *Fifty-nine thousand ninety and 90/100 Dollars (U.S. 59.090,90) per month, gross of taxes, from February 9, 2018, through December 31, 2018;*
2. *Sixty-six thousand six hundred sixty-six and 66/100 Dollard (U.S. 66.666,66), per month, gross of taxes, From January 1, 2019, through December 31, 2019.*
3. *Seventy Thousand Eight Hundred Thirty-Three and 33/100 Dollars (U.S. 70.833,33) per month, gross of taxes, from January 1, 2020, through December 31, 2020;*

Such compensation shall be paid in equal semi-monthly installments on the 15th and end of each month, and shall be pro-rated for any portion of a month that you are an MLS employee, unless otherwise stated.

[…]

2. Extensions.

a. Option through 2021. We may, by giving you written notice on or before December 1, 2020, extend your employment with us for an additional twelve months (i.e. until December 31, 2021) for a base salary of Nine-One Thousand Six hundred Sixty-Six and 66/100 Dollars (U.S. 91.666,66 per month, gross of taxes;

[…]"

10. Following the signing of the Contract, the Player started playing for the Red Bulls.

11. According to the Appellant, in February 2020, the alleged option to extend the Contract with the Player for a further 12 months until 31 December 2021 (the "Option") was duly exercised by the Appellant in writing, which letter, according to the Appellant, was delivered to the Player by hand, which is disputed by the Player.

12. During December 2020, and by the end of the 2020 season, the Mexican football Club, Club Tijuana, the Club and the Player apparently negotiated for a transfer of the Player to the Mexican club, but the negotiating parties never came to an agreement, and no such transfer was effectuated.

13. On 29 December 2020, the Club received a message from the Player´s representative, which stated, *inter alia*, "*But, very unlikely you will see Kaku for preseason as he is a free agent January 1st due to your club´s failure to notify the player correctly of the option.*"

14. On 15 January 2021, and without the Player having returned to the Appellant, the Player signed a new employment contract with the Second Respondent (the "New Contract"), valid as from the date of signing until 30 December 2023.

15. By letter of 20 January 202[1], MLS wrote, *inter alia*, as follows to the Player:

"*We write to you regarding recent media articles referring to you potentially being in contractual negotiations with Al-Taawoun of the Saudi Professional League. […]*
The Player Agreement
As you are aware, on February 6, 2018, you executed a Standard Player Agreement and Schedule with (the "Player Agreement") for an Initial guaranteed term until December 31, 2020. The Player Agreement also granted Major League Soccer ("MLS") the right (i) to extend the term of the Player Agreement for one additional year from January l, 2021 to December 31, 2021 (the "First Option") and (ii) if the First Option is exercised, to extend the Player Agreement for one additional year from January l, 2022 to December 3 l, 2022 (the "Second Option", together with the First Option, the "Options").
The form and content of the Player Agreement and the Options were fully in accordance with the terms of the collective bargaining agreement as agreed between MLS and the MLS Players Association, on behalf of all MLS players (including you). You entered into the Player Agreement of your own free will with full legal capacity and you expressly acknowledged the terms and lawfulness of the Options when you entered into the Player Agreement.
As you will be aware, MLS exercised the First Option by way of a letter dated February 19, 2020 (the "Option Letter") hand delivered to you on March 3, 2020 by Denis Hamlett, Sporting Director of NYRB. Mr. Hamlett also sent a copy of the Option Letter to your representative, Mr. Scott Pearson, via email on February 28, 2020. You did not dispute or raise any objection to the
First Option and continued to perform services in accordance with the terms of the Player Agreement for the remainder of the 2020 season. You have also continued to provide these services in the 2021 calendar year and have accepted payment in respect of the same in January 2021, clearly evidencing that you have accepted the exercise of the First Option and consented to the extension of the term of the Player Agreement until December 31, 2021.
Return to NYRB
It is the clear position of MLS and NYRB that the Player Agreement remains in full force and effect.

Given the current circumstances, both MLS and NYRB appreciate that you are not in a position to report to training with NYRB. However, both MLS and NYRB wish to confirm that you will be required to do so when instructed by NYRB.
Letter to Al-Taawoun and your authorized representative, Mr. Pearson
For your information, MLS has taken the pre-emptive step of contacting Al-Taawoun regarding this matter: (i) to put it on notice of the Player Agreement in place between you and MLS; and (ii) asking it to cease any contact it may have with you or your representative(s).
MLS has also contacted your authorized representative, Mr. Scott Pearson, to address any misunderstanding he may have regarding your obligations pursuant to the Player Agreement and the valid exercise of the First Option.

Conclusion
MLS and NYRB sincerely hope that the media reports referred to above are not accurate and would be grateful If you could confirm by return.
In light of those media reports, MLS and NYRB must put you on notice that they expect you to fully comply with and respect your contractual obligations under the Player Agreement, and look forward to your reporting back to NYRB for training when you are directed to do so."

16. And by letter of 28 January 202[1], MLS further informed the Player as follows:

"*We are disappointed that we have not received a response to our letter to you dated January 20, 2021 and our subsequent email of January 22, 2021.*

As you are aware, we also sent a letter to Al-Taawoun to put it on notice of your on-going contractual obligations to MLS and NYRB under your MLS Standard Player Agreement and requested it confirm it would cease any and all contact with you or your representatives. Regrettably, Al-Taawoun has also failed to respond to us.
In light of this, it is reasonable for MLS to assume that Al-Taawoun intends to pursue its interest in you and seek to enter into an employment contract with you. Indeed, MLS has also been informed by other sources that you may in fact have already entered into an employment contract with Al-Taawoun
In the event this is correct, you will be in unilateral and unlawful breach of your MLS Standard Player Agreement. In those circumstances, MLS and/or NYRB will have no option but to issue legal proceedings against you for breach of contract, alongside issuing proceedings against Al-Taawoun for inducing a breach of contract before the appropriate forum.
In this regard, please note that if you are proceeding under the misapprehension constructed by your representatives and/or the MLS Players Association, that you are no longer contracted to MLS due to an option in the MLS Standard Player Agreement not having been validly exercised to extend the term until December 31, 2021, then please be advised that such a contention is erroneous. As you very well know, the option was validly exercised and MLS will initiate a grievance in accordance with the terms of its collective bargaining agreement with the MLS Players Association to confirm this.
We sincerely hope that you have not in fact already unlawfully breached the MLS Standard Player Agreement and require you to confirm within 24-hours of receipt of this letter that: (i) you have not entered into an employment contract with Al-Taawoun; and (ii) that you intend to comply with the terms of your MLS Standard Player Agreement accordingly.
We await your urgent response and, in the meantime, reserve all of rights and remedies in this matter."

17. Also by letter of 20 January 202[1], MLS wrote, *inter alia*, as follows to the Second Respondent:

"We write on behalf of both Major League Soccer ("MLS") and New York Red Bulls ("NYRE") in respect of the Player.
MLS and NYRB are aware of recent media articles that have linked the Player with Al-Taawoun and which indicate that the Player is close to entering into an employment contract with Al Taawoun.
In the event that you are not already aware of the Player's employment status and contractual obligations, the Player remains contracted to MLS under an MLS Standard Player Agreement (the "MLS Contract") until December 31, 2021.
Consequently, given the aforementioned media reports, MLS puts Al-Taawoun on notice of the Player's contractual obligations to MLS / NYRB pursuant to the MLS Contract in the event that the Player, or any of his representatives: (a) approach Al-Taawoun in the future to discuss the possibility of the Player becoming registered with your club; or, alternatively (b) have already been in contact with AI-Taawoun in respect of becoming registered with your club.
In the event that Al-Taawoun has already been approached by the Player and/or his representative(s), or receives any such approach in the future, we hereby request that you inform the Player and/or his representative(s) that you are aware of this existence of the MLS Contract and the Player s obligations to MLS thereunder and that Al-Taawoun is therefore unable to have any contact with him.
Furthermore, and for the avoidance of any doubt, should the Player enter into an employment contract with Al-Taawoun, then he will have unilaterally and unlawfully acted in breach of the MLS Contract and AI-Taawoun will have unlawfully induced that breach.
In this instance, we request that you confirm by return that Al-Taawoun: (i) understands the Player remains under contract with MLS until December 31, 2021; and (ii) will not pursue an interest in the Player.
We trust that you will kindly take note of the Player's contractual obligations pursuant to the MLS Contract and MLS's legal rights in connection with it, including its rights pursuant to FIFA's Regulations on the Status and Transfer of Players and/or as we see fit, under the rules of the United States Soccer Federation and U.S. federal and state law."

18. And by letter of 28 January 202[1], MLS further informed the Second Respondent as follows:

"*We are disappointed that you have failed to respond to, or even acknowledge, our letter of January 20, 2021, and subsequent email of January 22, 2021, given the seriousness of this matter.*
In light of your failure to respond, we can only assume that Al-Taawoun intends to proceed with its interest in the Player and induce the Player to breach the obligations he owes to MLS under the MLS Contract. Regrettably, MLS has been informed by other sources that the Player may in fact have already entered into an employment contract with Al-Taawoun, In direct breach of the MLS Contract. Please note that in the event you are proceeding under a misapprehension created by the Player and/or his representatives and/or the MLS Players Association, that the Player is no longer contracted to MLS under the MLS Contract due to an option in the MLS Contract not having been validly exercised to extend the MLS Contract until December 31, 2021, then please be advised that such a contention is erroneous. The option was validly exercised and MLS will initiate a grievance in accordance with the terms of its collective bargaining agreement with the MLS Players Association to confirm this.

In the circumstances, unless you respond within 24-hours of receipt of this letter confirming Al-Taawoun has: (l) not entered into an employment contract with the Player; and (ii) no interest in the Player, we put you on notice that MLS and/or New York Red Bulls will commence legal proceedings against Al-Taawoun without further notice in the applicable forum for, inter alia, inducing the Player to breach the MLS Contract and to recover damages and costs from you as well as the imposition of sporting sanctions.
We await your urgent response and, in the meantime, reserve all of rights and remedies in this matter."

19. Also on 28 January 202[1], MLS informed the SAFF as follows:

"We write further to our recent exchange of WhatsApp correspondence in relation to the aforementioned Player and your member club, Al-Taawoun.
Please see the attached letter sent to Al-Taawoun earlier today, the contents of which are self-explanatory.
In the circumstances, we request you contact your member club, AI-Taawoun, to strongly advise
it not to proceed with any further interest in the Player, as otherwise it will be liable for inducing
a breach of contract and will face legal action from MLS and/or New York Red Bulls.
Furthermore, we request confirmation that, in light of the above and the attached, the Saudi Arabian Football Federation would respect the contractual relationship between MLS and the
Player and not act upon any request made by Al-Taawoun for the Player's ITC.
We await your urgent response and, in the meantime, reserve all of rights and remedies in this
Matter."

20. On 12 February 2021, the SAFF contacted the FIFA Players´ Status Chamber (the "PSC") and requested, in view of the pending dispute, the issuance of a provisional registration of the Player with the Second Respondent. On 18 February 2021, the PSC granted the requested provisional registration.

21. By letter of 15 February 2021 to the MLS Players Association (the "MLSPA"), MLS relied on the National Arbitration procedure provided for in Article 9(a) of the Contract, arguing that MLS and the Appellant had validly exercised the Option, and therefore the Player was bound by a valid agreement with MLS on behalf of the Appellant.

22. The independent arbitrator agreed upon, Mr Shyam Das (the "Independent Arbitrator"), heard the case and found, *inter alia*, that "[*the Player] has breached his SPA with MLS by signing with and playing for a team outside MLS in 2021, because MLS effectively exercised its option to extend his contract through December 31, 2021*."

23. On 2 April 2021, and based, *inter alia*, on the above, an award was issued by the Independent Arbitrator (the "DAS Decision") which stated: "[*The Player] breached his Player Agreement with Major League Soccer as set forth in the above Findings. The Player is ordered not to play, attempt to play or threaten to play soccer for any team other than a team in Major League Soccer, as provided in Paragraph 9(c) (vi) of his Player Agreement.*"

24. By letter of 13 April 2021, MLS informed the Player as follows:

"Re: MLS Playing Contract / Al-Taawoun

We refer to the expedited arbitration procedure commenced by MLS, for and on behalf of itself and New York Red Bulls ("NYRB"), against you (and the MLS Players' Association) pursuant to the terms of your MLS Standard Player Agreement dated February 6,2018 (the('MLS Contract"),

As you are aware, on April 2, 2021, an award was issued in that arbitration procedure (the "Award"), which held that MLS / NYRB validly exercised the option to extend the MLS Contract through to December 31, 2021, and that by signing for AI-Taawoun you have breached the MLS Contract. We attach a copy of the Award for ease of reference.

MLS and NYRB have always maintained that the MLS Contract remained in force at least until December 31, 2021, following the exercise of the option in February 2020. Indeed, you did not challenge the exercise of the option at all until you sought to move to Al-Taawoun nearly 12 months later. We made numerous attempts to remind you of your contractual obligations to MLS / NYRB and of the likely consequences that would follow if you entered into an employment contract with Al-Taawoun (or any other club outside of MLS); regrettably, however, you ignored our correspondence and proceeded to register with Al-Taawoun on or around February l, 2021.

The Award entirely vindicates the position of MLS / NYRB.

As you know, as a result of the finding that you unilaterally and unlawfully acted in breach of the MLS Contract, you have been ordered, by the Award, to not play, attempt to play or threaten to play soccer for any team outside of MLS, which is in accordance with Paragraph 9(c)(vi) of the MLS Contract.

To confirm, the Award is final and binding and you are legally obliged to comply with its terms. MLS / NYRB will now seek to enforce the Award and to recover substantial compensation from you arising from your breach.

This compensation shall be calculated by reference to a number of factors, including your transfer market value (and in this regard MLS / NYRB will rely on the terms of the offer made by Club Tijuana in December 2020, of which you were aware, for a guaranteed transfer fee of US $3,000,000 plus additional contingent payments, which sets a minimum threshold for the compensation that MLS / NYRB shall seek).

In addition to compensation, MLS / NYRB shall also request the imposition of sporting sanctions on you (namely a playing ban) due to the manner and timing of your breach.

We are separately contacting AI-Taawoun to notify them of the Award and that MLS / NYRB will also be taking action against them for ham induced your breach of contract.

Action Required

As further legal proceedings are now contemplated against you, please also ensure that you preserve all documentation that is relevant to this dispute (including all communications you and your representatives had with Al-Taawoun prior to your registration with them) and that any such documentation is not deleted, which includes all hard copy and electronic data.

In the meantime, we remind you of the terms of the Award and the order that you must not play for Al-Taawoun whilst the consequences of your breach of contract are being determined.

As you will note, this letter has been copied to the Saudi Arabian Football Federation and FIFA.

It follows that all rights of MLS and NYRB are reserved."

25. Moreover, on the same date, the Second Respondent was informed about the DAS Decision by MLS and its consequences.

III. PROCEEDINGS BEFORE THE DISPUTE RESOLUTION CHAMBER OF THE FIFA FOOTBALL TRIBUNAL

26. On 12 November 2021, the Club lodged a claim against the Player and the New Club before FIFA, requesting as follows:

"*(a) The claim is admissible.*

(b) The player unilaterally terminated the contract without just cause by not complying with the Arbitrator's Award and failing to remedy his breach; and must pay compensation to the Claimant based on its primary case in the sum of U5D 4,347,730.06 or USD3,845,544.02; or
Alternatively, the player must pay compensation to the Claimant based on its alternative case in the sum of USD 6,840,369.06 or U5D5.288,210.72; or

Alternatively, the player must pay to the Claimant such other compensation amount that the DRC deems appropriate; and

Interest is payable on the compensation award at a rate of 9% per annum or, alternatively, at a rate of 5% per annum from 1 January 2021 (i.e. the date that the First Respondent's breach); and

(c) The new club is jointly and severally liable to pay the compensation awarded to the Claimant;

(d) Sporting sanctions are to be imposed on the player, namely a six-month restriction on playing in official matches on account of the aggravating circumstances of the case, or alternatively a four-month restriction on playing in official matches;

(e) Sporting sanctions are to be imposed on the new dub, namely a ban on registering any new players, either nationally or internationally, for two entire and consecutive registration periods;

(f) In the event that any compensation (plus interest) due in accordance with this paragraph 146 is not paid to the Claimant within 45 days as from the notification by the Claimant of the relevant bank details to the players: (s) in respect of the First Respondent he shall not be permitted to pay in any official matches until payment has been made in full or the expiry of six months, whichever the earlier; and (U) in respect of the Second Respondent, it shall be banned from registering any new players, either nationality or internationally, up until the due amount is paid or for the duration of three entire and consecutive registration periods, whichever the earlier."

27. According to the Club, it had suffered significant losses as a consequence of the Player's unlawful termination of the Contract, and the Player was therefore required to pay compensation to the Club, for which payment the New Club should be held jointly and severally liable pursuant to Article 17(2) of the FIFA Regulations on the Status and Transfer of Players (the "FIFA RSTP"). Additionally, the Club requested that sporting sanctions be imposed on the Player and the New Club.

28. On 1 December 2021, the FIFA administration wrote to the Club, noting, *inter alia*, as follows:

"*We acknowledge receipt of your correspondence dated 12 November 2021 and its annexes in relation to the above-captioned matter.*

After a thorough analysis of the documentation in our possession, we understand that in the matter at hand, on 15 February 2021 you started arbitration proceedings before an independent arbitrator, Mr Shyam Das, in accordance with paragraph 9 (c) of the standard player agreement signed by the player in reference.

According to the information you have provided to us, said arbitrator appears to have already rendered an award, on 2 April 2021, with respect to the dispute opposing the parties.

From the aforementioned award, we in particular note that on page 8, inter alia, the following is stipulated:

'For the reasons set forth above, I find that Kaku has breached his SPA with MLS by signing with and playing for a team outside MLS in 2021, because MLS effectively exercised its option to extend his contract through December 31.2021.'

Bearing in mind the above, please note that in accordance with the general principle of res judicata, a deciding body of FIFA is not in a position to deal with the substance and/or the consequences of a matter already decided upon by another deciding authority.

In this context it should be noted that a party who chooses a certain course of legal remedy may not then decide to change the legal forum of the dispute, such conduct would fall within the framework of the principle of "forum shopping"

Consequently, we have to inform you that for a dispute that has already been decided upon by another deciding authority, FIFA would appear to be not competent."

29. By letter of 16 December 2021 to FIFA, the Club replied, *inter alia*, as follows, as referred to in the Appealed Decision:

"1.) No 'res judicata' - different issues under consideration

The issue determined by the arbitrator was narrowly limited and he solely decided 'whether [the player] remained under contract with MLS beyond December 31, 2020, which depends on whether MLS effectively exercised its option to extend his contract through December 31 2021. The dispute between the parties at that time was, therefore, whether MLS had effectively exercised an option to extend the Playing Contract. This is a separate and distinct issue as to whether the player thereafter unilaterally terminated the Playing Contract without just cause, and whether the new club induced him to do so.'

According to the Claimant the arbitrator- *"decided - with res judicata effect - that a binding contract existed, but he did not decide on issues such as unilateral termination without just cause or the consequences that follow from such termination"*

"2. Claimant has not brought any claim against Second Respondent outside of these FIFA proceedings"

The Claimant indicated that the new club has *"not yet been called to account in any fora for its inducement of the player to ignore the Arbitrator's Award and unilaterally terminate the Playing Contract without just cause."*

In this regard the Claimant mentioned that *"if the new club induced the player to terminate the Playing Contract without just cause, FIFA must be able to make Second Respondent answer for its wrongful actions. If FIFA were to hold otherwise, it would effectively permit 'foreign' clubs to act with impunity where a club and a player have sought to have any aspect of their dispute determined at a national level - and this would represent a 'lacuna' in FIFA's international dispute resolution system that would undermine FIFA's rules and its powers."*

"4. FIFA already deemed itself 'competent' in this matter and took steps to allow the first Respondent to register for Second Respondent

The PSC already confirmed FIFA's competence in respect of this matter. As noted in the Statement of Claim, in accordance with Article 15(6) of the FIFA Disciplinary Code, and following the issuance of the Arbitrator's Award, Claimant requested the assistance of the SAFF to ensure that First Respondent respected the Impartial! Arbitrator's order. Such request however, was completely ignored by the SAFF. Instead, the SAFF made a request of the PSC to provisionally register First Respondent for Second Respondent despite the USSF having rejected the ITC request (which it did on account of the fact that the employment relationship between Claimant and First Respondent had not expired). The PSC granted the SAFF's request. As such, despite Claimant following the dispute resolution process provided under the terms of the Playing Contract and the CBA, the PSC nevertheless intervened to allow First Respondent's provisional registration with Second Respondent.

The issuance of the ITC and the fact that the new club is affiliated to a different member association creates the international dimension. Under such circumstances, FIFA becomes competent to deal with the relevant contractual dispute, regardless of whether there is a recognised independent arbitration tribunal in the country concerned."

In conclusion, the Club requested the procedure to be continued, however, should FIFA maintain its position that it is not competent to hear this case, the Club requested FIFA "*to issue an appealable decision*".

30. The Chairperson of the FIFA DRC (the "Chairperson") initially analysed whether he was competent to deal with the case and found that the October 21 edition of the Procedural Rules Governing the Football Tribunal (the "Procedural Rules") was applicable, and pursuant to Article 19 par. 1 and 2 of the said rules, the Chairperson was to decide, in an expedited manner, whether the case at stake was affected by any preliminary procedural matters (i.e., *inter alia*, whether the FIFA DRC obviously does not have jurisdiction).

31. The Chairperson further observed that, in accordance with Article 23 par. 1, as read with Article 22 (1)(b) of the FIFA RSTP (March 2022 edition), the FIFA DRC is competent to deal with disputes between clubs and players with an international dimension.

32. However, the Chairperson further observed that the Club referred the issue as to whether its option as detailed in the Contract had been validly exercised to arbitration between MLS and the MLSPA with the Independent Arbitrator, who, on 2 April 2021, had issued a final and binding decision as per the expedited arbitration provisions provided for in the Contract,

determining that the Player *"breached his Player Agreement with MLS and is ordered to not play, attempt to play or threaten to play soccer for any team other than a Team in Major League Soccer, as provided in Paragraph 9(c)(vi) of his Player Agreement.*"

33. In this regard, the Chairperson observed that in the national arbitration proceedings and in the procedure before FIFA´s deciding bodies, an identity can been seen both in the object and in the cause of the request, based on which he determined that since a resolution had already been issued by an impartial arbitrator, he could not rule on a new decision in accordance with the general principle of *res judicata*.

34. Moreover, the Chairperson noted that a club deciding to bring forward a dispute before a local deciding body, rather than making use of the alternative dispute resolution process proposed within the legal framework of FIFA, must demonstrate consistency in relation to the choice of the course in action.

35. In this respect, the Chairperson further mentioned that a party who first decides to submit a dispute to a competent, specific, local deciding body and subsequently decides to submit this very same dispute to FIFA, should not be able to game the system by having multiple fora hear the same argument in the hope that one of them will hand down the judgment it wants. For example, a party should not be allowed to ask a national body to confirm that a contract has been breached without just cause and then, having obtained a favourable decision at national level, ask the DRC to set the compensation payable in the case. The Chairperson referred to the principle of *electa una via, non datur recursus ad alteram* and mentioned that in the present case, the Club seems to have elaborated and developed an inconsistent procedural strategy known as forum shopping.

36. Furthermore, it was noted that in accordance with Article 9(e) of the Contract, there is a clear waiver by the Club and the Player to bring "*for resolution on the merits any claim, action, dispute or grievance before the Football Tribunal*."

37. Based on the above, it was decided that the Club´s claim was to be considered inadmissible.

38. Thus, on 28 March 2022, the FIFA DRC rendered the Appealed Decision and decided that:

"*1. The claim of the Claimant, New York Red Bulls, is inadmissible.*

2. This decision is rendered without costs."

39. On 27 May 2022, the grounds of the Appealed Decision were notified to the Appellant.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

40. On 17 June 2022, the Appellant filed its Statement of Appeal in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration, 2021 edition (the "CAS Code"). In addition, the Appellant nominated Mr Ulrich Haas as an arbitrator in this matter.

41. On 4 July 2022, the Respondents jointly nominated Ms Anna Peniche as an arbitrator under this procedure.

42. On 15 July 2022, the Appellant filed its Appeal Brief in accordance with Article R51 of the CAS Code.

43. By letter dated 30 August 2022, the Parties were informed by the CAS Court Office that the Panel had been constituted as follows:

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

44. On 19 September 2022, the First Respondent filed his Answer in accordance with Article R55 of the CAS Code.

45. On 21 and 23 September 2022, the Third Respondent and the Second Respondent, respectively, filed their Answers in accordance with Article R55 of the CAS Code.

46. On 11 October 2022, the Parties were informed that the Panel had decided to hold a hearing in this matter and that the hearing should be conducted by video conference.

47. On 24 November, 1 December, 3 December and 5 December 2022, respectively, all Parties signed and returned the Order of Procedure.

48. On 8 December 2022, a hearing was held via Cisco WEBEX.

49. In addition to the members of the Panel, Ms Sophie Roud, Counsel to the CAS, and the following persons attended the hearing:

For the Appellant:

Mr Matthew Bennett – Legal Counsel for the Appellant

Mr Stuart Baird – Legal Counsel for the Appellant

Ms Jennifer Norris – Centrefield LLP – Legal Counsel for the Appellant

Mr Pete Tringali – New York Red Bulls – Observer from the Appellant

Ms Judith Eckl – New York Red Bulls – Observer from the Appellant

Ms Kari Choen – New York Red Bulls – Observer from the Appellant

Mr Doug Burns – MLS – Observer from the Appellant

For the First Respondent:

Mr Ariel Reck – Legal Counsel for the First Respondent

Mr Gustavo Casasola – Legal Counsel for the First Respondent

For the Second Respondent:

Mr Mohamed Rokbani – Legal Counsel for the Second Respondent

For FIFA:

Mr Alexander Jacobs, Senior Legal Counsel

Mr Roberto Nájera Reyes, Senior Legal Counsel.

50. At the outset of the hearing, the Parties confirmed that they had no objections to the appointment of the Panel.

51. The Parties were afforded ample opportunity to present their case, submit their arguments and answer the questions posed by the Panel.

52. After the Parties' final submissions, the Panel closed the hearing and reserved its final award. The Panel took into account in its subsequent deliberations all the evidence and arguments presented by the Parties although they may not have been expressly summarised in the present Award.

53. Upon the closure of the hearing, the Parties expressly stated that they had no objections in respect of their right to be heard and to have been treated equally and fairly in these arbitration proceedings.

V. THE PARTIES' SUBMISSIONS AND REQUESTS FOR RELIEF

54. The following outline of the Parties' requests for relief and positions is illustrative only and does not necessarily comprise every contention put forward by the Parties. The Panel has, however, carefully considered all the submissions and evidence filed by the Parties with the CAS, even if there is no specific reference to such submissions or evidence in the following summary.

A. The Appellant

55. In its Appeal Brief of 15 July 2022, the Appellant requested the CAS to decide that:

I. The Appeal is admissible and well-founded; and

II. The [Appealed Decision] is set aside in its entirety; and

III. The CAS is entitled to assess the merits of the New Claim and renders a new decision stating that:
a. The First Respondent unilaterally terminated the Playing Contract without just cause; and
b. The First Respondent must pay compensation to the Appellant based on its primary case in the sum of USD 4,347,730.06 or $3,845,544.02; or
c. Alternatively, the First Respondent must pay compensation to the Claimant based

on its alternative case in the sum of USD 6,840,369.06 or $5,288,210.12; or
d. Alternatively, the First Respondent must pay to the Claimant such other compensation amount that the CAS deems appropriate; and
e. Interest of 5% per annum [or, alternatively, 9% per annum) is payable on the compensation award from the date of the unilateral termination; and
f. The Second Respondent is jointly and severally liable to pay the compensation award; and
g. Sporting sanctions are to be imposed on the First Respondent, namely a six-month restriction on playing in official matches on account of the aggravating circumstances of the case, or alternatively a four-month restriction on playing in official matches; and
h. Sporting sanctions are to be imposed on the Second Respondent, namely a ban on registering any new players, either nationally or internationally, for two entire and consecutive registration periods; or

IV. Alternatively, the matter is remitted to the DRC for it to render a decision on the New Claim;

V. The Respondents shall pay in full, or in the alternative, a contribution towards:
a. the costs and expenses, including the Appellant's legal costs and expenses, pertaining to these appeal proceedings before the CAS; and
b, the costs and expenses, including the Appellant's legal costs and expenses, pertaining to the proceedings before the Third Respondent."

56. In support of its requests for relief, the Appellant submitted, *inter alia*, as follows:

Procedural issues

- By summarily dismissing the Appellant´s claim, allegedly exercising his powers under Article 19 of the Procedural Rules, the Chairperson acted outside of the powers afforded to him since the said provision only allows him to assess, as a preliminary matter, whether "*the relevant chamber obviously does not have jurisdiction*" in respect of a claim, and not whether the claim itself is admissible.

- Lack of jurisdiction cannot be compared to a situation of (in the present case wrongly assumed) lack of admissibility based on an (alleged) res judicata.

- The scope of Article 19 of the Procedural Rules is extremely narrow, and issues relating to the admissibility of a claim (including *res judicata*) and the merits of a claim are not suitable matters to be determined by the Chairperson as a preliminary issue under the said provision.

- For the mere reason that the Chairperson confirmed that the FIFA DRC is competent to deal with disputes between clubs and players with an international dimension, there is no basis for the Chairperson to conclude that "*the relevant chamber obviously does not have jurisdiction*" under Article 19 of the Procedural Rules.

- As such, the Chairperson was required to submit the claim for consideration by a fully constituted FIFA DRC as to its admissibility and merits.

- Based on that, the Appealed Decision exceeds the scope of Article 19 of the Procedural Rules in this regard and was not a decision the Chairperson was entitled to make.

- If such a decision is upheld, the Appellant will suffer serious unjustified prejudice, which is why the Panel is requested to overturn the Appealed Decision and replace it with a decision of its own on the Appellant´s claim, using its powers under Article R57 of the CAS Code.

Admissibility/Jurisdiction issues

- The Appellant´s claim before FIFA is an entirely new claim that has not yet been subject to a binding decision in any forum or jurisdiction and therefore cannot possibly be inadmissible on the basis of the principle of *res judicata*.

- The issue before the Independent Arbitrator was limited to the question of the presence of a valid exercise of the Option included in the Contract, while what the Appellant now is seeking is compensation for the unilateral termination of the Contract by the Player after the DAS Decision had been rendered.

- The principle of *res judicata* is a well-established part of Swiss procedural public policy and applies "*[w]hen the claim in dispute is identical to that which was already subject of an enforceable judgement (identity of the subject of the dispute). This is the case when both proceedings involve the same parties and the same matter in dispute. The identity must be understood from a substantive and not grammatical point of view, so that a new claim, no matter how it is formulated, will have the same object as the claim already adjudicated.*" (ATF 140 III 278 at 3.3; ATF 139 III 126 at 3.2.3).

- In this context, Swiss law has adopted the so-called "*triple identity*" test, referring to the same subject-matter, the same legal grounds and the same parties, which principle has been confirmed in various CAS cases.

- The Appellant´s claim does not "meet" such a test, not even regarding a single limb of such a test, and accordingly, *res judicata* cannot apply to the Appellant´s claim before FIFA.

- First of all, the subject-matter before the Independent Arbitrator and the subject-matter before FIFA are different, since the case before the Independent Arbitrator related to the narrow issue of whether the Option was validly exercised and the validity of the said Option in order to clarify the duration of the Contract and to facilitate the reintegration of the Player in the Appellant´s team.

- The claim before FIFA refers to facts that happened after the DAS Decision was issued, i.e. the Player terminating the Contract and actively playing for Al-Taawoun, rather than returning to the Appellant, and FIFA was requested to determine what the consequences of such actions of the Player and his New Club in this regard should be.

- In addition, the Independent Arbitrator never decided on any issue regarding the loss caused by the Player and the New Club or the compensation due to the Appellant.

- Secondly, the legal grounds relied upon to substantiate the claim before FIFA diverge materially from those relied upon before the Independent Arbitrator.

- Before the Independent Arbitrator, MLS sought to enforce Article 2 and Article 3 of the Contract, while before FIFA, the Appellant relied on Articles 13, 17 and 18 (5) of the FIFA RSTP regarding the unilateral termination of the Contract by the Player and the question of compensation and sporting sanctions.

- The scope of the procedure before the Independent Arbitrator was necessarily limited by virtue of the narrow and specific arbitration agreement set out in Article 9 of the Contract, and the reliefs sought before FIFA did not fall, and could not have fallen, within the scope of such proceedings. Thus, there is demonstrably no overlap, let alone the required "identity" between the causes of action or requests for relief and their underlying legal grounds.

- Thirdly, the parties before the Independent Arbitrator were MLS and the MLSPA, whereas the parties before FIFA were the Appellant, the Player and Al-Taawoun, based on which the required "identity of parties" is not present either.

- Thus, in issuing the Appealed Decision, the Chairperson has erred by failing to consider the dispute resolution provisions of the Contract in their proper context (i.e. as a whole and not on a clause-by-clause basis), which is necessary to ensure that the provisions are properly applied and the parties´ respective rights thereunder are fully respected.

- It was always the understanding of the parties to the Contract, as per the terms of the same, that MLS/the Appellant would be entitled to request the intervention of FIFA to determine the ultimate consequences of any breach (and subsequent unilateral termination) of the Contract by the Player after such breach had been determined via arbitration proceedings at national level, which is consistent with principles set out in other CAS cases.

- Moreover, as the Independent Arbitrator does not have jurisdiction over the Second Respondent, the inducement of the New Club would go unpunished, which cannot be the true intention of FIFA given that contractual stability is one of the fundamental pillars underpinning the FIFA RSTP.

- In addition, the Appellant would be forced to seek recourse against the Respondents in the civil courts, which would, *inter alia*, be contrary to the general prohibition against those subject to FIFA´s rules seeking recourse before the ordinary courts.

- Based on the above, the Appealed Decision must be overturned by the CAS.

- It is further noted that the Chairperson´s allegations of Forum Shopping are unjustified, and the conduct of the Appellant is totally in line with the provisions of the Contract and the FIFA RSTP.

- In this regard, it is also noted that FIFA was in fact willing to intervene in the matter when granting the Player´s provisional registration with his New Club, despite valid objections having been raised by the Appellant and MLS via the USSF.

- The principle of FIFA determining on the issue of compensation and sporting sanctions, following the issue of liability being determined by an NDRC, is already confirmed by the CAS, *inter alia* in the Mutu cases, and the same principle should be applied in this case.

- Finally, the Chairperson was wrong in finding that the Appellant waived its right to bring any claim to any FIFA body or tribunal with reference to Article 9(e) of the Contract, first of all since the Appellant was not a party to the Contract.

- Furthermore, the claim before FIFA does not relate to the "merits" of the dispute, but to the consequences which followed the Player´s decision to disregard the DAS Decision, which in any case falls outside the scope of the alleged waiver in the said article.

- Moreover, and pursuant to Swiss law, the parties to an employment contract are not entitled to contractually waive their respective rights in relation to the termination of such a contract, and given that FIFA is the only competent forum in which the Appellant is able to seek compensation from the Player and the Second Respondent, the Appellant cannot be deemed to have waived this right.

- Based on all the above, it is clear that the claim was admissible and should have been determined by the FIFA DRC, and the Appealed Decision must consequently be overturned, and the Panel must proceed to consider the Appellant´s substantive claim, i.e. the termination and compensation issues.

Termination issues

- The basis for the Appellant´s standing to bring a claim against the Player and the Second Respondent in this case is undisputed, even by the FIFA DRC, despite the Appellant not being a contracting party to the Contract, and in any case in line with the manner football is organised in the USA.

- This is also in line, *inter alia*, with FIFA and CAS jurisprudence stating that a non-contracting party can still efficiently be a party to a contract and enforce its terms if the facts of the case and the nature of the contractual relationship between the parties support this (CAS 20211/A/2380).

- In this regard, it is noted that it was clearly the intention of MLS, the Appellant and the Player that the Appellant would be entitled to enforce its right under the Contract.

- The issues for determination in the present dispute are (i) whether the Player was entitled not to return to the Appellant; (ii) whether the Player was entitled to terminate the Contact and play with his New Club; and what the financial and disciplinary consequences of such a behaviour by the Player and the Second Respondent are.

- The Independent Arbitrator held in the DAS Decision that the Option was validly exercised by the Appellant, and therefore the Player should return to the Appellant. However, the Player instead decided to terminate the Contract and stay with the Second Respondent.

- Accordingly, the consequences of such a decision should be imposed on the Player in accordance with Article 17 of the FIFA RSTP, and he should be ordered to pay compensation to the Appellant as set out below.

- The claim against the Second Respondent is brought in accordance with Article 17(2) of the FIFA RSTP as the Second Respondent is the Player´s New Club.

- Given the circumstances of the case, there can be no question that the Second Respondent was informed about the Player´s contract with the Appellant and knowingly induced the termination of the same, based on which it is to be considered jointly and severally liable for the payment of the compensation to be awarded to the Appellant by the Panel.

Compensation issues and sporting sanctions

- The DAS Decision contains a binding decision to the effect that the Option was validly exercised. As such, the Player terminated the Contract without just cause, which has caused a significant loss to the Appellant, and the Player is therefore liable to pay compensation in accordance with Article 17 of the FIFA RSTP.

- The Panel has a considerable scope of discretion in determining the amount of compensation that is to put the Appellant in the position in which it would have been had the Contract not been terminated by the Player.

- With regard to loss of transfer, it must be noted that in December 2020, the Appellant had reached an agreement with Club Tijuana regarding the transfer of the Player for a guaranteed transfer fee of USD 3,000,000 and various contingent payments, but as the Player and the said club did not agree on his personal terms, the transfer was never effectuated.

- As the Player signed his new contract with the Second Respondent already on 15 January 2021, in application of the positive interest principle, the starting point for calculating damages in this case must be the transfer compensation the Appellant would have received from Club Tijuana had the Player not terminated the Contract.

- In this case, there is a clear logical nexus between the Player´s termination of the Contract and the transfer to Club Tijuana not being effectuated, which is why the Appellant should be awarded the said compensation, which principle is consistent with CAS jurisprudence (CAS 2019/A/6463).

- The amount of compensation in this regard is set to USD 3,200,000 including various contractual bonuses.

- To the extent that the Panel does not agree with the above, the Appellant should be awarded compensation based on the loss of the Player´s services and replacement value, to be assessed in accordance with the costs the Appellant would have to incur to acquire the services of a player of analogous value to the Player.

- Based, *inter alia*, on the figures set out during the negotiations with Club Tijuana, the value of the Appellant´s loss of the Player´s services for the remaining period of the Contract amounts to USD 5,692,666 (i.e. the transfer fee, remuneration and intermediary costs payable to hire the services of a player of analogous value/standing for the remaining contractual period), which amount must be reduced by the saved remuneration of the Player, which results in a final amount of compensation payable to the Appellant of USD 4,592,666.10.

- Moreover, and in any case, the Appellant is entitled to a refund of the gross salary paid to the Player for the period 1 January 2021 to 15 February 2021, during which period the Player did not perform any services or duties to the Appellant, based on the (wrong) belief that the Contract had ended.

- With regard to the specificity of sport, it must be remembered that it is not an additional overhead of compensation, but a correcting factor which allows a judging authority to take into consideration other objective elements that are not envisaged under the other criteria of Article 17 of the FIFA RSTP.

- In this case, there are several relevant issues for consideration: (i) the Player´s behaviour and conduct, *inter alia*, in not objecting to the Option having been exercised, based on which the Appellant considered the Player an important part of its team for the new season and even negotiated a possible transfer to another club, (ii) the timing of the termination, i.e. shortly before the beginning of the new season, and (iii) the status of the Player, including the fact that he was one of the Appellant´s designated players and a key member of the team.

- Based on that, it is appropriate to award the Appellant an additional indemnity amount under the specificity of sport criterion, which should be USD 1,002,186 (based on six months´ net salary under the first year of the Player´s new contract with the Second Respondent or, alternatively, USD 549,999.96 (based on the six months´ salary the Appellant would have paid the Player if he had honoured the Contract as a player for the Appellant during the 2021 season).

- It follows from Article 17(2) of the FIFA RSTP that the Second Respondent is jointly and severally liable for this compensation.

- In addition to the compensation awarded, the Appellant should be awarded interest on the entire amount of at a rate of 9% p.a. if the Panel finds that the laws of the State of New York are applicable, and at a rate of 5% p.a. if the Panel finds that Swiss law should apply.

- Finally, the Panel should, and has the power to, impose sporting sanctions on the Player and the Second Respondent in accordance with Article 17(3) and (4) of the FIFA RSTP, given that the termination occurred during the Protected period of the Contract.

B. The First Respondent

57. In its Answer of 19 September 2022, the First Respondent requested the CAS to rule as follows:

"*1. To confirm FIFA's decision declining its jurisdiction.*

2. On a subsidiary basis if CAS upholds the appeal and enters into the merits of the dispute (instead of referring the case back to FIFA), we request the court to decide that the NYRB employment contract terminated on 31 December 2020 due to the invalidity of the unilateral option.

3. On a subsidiary basis, if CAS decides that a breach of contract was committed by the player. To award a maximum of USD 359.999.- as compensation to NYRB and to reject the request for sporting sanctions.

4. To allocate legal costs and expenses of these proceedings to be borne by the appellants and impose a contribution towards legal costs incurred by this party in the amount of CHF 20.000."

58. In support of its requests for relief, the First Respondent submitted, *inter alia*, as follows:

Admissibility/Jurisdiction issues

- The FIFA RSTP offers the parties to a dispute a forum to hear certain types of disputes, and Article 22 states, *inter alia*, as follows:
"Without prejudice to the right of any player, coach, association, or club to seek redress before a civil court for employment-related disputes, FIFA is competent to hear:
a) disputes between clubs and players in relation to the maintenance of contractual stability (articles 13-18) where there has been an ITC request and a claim from an interested party in relation to said ITC request, in particular regarding the issue of the ITC, sporting sanctions or compensation for breach of contract;
b) employment-related disputes between a club and a player of an international dimension; the aforementioned parties may, however, explicitly opt in writing for such disputes to be decided by an independent arbitration tribunal that has been established at national level within the framework of the association and/or a collective bargaining agreement. Any such arbitration clause must be included either directly in the contract or in a collective bargaining agreement applicable on the parties. The independent national arbitration tribunal must guarantee fair proceedings and respect the principle of equal representation of players and clubs;[…]".

- As such, three different potential jurisdictions arise from the wording of the rule: (i) ordinary employment-related courts, (ii) the FIFA DRC and (iii) an arbitral tribunal established at national level (an "NDRC").

- In order for parties to seek redress before a national arbitrational tribunal, an arbitration clause referring hereto must be included in the contract between the parties or in a collective bargaining agreement, and the tribunal must guarantee fair proceedings and respect the principle of equal representation of players and clubs.

- The core question in this case is how Article 22(1)(b) of the FIFA RSTP should be interpreted in light of Article 22(1)(a) of the same regulations.

- In this case, the dispute should have been analysed by the FIFA DRC only since the dispute became a dispute related to an ITC. Hence, the DAS Decision issued by the Independent Arbitrator should not be considered by FIFA.

- Another issue is that the Appellant was still able to choose the forum to solve the dispute, but such a choice also determined the applicable law, the consequences and extent of the claim as it is held under Swiss law that the selection of forum also represents an indirect selection of the applicable law, or a choice of law "*by reference*".

- Under this interpretation, when the provisional registration of the Player was granted, the Appellant had several choices:

  a) To file against the Player and the Second Respondent on the basis of Article 22(1)(a) of the FIFA RSTP, in which case FIFA, applying the same regulations, would have solved the issues at stake: i.e. the validity of the Option, the requested return of the Player to the Appellant and, in case an unjust termination was found to have occurred, the applicable compensation, the joint liability and finally the issue of possible sporting sanctions.
  b) To seek redress before an ordinary court competent to deal with employment-related disputes, in which case US law would have to be applied, which does not consider the joint liability of the new club or include any power to apply sporting sanctions.
  c) To initiate arbitration as per the provisions set out in the Contract, which is the route chosen by the Appellant, which meant that the claim was decided in application of US regulations, explicitly omitting essential articles of the FIFA RSTP, and analysing only whether the Option was duly notified or not, without analysing its validity under the FIFA RSTP and/or the applicable compensation, joint liability and potential sporting sanctions.

- Once the Appellant made a choice as to the forum, it made a choice as to the applicable law and thus set the limit of its request.

- As such, it is not possible to subsequently change the forum and the applicable law, to widen its scope of its request and obtain what the Appellant knew it was not possible to achieve in that previous forum.

- The Mutu cases, as referred to by the Appellant, are not applicable to the current version of the FIFA RSTP, and the former "two-step" procedure cannot be applied any more under the now applicable edition of the FIFA RSTP.

- As such, once a national forum is selected that has no jurisdiction over a player´s new club, it is not possible for a claimant to file its claim against the new club at a later date, seeking its joint liability via the FIFA procedure.

- These considerations are especially relevant in the present case, where the arbitration before the Independent Arbitrator was initiated only after the Player´s provisional registration with the Second Respondent and the Appellant was thus totally conscious of the potential consequences and differences between filing a claim before FIFA or before the Independent Arbitrator.

- In the present case, the Appellant is acting against its own previous steps in breach of the legal principle of *venire contra factum proprium*, which constitutes a clear case of *forum shopping*, which cannot be accepted.

- In any case, and with regard to the Player, the principle of *res judicata* also applies with regard to the Appellant´s claim.

- The Appellant´s claim before the Independent Arbitrator was clearly a claim for breach of contract, and in the Contract the two parties had expressly waived all rights to bring a claim before any FIFA body or tribunal and further expressly agreed that certain, otherwise applicable, provisions of the FIFA RSTP should not apply to the Contract.

- The argument by the Appellant that it never waived such rights since it is not a party to the Contract must be dismissed since, pursuant to the franchise system of MLS, the rules that bind MLS also bind the clubs.

- Based on that, the Independent Arbitrator issued an award deciding that the Player breached the Contract and ordered the Player, *inter alia*, not to play for any other club than the Appellant. The fact that the Player was not ordered to pay any compensation to the Appellant, which was also not requested by MLS during the said proceedings, does not mean that the Appellant can now request such compensation through FIFA for the mere reason that there is no longer any two-step procedure pursuant to the FIFA RSTP.

- In the same manner, it is not possible to request FIFA to "*enforce*" the DAS Decision as expressed in the Contract, as the applicable edition of the FIFA Disciplinary Code only provides for the enforcement of FIFA and CAS decisions and not decisions from national arbitration tribunals.

- The Appellant cannot have the best of two worlds, depending on which rules are in favour of the club on a certain issue.

- The claim for breach of contract between the Appellant and the Player has been decided in a final and binding decision by an US Arbitral tribunal, and therefore the present claim against the Player is covered by *res judicata* and cannot be heard again, neither by FIFA nor by the CAS.

Termination issues

- In the event that the Panel finds that the claim for compensation and breach of contract should be heard, then the only issue decided by the Independent Arbitrator with *res judicata* effect is the fact that the Player was notified of the Option by the Club, based on which the rest of the relevant aspects of the dispute, and thus not only the amount of compensation, the joint liability and the sporting sanctions, must be heard by the Panel in the light of the applicable FIFA Regulations.

- In any case, it is not possible to enter into such issues without analysing first whether the Contract was terminated without just cause pursuant to FIFA regulations.

- In this regard, the first aspect to be decided on is whether the Independent Arbitrator complied with the requirements set out in Article 22 of the FIFA RSTP and Circular 1010 regarding the equal representation of players and clubs.

- This requirement is not fulfilled in the present case since the Independent Arbitrator cannot be considered as an arbitral tribunal that respects the equal representation of players and clubs, as already indirectly confirmed by the CAS (CAS 2016/A/4846).

- This unequal representation had a direct impact on the outcome of the DAS Decision.

- Secondly, the DAS Decision was not in line with the FIFA RSTP.

- As set out in, *inter alia*, CAS 2008/A/1691, when considering the consequences of terminating a contract, a player cannot be obliged to remain employed by the club with which the contractual relationship has been terminated under any circumstances, nor can the club be obliged to (re)employ the player.

- However, the Independent Arbitrator decided that the employment relationship between the Appellant and the Player was still in force, which is not in line with the FIFA RSTP.

- Thirdly, the validity of the Option under applicable Swiss law has to be decided.

- In accordance with FIFA´s position, such unilateral options are not to be considered valid under Swiss law since they leave the option of extending a contract only in the hands of the club, regardless of the will of the players. The majority of CAS jurisprudence is found to be in line with that.

- Therefore, the unilateral Option allegedly exercised by the Appellant must be considered null and void under the FIFA RSTP.

Compensation issues and sporting sanctions

- In the unlikely event that the Panel should find that compensation for termination of contract without just cause is payable to the Appellant, the submissions and calculations of the Appellant must in any case be disregarded.

- First of all, the alleged transfer value of the Player is not a valid parameter in the present case since no transfer ever took place, no transfer agreement was ever drafted and the negotiations were conducted several weeks before the issues covered by this case took place.

- Moreover, the Appellant´s alleged acceptance of the offer from Club Tijuana has never been substantiated by any evidence.

- Furthermore, it must be noted that a player´s marked value declines rapidly when the player´s contract expires in 12 months.

- The essential notion when it comes to compensation for breach of contract under the FIFA regulations is the concept of positive interest.

- The usual practice of the CAS is to compare the former contract with the player´s new contract, and also taking into consideration any non-amortised fees and expenses paid or incurred by the former club.

- Based on the above, the correct amount of compensation would be USD 359,999, being one quarter of the signing fee plus the difference between the annual salary for the player for 2021 according to his new contract less the annual salary for the same year pursuant to the Contract.

- Any other elements presented by the Appellant are unfounded and must be disregarded.

- Furthermore, the Appellant´s request for sporting sanctions must be dismissed for substantial and procedural reasons.

- First of all, the Contract was supposed to run until the end of the 2020 season, and the disputed period is the 2021 season, which is why the alleged breach of contract in any case occurred outside the protected period, and no sanction can therefore be applied in any event.

- Moreover, the Appellant lacks the standing to claim the imposition of sporting sanctions since it has no direct and legitimate interest therein.

C. The Second Respondent

59. In its Answer of 23 September 2022, the Second Respondent requested the CAS:

"*l. To dismiss appeal filed by [the Appellant] against the [Appealed Decision].*

2. To confirm the [Appealed Decision].

3. The arbitration costs to be carried out by the Appellant.

4. To oblige the Appellant to reimburse the Second Respondent, with the advocacy costs, amounting to CHF 20,000.00."

60. In support of its requests for relief, the Second Respondent submitted, *inter alia*, as follows:

Admissibility/Jurisdiction issues

- The Appellant´s claim was already decided upon by the Independent Arbitrator.

- For this reason alone, FIFA is not competent to deal with the claim of the Appellant.

- Moreover, FIFA cannot be a subsidiarily deciding body that rules in a part of a dispute, while the most important question relation to the same dispute is decided by another judicial body.

- Furthermore, and as the Second Respondent was not a party to the proceedings before the Independent Arbitrator and was never heard, the Second Respondent cannot be bound by the decision of the Independent Arbitrator.

- In any case, FIFA can only decide on the issue of compensation after having analysed the important question of whether or not the exercise of the Option by the Appellant is valid, since a potential compensation will have to be paid on the basis of a possible breach of the Contract.

- Moreover, in Article 9(e) of the Contract, the Appellant and the Player included a clear waiver excluding them from bringing any claim before the FIFA Football Tribunal.

- Furthermore, the Appellant only initiated the proceedings before the Independent Arbitrator after the Player and the Second Respondent signed their new contract and after its rejection of the request for the ITC made by the Second Respondent, thus knowingly omitting to include the Second Respondent in such a procedure and knowingly choosing to initiate the procedure before the Independent Arbitrator and not before FIFA.

- Also, it must be noted that the Second Respondent was never invited to present its position, neither before the Independent Arbitrator, nor before FIFA, and the first time the Second Respondent was informed about any proceedings was when it received the Appellant´s Statement of Appeal through the CAS.

Termination issues

- The Second Respondent signed the contract with the Player when the Player was a free player and based on the confirmation by the Player that this was in fact the case.

- The Appellant never forwarded any documentation to the Second Respondent substantiating the opposite.

D. FIFA

61. In its Answer of 21 September 2022, FIFA requested the CAS to:

"*a. Reject the Appellant´s appeal in its entirety;*

b. Confirm the [Appealed Decision];

c. Order the Appellant to bear the full costs incurred with the present procedure;

d. Order the Appellant to make a contribution to FIFA's legal costs."

62. In support of its requests for relief, FIFA submitted, *inter alia*, as follows:

Admissibility/Jurisdiction issues

- The FIFA DRC was correct in declaring the Appellant´s claim against the First and the Second Respondent inadmissible following (i) an issue of *res judicata*; (ii) the lack of FIFA jurisdiction to solve a dispute between the Appellant and the Player; and (iii) the Appellant´s behaviour against the principle of "*electa una via, non dacur recursus ad alteram*".

- The *res judicata* principle is a general legal principle that prevents a judgment involving the same parties and the same object from being discussed over and over again and avoids the occurrence of two contradicting decisions, which would be contrary to public policy.

- In short, there is *a res judicata* situation when there is (i) a claim identical (from a substantive point of view) to another that has already been decided, (ii) the same parties were involved in such outcome, and (iii) the matter was solved based on the same facts existing at the time of the first judgment.

- The Chairperson was correct in declaring the claim inadmissible as "*an identity can be seen both in the object and in the cause of request*" and "*since there was already a resolution issued by an impartial arbitrator*" the Chairperson "cannot rule on a new decision".

- The Appellant is wrong when submitting that (i) the parties, (ii) the legal grounds for the reaching the decision and (iii) the object of the dispute are not the same.

- First of all, it is clear that the parties to the core of the dispute are identical; the Appellant and the Player, even if the parties before the Independent Arbitrator were MLS and MLSPA since these two parties were in fact representing the Appellant and the Player in their dispute.

- Even the Independent Arbitrator confirmed this in the DAS Decision stating that MLSPA was acting "*on behalf of [the Player]"*.

- Claiming the opposite should be considered contrary to the principles of *good faith* and *venire contra factum proprium*, which, in accordance with CAS jurisprudence, does not deserve any protection.

- Moreover, the fact that the Appellant included the Second Respondent in its claim before FIFA does not change the fact that the parties to the two cases are the same (the Appellant and the Player), and the Second Respondent would in any case only have a secondary or accessory role in the proceedings before the FIFA DRC.

- Moreover, the principal dispute in both cases between the Appellant and the Player is the breach of the Contract and the consequences thereof, which has already been solved by the Independent Arbitrator.

- The fact that the Appellant is now requesting FIFA to apply the FIFA RSTP does not change that.

- First of all, it goes against the principles of *pacta sunt servanda* and *venire contra factum proprium* since the inapplicability of these regulations were agreed in the Contract.

- Furthermore, the cause of action was the same, and when referring to the "*legal grounds*" in order to assess a possible *res judicata* situation, the decisive issue is not the applicable rules, but the identity of the cause of action or transaction on which the dispute arises, or in other words: if there is an identity of facts.

- In this case, the facts triggering the proceedings before the Independent Arbitrator are exactly the same as the ones in the FIFA DRC proceedings.

- The Appellant cannot make a distinction between the facts by submitting that its request for relief before the Independent Arbitrator only related to the breach of contract, but was not related to the termination of the Contract and its possible consequences.

- In any case, such a distinction is unsubstantial because the Player was already playing for his New Club when the claim was filed before the Independent Arbitrator, which means that the Player had in any case already terminated the Contract.

- Moreover, the object of the dispute is the same since the Appellant´s claim before the Independent Arbitrator substantively contains the same object as the claim filed before the FIFA DRC, i.e. focusing on determining whether (i) the Player breached the Contract and (ii) the consequences thereof.

- In any case, the identity must be understood from a substantive view and not grammatical point of view.

- Given the above circumstances, and taking into consideration that the cumulative requirements of *res judicata* are met in this case, the Chairperson was correct in applying the legal effects of such a principle and dismissing the appeal as inadmissible.

- Alternatively, it must be noted that the Chairperson was also correct in considering the claim inadmissible in view of his lack of jurisdiction to hear the matter based on the fact that the Appellant and the Player had clearly renounced to submit any dispute between them before FIFA bodies and opted to refer their disputes exclusively to national arbitration.

- Pursuant to Article 22 of the RSTP, recourse to ordinary courts or to any other forum on labour disputes is permitted and constitutes an exception to the prohibition set out in Article 58 par. 2 of the FIFA Statutes.

- In the same line, Article 22 (1)(b) of the FIFA RSTP provides that the parties may opt in writing for such disputes to be decided by an independent arbitration tribunal that has been established at national level within the framework of an association and/or collective bargaining agreement.

- Any such choice must be respected in accordance with the principles of *pacta sunt servanda* and *bona fide* and, accordingly, any claim not respecting such an agreement must be declared inadmissible.

- In this case, the Appellant and the Player not only contractually validly opted for the jurisdiction of national arbitration, but they also clearly excluded FIFA´s competence from hearing any dispute in relation to the Contract.

- The clauses of the Contract and their reference to the CBA signed between MLS and MLSPA are sufficiently clear and do not leave room for interpretation.

- In any case, the true intention of the two parties was to exclude the FIFA system altogether from any possible disputes related to their employment relationship.

- The fact that FIFA was involved in the issuing of the provisional registration of the Player with the Second Respondent does not have any influence on this, not least since the Appellant nevertheless chose to file its claim before the Independent Arbitrator and not before FIFA.

- Moreover, it must be stressed that the Appellant's submission that it is not a party to the waiver and is therefore not bound by it must be dismissed.

- As repeatedly stated by the Appellant before FIFA, MLS acted in the Contract *only as an agent, for and on behalf of the Red Bull*, just as the Appellant in the Appeal Brief stated that *MLS enters into player employment contracts for and on behalf of its member teams, in this case the Appellant*.

- Moreover, it must be recalled that the FIFA RSTP provides rights to players, coaches and clubs, but not to leagues, and the argument that the waiver included in Article 9(e) of the Contract is only binding on MLS and not on the Appellant is therefore inconsistent with the reality of the football system.

- In addition to the above, it must also be noted that the FIFA DRC will not serve as a body of appeal in respect of any decision made by a national body, nor will it enforce any decision made by an national dispute resolution body.

- In any case, the Appellant is in fact not only asking FIFA "to enforce" the DAS Decision, but in reality to (i) review the case, (ii) confirm that the Player breached the Contract and (iii) establish the consequences thereof in clear contradiction to the *res judicata* principle and to the waiver agreed upon.

- FIFA did not adopt a contradictory position by intervening in the request for the provisional registration, but not hearing the Appellant´s claim since the SFT jurisprudence has already established a distinction between employment-related disputes falling under the FIFA DRC´s realm as per Article 22(1)(a) or (b) of the RSTP and ITC administrative procedures, falling under the FIFA PSC´s jurisdiction as per Article 23(2) and Annexe 3 of the same regulations.

- In this regard, it is not even disputed that the ITC was issued "*without prejudice to any possible decision from the DRC and/or the competent deciding body on the substance of the potential contractual dispute between the Player and his former club (as well as the new club)*."

- With regard to the Appellant´s submission regarding the parties to an employment contract not being entitled to contractually waive respective rights in relation to the termination of such a contract, pursuant to Article 361 of the SCO, it is obvious that the SCO refers to the rights established therein and not to the rights that clubs and players have in accordance with the FIFA RSTP.

- Secondly, both the CAS and the SFT jurisprudence have established that parties can renounce their right to a competent forum and choose another tribunal.

- The fact that the Second Respondent is not subject to the waiver included in the Contract does not make the waiver invalid or inapplicable.

- Moreover, it must be noted that the Appellant´s behaviour was inconsistent and contrary to the principle of *electa una via, non datur recursus ad alteram*, thus constituting a textbook example of "*forum shopping*".

Termination issues

- FIFA declines to comment on the topics related to the contractual dispute between the Parties.

Compensation issues and sporting sanctions

- With regard to the Appellant´s request regarding sporting sanctions, it should be recalled that the Appellant lacks the necessary standing to request that such sporting sanctions be imposed on the Player and the Second Respondent as it does not have any direct and legitimate interests in those parties being banned from participating in official matches or from registering new players.

VI. JURISDICTION

63. Article R47 of the CAS Code states, *inter alia*, as follows:

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

64. With respect to the Appealed Decision, the jurisdiction of the CAS derives from Article 57 (1) of the FIFA Statutes, which reads as follows:

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

65. The Panel notes that the Respondents do not contest CAS jurisdiction. On the contrary, they have signed the Order of Procedure without any reservation. The Respondents, however, have

submitted that the DAS Decision already disposed of the present dispute with *res judicata* effect.

Qualification of the plea of res judicata

66. It is not clear whether the objection of *res judicata* pertains to jurisdiction or to the admissibility of a claim. The Swiss legal literature is of the view that the "*distinction between jurisdiction and admissibility is complex*" (GIRSBERGER/VOSER, International Arbitration, 4th ed. 2021, no. 1182a; cf. also STACHER, Jurisdiction and Admissibility under Swiss Arbitration Law – the Relevance of the Distinction and a New Hope, Bull-ASA 2020, 55 ff.). As a rule of thumb, the questions of whether the competence to decide a dispute in a binding way was transferred from the state-court system to arbitration and whether the matter before the arbitral tribunal is within the scope of the arbitration agreement are issues of jurisdiction, whereas all procedural issues that are non-jurisdictional issues and that may for procedural reason cause the end of the arbitration are admissibility issues (GIRSBERGER/VOSER, International Arbitration, 4th ed. 2021, no. 1182). The legal literature is split on the question whether the plea of *res judicata* is a jurisdictional matter or an issue of admissibility.

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

"Quant à l'autorité de chose jugée, ce principe interdit au juge de connaître d'une cause qui a déjà été définitivement tranchée; ce mécanisme exclut définitivement la compétence du second juge"

Free translation: With regard to *res judicata*, this principle precludes a judge from entertaining a case that has already been finally decided; such mechanism definitively excludes the jurisdiction of the second judge.

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

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

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

69. At the end of the day, the Panel can leave the above question open. It is clear that this Panel must address the question whether it is barred from looking at the merits of this dispute because of alleged *res judicata* effects of the DAS Decision be it under the heading "jurisdiction"

or "admissibility". The distinction whether a matter pertains to jurisdiction or admissibility is only important when an appeal is filed against an award according to Article 190 PILA. Here, the party appealing and the SFT must decide, which of the limited grounds in Article 190(2) PILA they wish to apply. The SFT has stated that not all matters related to admissibility can be revisited under Article 190(2) lit. b PILA (lack of jurisdiction) and that lack of jurisdiction is only one of the elements defining the mandate of a panel. Other elements delimiting the mandate of a court or a panel should therefore not be read into Article 190(2) lit. b PILA and can only be taken into account in the context of other subsections of Article 190 PILA:

"Sur un plan plus général, il ne faut pas perdre de vue que la compétence à raison de la matière et du lieu du tribunal saisi ne constitue qu'une condition de recevabilité parmi d'autres, comme l'existence d'un intérêt digne de protection, la capacité d'être partie et d'ester en justice ou encore l'absence de litispendance et de force de chose jugée (cf. l'art. 59 al. 2 CPC, qui énumère, à titre exemplatif, six conditions de recevabilité, dont la compétence du tribunal [let. b], que l'on désigne communément, sous l'angle négatif, par le terme de fins de non-recevoir). Si une ou des conditions de recevabilité ne sont pas remplies, le tribunal n'entrera pas en matière sur le fond mais prononcera un jugement d'irrecevabilité (HOHL, op. cit., n. 585).

On veillera donc à ne pas assimiler toutes les conditions de recevabilité à l'une d'entre elles - en l'occurrence, la compétence -, sauf à vouloir étendre indûment le pouvoir d'examen de l'autorité de recours dans l'hypothèse, qui se vérifie en droit suisse de l'arbitrage international, où la loi énonce limitativement les griefs susceptibles d'être invoqués dans un recours en matière civile visant une sentence et ne prévoit qu'un seul motif de recours tiré d'une fin de non-recevoir, à savoir le fait pour le tribunal arbitral de s'être déclaré à tort compétent ou incompétent (art. 190 al. 2 let. b LDIP)." (SFT 4A_394/2017, consid. 4.2.4)

Free translation : On a more general level, it should be borne in mind that jurisdiction by reason of the subject-matter and the place of the court seized is only one condition for admissibility among others, such as the existence of an interest worthy of protection, capacity to be a party and to institute proceedings, or the absence of lis pendens and res judicata (cf. art. 59 para. 2 CPC, which lists, by way of example, six conditions of admissibility, including the court's jurisdiction [subpara. b], which are commonly referred to, in negative terms, as 'grounds for dismissal'). If one or more of the conditions for admissibility are not met, the court will not enter into the merits of the case but will rule that the claim is inadmissible (HOHL, op. cit., n. 585).

Care must therefore be taken not to assimilate all the conditions of admissibility to one of them - in this case, jurisdiction -, without wishing to unduly extend the review authority's power of review in the event, as is the case in Swiss international arbitration law, where the law sets out an exhaustive list of the complaints that may be raised in an appeal in civil matters against an award and provides for only one ground of appeal based on a plea of inadmissibility, namely the fact that the arbitral tribunal has wrongly declared itself competent or incompetent (Art. 190 al. 2 let. b PILA).

70. In view of the above, the Panel will address the issue of *res judicata* not under the heading jurisdiction, but in light of admissibility.

VII. ADMISSIBILITY

The DAS Decision is vested with res judicata

71. The Panel notes that the DAS Decision is a (foreign) arbitral award and thus has *res judicata* effects that must be observed by this Panel sitting in Switzerland (subject to the conditions in Article 194 PILA in conjunction with the New York Convention on the recognition and enforcement of foreign arbitral awards from 1958).

Plurality of causes and parties

72. The Appellant´s financial claims against the First and the Second Respondent are based on Article 17(1) and (2) FIFA RSTP. The Panel also notes that the FIFA RSTP do not specifically describe a claim based on Article 17(2) against a "new club" as being purely accessory or ancillary to the one of Article 17(1) FIFA RSTP.

73. As set out in CAS 2020/A/7054, paras 173 ff., the Article 17(2) FIFA RSTP does not provide a graduated relationship between the liability of a player and the liability of a new club. Instead, the provision speaks about joint liability, which must be interpreted in light of the subsidiarily applicable Swiss law, in particular Article 144 of the SCO, which describes the substantive effects of joint and several liability as follow:

> *"(1) A creditor may at his discretion request partial performance of the obligation from each joint and several debtor or else full performance from any on of them.*
> *(2) All the debtors remain under the obligation until the entire claim has been redeemed."*

74. It follows therefrom, as confirmed by the SFT in 4A_140/2022, that "*the joint and several debtors are on an equal footing with their creditor. In procedural terms, the player concerned and his new club thus form a simple passive material consortium, which leaves intact the plurality of causes of parties."*

75. In light of this, and in view of ATF 140 III 520, the Panel understands that, in cases of joint liability, there are as many matters in dispute as there are "*couples demandeur/défendeur*", meaning that the claim against the Player and the claim against the Second Respondent are, from a procedural point of view, two different matters in dispute.

76. As such, it follows, among other consequences, that the possible *res judicata* effect of the DAS Decision must be examined separately for each of the Respondents involved in relation to the Appellant.

The effects of Res judicata

77. According to the SFT the effects of *res judicata* are as follows (SFT 4A_394/2017, consid. 4.2.3):

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

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

78. The *res judicata* effect extends to all the facts existing at the time of the first judgment, whether or not they were known to the parties, stated by them, or considered as proof by the first court (ATF 139 III 126 consid. 3.1, p. 129). However, it does not stand in the way of a claim based on a change in circumstance since the first judgment (ATF 139 III 126 consid. 3.2.1, p. 130). The *res judicata* effect does not extend to the facts after the time until which the object of the dispute could be modified, i.e. to those which took place beyond the last time when the parties could supplement their statements of facts and evidentiary submissions. Such circumstances are new facts (real nova) as opposed to the facts already in existence at the decisive time, which could not have been relied on in the previous proceedings (false nova), which under very restrictive conditions may justify the revision of the arbitral award (ATF 140 III 278 at 3.3; judgment 4A_603/2011 of November 22, 2011, at 3).

The Conditions of Res Judicata

79. The Appellant´s claim before FIFA was declared inadmissible in the Appealed Decision because the Chairperson found, *inter alia*, that

"*in the national arbitration proceedings followed and in the procedure before FIFA´s deciding bodies, an identity can be seen both in the object and in the cause of request*" and "*since there as already a resolution issued by an impartial arbitrator, the Chairperson cannot rule on a new decision*" and "*in accordance with the principle of res judicata, a deciding body of FIFA is not in a position to deal with the substance and/or the consequences of a matter already decided upon by another deciding authority[…]*" .

80. There is *res judicata* when the claim in dispute is identical to that which was already the subject of an enforceable judgment (identity of the subject-matter of the dispute). This is the case when in both litigations the same parties submitted the same claim to the court on the basis of the same facts. The identity must be understood from a substantive and not grammatical point of view, so that a new claim, no matter how it is formulated, will have the same object as the claim already adjudicated (ATF 140 III 278 at 3.3; ATF 139 III 126 at 3.2.3).

81. In this regard, the so-called "triple identity" test has been noted and relied upon on in previous CAS cases, including CAS 2010/A/2091, as mentioned by the Appellant, in which the Panel confirmed that:

"*If arbitral proceedings in Switzerland involve the same subject matter, the same legal grounds and the same parties as previous foreign arbitral proceedings terminated with an award, the so-called "triple identity" test – used basically in all jurisdictions to verify whether one is truly confronted with a res judicata question – is thus indisputably met.*"

82. The ratio behind the *res judicata* principle is to ensure the finality of judgments and to ensure that the same matter is not decided upon over and over again, however, the Panel appreciates that it must be applied with caution in order to not deprive any parties access to justice which by itself would also be a violation of Swiss public policy.

Applying the above Principles to the case at hand

83. The Appellant submits that the present case does not meet the "triple identity" test since its claim before FIFA is an entirely new claim that has not yet been subject to a binding decision in any forum or jurisdiction and therefore cannot be inadmissible on the basis of *res judicata*.

Moreover, the parties before the Independent Arbitrator and before FIFA were not the same. The Respondents, on their side, submit, *inter alia*, that this is a clear case of *res judicata*.

84. The Panel notes that the parties before the Independent Arbitrator were MLS and the MLSPA. However, based on the circumstances of the case, the Panel is convinced that MLS and the MLSPA were in fact acting on behalf and in the sole interest of the Appellant and the First Respondent, respectively. The Panel notes, *inter alia*, that the Independent Arbitrator stated in the DAS Decision that MLSPA was in fact "*acting on behalf of [the Player]*", and the Appellant itself similarly noted in its Appeal Brief, *inter alia*, that even if neither the Appellant nor the Player "*are identified as 'parties' to the arbitration proceedings, they are, in effect, the subject of those proceedings, they are represented by MLS and MLSPA respectively, and they are bound by the decision.*" Consequently, the Panel finds that with regard to the "triple identity" test, MLS and the MLSPA are to be considered as the same parties: the Appellant and the Player, respectively.

85. The fact that the Second Respondent was not a party to the proceedings before the Independent Arbitrator and is now called as a party before FIFA together with the Player does not exclude the possibility of a *res judicata* situation, at least not regarding the Appellant and the Player.

86. With regard to the subject-matter(s) of the two proceedings, the Panel notes that while the Appellant on its side submits that the case before the Independent Arbitrator related to the narrow issue of whether the Option was validly exercised and the validity of the said Option, in order to clarify the duration of the Contract and to facilitate the reintegration of the Player in the Appellant´s team regardless of the Player´s breach of contract, the Respondents, on their side, submit, *inter alia*, that the subject-matter before the Independent Arbitrator was in fact the same as before FIFA, i.e. the questions on (i) whether the Player breached the Contract and (ii) the consequences thereof.

87. According to the Appellant, the Independent Arbitrator only decided on the validity of the Option, whether it was validly exercised and, based on that, on whether the Player was to return to the Appellant´s team. The claim before FIFA covers different matters referring to facts that happened after the DAS Decision was issued, i.e. the Player terminating the Contract and actively playing for the New Club, rather than returning to the Appellant. Furthermore, the Independent Arbitrator was never requested to decide on the consequences of such termination, including the Appellant´s claim for compensation against the Player and the New Club.

88. The Panel does not agree with the Appellant that a formal distinction can be made in this particular case between the Player breaching his Contract with the Club by, *inter alia*, negotiating with the Second Respondent before the DAS Decision was issued, and the Player´s alleged subsequent termination of the Contract by him not returning to the Club after the issuing of the same decision.

89. The Player undisputedly signed the New Contract on 15 January 2021, thus in any case terminating his (alleged) contractual relationship with the Appellant on that date, which occurred before the proceedings before the Independent Arbitrator.

90. In the DAS Decision, the Independent Arbitrator found that the Player had breached the Contract "*by signing with and playing for a team outside MLS in 2021, because MLS effectively exercised its option to extend his contract through December 31, 2021.*" Based on that, the Player was "*ordered to not play, attempt to play or threaten to play soccer for any team other*

than a Team in Major League Soccer, as provided in Paragraph 9(c)(vi) of his Player Agreement."

91. As such, the Panel finds that the Independent Arbitrator was requested to and actually did decide on (i) whether the Option was effectively exercised, (ii) whether the Player breached his contractual relationship and (iii) on the consequences of such breach in respect of the scope of such consequences as set out in the Contract.

92. However, the Panel also finds that the Independent Arbitrator never dealt with any claim for damages against either the Player or the New Club, since such a claim was never lodged before the Independent Arbitrator.

93. Even if the Appellant also requested FIFA to find that the Player terminated the Contract without just cause by not complying with the DAS Decision, the Panel notes that the Appellant's claim before FIFA in essence is a claim for compensation against the Player and the New Club and for the imposition of sporting sanctions, all based on the Player´s alleged termination of the Contract without just cause and the New Club´s alleged inducement regarding the same.

94. As such a claim for financial compensation against the Player based on his alleged termination of the Contract without just cause was not heard and decided on by the Independent Arbitrator, the Panel finds that the subject matter(s) of the two proceedings is/are not the same.

95. In view of the foregoing, the Panel concludes that the "triple identity" test is not met in the present dispute with regard to the Appellant´s claim against the Player, based on which the Panel finds that the Chairperson erred in declaring the Appellant´s claim inadmissible based on the principle of *res judicata*.

96. With regard to the Second Respondent, and for the sake of good order, the Panel initially notes that the possible *res judicata* effect of a previous decision must be examined separately for the First and Second Respondent as confirmed by the SFT in 4A_140/2020 para 5.4.3.

97. In this regard, the Panel further notes that the Second Respondent was never called as a party before the Independent Arbitrator and, furthermore, that the Independent Arbitrator never dealt with any financial claim against the Second Respondent.

98. For this reason alone, the Panel finds that the claim against the Second Respondent does not meet the "triple identity" test either, and the Appellant´s claim against the Second Respondent is therefore not inadmissible based on the principle of *res judicata*.

99. It follows from the above that the CAS has jurisdiction and is not prevented to decide the dispute because of *res judicata*.

Timeliness of the Appeal

100. The grounds of the Appealed Decision were notified to the Appellant on 27 May 2022.

101. The Appellant filed its Statement of Appeal on 17 June 2022, *i.e.* within the statutory time limit set forth by Article 57 (1) of the FIFA Statutes, which is not disputed.

102. Furthermore, the Statement of Appeal complied with all the requirements of Article R48 and R51 of the CAS Code.

103. As such, it follows that the appeal is admissible.

VIII. APPLICABLE LAW

104. Article R58 of the CAS Code states as follows:

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

105. The Panel further notes that Article 56 par. 2 of the FIFA Statutes reads as follows:

"*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.*"

106. While the Appellant submits that the procedural issues and the issues regarding admissibility of the claim are to be determined in accordance with Swiss law as per the applicable provisions of Chapter 12 of PILA, it is at the same time submitted that the issues regarding termination of the Contract and the claim for compensation are to be determined according to the FIFA RSTP and, subsidiarily, to Swiss law in respect to the application of FIFA rules and regulations. However, matters that are not addressed in any FIFA rules or regulations are to be determined according to the laws of the USA, pursuant to Article 11(a) of the Contract.

107. The Respondents agree with the Appellant regarding the applicability of the FIFA RSTP, and on a subsidiary basis, Swiss law, however, dispute the alleged applicability of the laws of the USA, *inter alia*, "*because it contradicts the FIFA RSTP*".

108. Consequently, the Panel will decide the merits of the case based on the FIFA RSTP as the "*applicable regulation*" within the meaning of Article R58 of the CAS Code and will furthermore apply – in accordance with Article 56 par. 2 of the FIFA Statutes – Swiss law as to the interpretation and application of the FIFA RSTP.

109. With regard to any matter potentially not covered by the FIFA RSTP or any other FIFA regulations, the Panel will apply the rules of law chosen by the Parties, or, in the absence of such a choice, Swiss law, as the law of the country where FIFA, the federation that issued the Appealed Decision, is domiciled. The Panel notes in this regard that is not submitted by any party, that the Appellant and the Second Respondent agreed on any such applicable law.

110. With regard to the possible application of the laws of the USA with regard to the Appellant and the First Respondent pursuant to Article 11(a) of the Contract, the Panel will deal with this issue only if necessary.

IX. MERITS

111. The Panel notes that the relevant factual circumstances of this case are – in essence – undisputed by the Parties, including the fact that on 16 February 2018, the Player and MLS entered

into the Contract valid as from 9 February 2018 until 31 December 2020, which included the Option. It is further undisputed that on 15 January 2021, the Player signed the New Contract with the Second Respondent.

112. However, the Parties are in dispute with regard to whether or not the Option was ever validly exercised in February 2020, allegedly extending the contractual period for 12 months until 31 December 2021 as submitted by the Appellant and thus, whether the Player was actually under contract with MLS in January 2021 when he left the Club and signed the New Agreement.

113. On 2 April 2021, and following expedited arbitration proceedings before the Independent Arbitration, the DAS Decision was issued, in which the Independent Arbitrator found that the Option had been validly exercised, and the Player had consequently breached the Contract "*by signing with and playing for a team outside MLS*", on which grounds the Player was ordered "*not to play, attempt to play or threaten to play soccer for any other team than a team in the Major League Soccer.*"

114. Following the Appellant´s claim before FIFA against the Player and the New Club for compensation and imposition of sporting sanctions on the latter two parties, which was dismissed by the Chairperson of the FIFA DRC, the Panel now has to decide on the admissibility of the claim, the jurisdiction of the FIFA DRC and, in case of confirmation of the admissibility of the claim and the jurisdiction of the FIFA DRC, on the merits of the claim, unless the Panel decides to refer such a claim back to the FIFA DRC.

Preliminary issues

115. As a preliminary issue, the Panel notes that the Appellant submits that by summarily dismissing the Appellant´s claim allegedly exercising his powers under Article 19 of the Procedural Rules, the Chairperson acted outside the powers afforded to him and should instead have submitted the claim for consideration by a fully constituted FIFA DRC as to the admissibility and merits.

116. According to the Appellant, if such a decision is upheld, it will suffer serious unjustified prejudice, for which reason the Panel is requested to overturn the Appealed Decision and replace it with a decision of its own.

117. The Second Respondent submits that its right to defend itself was violated since it was never called as a party before the Independent Arbitrator. Without going into the merits of the two parties´ allegations, the Panel notes that in any event, the full power of review of the Panel before the CAS under Article R57, first paragraph, of the CAS Code would in principle cure the procedural violations that allegedly occurred in prior proceedings (see, *ex multis*, CAS 2011/A/2594, para. 41, CAS 2018/A/5853, para. 115, CAS 2021/A/8256, paras. 133 *et seq.*).

118. Consequently, the submissions related to the alleged violations of due process and the right to be heard can be dismissed.

119. Moreover, and with regard to the Second Respondent, the Panel notes that based on the outcome of these proceedings, the Second Respondent´s right to be heard will in any case be respected since the claim against it is ultimately referred back to FIFA for due consideration.

Jurisdiction of the FIFA DRC

120. In the Appealed Decision, the Chairperson stated, *inter alia*, as follows regarding the jurisdiction of FIFA:

"[…] a party who first decides to submit a dispute to a competent, specific, local deciding body, and subsequently decides to submit this very same dispute to FIFA; should not be able to game the system by having multiple fora hear the same argument in the hope that one of them will hand down the judgement it wants.", since this would be in contradiction to the principle of *electa una via, non datur recursus ad alreram*, i.e. known as forum shopping. Moreover, the Chairperson stated that "*in accordance with article 9(e) of the [Contract], there is a clear waiver by the parties to bring for a resolution on the merits any claim, action, dispute or grievance before the Football Tribunal*"

121. The Respondents submit that FIFA has no jurisdiction to hear and decide the matter at hand for the mere reason that, *inter alia*, the Appellant and the Player had clearly renounced any rights to submit any dispute between them before FIFA bodies and opted to refer their dispute exclusively to national arbitration, and moreover, since the conduct of the Appellant is a clear example of forum shopping, which should not be protected.

122. The Appellant submits, *inter alia*, that its claim before FIFA is an entirely new claim that has not yet been subject to a binding decision in any forum or jurisdiction, and, moreover, it was always the understanding of the parties to the Contract, as per the terms of the same, that MLS and/or the Appellant would be entitled to request the intervention of FIFA to determine the ultimate consequences of any breach and subsequent termination of the Contract by the Player after such breach had been determined via arbitrational proceedings at national level, which is consistent with principles set out in other CAS cases. Moreover, as the Independent Arbitrator does not have jurisdiction over the Second Respondent, the inducement of a new club would go unpunished, which cannot be the true intention of FIFA given that contractual stability is one of the fundamental pillars of the FIFA RSTP.

123. The Panel notes that it is undisputed between the Parties that any possible jurisdiction of the FIFA to decide on the claim of the Appellant must originate from the regulations of FIFA.

124. Article 2 par. 1 of the Procedural Rules provides as follows:

"*The matters for which each chamber has jurisdiction are provided by specific FIFA regulations.*"

125. Articles 22 and 23 of the FIFA RSTP (March 2022 edition) state, *inter alia*, as follows:

"*22. Competence of FIFA*

1. Without prejudice to the right of any player, coach, association, or club to seek redress before a civil court for employment-related disputes, FIFA is competent to hear:

a) disputes between clubs and players in relation to the maintenance of contractual stability (articles 13-18) where there has been an ITC request and a claim from an interested party in relation to said ITC request, in particular regarding the issue of the ITC, sporting sanctions or compensation for breach of contract;

b) employment-related disputes between a club and a player of an international dimension; the aforementioned parties may, however, explicitly opt in writing for such disputes to be decided by an independent arbitration tribunal that has been established at national level within the framework of the association and/or a collective bargaining agreement. Any such arbitration clause must be included either directly in the contract or in a collective bargaining agreement applicable on the parties. The independent national arbitration tribunal must guarantee fair proceedings and respect the principle of equal representation of players and clubs; […]

23. Football Tribunal

1. The Dispute Resolution Chamber of the Football Tribunal shall adjudicate on any of the cases described in article 22 paragraphs 1 a), b), d), and e).

[…]"

126. As such, the Panel agrees that recourse to an *independent arbitration tribunal that has been established at national level within the framework of the association and/or a collective bargaining agreement* is permitted, and the Panel also finds that a claim before FIFA is to be considered inadmissible due to lack of jurisdiction when the parties to an employment-related dispute of an international dimension have validly decided by contract to exclusively submit any such dispute to an independent arbitration tribunal in accordance with Article 22 (1)(b) of the FIFA RSTP.

The Appellant´s claim against the Player before FIFA

127. It is undisputed that the Appellant's claim against the Player is an employment-related dispute of an international dimension, since the Appellant is a football club from the USA and the Player being a professional football player of Argentinian nationality. Furthermore, the Second Respondent is a Saudi Arabian football club.

128. It is further undisputed that the Contract contains certain provisions regarding "Dispute Resolution", "Expedited Arbitration" and "Non-Applicability of FIFA Regulations", as set out above in para 8 and below in para 135, and it is similarly undisputed by the Appellant that the procedure before the Independent Arbitrator as set out in the Contract fulfils all necessary requirements to be considered as an *independent arbitration tribunal that has been established at national level within the framework of the association and/or a collective bargaining agreement* in accordance with the criteria set out in FIFA Circular 1010 and confirmed by CAS jurisprudence.

129. The Panel further notes that even if, from a strictly formal point of view, the parties to the Contract are MLS and the Player, the Panel finds that the Contract was in fact entered into by MLS, more or less as an agent for and in the sole interest of the Appellant, which is why the Appellant is also bound by the Contract vis-à-vis the Player. The Panel further notes that the Appellant, *inter alia*, in its Appeal Brief stated that "*MLS enters into player employment contract for and on behalf of it member team, in this case the Appellant.*"

130. Moreover, the Appellant is now claiming compensation from the Player and the Second Respondent based on the alleged breach of the Contract, which makes the Panel even more

comfortable in its finding regarding the Appellant also being bound by the contractual provisions of the Contract vis-à-vis the Player.

131. When establishing the contents of the relevant provisions of the Contract, the Panel must determine the true intention and will of the contractual parties, including the Appellant, and interpret the relevant provisions of the Contract accordingly.

132. Article 18(1) of the Swiss Code of Obligations (the "SCO") provides as follows regarding the interpretation of contracts:

"*When assessing the form and terms of a contract, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement.*

133. Furthermore, according to CAS jurisprudence, under Article 18 of the Swiss SCO:

"*the parties' common intention must prevail on the wording of their contract. If this common intention cannot be determined with certainty based on the wording, the judge must examine and interpret the formal agreement between the parties in order to define their subjective common intention (WINIGER B., Commentaire Romand – CO I, Basel 2003, n. 18-20 ad Art. 18 CO). This interpretation will first take into account the ordinary sense one can give to the expressions used by the parties and how they could reasonably understand them (WINIGER B., op. cit., n. 26 ad art. 18 CO; WIEGAND W., Obligationenrecht I, Basel 2003, n. 19 ad art. 18 CO). The behaviour of the parties, their respective interest in the contract and its goal can also be taken into account as complementary means of interpretation (WINIGER B., op. cit., n. 33, 37 and 134 ad art. 18 CO; WIEGAND W., op. cit., n. 29 and 30 ad art. 18 CO)" (CAS 2005/A/871, pg. 19, para. 4.29).*

*"By seeking the ordinary sense given to the expressions used by the parties, the real intention of the parties must – according to the jurisprudence of the Swiss Federal Court – be interpreted based on the principle of confidence. This principle implies that a party's declaration must be given the sense its counterparty can give to it in good faith ('Treu und Glauben': WIEGAND B., op. cit., n. 35 ad art. 18 CO), based on its wording, the context and the concrete circumstances in which it was expressed (ATF 124 III 165, 168, consid. 3a; 119 II 449, 451, consid. 3a). Unclear declarations or wordings in a contract will be interpreted against the party that drafted the contract (ATF 124III 155, 158, consid. 1b): It is of the responsibility of the author of the contract to choose its formulation with adequate precision (In dubio contra stipulatorem – WINIGER B., op. cit., n. 50 ad 18 CO). Moreover, the interpretation must – as far as possible – stick to the legal solutions under Swiss law (ATF 126 III 388, 391, consid. 9d), under which the accrued protection of the weakest party" (CAS 2005/A/871, pg. 19, para. 4.30)."(*CAS 2008/A/1468 and more)

134. In view of the above, the Panel attaches particular importance to the following clauses of the Contract:

9. Player´s Unique Skill and Breach of Agreement; Dispute Resolution

(b): […] The Player further agrees that he hereby waives any right he may otherwise have had pursuant to the FIFA Regulations Governing the Status and transfer of Football Players (including without limitation the Application regulations referenced therein) to unilaterally

breach or terminate this Agreement pursuant to such Regulations (including without limitation any right he may have to so breach or terminate this agreement for sporting just cause or otherwise) prior to the end of the Terms of his Agreement, including options periods, if any.
[…]
(d) All disputes arising under this agreement are disputes under the DBA. Except for a proceeding pursuant to the provisions of this paragraph 9, the parties agree that all disputes, relating to or arising out of this agreement shall be subject to the grievance procedures set forth in article 21 of the CBA.

(e) The Player and MLS hereby expressly waive all rights to bring for resolution on the merits any claim, action, dispute or grievance to any FIFA body or tribunal, including any right(s-) either may have pursuant to the FIFA Regulations Governing the Status and "transfer of Football Players (Including without limitation the Application Regulations referenced therein and the dispute resolution, disciplinary and arbitration system set forth in Chapter XIV). The Player and MLS agree that once a judgment has been rendered pursuant to this Paragraph 9, either party may immediately take such judgment to the relevant FIFA body or tribunal to be entered and enforce.

<u>10. Non applicability of FIFA Regulations:</u>
The Player hereby agrees that the following provisions in the FIFA Regulations Governing the Status and Transfer of Football Players (including the Application Regulations referenced therein) shall not apply to this Agreement:
[…]
vi. Chapter XIV. Dispute resolution, disciplinary and arbitration system, Article 42. The Player agrees that the sole and exclusive dispute resolution procedures available for resolving any dispute between himself and MLS are as set forth in the CBA and this Agreement. The Player therefore hereby waives any right to bring for resolution on the merits any claim, action, dispute or grievance to any FIFA body or tribunal, including any right(s) he may have pursuant to Chapter XIV, Article 42 of the FIFA Regulations Governing the Status und Transfer of Football Players. As set forth above, the Player Understands and agrees that once a judgment has been rendered pursuant to the mechanism and appeals process provided for above, either MLS or the Player may immediately take such judgment to the relevant FIFA body or tribunal or any court having jurisdiction to be entered and enforced."

135. The Panel finds no grounds for concluding that the above provisions could or should be given a meaning different from their clear wording, i.e. to exclude the competence of the judicial bodies of FIFA to decide on any contractual dispute between them.

136. There is no valid reasons to find that said provisions intend to provide two different fora (national arbitral bodies and the judicial bodies of FIFA) for resolving disputes. If this was in fact the intention of the contractual parties as submitted by the Appellant, the Contract should have been drafted in a totally different way. There is not a single provision reserving the right to bring specific disputes before the FIFA bodies.

137. On the contrary, it seems clear to the Panel that the real intention, as very specifically described in the Contract, was to "*waive all rights to bring for resolution on the merits any claim, action, dispute or grievance to any FIFA body or tribunal, including any right(s) either may have pursuant to the [FIFA RSTP]*". In accordance with its wording, such a waiver, which apparently covers all kinds of disputes, is supposed to be mutually binding on the

contractual parties, meaning, *inter alia*, that the Player would also be excluded from filing any claim at all against the Club before any, otherwise, competent judicial body of FIFA.

138. The fact that the Contract apparently at the same time refers to a no longer applicable "*enforcement procedure*" before FIFA does not alter this, not least since such a two-step enforcement procedure has not been possible for many years now. In fact, several provisions of the Contract apparently refer to articles and rules set out in previous editions of the FIFA Regulations on the Status and Transfers of Player, which are no longer in force. This is also why the Panel does not find the references made by the Appellant to CAS jurisprudence regarding such procedures relevant in any material way. In any case, the Panel is not convinced that such an alleged "enforcement procedure" would in fact include the task of deciding on any consequences of an alleged contractual breach, which in the Panel´s view cannot be qualified as "*enforcement*".

139. Moreover, the Panel does not agree that the mere fact that FIFA found itself competent with regard to the matter of the ITC automatically implies that FIFA is also competent to hear and decide any contractual dispute that might arise between the same parties, especially not when the Parties have specifically opted out of such competence. This is all the more true considering that the ITC is a matter dealt with between the national member federations and consequently is not a matter covered by the Contract.

140. The Appellant submits that even if the Contract was to be interpreted as a waiver, the parties to an employment contract are not entitled to waive their respective rights in relation to the termination of such a contract pursuant to Article 361 of the SCO. And given that FIFA is the only competent forum in which the Appellant is able to seek compensation from the Player and the Second Respondent, the Appellant cannot be deemed to have legally waived such a right.

141. In this regard, the Panel notes that this case is not about a waiver of the substantive rights enshrined in Article 361 of the SCO. Instead, this matter is about a waiver of the Appellant's procedural right to bring the dispute before the FIFA bodies. In this context, it has been established in jurisprudence that parties can validly renounce their rights to a competent forum and to choose another competent forum instead. This is exactly what happened here.

142. Furthermore, the Panel agrees with FIFA that the limitation set out in Article 361 of the SCO does not cover any and all rights in relation to the termination of a contract and, thus, *inter alia*, not any and all rights a party might otherwise have pursuant to the FIFA RSTP, i.e. the right to have a dispute heard and decided by a certain judicial body of FIFA.

143. Moreover, the Panel notes that the fact that the Independent Arbitrator – pursuant to the Contract and the provisions of the CBA – does not have the power to condemn a party to pay any compensation or to impose a sanction on a party in case of breach of contract does not alter the legal consequences of a waiver of rights of pursuing such reliefs before an otherwise competent judicial body. If the intention of MLS and the MLSPA in fact is that such consequences are to be imposed on a player or club breaching an employment contract, depending on the circumstances, the Panel finds that the wording of the CBA and/or the standard contract should be amended accordingly in order to create a sufficient legal basis for imposing such consequences.

144. Finally, and for the sake of good order, the Panel notes that the fact that the Second Respondent is not a party to the Contract does not make the waiver agreed between the Appellant and the Player invalid or inapplicable, since the question of FIFA jurisdiction with regard to the Appellant´s claim against the Second Respondent has to be dealt with individually as the Panel will do below.

145. Based, *inter alia*, on the above, the Panel finds that the Appellant´s claim against the Player filed with the FIFA is in fact inadmissible due to lack of jurisdiction since the Appellant and the Player have submitted themselves to the exclusive jurisdiction of the national, decision-making arbitrational body as set out in the Contract and in the CBA and have waived any and all rights to bring any claim before FIFA. Whether or not the claim before FIFA is identical with the claim dealt with by the Independent Arbitrator is not decisive in this regard as the waiver is considered to cover all disputes between the Appellant and the Player in relation to the Player´s employment relationship.

The Appellant´s claim against the Second Respondent before FIFA

146. Also the dispute between the Appellant and the Second Respondent is – as already noted above – an employment-related dispute of an international dimension, since the Appellant is a football club from the USA, and the Player being a professional football player of Argentinian nationality. Furthermore, the Second Respondent is a Saudi Arabian football club.

147. As also set out above, pursuant to Article 22(1)(b) of the FIFA RSTP, FIFA is in general competent to hear *employment-related disputes between a club and a player of an international dimension*, unless the parties to such a dispute have explicitly opted out of such competence.

148. Even if the Player is not a direct party to the dispute before FIFA between the Appellant and the Second Respondent, the Panel finds that the Appellant´s claim against the Second Respondent originates from the dispute between the Appellant and the Player since the claim is based on Article 17(2) and (4) of the FIFA RSTP in connection with the Player´s alleged breach of the Contract.

149. It is undisputed that FIFA is competent to hear such disputes with regard to a claim against a player´s new club in cases where FIFA is also competent to hear the alleged claim against the player in question.

150. A player´s new club cannot be considered automatically bound by any agreement entered into between a player and the player´s former club. This is also true for the dispute resolution clause contained therein. The latter cannot be extended to the new club. Consequently, the Panel finds that the dispute resolution clause binding the Appellant and the Player (and included in the Contract), does not automatically deprive FIFA from the competence to hear any claim of the Appellant against the Second Respondent as the Player´s new club, referring also to the considerations set out in paras 87-91 above.

151. As such, and with specific reference to the fact that the Appellant´s claim against the Second Respondent is based on Article 17 of the FIFA RSTP and the fact that the latter is the Player´s new club, the Panel finds that the claim is in fact to be considered as an employment-related dispute between a club and a player of an international dimension, based on which FIFA is

competent to hear and decide the claim against the Second Respondent in accordance with Article 22 (1)(b) of the FIFA RSTP.

152. As a result, the Panel rules that the FIFA DRC was wrong in declaring the Appellant´s claim against the Second Respondent inadmissible based on, *inter alia*, lack of jurisdiction to solve the dispute between the Appellant and the First Respondent.

153. The Panel notes in this regard that the Appellant submits that the *de novo powers* of the CAS extend to, *inter alia*, the merits of the Appellant´s claim, even though such merits were not examined or decided upon by the FIFA DRC in line with CAS 2019/A/6621, and that, accordingly, the Panel must decide on the merits of the case regarding the claim against the Second Respondent.

154. In general, the Panel agrees with the Appellant regarding the *de novo* powers of the CAS.

155. However, based on the circumstances of this particular case, including the fact that the Second Appellant was never called as a party before the Independent Arbitrator and was never heard by the Chairman, the Panel finds that the Second Respondent should be given the opportunity to have the case heard before the FIFA DRC. Moreover, the Panel finds it appropriate, based, *inter alia*, on the nature of the claim, that the FIFA DRC is given an opportunity to deal with the dispute in the first instance based on submissions from both the Appellant and the Second Respondent.

156. As such, the Panel finds that the Appellant´s claim against the Second Respondent must be referred back to the FIFA DRC, which will hear and decide the case *de novo*.

X. COSTS

157. Article R64.4 of the applicable edition of the CAS Code provides as follows:

"*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."

158. 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."

159. Considering the outcome of these proceedings, the Panel considers that the costs of the arbitration, to be determined and notified to the Parties by the CAS Court Office, must be split between the Appellant, the Second Respondent and FIFA in the proportions of 50% / 25% / 25%, respectively.

160. Furthermore, and also as a general rule, the award may grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with these proceedings. Taking into consideration the outcome of these proceedings and the fact that the Third Respondent was not represented by an external counsel, the Panel rules that the Appellant must pay a contribution towards the First Respondent´s legal fees in the amount of CHF 5,000 (five thousand Swiss Francs) while the Appellant, the First Respondent and the Third Respondent must bear their own legal fees and expenses.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed on 17 June 2022 by Red Bull New York, Inc. against the decision rendered by the Dispute Resolution Chamber of the FIFA Football Tribunal on 28 March 2022 is dismissed with regard to the claim against Alejandro Sebastián Romero Gamarra.

2. The appeal filed on 17 June 2022 by Red Bull New York, Inc. against the decision rendered by the Dispute Resolution Chamber of the FIFA Football Tribunal on 28 March 2022 is partially upheld with regard to the claim against Al-Taawoun Football Club, and the matter between these two parties is referred back to the Dispute Resolution Chamber of the FIFA Football Tribunal for a decision.

3. The costs of arbitration, to be determined and served to the Parties by the CAS Court Office, shall be borne by Red Bull New York, Inc., Al-Taawoun Football Club and FIFA in the proportions of 50% / 25% / 25%, respectively.

4. Red Bull New York, Inc. is ordered to pay to Alejandro Sebastián Romero Gamarra an amount of CHF 5,000 (five thousand Swiss Francs) as a contribution towards the expenses incurred in connection with these arbitration proceedings. Red Bull New York, Inc., Al-Taawoun Football Club and FIFA shall bear their own costs and expenses incurred in connection with these arbitration proceedings.

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

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

THE COURT OF ARBITRATION FOR SPORT

Lars Hilliger
President of the Panel

Ulrich Haas
Arbitrator

Anna Péniche
Arbitrator