**CAS 2023/A/9960 Sporting Clube de Portugal v. FC Internazionale Milano S.P.A**

# ARBITRAL AWARD

**delivered by the**

# COURT OF ARBITRATION FOR SPORT

**sitting in the following composition:**

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| President: | Dr Leanne O'Leary, Solicitor in Liverpool, United Kingdom |
| Arbitrators: | Prof. Petros C. Mavroidis, Professor at Columbia Law School, New York City, New York |
| | Mr Pierre Muller, Former Judge in Lausanne, Switzerland |

**in the arbitration between**

**Sporting Clube de Portugal, Lisbon, Portugal**

Represented by Ms Louise Riley S.C., Barrister, Prof. Edgar Philippin and Mr Riccardo Coppa, Attorneys-at-law, at Kellerhals Carrard, Lausanne, Switzerland

**Appellant**

**and**

**FC Internazionale Milano S.p.A., Milan, Italy**

Represented by Prof. Dr Antonio Rigozzi, Mr Eolos Rigopoulos and Mr Patrick Pithon, Attorneys-at-law at Lévy Kaufmann-Kohler, Geneva, Switzerland

**Respondent**

## I. PARTIES

1. Sporting Clube de Portugal (the "Appellant" or "Sporting") is a professional football club situated in Lisbon, Portugal. It is affiliated to the Federação Portuguesa de Futebol ("FPF"), which, in turn, is affiliated to the Fédération Internationale de Football Association ("FIFA").

2. FC Internazionale Milano S.p.A (the "Respondent" or "Inter") is a professional football club situated in Milan, Italy. It is affiliated to the Federazione Italiana Giuoco Calcio ("FIGC"), which, in turn, is affiliated to FIFA.

3. Collectively, the Appellant and the Respondent are referred to as "the Parties".

## II. INTRODUCTION

4. This is an appeal against a decision of the FIFA Players' Status Chamber (the "PSC") dated 29 June 2023 which dismissed Sporting's breach of contract claim against Inter (the "Appealed Decision"). The contract in dispute is a transfer agreement between the Parties dated 27 August 2016 regarding the Portuguese player, João Mário Naval da Costa Eduardo (hereinafter the "Player" and the "Transfer Agreement").

5. The Transfer Agreement contained a disputed right of first refusal clause (or pre-emption right), which in the event that Inter received "*a written offer for the transfer (loan or permanent) of the player*" from another FPF-affiliated club in Portugal, obliged Inter to inform Sporting in writing of the offer and to permit Sporting to exercise the right of first refusal to acquire the Player's services. Sporting alleges that Inter circumvented the pre-emption right when it agreed to mutually terminate the Player's employment contract in July 2021 and the Player subsequently moved on a free transfer to Sport Lisboa e Benfica ("Benfica"), another professional football club affiliated to the FPF. Sporting alleges that Inter deliberately structured the transfer arrangements to avoid payment of a conditional fee of EUR 30 million outlined in Clause 2.7 of the Transfer Agreement. Inter denies that the amount of EUR 30 million is owed because it never received a written offer for the Player's transfer.

## III. FACTUAL BACKGROUND

### A. Background Facts

6. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced at the hearing on 9 December 2024. Additional facts and allegations found in the Parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

7. In 2016, the Player was a talented 23-year-old footballer in Sporting's academy who assisted the Portuguese national team to win the UEFA European Championship in July 2016. His transfer fee at the time was estimated to be between EUR 50 to 60 million and in the summer of 2016, it was agreed that the Player would move to Inter.

8. On 27 August 2016, Sporting and Inter entered into the Transfer Agreement whereby the Player's services were transferred permanently to Inter on the following relevant terms:

"*2.3 As for the permanent transfer of the player, **Inter** shall pay to **Sporting** the fixed sum of €40.000.000.00 (forth million EUROS)…as follows:*

*a) as for Euro 20.000.000,00 (twenty million EUROS) within 2 (two days) by the receipt by Inter of the ITC;*

*b) as for Euro 20.000.000,00 (twenty million EUROS) within 10 July 2017.*

*…*

*2.4 **Sporting** shall be entitled to receive the conditioned amount of €1.000.000,00 (one million Euro)…each time, in the period from the effective date of this agreement and 30 June 2021, **Inter** wins one of the following competitions: Campionato Italiano di Serie A, UEFA Europa League and UEFA Champions League.*

*Parties agree the maximum amount achievable by **Sporting** as conditioned amounts pursuant to this clause 2.4 shall be in any case €5.000.000,00 (five million Euro). Nothing else shall be paid by **Inter** to **Sporting** as conditioned amounts pursuant to clause 2.4. even in the event **Inter** wins more than 5 times one of the above mentioned competitions.*

*The conditioned amounts under this clause 2.4., if become due, shall be paid in one instalment within 30 days by the date in which the relevant event took place.*

*2.5 In the event **Inter** is in default exclusively with the first instalment payment under letter a) clause 2.3, for more than 10 (ten) working days by the payment deadline provided always under letter a) clause 2.3., then **Inter** shall pay to **Sporting** by way of liquidated damages an amount equal to Euro 2.000.000,00 (two million euros) within further 7 (seven) days.*

*2.6 **Inter** hereby grant **Sporting** a right of first refusal over the transfer of the **player** exclusively in connection with possible **player**'s acquisition proposals made by clubs affiliated at the Federação Portuguesa de Futebol.*

*In case **Inter** receives- exclusively by clubs affiliated at the Federação Portuguesa de Futebol - a written offer for the transfer (loan or permanent) of the **player**, an offer that **Inter** and the **player** wish to accept, then **Inter** shall inform **Sporting** in writing with the details of the offer received. **Sporting** shall have two business days (or two hours if the offer is received in the last day of the*

*transfer market window) from the receipt of the communication by **Inter** for exercising the right of first refusal by confirming **Inter** in writing its willingness to acquire the **player** at conditions at least equal to the ones proposed by the third club. In this latter event the **player** shall be referred to **Sporting**, subject to relevant acceptance by the **player**. In the event that the third club offers the transfer of the rights of one or more of its players so as to cover partially or entirely the amount of the loan or permanent transfer compensation due to **Inter**, then **Inter** is compelled to include the market value in EUR of each offered player in the loan or permanent transfer contract as part of the loan or permanent transfer compensation, so as to be able to establish the final and total amount of the loan or permanent transfer compensation necessary in order to allow **Sporting** to evaluate the third club offer and to decide if to exercise, or not, its right of first refusal.*

*2.7 Failing any written communication within the above term set out in clause 2.6, **Inter** shall be free to transfer the player to the third club, but, in the event the transfer is effectively executed to a third club affiliated at the Federação Portuguesa de Futebo, **Sporting** shall be entitled to receive by **Inter** a conditioned amount of € 30.000.000,00 (thirty million euros)(save exclusively for what provided under clause 3.2 below) to be paid within 30 days by the **player**'s registration at the third club affiliated at the Federação Portuguesa de Futebol."*

9. On 27 August 2016, as part of the transfer arrangements, the Player and Sporting agreed to terminate the Player's existing employment contract in anticipation of the Player moving to Inter (the "Termination Agreement"). The Termination Agreement contained a preferential right in Sporting's favour similar to the right contained in Clause 2.6 of the Transfer Agreement, which if Sporting exercised the pre-emption right, obliged the Player to accept a transfer to Sporting on at least the same terms and conditions as proposed to Inter and the Player by a third club affiliated to the FPF.

10. Also on 27 August 2016, the Player entered a five-year employment contract with Inter pursuant to which the Player was to receive EUR 5,095,000 gross (EUR 2,750,000 net) for the first season and EUR 5,560,000 gross (EUR 3,000,000 net) for each of the following four seasons (the "Inter Employment Contract").

11. On 28 August 2016, the Player transferred from Sporting to Inter and became an Inter player. He played one season for Inter before being loaned to West Ham United FC for the 2017/2018 season and to FC Lokomotiv Moscow during the 2019/2020 season.

12. On 26 August 2019, the Player and Inter agreed a one-year extension of the Inter Employment Contract for the 2021/2022 season for which the Player was to receive a salary of EUR 4,605,000 gross (EUR 2,500,000 net).

13. On 5 October 2020, the Player was transferred on loan from Inter to Sporting, with Sporting, Inter and the Player entering into a one-year loan agreement pursuant to which the Player transferred temporarily to Sporting for the 2020/2021 season.

14. In March 2021, Sporting decided to approach Inter to acquire the Player's services.

15. On 5 March 2021, Mr Hugo Viana, Sporting's Football Director contacted Mr Piero Ausilio, Inter's Sports Director by WhatsApp to enquire about the Player's transfer to Sporting including on a temporary loan basis. Mr Ausilio's reply during the WhatsApp exchange confirmed that Inter, "*can accept only a permanent transfer. Inter payed 45M to SP. We need to be friendly and honest*."

16. On 4 June 2021, Mr Viana had a WhatsApp exchange with Mr Fernando Couto, the Player's agent, who at the time of the WhatsApp exchange was in the company of Inter's Sports Director, Mr Ausilio. Mr Viana offered to acquire the Player's services for a transfer fee of EUR 3 million and EUR 2 million in conditional bonuses, which Mr Couto indicated during the exchange that Inter was unlikely to accept. A certified translation from Portuguese into English of the relevant exchange that was submitted as evidence stated the following:

*"[Hugo Viana – 08:42]* *Good morning Fernando*

*I will send you our idea in a bit*

*[Fernando Couto – 09:10]* *Ok*

*Good morning Hugo*

*[Fernando Couto – 09:10]* *Fede is with Piero*

*[Hugo Viana – 09:22]* *3M€ Transfer 2M€ Bonus*

- *500k per x matches up to 1M*
- *500k champion (1 time)*
- *500k world cup or European cup qualification (1x)*

*[Hugo Viana – 09:26]* *Qualification meaning being called up*

*[Fernando Couto – 09:32]* *But what's the total value?*

*[Hugo Viana – 09:35]* *3M€ transfer plus 2M€ bonus*

*[Fernando Couto – 09:38]* *I'm sorry Hugo…Initially we talked about 7/8M€…now the offer is of 3M€ + 2M…?*

*[Hugo Viana – 09:39]* *Yes. If they want 7/8M from our side, I won't get it. They are saving more than 6M in wages.*

*Missed voice call at 22:43.*"

17. On 5 June 2021, Mr Viana had a WhatsApp exchange with the Player regarding the previous day's communication with Mr Couto. A certified translation from Portuguese

to English of the WhatsApp exchange that was submitted as evidence stated the following:

*"[Hugo Viana – 10:02]* *Good morning João,*

*Yesterday I have already passed the offer to Fernando. Let's see what they say this week. Regards*

*[Hugo Viana – 10:03]* *Have a nice weekend*

*[João Mário – 11:02]* *Good morning Hugo,*

*Perfect, I will talk with Fernando too. Let's see if this is closed this week. Have a nice weekend, regards"*

18. On 13 June 2021, Mr Federico Varandas, Sporting's President had a WhatsApp exchange with the Player which explained Sporting's position in the negotiation. A certified translation from Portuguese into English of the relevant exchange that was submitted as evidence stated the following:

*[João Mário – 17:28]* *President is everything ok? I really wanted to talk with you. When you are available, call me please.*

*João Mário*

*[Frederico Varandas – 20:38]* *Dear Johnny, I will call you soon.*

*I'm on my way to Lisbon.*

*[João Mário – 20:46]* *Thanks Presi, see you soon*

*[Frederico Varandas – 22:57]* *My dear João, please believe me from the bottom of my heart that when we made the proposal it had nothing to do with lack of consideration or respect. It's just that we don't have the financial capacity that we would like to have, so we must start negotiating like this. Nothing more than that. It is nothing more than the beginning of a negotiation. As I told you, you are a priority for the coach, Viana and me. Regards*

*[João Mário – 23:10]* *Presi the behaviour of Sporting, or the People who deal directly with me, this month has not been correct. I am 28 years old, 15 years at Sporting and I was sold for 43 million euros, I cannot accept being treated like any other person by Sporting. I'm watching the European Championship at home and I can't let my career continue to be dependent on the last days of the market. I gave up*

*500 thousand euros this year to Sporting to value myself and go to the European and I don't feel appreciated internally by Sporting to be honest.*

*I cannot be clearer about my will, both publicly and personally, but the message that Sporting constantly passes to the media is always negative for me. I thank you for your sincerity and I am repaying you in the same way. I hope you understand everything I've told you, but I can't wait much longer.*

*Regards,"*

19. Between 24 June 2021 and 7 July 2021, various media outlets and websites reported that Inter, Benfica and the Player were in negotiations to transfer the Player to Benfica.

20. On 12 July 2021 at 16:30pm, Inter announced on its website that it had agreed a mutual termination of the Inter Employment Contract with the Player.

21. Later on 12 July 2021, the Player's other agent, Federico Pastorello, posted a photo on his Instagram page of the Player and the agent inside a plane with the caption, "*Back to Portugal #joaomario*".

22. Still on 12 July 2021, and in view of the media reports, Sporting sent a letter to Inter reminding it of its obligations under the Transfer Agreement:

"*It has come to our attention that FC Internazionale have come to an agreement with João Mário Naval da Costa Eduardo for the early termination of the employment contract.*

*We struggle to understand the rationale behind such an agreement, where a month ago FC Internazionale rejected a proposal from Sporting CP for the definitive transfer of the player for the fixed amount of €3.000.000.00 plus €2,000.000,00 in contingent payments, and when news of SL Benfica's interest in signing the player for a reported €7.500.000,00 have been escalating in recent weeks.*

*We would like to respectfully remind FC Internazionale of its contractual obligations pursuant to the transfer agreement entered into between our clubs in August 2016, in particular the contingent payment of €30.000.000,00 in the event that the player was transferred to a Portuguese club*."

23. On 13 July 2021 between 9:30am and 12:30pm, Benfica publicly announced on its social media pages that the Player had joined the club.

24. Also on 13 July 2021, Benfica and the Player entered into an employment contract (the "Benfica Employment Contract")

25. Later on 13 July 2021, Sporting published a statement on its website which

"*In view of the news coming to the public yesterday and today, Sporting SAD informs the following:*

*1. In 2016, upon the transfer of player João Mário from Sporting CP to FC Internazionale Milano, the Italian club and the player himself agreed to make an additional payment of €30,000,000 in the event of the player subsequently being registered to a Portuguese club, including SL Benfica;*

*2. As has been made public, yesterday FC Internazionale Milano and João Mário agreed to terminate, by mutual consent, the employment contract that legally bound them, so that the player could immediately sign for SL Benfica. This was after FC Internazionale Milano had refused an offer from Sporting Clube de Portugal - Futebol, SAD for the player in question;*

*3. It is the conviction of the Board of Directors of Sporting Clube de Portugal - Futebol, SAD that a contractual expedient was used, through which Inter and João Mário sought to bypass the terms of the agreement signed with Sporting Clube de Portugal - Futebol, SAD in 2016;*

*4. This expedient only illustrates that all parties knew the obligations they assumed in 2016 and which, after 5 years, they have now intended to avoid;*

*5. Sporting Clube de Portugal - Futebol, SAD will not publicly comment further on this situation, which has arisen as SL Benfica aims to divert uncomfortable attention from other current affairs;*

*6. However, the club will not neglect to defend the interests of Sporting Clube de Portugal, holding the intervening parties responsible for the damages caused and for the non-fulfilment of the agreed obligations.*"

26. Still on 13 July 2021, Inter published a response to Sporting's statement on its website which read as follows:

"*MILAN – FC Internazionale Milano is aware of the statement released to the media by Sporting Clube de Portugal.*

*The comments are unacceptable, extremely serious and – most importantly – without basis in truth.*

*The club will protect its image and reputation in the relevant forums*."

27. On 20 July 2021, the first instruction for the transfer of the Player from Inter to Benfica was entered into the FIFA Transfer Matching System ("TMS").

## B. Proceedings before the Players' Status Chamber of the FIFA Tribunal

28. On 29 July 2022, Sporting filed a claim against Inter in the PSC, alleging a breach of contract arising from the non-payment of a fee owed under Clause 2.7 of the Transfer

Agreement, which Inter was obliged to pay when it transferred the Player to Benfica. Sporting requested payment of EUR 30 million plus interest at 5% p.a.

29. Before the PSC, Sporting submitted in its statement of claim that:

- Inter had acted in bad faith and circumvented the obligations established in Clause 2.6 of the Transfer Agreement, which triggered the payment defined in Clause 2.7 of the Transfer Agreement;

- Inter agreed a mutual termination of the Inter Employment Contract on 12 July 2021 to transfer the Player as a "free agent" to Benfica to prevent paying the fee set out in Clause 2.7 of the Transfer Agreement; and

- Inter used the free transfer of the Player to set off an amount in the transfer of another player, Valentin Lazaro, from Inter to Benfica;

- Clause 2.7 of the Transfer Agreement was a conditional fee and not a penalty clause.

30. In its replica, Sporting reiterated its position and submitted the following:

- Clause 2.6 of the Transfer Agreement stands alone as a provision without impacting the conditional fee in Clause 2.7 of the Transfer Agreement; whether Inter received an offer and/or informed Sporting is irrelevant. The only condition in Clause 2.7 of the Transfer Agreement is that the Player's transfer is executed to a third club affiliated to the FPF and it is not disputed that occurred. The definition of "transfer" is that the registration moved from one club to another.

- Clause 2.7 of the Transfer Agreement does not specify that the transfer needs to be executed on the basis of a written agreement. It is sufficient that the registration moves from one club to another for a "transfer" to arise.

- Inter sought to prevent Sporting from receiving the agreed conditional fee in bad faith.

- One day after the contract termination, Benfica tweeted that the Player would join and the timeline to negotiate all relevant contracts indicates that previous negotiations before the termination occurred.

- The conditional fee is not disproportionate considering the market value of the player at the time of the conclusion.

31. Before the PSC, Inter denied Sporting's claim and submitted in its defence that:

- It had paid a high transfer fee of EUR 40 million to acquire the Player's services from Sporting and that the Player disappointed during the season of 2016/2017, which led to the Player being loaned to West Ham United FC in 2017/2018 (loan fee of EUR 350,000), FC Lokomotiv Moscow in 2019/2020 (free of charge) and Sporting in 2020/2021 (free of charge).

- During the loan periods, Inter did not pay the Player's salary, however, it paid EUR 459,863.63 as an incentive for the Player to accept the loan to Sporting in October 2020. The Player resumed his duties with Inter after May 2021.

- Media reports of transfer rumours are part of doing business in the football industry during a transfer window and Inter never received any official offer, whether formally or informally, for the Player's transfer.

- The Player was disappointed that Sporting did not want to acquire his services on a definitive basis and since the Player was unwilling to go on another loan, the decision was made to mutually terminate the Inter Employment Contract. The decision benefitted both parties since the Player was free to join a club of his choice without a transfer fee and Inter saved on the Player's salary for the forthcoming season. It would have been difficult to find another loan agreement because of the Player's high salary.

- Inter had no contact with the Player after the mutual termination of the Inter Employment Contract and only learned from the media of his signature with Benfica. Inter never signed a transfer agreement with Benfica and although Benfica had shown interest in the Player, Inter did not receive a firm offer from the club.

- Inter denied any connection between Valentin Lazaro's transfer and the Inter Employment Contract termination. Mr Lazaro had been on loan with several other clubs prior to going on loan to Benfica and the loan to Benfica was nothing out of the ordinary. The loan fee received for Mr Lazaro represented the actual market value of the player and there was no link between it and termination of the Inter Employment Contract.

- The condition in Clause 2.6 of the Transfer Agreement was never fulfilled because Inter never received an offer.

- Clause 2.6 of the Transfer Agreement was "null and void" because its sole purpose was to limit the Respondent's freedom and the Player's freedom in transfer-related matters which was a de facto prohibition to transfer the Player to a Portuguese club and the clause was "*unlawful*" and "*immoral*".

- In the alternative, the penalty established in Clause 2.7 of the Transfer Agreement was excessive and disproportionate and should be reduced to zero.

32. In its Duplica, Inter reiterated its position and submitted the following:

- The information regarding Valentin Lazaro's transfer that had been revealed by FIFA to the Claimant was not addressed in Sporting's replica at all and had been a "*fishing expedition*".

- Sporting's claim was based on speculative media reports and not based on any evidence.

- Clauses 2.6 and 2.7 of the Transfer Agreement were not stand-alone provisions. Clause 2.7 of the Transfer Agreement was a contractual penalty and not a conditional fee. The conditions to trigger the payment did not arise and the conditional fee was not due. Clause 2.7 of the Transfer Agreement was also null and void because it was immoral and unlawful and limited contractual freedom.

- Sporting and Inter had a different interpretation of Clauses 2.6 and 2.7 of the Transfer Agreement which were imposed by Sporting and should be interpreted against the party who drafted the contract if unclear.

33. By the Appealed Decision, the PSC rejected Sporting's claim as follows:

"*1. The claim of the Claimant, Sporting Clube de Portugal, is rejected.*

*2. The final costs of the proceedings in the amount of USD 20,000 are to be paid by the Claimant to FIFA. As the Claimant already paid the amount of USD 5,000 to FIFA as advance of costs at the start of proceedings, the residual amount of USD 15,000 is still to be paid as procedural costs (cf. note relating to the payment of the procedural costs below).*"

34. The reasons for the Appealed Decision were as follows:

- Regarding the competence, applicable legal framework and burden of proof, the PSC accepted that it was competent to deal with the matter at hand pursuant to Article 34 of the March 2023 edition of the Procedural Rules Governing the Football Tribunal (the "Procedural Rules") and Article 23 par. 2 and Article 22 lit. f) of the Regulations on the Status and Transfer of Players (the "RSTP") (May 2023 edition), and on the basis that the matter concerned a contractual dispute between clubs belonging to different associations. The regulations applicable to the substance of the matter were the July 2022 edition of the FIFA RSTP. Article 13 par. 5 of the Procedural Rules provides that the burden of proof lies on a party claiming a right on the basis of an alleged fact. The PSC also emphasised that pursuant to Article 13 par. 4 of the Procedural Rules, it was entitled to consider evidence not submitted by the parties, including any evidence generated by or held in the TMS.

- The PSC acknowledged that its task was to determine whether Clause 2.7 of the Transfer Agreement applied and if Sporting was entitled to the conditional fee. It emphasised that Sporting bore the burden of proving that the payment established in Clause 2.7 of the Transfer Agreement was triggered.

- The PSC determined that Clause 2.6 of the Transfer Agreement established a right of first refusal should Inter have received an offer for the Player's services, but Sporting was unable to submit conclusive evidence to show that the offer had in fact materialised.

- The PSC also noted that Clause 2.7 of the Transfer Agreement referred to Clause 2.6 of the Transfer Agreement and the "failed communication" regarding the right of first refusal and concluded that Clause 2.7 of the Transfer Agreement did not

stand alone and was a penalty fee rather than a conditional payment. The PSC rejected Sporting's arguments to the contrary.

- The PSC concluded that Sporting could not show that Inter had circumvented its contractual obligations through the mutual termination of the Inter Employment Contract, that Inter had submitted a reasonable explanation for the termination, and the PSC rejected Sporting's allegation that the transfer of Valentin Lazaro had any connection to the Player's situation. The PSC held that the payment required pursuant to Clause 2.7 of the Transfer Agreement was not triggered and rejected Sporting's claim in its entirety.

- Considering that the claim was rejected, the PSC concluded that Sporting should bear the costs of the proceedings and directed that Sporting should pay the maximum amount of costs of USD 20,000. No procedural compensation was awarded.

35. The grounds of the Appealed Decision were notified to the Parties on 10 August 2023.

## IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

36. On 31 August 2023, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") pursuant to Article R48 of the Code of Sports-related Arbitration (the "Code") against the Respondent and FIFA regarding the Appealed Decision. In the Statement of Appeal, the Appellant nominated Prof Petros C Mavroidis, Professor in Commugny, Switzerland, as arbitrator. The Appellant also sought orders for disclosure of certain documents against the Respondent (the "Inter Document Request") and FIFA (the "FIFA Document Request"), collectively referred to as the "Document Production Requests".

37. On 6 September 2023, the CAS Court Office invited the Appellant to file the Appeal Brief and the Respondent and FIFA to nominate an arbitrator.

38. On 7 September 2023, FIFA informed the CAS Court Office that the dispute did not concern it, was not a disciplinary matter and the Statement of Appeal did not contain any substantial request against it. FIFA requested that it be excluded from the dispute.

39. On 7 September 2023, the Appellant informed the CAS Court Office of its request to suspend time to file the Appeal Brief while the Document Production Requests outlined in the Statement of Appeal were considered because the requested information was "*crucial*" to the Appeal Brief preparation.

40. On 11 September 2023, the CAS Court Office invited the Appellant to comment on FIFA's exclusion request and invited the Respondent to comment on the Document Production Requests.

41. On 14 September 2023, the Appellant informed the CAS Court Office that its Document Production Requests were directed to FIFA too and confirmed that it maintained the proceedings against FIFA.

42. On 15 September 2023, the CAS Court Office confirmed that FIFA would continue as a respondent and invited FIFA to comment on the Document Production Requests.

43. On 27 September 2023, FIFA informed the CAS Court Office of its position on the Document Production Requests. It also reiterated its desire to be removed from the proceedings.

44. On 3 October 2023, FIFA and the Respondent jointly nominated Mr Pierre Muller, Former Judge in Lausanne, Switzerland as arbitrator.

45. On 5 October 2023, the Respondent informed the CAS Court Office that it objected to the Document Production Requests.

46. On 1 November 2023 and pursuant to Article R54 of the Code, the Panel was constituted as follows:

President: Dr Leanne O'Leary, Solicitor in Liverpool, United Kingdom

Arbitrators: Prof. Petros C. Mavroidis, Professor at Columbia Law School, New York City, New York

Mr Pierre Muller, Former Judge in Lausanne, Switzerland

47. Still on 1 November 2023, the time limit for filing the Appeal Brief was suspended.

48. On 21 November 2023, the CAS Court Office informed the Parties of the Panel's decisions to reject the FIFA Document Request and to partially uphold the Inter Document Request. The reasons for the Panel's decisions are provided elsewhere in this Award.

49. On 5 December 2023, the Respondent informed the CAS Court Office of its reply to the Inter Document Request, confirming that, "[*After*] *a search in the relevant phones and other devices belonging to individuals within the club, there are no documents responsive to the Panel's production order* […]".

50. On 11 December 2023, the CAS Court Office informed the Parties that the document production phase had concluded and the time limit for filing the Appeal Brief continued.

51. On 14 December 2023, the Appellant confirmed that it did not object to the exclusion of FIFA from the proceedings, and FIFA was removed as a respondent.

52. On 22 January 2024, in accordance with Article R51 of the Code and within a previously granted extension of time, the Appellant filed the Appeal Brief.

53. On 19 April 2024, in accordance with Article R55 of the Code and within a previously granted extension of time, the Respondent filed its Answer.

54. On 22 April 2024, the CAS Court Office informed the Parties that unless the Parties agreed or the President of the Panel ordered otherwise on the basis of exceptional circumstances, pursuant to Article R56 of the Code, the Parties were not authorised to

supplement or amend their requests or their argument, nor to produce new exhibits or specify further evidence. The CAS Court Office also invited the Parties to inform of their preference for a hearing and a case management conference to be held.

55. On 2 May 2024, the CAS Court Office informed the Parties that pursuant to Article R57 of the Code, the Panel had decided to hold a hearing at the CAS Court Office in Lausanne. Following further consultation with the Parties, and considering the availability of the Parties' legal representatives, witnesses and the Panel, the proceedings were set down for a hearing on 9 December 2024.

56. On 5 July 2024, the CAS Court Office invited the Parties to confer and submit an agreed hearing schedule and to provide a list of attendees for the hearing, which was duly submitted on 21 October 2024.

57. On 20 November 2024, the Panel issued directions to the Parties concerning the order of proceedings for the expert evidence hot tub that the Parties had indicated on the agreed hearing schedule would be their preferred mode of hearing the expert evidence. A revised hearing schedule was also circulated.

58. On 28 November 2024, the CAS Court Office invited the Parties to sign the Order of Procedure, which the Appellant and the Respondent each returned separately, in duly signed copy, on 4 December 2024.

59. On 9 December 2024, a hearing was held at the CAS Court Office Headquarters in Lausanne, Switzerland. Besides the Panel and Mr Giovanni Maria Fares, CAS Legal Counsel, the following people attended:

For the Appellant:
Ms Louise Reilly SC - Barrister
Mr Riccardo Coppa - Legal Counsel
Prof. Edgar Philippin - Legal Counsel
Prof. Thomas Probst – Expert Witness
Mr Frederico Nuno Faro Verandas – Witness (by videoconference)
Mr Hugo Miguel Ferreira Gomes Viana – Witness (by videoconference)

For the Respondent:
Prof. Dr Antonio Rigozzi – Legal Counsel
Mr Gianpaolo Monteneri – Legal Counsel
Mr Eolos Rigopoulos – Legal Counsel
Mr Patrick Pithon – Legal Counsel
Prof. Sylvain Marchand – Expert Witness

60. At the outset of the hearing, the Parties confirmed that they had no objections with respect to the Panel and no objection was raised to the jurisdiction of the CAS to decide the dispute when the jurisdiction was confirmed by the Panel.

61. The hearing commenced with the Parties' opening statements and the Parties reiterated the arguments already put forward in their respective written submissions. The

Appellant's fact witnesses, Mr Viana and Mr Verandas, were heard with respect to the circumstances specified in the written submissions already submitted and to the other circumstances related to the dispute and the Parties and the Panel had the full opportunity to examine the fact witnesses. Professor Thomas Probst and Professor Sylvain Marchand gave evidence together, with the Parties cross-examining the expert witnesses.

62. The Parties presented their closing submissions orally and replied to questions from the Panel. Before the hearing concluded, the Parties expressly stated that they did not have any objection to the procedure adopted by the Panel and that their rights to be heard and to be treated equally had been duly respected.

## V. THE PARTIES' SUBMISSIONS AND EVIDENCE

63. The following outline is a summary of the Parties' arguments, submissions and oral witness testimony which the Panel considers relevant to decide the present dispute and does not necessarily comprise each and every contention put forward by the Parties. The Panel has, nonetheless, carefully considered all the submissions made by the Parties, even if no express reference has been made in the following summary. The Parties' written and oral submissions, documentary and oral evidence, and the content of the Appealed Decision were all taken into consideration.

### A. The Appellant's Position

64. Sporting's submissions, in essence, may be summarized as follows:

- Inter is liable to pay Sporting the conditional fee of EUR 30 million in accordance with Clause 2.7 of the Transfer Agreement. Sporting submitted three primary arguments in support of its position, namely:

  i) Inter prevented Sporting from validly exercising the right of first refusal set out in Clause 2.6 of the Transfer Agreement. The Parties agreed in advance that Inter should pay Sporting the amount of EUR 30 million as the legal consequences in case of breach of the pre-emption right.

  ii) Inter prematurely terminated the Inter Employment Contract and the Player was effectively transferred to Benfica, a FPF-affiliated club, on 13 July 2021. The (only) condition precedent provided for in Clause 2.7 of the Transfer Agreement was fulfilled and Inter should pay Sporting the amount of EUR 30 million.

  iii) Inter acted in bad faith by artificially structuring the Player's transfer to Benfica in a manner intended to prevent Sporting from being able to consider and exercise its pre-emption right and to avoid paying the conditional fee to Sporting. Pursuant to Swiss law and CAS jurisprudence, the condition to pay the conditional fee is deemed to be "fulfilled" because of Inter's bad faith conduct and Inter should be ordered to pay the amount of EUR 30 million.

*i) Inter prevented Sporting from validly exercising the right of first refusal (or pre-emption right) set out in Clause 2.6 of the Transfer Agreement*

- Clause 2.6 of the Transfer Agreement should be qualified as a pre-emption right under Swiss law, providing Sporting with an irrevocable option (right of first refusal) to acquire the Player's services under specific conditions.

- Sporting's pre-emption right is activated when Inter receives a "*written offer for the transfer (loan or permanent) of the player*" from "*clubs affiliated at the Federação Portuguesa de Futebol*". Despite the Document Production Requests, Sporting is unable to substantiate that Inter received a "*written offer*" from Benfica.

- Notwithstanding this, Clause 2.6 of the Transfer Agreement is triggered when a written offer is received and when any legal transaction that could be considered as economically equivalent to a transfer takes place. According to Swiss law, "any legal transaction economically equivalent to a transfer" must be considered a pre-emption event and should, in good faith, give rise to communication from Inter to Sporting and trigger the exercise of Sporting's right of first refusal (*cf*: Legal Expert Opinion of Professor Probst). The infringement of a pre-emption right gives rise to a damages' claim under Swiss law (*cf*: Legal Expert Opinion of Professor Probst), the amount of which the parties may validly agree in advance.

- The premature termination of the Inter Employment Contract on 12 July 2021 and the conclusion of a new contract between the Player and Benfica must be considered as economically equivalent to the transfer of a Player and the mutual termination ought to have been communicated to Sporting to allow it to properly exercise the right of first refusal. Inter's actions prevented Sporting from exercising the pre-emption right. Clause 2.7 of the Transfer Agreement prescribes the amount of EUR 30 million to be paid in the event of a breach and the Player's transfer to a FPF-affiliated club, and the amount became payable within 30 days after the Player's registration with Benfica.

*ii) Obligation of the Respondent to pay the conditional fee under Clause 2.7 of the Transfer Agreement*

- The Parties dispute the interpretation of Clause 2.7 of the Transfer Agreement. Pursuant to Article 1 of the Swiss Code of Obligations (the "SCO"), a contract requires "*the mutual expression of intent of the parties*". When the interpretation of a contract is in dispute, the judge must seek the true and mutually agreed intention of the parties, without dwelling on incorrect statements or expressions used by mistake or to conceal the true nature of the contract (Article 18(1) SCO). When the mutually agreed and genuine intention of the parties cannot be established, the contract must be interpreted according to the requirements of good faith (*cf*: ATF 129 III 664; 128 III 419 consid. 2.2 p.422).

- The requirements of good faith give preference to an objective approach. The emphasis is less on what a party may have meant than on how a reasonable person would have understood the party's declaration (*cf*: ATF 129 III 118 consid. 2.5

p.122; 128 III 419 consid. 2.2 p.422). To determine the intent of the party, or the intent that the reasonable person would have had in the circumstances, the judge needs to examine the relevant words or conduct, and the relevant circumstances of the case, including the negotiations, any subsequent conduct of the parties and usages (*cf*: CAS 2016/A/4544, para 94; CAS 2015/O/4362, para 83; CAS 2013/A/3133, para 63). When interpreting the contract, the true intention of the parties prevails over other elements of interpretation (CAS/A/5183, para 83 et seq; CAS 2017/A/5213, paras 40 - 42; CAS 2017/A/5219, para 93; CAS 2017/A/5339, para 87).

- The Parties' management has changed since the Transfer Agreement was signed so it is difficult to establish the common intention of the Parties at the time the Transfer Agreement was executed. Sporting submits, however, that the Parties' true and common intention was for Clause 2.7 of the Transfer Agreement to apply in the present case when the Player was effectively transferred from Inter to Benfica.

- Clause 2.7 sets out two conditions for the conditional fee to fall due, namely: i) the Player's transfer is effectively executed to a third club, and ii) the third club is affiliated to the FPF. These are conditions precedent within the meaning of Article 151(1) SCO because the obligation of Inter to pay the conditional fee is dependent on the occurrence of a future and uncertain fact. All the conditions were fulfilled.

- The Parties disagree as to whether the Player's registration with Benfica falls within the scope of Clause 2.7 of the Transfer Agreement i.e. "*in the event the transfer is effectively executed to a third club*". Sporting submits that the notion of 'the Player's transfer effectively being executed' is not limited to a transfer based on a transfer agreement between two clubs but includes any other possible movement of the Player's registration from one club to another.

- Paragraph 21 of the Definitions section of the FIFA RSTP defines 'an international transfer' as "*the movement of the registration of a player from one association to another association*". The Player's registration was moved from FIGC to the FPF because of the agreement between the Player and Inter, thus fulfilling a condition of Clause 2.7 of the Transfer Agreement and Inter is obliged to pay the EUR 30 million (subject to the deduction for the relevant solidarity contribution under Clause 3.2 of the Transfer Agreement).

- The wording of Clause 2.7 of the Transfer Agreement does not suggest that the transfer must be executed based on a contract because it does not contain any reference to terms such as "contract" or "agreement". The Parties used the broad phrase "*the transfer is effectively executed*" which clearly includes any possible scenario when the Player ends up moving to a Portuguese club (*cf*: CAS 2019/A/6525, paras 71-73 and CAS 2021/A/8099, para 103). If the Parties' intention were to limit the condition to a contractual transfer, the wording of Clause 2.7 of the Transfer Agreement would have contained the corresponding restriction.

*iii) Inter sought in bad faith to prevent Sporting from receiving the fee*

- Inter acted in bad faith by structuring the Player's transfer to Benfica as the transfer of a free agent i.e. without a written agreement between the clubs to have an argument against paying Sporting the conditional fee. By doing so, Inter contravened its obligation to act in good faith pursuant to the SCO and in particular Article 156 SCO which provides that, "*A condition is deemed fulfilled where one of the parties has prevented its fulfilment by acting in bad faith*".

- Jurisprudence of the Swiss Federal Tribunal and CAS confirm that if a condition is agreed and its occurrence, "*depends on the will of one of the parties on which the contract imposes obligations, this party does not have in principle an entire freedom to refuse this occurrence and to be freed, in that way, of its contractual obligations. It shall, on the contrary, act in a loyal way and according to the rules of good faith; in case of violation of these requirements, the condition is deemed to be accomplished according to Article 156 CO*" (*cf*: CAS 2010/A/2168, para 24; ATF 135 III 295).

- Inter's obligation to pay the conditional fee to Sporting should the Player be "*effectively*" transferred to a FPF-affiliated club was a condition that Inter was not permitted to circumvent. Inter had a duty to act in good faith towards Sporting when transferring the Player to Benfica (*cf*: CAS 2009/A/1756 and CAS 2018/A/5809). Because Inter prevented the condition precedent in Clause 2.7 of the Transfer Agreement from being fulfilled, the Panel should deem the condition to be fulfilled, and order Inter to pay the EUR 30 million.

- Inter's deliberate efforts to avoid the condition being fulfilled are evidenced by the following: i) Inter knew that Sporting was interested in keeping the Player after his loan expired on 30 June 2021; ii) Inter accepted that Benfica commenced discussions about a possible transfer of the Player, although there is no explanation of why the negotiations failed; iii) Inter's argument that it was too risky to wait too long into the transfer period for potential offers is unreasonable and cannot be true considering the Player's contract was terminated early in the summer transfer period and Sporting's transfer offer of EUR 5 million was higher that the Player's salary of EUR 4,605,000 gross; iv) the Player's transfer to Benfica and employment arrangements occurred in less than a day indicating that the Benfica Employment Contract must have been negotiated and agreed in advance; and v) Benfica's official financial report for the period dated 1 July 2021 to 31 December 2021 discloses that the acquisition of the economic and sports registration rights of the Player cost Benfica EUR 5,513,000 which is not compatible with Inter's contention that the Player transferred as a free agent.

- Sporting contends that Benfica's set-off payment to the agent, Mr Pastorello, on behalf of Inter and the transfer of the Player from Inter to Benfica was a single deal negotiated by the clubs.

- Article 156 SCO does not impose a positive obligation on Inter to actively encourage or promote the fulfilment of the condition in Clause 2.7 of the Transfer Agreement, however, Inter was prohibited from acting in bad faith by structuring the transfer as it did and deliberately preventing the condition's fulfillment.

- Under Swiss law, any reduction in the amount of a penalty clause is excluded when the parties that negotiated and signed the agreement containing the allegedly excessive penalty clause had equal bargaining power (*cf:* Basler Kommentar Obligationenrecht 1 (BSK OR I), 2020, Widmer/Constatini/Ehrat, ad article 163, N. 16-17). It is undisputed that the Transfer Agreement was concluded between two football clubs that participate in top-tier European football league and have significant experience in dealing with international matters, and who were of equal bargaining power when negotiating the Transfer Agreement. Inter and Sporting freely negotiated the Transfer Agreement's terms, and there is no reason to deviate from the principle of contractual freedom and reduce the payment amount.

- In the Appeal Brief, the Appellant submitted the following requests for relief:

"*122. Sporting Clube de Portugal - Futebol, SAD hereby respectfully requests the CAS to rule that:*

*(1) The decision rendered by the FIFA Players' Status Chamber on 29 June 2023 in the matter FPSD-6902 is set aside.*

*(2) FC Internazionale Milano S.p.A. is ordered to pay Sporting Clube de Portugal – Futebol, SAD the amount of EUR 30,000,000.00.*

*(3) FC Internazionale Milano S.p.A. is ordered to pay interest on the outstanding amount at a rate of 5% per annum from 13 August 2021 until the date of full payment.*

*(4) FC Internazionale Milano S.p.A. is ordered to reimburse Sporting Clube de Portugal - Futebol, SAD for the costs of the proceedings before FIFA in the amount of USD 20,000.*

*(5) The full amount of the arbitration costs should be borne by FC Internazionale Milano S.p.A.*

(6) *Sporting is granted a significant contribution to its legal costs and other related expenses*."

*a. Fact Witnesses*

**Mr Frederico Nuno Faro Verandas**

65. Mr Verandas, Sporting's president since September 2018, submitted a witness statement in support of the Appellant's appeal. He stated that in October 2020, Inter and Sporting entered into a loan agreement pursuant to which the Player transferred from Inter to Sporting on a temporary basis for the period between 5 October 2020 to 30 June 2021. Mr Verandas stated that the Appellant's sports director, Mr Viana, initiated discussions with Inter and the Player's intermediaries, Mr Fernando Couto and Mr Federico Pastorello, to transfer the Player on a permanent basis to Sporting. He stated that in June 2023 (sic), Mr Viana communicated Sporting's offer for a total of approximately EUR 5 million, but that eventually the Player was transferred to Benfica.

66. Mr Verandas gave evidence at the hearing remotely. He stated that before being Sporting's President, he had been the Appellant's head doctor, and that he knew the Player from when he was a young child in Sporting's academy. Mr Verandas recounted how in August 2020, Sporting was in a difficult position with a new coach and young players, and that it needed experienced players. Mr Verandas explained that it was known that the Player was not happy in Italy, and he spoke with the Player and put in a lot of effort to have the Player come to Sporting because he knew it would be "*decisive*" for the Appellant, and the Player came in August 2020. Mr Verandas stated that it was "*decisive*" because after 19 years the team won the championship, and the Player was one of the best players on the team.

67. Mr Verandas explained that in March 2021, Sporting was preparing for the next season and that preparation was always undertaken by a small committee which includes the coach, the sports director and himself. Mr Verandas explained that Sporting considered it "*really important to keep*" the Player for the next season and that they knew it would be a challenge to keep him because of his value and because Inter would not make it easy. It was also after COVID-19 and all clubs, including Sporting, were struggling financially. Mr Verandas explained that he took the decision to sign the Player permanently, not as a loan, and that after he took the decision, Mr Viana was responsible for actioning it. He confirmed that he knew that Sporting began talks with the Player's agent, although he could not remember if it was the end of March or beginning of April.

68. Mr Verandas recalled a WhatsApp exchange with the Player whereby the Player contacted him because the Player was disappointed by the effort that Sporting was making to hire him permanently. Mr Verandas explained that he told the Player of Sporting's offer of EUR 5 million, including bonuses, and that the Player had to understand that Sporting would love to have the financial capacity to buy many players, but it did not, and in a negotiation the club always started with a low number. Mr Verandas stated that he told the Player that the club, the coach, the sports director, the President and the fans loved him and would "*make every effort to keep him in the squad*". Mr Verandas confirmed that he never spoke to the agents, but that Mr Viana did.

69. During cross-examination, Mr Verandas confirmed that he knew of the negotiations because he spoke to Mr Viana about all the deals. Mr Verandas confirmed also that the amount the Appellant was prepared to pay for the Player's transfer was a fixed amount of EUR 3 million plus EUR 2 million in bonuses. Mr Verandas explained that he was not involved in the exchanges, that he was just involved at the beginning when he told Viana, "*let's do this*", and that all the numbers that are offered are approved by him first. When asked how he knew to whom the offer was communicated, Mr Verandas stated that he thought it was to the Player's agents and he explained that when Sporting starts a negotiation, it never talks to a club directly. It always talks first with the agent and that usually it was Mr Viana who did that.

**Mr Hugo Miguel Ferreira Gomes Viana**

70. Mr Viana, Sporting's football director since 2018, also submitted a witness statement in support of the Appellant's appeal. Mr Viana stated that he was primarily responsible

for overseeing the recruitment of first-team players and managing professional player transfers to and from the club by negotiating agreements with players, agents and other clubs in Portugal and internationally.

71. Mr Viana stated that when the Player transferred to Inter, the Appellant continued to monitor him and in October 2020, Sporting decided to get him back and it agreed a temporary one-year loan deal with Inter for the Player's services. During the 2020/2021 season, the Player performed well and played regularly in all the national competitions in which Sporting competed. At the end of the 2020/2021, Sporting won the Portuguese league (*Primeira Liga*) and the *Taça da Liga*. Prior to winning the league, Mr Viana stated that he initiated discussions with Piero Ausilio, Inter's sports director, and on several occasions, including by WhatsApp messages, Mr Viana explained that he communicated Sporting's intention to acquire the Player on a permanent basis. He also stated that he had conversations with Mr Fernando Couto, a football agent, who followed the Player's interests in Portugal and Mr Federico Pastorello with whom Sporting negotiated the Player's contract in October 2020. Mr Viana further stated that in June 2021 he communicated Sporting's offer of EUR 5 million, which consisted of EUR 3 million as a fixed fee and EUR 2 million, to permanently transfer the Player. He stated that he was aware that Inter's expectations were "*slightly higher, i.e. around EUR 7 - 8 million*", but that Sporting believed its offer was reasonable, "*taking into account various sporting and financial factors*".

72. Mr Viana confirmed that at the end of June, Sporting began to hear rumours in Portugal and in Italy which suggested that Benfica was also interested in acquiring the Player's services. Mr Viana stated that on 12 July 2021, Inter publicly announced on its official website that it had agreed to terminate the Inter Employment Contract. Mr Viana further stated that in his opinion, the decision did not make any sense because Inter was aware of Sporting's offer and interest, and the Player had performed well at Inter during the 2020/2021 season. Mr Viana stated that he "*was fully convinced that Inter's actions were taken to bypass the terms of the transfer agreement signed with Sporting in 2016 (when the Player was transferred from Sporting to Inter)*." Mr Viana stated that on 12 July 2021, Sporting sent a formal letter to Inter's management questioning the rationale of Inter's decision and reminding of the obligation under the Transfer Agreement to pay EUR 30 million to Sporting in the event the Player was transferred to a Portuguese club other than Sporting, however, Sporting did not receive a response. Mr Viana concluded his statement by stating that on 13 July 2021, Benfica announced that the Player had become a Benfica player and that Inter's actions were "*heavily detrimental for Sporting both from a financial and sporting point of view*".

73. Mr Viana gave evidence at the hearing remotely. He elaborated on the WhatsApp exchanges that he had with Mr Pierro Ausilio and then with Mr Fernando Couto. With regards to the WhatsApp exchanges with Mr Ausilio, Mr Viana explained that on 5 March 2021, he contacted Mr Ausilio regarding the Player and that he also had one or two phone calls. Mr Viana confirmed that on 4 June 2021 he had a WhatsApp exchange with the Player's agent at the time, Mr Couto, who worked with Mr Federico Pastorello, that he contacted Mr Couto because Sporting was interested in obtaining the Player's services for one year more, and that he communicated Sporting's offer to Mr Couto, which was EUR 3 million as a fixed fee and EUR 2 million (total EUR 5 million). Mr

Viana also explained that the following day on 5 June 2021, he had a WhatsApp exchange with the Player because the Player wanted to know if Mr Viana had any news, and Mr Viana told the Player that he had sent the offer to Mr Couto, to which the Player responded that he would speak to Mr Couto.

74. During cross-examination, Mr Viana clarified that because Sporting was unable to pay the amount Inter wanted for the Player's services, he had initially discussed on the telephone with Mr Pierro Ausilio, the idea of obtaining the Player's services on loan for one year more, but that Inter had rejected that idea, and Sporting decided instead to move forward with seeking a permanent transfer. Mr Viana confirmed that Mr Couto and Mr Pastorello were the Player's agents, that Mr Couto was working to get the deal done, and that he could not answer whether Mr Couto was also working for Inter. Mr Viana also explained that Inter was aware of Sporting's offer because during a WhatsApp exchange that Mr Viana had with Mr Couto on 4 June 2021 in which Mr Viana put Sporting's offer, Mr Couto was with Mr Ausilio at the moment of the exchange. This was confirmed by the statement "*Fede is with Piero*" that Mr Couto wrote during the WhatsApp exchange on 4 June 2021.

75. In response to a question from the Panel as to whether Mr Viana learned of Inter's expectations of a transfer fee from Mr Ausilio or Mr Couto or both, Mr Viana stated that he heard from Mr Couto, who told him that "*the idea of Inter was to get at least 9 to 10 million but they could decrease that numbe*r". He also stated that he heard that Inter was dealing with Benfica, but that it was nothing official and he did not know what kind of deal they eventually did. Regarding the WhatsApp exchange with Mr Couto on 4 June 2021 in which he put Sporting's offer to Mr Couto, Mr Viana confirmed that there were no further discussions about the deal after 4 June 2021.

*b. Expert Witness*

**Professor Thomas Probst**

76. In his legal opinion, Professor Probst stated, among other things, that:

- The FIFA PSC focused its analysis on a textual interpretation and omitted to examine the legal nature and the exercise of pre-emption rights under Swiss law. The SCO provides for specific statutory and contractual rights of pre-emption. The most prominent provisions on contractual pre-emption rights are those set out in Article 216 *et seq.* SCO for the sale of immovable property, which can be protected through registration in the land register.

- Based on the principle of freedom of contract, the parties are free within the limits of mandatory law to agree on pre-emption rights for the sale of any other object such as movable property (chattels), other types of contracts e.g. donations, leases, or contracts in the sports field such as transfer agreements. These pre-emption rights are not protected through registration but are secured through contractual penalty clauses or liquidated damages clauses, which enable the rightsholder to safeguard their interest and recover damages in case of a breach of the right.

- Clause 2.6 of the Transfer Agreement provides a preemption right in favour of Sporting over the Player's potential transfer to a FPF-affiliated club should Inter receive a written acquisition proposal. In the event of a transfer offer that Inter and the Player wished to accept, Inter was obliged to inform Sporting within a deadline of two business days and if Sporting chose to exercise its pre-emption right in accordance with the terms of the transfer offer that Inter received, then the Player would transfer to Sporting. In the present dispute, it appeared that Inter did not receive a written offer from Benfica, yet the Player still transferred to Benfica, which raised the question of the relevant circumstances that trigger a pre-emption right under Swiss law, an issue not addressed by the FIFA PSC.

- Article 216c(1) SCO enshrines the principle that a rightsholder's prerogative to acquire the object in question is not only established in case of a proper sale contract, but also in case of "*any other legal transaction economically equivalent to a sale*". The Swiss legislator protects the rightsholder's right of first refusal by preventing the right from being rendered inoperable through one or several transactions that bring about an outcome equivalent to that of a sale. The rationale of the legislative approach is that legal formalities are less relevant than the economic outcome and this approach applies by analogy to other pre-emption rights outside the scope of application of Article 216c(1) SCO.

- The pre-emption right in Clause 2.6 of the Transfer Agreement provided Sporting with the right to acquire the Player's services before any transfer was made to another Portuguese club. This objective was obstructed by Inter and the Player's agreement to prematurely terminate the Inter Employment Contract on 12 July 2021. The Player became a free agent and there was no need for a formal transfer agreement between Inter and Benfica, with the consequence that Sporting's pre-emption right was not triggered. The mode of terminating the Player's employment therefore rendered Sporting's pre-emption right inoperative.

- The concurrence of events, namely the termination of the Inter Employment Contract and the conclusion of the Benfica Employment Contract, was largely within Inter's control as without its timely agreement to an early termination, entering the Benfica Employment Contract would only have been possible by the Player breaching the Inter Employment Contract. By analogy with Article 216c(1) SCO, and consistent with the legislative rationale, the transactions amounted to a pre-emption event under Swiss law and should have triggered Sporting's pre-emption right in accordance with Clause 2.6 of the Transfer Agreement.

- It is difficult to quantify the damage arising from a breach of a pre-emption right and the parties usually confirm the point in advance.

- Professor Probst made the following observations regarding the quantification of damages in the present case: i) the Swiss Federal Supreme Court recently confirmed that the violation of a contracting party's pre-emption right gives rise to a damages claim by the aggrieved party (SFT 4A_145/2023, cons 6); ii) Clause 2.7 of the Transfer Agreement provides an amount of EUR 30 million should the Player be transferred to another FPF-affiliated club and although the provision does not

necessarily presuppose a breach of the pre-emption right it applies *a fortiori* to such a breach, and represents a fair overall valuation, including the transfer market value as well as further loss and/or cost related to a valuable asset being transferred to a direct national competitor; and iii) if the amount of damages sustained cannot be quantified by Sporting, the court may estimate it on a discretionary basis in accordance with the ordinary course of events (*cf*: Article 42(2) SCO).

77. Accordingly, Professor Probst concluded that under Swiss law a contractual right of first refusal that applies to a player's potential transfer, is triggered when any legal transaction economically equivalent to a transfer occurs. If a party's pre-emption right is bypassed and rendered inoperative by the other party's conduct, then the aggrieved party may seek damages. The amount of compensation may be determined in advance by a contractual liquidated damages clause or in the absence of such a clause, may be assessed by a judicial body in accordance with Article 42(2) SCO.

78. Professor Probst gave evidence in person and replied to the Respondent's expert evidence, questions from the Parties' legal representatives, and the Panel's questions. To summarise, his oral evidence included the following:

- Professor Probst explained that the text of Article 216 SCO is not applied by analogy because football players are not immovable objects, but that the rationale underpinning Article 216 SCO applies to conduct that can or could be considered to circumvent a contractual pre-emption right such as that contained in Clause 2.6 of the Transfer Agreement. The application of the rationale is the consequence of the principle of good faith (Article 2 of the Swiss Civil Code (the "SCC")) i.e. a party cannot on the one hand provide a right and then on the other hand, subvert it or somehow undercut it.

- Professor Probst clarified that by terminating the contract prematurely, Inter and the Player were removing the possibility of an offer being put to Sporting, which may not be illegal but is "*against bona fides*" and does not absolve a party from being required to pay damages. He explained his view that Clause 2.7 of the Transfer Agreement is a liquidated damages clause that applies in case of breach and which applied in the present case.

- Professor Probst accepted that there was nothing expressed in the Transfer Agreement that prohibited a mutual termination of the Inter Employment Contract but if his theory of contract breach was accepted because a condition was avoided, then it is against good faith and a breach materialised. In Professor Probst's view, causation was present because had there not been a premature termination of the Inter Employment Contract, then the Player would not have been a free agent and Benfica would have had to put an offer to Inter to secure the Player's services.

- In reply to Professor Marchand's opinion regarding the effect of Article 18ter FIFA RSTP, Professor Probst explained that a violation of the FIFA RSTP does not mean that the contract that infringes the FIFA regulation is illicit or immoral under Swiss law. A contract is not invalid simply because it falls foul of an association's

regulations, and in Professor Probst's view, Article 18ter FIFA RSTP is not relevant to the present case.

- In response to a Panel question seeking his view about the incentive structure or economic rationale behind Inter's behaviour, Professor Probst stated that it was one of the first questions that came to his mind i.e. what was the economic advantage or the incentive for Inter to terminate early and forgo a possible transfer fee, but he did not find an answer and he could not provide an answer because he did not have all the details.

### B. The Respondent's Position

79. Inter's submissions, in essence, may be summarized as follows:

- Sporting's claim is unsubstantiated, based on a flawed interpretation of Clauses 2.6 and 2.7 of the Transfer Agreement, a "*fanciful*" application of Swiss law, and factual speculation derived from media reports that are of no evidentiary value.

*i) Inter did not prevent Sporting from exercising its right of first refusal (or pre-emption right) set out in Clause 2.6 of the Transfer Agreement*

- Sporting relies on a legal expert opinion submitted by Professor Thomas Probst to claim that Clause 2.6 of the Transfer Agreement should qualify as a pre-emption right within the meaning of Articles 216a *et seq* SCO. However, this view is incorrect as the expert evidence of Professor Sylvain Marchand demonstrates. Articles 216a *et seq* SCO expressly state and apply exclusively to immovable property, which a football player is not. The rationale behind Article 216c(1) SCO is that Swiss real estate law provides for several legal pre-emption rights, justifying special protection for the holder of those rights. The principle does not apply to a contractual right of first refusal for the transfer of a football player. Had the Parties expressly wished to confer such protection then they could have provided for it in the contract, which they did not. Article 216c(1) SCO does not apply to movable goods and as Professor Marchand's evidence confirms, scholars are of the view that provisions on pre-emption of immovable property are not appropriate for movable property. Any agreement of the parties should always take precedence over any application by analogy of Articles 216a *et seq* SCO.

- The Player is neither movable nor immovable property, has personal autonomy and cannot be compelled on application of a pre-emption right to conclude a contract with a club. There is no decision from any Swiss court or arbitral tribunal applying Article 216a *et seq* SCO to the transfer of a football player (*cf*: Prof Marchand Legal Opinion). Clause 2.6 of the Transfer Agreement is a contractual right of first refusal only and its terms determine whether the right has been triggered. Inter submits that the right was not triggered because a written offer was not received.

- Even if the Panel were to accept that Article 216c(1) SCO applies, Sporting's pre-emption right was still not triggered because "*a legal transaction equivalent to a transfer did not arise in the present case*". The determining factor to ascertain the existence of such an "economically equivalent" transaction is the finding of an

agreement for the transfer of the relevant property in exchange for monetary consideration. Inter did not receive any consideration in respect of the Player signing with Benfica, and Sporting has not demonstrated that it did.

- Before the FIFA PSC, Sporting alleged that Inter had been secretly compensated through the loan of Valentin Lazaro to Benfica at a fee above market value, however, Inter successfully demonstrated that Valentin Lazaro's loan was unrelated to the Inter Employment Contract termination. Sporting now alleges that Inter's consideration consisted of the waiver of a claim that Mr Federico Pastorello had against Inter, which Inter disputes. Inter further submits that there is no reliable evidence other than questionable and unsubstantiated media reports to prove Sporting's claim. Sporting's reliance on Benfica's financial reports is also meritless because there is no evidence of the conditions under which the Player signed with Benfica, the amount reported in Benfica's financial statements for intermediation costs is not high considering that the Player signed for five seasons, and the FIFA PSC had access to the FIFA TMS and was able to see all information regarding any intermediary's involvement in Benfica's signing of the Player, including commission. The FIFA PSC never questioned the payments made in connection to the Player's signing with Benfica.

- Sporting inconsistently alleges that Mr Pastorello forgave his claim against Inter and on the other hand alleges that Benfica paid the debt to Mr Pastorello; both things cannot be true. Therefore, there is no evidence that would allow the Panel to conclude that termination of the Player's contract with Inter followed by his signing with Benfica would qualify as "economically equivalent to a transfer".

*ii) Sporting is not entitled to a payment under Clause 2.7 of the Transfer Agreement in the absence of a transfer from Inter to Benfica*

- Clause 2.7 of the Transfer Agreement is not a stand-alone clause. Clauses 2.6 and 2.7 of the Transfer Agreement are interrelated and must be analysed together.

- Under Swiss law, the principles on contract interpretation are found in Article 18(1) SCO. When interpreting a contract, the court or arbitral tribunal must ascertain the real and common intent of the parties (the so-called subjective interpretation), if necessary, empirically, based on clues. Clues are not only the content of the declaration of intent, whether written or oral, but also the general context i.e. all the circumstances that make it possible to discover the real intent of the parties, whether these are declarations made prior to the contract's conclusion or facts subsequent to it, and the subsequent conduct of the parties that establishes the parties' understanding (*cf*: ATF 144 III 93, para 5.2.2; 4A_596/2018, para 2.3.1).

- If the parties' real or common intent cannot be ascertained because the evidence is lacking or inconclusive or if their true intents diverge, the court or arbitral tribunal must interpret the statements and behaviour of the parties in accordance with the principle of legitimate expectations i.e. by determining the meaning that each of them could and should reasonably have given to the declarations of intent made by the other, according to the rules of good faith. The objective intention is based on

the contract's text, content and the circumstances preceding and accompanying them to the exclusion of subsequent events. There is no reason to depart from the literal meaning of the text adopted by the contracting parties where there is no serious reason to believe that it does not correspond to their intent (4A_596/2018, para 2.3.2; ATF 136 III 186, para 3.2.1). The contract must be considered as a whole, rather than interpreting specific parts or clauses in isolation (ATF 136 III 186, para 3.2.1). Should the application of this principle fail to bring a conclusive result, then alternative means of interpretation may be used e.g. *in dubio contra stipulatorem*, pursuant to which the contract is interpreted against the party that drafted it (*cf*: ATF 124 III 155, para 1b. *ab initio*).

- The payment of EUR 30 million in Clause 2.7 of the Transfer Agreement arises if the Player is effectively transferred to another FPF-affiliated club. The term "effective transfer" needs to be interpreted considering the entirety of Clause 2.7 of the Transfer Agreement and the other clauses in the Transfer Agreement. The reference to "transfer" follows from the right of first refusal outlined in Clause 2.6 of the Transfer Agreement, which can only be triggered in the presence of a written offer from a Portuguese club for the transfer of the Player for consideration.

- Sporting's submission that the term "transfer" in this context covers the situation in which the Player signs a new employment contract as a free agent is wrong because, *inter alia*: i) the contractual interpretation of Clause 2.7 of the Transfer Agreement leads to the conclusion that the transfer is a "typical transfer" in which Inter receives consideration for transferring the Player to another club, and ii) Sporting relies on the irrelevant case of CAS 2019/A/6525, the facts of which are different.

*iii) Inter did not structure an artificial transfer of the Player to Benfica to circumvent Clause 2.7 of the Transfer Agreement*

- Clause 2.7 of the Transfer Agreement is a penalty clause within the meaning of Article 160 SCO and not a condition precedent; Articles 156 SCO *et seq* do not apply to penalty clauses and the present dispute (*cf*: Pichonnaz, Art. 151 SCO, in Thévenoz/Werro, Code des obligations I. Commentaire Romand, Helbing, Lichtenhahn Verlag, 2021, para 69b, referring to Swiss Supreme Court decision ATF 135 III 433, para 3.2).

- Inter did not act in bad faith nor did it orchestrate the Player's transfer to Benfica in a manner to prevent the fulfillment of Clause 2.7 of the Transfer Agreement. The evidence shows that: i) Sporting expressed a vague interest in the Player but never made a firm transfer offer; ii) Inter never received any transfer offer from Benfica; iii) Inter never received a firm offer from any other club for the Player's transfer; iv) Inter did not conclude a transfer agreement with Benfica for the Player's transfer; and v) Inter did not receive any consideration in connection with the termination of the Inter Employment Contract nor for the Player signing with Benfica.

- Inter and the Player had compelling economic and sporting reasons for mutually terminating their contractual relationship. The 2021 summer transfer window

occurred during the COVID-19 pandemic and amidst the worldwide financial crisis that was felt in Europe and in China, where Inter's parent company, Suning Holdings Group, is based. The pandemic had a direct impact on Inter's financial situation and Inter was required to lower costs, including terminating the contracts of players such as Radja Nainggolan and the Player.

- Sporting's reliance on CAS 2009/A/1756 is misplaced; Clauses 2.6 and 2.7 of the Transfer Agreement do not provide for a sell-on clause or an expectation of profit for Sporting.

*iv) In the alternative, the penalty of Clause 2.7 of the Transfer Agreement is excessive and must be reduced to zero.*

- If the Panel finds that the conditions of Clause 2.7 of the Transfer Agreement have been met, Inter submits that the penalty provided in Clause 2.7 of the Transfer Agreement is excessive and should be reduced to zero.

- Article 163(3) SCO permits a court or arbitral tribunal to reduce excessive penalty amounts. A penalty amount is excessive if it is against justice and fairness (*cf*: CAS 2017/A/5242, para 86). The specific circumstances of the case (e.g. nature and duration of the contract), the seriousness of the breach, the degree of fault, the creditor's behaviour, the parties' financial situation, the special interest of the creditor that the debtor behaves in conformity with the contract, the parties' experience in business matters, and the damage incurred by the creditor, are factors considered to determine whether a penalty is excessive (ATF 114 II 264, para 1a; 4A_141/2008, para 14.1).

- The penalty amount in Clause 2.7 of the Transfer Agreement serves as a financial incentive for the Respondent not to transfer the Player to a FPF-affiliated club. Sporting's only interest was that the Player was not transferred to one of Sporting's Portuguese rivals and such interest does not deserve legal protection amounting to EUR 30 million.

- The Respondent has respected its obligations under the Transfer Agreement and paid Sporting the full transfer fee of EUR 40 million. Sporting has also not alleged, nor suffered, any damage in the present case. The Panel should therefore reduce the penalty amount in Clause 2.7 of the Transfer Agreement to zero.

- In the Answer, the Respondent submitted the following requests for relief:

"*119. For the reasons set out above, Inter respectfully requests the Panel to issue an arbitral award ruling as follows:*

*(i) The appeal filed by Sporting against the Decision under Appeal and all of its prayers for relief are dismissed;*

*(ii) The Decision under Appeal is confirmed;*

*(iii) Sporting shall bear all arbitration costs incurred with the present proceedings and pay a contribution towards the legal costs incurred by Inter in connection with these proceedings*."

*b. Expert Witness*

**Professor Sylvain Marchand**

80. In his legal opinion, Professor Marchand stated, *inter alia*, that:

- Clause 2.6 of the Transfer Agreement provided Sporting with a first refusal right subject to contractual conditions, namely that: i) Inter received from a FPF-affiliated club, a written offer for the transfer (loan or permanent) of the Player; ii) Inter and the Player wished to accept the offer; iii) Sporting confirmed within two days its willingness to acquire the Player at the same or better conditions; and iv) the Player accepts the transfer to Sporting. The first refusal right conditions were not met in the present case.

- Articles 216a *et seq.* SCO to which Professor Probst refers, do not apply directly or by analogy to Sporting's first refusal right because: i) these provisions of Swiss law only apply to immovable properties; ii) Swiss property law provides for several legal pre-emption rights, which justify special protection for the holder of these rights; iii) the Swiss doctrine only considers the application of Articles 216a *et seq*. SCO by analogy in movable property matters with reservation, and in any event the contract must apply first (CR CO I-Foëx/Martin-Rivara, intro. Art. 216-221 N 4); and iv) Professor Marchand is not aware of any Swiss court decision that applies Articles 216a *et seq*. SCO to a football player's transfer. A football player cannot be equated to movable or immovable property. A football player has their own personal autonomy which must be considered when applying these rights of first refusal as demonstrated in Clause 2.6 of the Transfer Agreement which reserves the Player's agreement to the transfer.

- Clause 2.6 of the Transfer Agreement is not a pre-emption right within the meaning of Articles 216a *et seq* SCO but a *sui generis* first refusal right. The exercise of the right of first refusal must be determined in accordance with the contract and according to the general principles of Article 18 SCO, the Panel must determine the Parties' intent in light of the circumstances and determine how the Parties were to understand the text of the contract in good faith. The Panel should not depart from the literal meaning of the text when there is no serious reason to believe that it does not correspond to the parties' intention (*cf:* 4A_596/2018 cons.2.3.2).

- The text of Clause 2.6 of the Transfer Agreement is clear, and Professor Marchand was not aware of any serious reason to believe that it did not correspond to the Parties' intention i.e. that the right of first refusal was subject to conditions.

- Clause 2.6 of the Transfer Agreement does not cover a situation in which the Player registers with another club without Inter being involved in the transfer, nor does it address a situation where the Player registers with another club after the mutual termination of the Inter Employment Contract. After termination of the Inter

Employment Contract, the Player was free to register with any club of his choice (*cf*: 4A_116/2016, cons. A).

- Clause 2.6 of the Transfer Agreement does not prohibit mutual termination of the Inter Employment Contract, which in any event would not be valid because of the application of Article 18bis of the FIFA Regulations on the Status and Transfer of Contracts which preclude clubs from agreeing a contract that enable another club or a third party to acquire influence in employment and transfer-related matters.

- Clause 2.7 of the Transfer Agreement qualifies as a penalty clause. It does not refer to the non-performance or defective performance of a contract, but Swiss literature accepts that a penalty clause can be used independently of a breach of contract to induce a party to behave in a certain way (in this case not transferring the player to a Portugese club). The Swiss Supreme Court qualifies such clause as a "non-genuine contractual penalty" and it is subject to the regime of Article 160 *et seq* SCO (Ramon Mabillard, Rechtsnatur, anwendbare Gesetzesbestimmungen und Zulässigkeit der unechten Konventionalstrafe, PJA 2005 pp 552 *et seq*). Such penalty would be subject to reduction if it were to be applied, in accordance with the mandatory provision of Article 160(3) SCO, however, the penalty in Clause 2.7 does not apply to the present dispute.

- Clause 2.7 of the Transfer Agreement applies failing any written communication within the term set out in Clause 2.6 of the Transfer Agreement, which must be the written communication whereby Sporting can exercise its right of first refusal. The only term set out in Clause 2.6 of the Transfer Agreement is Sporting's two-day time limit to exercise its right.

- The purpose of Clause 2.7 of the Transfer Agreement is to remunerate Sporting in case Sporting did not exercise its first refusal right despite an offer by another Portuguese club and Inter agrees a transfer agreement with that other Portuguese club. In the present case, there was no offer by another Portuguese club for the Player's transfer and Inter did not enter a transfer agreement with another Portuguese club for the Player's services. The penalty amount is therefore not due.

- Clause 2.7 of the Transfer Agreement is additionally problematic because it contradicts the prohibition in Clause 18ter of the FIFA RSTP which prohibits clubs from entering an agreement "*with a third party whereby a third party is being entitled to participate, either in full or in part, in compensation payable in relation to the future transfer of a player from one club to another*". Enforcing the clause would reinforce an immoral undertaking of violating a FIFA regulation contrary to Article 163(2) SCO.

81. Accordingly, Professor Marchand concluded that Clause 2.6 of the Transfer Agreement was a contractual first refusal right, the conditions for which were not met in this case. The right could only be exercised by Sporting if a transfer contract between Inter and another FPF-affiliated club was signed, not in a situation in which the Player freely registered with another club after the mutual termination of the Inter Employment

Contract. Clause 2.7 of the Transfer Agreement is a penalty as defined in Article 160 SCO, which does not apply because the conditions for its application have not been met.

82. Professor Marchand gave evidence in person at the hearing and replied to the Appellant's expert evidence, questions from the Parties' legal representatives, and the Panel's questions. To summarise, Professor Marchand's oral evidence included the following:

- Professor Marchand agreed with Professor Probst that a player is not "immovable property" or a building and expressed his surprise at the analogy drawn by Professor Probst with the right of pre-emption under Swiss law and reiterated that he considered the analogy was not appropriate in the present case. Clause 2.6 of the Transfer Agreement contained a contractual right of first refusal that was subject to clear, strict conditions and the conditions were not met. The Transfer Agreement did not prevent Inter from agreeing to the premature termination of the Inter Employment Contract and it would have been easy to include a clause to that effect, although Professor Marchand did not know whether such a clause would have been valid in view of the Player's interests.

- Clause 2.7 of the Transfer Agreement qualified under Swiss law as a penalty clause, which was intended to encourage a party towards certain behaviour, which in this case, would be to encourage Inter to transfer the Player to another club and not a Portuguese club. In Professor Marchand's view, if Clause 2.7 of the Transfer Agreement applied (which in his view it did not), it would certainly be disproportionate because the consequences of its application would be for Inter to pay the penalty without receiving a transfer fee for the Player.

- The question of whether Inter had the right in good faith or not to agree to the mutual termination of the Inter Employment Contract is a question that should be considered in light of all the circumstances and in view of the FIFA Regulations that require a club to independently manage its own players. There is nothing in the Transfer Agreement which prohibits Inter, even in good faith, from prematurely terminating the Inter Employment Contract. The Player was costly, one that Inter had to pay for over a long period and it was their autonomy to decide whether to terminate the contract or not.

- In response to the Appellant's counsel's question to elaborate further on why Professor Marchand considered that Article 216 SCO did not apply by analogy, Professor Marchand explained that the most important reason for its non-application to the present case was that Clause 2.6 of the Transfer Agreement took into consideration the Player's desires and intent whereas the situation was not the same under Article 216 SCO in respect of immovable property. Professor Marchand accepted that Article 216c(1) SCO also applied outside the realm of statutory pre-emption rights, and he also accepted that it was possible under Swiss law to contractually agree to certain consequences in case a third party acted or not.

- In response to a Panel question seeking his view about the incentive structure or economic rationale behind Inter's behaviour, Professor Marchand opined that he

was not aware of any offer and could not elaborate, but that once again the intent of the Player should be taken into consideration. Exercising the right of first refusal was subject to acceptance by the Player and there was the cost of keeping the Player in the meantime, so it was a strategic decision for Inter to make.

## VI. JURISDICTION

83. Article R47 of the Code provides as follows:

"*An appeal against the decision of a federation, association or sports-related body may be filed with the CAS 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*."

84. Pursuant to Article 57 of the FIFA Statutes:

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

*(2) Recourse may only be made to CAS after all other internal channels have been exhausted.*"

85. The Appellant relies on Article 57 of the FIFA Statutes and Article R47 of the Code as conferring jurisdiction on the CAS. The Respondent does not dispute the jurisdiction of the CAS and jurisdiction is further confirmed by the Parties' signatures on the Order of Procedure.

86. Accordingly, for the foregoing reasons, the Panel is satisfied that it has jurisdiction to adjudicate the present dispute.

## VII. ADMISSIBILITY

87. Article R49 of the Code provides as follows:

"*In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against […]"*

88. The Appellant relies on Article 57 (1) of the FIFA Statutes which provide that an appeal may be made to CAS within 21 days of receipt of a decision. The Appellant further submits that it was notified of the grounds of the Appealed Decision on 10 August 2023, and that it filed the Statement of Appeal on 31 August 2023, within the prescribed time limit.

89. The Panel observes that the PSC passed the Appealed Decision on 29 June 2023 and notified it on 10 August 2023. It further observes that the Statement of Appeal was filed on 31 August 2023, within the deadline of 21 days prescribed in the FIFA Statutes and the Code. The Statement of Appeal complies with the requirements of Article R48 of the Code. The Appeal Brief was filed on 22 January 2024 in accordance with Article R51 of the Code and a previously granted extension of time.

90. The Respondent does not challenge the admissibility of the appeal.

91. Accordingly, for the foregoing reasons, the Panel is satisfied that the Appeal was filed in time and is admissible.

## VIII. APPLICABLE LAW

92. Pursuant to Article R58 of the Code, the Panel is required to 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."*

93. Furthermore, Article 56(2) of the FIFA Statutes provides that:

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

94. The Panel also observes that the Transfer Agreement, which is the subject of this dispute, provides in Clause 3.7 that:

"*This agreement is the result of articulated dealings between the parties hereto, and the Swiss law together with F.I.F.A. Regulations on the status and transfer of players, under which it has been constructed and wanted by the parties, exclusively governs it*."

95. The Appellant relies on Clause 3.7 of the Transfer Agreement and Article 56.2 of the FIFA Statutes (May 2022 edition) and submits that FIFA Regulations and additionally Swiss law, constitute the applicable law.

96. The Respondent also points to Clause 3.7 of the Transfer Agreement as confirmation that the Parties chose "*Swiss law together with F.I.F.A. Regulations on the status and transfer of players*" as the applicable law and agrees with the Appellant's submission that this dispute shall be decided according to the various regulations of FIFA, in particular the FIFA RSTP (July 2022 edition) and Swiss law.

97. Accordingly, for the foregoing reasons, the Panel determines that the FIFA RSTP (July 2022 edition), and any other relevant FIFA regulations constitute the applicable law to the matter at hand, with Swiss law applying subsidiarily.

## IX. OTHER PROCEDURAL MATTERS

98. In the Statement of Appeal, the Appellant made an application pursuant to Article R44.3 of the Code, seeking orders that FIFA and Inter provide certain documents.

99. The FIFA Document Request requested the following documents that were under FIFA's control:

> *"(i) A copy of the TMS report relating to the transfer of the Player from Inter to Benfica that commenced on or around 12 July 2021 (referred by FIFA in para. 13 of the Appealed Decision).*
>
> *(ii) A copy of the "History" page of the TMS report relating to the transfer of the Player from Inter to Benfica, in particular, the information with respect to the exact time and date when Benfica and Inter started to enter transfer instructions to release the Player.*
>
> *(iii) A copy of the employment contract entered into between the Player and Benfica (referred by FIFA in para. 12 of the Appealed Decision).*
>
> *(iv) Details of the name(s) and commission(s) of the intermediary(ies) who participated in the Player's transfer from Inter to Benfica and who represented Benfica and/or the Player and/or Inter, which must have been provided in TMS as per Article 8.2 para. 1 Annexe 3 of the FIFA Regulations*."

100. The Inter Document Request requested "*all correspondence, WhatsApp exchange and other information pertaining to the interest of Benfica in transferring the Player and to the negotiations between Benfica and Inter (including between third parties representing either of the clubs)*".

101. In support of the Document Production Requests, the Appellant stated that:

- It was self-evident that the requested documents existed and were under the control of FIFA and Inter respectively.
- The documents were relevant to its argument that Inter and Benfica attempted to circumvent Sporting's right to the amount of EUR 30 million and to present the Player's transfer from Inter to Benfica as a transfer of a free agent and were "*crucial*" to the preparation of the Appeal Brief.

102. On 27 September 2023 and 5 October 2023, respectively, FIFA and Inter objected to the Document Production Requests. FIFA provided the following reasons in support of its objection to the FIFA Document Request:

- Article R44.3 of the Code and the relevant CAS jurisprudence requires a party requesting documents to demonstrate whether the documents exist and are relevant (*cf*: CAS 2019/A/6533-6539, para 82). The IBA Rules on the Taking of Evidence in International Arbitration outlines similar requirements.

- A request to produce documents shall: a) clearly identify or describe the requested documents, b) establish why they are likely to exist, c) establish how they are relevant to the case and, d) explain why these documents are not in possession of the requesting party. The Appellant has failed to establish any of the requirements and the Document Production Requests should be rejected.

- In relation to the Appellant's request in (i) for "*a copy of the TMS report relating to the transfer of the Player from Inter*", there was no "TMS Report" *per se*, only information contained in the TMS that is entered by the relevant clubs. The Appealed Decision never referred to a "TMS Report" but to "*the information contained in the Transfer Matching System*". The requested "TMS Report" does not exist and FIFA cannot produce it.

- In relation to the Appellant's request in (ii) for "*information with respect to the exact time and date when Benfica and Inter started to enter transfer instructions to release the Player*", FIFA provided the first instruction in the TMS related to the Player's registration with Benfica:

| **ENGAGE PERMANENTLY (OUT OF CONTRACT)** | |
|---|---|
| On 20.07.2021 at 11:46:21 Portugal time (12:46:21 Swiss time) | "*SL Benfica entered a transfer instruction to engage JOAO MARIO NAVAL DA COSTA permanently. The player's former club is FC inter Milan*" |

- In relation to the Appellant's request in (iii) for "*a copy of the employment contract entered into between the Player and Benfica*", which was apparently referred to in paragraph 12 of the Appealed Decision, the Appealed Decision only mentioned the date on which the Player and Benfica entered the Benfica Employment Contract (as per the information in TMS). FIFA confirmed that the Benfica Employment Contract was signed on 13 July 2021, as outlined in the Appealed Decision, but since the Appealed Decision did not disclose any other issues related to the Benfica Employment Contract, the Benfica Employment Contract was agreed between third parties who are not parties to these proceedings, and the Appellant has not proven the relevance of the disclosure, FIFA objected to the production request.

- In relation to the request in (iv) for "*the names and commissions of the intermediary (ies) who participated in the Player's transfer from Inter to Benfica and who represented Benfica and/or the Player and/or Inter*", FIFA submitted that the Appealed Decision did not disclose any issues related to intermediaries, the relevant contract was entered into by third parties who were not involved in these proceedings, and the Appellant had not proven the relevance of this disclosure. FIFA objected to the request, and pointed out that Inter was in a more suitable position to disclose the information should it wish to disclose it.

- The Appellant's request for disclosure concerns mainly Inter and third parties who are not connected to these proceedings and FIFA repeated its request to be excluded from the proceedings.

103. In support of its objection to the Document Production Requests, Inter stated the following:

- The requested documents were not relevant because to show the alleged circumvention, Sporting would need to show that Inter did in fact benefit from the alleged and contested transfer of the Player to Benfica.

- Sporting had tried on at least two occasions to fish for information to support its circumvention theory. It had requested document production in the proceedings before the PSC to support its contested theory that Inter received the equivalent of a transfer fee for the Player through the loan of another football player, Valentin Lazaro. The PSC requested the confidential documents, which Sporting did not rely on at all in its submissions as they did not support the scenario relied upon to obtain their production in the first place. The Inter Document Production Request follows the same procedural tactic and was nothing more than another fishing expedition.

- The Inter Document Production Request was in reality "*a sort of pre-trial discovery, which is inadmissible as a matter of Swiss law*".

- The FIFA Document Production Request should be rejected as well because the requested documents do not exist since the Player was never transferred from Inter to Benfica.

- Contrary to Sporting's allegations, the Appealed Decision mentioned that information contained in the TMS showed that the Player signed an employment contract with Benfica and was recorded in the TMS as registered with Benfica ('Engage out of contract free of payment'). There were no transfer instructions to release the Player, and no intermediaries who participated in the Player's transfer from Inter to Benfica and who represented Benfica and/or the Player and/or Inter.

- In the spirit of Article R57.3 of the Code, Sporting never formulated a request for document production against Inter in the PSC proceedings, despite having a second round of submissions. If Sporting was able to argue its case without the requested documents before the PSC, it should be able to argue it now as well and there is no reason to consider the documents as "*crucial*" as Sporting alleged.

104. The Panel recalls Article R44.3 of the Code, which applies to appeal proceedings by virtue of Article R57 of the Code and provides it with the discretion to order the production of documents. Article R44.3 states that:

"*A party may request the Panel to order the other party to produce documents in its custody or under its control. The party seeking such production shall demonstrate that such documents are likely to exist and to be relevant*."

105. An order for the production of documents at an early stage of legal proceedings can assist to formulate a claim and may also facilitate the settlement of a dispute. The Panel observes that there is no time constraint in Article R44.3 of the Code which limits the admissibility of document production requests, and it was not referred to any legal authority that would preclude consideration of a document production request set out in the Appellant's Statement of Appeal. Accordingly, the Panel considers that it can rule on the Document Production Requests.

106. The Panel recalls that pursuant to Article R44.3, it has the discretion to order the production of documents provided Sporting demonstrates that the documents likely exist and are relevant (*cf:* CAS 2019/A/6226). A document production request that is overly broad, does not identify specifically a relevant document, and amounts to nothing more than a "*fishing expedition*", ordinarily, will not be granted (*cf:* CAS 2017/A/5498; CAS 2017/A/5242). Moreover, the Panel only has the power to order document production against another party; it does not have the power to order production of documents from third parties (*cf*: CAS 2010/A/2079, para 8).

107. Based on the limited information filed with the Statement of Appeal, the Panel observes that the Appealed Decision is a determination of the FIFA PSC, and that the dispute relates to an alleged amount of EUR 30 million owed by Inter to Sporting under the terms of the Transfer Agreement. Sporting's arguments, which Inter denies, appear to be two-fold, namely that, i) Inter acted in bad faith and in breach of Clause 2.6 of the Transfer Agreement when the Player transferred to Benfica, and ii) regardless of whether or not Inter orchestrated the free transfer of the Player, Inter became liable to pay the money under Clause 2.7 of the Transfer Agreement when the Player transferred to another FPF-affiliated club. The Panel notes Sporting's reasons for the Document Production Requests, expressed generally, that the documents are "relevant", and are "crucial" to establishing the claim. No other more specific reasons were provided.

108. The Panel observes that the Appealed Decision does not concern a claim against FIFA, the Statement of Appeal does not disclose a claim against FIFA, and the FIFA Document Production Request appears to be required to pursue a claim against Inter and not FIFA. Furthermore, the FIFA Document Production Request relates to information that does not exist *(see (i))* or appears irrelevant to the claim as outlined against Inter in the Statement of Appeal *(see (ii), (iii)* and *(iv)*) or relates to information that came into existence between third parties who are not a party to these proceedings *(see (ii), (iii) and (iv)*), or relates to information that may be in Inter's possession (*see* (*iv*)). The Panel considers, therefore, that Sporting has not satisfied the requirements of Article R44.3 of the Code and rejects the FIFA Document Production Request.

109. With regards to the Inter Document Production Request, the Panel observes that the documents appear relevant to the claim against Inter, likely exist, and with the exception of the part of the Inter Document Production Request that seeks "*other information*" - which is not particularised, is too broad and amounts to no more than a fishing expedition - the Panel considers that Sporting has satisfied the requirements of Article R44.3 of the Code to direct the production of some requested documents.

110. Accordingly, the Panel grants the Inter Document Production Request in part and directs that Inter submit "*all correspondence and WhatsApp exchanges pertaining to the interest of Benfica in transferring the Player and to the negotiations between Benfica and Inter (including between third parties representing either of the clubs)*". The Panel's decision was notified to the Parties on 21 November 2023.

## X. MERITS

111. Having considered the Parties' oral and written submissions and evidence, the Panel considers that the main issue for determination is whether the Respondent is liable to pay the amount of EUR 30 million to the Appellant pursuant to Clause 2.7 of the Transfer Agreement.

112. The Panel's determination turns on the proper construction of Clauses 2.6 and 2.7 of the Transfer Agreement, which state the following:

> "2.6 *Inter hereby grant Sporting a right of first refusal over the transfer of the player exclusively in connection with possible player's acquisition proposals made by clubs affiliated at the Federação Portuguesa de Futebol.*
>
> *In case Inter receives- exclusively by clubs affiliated at the Federação Portuguesa de Futebol - a written offer for the transfer (loan or permanent) of the player, an offer that Inter and the player wish to accept, then Inter shall inform Sporting in writing with the details of the offer received. Sporting shall have two business days (or two hours if the offer is received in the last day of the transfer market window) from the receipt of the communication by Inter for exercising the right of first refusal by confirming Inter in writing its willingness to acquire the player at conditions at least equal to the ones proposed by the third club. In this latter event the player shall be referred to Sporting, subject to relevant acceptance by the player. In the event that the third club offers the transfer of the rights of one or more of its players so as to cover partially or entirely the amount of the loan or permanent transfer compensation due to Inter, then Inter is compelled to include the market value in EUR of each offered player in the loan or permanent transfer contract as part of the loan or permanent transfer compensation, so as to be able to establish the final and total amount of the loan or permanent transfer compensation necessary in order to allow Sporting to evaluate the third club offer and to decide if to exercise, or not, its right of first refusal."*
>
> *2.7 Failing any written communication within the above term set out in clause 2.6, Inter shall be free to transfer the player to the third club, but, in the event the transfer is effectively executed to a third club affiliated at the Federação Portuguesa de Futebol, Sporting shall be entitled to receive by Inter a conditioned amount of € 30.000.000,00 (thirty million euros)(save exclusively for what provided under clause 3.2 below) to be paid within 30 days by the player's registration at the third club affiliated at the Federação Portuguesa de Futebol."* (emphasis added)

113. The Panel recalls that the burden of proving the existence of an alleged fact rests with the party who invokes it and derives rights from that fact (Article 8 SCC; CAS

2009/A/1810 & 1811, para 18; and CAS 2020/A/6796, para 98). Consequently, it is for the Appellant to prove its claim on the balance of probabilities.

114. The Panel also recalls that pursuant to Article R57 of the Code, it has the full power to review the facts and the law of the case.

115. The principles applicable to the interpretation of a contract under Swiss law were helpfully outlined by the Parties' legal counsel in their written submissions, the pertinent parts of which are reproduced below.

116. The main provision under Swiss law that governs the interpretation of a contract is Article 18(1) SCO, which provides:

"*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*."

117. The interpretation of a contract in accordance with Article 18 (1) SCO requires the Panel to ascertain the "*true and common intention of the parties*" when the parties concluded the contract. If the true and common intention of the parties cannot be established, then the contract must be interpreted according to the requirements of good faith (*cf*: ATF 129 III 664; 128 III 419 para 2.2 p. 422). The requirements of good faith tend to give preference to an objective approach i.e. the emphasis is less on what a party may have meant than on how a reasonable person would have understood the party's declaration (*cf*: ATF 129 III 118 para 2.5 p.122; 128 III 419 para 2.2 p 422).

118. When determining a party's intent, or the intent that a reasonable person would have had in the same circumstances, it is necessary to examine the words actually used or the conduct involved. The assessment is not limited to those words or conduct even if they appear to give a clear answer to the question. Due consideration must be given to all the relevant circumstances of the case e.g. negotiations, any subsequent conduct of the parties establishing what was, at the time, the understanding of the contracting parties (*cf*: ATF 144 III 93, para 5.2.2; 4A_596/2018, para 2.3.1) and usages. These principles of interpretation have been confirmed in CAS jurisprudence (*cf*: CAS 2019/A/6525, para 67; CAS 2017/A/5172, paras 70 and 73; CAS 2016/A/4544, para 94; CAS 2015/O/4362, para 83; and CAS 2013/A/3133, para 63).

119. The starting point for an interpretation of a contract is the wording of the relevant clause. There is no reason to depart from the literal meaning of the text adopted by the contracting parties where there is no serious reason to believe that it does not correspond to their intent (4A_596/2018, para 2.3.2; ATF 136 III 186, para 3.2.1). Furthermore, the contract must be considered as a whole, rather than interpreting specific parts or clauses in isolation (ATF 136 III 186, para 3.2.1).

120. The Panel observes that since the Transfer Agreement was negotiated and signed, the management of both Parties has changed, and that there was no evidence from those directly involved in negotiation of the Transfer Agreement.

121. The Appellant makes three submissions to support its contention that the Respondent is liable to pay the amount of EUR 30 million under Clause 2.7 of the Transfer Agreement. These are:

i) That Inter deliberately prevented Sporting from exercising the pre-emption right in Clause 2.6 by agreeing to the premature termination of the Player's contract thereby violating Clause 2.6 of the Transfer Agreement;

ii) That the condition for payment of the EUR 30 million in Clause 2.7 was triggered by the objective fact of the Player's transfer to Benfica; and

iii) That Inter sought in bad faith to prevent Sporting from receiving the EUR 30 million.

122. The Respondent, unsurprisingly, rejects all the Appellant's arguments. It submits that Clause 2.6 of the Transfer Agreement is a contractual right of first refusal, which was not triggered because the sole triggering condition – namely, the receipt of a written offer from a FPF-affiliated club for the Player's transfer – never materialised. The Respondent further contends that Clause 2.7 of the Transfer Agreement must be analysed together with Clause 2.6, and that the payment obligation in Clause 2.7 was not triggered because the Respondent did not receive a written transfer offer nor enter a transfer agreement with Benfica for which it received consideration.

123. The Panel considers each of the submissions in turn.

*(i) Inter deliberately prevented Sporting from exercising the pre-emption right in Clause 2.6 by agreeing to the premature termination of the Player's contract thereby violating Clause 2.6 of the Transfer Agreement*

124. The Panel considers that the wording of Clause 2.6 of the Transfer Agreement demonstrates clearly the Parties' intention for Sporting to benefit from a right of first refusal (or pre-emption right) to apply when a written offer to acquire the Player's services was received from a FPF-affiliated club i.e. a club situated in Portugal.

125. The Panel considers the wording of the clause to be unambiguous. It is evident that the pre-emption right applied exclusively to transfer offers that Inter received from FPF-affiliated clubs, and was to be triggered if two conditions had been cumulatively met: first, when Inter received a *written offer for the transfer (loan or permanent) of the player* from a FPF-affiliated club, and second, assuming that both Inter and the Player wished to accept the tabled offer. Clause 2.6 of the Transfer Agreement also outlines the procedure for Sporting to exercise the pre-emption right upon notification of the offer. The wording of the clause could not be clearer.

126. There was no evidence before the Panel that the Respondent received a written offer from Benfica to acquire the Player's services. The Respondent steadfastly maintains through its legal representatives, not having put forward any fact witnesses of its own, and by its response to the Inter Document Production Request, that it did not receive a written offer from Benfica. Furthermore, the evidence before the Panel suggests that the Player was first liberated from Inter and then, and only then, signed for Benfica.

Sporting did not rebut any of these facts to the satisfaction of the Panel. Accordingly, in the absence of any evidence to the contrary, the Panel's conclusion is that the Appellant's pre-emption right in Clause 2.6 of the Transfer Agreement was not triggered because no written offer to acquire the Player's services was received by Inter from a FPF-affiliated club.

127. Whilst acknowledging that there was no evidence of a written offer, the Appellant invited the Panel to consider, nevertheless, that the Respondent breached Clause 2.6 of the Transfer Agreement when it agreed with the Player to the premature termination of the Inter Employment Contract because it obstructed or prevented the Appellant from exercising the pre-emption right. To support its position, the Appellant relied on the evidence of an expert witness, Professor Thomas Probst. Professor Probst explained his breach of contract theory that derives from the rationale underpinning Article 216 SCO *et seq*. and is applicable to the present dispute. Article 216c(1) SCO provides for specific pre-emption rights regarding the sale of immovable property, and states that:

"*A right of pre-emption may be exercised on the sale of the immovable property or any other legal transaction economically equivalent to a sale (pre-emption event).*"

128. Professor Probst explained that the text of Article 216c(1) SCO did not apply by analogy because football players are not immovable objects but that the rationale underpinning Article 216c(1) SCO applies generally to conduct that can or could be considered to circumvent a contractual pre-emption right such as that contained in Clause 2.6 of the Transfer Agreement. The application of the rationale is the consequence of the principle of good faith set out in Article 2(1) SCC and a party cannot on the one hand provide a right and then on the other hand, subvert it or render the right inoperative. By terminating the contract prematurely, Inter and the Player removed the possibility of an offer being put to Sporting, which was not illegal *per se* but was "*against bona fides*" and did not absolve Inter from the requirement to pay damages.

129. With due respect to Professor Probst, the Panel is not persuaded that the rationale underpinning Article 216c(1) SCO is applicable in the present case for the following reasons:

- The text of Clause 2.6 of the Transfer Agreement is clear and unambiguous, and the Panel finds no strong reason to depart from the literal meaning of the text, namely that the pre-emption right was triggered upon the receipt of a written offer from another FPF-affiliated club, for which there is no evidence before the Panel.

- The Transfer Agreement does not explain how the pre-emption right was to apply, if at all, in circumstances where the Player and Inter were contemplating the premature termination of the Inter Employment Contract or had mutually agreed to its termination. Had the Parties intended the pre-emption right to be triggered in the situation of a mutual termination of the Inter Employment Contract, then the Parties would have expressed that in the Transfer Agreement.

- Were the Panel to follow Professor Probst's opinion, then any unilateral or consensual termination of the Inter Employment Contract would have been suspect

as it would have prevented Sporting from exercising its pre-emption right, which cannot be the case. The Panel considers that Sporting should have demonstrated at the very least an agreement between Inter and Benfica to proceed through unilateral termination (and of course the corresponding consideration in Inter's favour) to successfully claim that the obligation in Clause 2.6 of the Transfer Agreement had been circumvented. Sporting tabled no evidence to this effect and in the absence of evidence, the Panel had no choice, but to dismiss the claim in this context.

- Professor Marchand's evidence highlights the reservations that academics hold regarding the application of Article 216 SCO *et seq*. to movable property. In the absence of any stronger legal support for its application (e.g. an SFT decision), the Panel is not persuaded to apply the rationale underpinning the special statutory protection provided to immovable property e.g. houses, to the sale of the economic rights attached to a Player's transfer, particularly when the Transfer Agreement clearly expresses the Parties' intention for the pre-emption right to be triggered by Inter's receipt of a written offer.

130. Accordingly, the Panel rejects the Appellant's submission that by agreeing to the premature termination of the Inter Employment Contract the Respondent prevented the Appellant from validly exercising the right of first refusal and breached Clause 2.6 of the Transfer Agreement.

*(ii) The condition for payment of the EUR 30 million in Clause 2.7 has been triggered by the objective fact of the Player's transfer to Benfica*

131. The Appellant submits that the Transfer Agreement provided for the Player's transfer through the immediate payment of EUR 40 million and two conditional payments, one of which is outlined in Clause 2.7 of the Transfer Agreement. The Appellant alleges that when entering the Transfer Agreement in 2016, the Parties' intention was for the Player not to return to Portugal, except, perhaps, to the Appellant, and that if the Player transferred to another Portuguese club, whether Sporting exercised the right of first refusal in Clause 2.6 or not, the conditional fee in Clause 2.7 of the Transfer Agreement fell due. The condition that triggered the obligation to pay the amount of EUR 30 million was the Player's transfer to a FPF-affiliated club other than the Appellant, which occurred in the present case through a free transfer.

132. The Respondent submits that Clause 2.7 of the Transfer Agreement is not a stand-alone clause, that it must be read together with Clause 2.6 and that the trigger for payment of the EUR 30 million was receipt by the Respondent of a written offer that was the subject of Clause 2.6 of the Transfer Agreement.

133. There was no evidence before the Panel from those directly involved in the negotiation of the Transfer Agreement and from which the Panel could ascertain the Parties' intentions regarding the consideration arrangements for the Player's transfer in 2016, other than the clauses in the Transfer Agreement itself.

134. Clause 2.7 of the Transfer Agreement is not well drafted. It contains several ambiguities, the words "*written communication*", "*above term*" and the first reference to "*the third*

*club*", arguably being capable of more than one interpretation in the context, and the amount of EUR 30 million is referred to as the "*conditioned amount*", the meaning of which is not entirely clear. The Panel observes that the term is used also to describe payments due under Clause 2.4 of the Transfer Agreement. The Parties dispute whether the clause is a condition precedent or a penalty clause or a liquidated damages clause.

135. Despite the ambiguities, the Panel accepts the Respondent's interpretation of Clause 2.7 and considers that Clause 2.7 is to be read together with Clause 2.6 because the first line of Clause 2.7 of the Transfer Agreement expressly refers to Clause 2.6 and states that "*Failing any written communication within the above term set out in clause 2.6, Inter shall be free to transfer the player to the third club* […]".

136. Clause 2.6 of the Transfer Agreement refers in fact to three pieces of *written communication* (e.g. the written offer for the transfer of the Player, Inter's notification in writing to Sporting of the offer, and Sporting's confirmation in writing of its willingness to acquire the Player on terms at least equal to those proposed by the third club). In the context of Clause 2.7 of the Transfer Agreement, the Panel considers that the term *written communication* is to be read as referring to Sporting's confirmation in writing of its willingness to acquire the Player's services, in other words, the Appellant's notification that it intended to exercise the pre-emption right.

137. The phrase *within the above term* may then be interpreted as a specific reference to the time period referred to in Clause 2.6 for Sporting to provide confirmation in writing of its willingness to acquire the Player's services e.g. within two business days. In the absence of Sporting confirming in writing its willingness to acquire the Player's services, the Respondent was "*free to transfer the player to the third club*". The phrase *the third club* is a short-hand reference to the FPF-affiliated club from which Inter received a written offer under Clause 2.6 of the Transfer Agreement.

138. In the absence of Sporting's written communication to acquire the Player's services, the Respondent was "*free to transfer the player to the third club*", being the FPF-affiliated club that had provided the written offer in the first place, although if Inter went ahead with the transfer, pursuant to the next part of Clause 2.7, the Appellant became entitled to receive from Inter the *conditioned amount* of EUR 30 million in the event that the transfer was "*effectively executed to a third club affiliated at the Federação Portuguesa de Futebol*".

139. The Appellant submits that in the context of Clause 2.7 of the Transfer Agreement, the term "*transfer*" is not limited to a transfer based only on the execution of a transfer agreement between two clubs but includes any other possible movement of the Player's registration from one club to another, including as a free agent. It relies on the definition provided in paragraph 21 of the 'Definitions' section of the FIFA RSTP, which defines an international transfer as "*the movement of the registration of a player from one association to another association*" and submits that the definition is fulfilled in the present case because the Player's registration moved from the FIGC to the FPF.

140. The Panel rejects the Appellant's submission. It considers that when read together with Clause 2.6 of the Transfer Agreement, and consistent with its interpretation of other

terms in Clause 2.7, the reference to *transfer* in Clause 2.7 can only refer to a *transfer* initiated by the receipt of a written offer from a FPF-affiliated club, which is typically an offer to acquire a player's services upon payment of a transfer fee. The Panel is not persuaded that the Parties intended Clause 2.7 of the Transfer Agreement to apply also to a transfer arising without a transfer agreement i.e. a free transfer.

141. The drafting of Clause 2.7 is peculiar, but the Panel considers that the text is more consonant with the Parties' intention for Clause 2.7 to be a penalty clause, included in the Transfer Agreement to discourage the Respondent from transferring the Player to a FPF-affiliated club following receipt of a written offer under Clause 2.6 of the Transfer Agreement and not a liquidated damages clause or a condition precedent. Had the Parties intended Clause 2.7 to be a liquidated damages clause, it is very likely that they would have used the term as they did in Clause 2.5 in relation to the late payment of an instalment specified in Clause 2.3 of the Transfer Agreement. It is not a condition precedent, the condition being the objective fact of the transfer as submitted by the Appellant, because the Panel considers that the Parties intended Clause 2.7 of the Transfer Agreement only to refer to transfers made following receipt of a written offer.

142. Accordingly, the Panel determines that the obligation to pay the EUR 30 million was not triggered by the objective fact of the Player's transfer to Benfica but was to be triggered when the Player was transferred to a FPF-affiliated club following the Respondent's receipt of a written offer for the Player's services, which it and the Player wished to accept, no doubt with a view to recording the terms, including the consideration offered, in a written transfer agreement. Since there is no evidence that a written offer was received from Benfica, the Panel determines that Clause 2.7 of the Transfer Agreement was not triggered at all and the amount is not owed to the Appellant.

*(iii) Inter sought in bad faith to prevent Sporting from receiving the EUR 30 million*

143. The Appellant submits that the Respondent sought in bad faith to prevent the Appellant receiving the payment of EUR 30 million by deliberately structuring the Player's transfer as a free agent. Its submission relied on an interpretation of Clause 2.7 of the Transfer Agreement as a condition precedent to which Article 156 SCO applied, and also more generally on the good faith principle in Article 2(1) SCC that underpins contractual relations in Swiss law. The Appellant referred CAS 2009/A/1756 *FC Metz v Galatasaray SK* and CAS 2018/A/5809 *Apollon Limassol v Torino FC* in support of its position. The Respondent disputes that it acted in bad faith.

144. As previously stated, the Panel considers that the purpose of Clause 2.7 of the Transfer Agreement is more appropriately characterised as a penalty clause and is subject to the regime of Article 160 *et seq*. SCO and not Article 156 SCO (*cf*: Pichonnaz, Art. 151 SCO in Thévenoz/Werro, Code de obligations I. Commentaire Romand, Helbing Lichtenhahn Verlag, 2021, para 69 b referring to ATF 135 III 433, para 3.2). The Panel also considers that CAS 2009/A/1756 *FC Metz v Galatasaray SK* and CAS 2018/A/5809 *Apollon Limassol v Torino FC* are irrelevant. The Panel considers that whether a contracting party has acted in bad faith turns very much on the facts of the case and both CAS 2009/A/1756 and CAS 2018/A/5809 raised bad faith arguments in the context of sell-on clauses, which is not the factual situation in the present case.

145. The Appellant invited the Panel to consider the reality of what occurred in the present dispute and submitted during the hearing that the timing of the Inter Employment Contract's premature termination and the Player signing with Benfica the next day, was not coincidental. It stated that Inter knew of Sporting's interest in acquiring the Player's services, was aware of the offer that Sporting had made of a fixed fee of EUR 3 million plus EUR 2 million in bonuses, and yet chose to let the Player move to Benfica as a free agent, which in its submission, made "*no sense*".

146. Moreover, the Respondent's assertion that its agreement to the mutual termination was motivated by financial difficulties, the absence of any other offers for the Player's services, and a desire to avoid paying the Player's high salary for another season, did not add up, when considering, a) that the Player and Inter mutually agreed to the premature termination of the Inter Employment Contract on 12 July 2021, a couple of weeks after the transfer window opened and long before it closed at the end of August 2021, and b) Inter could have checked whether the Appellant's offer was still open for acceptance and received a transfer fee. The Respondent's actions were inconsistent with that of a club "*desperate to offload a liability*" as it portrayed and more consistent with a club seeking to avoid payment of EUR 30 million under Clause 2.7 of the Transfer Agreement.

147. The Appellant referred the Panel to Benfica's financial report and accounts for the period between 1 July 2021 and 31 December 2021 to show that consideration was paid for the economic rights attached to the Player's transfer. Benfica's official financial reports for the relevant period, in evidence before the Panel, state that:

"*Acquisition of the economic and sports registration rights of the player João Mário, in a total investment of 5,513 thousand euros, which includes the costs of intermediation services and the effect of the financial discount taking into account the stipulated payment plans*".

148. The Panel recalls Article 2(1) SCC which requires a contracting party to "*act in good faith in the performance of his or her obligations*". Based on the available evidence, the Panel accepts that:

- Sporting expressed an interest in acquiring the Player's services directly to Inter on 5 March 2021.

- Sporting's football director, Mr Viana, made an offer to acquire the Player's services in a WhatsApp exchange with the Player's agent, Mr Couto, on 4 June 2021. Mr Couto was in the presence of the Respondent's Sports Director, Mr Ausilio, at the time the WhatsApp exchange occurred, however, there is no direct evidence that Mr Couto communicated the offer to Mr Ausilio.

- Mr Viana confirmed at the hearing that there were no further discussions regarding Sporting's offer after 4 June 2021.

- The WhatsApp exchange between Sporting and the Player, on 5 June 2021, the day after Sporting's offer was made, shows that the Player was interested in returning to Sporting, although the Player later expressed his frustration with the offer made

in a WhatsApp exchange with Mr Verandas, Sporting's President, on 12 June 2021, and states that "*I cannot be clearer about my will, both publicly and personally, but the message that Sporting constantly passes to the media is always negative for me. I thank you for your sincerity and I am repaying you in the same way. I hope you understand everything I've told you, but I can't wait much longer*".

- The Respondent subsequently agreed with the Player to the premature termination of the Inter Employment Contract on 12 July 2021 and the Player entered a new employment contract with Benfica on 13 July 2021 as a free agent.

149. The Panel acknowledges that questions remain regarding the economic rationale behind Inter's decision to agree to the premature termination of the Inter Employment Contract and forgo a possible transfer fee from Sporting and also the entry in Benfica's financial statements which records "*a total investment of 5,513 thousand euros"* to acquire the Player's economic rights, specifically questions about the nature of the investment costs and to whom they were paid for the transfer of a free agent.

150. There is, however, no direct evidence that Inter received any consideration for the Player's transfer or evidence of any underhand dealing. The Appellant submitted media articles as evidence, which reported that the Player's agent, Mr Pastorello, apparently waived a claim for money owed by Inter in connection with the Player's transfer. Newspaper reports on football matters are frequently inaccurate and unreliable, and on their own have no evidential value in the present case. In the proceedings before the FIFA PSC, the Appellant alleged that the Respondent used the free transfer of the Player to set off an amount in the transfer of another player, Valentin Lazaro, from Inter to Benfica, although there is no evidence of that, and it was a point the Appellant did not actively pursue in these proceedings.

151. The evidence to support a finding that the Respondent deliberately structured the termination and transfer arrangements with Benfica to avoid its contractual obligations to the Appellant must reach an appropriate level of cogency, which is simply not present in the current case, and the Panel is not persuaded by the Appellant's submission that the Respondent acted in bad faith to prevent Sporting from receiving the EUR 30 million. To the contrary, the Panel finds that the Respondent acted within the terms of the Transfer Agreement, which were not drafted to cover the situation of a free transfer.

152. For all the above reasons, the Panel concludes that the FIFA PSC was correct to dismiss the Appellant's claim, and the Panel upholds the Appealed Decision.

153. The Appellant's appeal is dismissed.

## XI. COSTS

(…).

# ON THESE GROUNDS

**The Court of Arbitration for Sport rules that:**

1. The appeal filed by Sporting Clube de Portugal on 31 August 2023 is dismissed.

2. The decision issued by the FIFA Players' Status Chamber on 29 June 2023 is confirmed.

3. (…).

4. (…).

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

Seat of arbitration: Lausanne, Switzerland
Date: 25 April 2025

# THE COURT OF ARBITRATION FOR SPORT

Dr Leanne O'Leary
President of the Panel

Prof. Petros C. Mavroidis
Arbitrator

Mr Pierre Muller
Arbitrator