



**Arbitrations CAS 2016/A/4669 Club Botafogo de Futebol e Regatas v. Club Tijuana Xolointzcuintles de Caliente & CAS 2016/A/4670 Club Tijuana Xolointzcuintles de Caliente v. Club Botafogo de Futebol e Regatas, award of 9 May 2017**

Panel: Mr Sofoklis Pilavios (Greece), President; Mr Ricardo de Buen Rodríguez (Mexico); Mr José María Alonso Puig (Spain)

*Football*

*Transfer*

*Validity of the transfer agreement entered into between the parties*

*Determination of the sell-on fee agreed under the transfer agreement*

1. A club that acquired a player in execution of the terms of a transfer agreement, exactly in the way agreed upon amongst all contracting parties cannot legitimately use the fact that the player was hired as a free agent as an excuse to avoid its obligations under the transfer agreement if the transfer agreement specifically provided that the prior termination of the player's contractual relationship with his club of origin was an express pre-condition to his transfer to his new club.
2. The main condition triggering payment of a sell-on fee provided in the transfer agreement is effectively fulfilled with the transfer of the player from the club to which the player was transferred from his club of origin to a third club. In the world of professional football, absent any proven fraudulent act, clubs are free to reassess their business understandings and to amend accordingly their contractual relationships when new circumstances such as the relegation of a club to a lower division and a club's financial difficulties arise affecting their interests. Therefore, adhering to the established jurisprudence of CAS in similar cases, the basis for calculation of the sell-on fee due to the player's club of origin shall be only the amount actually paid as transfer fee by the third club to the transferring club.

**I. PARTIES**

1. Club Botafogo de Futebol e Regatas ("Botafogo") is a Brazilian Football Club with its registered office in Rio de Janeiro, Brazil, affiliated to the Brazilian Football Confederation.
2. Club Tijuana Xolointzcuintles de Caliente ("Tijuana") is a Mexican Football Club with its registered office in Tijuana, México, affiliated to the Mexican Football Federation.

## **II. FACTUAL BACKGROUND**

### **A. Background Facts**

3. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced. 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.
4. On 26 July 2011, Botafogo and Tijuana entered into an agreement (the "Transfer Agreement") regarding the transfer of the federative rights of the Uruguayan player E. (the "Player") from Botafogo to Tijuana for a fee of USD 600,000. The Transfer Agreement was also signed by the Player as a third party.
5. According to article 2.1 of the Transfer Agreement the parties agreed that Tijuana shall pay Botafogo the amount of USD 600,000 in nine instalments starting on 20 July 2011 until 20 January 2012, according to the payment plan provided therein.
6. Further, according to articles 2.1 and 2.7 of the Transfer Agreement the parties agreed that, in addition to the fee of USD 600,000, Tijuana shall pay Botafogo a percentage of 25% of the fee received for the future, temporary or permanent, transfer of the Player to another club or company and that the value of this percentage must be paid in the following five days after having received each payment.
7. On 29 July 2011, the International Transfer Certificate (ITC) of the Player was issued by the Brazilian Football Confederation and was received that same day by the Mexican Football Federation and, thus, the Player was registered with Tijuana.
8. On 25 July 2012, Tijuana entered into an agreement with the Italian Football Club Unione Sportiva Città Palermo S.p.A. ("Palermo") for the permanent transfer of the Player for a fee of USD 3,000,000. According to article 1 of the agreement this amount was scheduled to be paid in three equal instalments as follows:
  - USD 1,000,000 seven (7) days after the receipt of the ITC by Palermo;
  - USD 1,000,000 on 1 August 2013; and
  - USD 1,000,000 on 1 August 2014.
9. On 20 August 2013, Botafogo lodged a claim against Tijuana in front of the Player's Status Committee of the Fédération Internationale de Football Association (the "FIFA PSC") requesting payment of the agreed sell-on fee on the basis of the Transfer Agreement of 26 July 2011, as a result of the Player's transfer to Palermo in July 2012.
10. On 10 January 2014, while the proceedings before the FIFA PSC were still pending, Tijuana and Palermo concluded an agreement in which they agreed to settle all pending matters in

connection to the transfer agreement concluded between them on 25 July 2012. More specifically, it was agreed that the Player and Palermo shall terminate their employment relationship by mutual consent and that Tijuana shall request the ITC of the Player as a free agent without any further claims by Palermo. In addition, according to article 3 of the transfer agreement it was stipulated: *“Tijuana expressly renounce to the total amount of USD 2.000.000 that Palermo would have to pay on 1.08.2013 and on 1.08.2014 in base of art. 1 of the transfer agreement signed on 25.07.2012 and declares to be completely satisfied of every credit or financial obligation against Palermo”*.

11. On 14 January 2014, Tijuana requested the ITC of the Player and subsequently the Player was registered back with Tijuana under a new employment contract.
12. On 15 January 2014, Tijuana transferred the Player temporarily on loan to the Mexican Club Atlético Monarcas Morelia (“Monarcas Morelia”) until May 2014.
13. On 7 July 2014 Tijuana transferred the Player on a permanent basis to the Mexican Club Tigres de la Universidad Autónoma de Nuevo León (“Tigres UANL”) for a definitive fee of 100,000 MXN.

#### **B. Proceedings before the FIFA Player’s Status Committee**

14. On 20 August 2013, Botafogo lodged a claim against Tijuana with the FIFA PSC requesting payment of the total amount of EUR 1,300,000 on the basis of the Transfer Agreement. The claim was made on the assumption that the transfer fee agreed between Tijuana and Palermo amounted to EUR 4,000,000. On this basis, the requests for relief were initially formulated as follows:
  - EUR 1,000,000 corresponding to 25% of the total transfer fee received by Tijuana from Palermo as well as an interest rate of 5% per year as from 1 July 2012;
  - EUR 300,000 as compensation for breach of contract as well as an interest rate of 5% per year as from 1 July 2012.
15. During the proceedings before FIFA PSC Tijuana presented information that the transfer fee agreed with Palermo amounted to USD 3,000,000 and that an amount of USD 150,000, namely a percentage of 5% corresponding to solidarity contribution, was deducted from the total amount of the agreed fee.
16. Botafogo with its further written submissions to FIFA PSC amended its original claim requesting the following amounts:
  - USD 750,000 corresponding to 25% of the total transfer fee received by Tijuana from the Italian Club as well as an interest rate of 5% per year as from due date for each payment.

- USD 500,000 as compensation due to breach of contract, false declaration on the Transfer Matching System (“TMS”) and clear intention to damage the rights of Botafogo.
17. On 30 June 2015, the Single Judge of the FIFA PSC rendered a decision on the matter (the “Appealed Decision”). The operative part of the Appealed Decision reads, *inter alia*, as follows:
- *The claim of the Claimant Botafogo de Futebol de Regatas is admissible.*
  - *The claim of the Claimant Botafogo de Futebol de Regatas is partially accepted.*
  - *The Respondent Tijuana Xolointzcuintles de Caliente has to pay to the Claimant Botafogo de Futebol de Regatas within 30 days as from the date of notification of this decision, the amount of USD 237,500 as well as an interest at a rate of 5% p.a. on the said amount as of 25 August 2012 until the date of effective payment.*
  - *Any further claims lodged by the Claimant Botafogo de Futebol de Regatas are rejected.*
18. On 2 June 2016, the grounds of the Appealed Decision were communicated to the parties, determining, essentially, the following:
- The parties had clearly signed a contract on 26 July 2011 for the transfer of the Player from Botafogo to Tijuana.
  - By means of said contract Tijuana accepted to pay Botafogo the amount of USD 600,000 as well as a 25% of a potential future transfer of the Player to a third party.
  - After having signed and concluded said contract Tijuana cannot invoke the fact that the Player was signed as a “free agent” to justify the breach of its contractual obligations and non-payment of the agreed transfer fee to Botafogo.
  - Therefore, and given that there is no evidence to the contrary, the contract is enforceable and Tijuana must fulfil the obligations it freely entered into and must pay the sell-on fee agreed upon.
  - Further, Tijuana has received by Palermo only the first instalment of USD 1,000,000, less the amount of solidarity contribution, i.e. the total amount of USD 950,000.
  - In addition, Tijuana renounced the payment of the second and the third instalments due by Palermo.
  - Therefore, Tijuana must pay Botafogo the total amount of USD 237,500, i.e. 25% of USD 950,000 as sell-on fee, as provided in article 2.7 of the Transfer Agreement, since it was established that the Player was indeed transferred to a third club, i.e. Palermo for a final amount of USD 950,000.
  - In view of the payment schedule provided under article 2.7 of the Transfer Agreement and in view of the fact that Tijuana and Palermo concluded an agreement for the transfer

of the Player on 25 July 2012, the Single Judge also decided that an interest of 5% per year is payable on the amount of USD 237,000 as from 25 August 2012.

- With regard to the additional request for compensation in the amount of USD 500,000 the Single Judge found that Botafogo did not provide further evidence in this respect and that the Transfer Agreement did not provide for any additional compensation. Therefore, this part of the claim is rejected.

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

19. On 22 June 2016, Botafogo filed a Statement of Appeal against Tijuana, pursuant to Article R48 of the Code of Sports-related Arbitration (the “Code”), with the Court of Arbitration for Sport (the “CAS”) challenging the Appealed Decision. The appeal was registered in the CAS roll under the reference *CAS 2016/A/4669*. With its Statement of Appeal Botafogo requested that its appeal be submitted to a Sole Arbitrator, yet in case of formation of a panel, it nominated Mr Ricardo de Buen Rodríguez, attorney-at-law in Mexico City, Mexico, as an arbitrator.
20. On 23 June 2016, Tijuana filed a Statement of Appeal against Botafogo, pursuant to Article R48 of the Code, with the CAS also challenging the Appealed Decision. The appeal was registered in the CAS roll under the reference *CAS 2016/A/4670*. With its Statement of Appeal Tijuana requested that its appeal be submitted to a Sole Arbitrator.
21. On 27 June 2016, the CAS Court Office invited the parties to provide their positions as to the consolidations of the above-referred procedures (*i.e. CAS 2016/A/4669* and *CAS 2016/A/4670*).
22. On 30 June 2016, Botafogo informed the CAS Court Office that it agreed with the consolidations of the procedures but it did not agree with the appointment of a Sole Arbitrator in the procedure *CAS 2016/A/4670*.
23. On the same date, Tijuana informed the CAS Court Office that it agreed with the consolidation of the procedures.
24. On 1 July 2016, the CAS Court Office confirmed that in view of the agreement of the parties the procedures *CAS 2016/A/4669* and *CAS 2016/A/4670* were consolidated pursuant to Article R52 of the Code. By same correspondence the CAS Court Office also informed the parties that the language of the consolidated proceedings was English and that, in view of the parties’ disagreement on the number of the arbitrators, the issue would be submitted to the President of the CAS Appeals Arbitration Division, pursuant to Article R50 of the Code.
25. On 4 July 2016, the CAS Court Office informed the parties that the President of the CAS Appeals Arbitration Division had decided to submit the consolidated proceedings *CAS 2016/A/4669* and *CAS 2016/A/4670* to a panel of three arbitrators.

26. On 7 July 2016, Tijuana informed the CAS Court Office that it agreed to the submission of the consolidated procedure to a panel of three arbitrators and nominated Mr José María Alonso Puig, attorney-at-law in Madrid, Spain, as an arbitrator.
27. On 14 July 2016, Botafogo filed its appeal brief in the procedure *CAS 2016/A/4669* pursuant to Article R51 of the Code, within the extended deadline granted. The brief contained several requests for evidentiary measures and also contained the following requests for relief:
  - *a) Accept this Appeal Brief filed by Botafogo de Futebol e Regatas against the decision of FIFA notified to the clubs on 2 June 2016;*
  - *b) Condemn the Respondent to pay:*
    - *b.1) USD 750,000 (Seven hundred fifty thousand north American dollars) to the Appellant based in the right to receive 25% of USD 3,000,000;*
    - *b.2) alternatively, USD 750,000 being USD 250,000 based in the participation of 25% over the transfer fee of USD 1,000,000, plus a compensation of USD 500,000 based in the breach of contract, unjust enrichment, bad faith, damages suffered by the Appellant and the benefits taken by the Respondent by taking the Player back and transferred him to other Mexican clubs;*
    - *b.3) alternatively, condemn the Respondent to pay USD 500,000 based in the participation of 25% in the transfer fee of USD 2,000,000;*
    - *b.4) alternatively, USD 250,000, based in the participation of 25% in the transfer fee of USD 1,000,000*
  - *c) In case during the procedures the documentation of the transfer of E. to Monarcas Morelia and Tigres, to be filed according to the requests below, shows that the total transfer fee spent by those clubs in the player was higher than the amount of USD 2,000,000 renounced by Tijuana to Palermo we request the Panel to determine Tijuana to pay USD 250,000 regarding the participation of 25% in the USD 1,000,000 paid by Palermo and determine Tijuana to pay 25% over the amounts paid by Monarcas Morelia and Tigres to Tijuana for the transfer of E. (in case their combined value is higher than USD 2,000,000);*
  - *d) Set aside the decision of FIFA, regarding the payment of the costs of proceedings, which determined that Botafogo should pay CHF 12,000. The totality of the costs of proceedings should be borne by the Respondent;*
  - *e) Condemn the Respondent to pay CHF 15,000 for the legal expenses of the Appellant, as well as all the expenses incurred by the Appellant during these procedures, and finally, paying the totality of the advance of costs and FIFA's costs.*
28. On 15 July 2016, Tijuana filed its appeal brief in the procedure *CAS 2016/A/4669* pursuant to Article R51 of the Code within the extended deadline granted. The brief contained the following requests for relief:

- *A. The Decision issued by the Single Judge of the FIFA Players' Status Committee of June 30<sup>th</sup>, 2015 in the matter with reference no. 13-02122/itr is entirely abolished.*
  - *B. Declares the non-existence of any right of the Respondent to receive an amount from Club Tijuana Xolointzcuintles de Caliente which derives from the subsequent transfer of the Player to Palermo FC; or alternatively declares the invalidity with ex tunc effects of the Transfer Agreement.*
  - *C. The Respondent shall bear all the procedural costs of the present proceeding.*
  - *D. Finally, the Respondent shall compensate Club Tijuana Xolointzcuintles de Caliente for the costs and the legal fees incurred in connection with this arbitration in an amount to be determined at the discretion of this Hon. Panel.*
29. On 29 July 2016, Tijuana filed an Answer to the appeal in the procedure CAS 2016/A/4669 in accordance with Article R55 of the Code with the following requests for relief:
- *A. The appealed filed by Club Botafogo [...] is dismissed.*  
*As an alternative prayer of relief:*
  - *B. Should this Hon. Panel consider that Botafogo is entitled to receive the twenty five per cent (25%) of the amount perceived by Tijuana from Palermo FC, the decision issued by the Single Judge of the FIFA Player's Status Committee [...] is fully confirmed and therefore,*  
*As second alternative prayer of relief:*
  - *C. Should this Hon. Panel consider that Botafogo is entitled to receive the twenty – five percent (25%) of the amount perceived by Tijuana from Palermo FC, Monarca Morelia FC and CF Tigre, the sum to be paid to Botafogo amounts to two hundred thirty seven thousand five hundred American dollars (USD 237,500,00) plus five thousand Mexican pesos (...).*  
*In all three cases:*
  - *D. The Appellant shall bear all the procedural costs in the present proceedings.*
  - *E. The Appellant shall compensate Club Tijuana [...] for the costs and the legal fees incurred in connection with this arbitration in an amount to be determined at the discretion of this Hon. Panel.*
30. On 8 August 2016, Botafogo filed an Answer to the appeal in the procedure CAS 2016/A/4670 in accordance with Article R55 of the Code with the following requests for relief:
1. *Fully dismiss the Appeal filed by Club Tijuana [...] against the decision of FIFA [...];*
  2. *Condemn Club Tijuana [...] to pay CHF 15,000 for the legal expenses of Botafogo de Futebol e Regatas, as well as all the expenses incurred by him during these procedures, and finally, paying the totality of the advance of costs and FIFA's costs.*

31. On 23 August 2016, pursuant to Article R54 of the Code and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that the Panel appointed to decide the matter was constituted by:

President: Mr Sofoklis P. Pilavios, attorney-at-law in Athens, Greece

Arbitrators: Mr Ricardo De Buen Rodríguez, attorney-at-law in Mexico City, México  
Mr José María Alonso Puig, attorney-at-law in Madrid, Spain.

32. On 28 September 2016, the CAS Court Office upon directions of the Panel requested FIFA to provide the complete case file related to the Appealed Decision.
33. Also on 28 September 2016, the CAS Court Office informed the parties of the decisions of the Panel with respect to the evidentiary measures requested by Botafogo in its appeal brief. By the same correspondence Tijuana was ordered pursuant to Articles R57 and R44.3 of the Code to provide the CAS Court Office with its financial reports for the years 2014 and 2015 and the employment contracts signed by the Player.
34. On 5 October 2016, Tijuana in response to the letter of the CAS Court Office provided its position with respect to the documents it had been ordered to disclose.
35. On 13 October 2016, the CAS Court Office upon directions of the Panel invited by separate letters: a) Palermo, b) Tigres UANL, c) Monarcas Morelia and d) the Mexican Football Federation, as third parties, to provide the requested information and documents pertaining to the dispute.
36. On 26 October 2016, Palermo in response to the letter of the CAS Court Office provided its position with respect to the requested information.
37. On 27 October 2016, the Mexican Football Federation in response to the letter of the CAS Court Office submitted information and documents.
38. On 7 November 2016, Botafogo submitted an unsolicited letter to the CAS Court Office requesting the Panel to take additional evidentiary measures and to order Tijuana to provide additional information and documents.
39. On 14 November 2016, the CAS Court Office informed the parties of the Panel's decision to dismiss the request for "additional evidentiary measures" made by Botafogo on 7 November 2016.
40. On 16 November 2016, Monarcas Morelia in response to the letter of the CAS Court Office also provided its position with respect to the requested information.
41. On the same date, FIFA provided the CAS Court office with the complete case file concerning the Appealed Decision.



42. On 23 November 2016, the CAS Court Office upon further directions of the Panel ordered Tijuana to provide and disclose at the hearing all agreements and relevant information for the transfer of the Player to Tigres UANL in 2014.
43. On 9 December 2016, Tigres UANL in response to the letter of the CAS Court Office of 13 October 2016 also provided its position with respect to the requested information.
44. On 12 December 2016 and on 13 December 2016, Tijuana and Botafogo, respectively, returned duly signed copies of the Order of Procedure to the CAS Court Office.
45. On 20 December 2016, a hearing was held in Lausanne, Switzerland.
46. In addition to the Panel and Mr Daniele Boccucci, Counsel to CAS, the following persons attended the hearing:
  - a) For Botafogo: Mr Eduardo Carlezzo, counsel;
  - b) For Tijuana: Mr Javier Ferrero Muñoz, counsel and Mr. Iñigo de Lacalle Baigorri, counsel.
47. No witnesses or experts were heard. The parties were afforded the opportunity to present their case, submit their legal arguments and answer the questions posed by the Panel.
48. Before the hearing was concluded, both parties expressly stated that they did not have any objection with respect to the procedure and that their right to be heard had been respected.
49. The Panel confirms that it carefully took into account in its deliberations all of the submissions, evidence, and the arguments presented by the parties, even if they have not been specifically summarized or referred to in the present award.

#### **IV. SUBMISSIONS OF THE PARTIES**

##### **A. Botafogo**

50. The submissions of Botafogo, in essence, may be summarized as follows:

##### In the Appeal CAS 2016/A/4669

- Botafogo relies on the Transfer Agreement, according to which Tijuana agreed to pay Botafogo an amount of USD 600,000 for the transfer of the Player, plus a sell-on fee of 25% on the amount received by Tijuana in the event of the future transfer of the Player to third club.

- Botafogo claims that following the transfer of the Player to Palermo in July 2012 for an agreed fee of USD 3,000,000 it is entitled to receive an amount equal to 25%, namely the total amount of USD 750,000.
- Tijuana was under the obligation to notify Botafogo about the transfer of the Player to Palermo and about the agreed transfer fee and by failing to do so it clearly acted in bad faith.
- Tijuana acted again in bad faith in January 2014, when it renounced to the remaining amount of USD 2,000,000 of the fee that was due by Palermo.
- Article 152 of the Swiss Civil Code (“SCO”), which is applicable in the present dispute, prohibits Tijuana from renouncing its right to request the remaining amount of USD 2,000,000, as, by such conduct, Tijuana cancelled payment of the related fee that was promised by contract to Botafogo, namely a percentage of 25%, which corresponds to USD 500,000.
- In addition, Botafogo argues that all rights granted under the Transfer Agreement were agreed as irreversible and irrevocable and, consequently, Tijuana could not renounce any related payments.
- Botafogo further asserts that after acquiring back the Player’s rights in January 2014, Tijuana gained additional profits, firstly by transferring the Player to Monarcas Morelia on loan, and subsequently by transferring the Player to Tigres UANL. According to Botafogo this is an indication of a fraudulent behaviour, as Tijuana wanted to avoid payment of a percentage of 25% on the amount of USD 2,000,000 owed by Palermo.
- In view of these alleged indications of fraud, Botafogo argues that the basis for calculation of its claims should be the amount of USD 3,000,000, which represents the entire transfer fee (initially) agreed between Tijuana and Palermo.
- Botafogo further points out that Tijuana renounced the amount of USD 2,000,000 at a very late stage, and in particular at time when payment of the second instalment of USD 1,000,000 had already fallen due since 1 August 2013. Consequently, and only in the alternative, Botafogo submits that the basis of calculation of its claims should be the amount of USD 2,000,000, which represents the amount of the transfer fee that was already contractually due by Palermo.
- In these circumstances, Botafogo claims that this is a case of illegal and unjust enrichment by Tijuana to the detriment of Botafogo that gives rise to an additional claim for damages.
- Finally, under the Transfer Agreement the parties agreed that all payments to Botafogo are net of taxes or payments to third parties. Therefore, any amounts paid for solidarity contribution to third parties should not be taken into account for the calculation of the sell-on fee.

In the Appeal CAS 2016/A/4670

- Botafogo had already acquired the definitive rights of the Player on 11 January 2011 from CF Monterrey for an amount of 550,000 USD.
- The Transfer Agreement with Tijuana is a fully effective, valid and binding contract and contains in clear terms the financial agreement of the parties.
- In execution of the terms of the Transfer Agreement, Tijuana paid Botafogo the agreed amount of USD 600,000 in instalments on the due dates for payment of each instalment. This clearly shows the enforceability of the Transfer Agreement.
- The allegation of Tijuana that the amount of USD 600,000 was paid in connection with other cases is completely unsubstantiated.
- As per the express agreement of the parties contained in articles 1.2 and 3.1 of the Transfer Agreement, the Player was required to sign a mutual termination of his contract with Botafogo.
- Tijuana inserted misleading information in the TMS Report to indicate that the Player was a free agent, only with the aim to avoid future payments to Botafogo.

**B. Tijuana**

51. The submissions of Tijuana, in essence may be summarized as follows:

In the Appeal CAS 2016/A/4670

- The Transfer Agreement never came into force and it does not create binding obligations upon the parties.
- In all events, the Transfer Agreement is null and void with *ex tunc* effect, due to the fact that Botafogo was not the rightful holder of the federative rights of the Player.
- As a result of this defect the Player terminated his employment relationship with Botafogo on 28 July 2011.
- Thereafter Tijuana hired the Player as a free agent. In this respect Tijuana also relies on TMS Report submitted for the request for the ITC of the Player, which indicates the Player as free agent.
- Botafogo did not provide evidence to show that payment of the amount of USD 600,000 had been made in relation to the Transfer Agreement.
- Botafogo is under no circumstances entitled to claim any amount in connection to the transfer of the Player to Palermo FC.

In the Appeal CAS 2016/A/4669

- Tijuana reiterates the argumentation that the Transfer Agreement is null and void.
- Tijuana further argues that it was free to amend its contractual relationship with Palermo FC through the conclusion of a new agreement made between them on 10 January 2014.
- The Player and Palermo FC terminated their employment relationship by mutual consent in January 2014 and thereafter the Player signed a new employment contract with Tijuana as a free agent.
- The Player could not play for Tijuana in season 2014 as all available places for foreign players had been occupied. Consequently, Tijuana loaned the Player on a temporary basis to Monarcas Morelia without receiving any fee.
- Subsequently, in July 2014 Tijuana transferred the Player on a definitive basis to Tigres UANL for an amount of one hundred thousand MXN 100,000.
- Following the two subsequent transfers of the Player to Monarcas Morelia and Tigres UANL Tijuana merely received MXN 100,000.
- Tijuana did not either commit any act of fraud or gain an unfair or illegal advantage and did not obtain unjust enrichment.
- At any rate, Tijuana received from Palermo FC the total amount of USD 950,000 due to the deduction of an amount for payment of solidarity contribution, as agreed with Palermo FC. Therefore, Botafogo is only entitled to a percentage 25% of the total amount of USD 950,000 that was actually received, namely the amount of USD 237,000.

**V. JURISDICTION**

52. The jurisdiction of CAS in this matter, which is not contested by the parties, derives from Article 58(1) of the FIFA Statutes and Article R47 of the Code.
53. Article 58(1) of the FIFA Statutes determines that: “[a]ppeals against final decisions passed by FIFA’s legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question”.
54. Article R47 of the Code provides that: “An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body”.
55. The jurisdiction of CAS is further confirmed by the Order of Procedure duly signed by the parties. It, therefore, follows that CAS has jurisdiction to decide on the present matter.

## VI. ADMISSIBILITY

56. Article R49 of the Code provides as follows:

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

57. The Panel notes that Article 58.1 of the FIFA Statutes also provides as follows:

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

58. The grounds of the Appealed Decision were notified to the parties on 2 June 2016. Botafogo filed its Statement of Appeal on 22 June 2016 and Tijuana filed its Statement of Appeal on 23 June 2016. Therefore, the 21-day deadline to file the appeal was met by both parties.

59. It follows that both appeals are admissible.

## VII. APPLICABLE LAW

60. Article R58 of the Code provides as follows:

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

61. The Panel notes that that article 66(2) of the FIFA Statutes stipulates the following: *“The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law”.*

62. Accordingly the Panel shall decide the present matter pursuant to the various applicable Regulations of FIFA, and Swiss law shall be applied subsidiarily.

## VIII. MERITS

63. The first issue that needs to be examined is whether the Transfer Agreement between Botafogo and Tijuana in relation to the transfer of the Player is a valid, effective and binding agreement, capable of conferring rights and obligations upon the parties.

64. In this respect, the Panel remarks that the Transfer Agreement was made as a tripartite agreement signed by all parties involved, namely Botafogo, Tijuana and the Player, as a consenting third party.
65. Although Tijuana does not contest that it had duly signed the Transfer Agreement on 26 July 2011, it yet argues that this Agreement never came into effect, as the Player terminated his employment contract with Botafogo by mutual agreement, allegedly due to the fact that Botafogo did not rightfully hold his registration. On this premise, Tijuana argues that it hired the Player as a free agent and, therefore, the Transfer Agreement should be deemed ineffective.
66. The Panel notes that article 1.2 of the Transfer Agreement specifically provides that the transfer of the Player was subject to the conclusion of an employment contract with Tijuana, and, also, to the mutual termination of his contract with Botafogo. In other words, the prior termination of the Player's contractual relationship with Botafogo was an express pre-condition to his transfer to Tijuana.
67. It therefore follows that all parties involved, namely both clubs and the Player himself, had explicitly intended to structure the Player's transfer precisely this way, something, which is also corroborated by the timeline of events: the Transfer Agreement was concluded on 26 July 2011 and immediately after the Player terminated his contract with Botafogo on 28 July 2011 and registered subsequently with Tijuana on 29 July 2011.
68. Consequently, Tijuana acquired the Player in execution of the terms of the Transfer Agreement, exactly in the way agreed upon amongst all contracting parties. As a result, Tijuana cannot legitimately use the fact that the Player was hired as a free agent as an excuse to avoid its obligations under the Transfer Agreement. As to the conflicting content of the TMS Report cited by Tijuana and Botafogo, the Panel deems that, since all parties had signed the Transfer Agreement, there is little evidentiary value in the information appearing on the different TMS Report submitted later by each party.
69. As a further point, the Panel finds important that Tijuana did not directly dispute the fact that it had paid Botafogo a total amount of USD 600,000 in instalments. And although Tijuana firmly denied that these payments were related to the Transfer Agreement, it nonetheless failed to explain in a convincing manner what obligations were settled thereby. On this basis, and also considering that this amount corresponds to the fixed fee payable under the Transfer Agreement, the Panel takes this as an additional indication that said Agreement has been applied and enforced by all parties.
70. In view of these considerations, the Panel finds that there is no credible evidence to support the allegation that the Transfer Agreement remained ineffective, or that it was null and void. On the contrary, the Panel is satisfied that the Transfer Agreement is a fully binding and enforceable agreement which remains directly applicable in the dispute at hand.

71. Having established so, the Panel turns to examine what amount, if any, of the sell-on fee agreed under article 2.7 of the Transfer Agreement is due to Botafogo.
72. It remains an uncontested fact that the Player was transferred from Tijuana to Palermo by agreement made on 25 July 2012 for a fee of USD 3,000,000 that was scheduled to be paid in three equal instalments of USD 1,000,000, each, the first upon receipt of the Player's ITC, and the remaining two on 1 August 2013 and on 1 August 2014.
73. Therefore, the main condition triggering payment of the sell-on fee in a percentage of 25% as provided in article 2.7 of the Transfer Agreement was effectively fulfilled with the transfer of the Player to Palermo in July 2012.
74. The central issue of contention, however, arises with respect to the relevant amount to be used as the basis to calculate the percentage of 25% especially in view of the fact that Tijuana subsequently decided to renounce a good part of the remaining transfer fee due by Palermo, and to acquire back the Player.
75. On the basis of the evidence submitted to the Panel it is established that Palermo FC failed to pay Tijuana the second instalment in the amount of USD 1,000,000 that was due on 1 August 2013, claiming cash flow difficulties. Further, on 10 January 2014 Tijuana, by means of a written agreement with Palermo, renounced its right to request the remainder amount of USD 2,000,000 of the transfer fee, namely the second instalment that was already overdue and the third instalment that was forthcoming, and, at the same time agreed to acquire the Player as a free agent, without any further claims by Palermo.
76. To the understanding of the Panel and in view of the facts of the present case, this agreement does not involve a dubious transaction and does not indicate an act of fraud against the financial interests of Botafogo.
77. First of all, the Panel acknowledges that in the world of professional football clubs are free to reassess their business understandings and to amend accordingly their contractual relationships when new circumstances arise affecting their interests. In the present case, the relegation of Palermo to the second division (Serie B) of the Italian National League for season 2013/2014 and its admitted financial difficulties to meet the scheduled payments of the transfer fee constitute objective factors that may reasonably justify an amendment in the initial agreement between Tijuana and Palermo.
78. At any rate, Botafogo failed to present conclusive and concrete evidence to substantiate any fraudulent act on the part of Tijuana, either acting on its own or in collusion with a third party. The allegation that Tijuana renounced its rights with the aim to avoid its payment obligations to Botafogo is a mere hypothetical speculation and is not in itself sufficient to establish an act of fraud or a simulation act with the aim to obtain an illegal or unjust profit at the expense of Botafogo.

79. The fact that Tijuana renounced its claims for the remaining amount of the transfer fee in January 2014, namely five months after the second instalment of USD 1,000,000 had fallen due, does not affect this conclusion, as there is no shred of evidence that the second instalment had ever been paid, even at a later date.
  
80. As a further point, the Panel remarks that according to article 2 of the transfer agreement of 25 July 2012 between Tijuana and Palermo it was agreed that *“Transfer fee mentioned in art. 1 includes solidarity contribution that Palermo will pay following art. 21 and annex 5 of FIFA Regulation on status and transfer of Players deducting relative amounts from compensation fee mentioned in the art.1”*.
  
81. In view of these considerations and on the basis of the evidence at its disposal, the Panel is satisfied to conclude that Tijuana ultimately received from Palermo only the first instalment of USD 1,000,000, out of total contractually agreed transfer fee of USD 3,000,000, minus the proportion paid for solidarity contribution in the amount of USD 50,000, namely the total amount of USD 950,000.
  
82. Therefore, in accordance with the contractual agreement of the parties, and adhering to the established jurisprudence of CAS in similar cases (*CAS 2012/A/2875*), the Panel finds that the basis for calculation of the sell-on fee due to Botafogo shall be only the amount actually paid as transfer fee by Palermo, namely the amount of USD 950,000. Consequently, the sell-on fee of 25% due to Botafogo by Tijuana is determined in the amount USD 237,500.
  
83. With these findings, the Panel considers that the subsequent transfers of the Player to Monarcas Morellia and Tigres UANL are irrelevant to this dispute, given that the transfer of the Player to Palermo effectively triggered a payment obligation in relation to the agreed sell-on fee in the amount of USD 237,500, and, thus, the respective right of Botafogo is thereby extinguished. As a result the Panel shall not inquire into the details of these transfers.
  
84. Finally, in the absence of any evidence of an act of fraud or illegal and unjust enrichment at the expense of Botafogo, all other claims for compensation of damages are dismissed.
  
85. In conclusion, the Panel fully confirms the Appealed Decision and all other requests for relief made by the parties are dismissed. As the Appealed Decision is confirmed, the interest on the amount of USD 237,500 at a rate of 5% per year as from 25 August 2012, as awarded with the Appealed Decision, is also confirmed.



## ON THESE GROUNDS

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

1. The appeal filed by Club Botafogo de Futebol e Regatas on 22 June 2016 against the decision rendered on 30 June 2015 by the Single Judge of the Players' Status Committee of the Fédération Internationale de Football Association is dismissed.
2. The appeal filed by Club Tijuana Xolointzcuintles de Caliente on 23 June 2016 against the decision rendered on 30 June 2015 by the Single Judge of the Players' Status Committee of the Fédération Internationale de Football Association is dismissed.
3. The decision issued on 30 June 2015 by the Single Judge of the Player's Status Committee of the Fédération Internationale de Football Association is confirmed.
4. (...).
5. (...).
6. All other motions or prayers for relief are dismissed.