Arbitration CAS 2010/A/2098 Sevilla FC v. RC Lens, award of 29 November 2010

Panel: Prof. Luigi Fumagalli (Italy); Mr Stuart McInnes (United Kingdom); Mr Olivier Carrard (Switzerland)

Football
Sell-on clause contained in a transfer agreement
Inadmissibility of a counterclaim
Purpose of a sell-on clause
Notion of "sale" of a player in the world of professional football
Admissibility of "federative rights" over a player
Transfers occurring in the context of a "sale" contract with the agreement of the old club
Transfers occurring outside a contractual ("sale") scheme without the agreement of the old club
Scope of a sell-on clause referring to the "resale" of a player

1. **As of 1 January 2010, Article R55 of the CAS Code no longer contemplates the possibility for the respondent to challenge in its answer the decision appealed against by the appellant. As a result, a party, dissatisfied with a decision rendered by a sports body or entity, is obliged to file an appeal within the applicable deadline and cannot wait to see whether the same decision is challenged by another party before filing an appeal.**

2. **The purpose of a sell-on clause is to "protect" a club (the "old club") transferring a player to another club (the "new club") against an unexpected increase, after the transfer, in the market value of the player's services; therefore, the old club receives an additional payment in the event the player is "sold" from the new club to a third club for an amount higher than that one paid by the new club to the old club. In transfer contracts, for that reason, a sell-on clause is combined with the provision defining the transfer fee: overall, the parties divide the consideration to be paid by the new club in two components, *i.e.* a fixed amount, payable upon the transfer of the player to the new club, and a variable, notional amount, payable to the old club in the event of a subsequent "sale" of the player from the new club to a third club.**

3. **In the world of professional football the term "sale" is used in an inaccurate way. Clubs, in fact, do not have property rights in, or equivalent title to, the player, which could be transferred from one entity to another. The "sale" of a player, therefore, is not an agreement affecting a club's title to a player, transferred from one entity to another against the payment of a purchase price. The transfer consented by the seller, and the price paid in exchange, do not directly consider a property right, but are part of a transaction affecting the employment relation existing between a club and a player, always requiring the consent of the "transferred" player and of the clubs involved. Through the "sale", then, the parties express their consent to the transfer of the right to benefit from the player's performance, as defined in the employment agreement, which,**

in turn, is the pre-condition to obtain the administrative registration of the player with a federation in order to allow the new club to field him.

4. **Insofar as the notion of "federative rights" may be taken to define "rights of a club over a player", including the right to control and transfer him, it cannot be accepted, at least to the extent these "federative rights" are held to stem only from the rules of a federation, and are not ultimately based on the player's explicit consent: in other words, on the employment contract between the club and the player. Rules providing for a right of a club over a player irrespective of the player's consent would be contrary to universal basic principles of labour law and are thus unenforceable on grounds of public policy.**

5. **In the context of a "sale" contract, a transfer, being object and purpose of the parties' consent, can actually be made in two ways: (i) by way of assignment of the employment contract; and (ii) by way of termination of the employment agreement with the old club and signature of a different employment agreement with the new club. In both cases, the old club expresses its agreement (to the assignment or to the termination of the old employment contract, as the case may be) against the receipt of a payment which substitutes for the loss of the player's services.**

6. **A transfer of a player can also take place outside the scheme of a ("sale") contract, in the event that the player moves from a club to another following the termination of the old employment agreement as a result (i) of its expiration or (ii) of its breach. In both cases, the transfer of the player from one club to another takes place without (or even against) the consent of his old club. Therefore, it takes place without a contract ("sale" or other), because there is no contract (let alone a "sale" contract) in a situation in which there is no obligation freely assumed by one party towards the other.**

7. **A sell-on clause that refers to a "resale" of a player appears to apply not to any and all subsequent transfers of the player to a new club, but only to either of those transfers which are based on a contract. Therefore, where the right of the player to put an end to the employment agreement, and the corresponding obligation to pay an indemnity, is based on the law and not on the employment agreement itself, the termination of the employment agreement is the result of the exercise of a statutory right of the player. Consequently, the transfer of the player occurs outside any contractual scheme. As a result, the termination appears to fall outside the scope of the sell-on clause that, failing an additional specification, does not cover, through the reference to "resale", transfers made on the basis of the mechanism provided by the law.**

Sevilla FC ("Sevilla" or the "Appellant") is a Spanish football club affiliated to the Real Federación Española de Fútbol (RFEF), which is the national football association for Spain. The RFEF, in turn, is affiliated to the Fédération Internationale de Football Association (FIFA), the world governing body of football.

RC Lens ("Lens" or the "Respondent") is a French football club affiliated to the Fédération Française de Football (FFF), which is also a member of FIFA.

On 10 July 2007, Lens and Sevilla signed, in Spanish and in French, a memorandum of understanding (*"Protocole d'Accord"* or *"Protocolo de Acuerdo"*, also referred to as the "Transfer Agreement") providing for the terms and conditions of the transfer of the player S. (the "Player") to Sevilla.

Article 2 of the Transfer Agreement set the financial conditions of said transfer. In particular, its Article 2.1 provided for the obligation of Sevilla to pay Lens the amount of EUR 4,000,000 (four million Euros), net of taxes, duties and charges of all kinds, in three instalments.

Article 2.2.4 of the Transfer Agreement, then, read as follows:

i. in the French version:

"2.2.4 – Intéressement:

En cas de revente du joueur S. de Seville FC vers un autre club le Racing Club de Lens percevra:

- *10% sur la plus value entre 4.000.000 euros et 8.000.000 euros.*
- *15% au-delà de 8.000.000 euros*
- *Ce sommes sont cumulables".*

ii. in the Spanish version:

"2.2.4 - Participaciones en los beneficios:

En el caso de una reventa a otro club del jugador S. por el Seville FC, el Racing Club de Lens percibirá:

- *el 10% sobre la plusvalía entre 4.000.000 euros y 8.000.000 euros.*
- *el 15% mas allá de 8.000.000 euros.*
- *Aquellos importes se pueden cumular".*

"2.2.4 - Profit-sharing. In case of resale of the player S. by Sevilla FC to another club, racing Club of Lens shall receive: - 10% of the capital gain between 4,000,000 Euro and 8,000,000 Euro. - 15% beyond 8,000,000 Euro. - These amounts may be cumulated" (English translation provided by the Respondent; the translation of the Appellant is equivalent).

In other words, the parties agreed in Article 2.2.4 of the Transfer Agreement (the "Sell-On Clause") that in case of "resale" (*"revente"* or *"reventa"*) of the Player by Sevilla to another club, Lens would receive an additional portion of the price to be paid by Sevilla, expressed as a percentage of the "capital gain" (*"plus value"*, *"plusvalia"*) made by Sevilla.

On 12 July 2007, Sevilla and the Player concluded an employment agreement valid until 30 June 2011 (the "Employment Agreement").

The Second Clause of the Appendix to the Employment Agreement (the "Indemnification Clause") stated, for the purposes of the Spanish *Real Decreto 1006/85, de 26 de junio 1985, por el que se regula la*

relación laboral de los deportistas profesionales (the "Real Decreto 1006/85"), that, in the event of unilateral termination of the Employment Agreement by the Player, the Player would pay Sevilla, as indemnification, the sum of EUR 14,000,000, in case of termination before 15 February 2009, and EUR 10,000,000 after said date, as follows:

> *"A los efectos contemplados en el Decreto 1.006/85 de 26 de Junio, para el supuesto de rescisión unilateral anticipada del presente contrato o de sus posibles prórrogas por parte del jugador, antes de la expiración del termino pactado, así como a efectos de indemnizaciones para este mismo supuesto en caso de someterse la cuestión al órgano arbitral de FIFA ò UEFA el jugador vendrá obligado a indemnizar al Sevilla FC en la suma de CATORCE MILLONES DE EUROS (14.000.000€), si la rescisión se produce antes del 15 de Febrero de 2009, si la fecha es posterior, la cantidad que se fija como indemnización será de DIEZ MILLONES DE EUROS (10.000.000€)".*
>
> *"To the effect of Royal Decree 1006/85 of the 26th of June, in the case of unilateral breach ante tempus of this present contract, or its possible extensions, by the player before the expiry of the agreement, as well as for the purpose of indemnification for this same matter in case that the parties submit the matter to the arbitration bodies of FIFA or UEFA, the Player should indemnify Sevilla FC with the sum of EUR 14,000,000, if the rescission occurs before the 15th of February 2009, and EUR 10,000,000 if it occurs afterwards"* (English translation provided by the Appellant).

In a letter dated 26 May 2008, the Player informed Sevilla of the exercise of the right to terminate the Employment Agreement pursuant to the Real Decreto 1006/85, with effect as of 30 June 2008, as follows:

> *"Mediante el presente, cúmpleme informarla que ejercito mi derecho a extinguir anticipadamente el contrato de trabajo que nos une, con fecha de efectos del 30 de junio del 2008, al amparo de lo dispuesto en el artículo 13.(i) del RD 1006/1985.*
>
> *En cuanto al pago del importe que podaría corresponder en función de lo dispuesto en el artículo 16 de la misma norma, quedo a su disposición para tratar de la referida cuestión".*
>
> *"By the present letter, I do inform you that I am exercising my right to extinguish ante tempus the employment contract that links us, from the date of 30 June 2008, according to what it is established in article 13.(i) of RD (Royal Decree) 1006/1985.*
>
> *As for the payment of the sum that might correspond according to article 16 of the same regulation, I am at your disposal in order to treat the question"* (English translation provided by the Appellant).

The amount of EUR 14,000,000 specified in the Indemnification Clause was later (on 14 July 2008) received by Sevilla through the offices of the Spanish *Liga Nacional de Fútbol Profesional*, which remitted to Sevilla a cheque drawn by the Spanish club Barcelona FC ("Barcelona").

Indeed, at the time of the signature by the Player of the letter dated 26 May 2008, news was reported in the press indicating that the Player was to imminently sign an employment agreement with Barcelona.

As a result, on 27 May 2008, Lens contacted Sevilla for information regarding the transfer of the Player to Barcelona, seeking the additional payment provided for in the Sell-On Clause. In the absence of an answer from Sevilla, a further request was made on 12 June 2008.

On 16 June 2008, Sevilla replied to Lens asserting that no agreement had been entered into with Barcelona regarding the transfer of the Player, and that the Player had only informed Sevilla of his intention to unilaterally terminate the Employment Agreement.

Correspondence was then exchanged between Lens and Sevilla, but no agreement was reached by the parties: on one hand, Lens insisted that an additional payment was due by Sevilla on the basis of the Sell-On Clause as a result of the Player's transfer to Barcelona; on the other, Sevilla denied that any payment was due.

On 11 July 2007, Lens filed a claim with the FIFA Players' Status Committee (PSC) to obtain payment of the additional portion of the transfer compensation in accordance with Article 2.2.4 of the Transfer Agreement. The claim was based on Lens's firm belief of the existence of a transfer of the Player from Sevilla to Barcelona and, therefore, of the enforceability of the Sell-On Clause.

Sevilla resisted, asserting that Lens did not have any right to a payment according to the Sell-On Clause. Sevilla argued that no sale of the Player had taken place, because the Player had merely exercised his right to an early termination of the Employment Agreement by means of the payment of the compensation provided for in the Indemnification Clause, and, *de facto*, Sevilla itself had not entered into any agreement with Barcelona.

On 9 December 2009, the Single Judge of the PSC (the "Single Judge") issued a decision (the "Decision") on the claim brought by Lens, as follows:

"1. The claim of the Claimant, Racing Club de Lens, is partially accepted.

2. The Respondent, Sevilla FC, is ordered to pay the amount of EUR 1,300,000 to the Claimant, Racing Club de Lens, within 30 days as from the date of notification of this decision.

3. Any further claims lodged by the Claimant, Racing Club de Lens, are rejected.

4. If the aforementioned sum is not paid within the aforementioned deadline, an interest rate of 5% per year will apply as of expiring of the fixed time limit and the present matter shall be submitted upon the parties' request to FIFA's Disciplinary Committee for consideration and formal decision.

5. The final amount of costs of the proceedings in the amount of CHF […] are to be paid by the Respondent, Sevilla FC, within 30 days as from the date of notification of the present decision as follows:

5.1 The amount of CHF […] to FIFA …

5.2 The amount of CHF […] to the Claimant, Racing Club de Lens.

6. The Claimant, Racing Club de Lens, is directed to inform the Respondent, Sevilla FC, immediately and directly of the account number to which the remittance in accordance with the above points 2. and 5.2. are to be made and to notify the Single Judge of the Players' Status Committee of every payment received".

In support of his Decision, the Single Judge held the following:

"8. … The Single Judge concluded that it had been established and was not contested by the parties to this dispute, that the employment contract between the player and the Respondent had terminated at the above mentioned date, i.e. 14 July 2008, as a result of the payment of the sum of EUR 14,000,000 to the Respondent.

9. The Single Judge further noted that the parties did not dispute that the player in question allegedly signed an employment contract with Barcelona on 26 May 2008. …

12. Consequently, … the Single Judge deemed that the question at the centre of the dispute was whether the payment in question of the sum of EUR 14,000,000 in the above circumstances was equivalent to the transfer of the player S. between two clubs, which would thus activate clause 2.2.4 of the Protocole signed by the Claimant and the Respondent on 10 July 2007.

13. The Single Judge firstly analyzed clause 2 of the appendix to the employment contract between the player and Sevilla. In this regard, the deciding authority underlined that this release clause, the content of which had been approved by the above two parties, should not be interpreted literally, i.e. by adhering only to the letter of the clause in question, but in accordance with the theory of the parties' recognizable intent, i.e. by ascertaining the meaning that the parties could reasonably have wished to give to the contractual clause in question. The Single Judge highlighted the fact that according to this interpretation, it appears likely according to the principle of good faith and in view of the considerable sum of EUR 14,000,000 set forth in the clause in question, that the Respondent and the player were providing for the possibility of a third club indirectly intervening in the payment of the release clause on a subsidiary basis with a view to contracting the services of the player in question.

14. The Single Judge then noted that in May 2008 the player S. had signed an employment contract with the club Barcelona before the notification and implementation of clause 2 of the appendix to the employment contract he had signed with Sevilla and that said fact had not been disputed by either of the parties. The Single Judge also observed that according to the Respondent's submissions, which are not disputed by the Claimant, Barcelona provided the player with the amount in question, EUR 14,000,000, so that he could terminate the employment contract signed with the Respondent on 12 July 2007.

15. In this regard, the Single Judge compared the content of clause 2 of the appendix to the employment contract signed between the player and Sevilla and the facts of this case to a transfer agreement signed by two clubs for the transfer of a player. The Single Judge underlined that a typical transfer agreement signed by two clubs and a player generally stipulates a sum of money freely agreed between the player's former and new clubs in exchange for the early termination of the contractual relationship between the player and his former club, which is thus tantamount to the early termination of the employment contract in question by means of the payment of a sum commonly described as the "transfer amount". Furthermore, the Single Judge underlined that the professional services that a player renders to a club is a factor that is liable to be assessed by the employer from a financial standpoint. Consequently, when a club shows an interest in the professional services of a player who has a valid employment contract with another club, the interested club must reach an agreement with the old club with regard to the value of this transfer, with a view to compensating the old club for agreeing to dispense with the professional services of the player in question before the expiry of the employment contract.

16. In view of the above paragraph, the Single Judge deemed that the two situations, i.e. the concrete one at hand in the present procedure concerning the payment of EUR 14,000,000 by Barcelona in accordance

with the clause in the appendix to the employment contract signed between the player and the Respondent and the payment of a sum by one club to another in connection with a typical transfer agreement, are similar and have the same characteristics, in that they both constitute a transfer agreed between two clubs and a player for a specific amount for the early termination of a former labour relationship, except for the fact that in this dispute, at first the value of the transfer was agreed bilaterally, i.e. without the intervention of the interested club, Barcelona. Yet, the latter gave its agreement to the move of the player, thus to his transfer, at a later stage, namely when it agreed to sign the player and to pay the amount in accordance with the pertinent clause of the appendix.

17. *With regard to the similarities in the above two situations, the Single Judge highlighted that in both cases a sum was paid to the player's former club to enable him to terminate the employment contract before the contractually stipulated expiry date with a view to being transferred to a new club. The Single Judge also insisted on the fact that the only difference resided in the fact that in the present case, the "transfer amount" was set bilaterally and Barcelona were not consulted at first, although they nevertheless subsequently freely accepted it and paid the relevant amount, EUR 14,000,000, to the player so that he could forward it to Sevilla. The Single Judge thus concluded that the facts of the present case constitute a transfer agreed to by Sevilla, in the terms it had offered at the time of concluding the employment contract with the player.*

18. *Consequently, and in view of the above paragraphs, the Single Judge decided that in the present case, the activation of the relevant contractual clause by the player S. (cf. clause 2 of the appendix to the employment contract concluded between the Respondent and the player), bearing in mind that the sum in question, EUR 14,000,000, was voluntarily borne by Barcelona, has to be considered a transfer agreed between the Respondent and Barcelona in the sense of clause 2.2.4 of the transfer agreement signed by and between the Claimant and the Respondent. The Single Judge underlined that the fact that said compensation for termination was provided for in the relevant employment contract, as mentioned in art. 17 of the Regulations, does not alter the interpretation of the facts in the present case.*

19. *The Single Judge thus took the view that the specific circumstances of this matter are tantamount to a transfer agreed between Sevilla, the player and Barcelona and that therefore, clause 2.2.4 of the Protocole signed by the Claimant and the Respondent was applicable in this case considering the present specificities.*

20. *Subsidiary, the Single Judge held that if the present case were not considered a transfer in which clause 2.2.4 of the Protocole was applicable, this would lead to interpret the relevant clause 2.2.4 contrary to the principle of trust between the contracting parties and thus contrary to the principle of good faith. In such a case said clause would be interpreted as contrary to the loyalty that must be observed in legal relations. Not applying clause 2.2.4 of the Protocole in the present matter would be contrary to the meaning that should be objectively given to the clause in question. The Single Judge further held that this opinion was all the more justified in view of the profit of EUR 10,000,000 made by the Respondent following the departure of the player S. to Barcelona.*

21. *The Single Judge also referred to the Respondent's argument that the difference between the payment of a sum for the early termination of an employment contract and the transfer of a player agreed between clubs had been upheld by the Dispute Resolution Chamber in the case concerning the payment of a solidarity contribution between Club Atlético River Plate and Club Newell's Old Boys for the player Ariel Arnaldo Ortega, in which the Chamber mentioned that "En virtud de todo lo antes expuesto, los miembros de la Cámara concluyeron unánimemente que el monto de EUR …. comprometido por el club NOB [Newell's Old Boys] al Fenerbahce, en nombre y representación del jugador Ortega, no constituye un monto de transferencia acordado libremente entre los clubes interesados sino más bien parte del pago que el jugador*

Ortega debía abonar al club turco por la ruptura unilateral sin causa justificada del contrato laboral pertinente en cumplimiento de la decisión de la Cámara de fecha 6 de junio de 2003 y de la cual el club NOB es solidariamente responsable a la luz del Reglamento". In this regard, the Single Judge underlined that the Respondent's position regarding the above decision cannot be backed in the matter at stake. In the above-mentioned case, the Dispute Resolution Chamber had previously ordered, via a formal decision, the player Ortega to pay compensation for unilateral termination of his employment contract with his former club without just cause. The Single Judge highlighted the fact that in the case cited by Respondent, the compensation for early termination was not provided for in the employment contract, i.e. on a consensual basis like it is the case in the present procedure, but was imposed by a judicial body after it was established that the employment contract had been unilaterally terminated without just cause. Most importantly, the Single Judge was eager to emphasise that, contrary to the case at stake, the new club of the player following the latter's unilateral and unjustified termination of the contract, had not had the opportunity to decide on its free will on the amount of compensation to be paid. As a consequence the Single Judge concluded that the affair cited by the Respondent is not comparable to the circumstances in the present procedure.

22. *Consequently, and having established that clause 2.2.4 of the Protocole is applicable in this case, the Single Judge referred to Lens' specific claims.*

23. *With regard to Lens' claim regarding the application of clause 2.2.4 of the Protocole, the Single Judge referred to the content of the clause in question … . In this regard, the Single Judge decided that with regard to the "transfer amount" between EUR 4,000,000 and EUR 8,000,000 received by Sevilla, the Claimant was entitled to receive 10% of EUR 4,000,000 i.e. EUR 400,000. Furthermore, the Single Judge decided that of the "transfer amount" received by Sevilla in excess of EUR 8,000,000, the Claimant was entitled to a 15% share, i.e. EUR 900,000. Consequently, and in view of the foregoing, the Single Judge concluded that in accordance with clause 2.2.4 of the Protocole, the Claimant was entitled to receive the sum of EUR 1,300,000.*

24. *With regard to Lens' claim for interest of 5% on the sum of EUR 1,300,000 payable from 12 June 2008, the Single Judge decided that this part of the claim should be rejected, as in the present case and given the legal complexity of the case, no bad intention could be attributed to the Respondent, as the latter was objectively convinced of the soundness of its arguments that the application of clause 2.2.4 of the Protocole should be excluded from this case.*

25. *Furthermore, the Single Judge analyzed Lens' request that Sevilla be ordered to pay EUR 500,000 for the prejudice suffered due to the Respondent's bad faith and refusal to pay. With regard to this part of the claim, the Single Judge underlined that, as mentioned in the previous paragraph, the Respondent had not been proven to have acted in bad faith in the present case and that consequently, these claims should be rejected".*

The Decision was served upon Sevilla and Lens on 29 March 2010.

On 16 April 2010, the Appellant filed a statement of appeal with the Court of Arbitration for Sport (CAS), pursuant to the Code of Sports-related Arbitration (the "Code"), to challenge the Decision.

On 29 April 2010, the Appellant filed its appeal brief.

On 17 May 2010, FIFA informed the CAS that it waived *"its right to request its possible intervention in the … arbitration proceeding"*, and provided some *"merely technical observations … of certain relevance for the proper appreciation of the present matter"*.

On 28 May 2010, the Respondent filed its answer brief.

A hearing was held in Lausanne on 1 September 2010.

In summary, the Appellant contends that the Sell-On Clause must be interpreted literally and applied only to a "resale" of the Player. In view of that, it asserts that the Indemnification Clause provides for a quantification of damages caused by the unilateral termination of the Employment Agreement and suffered by the Appellant which has lost one of its players. In no case can such mechanism be construed as a transfer of the Player between Barcelona and Sevilla. In this respect, the Appellant insists that it did not agree to or negotiate the transfer of the Player with a third club and therefore an amicable transfer of the latter between Sevilla and Barcelona never occurred. In addition, the Appellant outlines that such option of damage quantification is provided for in the FIFA Regulations for the Status and Transfer of Players and in the Spanish employment legislation for professional athletes.

Lens, asks this Panel to dismiss the appeal brought by Sevilla. At the same time, however, the Respondent requests the Panel, by way of counterclaim, to modify the Decision on a point concerning interest.

In support of its claim to have the appeal dismissed, the Respondent alleges that the Appellant *"is … playing on words and its bad faith is obvious"* and *"indulges in strictly artificial reasoning"*, to the extent it draws a distinction between amounts paid as indemnification and sums paid as transfer fee.

The Respondent, in addition to the above, challenges the Decision on a specific point. The Single Judge, in fact, denied Lens' request to be awarded interest on the amounts owed by Sevilla from the date of the formal notice requesting the payment of such amount. The Respondent, in this respect, does not agree with the Single Judge's reasoning that held that no bad intention could be attributed to Sevilla, since the Swiss Code of Obligations does not make payment of interest *"conditional on proof of the debtor's bad faith, but only on the existence of formal notice served by the creditor"*. As a result, Lens, on the basis of Article 104.1 of the Swiss Code of Obligations, requests the Panel to condemn the Appellant to pay default interest at 5% per annum, starting from 12 June 2008.

In the letter to the CAS dated 17 May 2010, FIFA, while renouncing the possibility to file a request for intervention in the arbitration, provided the Panel with its observations regarding the outstanding issues. In summary, it is FIFA's opinion that *"each of the relevant parties, i.e. the appellant, the player … and FC Barcelona, expressed their respective volition to a release of the player from his employment-related obligations towards the Appellant against a certain amount of money, due to which the relevant transaction must be considered as an agreed transfer for the purpose of the present matter"*.

LAW

Jurisdiction

1. The CAS has jurisdiction to decide the present dispute between the parties. The jurisdiction of the CAS, which is not disputed by either party, is based *in casu* on Article R47 of the Code and on Articles 62 and 63 of the FIFA Statutes.

2. More specifically, the provisions of the FIFA Statutes that are relevant to that effect in these proceedings are the following:

   i. Article 62 ["Court of Arbitration for Sport (CAS)"]:

   "1. FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, clubs, Players, Officials and licensed match agents and players' agents.

   2. 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".

   ii. Article 63 ["Jurisdiction of CAS"]:

   "1. Appeals 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.

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

   3. CAS, however, does not deal with appeals arising from:

   (a) violations of the Laws of the Game;

   (b) suspensions of up to four matches or up to three months (with the exception of doping decisions);

   (c) decisions against which an appeal to an independent and duly constituted arbitration tribunal recognised under the rules of an Association or Confederation may be made.

   4. The appeal shall not have a suspensive effect. The appropriate FIFA body or, alternatively, CAS may order the appeal to have a suspensive effect. […]".

Appeal proceedings

3. As these proceedings involve an appeal against a decision in a dispute relating to a contract, issued by a federation (FIFA), which statutes provide for an appeal to the CAS, they are considered and treated as appeal arbitration proceedings in a non-disciplinary case, in the meaning and for the purposes of the Code.

Admissibility

4. The statement of appeal was filed within the deadline set in the FIFA Statutes and the Decision. No further recourse against the Decision is available within the structure of FIFA. Accordingly, the appeal filed by Sevilla is admissible.

5. The Decision is challenged, however, also by the Respondent, to the extent that the Single Judge denied Lens' request to be paid interest on the claimed amount starting from the date the payment was originally requested.

6. The Panel notes that such challenge was brought by way of counterclaim, submitted by the Respondent in the answer filed on 28 May 2010 pursuant to Article R55 of the Code. Such provision, however, in the text amended as of 1 January 2010, currently in force and applicable in this arbitration, no longer contemplates the possibility for the Respondent to challenge in its answer the decision appealed against by the appellant. As a result, under the current CAS rules, a party, dissatisfied with a decision rendered by a sports body or entity, is obliged to file an appeal within the applicable deadline and cannot wait to see whether the same decision is challenged by another party before filing an appeal.

7. The answer of Lens was filed well beyond the deadline for an appeal against the Decision. Accordingly, the counterclaim therein contained is not admissible.

Scope of the Panel's review

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

Applicable law

9. Pursuant to Article R58 of the Code, the Panel is required to decide the dispute

   "according to the applicable regulations and 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 application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

10. In the present case, the question is which "rules of law", if any, were chosen by the parties: *i.e.*, whether the parties choose the application of a given State law and the role in such context of the "applicable regulations" for the purposes of Article R58 of the Code. In this respect, the parties agree that the FIFA rules and regulations concerning the status and transfer of players apply primarily, with Swiss law applying subsidiarily. The Appellant, however, submits that also Spanish law has to be applied by the Panel, chiefly with respect to the issues concerning the

breach of the Employment Agreement by the Player. The relevance of Spanish law is, on the other hand, denied by the Respondent.

11. In solving this question the Panel has to consider the following:

    i. Article 7 of the Transfer Agreement provides that:

    "En cas de litige, les deux parties sont d'accord pour que la décision de la FIFA et ou du tribunal administratif du sport soit la seule applicable" – "En el caso de litigio, las dos partes están de acuerdo para que la decisión de la FIFA, y/o del tribunal administrativo del deporte sea la única aplicable".

    "In the event of dispute, the two parties agree that the decision of FIFA and/or the Court of administration for sport shall be the only one applicable" (English translation by the Panel; there is no dispute between the parties that the reference to the "Court of administration for sport" is to be intended as a reference to the "Court of Arbitration for Sport");

    ii. Article 62.2 ["Court of Arbitration for Sport (CAS)"] of the FIFA Statutes indicates that:

    "... CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law";

    iii. the Sixth Clause of the Employment Agreement indicates that:

    "En lo no previsto en el presente contrato, se estará a lo dispuesto en el Real Decreto 1006/1985 de 26 de Junio, por el que se regula la relación laboral especial de los Deportistas Profesionales, Convenio Colectivo vigente y demás normas de aplicación".

    "In the event there is no provision in this contract, the provisions of the Royal Decree 1006/1985 of 26 June, which governs the special labour relation concerning Professional Sportsmen, the Collective Agreement in force and the other applicable rules, will be followed" (English translation by the Panel);

    iv. the Indemnification Clause contains an express reference to the Real Decreto 1006/85.

12. In respect of the foregoing, the Panel remarks that:

    i. the dispute concerns the Transfer Agreement, and mainly the claim of Lens to obtain a payment under the Sell-On Clause therein contained;

    ii. the appeal is directed against a decision issued by the Single Judge, which considered such claim, and is based on Article 62.2 of the FIFA Statutes, mandating the application of the *"various regulations of FIFA"* and, additionally, of Swiss law;

    iii. the parties discussed in this arbitration the meaning of the Indemnification Clause, inserted pursuant to Spanish law in a contract (the Employment Agreement) making reference to Spanish law.

13. The Panel therefore finds that this dispute has to be determined on the basis of the FIFA regulations, with Swiss law applying subsidiarily. More specifically, the Panel agrees with the Single Judge that the dispute, submitted to FIFA by Lens on 11 July 2008, is subject to the 2008 edition of the FIFA Regulations for the Status and Transfer of Players (the "2008 RSTP"), according to their Article 26.

14. The Panel however remarks that the interpretation of the Indemnification Clause has to be conducted also on the basis of Spanish law, and mainly of the Real Decreto 1006/85, to which the Employment Agreement made reference. The provisions set in such the Real Decreto 1006/85 which appear to be relevant in this arbitration are the following:

    i. Article 13 – "Extinción del contrato":
    "La relación laboral se extinguirá por las siguientes causas: …
    i) Por voluntad del deportista profesional".

    Article 13 – *"Termination of the contract": "The employment relationship shall terminate in the following circumstances: … i) as a result of the professional sportsman's will"* (English translation by the Panel).);

    ii. Article 16 – "Efectos de la extinción del contrato por voluntad del deportista":
    "Uno. La extinción del contrato por voluntad del deportista profesional, sin causa imputable al club, dará a éste derecho, en su caso, a una indemnización que en ausencia de pacto al respecto fijará la Jurisdicción Laboral en función de las circunstancias de orden deportivo, perjuicio que se haya causado a la entidad, motivos de ruptura y demás elementos que el juzgador considere estimable. En el supuesto de que el deportista en el plazo de un año desde la fecha de extinción, contratase sus servicios con otro club o entidad deportiva, éstos serán responsables subsidiarios del pago de las obligaciones pecuniarias señaladas. …".

    Article 16 – *"Effects of the termination for sportsman's will": "One. The termination of the contract as a result of the professional sportsman's will, without a cause attributable to the club, shall give the club the right, in its case, to an indemnification which failing an agreement concerning it shall be fixed by the Labour Court taking account of the circumstances of sporting nature, of the loss caused to the entity, off the reasons of the breach and of the additional elements that the court considers relevant. In the event the sportsman within one year after the date of termination enters into a contract with another club or sports entity, these shall be subsidiarily liable for the payment of the mentioned pecuniary obligations. …"* (English translation by the Panel).

Merits

15. The main issue in this arbitration, as raised by the Appellant, concerns the interpretation of a provision (the Sell-On Clause) contained in the Transfer Agreement. The Appellant maintains that the calculation of the additional payment to be possibly made under it to the Respondent does not include the amount received by Sevilla on the basis of the Indemnification Clause, which is not a transfer fee, but compensation for the damage sustained because of the unilateral breach by the Player of the Employment Agreement. The Decision and the Respondent, on the other hand, hold the opposite view.

16. As mentioned (see § 13 above), the Transfer Agreement and the Employment Agreement, as well as the Sell-On Clause and the Indemnification Clause therein respectively contained, have to be interpreted on the basis of the FIFA rules and regulations, with Swiss law applying subsidiarily. The meaning and the purpose of the Indemnification Clause, however, has to be

understood also on the basis of Spanish law and mainly of the provisions set by the Real Decreto 1006/1985 (see § 14 above).

17. Article 18.1 of the Swiss Code of Obligations ("CO"), dealing with the interpretation of contracts, sets the following provision:

"Pour apprécier la forme et les clauses d'un contrat, il y a lieu de rechercher la réelle et commune intention des parties, sans s'arrêter aux expressions ou dénominations inexactes dont elles ont pu se servir, soit par erreur, soit pour déguiser la nature véritable de la convention".

"In order to evaluate the form and the content of a contract, the real and common intent of the parties has to be investigated, without limiting the investigation to the expressions or words improperly used by the parties, either by mistake or to hide the real nature of the agreement" (English translation by the Panel).

18. The interpretation of a contractual provision in accordance with Article 18 CO aims at assessing the intention the parties had when they concluded the contract. On this basis, Swiss scholars (WIEGAND, in *Basler Kommentar*, No. 7 *et seq.*, ad Art. 18 CO) and case law (decisions of the Federal Tribunal of 28 September 1999, ATF 125 III 435, and of 6 March 2000, ATF 126 III 119) have indicated that the primary goal of interpretation is to ascertain the true common intentions (consensus) of the parties. Where a factual consensus cannot be proven, the declarations of the parties must be interpreted pursuant to the principle of good faith in the sense in which they could and should have been understood, taking into account the wording, the context as well as all circumstances.

19. Therefore, this Panel has to explore the *"real and common intent of the parties"*, pursuant to the mentioned principles, beyond the literal meaning of the words used, in order to determine the implications of the Sell-On Clause, as well as of any other contractual provision relevant in this arbitration (save as mentioned above with respect to the Indemnification Clause: § 14).

20. The Sell-On Clause contains a well-known mechanism in the world of professional football: its purpose is to "protect" a club (the "old club") transferring a player to another club (the "new club") against an unexpected increase, after the transfer, in the market value of the player's services; therefore, the old club receives an additional payment in the event the player is "sold" from the new club to a third club for an amount higher than that one paid by the new club to the old club. In transfer contracts, for that reason, a sell-on clause is combined with the provision defining the transfer fee: overall, the parties divide the consideration to be paid by the new club in two components, *i.e.* a fixed amount, payable upon the transfer of the player to the new club, and a variable, notional amount, payable to the old club in the event of a subsequent "sale" of the player from the new club to a third club.

21. Following this pattern, in the case at hand, Lens (the "old club") and Sevilla (the "new club") set in the Transfer Agreement a transfer fee (EUR 4,000,000) payable upon the transfer of the Player, and the Sell-On Clause, providing for an additional payment in case of "resale" (*"revente"* or *"reventa"*) of the Player to a third club. The dispute between the parties (as summarized at § 15 above) precisely refers to this point, *i.e.* to the exact identification of the meaning and scope of this triggering element ("resale").

22. According to Article 184 of the Swiss Code of Obligations, a "sale" (and therefore a "resale") is a *"contract whereby the seller obligates himself to deliver to the buyer the object of the purchase and to transfer title thereto to the buyer, and the buyer obligates himself to pay the purchase price to the seller"*. In other words, in a "sale" the transfer of title to an object is based on the consent of the seller, and the price paid by the buyer is the consideration for such seller's consent.

23. The Panel notes, however, that in the world of professional football the term "sale" is used in an inaccurate way. It is in fact not possible to describe the transfer of a player, from a club to another, in terms of a sale (or the contract entered into by the old and the new club as a sale contract), in the same way as one could refer to the sale of goods or other property. Clubs, in fact, do not have property rights in, or equivalent title to, the player, which could be transferred from one entity to another. Such property rights or title are inconceivable, whatever the law applicable to the relation between a club and a player.

24. In order to make good this lack of property or title and to establish a "right" which can be transferred from one club to another, and therefore become the subject of a "sale" in proper terms, the industry has identified a category of so-called "federative rights", being rights stemming from the registration with a football association or league of a player with a club. Indeed, the Transfer Agreement itself refers to the *"droits sportifs"* or *"derechos deportivos"* as the property of Lens and the object of the transfer to Sevilla.

25. The Panel, however, holds that this notion of "federative rights" (at least insofar as such expression may be taken to define "rights of a club over a player", including the right to control and transfer him) cannot be accepted, at least to the extent these "federative rights" are held to stem only from the rules of a federation, and are not ultimately based on the player's explicit consent: in other words, on the employment contract between the club and the player. As already noted in a CAS precedent (award of 27 January 2005, CAS 2004/A/635 at § 68), *"sports rules of this kind"*, *i.e.* rules providing for a right of a club over a player irrespective of the player's consent, would be *"contrary to universal basic principles of labour law and are thus unenforceable on grounds of public policy"*.

26. The "sale" of a player, therefore, is not an agreement affecting a club's title to a player, transferred from one entity to another against the payment of a purchase price. The transfer consented by the seller, and the price paid in exchange, do not directly consider a property right, but are part of a transaction affecting the employment relation existing between a club and a player, always requiring the consent of the "transferred" player and of the clubs involved. Through the "sale", then, the parties express their consent to the transfer (in the ways described below: see § 27) of the right to benefit from the player's performance, as defined in the employment agreement, which, in turn, is the pre-condition to obtain the administrative registration of the player with a federation in order to allow the new club to field him. This point is confirmed by Article 8 of the 2008 RSTP, under which *"The application for registration of a professional must be submitted together with a copy of the player's contract"*.

27. In the context of a "sale" contract, a transfer, being object and purpose of the parties' consent, can actually be made in two ways: (i) by way of assignment of the employment contract; and (ii)

by way of termination of the employment agreement with the old club and signature of a different employment agreement with the new club. In both cases, the old club expresses its agreement (to the assignment or to the termination of the old employment contract, as the case may be) against the receipt of a payment – which substitutes for the loss of the player's services; the new club accepts the assignment of the existing employment contract or consents to enter into a new contract with the player; and the player consents to move to the new club.

28. At the same time, the Panel recognises that a transfer of a player can also take place outside the scheme of a ("sale") contract, in the event that the player moves from a club to another following the termination of the old employment agreement as a result (i) of its expiration or (ii) of its breach. In both cases, the transfer of the player from one club to another takes place without (or even against) the consent of his old club. Therefore, it takes place without a contract ("sale" or other), because there is no contract (let alone a "sale" contract) in a situation in which there is no obligation freely assumed by one party towards the other. In the second case (transfer following a breach), an amount is due to the old club, but cannot be defined as a "purchase" price, paid as consideration for the consent to the transfer, since it is of a different character and title: it is compensation for the damage caused by the breach. In other words, the transfer of the player in this case is not a sale, because the old club has not agreed to the transfer (necessary element under Swiss law: § 22 above), even if it implies the payment of an amount to the old club.

29. The Sell-On Clause must be interpreted against this background. To the extent it refers to a "resale", it appears to apply not to any and all subsequent transfers of the Player to a new club, but only to either of those transfers which are based on a contract (see § 27).

30. The Panel finds in fact that such interpretation corresponds to the notion of "sale" under Swiss law (§ 21 above), as used in the world of professional football, and consistently applied in the context of the Transfer Agreement (under which the Player was "sold" to Sevilla). Contrary to it, no evidence has been given to prove that, where the parties indicated in the Transfer Agreement the "resale" as the triggering element for the additional payment under the Sell-On Clause, their common and actual intention was to refer to any other form of "transfer". Nor is it possible to presume that the parties, at the time the Contract was concluded, acting reasonably and loyally, intended to include in the notion of "sale" also forms of "transfer" of the Player occurring outside a contractual ("sale") scheme: of such possibility (*i.e.* of the possibility that a player moves from one club to another even without, or against, the consent of the former club) the parties, primary clubs of professional football, could not be unaware.

31. The question, then, arises whether the transfer of the Player from Sevilla to Barcelona, as a result of the exercise of the Player's right to terminate the Employment Agreement under the Real Decreto 1006/1985 and the payment of the amount contemplated in the Indemnification Clause, falls within any of such forms of transfer constituting a sale, and in particular whether it corresponds to the second way in which a "sale" can be structured (*i.e.*, through the termination of the employment agreement with the old club and the signature of a different employment agreement with the new club).

32. As mentioned, the Indemnification Clause was inserted in the Employment Agreement pursuant to the Real Decreto 1006/1985, to which it explicitly makes reference.

33. The Real Decreto 1006/1985, in fact, provides, at Article 13(i), for the absolute right of a player to put an end, on the basis of his sole will and irrespective of the existence of any clause justifying it (*"ad nutum"*), to the employment relationship binding him to a club, and obliges the player, by Article 16.1 (together with the club to which the player may have transferred), to pay an indemnification to the old club. That indemnification can be defined in a specific contract clause or by a labour court. The amount mentioned in the Indemnification Clause is precisely intended to quantify the indemnification to be paid, in accordance with Article 16.1 of the Real Decreto 1006/1985, in the event of exercise of the Player's statutory right to terminate the Employment Contract pursuant to Article 13(i) of the Real Decreto 1006/1985.

34. The Panel notes that the nature and function of contractual clauses, intended to quantify the indemnification to be paid pursuant to Article 16.1 of the Real Decreto 1006/1985, is disputed in the Spanish doctrine and case law. It is in fact not clear whether they perform the function of a "liquidated damages" clause (*"cláusula penal"*), defining in advance the damages to be paid in the event of breach of an obligation (*"pena convencional"*), or a type of "indemnity" to be paid for the exercise of a right of termination, intended to compensate for the loss of the player's services (*"cláusula convencional o pacto indemnizatorio"*). As mentioned, in fact, by the *Juez del Juzgado de lo Social of San Sebastian* in the decision n. 128/06 of 9 March 2006, there is *"a nivel doctrinal una discusión no resulta aun de forma pacifica, hasta el punto que mientras el sector mayoritario de la doctrina la califica como una cláusula penal o pena convencional, otro sector de la doctrina, que cuenta con el apoyo de las sentencias de dos Tribunales Superiores de Justicia, de Galicia, cuyo criterio queda reflejado en la sentencia de fecha 22.09.99 …, y de Catalunya, expresada en la resolución de fecha 02.02.04 …, la califica como cláusula convencional o pacto indemnizatorio"*. In the same way, a dispute exists as to the nature and effects of the termination right given to the athlete by Article 13(i) of the Real Decreto 1006/1985: the *Tribunal Superior de Justicia de Asturias*, in a decision rendered on 12 December 1997, indicated that even though the termination of the contract by the player is usually described as *"rescisión"* it is not *"tal cosa, sino revocación o acto por el que voluntariamente y sin causa una de las partes contratantes retira para el futuro la eficacia que el contrato presta a su libertad declarada en él"*.

35. The Panel considers however that it needs not take a position in general and abstract terms on the question, disputed in Spanish legal doctrine and jurisprudence, concerning the characterization of the termination right provided by Article 13(i) of the Real Decreto 1006/1985 and the nature of the payment due under Article 16.1 of the Real Decreto 1006/1985 on the player exercising his right to terminate. The Panel's only task is to verify whether the combination of (i) the insertion in the Employment Agreement of a clause (the Indemnification Clause) pursuant to Article 16.1 of the Real Decreto 1006/1985, (ii) the exercise by the Player of its statutory right to terminate the Employment Agreement in accordance with Article 13(i) of the Real Decreto 1006/1985, (iii) the payment – by Barcelona – of the amount indicated in the Indemnification Clause, and (iv) the signature by the Player of a new employment contract with Barcelona, constitutes a "resale" for the purposes of the Sell-On Clause.

36. In this regard the Panel notes that the termination of the Employment Agreement was the result of the exercise of a statutory right of the Player. The right of the Player to put an end to the Employment Agreement, and the corresponding obligation to pay an indemnity, was based on the law (the Real Decreto 1006/1985) and not on the Employment Agreement itself, whose limited purpose was to define, in the Indemnification Clause, the measure of the indemnity due under the law. In other words, the Player's release from the Employment Agreement was not effected by Sevilla, but by operation of the law. Sevilla did not consent to the early termination of the Employment Agreement: it was obliged to "tolerate" it, as imposed by the law. Sevilla, actually, stipulated in the Indemnification Clause the amount to be paid by the Player in the event of exercise of the statutory right of termination. But the claim for such payment would have existed irrespective of the Indemnification Clause, and cannot be regarded to refer to a consideration for the grant of a (termination) right to the Player.

37. The above leads the Panel to distinguish the events concerning the Player (as described above) from a sale effected by way of termination of the employment agreement with the old club and signature of a different employment agreement with a new club. The Panel, in fact, notes that in the second scenario the old club agrees to the termination of the employment contract, and the "transfer fee" represents precisely the consideration for the consent to this termination. In the actual case of the Player there was, on the contrary, no consent by Sevilla to the termination and no consideration, for the grant and exercise of the termination right, was received by it. In other words, the transfer of the Player occurred outside any contractual scheme. It did not even follow a breach of contract, because the Player exercised a statutory right to terminate his contract of employment; but still it took place regardless of Sevilla's consent.

38. Contrary to this conclusion, it is not possible to refer to the contractual determination of the indemnity to be paid by the Player – and actually paid by Barcelona – in the Indemnification Clause. As mentioned, the Player (and Barcelona subsidiarily) was obliged by the law to indemnify Sevilla and in the event of there being pre-determined contractual provision, the same indemnity could be set by a labour court. The parties simply agreed in advance on the measure of the indemnity, without implying any consent to the termination of the Employment Agreement or any offer to a third party.

39. This conclusion, on the contrary, allows the Panel to avoid an inconsistency that the FIFA position makes clear. The payment of an indemnification to the old club under Article 16.1 of the Real Decreto 1006/1985 has in fact the same nature (whatever this is: see § 34 above) irrespective of the fact that its measure is defined by the parties or set by the labour court. It is therefore unsustainable to equate the payment of the indemnity (for whatever purpose under the FIFA regulations, including to the ends of the solidarity contribution mechanism) to a transfer fee in one case (consensual determination between the club and the player) and deny the equation in the other case (determination by a court or a FIFA body).

40. In summary and conclusion, failing a consensual termination of the Employment Agreement, the transfer of the Player from Sevilla to Barcelona cannot be equated to a "sale" of the Player. As a result, it appears to fall outside the scope of the Sell-On Clause that, failing an additional

specification, does not cover, through the reference to "resale", transfers made on the basis of the mechanism provided by the Real Decreto 1006/85.

41. The Decision that held otherwise must therefore be set aside. Indeed, the Decision erred where it held that the transfer of the Player to Barcelona was *"a transfer agreed between two clubs and a player for a specific amount"*, with the sole peculiarity that the *"specific amount"* had been agreed only by Sevilla and the Player in the Indemnification Clause. With all deference, in the Panel's view, the Single Judge missed the point: the key aspect is not whether Sevilla agreed the measure of the amount to be paid by the Player in the event of termination of the Employment Contract, but whether Sevilla agreed to the termination of the Employment Contract. In the absence of this consent, the transfer of the Player to Barcelona cannot be equated to a sale.

42. A final point has however to be emphasized. The Panel, in fact, could have reached a different conclusion if sufficient evidence had been given (also by way of inferences: Swiss Federal Tribunal, 15 June 1978, ATF 104 II 68, 75; 24 September 1974, ATF 100 II 352, 356) of bad faith on the part of Sevilla. Failing such evidence, no departure from the above conclusion seems possible to the Panel.

43. In light of the foregoing, the Panel finds that the appeal brought by the Appellant against the Respondent with respect to the Decision is to be granted and the Decision set aside. The counterclaim brought by the Respondent is inadmissible.

44. This award is rendered by a majority decision.

The Court of Arbitration for Sport rules by majority that:

1. The appeal filed by Sevilla FC against the decision issued on 9 December 2009 by the Single Judge of the Player's Status Committee of FIFA is granted.

2. The decision issued on 9 December 2009 by the Single Judge of the Player's Status Committee of FIFA is set aside.

3. The counterclaim filed by RC Lens against the decision issued on 9 December 2009 by the Single Judge of the Player's Status Committee of FIFA is inadmissible.

(…)

6. All other prayers for relief are dismissed.