Arbitration CAS 2017/A/5172 Real Club Celta de Vigo v. Olympique Lyonnais, award of 15 December 2017

Panel: Prof. Ulrich Haas (Germany), President; Mr José Juan Pintó (Spain); Mr François Klein (France)

Football
Variable transfer compensation
Contract interpretation despite clear wording
Contract interpretation according to Article 18 Swiss Code of Obligations
In dubio contra stipulatorem
Avoidance of contract on grounds of error

1. **Recent Swiss jurisprudence has finely modified the principle according to which the rules of interpretation should apply only if the terms of the agreement between the parties leave room for doubt or are unclear. Accordingly it cannot be held anymore that in the presence of a "clear text" all other means of interpretation are excluded. Rather, it derives from Article 18 para. 1 Swiss Code of Obligations ("CO") that the meaning of a text, even a clear one, is not necessarily determining and that on the contrary, the purely literal interpretation is prohibited. Even if a contractual clause appears clear at first view, it can result from the conditions of the contract, from the objectives sought by the parties or from other circumstances – *e.g.* the drafting history of the agreement, its purpose or the overall content of the contract – that the text of such contractual clause does not convey exactly the content of the agreement concluded. Consequently, even in case the terms used in a contract have a clear literal (*i.e.* unambiguous) meaning, the adjudicatory body must assess whether or not the parties truly wished to attribute such meaning to the terms used.**

2. **Under Swiss law, the principles on contract interpretation are to be found in Article 18 para. 1 CO, which is based on the assumption that the parties have concluded a contract and, in principle, do not dispute its effectiveness but rather the content of the agreement reached (so-called "reiner Auslegungsstreit"). In that case, Article 18 para. 1 CO rules that the content of the agreement must be construed according to the true intentions of the parties. Thus, the parties' subjective will has priority over any contrary declaration in the text of the contract. In case a common subjective will of the parties cannot be ascertained, the contents of the contract must be determined by application of the principle of mutual trust, *i.e.* by seeking, in accordance with the rules of good faith, the meaning the parties could and should have given to their respective declarations.**

3. **The scope of application of the principle *in dubio contra stipulatorem* is limited to cases where the contents of a contract cannot be determined, *i.e.* where the terms of the contract remain ambiguous. In addition, this principle may apply only on a subsidiary**

basis, *i.e.* if the primary interpretation in application of the principle of good faith does not lead to a clear result.

4. **In order to avoid a contract on the grounds of error, under Swiss law, the party relying on avoidance of the contract must (1) be in *"error"* and (2) the error must be *"fundamental"*. Furthermore, avoidance must be declared within a time limit of one year from the time the error was discovered and must be declared *vis-à-vis* every single contracting party. A party is in error if it was mistaken about the contents of its declaration or if it had no intention whatsoever of making a declaration with the respective content. An error is fundamental in nature if based on the circumstances of the case it is to be assumed that the party being in error would not have made the declaration if it had knowledge of the true circumstances, *i.e.* if it had a correct understanding of the facts.**

I. PARTIES

1. Real Club Celta de Vigo SAD (hereinafter the "Appellant") is a professional football club headquartered in Vigo, Spain. The Appellant is registered with the Royal Spanish Football Federation (Real Federación Española de Fútbol – hereinafter "RFEF"), which in turn is affiliated to the Union Européenne de Football Association (hereinafter "UEFA") and to the Fédération Internationale de Football Association (hereinafter "FIFA").

2. Olympique Lyonnais SASU (hereinafter the "Respondent") is a professional football club headquartered in Décine-Charpieu, France. The Respondent is registered with the French Football Federation (Fédération Française de Football – hereinafter "FFF"), which in turn is affiliated to UEFA and FIFA.

II. FACTUAL BACKGROUND

3. The present dispute concerns the claim for payment of a variable transfer compensation in connection with the transfer of the French football player C. (hereinafter the "Player") from the Respondent to the Appellant.

4. Below is a brief summary of the main facts and allegations based on the Parties' written submissions, the CAS file and the content of the hearing that took place in Lausanne, Switzerland, on 2 October 2017. Additional facts and allegations found in the Parties' submissions, pleadings and evidence may be set out, where relevant, in other parts of this award.

1. The Contents of the Transfer Agreement

5. On 16 January 2016, the Parties agreed on the transfer of the Player from the Respondent to the Appellant. The transfer was based on a contract (hereinafter "the Transfer Agreement") that was negotiated for 10 days and finally signed on 16 January 2016.

6. The Transfer Agreement provides for a "fixed" and a "variable" transfer fee for the Player. Clause 3.1 governs the "fixed" transfer fee. According thereto the Appellant must pay to the Respondent EUR 5,000,000 in 3 instalments: EUR 2,000,000 upon RFEF's receipt of the International Transfer Certificate (hereinafter the "ITC") for the Player; EUR 1,500,000 on 15 September 2016 and EUR 1,500,000 on 15 September 2017.

7. The variable transfer fee is regulated in clause 3.3 of the Transfer Agreement which reads as follows:

> *"Variable Amount*
>
> *In addition to the fixed amount under article 3.1 above,* [the Appellant] *agrees and shall pay to* [the Respondent] *the net amount of € 1.000.000 (net of any local taxes and VAT), if* [the Appellant] *participates in the Champions League and, the player has been registered on 60% of Liga match sheets during the season immediately prior to the season in which* [the Appellant] *participates in the Champions League (1)(2).*
>
> *In addition to the fixed amount under article 3.1 above,* [the Appellant] *agrees and shall pay to* [the Respondent] *the net amount of € 500.000 (net of any local taxes and VAT), if* [the Appellant] *participates in the Europa League and, the player has been registered on 60% of Liga match sheets during the season immediately prior to the season in which* [the Appellant] *participates in the Europa League (1)(2).*
>
> *In addition to the fixed amount under article 3.1 above,* [the Appellant] *agrees and shall pay to* [the Respondent] *the net amount of € 500.000 (net of any local taxes and VAT), if* [the Appellant] *team sporting final ranking in Liga is between first and eighth place included (and this regardless whether the team is subject to an administrative derating), and the player has been registered on 60% of Liga match sheets during this same season (1)(2).*
>
> *(1) This clause is applicable during the following seasons: 2015/2016, 2016/2017, 2017/2018, 2018/2019 and 2019/2020. For season 2015/2016 the matches considered for counting the 60% are the Liga matches for which the player was qualified to play with* [the Appellant].
>
> *(2) The amounts above are cumulative.*
>
> *It is expressly specified that the global variable amount which can be paid by* [the Appellant] *to* [the Respondent] *under this clause 3.3 cannot exceed more than 2.500.000 €.*
>
> *If due, the amounts above should be paid by* [the Appellant] *to* [the Respondent] *on seven working days after having been fulfilled the condition.* [The Respondent] *must provide* [the Appellant] *with the relevant invoice to allow for payment to be made accordingly".*

8. Clause "3.4" of the Transfer Agreement (in reality clause "3.5" if counted correctly), is entitled "Penalties" and reads as follows:

"In case of disrespect of the above obligations mentioned in article 3.3 and in article 3.4, no matter it would have been caused by any justifiable fact, fact of rights or case of force majeure, [the Appellant] *will pay penalties to* [the Respondent] *consisting in both legal penalties defined below and a lump sum of 10% of the total due variable amount after more than 7 calendar days of payment delay.*

Legal penalties should be calculated using a 5% rate and should accrued on a daily basis from the due date until the actual date of payment of the full due amount".

2. The negotiations leading to the execution of the Transfer Agreement

9. Before the execution of the Transfer Agreement, the Parties had exchanged abundant correspondence. In particular, the following emails were exchanged between the Parties:

Email of 6 January 2016, 13:24, from the Appellant to the Respondent [A-8]:

"Dear Mr Ponsot,

I write this email because my club [the Appellant] *is interested in pay a transfer of* [the Player].

Our proposal is in the next terms:

- ***2.400.000 €*** *(payments in three times with same value) (…).*
- *500.000 € of bonus when* [the Appellant] *plays Champion League in the Groups Phase Classifications if the player played in the last season 75% of the matches in LIGA.*
- *250.000 € of bonus when* [the Appellant] *plays Europe League in the Groups Phase Classifications if the player played in the last season 75% of the matches in LIGA.*
- *250.000 € of bonus when* [the Appellant] *win Cup of the King if the player played in the last season 75% of matches in LIGA. (…)".*

Answer of Respondent to the Appellant by email of 7 January 2016, 12:13 [A-9]:

"Dear Mr Montes,

Thank you for your interest for our [Player].

However it is impossible to us to accept your offer for a player whom we paid 7,5ME only six months ago".

Email of the same day, 13:25, from the Appellant to the Respondent [A-9]:

"Dear Mr Ponsot.

Thank you for your answer about [the Player].

In this case I can increase my offer in this terms.

- ***3.200.000 €*** *(In 3 dates with the same value) (…).*
- *1.000.000 € of bonus when* [the Appellant] *plays Champion League in the Groups Phase Classifications if the player played in the last season 75% of the matches in LIGA.*
- *500.000 € of bonus when* [the Appellant] *plays Europe League in the Groups Phase Classifications if the player played in the last season 75% of the matches in LIGA.*
- *500.000 € of bonus when* [the Appellant] *win Cup of the King if the player played in the last season 75% of matches in LIGA. (…)".*

Answer of Respondent to Appellant by email of 8 January 2016, 18:13 [A-10]:

"Dear Mr Montes,

After discussion with my president we are ready to accept the following transfer:

- *5ME of fixed compensation of transfer*
- *2,5ME bonus".*

Email of 10 January 2016, 12:17, from the Appellant to the Respondent [A-11]:

"Dear Mr Ponsot.

Thank you for your last answer about [the Player].

In this case I can change in my proposal the bonus's structure in this terms.

- ***3.200.000 €*** *(In 3 dates with the same value) (…).*
- *1.000.000 € of bonus when* [the Appellant] *plays Champion League in the Groups Phase Classifications and if the player played in the last season 75% of the matches in LIGA.*
- *500.000 € of bonus when* [the Appellant] *plays Europe League in the Groups Phase Classifications and if the player played in the last season 75% of the matches in LIGA.*

- *500.000 € of bonus when* [the Appellant] *in the end of the season is in the tables between 10 first clubs and if the player played in the last season 75% of matches in LIGA".*

These bonuses won't be accumulated.

These bonuses [the Appellant] *only will pay for one time, in this case when* [the Respondent] *receive money about [the Appellant's] bonus,* [the Respondent] *won't can receive more money about some bonus from* [the Appellant] *again. (…)".*

Answer from the Respondent to the Appellant by email of 11 January 2016, 10:07 [R-1, p. 58]:

"Dear Mr Montes,

Your proposal below is less important than the previous one? It is the same except that you put an upper limit on bonuses?

In any case you know our position on the transfer indemnity".

Email of 12 January 2016, 10:53, from the Appellant to the Respondent [A-12]:

"Dear Mr Ponsot.

I propose you a new offer for your [Player].

I hope you accept this conditions:

- ***3.500.000 €*** *(In 3 dates with the same value) (…).*

And these bonuses:

- *1.000.000 € of bonus when* [the Appellant] *plays Champion League in the Groups Phase Classifications and if the player played in the last season 75% of the matches in LIGA.*

- *500.000 € of bonus when* [the Appellant] *plays Europe League in the Groups Phase Classifications and if the player played in the last season 75% of the matches in LIGA.*

- *500.000 € of bonus when* [the Appellant] *in the end of the season is in the tables between 10 first clubs and if the player played in the last season 75% of matches in LIGA. (…)".*

Email of 14 January 2016, 9:51, from the Appellant to the Respondent [A-13, p. 5]:

"Dear Mr Ponsot

After our phone conversation and after that I sent a last offer in this terms:

- *3.500.000 € of transfer fee in a different a payments*

- *2.000.000 € in a different bonuses*

Now I consider that of the difference is 1,5 millions in the transfer fee, I propose you that we can find a agree if [the Appellant] *and* [the Respondent] *divided between two that amount then our definitive proposal would be in this terms:*

- ***4.200.000 €*** *(In 3 dates with the same value) (…).*

And these bonuses:

- *1.000.000 € of bonus when* [the Appellant] *plays Champion League in the Groups Phase Classifications and if the player played in the last season 75% of the matches in LIGA.*

- *500.000 € of bonus when* [the Appellant] *plays Europe League in the Groups Phase Classifications and if the player played in the last season 75% of the matches in LIGA.*

- *500.000 € of bonus when* [the Appellant] *in the end of the season is in the tables between 8 first clubs and if the player played in the last season 75% of matches in LIGA. (…)".*

Email of the same date, 19:19, from the Appellant to the Respondent [A-13, p. 4]:

"Dear Mr Ponsot.

After of our last proposal and after that I studied the situation and in consideration to your email with date 10 of January at 12:17 hours, I inform you that [the Appellant] *accept your conditions for a transfer of your* [Player].

- ***Transfer fee: 5.000.000 €*** *(this amount is for all concepts, solidarity included) (…).*

And these bonuses:

- *1.000.000 € of bonus when* [the Appellant] *plays Champion League in the Groups Phase Classifications and if the player played in the last season 75% of the matches in LIGA.*

- *500.000 € of bonus when* [the Appellant] *plays Europe League in the Groups Phase Classifications and if the player played in the last season 75% of the matches in LIGA.*

- *500.000 € of bonus when* [the Appellant] *in the end of the season is in the tables between 8 first clubs and if the player played in the last season 75% of matches in LIGA. (…)".*

Response of the Respondent to the Appellant by email of the same day, 21:03 [A-13, p. 3]:

"Dear Mr Montes Torrecilla,

I come back to you with the financial terms that we are ready to accept regarding the definitive transfer of [the Player]*:*

- *Fix amount: 5.000.000 € net to be paid in two instalments: (…).*

- *Variable amounts (season 15/16 until season 19/20):*

  - *1.000.000 € if* [the Appellant] *participates to the UEFA CL during the season N and the player has been registered on 75% of the match sheets in Liga during the season N-1 (…).*

  - *500.000 € if* [the Appellant] *participates to the UEFA EL during the season N and the player has been registered on 75% of the match sheets in Liga during the season N-1 (…).*

  - *500.000 € if* [the Appellant] *final rank is between 1st place and 8th rank (included) and the has [sic.] been registered on 75% of the match sheets in Liga during this season (…).*

  These variable amounts are cumulative and cannot exceed a global amount of 2.500.000 €.

  If the player is sold before the end of the season 19/20 bonuses will be immediately due by [the Appellant] *to* [the Respondent]. *(…)".*

Still on the same day, 22:25, the Respondent forwarded to the Appellant a first draft of the Transfer Agreement via email [A-13, p. 2]:

"Dear Miguel,

Please find attached the transfer agreement to be signed. (…).

The **draft #1** reads – *inter alia* – as follows:

"(…) Article 3.3: Variable Amount

In addition to the fixed amount under article 4.1 above, [the Appellant] *agrees and shall pay to* [the Respondent] *the net amount of € 1.000.000 (net of solidarity contribution, of any local taxes and VAT), if* [the Appellant] *participates in the Champions League and, the player has been registered on 75% of Liga match sheets during the season immediately prior to the season in which* [the Appellant] *participates in the Champions League (1)(2).*

In addition to the fixed amount under article 4.1 above, [the Appellant] *agrees and shall pay to* [the Respondent] *the net amount of € 500.000 (net of solidarity contribution, of any local taxes and VAT), if* [the Appellant] *participates in the Europa League and, the player has been registered on 75% of Liga match sheets during the season immediately prior to the season in which* [the Appellant] *participates in the Europa League League (1)(2).*

In addition to the fixed amount under article 4.1 above, [the Appellant] *agrees and shall pay to* [the Respondent] *the net amount of € 500.000 (net of solidarity contribution, of any local taxes and VAT), if* [the Appellant] *team sporting final ranking in Liga is between first and eighth place included (and this regardless whether the team is subject to an administrative derating), and, the player has been registered on 75% of Liga match sheets during this same season (1)(2).*

(1) For the season 2015/2016, matches considered for counting the 75% are the Liga matches for which the player was qualified.

(2) The amounts above are cumulative.

It is expressly specified that the global variable amount which can be paid by [the Appellant] *to* [the Respondent] *under this clause cannot exceed more than 2.500.000 €.*

This clause is applicable during the following seasons: 2015/2016, 2016/2017, 2017/2018, 2018/2019 and 2019/2020.

In the event that the Player is subject to a definitive transfer or temporary transfer before 01/07/2020, [the Appellant] *agrees and shall pay to* [the Respondent] *the difference between the net amount of € 2.500.00 and the net amount of the bonus already paid to* [the Respondent] *at the date of the said transfer under the present article 3.3.*

If due, (…)".

Later, on the same day, 23:01, the Appellant answered to the Respondent as follows [A-13, p. 2]:

"Good night Mr Ponsot.

(…) I need to change the payments:

I can convince to my president in this terms:

- *2.000.000 euros with TMS confirmation*
- *1.500.000 euros in September 2016*
- *1.500.000 euros in September 2017.*

(…) The last question is the term that you wrote in the end of the email. It's … 'if the player is sold before the end of the season 19/20 bonuses will be immediately due by [the Appellant] *to* [the Respondent]*'.*

I need you understand that [the Appellant] *can't accept this consideration and we ask to you that you quit this term.*

Mr Ponsot with this corrections the agree is finishing and we are waiting for you transfers documents and we are solicited [the Player] *can travel to our city for the medical control".*

Email of 15 January 2016, 10:16, from the Appellant to the Respondent returning the draft #1 of the Transfer Agreement with the following comments and modifications, respectively [R-1, p. 41]:

"Dear Vincent:

(…) On [the Player's] *transfer we do not agree in a series of points for that I hope that they deal:*

1. *On the payments, it is very important for us to introduce it of the way proposed in the contract that I attach. (…).*

2. *(…).*

3. *The payments include the solidarity. (…). We have never introduced in the negotiations that the solidarity was excluded.*

(…) The change been in yellow".

"(…) Article 3.3: Variable Amount

In addition to the fixed amount under article 4.1 above, [the Appellant] *agrees and shall pay to* [the Respondent] *the net amount of € 1.000.000 (net of any local taxes and VAT), if* [the Appellant] *participates in the Champions League (Group stage) and, the player has been registered (more 45 minutes or holder) on 75% of Liga match sheets during the season immediately prior to the season in which [the Appellant] participates in the Champions League (1)(2).*

In addition to the fixed amount under article 4.1 above, [the Appellant] *agrees and shall pay to* [the Respondent] *the net amount of € 500.000 (net of any local taxes and VAT), if* [the Appellant] *participates in the Europa League (Group stage) and, the player has been registered (more 45 minutes or holder) on 75% of Liga match sheets during the season immediately prior to the season in which* [the Appellant] *participates in the Europa League League (1)(2).*

In addition to the fixed amount under article 4.1 above, [the Appellant] *agrees and shall pay to* [the Respondent] *the net amount of € 500.000 (net of any local taxes and VAT), if* [the Appellant] *team sporting final ranking in Liga is between first and eighth place included (and this regardless whether the team is subject to an administrative derating), and, the player has been registered (45 minutes or holder) on 75% of Liga match sheets during this same season (1)(2).*

(1) For the season 2015/2016, matches considered for counting the 75% are the Liga matches for which the player was qualified.

(2) The amounts above are cumulative.

It is expressly specified that the global variable amount which can be paid by [the Appellant] *to* [the Respondent] *under this clause cannot exceed more than 2.500.000 €.*

This clause is applicable during the following seasons: 2015/2016, 2016/2017, 2017/2018, 2018/2019 and 2019/2020

….

If due, (…)".

On 15 January 2016, 10:58, the Respondent wrote the following email to the Appellant with another draft of the Transfer Agreement attached [A-14]:

"Dear Miguel,

(…).

- *We remind you that we always asked you the payment of the fix amount of 5.000.000 € net considering the fact (…).*

- *Regarding the instalments of payment, we are ready to accept your proposal on the payment schedule provided the payment schedule in September 2016 and 2017 are coupled with bank guarantees.*

- *Regarding your third point, the clause we inserted is related to the fact that you condition the payment of bonuses to the player's participation or, as you know, we do not have power to decide on a future sale of the player and we can lose very quickly the benefit of bonuses. However, we propose that bonuses are maintained but are not conditioned to the presence / participation of the player. In return, we accept to delete the clause for payment of the total amount of bonus in case of departure the player.*

Please find attached the revised transfer agreement based on the aforementioned elements".

The **draft #2** reads – *inter alia* – as follows:

"(…) Article 3.3: Variable Amount

In addition to the fixed amount under article 3.1 above, [the Appellant] *agrees and shall pay to* [the Respondent] *the net amount of € 1.000.000 (net of solidarity contribution, of any local taxes and VAT), each time* [the Appellant] *participates in the Champions League (1)(2).*

In addition to the fixed amount under article 3.1 above, [the Appellant] *agrees and shall pay to* [the Respondent] *the net amount of € 500.000 (net of solidarity contribution, of any local taxes and VAT), each time* [the Appellant] *participates in the Europa League (1)(2).*

In addition to the fixed amount under article 3.1 above, [the Appellant] *agrees and shall pay to* [the Respondent] *the net amount of € 500.000 (net of solidarity contribution, of any local taxes and VAT), each time* [the Appellant] *team sporting final ranking in Liga is between first and eighth place included (and this regardless whether the team is subject to an administrative derating), (1)(2).*

(1) This clause is applicable during the following seasons: 2015/2016, 2016/2017, 2017/2018, 2018/2019 and 2019/2020, irrespective of the player being registered or not with [the Appellant] *during such time period.*

(2) The amounts above are cumulative.

It is expressly specified that the global variable amount which can be paid by [the Appellant] *to* [the Respondent] *under this clause cannot exceed more than 2.500.000 €. (…)".*

On the same date, 11:24, the Appellant responded to the Respondent by email:

Dear Jean and Vicent:

Below our proposition [the parts added by Appellant are underlined].

(…).

- *Regarding your third point, the clause we inserted is related to the fact that you condition the payment of bonuses to the player's participation or, as you know, we do not have power to decide on a future sale of the player and we can lose very quickly the benefit of bonuses. However, we propose that bonuses are maintained but are not conditioned to the presence / participation of the player. In return, we accept to delete the clause for payment of the total amount of bonus in case of departure the player. "Lamentably we cannot accept it, He is the player mas expensively of last 15 years in the Club and we cannot reward that it does not play. I propose him that in case of sale an appreciation of 10% but providing that 2.5 Millions do not happen with already received in Bonus".*

Still on the same day, 15:33, the Respondent forwarded a revised draft to the Appellant [A-14, p. 2]:

"Dear Antonio,

Please find attached the new draft.

We accept your proposal on the solidarity mecanism.

We accept your proposal on the garantee.

We maintain our position on the bonuses which is a fundamental point because as you know since the beginning we shall have bonuses to be paid to the club of Guingamp (2,5ME) in spite of [the Player's] *departure. (…)".*

The enclosed **draft #3** reads – *inter alia* – as follows:

"(…) Article 3.3: Variable Amount

In addition to the fixed amount under article 3.1 above, [the Appellant] *agrees and shall pay to* [the Respondent] *the net amount of € 1.000.000 (net of any local taxes and VAT), each time* [the Appellant] *participates in the Champions League (1)(2).*

In addition to the fixed amount under article 3.1 above, [the Appellant] *agrees and shall pay to* [the Respondent] *the net amount of € 500.000 (net of any local taxes and VAT), each time* [the Appellant] *participates in the Europa League (1)(2).*

In addition to the fixed amount under article 3.1 above, [the Appellant] *agrees and shall pay to* [the Respondent] *the net amount of € 500.000 (net of any local taxes and VAT), each time* [the Appellant] *team sporting final ranking in Liga is between first and eighth place included (and this regardless whether the team is subject to an administrative derating), (1)(2).*

(3) This clause is applicable during the following seasons: 2015/2016, 2016/2017, 2017/2018, 2018/2019 and 2019/2020, irrespective of the player being registered or not with [the Appellant] *during such time period.*

(4) The amounts above are cumulative.

It is expressly specified that the global variable amount which can be paid by [the Appellant] *to* [the Respondent] *under this clause cannot exceed more than 2.500.000 €. (…)".*

Still on the same date, 17:41 and 18:31 respectively, the Appellant sent the following emails to the Respondent [A-14, p. 2]:

"Dear Vicent

That seems to him if we leave the bonus since they are in his contract with 65 per cent of which it plays.

And the last, the bonus is for group league in europe

Are you agree???".

and

"Sorry

our offer is to reduce [the Player's] *participation in the bonus in order that these are effective to 60%,*

And the bonus will be if [the Appellant] *will play in Europa groups".*

Later that day, at 21:27 or 21:28, the Respondent wrote an email to the Appellant enclosing a newly drafted Transfer Agreement [A-14, p. 1 – attachment in R-1, p. 24]:

"Dear Sir,

Following our exchanges, we accept to do make a lot of efforts (after having done yet other efforts):

We accept that the variable bonus (article 3.3) are conditioned to the participation / registration of the player with [the Appellant].

In counterpart, it is normal to add an incentive of 20% in case of departure of the player considering as we said all the variable amounts we had to pay to Guingamp.

You will find attached the transfer agreement with these new elements.

You understand that this proposal is the last one we can formulate".

The forwarded **draft #4** reads – *inter alia* – as follows:

"(…) Article 3.3: Variable Amount

In addition to the fixed amount under article 3.1 above, [the Appellant] *agrees and shall pay to* [the Respondent] *the net amount of € 1.000.000 (net of any local taxes and VAT), if* [the Appellant] *participates in the Champions League and, the player has been registered on 60% of Liga match sheets during the season immediately prior to the season in which* [the Appellant] *participates in the Champions League (1)(2).*

In addition to the fixed amount under article 3.1 above, [the Appellant] *agrees and shall pay to* [the Respondent] *the net amount of € 500.000 (net of any local taxes and VAT), if* [the Appellant] *participates in the Europa League and, the player has been registered on 60% of Liga match sheets during the season immediately prior to the season in which* [the Appellant] *participates in the Europa League League* [sic] *(1)(2).*

In addition to the fixed amount under article 3.1 above, [the Appellant] *agrees and shall pay to* [the Respondent] *the net amount of € 500.000 (netof* [sic] *any local taxes and VAT), if* [the Appellant] *team sporting final ranking in Liga is between first and eighth place included (and this regardless whether the team is subject to an administrative derating), and, the player has been registered on 60% of Liga match sheets during this same season (1)(2).*

(1) This clause is applicable during the following seasons: 2015/2016, 2016/2017, 2017/2018, 2018/2019 and 2019/2020. For the season 2015/2016, matches considered for counting the 60% are the Liga matches for which the player was qualified.

(2) The amounts above are cumulative.

It is expressly specified that the global variable amount which can be paid by [the Appellant] *to* [the Respondent] *under this clause cannot exceed more than 2.500.000 €. (…).*

Article 3.4: Incentive on any kind of monetary compensation received by [the Appellant] *relating to the player*

It is expressly agreed that [the Respondent] *will receive, proportionally to payments received, an amount of 20 (twenty) % on any kind of monetary compensation received by* [the Appellant] *relating to any departure of the player, at any time (1), net of any local taxes and VAT, which is in excess of the sums actually received by* [the Respondent] *from* [the Appellant] *under this Agreement. (…).*

It is expressly advisable that this clause applies without limitation of duration and that the global amount that [the Appellant] could pay to [the Respondent] under this clause 3.4 cannot exceed more the € 2.500.000. (…)".

Afterwards, the Appellant answered by email on the same day (15 January 2016, 21:59) as follows [R-1, p. 23]:

"Dear vincent

We agree in the whole contract, only an explanation to the point 3.4 that I accompany you in order that there are no doubts.

It is expressly advisable that this clause applies without limitation of duration and that the global amount that [the Appellant] *could pay to* [the Respondent] *under this clause 3.4 AND 3.3 cannot exceed more than € 2.500.000.*

THANK YOU for your collaboration (…)".

Email of 16 January 2016, 11:03, again from the Appellant to the Respondent [R-1, p. 8]:

"Dear Vincent:

I attach the contract signed with a clause on the medical recognition. We have the tickets for the one of the evening with what we will be grateful to him that they were returning it to us signed. (…)".

Responding email of the same day, 12:45, from the Respondent to the Appellant together with a finally revised draft of the Transfer Agreement:

"Dear Sirs,

Even if we would appreciate to be informed directly on the modifications done for an efficient cooperation, we send you the transfer agreement that we wish to receive back signed for allowing the player come in Vigo.

(…).

And as you wish, we indicate that the global amount of variable amounts can receive in application of article 3.3 and article 3.4 cannot exceed more than 2.500.000 €.

The condition of medical examination is specified as you wish.

We are waiting for the document signed from your share".

The final **draft #5** reads – *inter alia* – as follows:

"(…) Article 3.3: Variable Amount

In addition to the fixed amount under article 3.1 above, [the Appellant] *agrees and shall pay to* [the Respondent] *the net amount of € 1.000.000 (net of any local taxes and VAT), if* [the Appellant] *participates in the Champions League and, the player has been registered on 60% of Liga match sheets during the season immediately prior to the season in which* [the Appellant] *participates in the Champions League (1)(2).*

In addition to the fixed amount under article 3.1 above, [the Appellant] *agrees and shall pay to* [the Respondent] *the net amount of € 500.000 (net of any local taxes and VAT), if* [the Appellant] *participates in the Europa League and, the player has been registered on 60% of Liga match sheets during the season immediately prior to the season in which* [the Appellant] *participates in the Europa League League* [sic] *(1)(2).*

In addition to the fixed amount under article 3.1 above, [the Appellant] *agrees and shall pay to* [the Respondent] *the net amount of € 500.000 (net of any local taxes and VAT), if* [the Appellant] *team sporting final ranking in Liga is between first and eighth place included (and this regardless whether the team is subject to an administrative derating), and, the player has been registered on 60% of Liga match sheets during this same season (1)(2).*

(1) This clause is applicable during the following seasons: 2015/2016, 2016/2017, 2017/2018, 2018/2019 and 2019/2020. For the season 2015/2016, matches considered for counting the 60% are the Liga matches for which the player was qualified to play with [the Appellant].

(2) The amounts above are cumulative.

It is expressly specified that the global variable amount which can be paid by [the Appellant] *to* [the Respondent] *under this clause cannot exceed more than 2.500.000 €. (…).*

Article 3.4: Incentive on any kind of monetary compensation received by [the Appellant] *relating to the player*

It is expressly agreed that [the Respondent] *will receive, proportionally to payments received, an amount of 20 (twenty) % on any kind of monetary compensation received by* [the Appellant] *relating to any departure of the player, at any time (1), net of any local taxes and VAT. (…).*

It is expressly advisable that this clause applies without limitation of duration and that the global amount that [the Appellant] *could pay to* [the Respondent] *under the clause 3.4 and the clause 3.3 cannot exceed more than € 2.500.000. (…)".*

Email of 16 January 2016, 13:01, from the Appellant to the Respondent [R-1, p. 8]:

"Dear sirs

we send the contract, the last

Please, We are waiting for the document signed from your".

Email of the same date, 14:28, from the Respondent to the Appellant [R-1, p. 1]:

"Antonio, Miguel

We authorize officially [the Player] *to go to* [the Appellant] *to have its medical examination until Sunday, January 17th".*

Still on 16 January 2016, 14:33, the Appellant wrote to the Respondent [R-1, p. 1]:

"Thanks

Please send me the contract with your signs".

3. Sporting Results of the Appellant and the alleged claim of the Respondent

10. The Appellant finished the 2015/2016 season in 6th place of the Spanish "La Liga" and qualified for the 2016/2017 Europa League.

11. After being transferred to the Appellant the Player was registered on 12 out of 18 of the Appellant's match sheets corresponding to 66,66%, of the matches in the 2015/2016 season for which the Player was qualified (cf. Note 1 to clause 3.3). However, out of the 12 matches registered on the match sheets, he played only in 10 matches, which corresponds to 55.55%.

12. On 19 May 2016, the Respondent issued the invoice #12414 in the amount of EUR 500,000 based on clause 3.3 (3rd para.) of the Transfer Agreement and forwarded it to the Appellant on 20 May 2016 by email. Furthermore, on 31 May 2016, the Respondent issued a second invoice #12441 amounting to EUR 500,000 based on clause 3.3 (2nd para.) and, likewise, forwarded it to the Appellant.

13. The Appellant refused to settle the above invoices. On 13 June 2016, the Respondent addressed a last notice to the Appellant and requested the payment of the invoices #12414 and #12441 within 8 days as from the receipt of the notice.

14. Despite Respondent's reminder, the Appellant failed to make any payments to the Respondent. The respective amounts are still outstanding as of today.

III. PROCEEDINGS BEFORE THE PLAYERS' STATUS COMMITTEE OF FIFA

15. On 29 September 2016, the Respondent filed a claim with the FIFA Players' Status Committee (hereinafter "FIFA PSC") requesting that the Appellant pay EUR 1,100,000 plus EUR 25,000 per day as late-payment penalty.

16. On 28 February 2017, the FIFA PSC issued its decision in the above dispute. Following a request by the Appellant, the FIFA PSC forwarded the grounds of said decision to the Parties by fax on 15 May 2017 (hereinafter the "FIFA Decision"). The FIFA Decision reads, amongst others, as follows:

> *"III. Decision of the Single Judge of the Players' Status Committee*
>
> *1. The claim of the Claimant, Olympique Lyonnais, is partially accepted.*
>
> *2. The Respondent, RC Celta de Vigo, has to pay to the Claimant,* ***within 30 days*** *as from the date of notification of this decision, the amount of EUR 1,100,000, plus interest as follows:*
>
> - *5 % p.a. over the amount of EUR 1,000,000 as of 8 July 2016 until the date of the effective payment.*
>
> *3. If the aforementioned sum plus interest is not paid within the aforementioned deadline the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.*
>
> *4. Any further claim lodged by the Claimant is rejected.*
>
> *5. The final amount of costs of the proceedings in the amount of CHF 22,000 are to be paid by the Respondent within 30 days of notification of the present decision as follows: (…)".*

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

17. On 2 June 2017, the Appellant filed its statement of appeal against the FIFA Decision with the Court of Arbitration for Sport (hereinafter the "CAS"). The appeal is directed against the Respondent. The Appellant has nominated Mr José Juan Pintó as arbitrator.

18. By letter of 8 June 2017, the CAS Court Office advised the Parties that, pursuant to Article R51 of the Code of Sports-related Arbitration (hereinafter the "Code"), the Appellant shall file its Appeal Brief with CAS, within 10 days following the expiry of the time limit for the appeal. In the same letter, the CAS Court Office invited the Respondent to nominate an arbitrator as provided in Article R53 of the Code within 10 days as from the receipt of this letter.

19. By letter of 13 June 2017, the Appellant requested, pursuant to Article R32 of the Code, an extension of the deadline to file its Appeal Brief.

20. With letter dated 14 June 2017, the CAS Court Office granted a preliminary extension of the Appellant's time limit to file the Appeal Brief by 5 days. Furthermore, the CAS Court Office invited the Respondent to comment on a further extension of the Appellant's deadline to file the Appeal Brief.

21. By letter of 16 June 2017, the Respondent agreed to a further extension of the Appellant's time limit to file the Appeal Brief.

22. On 19 June 2017, the CAS Court Office informed the Parties that the Appellant's time limit to file the Appeal Brief has been extended by an additional 5 days.

23. By letter of 20 June 2017, the CAS Court Office noted that the Respondent had failed to nominate an arbitrator within the prescribed deadline and that therefore it will be for the President of the CAS Appeals Arbitration Division, or her Deputy, to appoint an arbitrator *in lieu* of the Respondent in accordance with Article R53 of the Code.

24. On the same date, the Respondent informed the CAS Court Office that the Appellant had agreed to restore the Respondent's deadline to nominate an arbitrator and that it nominated Mr François Klein as arbitrator.

25. In a letter of 20 June 2017, the CAS Court Office acknowledged the Respondent's nomination of Mr François Klein as arbitrator.

26. On 23 June 2017, the Appellant filed its Appeal Brief.

27. By letter of 10 July 2017, the Respondent requested pursuant to Article R55 of the Code that the time limit for the filing of its answer (hereinafter the "Answer") be fixed after the payment by the Appellant of its share of the advance of costs in accordance with Article R64.2 of the Code.

28. With letter dated the same day, the CAS Court Office advised the Respondent, that the Appellant had already paid its share of the advance of costs. Accordingly, the Respondent's request pursuant to Article R55 of the Code was deemed moot.

29. Still on the same day, the Respondent informed the CAS Court Office that the Parties had agreed on an extension of the Respondent's time limit to file its Answer by 10 days.

30. On 11 July, the CAS Court Office confirmed that the Respondent's time limit to file its Answer is extended until 27 July 2017.

31. By letter of 19 July 2017, the CAS Court Office announced that the Panel had been constituted in accordance with Article R54 of the Code as follows: Mr Ulrich Haas, President of the Panel, Mr José Juan Pintó and Mr François Klein, arbitrators. The Parties did not lodge any objections with regard to the constitution of the Panel.

32. On 25 July 2017, the CAS Court Office advised the Parties that Mr Oliver Vogel had been appointed *Ad hoc* Clerk in this matter. No objections have been raised by the Parties against this appointment.

33. On 27 July 2017, the Respondent filed its Answer.

34. On 28 July 2017, the Parties were invited to inform the CAS Court Office by 4 August 2017 whether they wished that a hearing be held in this matter.

35. On 28 July 2017 and 4 August 2017 respectively, the Appellant and the Respondent informed the CAS that their preference was for a hearing to be held.

36. On 1 August 2017, following an invitation from the CAS Court Office of 25 July 2017, the Appellant provided English translations of its Exhibits 6, 7 and 18 of the Appeal Brief.

37. By letters of 4 August and 9 August 2017, the CAS Court Office advised the Parties that the hearing in the present matter would be held on 2 October 2017 at the CAS Court Office, Lausanne, Switzerland.

38. On 10 August 2017, the CAS Court Office forwarded to the Parties an Order of Procedure and requested them to return a signed copy thereof by 31 August 2017.

39. By letter of 17 August 2017, the Appellant filed an additional (unsolicited) submission.

40. By letter dated 18 August 2017, the CAS Court Office invited the Respondent to comment on the Appellant's additional submission until 22 August 2017.

41. By letter of 21 August 2017, the Respondent did not object to the late production of the Appellant's additional submission.

42. The Appellant returned a duly signed copy of the Order of Procedure on 30 August 2017 together with a list of persons that will be attending the hearing on its behalf.

43. The Respondent returned its signed copy of the Order of Procedure on 31 August 2017 together with its list of persons that will be attending the hearing for the Respondent.

44. On 2 October 2017, a hearing was held at the CAS Court Office in Lausanne, Switzerland. At the outset of the hearing both parties confirmed that they did not have any objection as to the constitution of the Panel.

45. In addition to the Panel, Mr William Sternheimer, CAS Deputy Secretary General, and Mr Oliver Vogel, *Ad hoc* Clerk, the following persons attended the hearing:

    a) For the Appellant:

        1) Mr Javier Ferrero Muñoz, legal counsel
        2) Mr Iñigo de Lacalle Baigorri, legal counsel

3) Mr Claudinei Nunes da Silva, Interpreter

b) For the Respondent:

1) Mr Jean Sudres, lawyer and representative of the Respondent
2) Mr Vincent Ponsot, Deputy General Director of the Respondent
3) Mr Jorge Ibarrola, legal counsel
4) Mr Fabien Cagneux, legal counsel
5) Mr Sebastien Permain, legal counsel
6) Mr Patrick Kendrick, Interpreter
7) Ms Dana Morales Cardenas, intern (as observer).

46. The Panel heard evidence of the following persons:

a) On behalf of the Appellant:

1) Mr Antonio Chaves Escalante, Managing Director of the Appellant (by video-conference)
2) Mr Miguel Montes Torrecilla, ex-Sports Director of the Appellant (by video-conference)
3) [C.], third contractual party of the Transfer Agreement (by telephone-conference)

b) On behalf of the Respondent:

1) Mr Vincent Ponsot, Deputy General Director of the Respondent (in person)
2) Mr Jean Sudres, lawyer and representative of the Respondent (in person).

47. All witnesses were invited by the President of the Panel to tell the truth subject to the sanctions of perjury. Both parties and the Panel had the opportunity to examine and cross-examine the witnesses and the party representatives giving testimony.

48. During the hearing, the Appellant expressly waived additional testimonies of Mr Javier Carlos Mouriño Atanes, President of the Appellant, Mr Egal Warsame, Intermediary of the Player and Mr Manuel Eduardo Berizzo Magnolo, ex-Head Coach of the Appellant as witnesses.

49. At the closing of the hearing, the Parties expressly stated that they did not have any objections with regard to the procedure. The Parties further confirmed that they were afforded ample opportunity to present their case, submit their arguments and answer the questions posed by the Panel and that their right to be heard had been respected.

V. POSITIONS OF THE PARTIES

50. The following is a summary of the Parties' submissions and does not purport to be comprehensive. However, the Panel has thoroughly considered in its discussion and deliberation all of the evidence and arguments submitted by the Parties, even if no specific or detailed reference has been made to those arguments in the following outline of their positions and in the ensuing discussion on the merits.

A. The Appellant

51. The Appellant – in essence – is of the view that the FIFA Decision is wrong and must be squashed, because

- *"**the Respondent's claim** has **no factual and legal basis**"*;
- *"the Respondent, … has instigated this dispute **maliciously and in bad faith** by means of a grave misrepresentation that completely **distorts and perverts the covenants agreed and the true and unique intention of the Parties**".;*
- *the Respondent "has taken advantage of the good faith of* [the Appellant] *by relying on an **arbitrary and capricious interpretation** of the terms agreed whose obscurity has been created solely by the Respondent". and because*
- the FIFA Decision *"inexplicably ignores that the **negotiations** carried out by the Parties clearly demonstrate their real intentions and the spirit of the disputed clause whose **purpose and ratio is to subject inescapably the payment of the variable fees to the effective participation of the Player** by taking part of the games of* [the Appellant]*, so that the Player would play and contribute to the accomplishment of the sporting goals which precisely give rise to the payment of the variable compensation".*

52. In particular, the Appellant submits that:

(a) it follows from the purpose and essence of clause 3.3 of the Transfer Agreement that the variable transfer fee only becomes due in case the specified sporting goals are achieved. Therefore, the Appellant's payment obligation is inevitably conditional on the effective participation of the Player in the relevant matches and not upon the mere registration of the Player on some forms. Consequently, in order for the payment obligations to materialize the Player must have played a certain number of matches with the Appellant (in the matter at hand 60% of the matches of the Spanish football league). Only in case the Player is effectively fielded he contributes to the sporting achievement of the Appellant's team. For this reason, clause 3.3 of the Transfer Agreement must be interpreted in light thereof. Any other interpretation would lead to absurd results according to which the Appellant would be obliged to pay significant bonuses to the Respondent even despite the fact that the Player had not played a single minute with the Appellant.

(b) The aforementioned understanding is also reflected in the Appellant's request for the ITC. The latter specifies that the variable transfer fee is subject to the Player's participation in the relevant matches (quote from the TMS Transfer Report no. 129.923 in Spanish: *"… y el jugador participa en un 60 por ciento de los partidos …";* in translation: *"… and the Player participates in 60 percent of the matches …"*). The Respondent did not object to this specification inserted by the Appellant, but accepted it so that the ITC was granted as requested by the Appellant on 20 January 2016. According to the Appellant the Respondent *"would not have ratified the information inserted by* [the Appellant] *within the TMS system"* if it had not agreed with its contents. The Appellant, in addition, submits that the TMS Transfer Report / ITC constitutes an official document that has evidential value.

(c) Furthermore, the Appellant argues that his interpretation of clause 3.3 is backed by the correspondence exchanged between the Parties prior to the execution of the Transfer Agreement.

(d) That the term *"… registered on 60% of Liga match sheets"* in clause 3.3 of the Transfer Agreement is to be interpreted meaning *"60% of Liga matches played"* is further corroborated – according to the Appellant – by the employment contract between the Player and the Appellant that was executed on the same date as the transfer. Both the Transfer Agreement and the employment contract constitute a single act. The employment contract reads – *inter alia* – as follows:

> ***"B) AS VARIABLE REMUNERATION, WILL RECEIVE THE FOLLOWING BONUSES PER OBJECTIVES IN EACH SEASON OR FULLFILLMENT OF FACTS:***
>
> 1. *OBJECTIVE FOR MATCHES PLAYED WITH* [THE APPELLANT]: *Both parties establish a bonus for matches played in favour of the player, for each season, (being understood by playing to remain in a match in field a minimum of forty-five (45') minutes per game), provided that the match played corresponds to the League Championship of the First Division, Cup and/or European competition. This amount is the follows:*
>
> ***2015/2016 SEASON***
>
> a. *If plays NINE (9) or more matches fulfilling all the requirements established above, you will receive the economic amount of FORTY-FIVE THOUSAND EUROS GROSS (45,000.00 Euros), which will be paid by* [the Appellant] *on June 30th of the respective season.*
>
> b. *If plays FOURTEEN (14) or more matches, fulfilling all the requirements established above, you will receive additionally to the previous one the economic amount of FOURTY-FIVE THOUSAND EUROS GROSS (45,000.00 Euros) which will be paid by* [the Appellant] *on June 30th of the respective season.*

REST OF SEASONS

c. If plays TWENTY (20) or more games, fulfilling all the requirements established above, you will receive the economic amount of NINETY THOUSAND EUROS GROSS (90,000.00 Euros) which will be paid by [the Appellant] *on June 30th of the respective season.*

d. If plays THIRTY (30) or more games, fulfilling all the requirements established above, you will receive additionally to the previous one the economic amount of NINTEY THOUSAND EUROS GROSS (90,000.00 Euros) which will be paid by [the Appellant] *on June 30th of the respective season. (…)".*

(e) The above understanding also corresponds to the general practice in the industry. Thus, e.g., also the employment contract between the Respondent and the Player provided for a similar bonus system that required the Player to effectively participate in the matches of the Respondent in order to obtain the variable bonus payment. The latter was subject to the following condition that "[the Respondent] *qualifies (…) for the UEFA Champion's League group phase classifications … AND the participation of the player (…) in 80% of the matches (…)".* In addition, the Appellant submits that *"it is common practice in the world of football to stablish variable remunerations which are based on the appearance of the footballers and the accomplishment of individual objectives in so much as the expected and optimum performance of the player precisely will contribute to the consecution of collective goals".*

(f) A further example can be found in the transfer negotiations between the Appellant and the Respondent in relation to another player. The Respondent has sent the Appellant a transfer offer by email on 10 August 2017 concerning that other player which reads as follows:

"Mr Minambres,

I'm Vincent PONSOT the deputy general manager of [the Respondent].

Following your exchange with Florian I confirm you we are interested by your player [P.].

Please find below our proposal:

- *Fix transfer: 6 000 000 euros (…)*
- *Variable Transfer: 2 000 000 euros*

500 000 each time [the Respondent] *qualifies for champions league for the next 4 seasons and the player plays 60% of the games (…)".*

(g) The Appellant further states that his interpretation of clause 3.3 of the Transfer Agreement also corresponds to the Player's understanding. This follows from the following statement by the Player:

"II. That my agent and I have been participants and therefore we know the negotiations carried out between both entities.

IV. That I am aware of several variable fees conditioned to if I play official matches with [the Appellant]. *At no point in the negotiations or in the conversations that I had with the managers of* [the Respondent] *I was informed of a different assumption. I was always told that the variable amounts depended on me playing official matches like the bonuses that* [the Respondent] *paid me for the games I played with my previous club. For that reason, the managers of* [the Respondent] *wished me good luck and asked me to work hard to play many games so that they could receive the variable sums".*

(h) Insofar as clause 3.3 of the Transfer Agreement reads *"(…) the player has been registered on 60% of Liga match sheets (…)"*, this must be understood as meaning that *"the variable transfer fee is conditioned to the Player must take part of the starting eleven (11) players which commence the match"*. Clause 3.3 of the Transfer Agreement does not refer to "team list", but to the "match sheet". The term "team list" is defined by the International Football Association Board (hereinafter "IFAB") as the *"official team document usually listing the players, substitutes and team officials"*.

(i) Its interpretation of clause 3.3 of the Transfer Agreement is also corroborated – according to the Appellant – by the overall structure of the Transfer Agreement. The latter *"would not contain clause 3.4 related to the participation of* [the Respondent] *in twenty percent (20%) of the subsequent transfer of the Player to a third club"* if the Respondent's interpretation was correct.

(j) It is the Respondent who drafted the Transfer Agreement. Thus, in case the wording of clause 3.3 of the Transfer Agreement is unclear, the principle of *in dubio contra stipulatorem* must be applied.

(k) The Appellant submits that by claiming the bonus payments the Respondent acts in an arbitrary, unlawful and abusive manner as well as maliciously and in bad faith. Consequently, the Appellant finds that the principle of *venire contra factum proprium* has to be applied in these proceedings.

(l) On a subsidiary basis, the Appellant submits that clause 3.3 of the Transfer Agreement does not bind the Appellant, because of a lack of consent. The Appellant emphasizes that *"in this and other transactions,* [it] *has never agreed to pay a variable fee in consideration to the mere call up of a player* and that it *would never have signed the transfer contract with* [the Respondent] *if the variable price would be subject to the call up of the player and not to games played as alleges* [the Respondent]*"*. The meaning given to clause 3.3 of the Transfer Agreement by the Respondent *"(…) contradicts the very essence of this typology of clauses of variable nature"*.

53. The Appellant has filed the following prayers for relief:

*"**A.-** The Decision adopted by the Single Judge of the Players' Status Committee of the Fédération Internationale de Football Association (FIFA) on February 28th, 2017 (notified on May 15th, 2017) (Ref.-No 16-01787/cpe) is* ***entirely abolished****.*

B.- ***Declares that the payment of the variable fees foreseen in clause 3.3 of the Transfer Agreement are subject to the effective participation of the Player in the achievement by* [the Appellant] *of the sporting accomplishments stipulated in said clause 3.3.***

C.- ***Alternatively,*** *in the unlikely event that this H. Panel should consider that the Decision should not be abolished, then* ***clause 3.3 of the Transfer Agreement is not binding to* [the Appellant] *since there is a lack of consent of the Appellant to such disputed clause.***

In both cases:

D.- *The Respondent shall bear* ***all the procedural costs*** *of the present proceedings.*

E.- *Finally, the Respondent shall compensate* [the Appellant] *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".*

B. The Respondent

54. The submissions of the Respondent, in essence, may be summarised as follows:

(a) Clause 3.3 of the Transfer Agreement is not ambiguous, but was chosen by the Parties on purpose. This follows from the exchange of correspondence during the negotiations. While the Appellant had proposed to condition the variable transfer fee on the percentage of the matches played by the Player, the Respondent consistently maintained that, if the bonuses were to be subject to any condition, that condition should be that the Player be registered in the match sheets in the Liga. The Appellant – finally – did not object to this condition.

(b) The Respondent submits that the details inserted in the TMS by the Appellant do not faithfully reflect the contents of the Transfer Agreement. While the latter states in relation to the variable transfer fee whether or not the Player *"has been registered on 60% of the Liga match sheets",* the TMS application subjects the payment of the variable transfer fee to the Player on *"participating in 60 percent of the matches"*. The Respondent never accepted the Appellant's understanding. This clearly follows from the fact that the Respondent filled in the data into the TMS correctly, i.e. in accordance with the terms of the Transfer Agreement. The Respondent's insertion into the TMS refers to the bonus being earned in case the Player *"has been registered in 60% of Liga match sheets"*. Therefore, contrary to the Appellant's submissions the Respondent did not *"accept the information inserted by the Appellant* [in the TMS]*"*. Instead, it was the Appellant who did not object to the Respondent's insertion into the TMS.

(c) In any event, the Respondent finds that the data inserted into TMS by the Appellant does not necessarily back the Appellant's understanding, since the Appellant's TMS

application only *"refers to the Player's participation and no to his actual playing the matches"*. The term "participation", however, covers also the "participation as substitute".

(d) The Respondent submits that the wording of clause 3.3 of the Transfer Agreement is *"totally clear and leaves absolutely no room to any interpretation"*. The wording in clause 3.3 cannot be construed to mean that *"the Player had to be actually fielded in the Match or even less that the Player had to be on the starting team"*. The terms "match sheet" and "team list" are identical in content. While the IFAB uses the term "team list" to refer to the official form that needs to be filled out before any match and indicates all players, substitutes and officials by name, the UEFA and also the FFF refer to the same official form as "match sheet".

(e) The Respondent argues that the burden of proof lies with the Appellant that the Parties' intention differed from the objective meaning of the terms used in the Transfer Agreement. The Respondent finds that the Appellant has not discharged its burden of proof. In particular, the Respondent finds that it does not follow from the emails exchanged between the Parties in the course of the negotiations that the Parties submitted the Appellant's obligation to pay the variable transfer fee to the Player effectively playing matches for the Appellant.

(f) The Respondent is further of the view that negotiations or draft contracts with respect to the transfer of other players have absolutely no relevance for the case at hand. The transfer of the Player is based on a standalone contract that is totally independent from the transfer of other players. The only conclusion that can be drawn from looking at other transfers is – at best – that *"there is no general and binding rule applicable to transactions between football clubs, in general, and between* [the Appellant] *and* [the Respondent]*, in particular, according to which the bonuses must necessarily be subject to the player's actually playing. Each case must be looked at individually and considered in accordance with the agreement concretely reached by the parties"*.

(g) According to the Respondent there is no room for applying the principle of *in dubio contra stipulatorem*. Such principle requires that there is an ambiguous, doubtful or unclear wording contained in the Transfer Agreement in the first place. Only in such circumstance the clause in question shall be interpreted against the party which drafted it. In the case at hand, however, the wording in clause 3.3 of the Transfer Agreement is clear, free from doubts and unambiguous.

(h) The Respondent further objects to the application of the principle of *venire contra factum proprium*. At no time did the Respondent accept that the variable transfer fee be conditional upon the Player being fielded in the matches for the Appellant. On the contrary, the Respondent had always insisted that the only condition for the payment of the variable transfer fee be that the Player is registered on the Appellant's match sheets. Thus, at no moment in time did the Respondent act in an abusive manner or in violation of the principle of *venire contra factum proprium* when claiming the payments of bonus in dispute based on clause 3.3 of the Transfer Agreement.

(i) When signing the Transfer Agreement, the Appellant was not in error, let alone in fundamental error. Instead, the Transfer Agreement reflects the true intentions of both parties. Therefore, clause 3.3 of the Transfer Agreement is binding upon the Appellant. The latter's objection that the clause is not binding because of lack of consent must be rejected.

55. The Respondent submitted the following prayers for relief:

"I. The appeal filed by [the Appellant] *against the decision issued on 28 February 2017 by the* [FIFA PSC] *is dismissed.*

II. The decision issued 28 February 2017 by the [FIFA PSC] *is confirmed.*

III. Accordingly, [the Appellant] *is ordered to pay* [the Respondent] *EUR 1,100,000 (one million and one hundred thousand euro), plus interest at a yearly rate of 5% from 8 July 2016 until the date of effective payment.*

IV. [The Appellant] *shall bear all arbitration costs and shall be ordered to reimburse* [the Respondent] *any amounts of advances of costs to the CAS.*

V. [The Appellant] *shall be ordered to pay* [the Respondent] *a contribution towards the legal and other costs incurred by the latter in the framework of these proceedings, in an amount to be determined at the discretion of the Panel".*

VI. JURISDICTION

56. The jurisdiction of CAS, which is not disputed between the Parties, derives from Article 58 para. 1 of the FIFA Statutes. The latter provides that *"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 questions"*. Furthermore, Article R47 para. 1 of the Code reads as follows:

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

57. The jurisdiction of CAS in the present matter is further confirmed by the Order of Procedure duly signed by the Parties.

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

59. In application of Article R57 of the Code and in line with the consistent jurisprudence of the CAS the Panel has full power to review the facts and the law of the case. The Panel, therefore, deals with the present case *de novo*, evaluating all facts and legal issues involved in the dispute.

VII. ADMISSIBILITY

60. Article R49 of the Code provides as follows:

> *"In absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after considering any submission made by the other parties".*

61. The appeal was filed within the deadline of 21 days set by Article 58 para. 1 of the FIFA Statutes. Furthermore, the appeal complies with all other requirements of Article R48 of the Code. It follows that the appeal is admissible.

VIII. APPLICABLE LAW

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

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

63. Article 57 para. 2 FIFA Statutes determines 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".*

64. In addition, clause 5 of the Transfer Agreement reads as follows:

> *"This agreement is governed by FIFA regulations".*

65. Therefore, the Panel considers that the present dispute shall be resolved on the basis of the applicable FIFA Regulations and, subsidiarily, based on Swiss Law. In addition, both parties at the hearing on 2 October 2017 explicitly agreed that Swiss Law shall apply to the interpretation of the Transfer Agreement.

IX. MERITS

66. The present procedure is an appeal arbitration procedure, in which the Appellant challenges the FIFA Decision. The Appellant submits that the interpretation of the Transfer Agreement, in particular of clause 3.3 of the Transfer Agreement by the FIFA PSC is incorrect. The term *"registered on 60% of Liga match sheets"* used in clause 3.3 of the Transfer Agreement – according

to the Appellant – must be construed such that the variable fee only becomes due in case the Player is fielded in a certain number of matches (instead of listed on the respective match sheets). Subsidiarily the Appellant submits that should the interpretation of clause 3.3 of the Transfer Agreement followed by the FIFA PSC be correct, such clause and/or the Transfer Agreement would not be binding upon it, because it never had the intention to sign a transfer agreement with such contents. The Respondent objects to the above arguments submitted by the Appellant.

67. In light of its mandate, i.e. to verify the legality of the FIFA Decision, the Panel must address the following main issues:

i. is there room for the interpretation of the Transfer Agreement?

ii. (in case the previous question is answered in the affirmative) what are the principles applicable to contract interpretation in the case at hand?

iii. how shall the term *"registered on 60% of Liga match sheets"* contained in clause 3.3 of the Transfer Agreement be interpreted in light of the principles established under (ii)? and

iv. is there room for the avoidance of the contract on the grounds of error?

1. Is there room for the interpretation of the Transfer Agreement?

68. The Respondent is of the view that the wording used in clause 3.3 of the Transfer Agreement (*"registered on 60% of Liga match sheets"*) is blunt clear, unequivocal and, consequently, not open to any doubts as to its contents. Thus, according to the Respondent, there is no room for interpretation by this Panel.

69. The Panel is not prepared to follow Respondent's reasoning. Swiss Law does not follow a concept of *"sens clair"* (cf. SFT 111 II 287 and 99 II 285). Reference is made also to SFT 127 III 444 para. b) where it was held as follows:

> *"A cet égard, la jurisprudence récente a nuancé le principe selon lequel il y aurait lieu de recourir à des règles d'interprétation uniquement si les termes de l'accord passé entre parties laissent planer un doute ou sont peu clairs. On ne peut ériger en principe qu'en présence d'un "texte clair", on doit exclure d'emblée le recours à d'autres moyens d'interprétation. Il ressort de l'art. 18 al. 1 CO que le sens d'un texte, même clair, n'est pas forcément déterminant et que l'interprétation purement littérale est au contraire prohibée. Même si la teneur d'une clause contractuelle paraît claire à première vue, il peut résulter d'autres conditions du contrat, du but poursuivi par les parties ou d'autres circonstances que le texte de ladite clause ne restitue pas exactement le sens de l'accord conclu".*
>
> **free translation***:* In this respect, recent case law has modified the principle according to which the rules of interpretation should apply only if the terms of the agreement between the parties leave room for doubt or are unclear. One cannot state that in the presence of a "clear text" one must exclude all other means of interpretation. It derives from Article 18 para. 1 CO that the meaning of a text, even a clear one, is not necessarily determining and that the purely literal

interpretation is on the contrary prohibited. Even if a contractual clause appears clear at first view, it can result from the conditions of the contract, from the objectives sought by the parties or from other circumstances that the text of such contractual clause does not convey exactly the content of the agreement that was concluded.

70. Consequently, even in case the terms used in a contract have a clear literal (i.e. unambiguous) meaning, the adjudicatory body must assess whether or not the parties truly wished to attribute such meaning to the terms used. The view held here is also backed by legal literature (BK-OR I/WIEGAND, Art. 18 N. 25). Article 18 CO prohibits an "interpretation by means of letters" (Verbot der reinen "Buchstabenauslegung", cf. SFT 131 III 287, see also SFT (14.12.2011) 5A_677/2011, E. 3.2; (31.5.2011) 4A_370/2010, E. 5.3; SFT BGE 128 III 212; SFT (24.10.2002) 5C.87/2002, E. 2.2; KuKo-OR/WIEGAND/HURNI, Art. 18 N. 30; BK-OR I/WIEGAND, Art. 18 N. 25 and 37 with further references). Only in the very limited circumstances in which there are no objective grounds to think that the plain text does not reflect the parties' will, there is no reason to depart from it (SFT 136 III 188 E. 3.2.1; BK-OR I/WIEGAND, Art. 18 N. 25). Doubts that the wording used by the parties in the contract truly reflects their will may arise from a multitude of different circumstances, such as the drafting history of the agreement, its purpose or the overall content of the contract.

71. In the case at hand there may be a room for doubts as to the true meaning of the term *"registered on 60% of Liga match sheets"*. The potential doubts may arise from the simple fact that the parties redacted the Transfer Agreement in English despite their representatives' native language being different. When looking at the email correspondence between the Parties' representatives in the course of the contract negotiations it appears as possible that there was a language barrier. Thus, there is a certain likelihood that "something got lost in translation" along the lines when executing the Transfer Agreement. Consequently, the Panel finds that it must interpret the Transfer Agreement in order to determine its true contents.

2. What are the principles applicable to the interpretation of contracts?

72. Under Swiss law, which is the applicable law to this question (cf. supra para. XX), the principles on contract interpretation are to be found in Article 18 para. 1 of the Code of Obligations (hereinafter the "CO") which reads as follows:

"Bei der Beurteilung eines Vertrages sowohl nach Form als nach Inhalt ist der übereinstimmende wirkliche Wille und nicht die unrichtige Bezeichnung oder Ausdrucksweise zu beachten, die von den Parteien aus Irrtum oder in der Absicht gebraucht wird, die wahre Beschaffenheit des Vertrages zu verbergen".

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

73. Article 18 para. 1 CO is based on the assumption that the parties have concluded a contract and, in principle, do not dispute its effectiveness (BSK-OR I/WIEGAND, Art. 18 N. 9; KuKo-OR/WIEGAND/HURNI, Art. 18 N. 7). The dispute rather concerns the content of the

agreement reached (so-called "reiner Auslegungsstreit") (cf BGer, 3.12.2003, 4C.240/2003, E. 3.1; 7.8.2001, 4C.163/2001, E. 2b). In this case, Article 18 para. 1 CO rules that the content of the agreement must be construed according to the true intentions of the parties. Thus, the parties' subjective will has priority over any contrary declaration in the text of the contract. In case a common subjective will of the parties cannot be ascertained, the contents of the contract must be determined by application of the principle of mutual trust. In SFT 127 III 444 para. b), the Swiss Supreme Court indicated that:

"Pour déterminer s'il y a eu effectivement accord entre parties, il y a lieu de rechercher, tout d'abord, leur réelle et commune intention (art. 18 al. 1 CO). Il incombe donc au juge d'établir, dans un premier temps, la volonté réelle des parties, le cas échéant empiriquement, sur la base d'indices. S'il ne parvient pas à déterminer cette volonté réelle, ou s'il constate qu'une partie n'a pas compris la volonté réelle manifestée par l'autre, le juge recherchera quel sens les parties pouvaient et devaient donner, selon les règles de la bonne foi, à leurs manifestations de volonté réciproques (application du principe de la confiance)".

free translation: To determine if there has been an agreement between the parties one must first seek their true and common intention (art. 18 para.1 CO). The judge must therefore first establish the true will of the parties, empirically as the case may be, based on clues. If he cannot establish the true will or he finds that one of the parties did not understand the true will expressed by the other party, the judge will seek the meaning that the parties could and should have given to their respective declarations in accordance with the rules of good faith (application of the principle of trust).

3. How is the term *"registered on 60% of Liga match sheets"* to be understood in light of the principle of good faith?

74. In the case at hand the Parties disagree as to the meaning of the term *"registered on 60% of … match sheets"*. While the Appellant submits that it understood the respective clause to mean that the Player must have been fielded in 60% of the Liga matches, the Respondent submits that it wanted the variable transfer fee to depend solely on the Player being listed on the match sheet (without necessarily being fielded in the course of the match).

a) The application of the above principles

75. As a preliminary remark, the Panel observes that both parties are professional European clubs, playing in the first-league of the respective national tournaments. Both parties are experienced in international transfers and – in addition – the contract that forms the matter in dispute before this Panel is related to their core professional activities. Thus, the Panel finds it appropriate to take as a starting point the (objective) meaning of the term *"registered … on match sheets"* in the football industry, to which both parties belong (cf. for the precedence of the professional/technical language over the general language, KuKo-OR/WIEGAND/HURNI, Art. 18 N. 19; BK-OR I/WIEGAND, Art. 18 N. 21).

76. The Panel observes that in the football industry the terms *"match sheet"* and *"team list"* are used as synonyms. While the latter is used, in particular, in the FIFA Laws of the Game 2017/18 and

is defined as *"Official team document usually listing the players, substitutes and team officials"* (Laws of the Game 2017/18, p. 169), the term *"match sheet"* is used, in particular, by UEFA. Article 39 of the Regulations of the UEFA Champions League, 2015-18 Cycle, 2017/18 Season – for instance – reads as follows:

> *"Article 39 Match sheet*
>
> *39.01 Before each match, each team shall indicate in the relevant match sheet the numbers, surnames, first names (and dates of birth for qualifying-phase and play-off matches) and, if applicable, shirt names of the 18 players in the squad, together with the surnames and first names of the officials seated on the substitutes' bench and on the additional technical seats. The match sheet must be validated by the competent club official.*
>
> *39.02 The 11 players indicated on the match sheet as forming the starting 11 must commence the match. The other seven are designated as substitutes. The numbers on the players' shirts must correspond with the numbers indicated on the match sheet. The goalkeepers and team captain must be identified.*
>
> *39.03 Both teams must submit their validated match sheets at least 75 minutes before kick-off.*
>
> *39.04 Only three of the substitutes listed on the match sheet may take part in the match. A player who has been substituted may take no further part in the match.*
>
> *39.05 After the validated match sheets have been provided to the referee by both teams, and if the match has not yet kicked off, no replacement is allowed except in the following cases:*
>
> *a. If any of the 11 players indicated on the match sheet as forming the starting 11 are not able to start the match due to unexpected physical incapacity, they may only be replaced by any of the seven substitutes listed on the initial match sheet. The substitute(s) in question may then only be replaced by a registered player (players) not listed on the initial match sheet, so that the quota of substitutes is not reduced. During the match, three players may still be substituted.*
>
> *b. If any of the seven substitutes listed on the match sheet are not able to be fielded due to unexpected physical incapacity, they may only be replaced by a registered player not listed on the initial match sheet.*
>
> *c. If none of the goalkeepers listed on the match sheet are able to be fielded due to unexpected physical incapacity, they may be replaced by registered goalkeepers not listed on the initial match sheet.*
>
> *The club concerned must, upon request, provide the UEFA administration with the necessary medical certificates".*

77. It follows from the above that according to an objective reading the term "match sheet" (just like the term "team list") refers to an official document listing the starting eleven players, the substitutes and the other officials in relation to a certain match. Consequently, an interpretation taking account of the language used in the football industry understands the term *"registered … on match sheets"* not to require that a player listed on such document must also be fielded in the relevant match. The question, however, is, whether the Panel must deviate from the above

objective understanding of the term *"registered … on match sheets"* because both parties had a different understanding of the term when executing the Transfer Agreement.

78. It is true that Mr Antonio Chaves Escalante, Managing Director of the Appellant, who participated in the negotiations of the Transfer Agreement for the Appellant testified at the hearing that he was not aware of the true meaning of the term *"match sheet"* as defined by FIFA/UEFA. It is also true that the Appellant consistently stated in the course of the negotiations that the condition for the variable bonus shall be that the Player is fielded (in a certain percentage of the matches). Evidence of this can be found in

- the Appellant's email dated 6 January 2016, 13:24 (*"if the player played in the last season 75% of the matches"*)
- the Appellant's email dated 7 January 2016, 13:25 (*"if the player played in the last season 75% of the matches"*)
- the Appellant's email dated 10 January 2016, 12:17 (*"if the player played in the last season 75% of the matches"*)
- the Appellant's email dated 12 January 2016, 10:53 *("if the player played in the last season 75% of the matches"*)
- the Appellant's email dated 14 January 2016, 9:51 (*"if the player played in the last season 75% of the matches"*)
- the Appellant's email dated 14 January 2016, 19:19 (*"if the player played in the last season 75% of the matches"*)
- the Appellant's email dated 15 January 2016, 10:16 (*"and, the player has been registered (more 45 minutes or holder) on 75% of Liga match sheets"*)
- the Appellant's email dated 15 January 2016, 18:31 (*"our offer is to reduce* [the Player's] *participation in the bonus in order that these are effective to 60%"*).

79. However, the Respondent never explicitly accepted the Appellant's condition, but instead always referred in its email and drafts to the Player being *"registered … on match sheets"*. Thus, the Respondent never consented to the Appellant's understanding. This is evidenced by the following correspondence:

- the Respondent's email dated 14 January 2016, 21:03 (*"and the player has been registered on 75% of the match sheets"*)
- the draft forwarded with Respondent's email dated 14 January 2016, 22:25 (*"the player has been registered on 75% of the … match sheets"*)
- the draft forwarded with Respondent's email dated 15 January 2016, 21:27 or 21:28 (*"the player has been registered on 60% of … match sheets"*)
- the draft forwarded with Respondent's email dated 16 January 2016, 12:45 (*"the player has been registered on 60% of … match sheets"*).

80. The above is not contradicted by the testimony of the Player. The latter signed and was a party to the Transfer Agreement. However, he did not have any recollection what the Parties' understanding or interpretation of the relevant terms were. In light of the above it cannot be assumed that the Parties had a common subjective will that deviated from the ordinary understanding of the term *"registered … on match sheets"*. Instead, it appears that only the Appellant may have erred with respect to the true meaning of its declaration when it signed the Transfer Agreement. This possible error cannot be shifted to the contractual partner. This is all the more true, considering that both parties are experienced in transfer negotiations. It is, thus, a party's duty to check whether the terms in the agreement that is being signed correspond to its intentions. If the latter is not the case, it can be expected from a party experienced in such type of transactions that it objects to the wording used by the other party. In the case at hand the Appellant in the course of the negotiations has never objected to the repeated use of the term *"registered … on match sheets"* (instead of *"plays … matches"*) by the Respondent and has never sought an explanation of these terms that – according to the testimony of the Appellant – it did not understand.

81. This finding of the Panel is not contradicted when looking at the data that has been inserted into the TMS by the Parties. It is accepted in the legal literature that an adjudicatory body may refer to the behaviour of the parties following the execution of a contract in order to discern the parties' intentions at the time of its conclusion. The Panel notes that the data entered into TMS by the Appellant refers to *"participates in … matches"*. The term "participates" is in itself already ambiguous, because, in principle it also covers participation of a player in a match as a substitute. Even if the term "participation" would be understood as meaning "playing" or being fielded (as advanced by Mr Antonio Chaves Escalante, Managing Director of the Appellant) there is no expression of will from the Respondent's side whereby the latter agrees to the Appellant's understanding. The Panel also notes that the information entered by Celta into the TMS was drafted in Spanish and differs from the wording of the Transfer Agreement.

82. Finally, the view held by the Panel is not contradicted when looking at the interests and motives of the contracting parties or the practice in the football industry. First and foremost, it appears to the Panel that there is no standing practice in the football industry. Furthermore, the Panel notes that the Parties had very different objectives when entering into the Transfer Agreement. While the Respondent sought to achieve the highest possible (variable) transfer fee, the Appellant sought to push the transfer fee as much downward as possible. Thus, with respect to the variable transfer fee the interest of the Appellant and the Respondent were far apart.

83. The Panel finds that if there is no common intention of the Parties, the term *"participates in … matches"* must be interpreted taking account of the principle of good faith. In application of the latter, in particular when considering the language used in the football industry, the Panel finds that the Parties made the variable bonus dependent on the Player being listed on the match sheet, instead of being fielded in the match.

b) Other principles of interpretation referred to by the Parties

84. The Appellant submitted that his construction of the terms of the Transfer Agreement must be followed in light of the principle *in dubio contra stipulatorem*. The latter principle, however, has a

limited scope of application. It only comes into play where the contents of a contract cannot be determined, i.e. where the terms of the contract remain ambiguous (see BK-OR I/WIEGAND, Art. 18 N. 40). In addition, this principle may apply on a subsidiary basis, i.e if the primary interpretation in application of the principle of good faith does not lead to a clear result (BK-OR I/WIEGAND, Art. 18 N. 40). The Panel finds that there is no room for the principle *in dubio contra stipulatorem* in the case at hand, because the Panel arrived at a clear and unambiguous result in application of the principles enshrined in Article 18 para. 1 CO.

85. The Appellant also submitted that the Panel shall follow its construction of the Transfer Agreement because the Respondent acted in an abusive manner or in violation of the principle of *venire contra factum proprium*. According to the jurisprudence of the SFT, a party violates the principle of *venire contra factum proprium* if it has induced the other party (through its previous behaviour) to legitimately rely on certain assumptions. In the present case, the Panel finds that there are elements that could constitute a breach of the above principle. It is not without hesitation that the Panel concludes that the Respondent failed to mislead the Appellant to misconstrue the term *"registered … on match sheet"*. In one of the emails sent by the Respondent to the Appellant the latter appears to mix the terms "registration" and "participation" (not "playing"). In the email dated 15 January 2016 (21:27 or 21:28) the Respondent wrote – *inter alia* – *"*[w]*e accept that the variable bonus (article 3.3) are conditioned to the participation / registration of the player"*. This email is – to say the least – unclear. In the view of the Panel, however, this email is insufficient to cause a legitimate expectation on the part of the Appellant that the Respondent would claim the variable amount of the transfer fee only in case the Player was fielded in (a certain percentage of the) matches. This is all the more true considering that the draft of the Transfer Agreement attached to said email did not reflect the alleged understanding of the Appellant. A diligent and prudent contractual partner experienced in the respective industry would have checked the draft agreement accordingly.

4. Avoidance of the Transfer Agreement on the grounds of error?

86. The Appellant – as previously established – attributed subjectively a different meaning to clause 3.3 of the Transfer Agreement as objectively contained therein. The Appellant, thus, may have erred with respect to the contents of its declaration. The question is, therefore, whether the Appellant can withdraw from the Transfer Agreement on the grounds of error.

a) The legal grounds and conditions for the avoidance of contracts

87. Under Swiss law, the grounds for avoidance on the grounds of error are to be found in Article 23 *et seq.* CO, in particular in Articles 23, 24 and 31 CO.

Article 23 CO reads as follows:

> *Der Vertrag ist für denjenigen unverbindlich, der sich beim Abschluss in einem wesentlichen Irrtum befunden hat".*

free translation: A party labouring under a fundamental error when entering into a contract is not bound by that contract.

Article 24 CO provides as follows:

"1 Der Irrtum ist namentlich in folgenden Fällen ein wesentlicher:

1. wenn der Irrende einen andern Vertrag eingehen wollte als denjenigen, für den er seine Zustimmung erklärt hat;

2. wenn der Wille des Irrenden auf eine andere Sache oder, wo der Vertrag mit Rücksicht auf eine bestimmte Person abgeschlossen wurde, auf eine andere Person gerichtet war, als er erklärt hat;

3. wenn der Irrende eine Leistung von erheblich grösserem Umfange versprochen hat oder eine Gegenleistung von erheblich geringerem Umfange sich hat versprechen lassen, als es sein Wille war;

4. wenn der Irrtum einen bestimmten Sachverhalt betraf, der vom Irrenden nach Treu und Glauben im Geschäftsverkehr als eine notwendige Grundlage des Vertrages betrachtet wurde.

2 Bezieht sich dagegen der Irrtum nur auf den Beweggrund zum Vertragsabschlusse, so ist er nicht wesentlich.

3 Blosse Rechnungsfehler hindern die Verbindlichkeit des Vertrages nicht, sind aber zu berichtigen".

free translation:

1 "An error is fundamental in the following cases in particular:

1. where the party acting in error intended to conclude a contract different from that to which he consented;

2. where the party acting in error has concluded a contract relating to a subject matter other than the subject matter he intended or, where the contract relates to a specific person, to a person other than the one he intended;

3. where the party acting in error has promised to make a significantly greater performance or has accepted a promise of a significantly lesser consideration than he actually intended;

4. where the error relates to specific facts which the party acting in error considered in good faith to be a necessary basis for the contract.

2 However, where the error relates solely to the reason for concluding the contract, it is not fundamental.

3 Calculation errors do not render a contract any less binding, but must be corrected".

Article 31 CO reads as follows:

"1 Wenn der durch Irrtum, Täuschung oder Furcht beeinflusste Teil binnen Jahresfrist weder dem anderen eröffnet, dass er den Vertrag nicht halte, noch eine schon erfolgte Leistung zurückfordert, so gilt der Vertrag als genehmigt.

2 Die Frist beginnt in den Fällen des Irrtums und der Täuschung mit der Entdeckung, in den Fällen der Furcht mit deren Beseitigung.

3 Die Genehmigung eines wegen Täuschung oder Furcht unverbindlichen Vertrages schliesst den Anspruch auf Schadenersatz nicht ohne weiteres aus".

free translation:

"1 Where the party acting under error, fraud or duress neither declares to the other party that he intends not to honour the contract nor seeks restitution for the performance made within one year, the contract is deemed to have been ratified.

2 The one-year period runs from the time that the error or the fraud was discovered or from the time that the duress ended.

3 The ratification of a contract made voidable by duress or fraud does not automatically exclude the right to claim damages".

88. To be entitled to challenge a contract according to the cited provisions of the CO, the party relying on avoidance of the contract must (1) be in *"error"* and (2) the error must be *"fundamental"*. A party is in error if it was mistaken about the contents of its declaration or if it had no intention whatsoever of making a declaration with this content (BK-OR I/SCHWENZER, Art. 23 N. 2; KUKO-OR/BLUMER, Art. 23 N. 12). An error is furthermore fundamental in nature if it is to be assumed based on the circumstances of the case that the party being in error would not have made the declaration if it had knowledge of the true circumstances, i.e. if it had a correct understanding of the facts (BK-OR I/SCHWENZER, Art. 23 N. 4; KuKo-OR/BLUMER, Art. 23 N. 14).

b) The facts of this specific case

89. The Appellant submitted that it would never have signed the Transfer Agreement if it had known that the (variable) transfer fee was not conditional upon the Player being fielded in the relevant matches. The Appellant concluded that, therefore, clause 3.3 of the Transfer Agreement cannot be binding on it.

90. Whether the Appellant indeed was under a fundamental error when executing the Transfer Agreement, because it understood the terms "to be registered on the match sheets" differently from their ordinary (objective) meaning appears rather questionable. In any case this Panel does not need to decide this issue, because even in case the Appellant was under a fundamental error, the latter did not respect the applicable time limit. In order to avail itself of the nullity of the Transfer Agreement (based on error) the Appellant must declare within a deadline of one year that it does not intend to honour the contract. It is undisputed between the Parties that the Appellant referred to the avoidance on the grounds of error for the first time in the course of the proceedings before the FIFA PSC. This is – at first sight – within the time limit prescribed by Article 31 CO (cf. BK-OR I/SCHWENZER, Art. 31 N. 11 f.). However, it must be kept in mind that the Transfer Agreement in the case at hand is a three-partite agreement between the Parties and the Player. The latter was not a party to the proceedings before the FIFA PSC. Since avoidance must be declared (within the applicable time limit) vis-à-vis every single contracting

party (BK-OR I/SCHWENZER, Art. 31 N. 10; cf. BGE 74 II 215 E. 3), the Appellant's declaration in the course of the proceedings before the FIFA PSC was insufficient to trigger the effects of avoidance based on error. When being questioned by the Panel on the circumstances of its declaration on avoidance the Appellant did not submit that it made the relevant declaration within the prescribed deadline according to Article 31 CO also vis-à-vis the Player. Consequently, the Panel finds that – even if the Appellant should have erred (what appears questionable) – it is time-barred from availing itself of avoidance of the Transfer Agreement on the grounds of error.

5. Summary

91. Based on the foregoing, and after having taken into due consideration the regulations applicable and all the evidence produced and all arguments submitted, the Panel finds that:

    i. The term *"registered on 60% of Liga match sheets"* contained in clause 3.3 of the Transfer Agreement is to be interpreted in line with the FIFA Decision and that

    ii. the Transfer Agreement (including its clause 3.3) is binding upon the Appellant.

92. Consequently, the appeal against the FIFA Decision must be dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Real Club Celta de Vigo SAD against the decision issued on 28 February 2017 by the Players' Status Committee of the Fédération Internationale de Football Association is dismissed.

2. The decision issued 28 February 2017 by the Players' Status Committee of the Fédération Internationale de Football Association is confirmed.

(…)

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