Arbitration CAS 2020/A/7612 Club Atlético Newell's Old v. AS Roma, award of 23 November 2021

Panel: Mr Kepa Larumbe (Spain), Sole Arbitrator

Football
Transfer with sell-on clause
Contractual simulation
Difficulty of a party to discharge its burden of proof
Mitigation of the burden of proof

1. **Within the meaning of Article 18 of the Swiss Code of Obligations (SCO), a simulation exists when both parties agree that the legal effects corresponding to the objective meaning of their statement must not occur and that they only wanted to create the appearance of a legal act towards third parties. When the parties have feigned to conclude a contract ("the simulated act") in order to conceal the existence of another ("the concealed act"), the situation is the following: the simulated act is without effect; by contrast, the concealed act is valid (provided that it satisfies the conditions of validity).**

2. **Swiss law is not blind *vis-à-vis* difficulties of the parties when discharging their burden of proof (*"Beweisnot"*). Accordingly, Swiss law provides a number of tools in order to ease the – sometimes difficult – burden put on a party to prove certain facts. These tools range from a duty of the other party to cooperate in the process of fact finding, to a shifting of the burden of proof or to a reduction of the applicable standard of proof. The latter is, *e.g.*, the case if – from an objective standpoint – a party has no access to direct evidence (but only to circumstantial evidence) in order to prove a specific fact. In such cases, the applicable standard is lower. The required threshold of conviction is reached in these cases if a fact is deemed to be so likely to have occurred that the occurrence of all other alternative courses of events cannot sensibly be accepted.**

3. **Article 42 para. 2 of the SCO is an exception to the general principle that whoever claims damages must prove the damage, which results from Article 8 of the Swiss Civil Code and from Article 42 para. 1 CO. When it is very difficult, if not impossible, to bring a strict evidence of the damage, Article 42 para. 2 CO intends to mitigate the burden of proof. The claiming party is not freed from the obligation of submitting and evidencing the relevant facts but such obligation is limited to the allegation of all the circumstances indicating the existence of a damage. The exception of Article 42 para. 2 CO applies not only for tort claims, but also for contractual claims.**

I. PARTIES

1. Club Atlético Newell's Old Boys (the "Appellant" or "CANOB") is a professional football club based in Rosario, Argentina, affiliated with the Argentinian Football Association (AFA), which in turn it is affiliated to FIFA.

2. Associazione Sportiva Roma (the "Respondent" or "AS Roma") is a professional football club based in the city of Rome, Italy, affiliated with the Italian Football Federation (FIGC), which in turn it is affiliated to FIFA; The Appellant and the Respondent are hereinafter jointly referred as the "Parties".

II. FACTUAL BACKGROUND

A. Background Facts

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

4. On 1 July 2015, CANOB and AS Roma reached an agreement for the definitive transfer of the Argentinian player A. The terms of the contract provided for the following:

   a. A fixed transfer fee of EUR 4,200,000 for the 100% of the federative and economic rights of the Player.

   b. A sell-on fee clause in favour of the Appellant. To this effect, CANOB was entitled to receive 40% of a subsequent transfer of the Player. AS Roma had also the right to decrease the percentage to a 20% in case of paying an additional amount of EUR 2,200,000 before 30 December 2018, which did not happen.

   c. In the event that AS Roma failed to pay CANOB on time its respective economic rights derived from the transfer fee and the sell-on fee, a monthly interest rate of 1% would be applicable plus a punitive interest of 50% of the aforementioned interest.

   d. Subsequently, Clause 9.2 established that in case AS Roma failed to pay the sell-on fee, a penalty clause would be triggered by the said club. The compensation set thereby would be double of the amount CANOB is entitled to receive as a consequence of a future transfer.

5. On 31 August 2015, A. and AS Roma signed an employment contract with a duration until 30 June 2020.

6. A. was loaned to several clubs in different European leagues:

   a. The 2016/2017 season, A. was transferred on loan to the Spanish club Granada Club de Fútbol ("Granada C.F".). A. made 27 appearances (15 as a substitute) among all competitions played by the team and scored 2 goals.

   b. The 2017/2018 season, A. was transferred on loan to the French club Lille Olympique Sporting Club ("Lille"). The loan transfer agreement provided for an option in favour of Lille OSC to permanently register the player at the end of the season amounting to EUR 11,000,000. As to his performance, A. made 32 appearances (20 as a substitute) in all of the competitions the team played and scored 3 goals. Lille OSC, however, did not exercise this option right at the end of the season and the player returned to AS Roma.

   c. The 2018/2019 season, A. was transferred on loan to the Greek club AEK Athens CF ("AEK"). The loan transfer agreement provided for an option in favour of AEK to permanently register the player at the end of the season. The purchase option set two alternatives for AEK in the event it proceeded to execute it (Clauses 13 to 16):

      i. A fixed sum of EUR 7,000,000, plus a 15% sell-on fee of a future transfer to a third club in favour of AS Roma.

      ii. A fixed sum of EUR 6,000,000, plus a 30% sell-on fee of a future transfer to a third club in favour of AS Roma.

   A. made 41 appearances (most of them from the starting eleven) and scored 21 goals in all competitions, including UEFA Champions League. However, AEK discarded the purchase option and A. went back to Rome.

7. On 16 June 2019, AS Roma and the Russian club FC Spartak Moscow ("Spartak") reached an agreement for the permanent transfer of A. ("the Spartak transfer agreement", hereinafter). The agreement was concluded upon the following terms:

   a. A fixed fee of EUR 3,000,000 distributed in two instalments:

      i. EUR 2,000,000 to be paid within 5 business days after the ITC of the Player was delivered to the Russian Football Union.

      ii. EUR 1,000,000 before 15 June 2020.

   b. A variable fee, limited to the amount of EUR 3,000,000 subject to meeting the following conditions (Clause 3.1 of the Spartak transfer agreement):

      i. EUR 1,000,000 if the Player participated in 60% of the first team matches in the Russian Premier League, during any season. In order to count a match appearance, the Player had to be fielded for at least 45 minutes.

ii. EUR 1,000,000 in the event Spartak reached the 2nd or 3rd place in the Russian Premier League and made it to the group stage in the UEFA Champions League. All as long as A. remained linked to Spartak during the entire season.

iii. EUR 2,000,000 if Spartak finished 1st and won the Russian Premier League, while being the Player under contract for the entire relevant season.

c. In the event of a future transfer of the A.'s sports and economic rights to a third club, a sell-on fee of 20% of the positive difference between the net transfer fee received by Spartak exceeding EUR 6,000,000 and EUR 6,000,000 of any transfer fee (including any fixed and conditional amount) received by Spartak from the third club.

8. According to FIFA TMS, A. was registered with Spartak on 4 July 2019.

9. On 19 July 2019, Spartak paid EUR 2,000,000 to AS Roma in connection with the transfer fee under the Spartak transfer agreement.

10. On 13 August 2019, AS Roma paid EUR 800,000 to CANOB in connection with the sell-on fee established under the transfer agreement signed between the Parties.

11. On 11 June 2020, Spartak paid EUR 1,000,000 to AS Roma in connection with the transfer fee under the Spartak transfer agreement.

12. On 17 June 2020, the Respondent paid EUR 400,000 to CANOB in connection with the sell-on fee established under the transfer agreement signed between the Parties

13. A. and Spartak signed an employment contract (the "A. employment contract") under the following terms:

- Duration: until the end of the 2023/2024 season, i.e. four sporting seasons.

- Team: Spartak first team.

- Monthly salary: EUR 71,389.

- Guaranteed bonus: EUR 574,712.

- Conditional bonus: yes.

14. On 20 June 2019, AS Roma and Spartak reached an agreement for the permanent transfer of the player B. ("the B. transfer agreement", hereinafter). The agreement was concluded upon the following terms:

a. A transfer fee of EUR 3,000,000, to be paid in two instalments:

i. First, EUR 2,000,000 within 8 business days after the delivery of the ITC to the Russian Football Union;

ii. and secondly, EUR 1,000,000 before 5 June 2020.

15. B. and Spartak signed an employment contract (the "B. employment contract") under the following terms:

- Duration: until the end of the 2020/2021 season, i.e. two sporting seasons.
- Team: Spartak second team.
- Monthly salary: EUR 3,000.
- Guaranteed bonus: none.
- Conditional bonus: none.

III. PROCEEDINGS BEFORE THE FIFA PLAYERS' STATUS COMMITTEE

16. On 4 May 2020, the Appellant filed the claim against the Respondent before the FIFA Players' Status Committee (the "FIFA PSC") requesting the following:

"1. Nos tenga presentados y nos dé la participación que por derecho nos corresponde habiéndose abonado el adelanto de costas de acuerdo a lo estipulado.

2. Admita la demanda en todos sus términos, tenga por acompañados los documentos adjuntos y haga lugar a lo solicitado en lo relativo a la producción de prueba.

3. Se inicie proceso disciplinario conforme a lo establecido en el Art. 11 del Código Disciplinario de F.I.F.A, enmarcándose la presente solicitud en el deber impuesto por el Art. 19 del mencionado código.

4. Condene al AS ROMA abonar a Newell's Old Boys las sumas reclamadas o las que la CEJ estime, imponiéndoles las costas del proceso".

Free translation into English:

"1. To have us as a party to the proceedings and give us the share we are entitled to, the advance on costs having been paid in accordance with the regulations.

2. To admit the claim in all its terms, consider the documents attached and grant the request for the production of evidence.

3. to initiate disciplinary proceedings in accordance with the provisions of Article 11 of the FIFA Disciplinary Code, the present application being framed within the duty imposed by Article 19 of the aforementioned Code.

4. to order AS ROMA to pay to Newell's Old Boys the sums claimed or such other sums as the PSC may deem appropriate, and order them to pay the costs of the proceedings".

17. On 17 June 2020, the Respondent filed its answer to the Appellant's claim, requesting the following:

"a. The Respondent respectfully requests FIFA not to consider the Claim, due to the fact that there is no legitimate reason to deal with this claim, which is totally unfounded and meritless (cf. Article 5, paragraph 4 of the FIFA Rules).

b. Should FIFA decide to submit the Claim to the FIFA Players' Status Committee, the Respondent respectfully requests the FIFA Players' Status Committee to issue a decision:

- DECLARING the Claim not admissible due to the fact that it is incomplete;

Alternatively:

- REJECTING the Claim in its entirety;

In any case:

c) ORDERING Club Atletico Newell's Old Boys to bear all costs relating to these proceedings".

18. On 14 October 2020, the Single Judge of the Player's Status Committee passed its decision (the "Appealed Decision"):

1. The claim of the Claimant, CA NEWELL'S OLD BOYS, is rejected.

2. The final costs of the proceedings in the amount of CHF 5,000 are to be paid by the Claimant to FIFA (cf. note relating to the payment of the procedural costs below). Such amount is offset against the advance of costs paid by the Claimant.

19. On 7 December 2020, the Single Judge of the Player's Status Committee notified the grounds of the Appealed Decision, which can be summarized as follows:

48. The Single Judge also emphasised that, whilst in a manoeuvre of this nature (if indeed there was one) the involved parties would have an incentive to conceal the real agreement and therefore that the Claimant may be in a more difficult position to provide adequate evidence, this still does not reverse the burden of proof. As previously mentioned, pursuant to the applicable Procedural Rules, it is up to the Claimant to prove the allegation that A. was in reality transferred to Spartak for an amount higher than the one effectively declared.

49. In this regard, the Single Judge notes that the Claimant's case is mostly one of circumstantial evidence. In other words, in the absence of conclusive direct evidence of a simulation, the Claimant has mostly relied upon a set of circumstances which, in its view, confirms that the Respondent implemented a scheme to artificially reduce the real transfer value of A. In essence, these are circumstances which, in the Claimant's view, confirm that (i) A.'s transfer value is higher than that which was declared; (ii) B.'s transfer value was lower than that which was declared and (iii) there is a link between the two transfers. The Claimant's position is that these

circumstances should lead to the conclusion that a scheme was implemented to defraud the interests of the Claimant. It is for the Single Judge to decide whether he is sufficiently convinced that the Claimant has discharged its burden of proof.

50. Accordingly, the Single Judge started by taking note of the fact that the FIFA Regulatory Enforcement Department (formerly FIFA TMS Compliance Department) requested Roma and Spartak to provide various documents and evidence, such as (a) the correspondence exchanged between Spartak and Roma as to both transfers; (b) B. and A.'s employment contracts; and (c) the various match sheets of said players in which they were involved with Spartak.

51. In this respect, the Single Judge was observant of the fact that the transfers of the players were not concluded in the same contract, but in two separate documents, executed on different dates. Furthermore, the Single Judge underlined that such agreements neither referred to each other nor made any reference to the any player other than the one being transferred. Additionally, the Single Judge was mindful of the fact that the transfer instructions in TMS were conducted separately.

52. Finally, having analysed the e-mail exchange between Spartak and Roma filed by said clubs with FIFA in the context of the aforementioned investigation, the Single Judge could not establish from those documents a connection between the two transfers.

53. The Single Judge then proceeded to analyse the remaining evidence/arguments which were submitted to support the claim that the two players' transfer value could not correspond to their real market value.

54. In brief, the Single Judge outlined the following comparison between the two players while at Spartak:

	B.	**A.**
Position	Goalkeeper	Striker
Background	Italian Serie C	Greek Superleague 1
Appearances	Few	Several
Current team	Spartak 2	Spartak 1
Monthly salary	EUR 3,000	EUR 71,389
Guaranteed bonus	None	EUR 574,712
Conditional bonuses	None	Yes
Contract duration	2019-2021	2019-2024
Previous transfer remarks	None	Option to buy in 2018

55. The Single Judge wished to first analyse the issue of the market value of A. The Claimant argues that the real market value of A. was between EUR 6,000,000 and EUR 7,000,000.

In this regard, the Single Judge remarked that, whilst it is true that the agreement between the Respondent and Spartak for the transfer of A. only provided for a fixed fee of EUR 3,000,000, it did provide for another EUR 3,000,000 in potential contingent transfer fees.

The Single Judge highlighted that he found these contingent amounts to be relatively feasible (see para. 9 above), especially in light of the fact that they were not limited by season, and thus could be triggered during any of the seasons A. was under contract with Spartak. Additionally, the Single Judge emphasized that the cited contingent payments were cumulative.

56. In light of the above, the actual potential total fees which the Respondent could receive from Spartak for the transfer of A. could actually end up not being significantly different from the market value which the Claimant argues A. had.

57. Moreover, having examined the trajectory of A. after having been transferred from the Claimant and the various agreements and amounts which were concluded and agreed between the relevant parties in connection thereto (see para. 28 above), the Single Judge is not convinced that the real market value of A. would necessarily be between EUR 6,000,000 and EUR 7,000,000. In other words, even if the final total transfer fee paid by Spartak would only be EUR 3,000,000 (with no additional contingent fees payable), the Single Judge is not convinced that such a value would necessarily correspond to an undervaluation of A.

58. In this regard, the Single Judge wishes to underline the limited evidentiary value of the option right (and respective amount) agreed between the Respondent and AEK for the permanent transfer of A., as the fact that AEK did not exercise said option could well indicate that it did not consider the respective amount to be reflective of the player's value at that point in time.

59. In the Single Judge's view, in circumstances where he is not convinced that A. was undervalued in the transfer from the Respondent to Spartak, then the necessary conclusion must be that he cannot be convinced that there was a simulation in his transfer so as to artificially reduce the sell-on fees payable to the Claimant.

60. Notwithstanding the above, the Single Judge wishes to note that indeed the transfer fee paid for the transfer of B. to Spartak seems strangely high, since, among other considerations, he is a player with a limited sporting track record if compared to other players in the market of his age/position.

61. The Single Judge therefore cannot completely exclude that the transfer fee agreed for the transfer of B. may have been inflated. However, the Single Judge emphasised that there may be a variety of reasons (some arguably perhaps more legitimate than others) why two clubs (any two clubs) may agree on a transfer fee which does not reflect the actual value of a player. In this specific case and as previously mentioned, the Single Judge has not been provided, however, with evidence that links the two transfers and, therefore, that proves a connection between a supposed lower real transfer value of B. and a supposed higher transfer value of A. (even if the latter had been proved). The fact that Spartak may have paid a considerable transfer fee for a player of limited sporting relevance cannot be considered a circumvention of the contract, absent any other evidence to the contrary.

62. For the sake of completeness, the Single Judge also noted the Claimant's argument that:

- The Financial Statement of the Respondent appears to consider the transfers of both players as one and only financial operation;

- The value of B. is to be considered as zero according to the Financial Statement of the Respondent.

63. With respect to the two points above, the Single Judge emphasized that upon express request from FIFA, Roma provided the following explanations:

> *"The two players are mentioned together only in five circumstances (pp. 12, 21, 27, 107, 193). Out of these five circumstances, in two times (pp. 107, 193) the reason why the players have been mentioned together is evident: the relevant tables relate to 'credits towards football clubs' and are arranged in alphabetical order by club name in the rows and by fiscal years in the columns: both players having transferred to Spartak Moskow during the same fiscal year, both players have been inserted in the same slot. In the same tables, many other players have been inserted in the same slot, following the same principles applicable to A. and B.: C. – D. – K., E. – R., M. – S., F. – X. – R. In some cases, the relevant credit is spread over several fiscal years and therefore the same player appears in both slots, in relation to credits related to the 2018 fiscal year and 2019 fiscal year for (for instance the credit towards Napoli for the transfer of the player S., which occurred in July 2017).*
>
> *As a result, even if the names of different players appear in the same slot, all of these "combined mentions" refer to different operations, totally unrelated and autonomous to each other. It is therefore clear that a "combined mention" does not refer to transactions which should be considered 'one operation', as has been erroneously assumed.*
>
> *We therefore understand that the allegedly 'suspicious mentions' of the two players together are the remaining three references (out of 17 mentions for A. and out of 8 mentions for B.), on pp. 12, 21, 27 of the report.*
>
> *In this respect, we note that in all of these cases, both players are mentioned in the list of the players which have been transferred by Roma to third clubs on June 2019:*
>
> *– p. 12: "Nel corso del mese di giugno 2019 sono state definite le operazioni di acquisizione a titolo definitivo dei DPC relativi al giocatore Y., e di cessione dei DPC dei calciatori M., L., A. and B." (free translation: "During the month of June 2019 have been finalised the definitive acquisition of the DPC [multi-annual rights to sporting services] relating to the player Y., and the transfer of the DPC of the players M., L., A. and B.");*
>
> *– p. 21: "… definite nella prima parte dell'esercizio, e M., L., A. e B., definite nel mese di giugno 2019" (free translation: "… finalized during the first part of the fiscal year, and M., L., A. and B. finalized during the month of June 2019");*
>
> *– p. 27: "… definite nella prima parte dell'esercizio, e M., L., A. e B., definite nel mese di giugno 2019" (free translation: "… finalized during the first part of the fiscal year, and M., L., A. and B. finalized during the month of June 2019").*

In this regard, please note that such lists are simply in alphabetical order.

Finally, we note that the Players are also mentioned in the tables on pages 139 and 222: in both tables the players are however not mentioned together and the operations are clearly analysed separately.

However, in relation to these tables, it must be stressed that both specifically refer to the capital gains generated by every single operation: thus, if the transfers of A. and B. were de facto a single operation, quod non, both tables should have considered them as a single operation for financial purposes. The fact that both tables consider the two transfers as independent and autonomous operations, clearly proves that Roma has never considered such operations as a single one, not even for financial purposes. (…)

In relation to your second query, please note that the reason why the player B. had a book value equal to zero, is because B. is a 'product' of Roma's youth sector and therefore no costs were paid by Roma to acquire him.

Accordingly, for the purposes of the financial report, there is no net book value attributable to B. As I am sure you are aware, it is against generally accepted accounting principles (International Financial Reporting Standards – IAS 38- and the accounting requirements laid down in UEFA's Club Licensing and Financial Fair Play Regulations Annex VII) to revalue upwards the carrying value of players in the financial statements and indeed only costs directly attributable to the acquisition of a player can be capitalised on the balance sheet".

64. Having analysed the explanations provided by the Respondent with regard to the financial statements, the Single Judge considers that they are consistent and logical and that, therefore, it cannot be concluded from those elements in the financial statements that there was a simulation between the Respondent and Spartak in the transfers of A. and B.

65. Finally, the Single Judge reverted to the media articles quoted by the Claimant – and not filed as annexes to the claim but as referenced links only – and concluded that such documentation is not enough to demonstrate that the players were transferred in the context of a fraudulent operation. In particular, the Single Judge found such media articles to be considered speculative, as nothing brought forward by the Claimant can validly support its position.

66. On the basis of the documentation on file, the Single Judge was therefore of the firm opinion that the Claimant has not sufficiently discharged its burden to prove that the two transfers are in fact one only and were carried out so as to mask the real value of A., thereby artificially reducing the amount of sell-on fees due to the Claimant. Consequently, the Single Judge decided to reject the Claimant's claim in its entirety.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

20. On 28 December 2020, in accordance with Article R47 of the Code of Sports-related Arbitration ("CAS Code"), the Appellant filed its Statement of Appeal with the CAS against the Respondent, challenging the Appealed Decision.

21. On 26 January 2021, the Appellant filed its Appeal Brief in accordance with Article R51 of the Code.

22. The Appeal Brief contained the following evidentiary requests:

"1. The entire file that lead to this decision.

2. The documents and conclusions of the FIFA Regulatory Enforcement Department allowing us to comment on its content, either at the hearing or on a second round of submissions.

3. The TMS instructions and dates for the transfers of B. and A. from AS Roma to Spartak (including dates the documents were uploaded, validated and the ITC were released)

EXPERT REPORT

In order to evaluate the real "market value" of the two players involved in the present dispute B. and A., we request the Court to order the production of an expert report by the CIES".

23. On 1 February 2021, the CAS Court Office, on behalf of the Deputy Division President, informed the parties that the Panel appointed to decide the present dispute was constituted as follows:

Sole Arbitrator: Mr. Kepa Larumbe, Attorney-at-law in Madrid, Spain.

24. On 2 February 2021, the complete FIFA case file was received in the CAS Court Office.

25. On 8 March 2021, the Respondent filed its Answer, in accordance with Article R55 of the Code.

26. On 23 March 2021, after having consulted the Parties, the CAS Court Office informed them that the Sole Arbitrator had decided to hold a hearing by videoconference.

27. On 26 March 2021, after an exchange of correspondence with the Parties, the CAS Court Office informed the Parties that the hearing would be held by videoconference on Thursday, 5 May 2021 at 14:00 CET (Swiss time).

28. On 31 March 2021, after an exchange of communications with the Parties, the CAS Court Office notified the following decision of the Sole Arbitrator with regard to the evidentiary measures requested by the Appellant:

"On behalf of the Sole Arbitrator and for the sake of clarification, the Parties are advised of the following regarding the Respondent's request for production of documents:

1) The FIFA case file: The CAS Court Office has already provided a copy of the FIFA case file to the Parties. Therefore, such request is moot.

2) <u>The documents of the FIFA Regulatory Enforcement Department (now TMS Department):</u> Such documents have been already filed by the Respondent with its Answer. Therefore, such request is moot.

3) <u>The TMS instructions and dates for the transfers of B. and A.</u>: Such documents have been already filed by the Respondent with its Answer. Therefore, such request is moot.

4) <u>Expert Report</u>: The Appellant is advised that it is the Parties' sole responsibility to produce evidence, including expert reports, that they intend to rely. The Appellant had full opportunity to request and obtain the production of an expert report from CIES or any other entity at the relevant time without the intervention of the CAS. In this regard, the Appellant is advised that pursuant to Article 8 of the Swiss Civil Code, « Chaque partie doit, si la loi ne prescrit le contraire, prouver les faits qu'elle allègue pour en déduire son droit ».

In light of the above, the Appellant's alleged limitation of its right to be heard is rejected.

For the sake of completeness, the Appellant is advised that CIES is not a party to this procedure. Consequently, the CAS has not authority to order CIES to produce an expert report.

*Notwithstanding the above, if the Appellant deems it pertinent to file an expert report from CIES or any other entity regarding the market value of the relevant players, it is requested to do so together with its comments on such report by <u>**14 April 2021**</u>. Upon receipt of such expert report, a 14-day deadline will be granted to the Respondent to file its comments on such report".*

29. On 31 March 2021, the CAS Court Office to the Parties the Order of Procedure, which was duly signed by the Parties.

30. On 16 April 2021, the Appellant submitted the expert report of Mr. Rafaelle Poli which was forwarded to the Respondent.

31. On 16 April 2021, the Respondent requested the Sole Arbitrator to order the Appellant to comment on the expert report of Mr. Poli.

32. On 19 April 2021, the CAS Court office informed the Parties that the Sole Arbitrator noted that the Appellant chose not to file any comment on the Expert Report. Therefore, the Sole Arbitrator did not consider necessary to order the Appellant to do so. The Respondent, in turn, had also the opportunity to file its comments on the Expert Report filed by the Appellant if it deems it convenient within the time limit granted by the CAS (i.e. 30 April 2021).

33. On 29 April 2021, the Respondent submitted its comments to the expert report provided by the Appellant and submitted the expert report of Mr. Omar Ongaro.

34. On 30 April 2021, the CAS Court Office forwarded the expert report off Mr. Omar Ongaro to the Appellant and informed the Parties that the Sole Arbitrator would hear the testimony of both experts at the hearing.

35. On 5 May 2021 the hearing of the present case was held by videoconference. In addition to the Sole Arbitrator and Mr. Antonio de Quesada, CAS Head of Arbitration, the following persons attended the hearing:

For the Appellant:	Mr. Ariel N. Reck (Legal counsel). Mr. Julián Tanus Mafud (Legal counsel). Mr. Martín Montoya (In-house lawyer). Mr. Rafaelle Poli (Expert).
For the Respondent:	Mr. Paolo Lombardi (Legal counsel). Mr. Luca Pastore (Legal Counsel). Mr. Ian Laing (Legal counsel). Mr. Daniele Muscara (In-house legal counsel). Mr. Lorenzo Vitali (In-house legal counsel). Mr. Omar Ongaro (Expert).

36. At the outset of the hearing, the Appellant informed that it had decided to withdraw one of the evidentiary measures requested in its Appeal Brief, i.e., the cross examination of the witness Z., father and advisor of the Player. The Sole Arbitrator asked the Parties whether or not they were willing to reach an agreement in this dispute. The Parties, after having considered the matter, informed the Sole Arbitrator that they did not reach an agreement. During the hearing, the Parties had the opportunity to present their case, to submit their arguments and submit their final pleadings. At the end of the hearing the Parties expressly declared that they did not have any objections with respect to the procedure and that their right to be heard had been fully respected.

V. SUBMISSIONS OF THE PARTIES

37. The following outline of the parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the parties. The Sole Arbitrator, however, has carefully considered all the submissions made by the parties, even if no explicit reference has been made in what immediately follows. The parties' written submissions, their verbal submissions at the hearing and the contents of the Appealed Decision were all taken into consideration.

A. The Appellant

38. The Appellant filed the following prayers for relief:

1.- To entirely revoke the FIFA PSC decision in the present case.

2.- To condemn AS Roma to pay CANOB an amount of Euro 2.360.000.- as compensation for damages (sell on fee and penalties) or the amount it considers appropriate as provided for in art.42.2 of the Swiss CO. All with interests at a 1% monthly annual rate since the date of the player's transfer June 16, 2019.

3.- To order the respondent to pay all costs and expenses relating to the CAS arbitration proceedings and a contribution towards the legal fees and other expenses incurred by this party, estimated in CHF 20.000.-

39. The Appellant's submissions, in essence, may be summarized as follows:

- The decision issued by FIFA PSC did not contain anything about the applicable standard of proof. The applicable standard shall be the "balance of probabilities", which arises when a party faces serious difficulty in discharging its burden of proof.

- In relation to the ordinary course of events, CANOB argued that FIFA had applied the incorrect standard of proof. They also asked CAS to delve further and analyze the real will of the parties at the time of signing the agreement.

- The most plausible situation in the present case is that, taken into account that there is a sell-on fee agreed between CANOB and AS Roma in favour of CANOB, AS Roma had inflated the transfer fee of B. and decreased the transfer fee of A. to Spartak.

- In relation to the simulation, the arguments provided by FIFA PSC ignored the nature of the simulation, in which two parties agree that, through their statements and actions, the true will at the time of closing a deal is not transmitted.

- The existence of two separate contracts does not exclude the possibility of the existence of a simulation.

- CANOB alleges that there are more than enough elements to confirm the alleged simulation and the intention to reduce CANOB sell-on fee over A.

- CANOB wondered how B., who had not been fielded by AS Roma's first team in any matches, could have the same value as A. Moreover, the goalkeeper was reportedly earning a EUR 3,000 monthly salary and the length of his contract was two more years. CANOB strongly believed that all these facts nurtured the possible conspiracy theory aforementioned.

- In relation to the time of the transfers, CANOB argued that even accepting the dates stated on the documents, the difference between both contracts was highly suspicious and short, (around four or five days). This small gap showed that both transfers were carried out simultaneously and did not prove a clear independence between the transactions.

- Moreover, in relation to the assertion done by AS Roma and the risk taken, A. was registered for Spartak on 4 July 2019; that is, right after both transfer contracts were signed. This meant that ultimately there was no risk for Spartak changing its mind.

- With regard to the financial aspects of the deals, CANOB pointed out that the choice of B. was not a coincidence. The goalkeeper, who was a product of AS Roma's youth division, had no value to amortize and could only provide a benefit to AS Roma's financial books.

- CANOB also mentioned that there were too many coincidences in relation to the payment schedule and amounts.

- The sell-on fee of the Spartak transfer agreement was calculated over EUR 6,000,000 without any condition, instead of EUR 3,000,000, which could have led to thinking his hidden and truest value had always been EUR 6,000,000.

- CANOB argued that AS Roma inserted a specific clause (para. 3 of the clause 3.2 of the Spartak Transfer Agreement) to protect itself and its sell-on fee from the same fraud it was perpetrating against CANOB.

- Finally, it was also alleged that AS Roma had violated the duty of loyalty and the principle *pacta sunt servanda*.

- CANOB referred to the cases CAS 2013/A/3379 and CAS 2018/A/5809 (both related to sell-on fee clauses), in which FIFA decided in one manner and CAS revoked the decision.

- CANOB concluded that despite the transfer of B. did not violate any formal rule, its sole purpose was to conceal the real value of the transfer of A. and hence to reduce the sell-on fee CANOB was entitled to receive.

- Finally, CANOB weighed how different the transfer deal would have been if B.'s transfer had not been concluded at a similar time. The consequences would have been the following:

  a. The financial statements for AS Roma remained the same;

  b. Roma transferred a player that was not playing for the club. Hence, no loss of services was suffered;

  c. Spartak paid EUR 6,000,000 as fixed and EUR 3,000,000 as conditional fees. Since B. was trained by AS Roma, no additional solidarity payments were due;

  d. Had AS Roma received the entire EUR 6,000,000 fixed fee for A., then the amount to be paid to CANOB would have been EUIR 2,400,000, and the benefit for AS Roma smaller, i.e. EUR 3,600,000. By receiving EUR 3,000,000 for A. (paying only EUR 1,200,000 as sell-on fee) and EUR 3,000,000 for B., the financial gain for AS Roma was higher, EUR 4,800,000.

  e. Hence, Spartak had no risk in participating in the move, and Spartak had an economic incentive to participate in the simulation since the solidarity contribution was lower.

B. The Respondent

40. The Respondent filed the following prayers for relief:

a) REJECTING the Appellant's requests in their entirety;

b) CONFIRMING the FIFA Decision;

c) ORDERING the Appellant to cover all procedural costs related to these proceedings;

d) ORDERING the Appellant to cover the Respondent's legal costs related to these proceedings, in the highest amount that is deemed appropriate.

41. The Respondent's submissions, in essence, may be summarized as follows:

- In relation to the burden of proof, AS Roma alleged that *"an appellant bears the burden to prove each and every element of its claim"*. Each party has to substantiate and prove the facts on which it relies to support its claim. This is confirmed by CAS jurisprudence: *"(…) In other words, the party which asserts facts to support its rights has the burden of establishing them"*.

- In relation to the test of the balance of probability, AS Roma stated that *"it requires the satisfaction of the lowest possible threshold applicable before a court. (…) Even if the lowest standard of the balance of probability were to be applied in these proceedings, CANOB has openly failed to prove any of its allegations put forward"*. They consider that CANOB has not established:

  a. the existence of a link between the transfer of A. and the transfer of B.; and

  b. the existence of a common plan among AS Roma, Spartak, A. and B. to defraud CANOB.

- AS Roma asserted that the fact that CANOB requires cooperation from AS Roma explains the lack of evidence upon which CANOB based its claim and only proves CANOB's bad faith.

- FIFA TMS Department requested some clarifications from AS Roma and Spartak, and these explanations were given. As a result, not only FIFA PSC but also FIFA TMS found no wrongdoing on the part of AS Roma.

- Regarding to the non-existence of the simulation alleged by CANOB, AS Roma asserted that *"not only no simulation ever exists in the present matter but, what is more, no simulation was ever needed given that the transfer fee agreed for A. was fair and proportionate to A.'s market value, and therefore there was no reason to surreptitiously inflate the transfer fee for B."*.

- AS Roma based its assertion related to the transfer fee of A. in the following points:

a. Any amount agreed as compensation for the transfer of a player must be considered in the calculation of a "transfer amount".

b. The conditions related to the variable EUR 3,000,000 are really feasible as long as these conditions should be fulfilled in the entire contract of A. with Spartak, not only for a single season.

c. AS Roma and Spartak gave A. a value much higher than EUR 3,000,000 by including an additional EUR 3,000,000 as contingent payments and a 20% of sell-on fee.

d. With regard to the following CANOB's argument: *"CAS jurisprudence has held that a valid method to determine the value of a player where no transfer fee exists is to compare the amount previously paid for that player"*, such criterion only applies in very specific scenarios.

e. In relation to the economic argument raised by CANOB in para. 82.c of its Appeal Brief, AS Roma asserted that the percentage included in the transfer agreement is a sell-on fee clause; this does not mean that CANOB still holds the 40% of the economic rights of A.

f. A. does not gather the expected footballing conditions, taking into account his career thus far. Proof is that none of the clubs in which he was on loan decided to execute the permanent transfer option.

g. AS Roma asserted that the amounts negotiated in the past with Granada CF, LOSC Lille and AEK Athens did not play a role in the transfer of A. to Spartak. It was mainly based on the remaining duration of the contract of A. with AS Roma.

h. In case that AS Roma accepts a subjective and arbitrary valuation of players, the only possible value of a player is the one paid for their transfer *i.e.* the transfer fee paid by Spartak to AS Roma.

i. In connection with the contract length argument raised by CANOB in its Appeal Brief, AS Roma asserted that there was only a year left. This leads to the Bosman Ruling: depreciation of the value of a player as his contract progresses without being renewed - the value a club places on a player is intrinsically linked to the contract length, with the value decreasing to nil as the contract expires.

j. AS Roma has the opinion that, pursuant Article 18.3 FIFA RSTP, *"a player's value may have been decreased to nil six months prior to the expiry of his contract"*. An example was the player Christian Eriksen, who was transferred to FC Internazionale with a transfer fee much lower than his real market value because he was being transferred six months before the expiry of his contract with Tottenham Hotspur FC.

k. According to the accounting books of AS Roma, the value of A. at the time of the transfer to Spartak was EUR 1,510,000, so they saw a window to make a profit of EUR 1,490,000 for AS Roma.

- With regard to the transfer fee of B., AS Roma stated the following:

    a. CANOB has no interest whatsoever in relation to this transfer.

    b. In the Appealed Decision, the Single Judge decided that there was no connection between the transfer of A. and the transfer of B.

    c. AS Roma is not obliged to give CANOB any explanation whatsoever in relation to its transfer policy concerning other players.

    d. CANOB is only relying on the last sports season of B., but he is a very talented goalkeeper. Also, the UEFA Home Grown Player Rule increases the value of a football player.

    e. CANOB contradicts itself by using Transfermarkt as a source to calculate the market value of a player. On one hand, the market value of A. registered by the website has never been higher than EUR 4,300,000 and CANOB demands a higher amount. On the other hand, CANOB used the market value of B. in Transfermarkt to discredit the potential of the Italian player.

    f. Also, AS Roma mentioned the risk taken by them; Spartak could have perfectly changed its mind with regards to the agreement of A. prior to B.'s transfer.

    g. With regard to the salary of B. with Spartak, AS Roma has never been a part of this negotiation.

- As to the time of the transfers, AS Roma asserted the following:

    a. It is not necessary to upload a transfer agreement to FIFA TMS in order to make it valid and binding to the parties.

    b. FIFA Dispute Resolution Chamber jurisprudence: *"The validity of a contract or of an amendment to a contract cannot be made conditional upon the execution of '(administrative) formalities, such as, but not limited to, the registration procedure"*.

    c. The TMS dates are irrelevant as long as the agreement between Spartak and AS Roma related to the transfer of A. entered into force on 16 June 2019.

- As to the financial aspect of the deal, AS Roma admitted that, with the transfer of B. to Spartak, AS Roma obtained an economic profit. That is the reason why they chose a "UEFA Home Grown Player".

- Also, AS Roma alleged that *"As is common practice in the football industry, the payment schedules agreed between clubs usually follow criteria connected to cash flow and accountancy requirements. It is therefore not surprising at all that both transfers present similar payment schedules"*.

- In relation to the provision of the sell-on fee in the Spartak Agreement, AS Roma alleged that, given the probability that the conditions are met, it is logical the inclusion of that self-protection provision in the sell-on fee clause.

- As to the role of Spartak and B. in the alleged simulation, AS Roma pleaded that, if there was a simulation in this case, there would be other parties involved and potentially involved. CANOB does not explain in its Appeal Brief why Spartak, A. and B. would have accepted to be a part of a simulation.

- As to the damages calculated by CANOB, they use the Transfermarkt value for valuing B., but not for A., whose market value has never been higher than EUR 4,300,000.

- With regard to the application of Clause 9.2 of the transfer agreement of A. signed between CANOB and AS Roma, the Respondent argued that "Players' Status Committee has previously held that *"penalty clauses may be freely entered into by the contractual parties and may be considered acceptable, in the event that the pertinent written clause meets certain criteria such as proportionality and reasonableness"*. AS Roma said that the relevant penalty can be reduced by the Court in cases of disproportionality, which is the present case.

VI. JURISDICTION

42. Article R47 of the Code provides as follows:

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

43. Article 58.1 of the FIFA Statutes provides that:

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

44. The jurisdiction of the CAS is based on the abovementioned provisions. In addition, the Parties confirmed the jurisdiction of the CAS by signing the Order of Procedure.

45. The Sole Arbitrator, therefore, is satisfied that it has jurisdiction over this dispute.

VII. ADMISSIBILITY

46. Article R49 of the Code provides as follows:

In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.

47. It is undisputed that the appeal was filed within the 21 days set by Article 58(1) of the FIFA Statutes. The appeal complied with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fee.

48. It follows that the appeal is admissible.

VIII. APPLICABLE LAW

49. Article R58 of the Code provides as follows:

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

50. The Sole Arbitrator therefore finds that the relevant FIFA rules and regulations, and more specifically the FIFA Regulations on the Status and Transfer of Players (the "FIFA RSTP"), as in force at the relevant time of the dispute, shall be applied primarily, and Swiss law shall be applied subsidiarily.

IX. MERITS

A. Did AS Roma hide from CANOB the real full value of A.'s transfer from AS Roma to Spartak?

51. Regarding to this question, Appellant's submission is that the transfer fee provided in the Spartak Transfer Agreement is not, and cannot be, the real full amount paid by Spartak to AS Roma for the transfer of A.; i.e. the transfer of B. was prepared in parallel with the Spartak Transfer Agreement for the purpose of AS Roma's circumventing the obligation of paying the sell-on fee contained in the transfer agreement concluded between CANOB and AS Roma, which constitutes a contractual simulation. Thus, in the aggregate, Spartak actually paid at least EUR 6,000,000 for the transfer of A.

52. Article 18 par. 1 Swiss Code of Obligations (hereinafter "SCO") provides as follows:

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.

53. As it was stated in CAS 2014/A/3508, in accordance with Article 18 par. 1 SCO, the judge or the arbitrator interpreting a contract governed by Swiss law must go beyond the mere terms of the contract in order to determine the real and common intention of the parties (Decision of the Swiss Federal Tribunal dated 20 August 2012, 4A_240/2012, published in: 31 ASA Bull. 100 (2013); ATF 131 III 288, para. 3.1).

54. According to the Swiss Federal Tribunal's long-standing case law, a simulated act is defined as follows (see for instance Decision of the Swiss Federal Tribunal dated 2 November 2012, in: SJ 2013 I p. 286):

On parle d'acte simulé au sens de l'art. 18 CO lorsque les deux parties sont d'accord que les effets juridiques correspondant au sens objectif de leur déclaration ne doivent pas se produire et qu'elles n'ont voulu créer que l'apparence d'un acte juridique à l'égard des tiers (ATF 123 IV 61 c. 5c/cc p. 68; 112 II 337 c. 4a p. 343; 97 II 201 c. 5 p. 207 et les arrêts cités).

English (free translation):

Within the meaning of art. 18 SCO, a simulation exists when both parties agree that the legal effects corresponding to the objective meaning of their statement must not occur and that they only wanted to create the appearance of a legal act towards third parties (ATF 123 IV 61 c. 5c/cc p. 68; 112 II 337 c. 4a p. 343; 97 II 201 c. 5 p. 207 and the other quoted decisions).

55. When the parties have feigned to conclude a contract ("the simulated act") in order to conceal the existence of another ("the concealed act"), the situation is the following (TERCIER P., op. cit., N 589, p. 133):

- the simulated act is without effect;

- by contrast, the concealed act is valid (provided that it satisfies the conditions of validity).

56. The Appellant has supported its position with indirect (circumstantial) evidence to the effect that (i) the Spartak transfer fee may well have been low or very low in relation to the true or market value of A. at the time and (ii) the B. transfer fee may well have been high or very high in relation to the true or market value of B. at the time, and thus (iii) according to the Appellant, the only reasonable explanation for the above is that AS Roma entered into two different agreements with Spartak, one inflated and one reduced in its real market value, in order to circumvent the payment to CANOB of the sell-on fee for A.

a. The applicable standard of proof

57. Whether the standard of proof is a question related to procedure or to the merits is – since the entry into force of the new Swiss Code of Civil Procedure ("CCP") in 2011 – disputed in

the legal literature (KuKo-ZPO/SCHMID, 2nd ed. 2014, Vor Art. 150-193 no. 16). However, the question can be left unanswered here. In case the standard of proof is considered as a question related to the merits, Swiss law would apply, since the latter is applicable subsidiarily. If, on the contrary, the standard of proof were a question of procedure, then the Sole Arbitrator would have – primarily – to refer to the procedural provisions agreed upon by the Parties. However, the CAS Code is silent on what standard of proof to apply to CAS proceedings. Consequently, article 182 (2) of the Private International Law Act ("PILA") provides that – in the absence of an agreement by the Parties – the Panel shall fix the procedure as necessary, either directly or by reference to a law or rules of arbitration. It is, thus, up to the Sole Arbitrator to decide what procedural principles shall be applied to the present matter. The Sole Arbitrator's discretion is only limited by article 182(3) of the PILA according to which it – in any event – must accord equal treatment to the Parties and respect their right to be heard as well as the right to an adversarial proceeding. In case the question of the standard of proof were to be considered a procedural matter, the Sole Arbitrator deems it appropriate to be guided by the principles applicable before Swiss state courts. Consequently, irrespective of whether the standard of proof is considered a procedural or a substantive matter, Swiss law applies.

58. The Sole Arbitrator observes that CAS jurisprudence is inconsistent in its approach with respect to the standard of proof applicable in civil cases according to Swiss law. On the one hand, it is held that *"[u]nder Swiss law, the standard of proof normally applied to a civil claim is whether the alleged facts have been established beyond reasonable doubt, thereby leading to the judges' conviction that the claim is well founded"* (CAS 2006/A/1130). In other cases, CAS jurisprudence referred to the applicable standard of proof in civil law cases under Swiss law as "balance of probability" (e.g. CAS 2011/A/2426, no. 88, with references to CAS 2010/A/2172, no. 53; CAS 2009/A/1920, no. 85). However, when consulting the legal literature and the jurisprudence, it is rather obvious that the applicable standard of proof in civil cases under Swiss law is "beyond reasonable doubt" (SFT 132 III 715, E. 3.1; KuKo-ZPO/SCHMID, 2nd ed. 2014, Vor Art. 150-193 no. 13; BK-ZPO/BRÖNNIMANN, 2012, Art. 157 no. 40; DIKE-ZPO/LEU, 2nd ed. 2016, Art. 157 no. 60 et seq.).

59. This being said, the Sole Arbitrator also notes that Swiss law is not blind *vis-à-vis* difficulties of the parties when discharging their burden of proof (*"Beweisnot"*). Accordingly, Swiss law provides a number of tools in order to ease the – sometimes difficult – burden put on a party to prove certain facts. These tools range from a duty of the other party to cooperate in the process of fact finding (cf. CAS 2011/A/2384 & 2386, no. 255 *et seq.*), to a shifting of the burden of proof or to a reduction of the applicable standard of proof. The latter is, *e.g.*, the case if – from an objective standpoint – a party has no access to direct evidence (but only to circumstantial evidence) in order to prove a specific fact (SFT 132 III 715, E. 3.1; BK-ZPO/BRÖNNIMANN, 2012, Art. 157 no. 41; DIKE-ZPO/LEU, 2nd. ed. 2016, Art. 157 no. 60; BSK-ZPO/GUYAN, 2nd ed. 2013, Art. 157 no. 11). In such cases, the applicable standard is lower. The required threshold of conviction is reached in these cases if the Panel deems a fact to be so likely to have occurred that the occurrence of all other alternative courses of events cannot sensibly be accepted (KuKo-ZPO/SCHMID, 2nd ed. 2014, Vor Art. 150-193 no. 13; DIKE-ZPO/LEU, 2nd. ed. 2016, Art. 157 no. 71: *"für die Verwirklichung anderer Sachverhaltsversionen kein ernst zunehmender Raum verbleibt"*).

60. In the case at hand, the Sole Arbitrator acknowledges that there is only circumstantial evidence available to the Appellant to prove the facts it relies upon, *i.e.* that the A. Transfer Agreement between AS ROMA and Spartak as well as the B. Transfer Agreement are sham contracts to the extent they conceal the true transfer fee for A. In view of these evidentiary difficulties, the Sole Arbitrator is prepared to apply this (lower) standard of proof in the case at hand.

b. The application of the above standard of proof to the case at hand

61. The Appellant argues that the following elements confirm the alleged simulation:

   a. A.'s transfer value;

   b. B.'s transfer value;

   c. The time of both transfers;

   d. The financial aspect of the deals; and

   e. The ordinary course of events.

62. The Sole Arbitrator notes that the evidentiary efforts carried out by the Parties were focused on demonstrating (i) the market value of A. (higher for the Appellant and accurate for the Respondent) and (ii) to a lower extent the market value of B. (lower for the Appellant and accurate for the Respondent).

63. As to the market value of A., the Parties have provided the expert reports of Mr. Poli (the Appellant) and Mr. Ongaro (the Respondent), both of whom are recognised experts in the field of the football player's transfer market.

64. The expert report of Mr. Poli develops a statistical approach from a scientific perspective and the methodology used is econometric modelling. It concludes that the fair transfer value of A. is EUR 8,100,000.

65. On the other hand, the expert report of Mr. Ongaro states that it does not exist an objective market value for a player and it cannot be quantified and determined by means of a mathematical formula. The report concludes that the transfer fee agreed between AS Roma and Spartak cannot be considered disproportionately low or inadequate.

66. The sole arbitrator considers that both reports are valid insofar as they produce an objective analysis of the market value of A., albeit from different premises, which means that the conclusions reached are of a different nature.

67. As far as the valuation of A. is concerned, the Sole Arbitrator cannot determine which the market value of the player's transfer should be, since this assessment is affected by different statistical or numerical factors (as stated in Mr. Poli's report) and by the singular nature of the football transfer market (as highlighted in Mr. Ongaro's report).

68. At this point, the Sole Arbitrator considers it is important to pay attention to the Respondent's actions regarding the valuation of A. prior to his transfer to Spartak and, specifically, the value given by AS Roma to the Player.

69. In the 2018/2019 season A. was transferred on loan to AEK. The transfer contract recognised a purchase option in favour of AEK set at EUR 7,000,000 plus a 15% sell on fee of the future transfer of the Player to a third club or EUR 6,000,000 plus a 30% sell on fee of the future transfer of the Player to a third club. This is the valuation made by AS Roma after two seasons in which A. played on loan with Granada CF (2016/2017 season) and OSC Lille (2017/2018 season).

70. It is incontrovertible that the 2018/2019 season was the season in which A. offered his best sporting performance, in which he accredited his best numbers, suggesting that, *prima facie*, his market value could have increased. It is irrelevant, in view of the Sole Arbitrator, the fact that AEK did not exercise the purchase option over A. since this could be due to multiple reasons and no evidence was provided in this regard.

71. On the other hand, the 2019/2020 season was the final season of the A.-AS Roma employment contract what implies that the market value of the Player could have decreased and that it could be a proper time for AS Roma to transfer the player.

72. Taking into consideration both conditions, i.e. the outstanding performance of the Player in the previous season that would increase the market value and the remaining duration of the employment contract (one season) that would decrease the market value, the Sole Arbitrator is of the opinion that the transfer fee agreed between AS Roma and Spartak, i.e. a fixed price of EUR 3,000,000 and a conditional and therefore uncertain variable price of a maximum of EUR 3,000,000 is lower than the real market value of A. Moreover, during the hearing, the Respondent confirmed that at the time of the hearing, i.e. almost two years after the transfer of A., only EUR 1,000,000 had been accrued as conditional payments.

73. The above does not, individually, imply the existence of a contractual simulation. For this purpose, it is necessary to analyse the events contemporaneous with and subsequent to the transfer of A., such as, in the present case, the transfer of B. and the employment contracts signed between the two players and Spartak.

74. B.'s transfer to Spartak is valued at EUR 3,000,000, payable in two instalments almost the same as those established in A.'s transfer (EUR 2,000,000 on receipt of the ITC and EUR 1,000,000 in June 2020). It is clear from the evidence that the current value of the player in view of his sporting career was significantly lower than EUR 3,000,000, although the arguments put forward by AS Roma that he is a very talented goalkeeper and that the UEFA Home Grown Player Rule increases the value of a football player cannot be discarded.

75. Both arguments are admissible in the context of the football transfer market and the autonomy of clubs to freely conclude agreements and that the signing of B. would be an investment in the future by Spartak.

76. However, the practice, i.e. the course of events, reveals exactly the opposite. An analysis of the employment contract signed between B. and Spartak shows that (i) he was registered to play for the club's "2" team, (ii) his salary amounted to EUR 3,000 per month, (iii) no bonus of any kind was recognised and, (iv) he was signed on a two seasons contract. That is the valuation that Spartak gave B., which is far from that of a player for whom a transfer fee of EUR 3,000,000 is paid and which is also far from the valuation of a player in whom a significant initial investment is made because of his future prospects. Moreover, at the end of the 2020/2021 season, B. was registered with US Catanzaro[1], an Italian "Serie C" club.

77. It is, in the Sole Arbitrator's opinion, totally contradictory that two players for whom the same fixed transfer fee is paid, are valued so differently by the acquiring club and demonstrate that Spartak had a real interest in signing A., but not in signing B. On this point it is appropriate, as illustrative, to reproduce the table contained in paragraph 54 of the Appealed Decision:

	B.	**A.**
Position	Goalkeeper	Striker
Background	Italian Serie C	Greek Superleague 1
Appearances	Few	Several
Current team	Spartak 2	Spartak 1
Monthly salary	EUR 3,000	EUR 71,389
Guaranteed bonus	None	EUR 574,712
Conditional bonuses	None	Yes
Contract duration	2019-2021	2019-2024
Previous transfer remarks	None	Option to buy in 2018

78. All of the above, together with the other indirect evidence in the present case, such as the coincidence in the timing of the two agreements (June 16 and 20, 2019) and the payment deadlines (a few days after the issuance of the ITC and June 2020 in both cases), lead to the conclusion that there was a contractual simulation with the purpose of concealing the real transfer value of A.

[1] https://www.uscatanzaro.net/team/us-catanzaro/

B. The financial consequences of the simulation

79. The Appellant rates the real transfer of A. and B. as follows:

- A.:
    - EUR 5,950,000 as the fixed transfer fee, instead of EUR 3,000,000 of the transfer contract.
    - A maximum of EUR 3,000,000 as variable fee.
- B.:
    - EUR 50,000, instead of EUR 3,000,000 of the transfer contract. The Appellant relies on the figures offered by the "Transfermarkt" web site.

80. Consequently, the Appellant requests the payment of EUR 2,360,000 plus an interest rate at a 1% monthly annual rate since the date of the player's transfer June 16, 2019, in accordance with the following breakdown:

- EUR 1,180,000, i.e., 40% of EUR 2,950,000, as the sell-on fee that has not been paid by AS Roma to CANOB.
- EUR 1,180,000, as the penalty clause set out in Clause 9.2 that establishes that in case AS Roma failed to pay the sell-on fee, a penalty clause amounting the double of the amount CANOB is entitled to receive as a consequence of the future transfer.

81. In a subsidiary manner, the Appellant requests that in the event that the market value of both players might be difficult to assess, pursuant Article 42.2 of the Swiss Code of Obligations (SCO), the Sole Arbitrator is allowed estimate the value of the loss or damage at its discretion. This is in fact, the case at hand.

82. As stated above in paragraph 70 the Sole Arbitrator cannot assess the exact real market value of A. and neither can do with the market value of B., as several factors, all of them hard to quantify, concur in the assessment of a football player. The main proof of this assertion is the fact that two reputed experts as Mr. Poli and Mr. Ongaro could not agree on the market value of A. This premise directs the Sole Arbitrator to calculate the compensation due to CANOB on the rules of equity and on the ordinary course of events.

83. Article 42.2 of the SCO states as follows:

"Where the exact value of the loss or damage cannot be quantified, the court shall estimate the value at its discretion in the light of the normal course of events and the steps taken by the injured party" [English translation of the official text of the Swiss Code of Obligations by the Swiss American Chamber of Commerce, Zurich 2005].

84. Article 42.2 of the SCO has been interpreted by CAS. For instance, in CAS 2009/A/1756, the Panel stated in paragraph 25 of the public version available in the CAS web site:

"25. Art. 42 para. 2 CO is an exception to the general principle that whoever claims damages must prove the damage, which results from the above mentioned Art. 8 CC and from Art. 42 para. 1 CO. When it is very difficult, if not impossible, to bring a strict evidence of the damage, Art. 42 para. 2 CO intends to mitigate the burden of proof. The claiming party is not freed from the obligation of submitting and evidencing the relevant facts but such obligation is limited to the allegation of all the circumstances indicating the existence of a damage (see WERRO F., in: THÉVENOZ/WERRO (eds), Commentaire romand du Code des obligations, No. 29 ad art. 42). According to the case law of the Swiss Supreme Court, the exception of Art. 42 para. 2 CO applies not only for tort claims, but also for contractual claims (see for instance ATF 122 III 61, concerning a dispute based on a construction contract)".

85. In the case at hand, the Sole Arbitrator considers that that Article 42.2 of the SCO is to be applied and that it has to apply his discretion to the assessment of the value of A. in June 2019 and, in turn, to the assessment of any damages and penalties resulting from the simulation.

86. The Appellant submits that the real fixed transfer fee paid by Spartak to AS Roma amounts EUR 5,950,000. This conclusion is reached by adding the fixed transfer fees of A. and B. (EUR 3,000,000 each) and subtracting the real market value of B. (EUR 50,000) provided for in Transfermarkt web site.

87. The Sole Arbitrator notes that despite the fact that Transfermarkt is not an official source of information, the real valuation of B. offered by this web site is more accurate that the one given in the transfer contract. The Sole Arbitrator also notes that this has been the only evidence produced in relation to the market value of B.

88. As regards to the calculation of the market value of A., the Sole Arbitrator is of the opinion that the following circumstances need to be taken into account:

- The purchase option recognised in favour of AEK in July 2018, i.e., EUR 7,000,000 plus a 15% sell on fee of the future transfer of the Player to a third club or EUR 6,000,000 plus a 30% sell on fee of the future transfer of the Player to a third club.

- The sporting performance of A. in the previous season (2018/2019) in which the player made 41 appearances (most of them from the starting eleven) and scored 21 goals in all competitions, including the UEFA Champions League.

- The fact that the 2019/2020 season was the final season of the player's employment contract with AS Roma.

- The sell-on fee of the Spartak transfer agreement was calculated over EUR 6,000,000 without any condition.

- The employment contract signed between A. and Spartak with a duration of four sporting seasons, a monthly salary of EUR 71,389, a guaranteed bonus of EUR 574,712 and other conditional bonuses.

89. Based on the above-mentioned considerations, the Sole Arbitrator is of the opinion that the real fixed transfer fee paid by Spartak to AS Roma for the transference of A. in June 2019, was over EUR 3,000,000 but under EUR 8,000,000. As a consequence, and applying its discretion as regards this aspect of the case, the Sole Arbitrator considers that the amount of EUR 5,000,000 is to be considered as the basis to calculate compensation due to CANOB.

90. Consequently, it is to be deemed that, in June 2019, A. would have been transferred to Spartak for a fixed amount of EUR 5,000,000 plus a variable fee of a maximum of EUR 3,000,000. Applying Clause 7 (first paragraph) of the player's transfer agreement signed by the Parties on 1 July 2015, the sell-on fee to be paid by AS Roma to CANOB as a result of the transfer of the player to Spartak amounts to EUR 2,000,000 to which must be subtracted the amount of EUR 1,200,000 that already have been paid by AS Roma to CANOB. Hence, the final amount should be EUR 800,000.

C. Conclusion

91. Based on the foregoing, and after taking into due consideration all evidence produced and all arguments made, the Sole Arbitrator finds that the Appellant has a valid claim for the payment by the Respondent of an amount of EUR 800,000, including penalties and damages, in execution of Clause 7 of the transfer agreement signed between the parties on 1 July 2019. The Appeal is therefore partially upheld.

92. The sum to be paid by the Respondent to the Appellant therefore amounts to EUR 800,000 with interests at a 1% monthly rate since the date of the player's transfer, i.e. 16 June 2019 as stipulated in Clause 9.1 of the player's transfer agreement.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Club Atlético Newell's Old Boys against the decision rendered by the Players' Status Committee of FIFA on 14 October 2020 is partially upheld.

2. The decision rendered by the Players' Status Committee of FIFA on 14 October 2020 is set aside.

3. Associazione Sportiva Roma is ordered to pay Club Atlético Newell's Old Boys the amount of EUR 800,000 with interests at a 1% monthly rate since 16 June 2019.

4. (…).

5. (…).

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