

**Arbitration CAS 2019/A/6525 Sevilla FC v. AS Nancy Lorraine, award of 14 April 2020**

Panel: Prof. Luigi Fumagalli (Italy), President; Mr Nicholas Stewart QC (United Kingdom); Mr Olivier Carrard (Switzerland)

*Football**Transfer with sell-on clause**Primary goal of interpretation**Definition of sell-on clause**Definition of transfer**Transfers occurring inside a contractual scheme**Transfers occurring outside a contractual scheme**Scope of a sell-on clause referring in general terms to the “transfer” of a player*

- 1. The interpretation of a contract in accordance with Article 18 of the Swiss Code of Obligations aims at assessing the intention the parties had when they concluded the contract. The primary goal of interpretation is to ascertain the true common intention (consensus) of the parties. Where a factual consensus cannot be proven, the declarations of the parties must be interpreted pursuant to the principle of good faith in the sense in which they could and should have been understood, taking into account the wording, the context as well as all circumstances.**
- 2. The purpose of a sell-on clause is to “protect” a club (the “old club”) transferring a player to another club (the “new club”) against an unexpected increase, after the transfer, in the market value of the player’s services; therefore, the old club receives an additional payment in the event the player is “sold” from the new club to a third club for an amount higher than that one paid by the new club to the old club. In other words, the new club agrees to share with the old club a portion of any profit made by the new club in connection with a player’s movement. In transfer contracts, for that reason, a sell-on clause is combined with the provision defining the transfer fee: overall, the parties divide the consideration to be paid by the new club in two components, *i.e.* a fixed amount, payable upon the transfer of the player to the new club, and a variable, notional amount, payable to the old club in the event of a subsequent “sale” of the player from the new club to a third club.**
- 3. In the world of professional football a “transfer” of a player means in general terms a change of “registration” of a player or for a professional player it means a “change of employer”. A player, registered to play for a club, becomes eligible to play for a different club, or, when employed with a club, becomes an employee of another club. In that regard, therefore, a “transfer” can be equated to a “movement” in the registration/employment relation.**

4. A transfer can be the object and the purpose of the parties' agreement. In that case, it can actually be made in two ways: (i) by way of assignment of the employment contract; and (ii) by way of termination of the employment agreement with the old club and signature of a new employment agreement with the new club. In both cases, the old club expresses its agreement (to the assignment or to the termination of the old employment contract, as the case may be) against the receipt of a payment – which compensates for the loss of the player's services; the new club accepts the assignment of the existing employment contract or consents to enter into a new contract with the player; and the player consents to move to the new club.
5. The transfer of a player can also take place outside the scheme of a contract between the old and the new club, in the event that the player moves from a club to another following the termination of the old employment agreement as a result of (i) its expiration or (ii) its breach. In both cases, the transfer of the player from one club to another takes place without (or even against) the consent of his old club. Therefore, it takes place without a contract, because there is no contract in a situation in which there is no obligation freely assumed by one party towards the other. In the second case (transfer following a breach), an amount is due to the old club, but cannot be defined as a price paid as a consideration for the consent to the transfer, since it is of a different character and title: it is compensation for the damage caused by the breach.
6. The general purpose of a sell-on clause is to allow the old club to share the benefit of a subsequent transfer. In the absence of specific limitations, it applies to all cases where the intended purpose can be achieved. The wording of a sell-on clause whose triggering element is not specifically a "resale", but in general terms a "transfer", is wide enough to cover every kind of transfer, both in a contractual and non-contractual framework, for which the new club is to receive a payment, whatever label is put upon it.

## **1. BACKGROUND**

### **1.1 The Parties**

1. Sevilla FC ("Sevilla" or the "Appellant") is a Spanish football club affiliated to the Real Federación Española de Fútbol (the "RFEF"), which is the national football association for Spain. The RFEF, in turn, is affiliated to the Fédération Internationale de Football Association ("FIFA"), the world governing body of football.
2. AS Nancy Lorraine ("Nancy" or the "Respondent") is a French football club affiliated to the Fédération Française de Football (the "FFF"), which is also a member of FIFA.

### **1.2 The Dispute between the Parties**

3. Below is a summary of the main relevant facts, as submitted by the Parties in their written

pleadings and adduced at the hearing. Additional facts may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

4. On 5 January 2017, Nancy and Sevilla signed a transfer agreement (the “Transfer Contract”) providing for the terms and conditions of the transfer of the player C. (the “Player”) from Nancy (therein referred to as “ASNL”) to Sevilla.
5. Article 3 of the Transfer Contract set the financial conditions of said transfer. In particular, its Article 3.1 provided for the obligation of Sevilla to pay Nancy the amount of EUR 5,000,000 (five million Euros) in three instalments.
6. Article 3.2 of the Transfer Contract [“*Payment of an additional compensation*”] (the “Sell-on Clause”) then reads as follows:

*“SEVILLA FC agrees to pay to ASNL an additional transfer compensation as follows:*

*In case a definitive transfer of the player is signed, and the player is transferred from SEVILLA FC to another club, allowing SEVILLA FC to realize a capital gain, 12% of this value will be transferred to the club ASNL.*

*The capital gain must be understood as the difference between the amount received (training compensation included) by the club Seville FC from a third-party club as a result of the player’s definitive transfer to that club and the sum of 5,000,000 € paid by the SEVILLE FC in respect of the ASNL final transfer compensation, to the club SEVILLA FC.*

*For example, in the event of transfer of the player from the SEVILLA FC to a third club for a sum 7,000,000€ (including training compensation), SEVILLA FC would have to pay to ASNL an additional compensation of 12% of 2,000,000€, that’s to say 240,000€”.*

7. On 5 January 2007, Sevilla and the Player concluded an employment agreement valid until 30 June 2021 (the “Employment Agreement”).
8. The Third Clause of the Appendix to the Employment Agreement (the “Buy-out Clause”) stated, for the purposes of the Spanish *Real Decreto 1.006/85, de 26 de junio 1985* (the “Real Decreto”), that in the event of unilateral termination of the Employment Agreement by the Player, the Player would pay Sevilla, as indemnity, the sum of EUR 35,000,000, as increased by an amount corresponding to the consumer price index variation:<sup>1</sup>

*“3.1. - A los efectos contemplados en el Art. 16 del Real Decreto 1.006/85 de 26 de Junio, para el supuesto de rescisión unilateral anticipada del presente contrato antes de la expiración del termino pactado, el jugador*

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<sup>1</sup> *“For the purposes contemplated by art. 16 of Royal Decree 1.006/85 of 26 June, in the event of early unilateral termination of this contract by the player before the expiration of the agreed term, the player will be obliged to compensate [Sevilla] regardless of the season and the time of the same in which it is exercised, with the sum of EUR 35,000,000, updated upward with the increase in the Index of Consumer Prices (or index that will replace it in the future) as a whole national, counted from the first day of the month prior to its breach”* (English translation provided by the Single Judge in the appealed decision).

*vendrá obligado a indemnizar al Sevilla FC, independientemente de la temporada y el momento de la misma en la que lo ejercitase, con la suma de EUR 35,000,000, actualizada al alza con el Incremento de Índice de Precios al Consumo (o índice que le sustituyera en el futuro) en su conjunto nacional, contado desde el primer día del mes anterior a su incumplimiento”.*

9. On 12 July 2018, FC Barcelona (“Barcelona”) deposited, with the consent of the Player, the total amount of EUR 35,910,000 in the account of the Spanish Professional Football League (the *Liga Nacional de Fútbol Profesional*: “La Liga”), to be paid to Sevilla for the purposes of the Buy-out Clause. The Player then joined Barcelona by executing an employment contract with such club.
10. On 13 July 2017, Nancy sent an email to Sevilla inquiring about the financial conditions of the transfer of the Player to Barcelona, in order to “*establish the corresponding invoice*”.
11. On 17 July 2018, Nancy insisted on its request, by making reference to the Sell-on Clause.
12. On 18 July 2018, Sevilla replied to the messages of Nancy, indicating that “*we don’t share the same legal position regarding C.’s move to FC Barcelona*” because:  
  
*“Seville did not transfer the player but he was him that decided to breach the contract and leave Sevilla FC. Our club did not “sign any transfer” or “transferred the player” as mentioned in the contract but rather was deprived of the player. As you know the rescission clause is a penalty one for breach of contract, which includes the sporting loss of a player but definitively is not a transfer.*  
  
*Thus, I must say that we do not consider that the conditions of the contract have been fulfilled and that there is no amount to pay to your club”.*
13. On 30 July 2018 and 21 August 2018, Nancy sent Sevilla formal notices to pay the amount of EUR 3,708,000, granting it 30 days to remedy the alleged default.
14. On 5 November 2018, Nancy filed a claim with the FIFA Players’ Status Committee (the “PSC”) to obtain payment of the additional portion of the transfer compensation in accordance with Article 3.2 of the Transfer Contract, in the total amount of EUR 3,708,000 plus 5% interest *p.a.* as from 8 September 2018, *i.e.* from the “*date of the end of the deadline provided ... in its default letter dated 21 August 2018*”, until the date of effective payment.
15. Sevilla resisted, asserting that Nancy did not have any right to a payment according to the Sell-On Clause. Sevilla argued that no transfer of the Player had taken place, because the Player had merely exercised his unilateral right to an early termination of the Employment Agreement by means of the payment of the compensation provided for in the Buy-out Clause.
16. On 24 July 2019, the Single Judge of the PSC (the “Single Judge”) issued a decision (the “Decision”) on the claim brought by Nancy, as follows:  
  
*“1. The claim of the Claimant, AS Nancy Lorraine, is accepted.*

2. *The Respondent, Sevilla FC, has to pay to the Claimant the total amount of EUR 3,708,000, plus interest at a rate of 5% p.a. on the said amount as of 8 September 2018 until the date of effective payment.*
  3. *The Claimant is directed to inform the Respondent, immediately and directly, of the relevant bank account to which the Respondent must pay the amount mentioned under point 2. above.*
  4. *The Respondent shall provide evidence of payment of the due amount in accordance with point 2. above to FIFA ....*
  5. *In the event that the amount due plus interest in accordance with point 2. above is not paid by the Respondent within 45 days as from the notification by the Claimant of the relevant bank details to the Respondent, the Respondent shall be banned from registering any new players, either nationally or internationally, up until the due amount is paid and for the maximum duration of three entire and consecutive registration periods (cf. art. 24bis of the Regulations on the Status and Transfer of Players).*
  6. *The ban mentioned in point 5. above will be lifted immediately and prior to its complete serving, once the due amount is paid.*
  7. *In the event that the aforementioned sum plus interest is still not paid by the end of the ban of three entire and consecutive registration periods, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.*
  8. *The final costs of the proceedings in the amount of CHF 20,000 are to be paid by the Respondent, within 45 days as of notification of the present decision as follows:*
    - 8.1 *The amount of CHF 15,000 has to be paid by the Respondent to FIFA ...*
    - 8.2 *The amount of CHF 5,000 has to be paid directly to the Claimant.*
  9. *In the event the aforementioned amount of costs is not paid within the stated time limit, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision”.*
17. On 3 October 2019, the grounds of the Decision were issued. They read, in the pertinent portions, as follows:
- “12. *In light of the parties' conflicting position and considering the abovementioned undisputed facts, the Single Judge concluded that the main issue in the matter at stake was to determine whether Barcelona's execution of the payment of the buyout clause contained in the player's employment contract triggered the sell-on clause contained in the transfer agreement between the Claimant and the Respondent.*
  13. *In this respect, the Single Judge noted that the Respondent relied on a specific award rendered by the Court of Arbitration for Sport (CAS) on 29 November 2010, i.e. CAS 2010/A/2098 Sevilla FC v. RC Lens. ...*
  20. *... the Single Judge pointed out that:*
    - (i) *contrary to the CAS 2010/A/2098 case, whereby the underlying sell-on clause explicitly referred to a “resale” of the player, the sell-on clause at the basis of the present dispute solely refers to a “definitive transfer of the player [...] from [the Respondent] to another club, allowing [the Respondent] to realize a capital gain”;*

- (ii) *as pointed out by the Panel in CAS 2010/A/2098 case, a transfer of a player can occur outside the contractual scheme of a sale.*
21. *That having been clarified, the Single Judge was of the opinion that, in order to shed light on the sell-on clause's meaning, he should look at its literal tenor as first means to interpret the parties' real intention. In this respect, he noted that such clause does not seem to explicitly require the contractual scheme of a sale, "resale", or any other determined contractual scheme in order for the 12% sell-on clause to be triggered.*
22. *The clause at stake rather seems to require only that the player is transferred to a third club and that the Respondent makes a 'capital gain' out of the said transfer. It appeared to the Single Judge that both circumstances undisputedly occurred in the case at hand, since:*
- a. *the player was transferred from the Respondent to Barcelona following the payment of EUR 35,910,000 that the former uncontestedly received from the latter;*
- b. *as a consequence, the Respondent made a 'capital gain' of EUR 30,910,000, i.e. a profit net of the amount of EUR 5,000,000 it had originally paid for the player in the context of his transfer from the Claimant on 5 January 2017.*
23. *Moreover, the Single Judge looked at the part of art. 3.2 of the transfer agreement which read that the clause would be triggered "in case of a definitive transfer of the player is signed". In this respect, the Single Judge noted that transfers are not "signed" but rather concluded or executed. Therefore, in the Single Judge's opinion, with regards to this expression, the real intention of the parties could not be other than to subject the operation of the sell-on clause to a transfer of the player being concluded.*
24. *Although confident of the exhaustiveness of the foregoing line of reasoning, for the sake of completeness, the Single Judge deemed it worth to recall, once more, the very purpose of sell-on clauses. In the reality of the transfer market, whereby the value of players undergoes unforeseeable fluctuations, clubs agree to include such clauses in order to 'protect' themselves against an uncertain or hardly predictable significant increase in the value of a player that, at a certain stage, they decide, or have the necessity, to sell to another club.*
25. *Against this background, the Single Judge also recalled that the football market shows that clubs sometimes follow the practice of including buyout clauses in the employment contracts they sign with players.*
26. *In light of the foregoing, the Single Judge was of the opinion that, although in some occasions the inclusion of such buyout clauses in football employment contracts seems to be the direct consequence of a state law provision, the substance of the transaction underneath their execution and the purpose that such clauses serve must be always kept in mind. In this respect, the Single Judge wished to emphasise that the reality and the substance of the transactions should prevail on discussions about forms or schemes of transfers.*
27. *Moreover, the Single Judge thought important to bear in mind that, although formally speaking these buyout clauses seem to require that the player pays the related amount himself, in reality most of the times, if not always, their amount is, as a matter of fact, not payable by a physical person. As it happens, players do not trigger buyout clauses by paying the, often enormous, amounts themselves. The clubs wanting to secure their services do so on their behalf.*
28. *In other words, buyout clauses, regardless of how they are drafted, constitute de facto an anticipated acceptance of a future possible transfer of a player against the relevant predetermined amount.*
29. *In light of all the above considerations, the Single Judge concluded that, as the transfer of the player from the Respondent to Barcelona had undisputedly occurred, the Claimant was entitled to 12% of the net*

*profit made by the Respondent in relation to it, in accordance with art. 3.2. of the transfer agreement signed between the parties on 5 January 2017.*

30. *The foregoing having been established, the Single Judge noted that, although entitled to 12% of the 'capital gain' made by the Respondent from the transfer of the player to Barcelona, the Claimant limited its requests to the amount of EUR 3,708,000.*
31. *Consequently, the Single Judge decided that, in accordance with the general legal principle of pacta sunt servanda, the Respondent is liable to pay to the Claimant the amount of EUR 3,708,000 in accordance with clause 3.2 of the transfer agreement.*
32. *In addition, taking into account the Claimant's request, the Chamber decided that the Respondent must pay to the Claimant 5% interest p.a. on the said amount as of the date of 8 September 2018, as requested, until the date of effective payment. ...".*

## **2. THE ARBITRAL PROCEEDINGS**

### **2.1 The CAS Proceedings**

18. On 15 October 2019, Sevilla filed a statement of appeal with the Court of Arbitration for Sport (the "CAS"), pursuant to the Code of Sports-related Arbitration (the "Code"), to challenge the Decision. The Statement of Appeal contained, *inter alia*, the appointment of Mr Nicholas Stewart Q.C. as an arbitrator.
19. On 22 October 2019, a copy of the statement of appeal was transmitted by the CAS Court Office to Nancy and, pursuant to Articles R52 and R41.3 of the Code, to FIFA.
20. On 30 October 2019, the Respondent appointed Mr Olivier Carrard as an arbitrator.
21. On 4 November 2019, FIFA informed the CAS that it renounced "*its right to request its possible intervention in the present arbitration proceedings*".
22. On 8 November 2019, the Appellant filed its Appeal Brief pursuant to Article R51 of the Code, together with 26 exhibits and the indication of Mr Jesus Arroyo Sanchez as a witness.
23. In an email message of 29 November 2019, the Respondent sought some clarification from the CAS Court Office as to the necessity to indicate the names of the possible witnesses together with the answer to the appeal.
24. On 29 November 2019, the CAS Court Office, writing in reply, reminded the Respondent of the content of Article R55 of the Code.
25. On 29 November 2019, the Respondent filed its Answer, together with 24 exhibits. By separate letter, the Respondent named Mr Jacques Rousselot and Mr Gérard Parentin as witnesses.
26. By communication dated 29 November 2019, the CAS Court Office informed the Parties, on behalf of the President of the CAS Appeals Arbitration Division, that the Panel had been

constituted as follows: Prof. Luigi Fumagalli, President of the Panel; Mr Nicholas Stewart Q.C. and Mr Olivier Carrard, arbitrators.

27. On 13 December 2019, the CAS Court Office, on behalf of the President of the Panel, issued an order of procedure (the “Order of Procedure”), which was accepted and countersigned by the Parties. The Order of Procedure confirmed, *inter alia*, the CAS jurisdiction to hear the appeal brought by the Appellant.
28. On 31 January 2020, the Respondent indicated that it had received “*a new testimony from the sport agent of C. concerning the negotiations between FC BARCELONA and FC SEVILLE for the transfer of the Player*”. The Respondent therefore asked the Appellant whether it agreed to “*the production of this new exhibit in the proceedings*”.
29. On 31 January 2020, the Appellant denied its consent to the introduction of new evidence by the Respondent.
30. On 5 February 2020, the CAS Court Office, writing on behalf of the Panel, invited the Respondent (i) to elaborate on the reason(s) why it had been impossible to produce the written testimony of the Player’s agent together with its Answer, and (ii) to explain the exceptional circumstances that would authorize the Respondent to file this document.
31. On 6 February 2020, the Respondent specified the reasons for its request to introduce the testimony of the agent of the Player. In essence, the Respondent explained that in its Answer it had referred to a decision rendered in an arbitration conducted at La Liga, which in a similar case had condemned the Respondent, and had invited the Appellant to communicate to the Panel such decision, not available to the Respondent. The Appellant, however, did not communicate the requested decision. As a result, the Respondent resumed contacts with the Player’s agent and had discussions with him regarding the negotiations regarding the transfer of the Player to Barcelona, a key element in order to show that the transfer of a player following the payment of a buy-out clause is equivalent to a transfer operation.
32. On 6 February 2020, the CAS Court Office, on behalf of the Panel, invited the Appellant to submit a reply to the Respondent’s observations.
33. On 9 February 2020, the Appellant confirmed its opposition to the introduction of new evidence by the Respondent, *inter alia* because the Respondent had not demonstrated the existence of exceptional circumstances under Article R56 of the Code.
34. On 18 February 2020, the Parties were informed that the Panel had decided to deny the Respondent’s request to add new evidence to the file, and that the grounds for this decision would be provided in the final award.
35. A hearing was held in Lausanne on 21 February 2020 on the basis of the notice given to the Parties in the letter of the CAS Court Office dated 11 December 2019. The Panel was assisted at the hearing by Mr Fabien Cagneux, Counsel to the CAS.



36. The hearing was attended:
- i. for Sevilla: by Mr Jesus Arroyo Sanchez, Deputy CEO, Mr Juan de Dios Crespo Pérez and Mr Paolo Torchetti, counsel;
  - ii. for Nancy: by Mr Jacques Rousselot, Chairman of the Board of Directors, Mr Olivier Martin and Mr Charles Bringand counsel; and by Mrs Dominique Baz, interpreter .
37. At the hearing, the Parties made submissions in support of their respective cases. The Panel heard the depositions of Mr Jesus Arroyo Sanchez, Mr Gérard Parentin (by video link) and Mr Jacques Rousselot. At the conclusion of the hearing, the Parties confirmed that they had no objections in respect of their right to be heard and to be treated equally in the arbitration proceedings.

## 2.2 The Position of the Parties

38. The following outline of the Parties' positions is illustrative only and does not necessarily comprise every contention put forward by the Parties. The Panel, indeed, has carefully considered all the submissions made by the parties, even if there is no specific reference to those submissions in the following summary.

### a. *The Position of the Appellant*

39. In its Statement of Appeal, the Appellant requested the CAS:
1. *To allow the appeal.*
  2. *To adopt an award stating that:*
    - a. *the Player was not transferred to FC Barcelona within the meaning of the Transfer Agreement; and*
    - b. *Sevilla do not owe the 12% sell-on fee to Nancy.*
  3. *Independently of the type of the decision to be issued, the Sevilla requests the CAS Panel:*
    - a. *to fix a sum of 10,000 CHF to be paid by the Claimant to the Respondent, in order to contribute to the payment of its legal fees and costs; and*
    - b. *to order the Claimant to assume the entirety of the administration and procedural fees”.*
40. The relief so sought was confirmed in the Appeal Brief.
41. In other words, the Appellant opposes the Decision, which it asks the Panel to set aside. In essence, according to the Appellant, the Sell-on Clause was triggered only in the event the Player was “transferred” to, and a transfer agreement was signed with, another club. In this case, the Player exercised the Buy-out Clause inserted in his Employment Agreement pursuant to the Decreto Real, unilaterally terminating the employment relation with the Appellant: the Appellant in that regard, did not engage in any negotiation with Barcelona and had no choice but to accept the Player’s termination of the Employment Agreement. According to the

Appellant, in fact, a “transfer” of a player from one football club to another is a “*tri-partite agreement*” where “*i. privity of contract exists between two football clubs where the previous club and the new club enter into an agreement to release the player from the obligations of the employment contract for a fee; ii. the player consents to the signing of the transfer agreement between the clubs; and iii. the player and the new club enter into a new employment contract*”. Therefore, the Player was not “transferred” to Barcelona: the Sell-on Clause was not triggered and no payment is due to the Respondent.

42. In support of its position, the Appellant invokes the following reasons:

- i. the rules governing the interpretation of contracts require that the word “transfer”, as used in the Transfer Contract, is understood to exclude the execution of a buy-out clause, because of the following “*contextual*” factors:
  - a. “*the word “transfer” is to be interpreted within the context of its use in the legal football world, where the Employment Contract was terminated via the execution of the Buy-out Clause, which is a different transaction in both law and substance than a transfer*”. In fact, a transfer requires an agreement between the old and the new club, which is absent in the event a buy-out clause, inserted in a contract pursuant to Article 16 of the Real Decreto, a mandatory provision of Spanish law, is exercised. Therefore, the Single Judge made a “*fundamental error*” in the Decision, where it was held that Barcelona paid the amount due under the Buy-out Clause: actually, no direct relation existed between the Appellant and Barcelona. Such point, distinguishing a transfer from the exercise of a buy-out clause, finds confirmation in a CAS award of 29 November 2010 (CAS 2010/A/2098), in which it was ruled that the execution of a buy-out clause is categorically not a transfer, and is not contradicted by FIFA precedents, which were set aside by CAS;
  - b. the quantum of the amount paid supports the view that this transaction was not a “transfer”: in fact, Barcelona paid exactly the amount indicated in the Buy-out clause, *i.e.* EUR 35,000,000, plus EUR 910,000 to adjust that amount to the variation of the Spanish consumer price index. In addition, also the way in which the Buy-out Clause was enforced leads to the conclusion that there was no “transfer”, since the formalities to trigger its application were exactly complied with;
  - c. application and treatment of the amount paid under Spanish taxation law supports the view that the exercise of a buy-out clause is not the same as a transfer; and
  - d. in the circumstances, the Respondent, a large and sophisticated European club, should have and could have known that the use of the word “transfer” excludes the reference to buy-out clauses;
- ii. in the alternative, should the Panel determine that an ambiguity remains and must be resolved, the application of the *contra proferentem* rule of interpretation should lead to the conclusion that the execution of a buy-out clause is not a transfer, since the Sell-on Clause was introduced in the Transfer Contract by the Respondent during the negotiation, and any ambiguity should be held against the drafter of the text.

**b. *The Position of the Respondent***

43. In its Answer, Nancy requested the CAS to:

***“DECLARE** that the execution of the transfer contract of 5 January 2017 necessarily implies the payment of the 12% sell-on clause to AS NANCY LORRAINE, taking into account the drafting of the contract and its interpretation in the light of FIFA’s case law, to which the Parties have themselves been subjected to.*

***In the alternative,***

***DECLARE** that the Player’s implementation of the buy-out clause of his employment contract is equivalent to a transfer transaction, so that this necessarily implies the payment of the 12% sell-on clause to AS NANCY LORRAINE.*

***IN CONSEQUENCE,***

***ORDER** FC SEVILLE to pay AS NANCY LORRAINE the sum of €3,708,000 plus 5% default interest per year as from 8 September 2018;*

***ORDER** FC SEVILLE to pay all the costs of the proceedings related to these proceedings before the Court of Arbitration for Sport”.*

44. The Respondent, in other words, asks this Panel to dismiss the appeal brought by Sevilla and confirm the Decision.

45. In essence, the Respondent underlines that the insertion of the Sell-on Clause in the Transfer Contract was essential and decisive for its consent to accept the financial conditions proposed by the Appellant and the transfer of the Player to the Appellant and submits that:

- i. the Respondent’s claim for payment, granted by the Single Judge, of an amount determined on the basis of the Sell-on Clause is based on a strict interpretation and application of the terms of the Transfer Contract and on the obligation for the Parties to enforce the signed agreements in good faith;
- ii. alternatively, the activation of the Buy-out Clause was equivalent to a transfer, in the circumstances of the case; and therefore
- iii. its claim, as lodged before the PSC and granted by the Single Judge, should be confirmed.

46. As to the first point, the Respondent contends that the application of the Sell-on Clause is triggered according to the terms of the Transfer Contract and the rules applicable thereto:

- i. the negotiating history of the Transfer Contract shows the importance for the Respondent to benefit from any profit made by the Appellant on a subsequent transfer of the Player;
- ii. the definition of “capital gain” set by Article 3.2 of the Contract includes the payment received by the Appellant upon the transfer of the Player to Barcelona following the exercise of the Buy-out Clause, because it simply makes reference to the difference between the amount received (including training compensation) by Seville from a third-party club as a result of the Player’s definitive transfer to that club and the amount of

- EUR 5,000,000 paid by Seville to Nancy. Since, the Appellant earned a profit on the transfer of the Player to Barcelona, the Respondent is entitled to a percentage thereof in accordance with the Sell-on Clause;
- iii. the concept of “transfer”, mentioned in the Sell-on Clause, has to be interpreted according to the rules of FIFA and the relevant case law of its bodies, to the exclusion of any other rules, including Spanish law. And the FIFA rules and case law are very clear: the transfer of a player following the exercise of a buy-out clause constitutes a transfer transaction;
  - iv. if the Appellant had wished to restrict the notion of transfer for the purposes of the Sell-on Clause, it should have specified it in the Transfer Contract;
  - v. the “*contra proferentem*” rule of interpretation does not apply, since the Transfer Contract, and more specifically the Sell-on Clause, was negotiated by the Parties.
47. As to the second point, the Respondent underlines that the amount of the Buy-out Clause is totally unrelated to the market value of the Player’s services at the time it was negotiated. It therefore corresponds to the amount that the Appellant “*required to agree to separate from the player for the benefit of another club*”. As a result, it is clear that the Appellant, by setting that amount in the Buy-out Clause, freely consented to the Player’s departure, provided that amount was paid. In addition, it should be noted that:
- i. Barcelona not only paid the amount explicitly mentioned in the Buy-out Clause (EUR 35,000,000), but also increased it by EUR 910,000 to take into account the variation in the Consumer Price Index, in a measure (of EUR 105,000) exceeding the amount due for such adjustment. This shows that negotiations took place between the Appellant and Barcelona, which exclude that the Player departed only on the basis of the operation of the Buy-out Clause;
  - ii. the circumstance that the movement of the Player in the circumstances of the case corresponds to a transfer for the purposes of the Sell-on Clause is confirmed by the FIFA jurisprudence (because the Player was immediately recruited by Barcelona, which paid the amount due under the Buy-out Clause), the CAS precedents (including CAS 2010/A/2098) and the recent Spanish case law.
48. In light of the foregoing, the Respondent insists that the Appellant made a “capital gain” (as defined in the Transfer Contract) of EUR 30,910,000 following the transfer of the Player to Barcelona, this amount being the difference between the EUR 35,910,00 it paid by Barcelona and the EUR 5,000,000 paid to the Respondent. The Respondent is therefore entitled to the payment of EUR 3,708,000, corresponding to 12% of such “capital gain”. The Decision, which so held, has therefore to be confirmed.

### 3. LEGAL ANALYSIS

#### 3.1 Jurisdiction

49. The jurisdiction of the CAS, which is not disputed by either party, is based *in casu* on Article

R47 of the Code, Article 10 of the Transfer Contract and Articles 57 and 58 of the FIFA Statutes.

50. Article 10 [“Disputes”] of the Transfer Contract reads as follows:

*“Disputes arising from this Agreement shall be subjected to the jurisdiction of:*

- *the relevant body of FIFA pursuant to the FIFA Regulations on the Status and Transfer of Players,*
- *CAS-TAS”.*

51. In addition, the provisions of the FIFA Statutes that are relevant to that effect are the following:

i. Article 57 [“Court of Arbitration for Sport (CAS)”]:

- “1. FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, clubs, Players, Officials and licensed match agents and players’ agents.*
- 2. The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law”.*

ii. Article 58 [“Jurisdiction of CAS”]:

- “1. Appeals against final decisions passed by FIFA’s legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question.*
- 2. Recourse may only be made to CAS after all other internal channels have been exhausted.*
- 3. CAS, however, does not deal with appeals arising from: ...*
- 4. The appeal shall not have a suspensive effect. The appropriate FIFA body or, alternatively, CAS may order the appeal to have a suspensive effect. [...]”.*

52. Therefore, the CAS has jurisdiction to decide the present dispute between the Parties.

### **3.2 Admissibility**

53. The statement of appeal was filed within the deadline set in the FIFA Statutes and the Decision, and complies with the requirements set by Article R48 of the Code. No further recourse against the Decision is available within the structure of FIFA. Accordingly, the appeal filed by Sevilla is admissible.

### **3.3 Scope of the Panel’s review**

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

### 3.4 Applicable law

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

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

56. Article 8 [*“Applicable Law”*] of the Transfer Contract reads as follows:

*“This agreement is governed by FIFA regulations and Swiss law”.*

57. Article 58.2 of the FIFA Statutes indicates that:

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

58. As a result, the FIFA rules and regulations apply primarily, with Swiss law applying subsidiarily.

59. The Appellant, however, submits that also Spanish law has to be applied by the Panel, chiefly with respect to the interpretation of the Sell-on Clause. The relevance of Spanish law is, on the other hand, denied by the Respondent.

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

- i. the dispute concerns the Transfer Contract, and mainly the claim of Nancy to obtain a payment under the Sell-on Clause therein contained;
- ii. the appeal is directed against a decision issued by the Single Judge, which considered such claim, and is based on Article 58.2 of the FIFA Statutes, mandating the application of the *“various regulations of FIFA”* and, additionally, of Swiss law;
- iii. the Parties discussed in this arbitration the meaning of the Buy-out Clause, inserted pursuant to Spanish law in a contract (the Employment Agreement) making reference to Spanish law.

61. As a result, while the interpretation of the Contract is to be conducted according to FIFA Regulations and, if the case, Swiss law, the Panel shall have to verify whether Spanish law, and mainly the Real Decreto, has any impact on the determination of the dispute between the Parties. The provisions set in such the Real Decreto which could be relevant in that regard are the following:

- i. Article 13 – *“Extinción del contrato”*:  
*“La relación laboral se extinguirá por las siguientes causas: ...*  
*i) Por voluntad del deportista profesional”* <sup>(2)</sup>;

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<sup>(2)</sup> Article 13 – *“Termination of the contract”*: *“The employment relationship shall terminate in the following circumstances: ... i) as a result of the professional sportsman’s will”* (English translation by the Panel).

ii. Article 16 – “*Efectos de la extinción del contrato por voluntad del deportista*”:

“Uno. *La extinción del contrato por voluntad del deportista profesional, sin causa imputable al club, dará a éste derecho, en su caso, a una indemnización que en ausencia de pacto al respecto fijará la Jurisdicción Laboral en función de las circunstancias de orden deportivo, perjuicio que se haya causado a la entidad, motivos de ruptura y demás elementos que el juzgador considere estimable.*

*En el supuesto de que el deportista en el plazo de un año desde la fecha de extinción, contratase sus servicios con otro club o entidad deportiva, éstos serán responsables subsidiarios del pago de las obligaciones pecuniarias señaladas. ...”*<sup>(3)</sup>.

### 3.5 The dispute

62. The main issue in this arbitration, as raised by the Appellant, concerns the interpretation of a provision (the Sell-on Clause) contained in the Transfer Contract. The Appellant maintains that no payment is to be made to the Respondent with respect to the amount received on the basis of the Buy-out Clause: the Sell-on Clause was triggered only in the event of a “*definitive transfer ... signed*” by Sevilla; in this case, since the Player terminated the Employment Agreement by exercising the Buy-out Clause, there was no transfer signed by Sevilla – hence, no payment is due to Nancy. The Respondent, on the other hand, holds the opposite view.
63. Before turning to the examination of such issue, the Panel needs to explain its decision not to admit the Respondent’s request of 31 January 2020 (§ 28 above) to introduce new evidence after the submission of its Answer.
64. The Panel recalls that pursuant to Article R56 of the Code, after the submission of the appeal brief and of the answer the Parties shall not be authorized to supplement or amend their requests or their argument, to produce new exhibits or to specify further evidence unless the Parties agree or the President of the Panel so allows on the basis of exceptional circumstances. In that regard, the Panel noted (and now confirms) that the conditions mentioned by Article R56 of the Code were not satisfied: in fact, the Appellant denied its consent to admit the new evidence presented by the Respondent; and no “exceptional circumstances” could be found justifying the late submission. In this regard, the Panel notes (i) that the matter on which the deposition of the Player’s agent was sought had been discussed by the Respondent in its Answer, where submissions were made concerning an alleged negotiation between Sevilla and Barcelona about the transfer of the Player, and (ii) that no convincing explanation was offered by the Respondent to explain why the deposition of the Player’s agent could not be introduced together with the Answer.
65. Turning to the merits of the dispute, the Panel remarks that, as indicated above, the Transfer

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<sup>(3)</sup> Article 16 – “*Effects of termination at sportsman’s will*”: “*One. The termination of the contract at the professional sportsman’s will, without a cause attributable to the club, shall give the club the right, in its case, to an indemnity which failing agreement shall be fixed by the Labour Court taking account of the circumstances of a sporting nature, loss caused to the entity, the reasons for the break and additional matters that the court considers relevant. In the event that the sportsman within one year after the date of termination enters into a contract with another club or sports entity, that club or entity shall be subsidiarily liable for the payment of the aforementioned pecuniary obligations. ...*” (English translation by the Panel).

Contract (and therefore the Sell-on Clause therein contained) has to be interpreted primarily on the basis of the FIFA rules and regulations, with Swiss law applying subsidiarily.

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

*“Pour apprécier la forme et les clauses d’un contrat, il y a lieu de rechercher la réelle et commune intention des parties, sans s’arrêter aux expressions ou dénominations inexactes dont elles ont pu se servir, soit par erreur, soit pour déguiser la nature véritable de la convention”*<sup>(4)</sup>.

67. As a result, the interpretation of a contract in accordance with Article 18 CO aims at assessing the intention the parties had when they concluded the contract. On this basis, Swiss scholars (WIEGAND, in *Basler Kommentar*, No. 7 *et seq.*, ad Art. 18 CO) and case law (decisions of the Federal Tribunal of 28 September 1999, ATF 125 III 435, and of 6 March 2000, ATF 126 III 119) have indicated that the primary goal of interpretation is to ascertain the true common intention (consensus) of the parties. Where a factual consensus cannot be proven, the declarations of the parties must be interpreted pursuant to the principle of good faith in the sense in which they could and should have been understood, taking into account the wording, the context as well as all circumstances.
68. Therefore, this Panel has to explore the *“real and common intention of the parties”*.
69. As noted in CAS 2010/A/2098 (§ 67), referred to by the Parties, the Sell-On Clause contains a well-known mechanism in the world of professional football. Its purpose is to “protect” a club (the “old club”) transferring a player to another club (the “new club”) against an unexpected increase, after the transfer, in the market value of the player’s services; therefore, the old club receives an additional payment in the event the player is “sold” from the new club to a third club for an amount higher than that one paid by the new club to the old club. In other words, the new club agrees to share with the old club a portion of any profit made by the new club in connection with a player’s movement. In transfer contracts, for that reason, a sell-on clause is combined with the provision defining the transfer fee: overall, the parties divide the consideration to be paid by the new club in two components, *i.e.* a fixed amount, payable upon the transfer of the player to the new club, and a variable, notional amount, payable to the old club in the event of a subsequent “sale” of the player from the new club to a third club.
70. Following this pattern, in the case at hand, Nancy (the “old club”) and Sevilla (the “new club”) set in the Transfer Contract a transfer fee (EUR 5,000,000) payable upon the transfer to Sevilla of the Player, and the Sell-On Clause, providing for an additional payment in case of “transfer signed” by Sevilla of the Player to a third club. The dispute between the parties (as summarized above) precisely refers to this point, *i.e.* to the exact identification of the meaning and scope of this triggering element (“transfer signed” by Sevilla).
71. The Panel notes (as already underlined in CAS 2010/A/2098) that in the world of professional

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<sup>(4)</sup> *“In order to evaluate the form and the content of a contract, the real and common intent of the parties has to be investigated, without limiting the investigation to the expressions or words improperly used by the parties, either by mistake or to hide the real nature of the agreement”* (English translation by the Panel).



football a “transfer” of a Player means in general terms a change of “registration” of a player or – to put it in another way – for a professional player it means a “change of employer”. A Player, registered to play for a club, becomes eligible to play for a different club, or, when employed with a club, becomes an employee of another club. The FIFA rules, and chiefly the Regulations on the Status and Transfer of Players, in all their editions, are based on such a concept. In that regard, therefore, a “transfer” can be equated to a “movement” in the registration/employment relation.

72. More specifically, and also considering the FIFA provisions, a transfer can be the object and the purpose of the parties’ agreement. In that case, it can actually be made in two ways: (i) by way of assignment of the employment contract; and (ii) by way of termination of the employment agreement with the old club and signature of a new employment agreement with the new club. In both cases, the old club expresses its agreement (to the assignment or to the termination of the old employment contract, as the case may be) against the receipt of a payment – which compensates for the loss of the player’s services; the new club accepts the assignment of the existing employment contract or consents to enter into a new contract with the player; and the player consents to move to the new club.
73. At the same time, a transfer of a player can also take place outside the scheme of a contract between the old and the new club, in the event that the player moves from a club to another following the termination of the old employment agreement as a result of (i) its expiration or (ii) its breach. In both cases, the transfer of the player from one club to another takes place without (or even against) the consent of his old club. Therefore, it takes place without a contract, because there is no contract (in a situation in which there is no obligation freely assumed by one party towards the other). In the second case (transfer following a breach), an amount is due to the old club, but cannot be defined as a price paid as a consideration for the consent to the transfer, since it is of a different character and title: it is compensation for the damage caused by the breach.
74. In light of the foregoing, the Panel notes that the wording of the Sell-on Clause is wide enough to cover every kind of transfer, both in a contractual and non-contractual framework, for which Sevilla was to receive a payment, whatever label is put upon it. This point marks a decisive distinction between this case and the dispute decided in CAS 2010/A/2098, where the triggering element was not in general terms a “transfer”, but specifically a “resale”. This interpretation is confirmed by the definition of “capital gain” in Article 3.2 of the Transfer Contract, which simply makes reference to the difference between the amount paid and the amount received as a result of the Player’s transfer(s), without additional qualification, and appears to correspond to the “*real and common intent of the parties*”, as it is consistent with the general purpose of sell-on clauses, which, in the absence of specific limitations, call for their application to all cases where the intended purpose (to allow the old club to share the benefit of a subsequent transfer) can be achieved.
75. The above conclusion makes it irrelevant to speculate about the effect under Spanish law of the exercise of the Buy-out clause. Accepting, in line with CAS 2010/A/2098, that following its exercise the Player moved outside a contractual scheme (*i.e.* with no contract between Sevilla and Barcelona), then his transfer would still trigger the application of the Sell-on Clause.

76. In addition, this conclusion is not affected by the reference in the Sell-on Clause to the transfer needing to be “signed” by Sevilla. In that regard, the Panel agrees with the Single Judge that such reference appears only to confirm that the “transfer”, in order to trigger the payment, had to be concluded – or be final, as indicated in the same provision.
77. In summary and conclusion, the Decision that held that the Sell-on Clause was triggered has to be approved and confirmed: the Respondent was entitled to receive 12% of the profit made by the Appellant for the transfer of the Player to Barcelona. Such amount has to be paid to the Respondent by the Appellant, as already ordered by the Single Judge.

### **3.6 Conclusion**

78. In light of the foregoing, the Panel finds that the appeal brought by the Appellant against the Respondent with respect to the Decision is to be denied and the Decision confirmed.

## **ON THESE GROUNDS**

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

1. The appeal filed by Sevilla FC against the decision issued on 24 July 2019 by the Single Judge of the Player’s Status Committee of FIFA is dismissed.
2. The decision issued on 24 July 2019 by the Single Judge of the Player’s Status Committee of FIFA confirmed.
3. (...).
4. (...).
5. All other prayers for relief are dismissed.