Arbitration CAS 2014/A/3647 Sporting Clube de Portugal SAD v. SASP OGC Nice Côte d'Azur & CAS 2014/A/3648 SASP OGC Nice Côte d'Azur v. Sporting Clube de Portugal SAD, award of 11 May 2015

Panel: Mr Michael Gerlinger (Germany), President; Mr Michele Bernasconi (Switzerland); Mr Alasdair Bell (United Kingdom)

Football
Transfer not concluded due to the non-fulfillment of two conditions precedent
Exception with respect to the intention of the parties
Negative and positive obligations with respect to the fulfillment of the condition precedent
Bad faith
Compensation for loss of a chance
Compensation for loss in sporting image
Reduction of the compensation

1. **As a general rule, a contract that has been concluded subject to one or more conditions precedent, does not take effect if the condition(s) precedent is (or are) not fulfilled. As an exception, parties can intend that rights and obligations should arise already before the condition is fulfilled. However, merely following a sensible approach to allow a player to start to train with his future club cannot lead to the conclusion that a party has consciously waived the conditional nature of the transfer agreement that is expected to bring, legally, the player to the new club.**

2. **According to Article 152 para. 1 CO, until such time as the condition precedent occurs, the conditional obligor must refrain from any act which might prevent the due performance of his obligation. The wording of this provision first provides for a negative obligation to *"refrain"* from specific acts. However, under Swiss law it is recognized that in addition to the negative aspect, this provision also establishes positive duties of the parties to do what is appropriate to safeguard the prospect of the fulfilment. In this respect, the provision requires the parties to act positively in a way that is expected from them in good faith.**

3. **According to Article 156 CO, a condition is deemed fulfilled where one of the parties has prevented its fulfilment by acting against good faith. This provision includes the elements of preventing the fulfilment as well as acting against good faith. In that respect, Article 156 CO requires more than Article 152 para. 1 CO, i.e. that the party preventing the fulfilment acted against good faith "in a gross manner". The element of protecting primarily own interest does generally not speak for bad faith within the meaning of Article 156 CO.**

4. **Although compensation for *loss of a chance* might be due in certain countries in certain**

exceptional circumstances, it is recognised under Swiss law that there must be a *logical nexus* between the damage allegedly suffered and the lost chance, for example, if there was a concrete offer capable of acceptance by the parties. If no such concrete circumstances are present in the concrete case, the party is not liable for any lost chance, independently on whether under Swiss law such loss of a chance would justify a compensation.

5. **With respect to a loss in sporting image induced by the decision of a free agent player to sign a contract with a rival club rather than with the club with which his previous club was in negotiation, a *logical nexus* also needs to exist between the non-performance and the alleged loss. The previous club cannot influence the choice of next club for a free agent player, and so there is no sufficient nexus between the non-performance and the alleged loss.**

6. **According to Article 44 para. 1 CO, compensation may be reduced if there are circumstances attributable to the injured party that helped to give rise to or increase the damage.**

I. PARTIES

1. Sporting Clube de Portugal SAD (hereinafter "Sporting") is a football club with its registered office in Lisbon, Portugal. Sporting participates in the top division of the Portuguese League (hereinafter the "LPFP") and is registered with the Portuguese Football Federation (hereinafter the "FPF"), which in turn is affiliated to the Fédération Internationale de Football Association (hereinafter "FIFA").

2. SASP OGC Nice Côte d'Azur (hereinafter "Nice") is a football club with its registered office in Nice, France. Nice participates in the top division of the French League (hereinafter the "LFP") and is registered with the French Football Federation (hereinafter the "FFF"), which in turn is affiliated to FIFA.

II. FACTUAL BACKGROUND

A. Background Facts

3. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced during the present procedure and at the hearing. Additional facts and allegations 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. In August 2011, the Parties entered into negotiations regarding the transfer of the player Y. (hereinafter the "Player") from Sporting to Nice. After having agreed on the terms for the transfer, Nice sent a draft transfer agreement to Sporting in the morning of 31 August 2011 by email. As described in the following paragraphs, an exchange of emails and other communications subsequently occurred (the time indications reported below refer to CET).

5. Sporting signed the transfer agreement and sent the signed document via email to Nice at 12:14. Nice then asked by email at 13:17 for the agreement to be signed again (erasing the name of the Player on the front page). This was because the Player had not been able to sign the agreement as he was undergoing a medical test. After an exchange of communication concerning the FIFA Player Passport and the report of the FIFA Transfer Matching System (hereinafter the "FIFA TMS"), Sporting then sent the new agreement at 15:32 by email (hereinafter the "First Transfer Agreement"). The First Transfer Agreement contained the following clause in Article 2:

"This agreement is subject of the following conditions:
a) The signing of an employment contract between OGC Nice and the player.
b) The issue of the player's international Transfer Certificate by the Portuguese football association.
c) The approval by the new club's Football Association of the contract between OGC Nice and the player.

If any of these conditions have not been met, then this agreement shall be automatically terminated and ineffective".

6. Later that day and for the reasons described further below, the Parties renegotiated Article 4 of the First Transfer Agreement, which contained a "Sell-on" clause relating to future transfers of the Player. Nice sent the draft of the so modified agreement to Sporting by email at 23:50, which was received by Sporting at 23:53. The modified agreement contained certain changes to the content of the "Sell-on" clause, decreasing from 50 % to 40 % the amount that Sporting would receive and setting different thresholds for the "Sell-on". In addition, the modified agreement also contained a change in Article 5, which in the First Transfer Agreement read *"OGC NICE undertakes to take all necessary steps to obtain the International Transfer Certificate required for the qualification of the player".* The modified agreement instead read *"SPORTING PORTUGAL undertakes to take all necessary steps to obtain the International Transfer Certificate required for the qualification of the player".*

7. Sporting returned the signed document at 23:59 (hereinafter the "Second Transfer Agreement"). Nice uploaded the Second Transfer Agreement at 0:04 into the electronic transfer system of the FIFA TMS, and the International Transfer Certificate (hereinafter the "ITC") was requested at 0:05 on 1 September 2011 by the FFF. Since the ITC request occurred after midnight of 31 August 2011, the ITC was not issued by the FIFA TMS, because 31 August was the last day of the summer transfer period.

8. Notwithstanding the above, the Player started training with Nice, while the situation of his registration for Nice remained unclear.

9. On 2 September 2011, Nice requested the FFF to obtain the ITC from FIFA, pointing out that the only reason for it not having been issued was because of a very slight delay.

10. On 7 September 2011, the FIFA administration sent a letter to the FFF refusing the issuance of the ITC on the basis that the transfer instruction had not been completed before the transfer period closed.

11. On 15 September 2011, the FFF requested a decision of the FIFA Players' Status Committee on the issuance of the ITC. The issuance of the ITC was denied by FIFA with its decision taken and served on 23 September 2011.

12. On 28 September 2011, Nice and the Player appealed against the aforementioned decision to CAS, requesting provisional measures.

13. The Player then returned to Lisbon with his lawyer to negotiate a termination agreement with Sporting over the weekend of 8 and 9 October 2011 and subsequently signed such a termination agreement on 11 October 2011.

14. Also on 11 October 2011, CAS rejected the request for provisional measures due to the fact that the appeal did not have the necessary likelihood of success on the merits. The decision of CAS referred to the fact that Nice was negligent in failing to upload the player's identification/passport and transfer agreement in due time, in particular, since it had been in possession of the document already at 15:31 hours on 31 August.

15. Nice then requested the LFP to formally deny the request for admission (*"homologation"*) of the Player's employment contract on 13 October 2011, and, via the FFF, asked FIFA to confirm the Player's status by letter of 14 October 2011.

16. On 17 October 2011, Nice withdrew its appeal to CAS. On the same day the Player arrived in Nice and asked to be integrated into the training of the French club. He stayed some days in a hotel in Nice but never joined the squad in training. In an exchange of communication between the Player and Nice, the club informed him that his employment contract had never come into force.

17. On 25 October 2011, the LFP took a formal decision refusing to "homologate" the employment contract of the Player and on 28 October 2011 the FIFA administration informed the FFF that the Player could not be registered with Nice.

18. Following a request by the Player to be integrated in the training of Nice (sent by letter dated 2 November 2011) the club offered to execute the transfer in the winter transfer period of the season 2011/2012 by concluding a new transfer agreement and a new employment contract.

The Player replied on 8 November 2011, insisting that his employment contract with Nice was valid and therefore there was no need to conclude a new employment contract. In a further exchange of communication in November, Nice and the Player insisted on their respective positions. Finally, by letter of 25 November 2011 the Player terminated his employment contract with Nice due to the fact that he had not been paid.

19. In several emails in November 2011, Sporting informed Nice that the transfer will or needed to be effected in the winter transfer period, arguing that a conclusion of a new transfer agreement was not necessary.

20. On 20 December 2011, Sporting commenced another transfer instruction for the Player in the FIFA TMS, whereas no counter-instruction was made by Nice.

21. At the end of the winter transfer period 2012, the Player signed an employment contract with and then joined the Portuguese club SL Benfica.

B. Proceedings before the Players' Status Committee of FIFA

22. On 15 February 2012, Sporting lodged a claim against Nice with FIFA, maintaining that Nice had breached the Second Transfer Agreement by not completing the transfer. Sporting asked for an amount of EUR 1,000,000, corresponding to the transfer fee, plus 5 % interest as from the date of its claim, as well as *"the difference between 40 % of the amount spent by SL Benfica in the acquisition of Y. (…) and EUR 1,300,000"* as per the "Sell-on" clause, and EUR 1,000,000 as *"damages into sporting image"*.

23. By response dated 23 March 2012, Nice rejected the claim, arguing that the conditions precedent set out in the Second Transfer Agreement had not been fulfilled. Nice further argued that it only received the signed document shortly before midnight and, therefore, was not responsible for the delay.

[…] On 19 March 2014, the Bureau of the Players' Status Committee of FIFA (hereinafter the "Bureau of the FIFA PSC"), rendered its decision (hereinafter: the "Appealed Decision"), with, inter alia, the following operative part:

1. The claim of the Claimant, Sporting Clube de Portugal, is partially accepted.

2. The Respondent, OGC Nice, has to pay to the Claimant, Sporting Clube de Portugal, within 30 days as from the date of notification of this decision, the amount of EUR 1,000,000 plus 5 % interest p.a. on the said amount as from 15 February 2012, until the date of effective payment.

3. Any further claims lodged by the Claimant, Sporting Clube de Portugal, are rejected.

4. If the aforementioned sum plus interest is not paid within the aforementioned deadline, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.

5. The final costs of the proceedings in the amount of CHF 18,000 are to be paid by both, the Claimant, Sporting Clube de Portugal, and the Respondent, OGC Nice, within 30 days as from the date of notification of the present decision as follows:

5.1. The amount of CHF 8,000 has to be paid by the Respondent, OGC Nice.

5.1. The amount of CHF 10,000 has to be paid by the Claimant, Sporting Clube de Portugal. Considering that the Claimant, Sporting Clube de Portugal, already paid the amount of CHF 5,000 as advance of costs, the latter has to pay the remaining amount of CHF 5,000.

5.2. (…).

6. (…).

24. On 19 June 2014, the grounds of the Appealed Decision were communicated to the Parties determining, inter alia, the following:

- The Bureau of the FIFA PSC recalled that *"(…) the new club of a professional player is responsible to submit all applications to register the professional player in question during one of the registration periods established by its association, whereas all applications shall be accompanied by a copy of the contract between the new club and the professional as well as by a copy of the transfer agreement in question, if applicable"*. For this reason, the Bureau of the FIFA PSC held that Nice was responsible for inserting all the documents and was therefore the only party that could have influenced the fulfilment of the conditions precedent.

- As a result, the Bureau of the FIFA PSC concluded that, since Nice only started to upload the documents shortly before midnight, Nice had acted *"with negligence"*, which in turn entitled Sporting to receive the transfer sum agreed in the contract, since Sporting had no influence on the fulfilment of the conditions precedent.

- Regarding the "Sell-on" clause, the Bureau of the FIFA PSC recalled that the Player was transferred to Benfica as a free agent and concluded, therefore, that no payment under the "Sell-on" clause was due.

- With respect to the *"damages into the sporting image"*, the Bureau of the FIFA PSC rejected Sporting's claim, on the basis that no evidence had been provided by Sporting regarding the said damages and that the claim had no contractual basis.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

25. On 1 July 2014, Nice filed a Statement of Appeal with the Court of Arbitration for Sport (hereinafter the "CAS") in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (hereinafter the "CAS Code"). In the Statement of Appeal, Nice nominated Mr. Michele A.R. Bernasconi as arbitrator and made the following requests for relief from CAS:

> *"1. The Appellant requests that the decision issued by the Bureau of the Players' Status Committee of FIFA on 19 March 2014 be set aside.*
>
> *2. The Appellant's request for relief will be set out in further detail in its Appeal Brief".*

26. In addition, in its Statement of Appeal, Nice requested the production of the termination agreement between the Player and Sporting, which was submitted by Sporting on 15 July in the original language and on 23 July 2014 in an English translation respectively.

27. Also on 1 July 2014, Sporting filed a Statement of Appeal with the CAS in accordance with Articles R47 and R48 of the CAS Code, nominating Mr. Alasdair Bell as arbitrator and submitting the following requests for relief:

> "*Although OGN Nice has been ordered to pay the sum of € 1.000.000, plus 5 % in interest from 15th of February 2012 until the date on which payment is made, that same entity was acquitted of the additional requests made by Sporting CP in appeal with regards to the damages caused by that entity's illicit conduct, more specifically:*
>
> *a) Non payment of the transfer compensation in the amount of EUR 1.000.000.*
>
> *b) Non payment of conditional compensation, as stated in clause 4 of the transfer contract. Considering that the player was registered with SL Benfica on 31 January 2012, OGC Nice should be respeonsible to pay additionally to Sporting the difference between 40 % of the total amount spent by SL Benifca in the acquisition of Y. (namely, salaries, wages, bonus, commissions, image rights, signing on fee, etc) and EUR 1.300.000.*
>
> *c) Damages into Sporting image evaluated on EUR 1.000.000, considering that it is well-known that SL Benfica is the historical and centenary rival in the city of Lisbon (only a European football expert can understand this kind of damage, due to* ***specificity of Sport****).*
>
> *In the light of the above, the decision rendered by the FIFA DRC ought to be reviewed accordingly and the appeal presented by the appellant considered and upheld".*

28. By letter of 7 July 2014, FIFA informed the CAS that it could not be considered as a Respondent since FIFA was not a party to the dispute but was rather a decision making body of first instance. Moreover, the decision was not of a disciplinary nature.

29. By letter of 9 July 2014, and in view of the agreement of the Parties, the CAS informed the Parties that the procedures *CAS 2014/A/3647 Sporting Clube de Portugal SAD vs. SASP OGC Nice Côte d'Azur* and *CAS 2014/A/3648 SASP OGC Nice Côte d'Azur vs. Sporting Clube de Portugal & FIFA* would be consolidated into a single arbitration and submitted to the same Panel.

30. Sporting confirmed to the CAS that it wished to keep FIFA as a Respondent by letter dated 10 July 2014, whereas FIFA in its letter of 17 July 2014 informed the CAS that it would *"adopt a passive stance"*. By letter dated 24 July 2014, Nice agreed to withdraw FIFA as a party to the arbitration proceedings.

31. In its letter of 15 July 2014, Sporting requested the production of the Player's employment contract with Nice, which was submitted as Exhibit 10 to the Appeal Brief of Nice.

32. Subsequently, the Parties agreed on the extension of several deadlines for the submission of the Appeal Briefs and Answers.

33. Both Parties submitted their Appeal Briefs on 1 October 2014.

34. In its Appeal Brief, Nice submitted the following requests for relief:

"SASP OGC Nice Cote d'Azur respectfully requests the Court of Arbitration for Sport to:

(i) Set aside the decision of the Bureau of the Players' Status Committee of the Féderation Internationale de Football Association dated 19 March 2014, which ordered SASP OGC Nice Cote d'Azur to pay Sporting Clube de Portugal SAD the amount of € 1,000,000 plus interest;

(ii) Confirm that SASP OGC Nice Cote d'Azur is not liable to pay Sporting Clube de Portugal SAD any amount in connection with the transfer agreement document signed between those parties on 31 August 2011;

(iii) Order Sporting Clube de Portugal SAD to pay the full amount of the CAS arbitration costs; and

(iv) Order Sporting Clube de Portugal SAD to pay a significant contribution towards the legal costs and other related expenses of SASP OGC Nice Cote D'Azur, at least in the amount of € 30,000 (thirty thousand euros)".

35. In its Appeal Brief, Sporting submitted the following requests for relief:

"In the light of the above, we gently request the Panel to render a formal decision, condemning OGC Nice in the additional payment of

a) An additional compensation regarding the breach of the contract and the non payment of conditional compensation due to the transfer to a third club under the clause 4 of the transfer agreement, in the minimum amount of € 1.080.000.

b) EUR 1.000.000 regarding the damages into Sporting's image considering that the third club to whom the player was transferred as a free agent was the Portugese eternal rival of Sporting CP: SL Benfica.

c) Any and all costs in connection with the present appeal arbitration procedure, including attorney's fees".

36. By communication dated 8 October 2014, the CAS Court Office informed the parties, on behalf of the President of the CAS Appeals Arbitration Division, that a panel of three arbitrators had been constituted as follows: Dr. Michael Gerlinger, President of the Panel, Mr. Alasdair Bell and Mr. Michele Bernasconi, arbitrators.

37. Both Parties submitted their respective answers on 21 November 2014, in accordance with Article R55 of the CAS Code.

38. In its Answer, Nice made the following requests for relief from the CAS:

"SASP OGC Nice Cote D'Azur requests the Court of Arbitration for Sport to:

(i) Reject the appeal filed by Sporting Clube de Portugal SAD;

(ii) Set aside the decision of the Bureau of the Players' Status Committee of the Fédération Internationale de Footbal Association dated 19 March 2014, which ordered SASP OGC Nice Cote D'Azur to pay Sporting Clube de Portugal SAD the amount of €1,000,000 plus interest;

(iii) Confirm that SASP OGC Nice Cote D'Azur is not liable to pay Sporting Clube de Portugal SAD any amount in connection with the transfer agreement document signed between those parties on 31 August 2011;

(iv) Order Sporting Clube de Portugal SAD to pay the full amount of the CAS arbitration costs; and

(v) Order Sporting Clube de Portugal SAD to pay a significant contribution towards the legal costs and other related expenses of SASP OGC Nice Cote D'Azur, at least in the amount of €30,000".

39. In its Answer, Sporting made the following requests for relief from the CAS:

"Sporting Clube de Portugal – Futebol SAD respectfully requests the Court of Arbitration for Sport to:

a) Upheld the Appealed decision, which ordered SASP OGC Nice to pay to Sporting SAD the amount of € 1,000,000 (one million Euro) plus 5 % interests per annum on the said amount as from 15 February 2012 until the date of effective payment.

b) Order SASP OGC Nice to pay the full amount of the CAS arbitration costs;

c) Order SASP OGC Nice to pay the legal costs and other expenses at least in the amount of € 21,000 (twenty one thousand Euro)".

40. On 23 January 2015, a hearing was held at the CAS Court Headquarters in Lausanne Switzerland (hereinafter the "Hearing").

IV. THE HEARING

41. The following persons attended the Hearing:

- For Nice: Mr. Julien Fournier, Director General
  Mr. David Casserly, Counsel to Nice
  Mr. Karim Piguet, Counsel to Nice
  Mr. José Luis Andrade, Assistant to Mr Casserly
  Ms. Starr Pirot, interpreter
  Mr. Jean-Pierre Rivere, president, was available for testimony by telephone
- For Sporting: Mr. Hugo Vaz Serra, In-house Lawyer.

42. The following persons were present to testify at the Hearing, all presented by Nice:

- Ms Pascale Marrel, Assistant to the Director General
- Mr. Lionel da Silva, player agent
- Mr. Loic Morin, Legal Director of the LPF.

43. At the beginning of the Hearing, Nice presented originals of print-outs regarding comments on the Player in different internet forums, only submitted before in an English translation as Exhibit 49. Sporting agreed to admit such documents, which were therefore allowed by the Panel.

44. The Parties were given the opportunity to present their cases, to make their submissions and arguments and to answer questions posed by the Panel. Since the Panel was fully satisfied with the presentation of the facts by the representatives of the Parties, *i.e.* by Mr. Fournier and Mr. de Vaz Serra, and since both Parties agreed, the witnesses called and presented to testify were not requested to give testimony.

45. After closing submissions, the Parties were invited by the Panel to indicate whether they would be prepared to allow the Panel to decide the matter *ex aequo et bono*. The Parties also expressly stated that they had no objections as concerns their right to be heard.

46. By letters of 30 January 2015, Sporting agreed that the Panel decide the case *ex aequo et bono*, whereas Nice disagreed.

V. SUBMISSIONS OF THE PARTIES

V.1. Nice's submissions

V.1.1. The events on 31 August 2011

47. On or around 17 August 2011, Nice and the Player's agent Mr. Lionel da Silva (hereinafter the "Agent") met and negotiated a potential employment contract. Both parties discussed amounts of salary, without referring to being it gross or net.

48. On 31 August 2011, at approximately 16:00, the Player arrived at Nice's premises with the Agent. Nice presented the employment contract including a salary of € 800.000 (gross). The Player refused to sign the contract, requesting the salary to be net.

49. Since Nice was under financial control by the respective authority DNCG, Mr. Fournier could not meet the request and therefore deemed the negotiations failed. After informing the President of the club, who was attending a match of Nice in Toulouse, the President instructed Mr. Fournier to re-start negotiations, which could be held at the club's premises and continued when the President returned from Toulouse to Nice. In fact, thereafter, around 22:30, the Player and the President arrived at the premises of Nice and started the re-negotiations. As a result of these re-negotiations, the Player and Nice agreed on new terms with a fixed salary and bonuses for the Player that would cover the difference between the club's offer and the Player's request.

50. However, there was a further issue, related to the Player having an additional 10% of the "Sell-on" fee, which was discussed between approximately 23.30 and 23.45. Since Sporting had the right to receive 50 % of the "Sell-on", Nice intended to re-negotiate Sporting's participation down from 50 % to 40 %.

51. Mr. Fournier then called Sporting's director, Mr. Carlos Freitas, and discussed the proposed changes in the "Sell-on" clause as well as the change in Article 5, containing the obligation of Nice to take all necessary steps to obtain the International Transfer Certificate required for the qualification of the player, shifting that obligation from Nice to Sporting.

52. Since Mr. Freitas had agreed on the new terms, Mr. Fournier's assistant Ms Marrel drafted a new version of the transfer agreement, and the Player started to sign the employment contract. Because the Player's signature was very long, he only signed the respective first page. At the same time (around 23.45 and possibly even later), the Player or his wife handed over the Player's ID/passport, which they had withheld previously until signature. Nice sent the employment contract to the LFP immediately, which it received at 23:55.

53. The amended transfer agreement was sent to Sporting at 23:50 for signature. Since Sporting's email answer did not yet contain the signed document, Mr. Fournier called again Mr. Freitas to remind him. Mr. Freitas seemed not concerned on the timing, since due to the time difference in Portugal he apparently thought that there was an hour left for submitting the relevant documents. Mr. Fournier explained to Mr. Freitas the urgency.

54. After Sporting sent the signed document at 23:59, which was received by Nice at 0:01, Nice immediately uploaded the transfer agreement into the FIFA TMS. Nice realized that the deadline was already passed when uploading the document, but asked the LFP to request the ITC anyway, hoping that it would be delivered because all the documents were uploaded continuously starting before midnight.

V.1.2. The events after 31 August 2011

55. On 1 September 2011, Nice contacted FIFA, in order to obtain the ITC, hoping there might be some legal precedent which could allow the delivery of the ITC. Mr. Fournier also contacted Mr. de Vaz Serra to discuss the issue. He asked Mr. de Vaz Serra to have a joint approach to the issue. However, Mr. Fournier did not ask Mr. de Vaz Serra that Sporting should take all the blame for the delayed upload vis-à-vis FIFA.

56. The Player had only played internal matches for Nice, or friendly matches that were of a non-official nature, since the opponents were regional partner clubs and the matches were only for training purposes, *i.e.* the clubs against Fréjus and Istres.

57. The Player had been requested by the coach and there were no problems with his integration into the club. The only reason he could not continue with the club was because his employment contract could not be homologated.

58. The Player was informed that if his employment contract could not be homologated he would not be paid and he accepted this. His Agent was also so informed. French labour law actually prevented the club from paying a salary without a valid contract, since otherwise the employment contract would become unlimited.

59. The procedure at CAS was urgently prepared so the Player would be available immediately. But this was no longer possible after the negative CAS decision on provisional measures. For this reason, the appeal was withdrawn.

60. The request to the LFP to deny homologation was made by Nice to show to the Player that homologation was impossible. The initiative for this request came from the LFP in a discussion with LFP's legal Director.

61. Nice's intention when concluding the Second Transfer Agreement was only to effect the transfer in the summer, which is why Mr. Fournier introduced the conditions precedent in the contract.

62. Nevertheless, Nice was also ready to sign a new agreement with the Player and with Sporting in winter. Nice intended to sign these under identical terms. However, Nice required new documents and could not use the previous ones due to French league regulations. Every document needed to be matched with the transfer period.

63. Nice stayed in regular contact with Sporting prior to the winter transfer period, but both Parties maintained their position.

V.1.3. Legal Arguments

64. The Second Transfer Agreement did not take effect according to Article 151 para. 2 of the Swiss Code of Obligations (hereinafter the "CO"), since it was dependent on three conditions precedent. Since the ITC was never issued and the employment contract was never approved by the LFP, those conditions were never fulfilled.

65. There were three periods to be distinguished: first, the period before conclusion of the contract, when only pre-contractual duties exist. Second, the period after conclusion of the contract, but before fulfillment of the conditions, in which a lawful expectation exists. And third, the period after the condition is fulfilled, when the contract takes effect. In the second period, which is the case here, Article 152 para 1 CO only obliges the Parties to refrain from any acts that might jeopardize fulfillment. This obligation was only negative, thus not imposing positive obligations to fulfill the conditions. Consequently, Nice was not obliged to positively take actions for the fulfillment of the conditions.

66. There was also no bad faith on the part of Nice within the meaning of Article 156 CO. Under this provision of the CO, a condition precedent may be deemed fulfilled in case of bad faith. However, bad faith must be strictly interpreted and assessed in the light of all circumstances. Sporting had not demonstrated any valid arguments to support an allegation of bad faith.

67. To the contrary, Nice acted in good faith with respect to both the summer transfer period and the winter transfer period.

68. Regarding the summer transfer period, Nice did everything it could to conclude the transfer on time and uploaded the documents as soon as possible. There was no fault by Nice for the delay. Furthermore, even if one could assume fault by Nice, Sporting would have to share some of the blame too, owing to its lack of sense of urgency.

69. Regarding the winter transfer period, first of all, the Second Transfer Agreement could not be interpreted in the sense that Nice actually had an obligation to effect the transfer in winter. This was because the agreement was dated "31 August 2011", which is during the summer transfer period. To the Parties, it was, therefore, clear that the transfer had to be effected in the summer. Despite this, Nice actually undertook all steps for a transfer in the winter as well. Nice proposed to conclude the same agreements in winter in a cooperative way.

70. With respect to the damages claimed by Sporting, even if one could assume that the Second Transfer Agreement came into force, Sporting could not claim compensation for a missed opportunity regarding the "Sell-on" clause. Such entitlement can only be assumed by way of exception, if a transfer had already been negotiated and agreed in a concrete manner. Sporting did not demonstrate any offer for the transfer of the Player and, therefore, failed to provide any evidence with respect to a missed opportunity.

71. Nor could Sporting claim damages for loss of image. According to Article 42 para. 2 CO, such a claim required an *"almost certain damage"*. Sporting failed to provide any evidence to show how the image of the club had been damaged and to what monetary extent. The fact that the Player signed for a rival club was not sufficient. In addition, it was Sporting's own responsibility that the Player signed with another club, since Sporting terminated the employment contract with the Player on 11 October 2011.

V.2. Sporting's submissions

V.2.1. The events on 31 August 2011

72. When entering the data into the FIFA TMS in the afternoon of 31 August 2011, Sporting assumed that it had done everything to effect the transfer and that the transfer of the Player would be executed indeed. Also, when Nice contacted Sporting in the late evening to discuss again the transfer agreement, Sporting did everything to effect the transfer that day.

73. After having received the new draft of the transfer agreement at 23:50, Mr. de Vaz Serra checked the change of Article 4 regarding the "Sell-on" clause. Therefore, when sending a reply email to Nice at 23:54, he could not yet attach the signed document, since he needed to check the changes first.

74. Mr. de Vaz Serra and Mr. Freitas agreed to the changes in Article 4, signed the document and sent it back at 23:59. However, Mr. de Vaz Serra was not aware of the change in Article 5 regarding the responsibility for the ITC at that time. After returning the signed document, Sporting assumed that the transfer was now completed.

V.2.2. The events after 31 August 2011

75. In the afternoon of 1 September 2011, Mr. de Vaz Serra received a call from Mr. Fournier. During that call, Mr. Fournier asked Mr. de Vaz Serra to confirm that it was Sporting's fault that the transfer could not be completed on time. Mr. de Vaz Serra refused to do that.

76. Subsequently, Sporting was in contact with Nice regarding the procedural steps taken to obtain the ITC, while the Player was not only integrated into the training of Nice, but also played friendly matches against Fréjus and Istres.

77. On 11 October 2011, Sporting signed the termination agreement with the Player in front of a public notary. This was a typical procedure in Portugal in order to comply with the administrative rules of the Portuguese league and to settle outstanding claims between parties. *De facto*, the termination had already taken place on 31 August 2011. It was also practice that the Portuguese league issues the ITC without any such formal termination document, since the *de facto* termination was enough. In addition, Sporting needed to formally terminate the employment contract because it was obliged to do so under the Second Transfer Agreement and failure to do so would have allowed Nice to accuse Sporting of non-compliance with the contract.

78. Sporting was unable to agree on a new transfer agreement for the winter transfer window for two reasons: firstly, the Player had terminated his employment contract with Nice for just cause in the meantime, so the required approval of the Player was unclear. Replacing the existing Second Transfer Agreement with a new one without the approval of the Player would have jeopardized the contractual claims under the previous agreement. Secondly, by concluding a new transfer agreement, Sporting would have recognized that the Second Transfer Agreement was invalid. Sporting also understood Nice's request for a new transfer agreement as requesting different terms for such an agreement, which would have been unacceptable for Sporting.

79. After initiating the transfer instruction into the FIFA TMS for the winter transfer period, Sporting was not surprised that there was no counter-instruction by Nice. The reason for that was that the Player had already terminated his contract with Nice at that time.

V.2.3. Legal Arguments

80. The conditions precedent with respect to the ITC and the registration of the employment contract were redundant, since this is already covered by the FIFA Regulations.

81. In addition, by including the Player into the team's training and the squad for friendly matches, Nice had effectuated the Second Transfer Agreement, even if a condition precedent had not yet been fulfilled. Article 151 para. 2 CO foresaw an exception *"unless the parties clearly intended otherwise"*. This was the case here. Nice could, therefore, not invoke the non-fulfillment of the conditions.

82. In any case, Nice was responsible for the non-completion of the transfer in the summer transfer period as well as in the winter transfer period.

83. Regarding the summer transfer period, Nice uploaded the Second Transfer Agreement as well as the Player's ID/passport too late, the latter being only uploaded after midnight. Nice should have already prepared the FIFA TMS instruction after Sporting's instruction in the afternoon. Nice could have also uploaded the First Transfer Agreement early enough and submitted the changes afterwards. In addition, Nice acted in bad faith when changing the responsibility for the ITC in Article 5 of the Second Transfer Agreement.

84. Also, Nice breached Article 152 para. 1 CO, which stipulates: *"Until such time as the condition precedent occurs, the conditional obligor must refrain from any act which might prevent the due performance of his obligation"*. Such acts where:

- The negligent behaviour on 31 August 2011;
- The withdrawal of the appeal against FIFA's decision to deny the ITC;
- The fact that Nice did not integrate the Player into the training as from 17 October 2011 and the non-payment of his salary; to the contrary, Nice requested the LFP to reject the homologation of the employment contract and, therefore, to prevent a condition to be fulfilled;
- The non-performance with respect to a transfer in the winter transfer period.

85. With respect to the damages claimed, Sporting had a legitimate expectation for receiving an additional compensation under the "Sell-on" clause. There was a market for the services of the Player and Sporting provided evidence for that.

86. Sporting could also claim damages for loss of image. The public reaction to the transfer of the Player to Benfica, *i.e.* Sporting's biggest rival showed such damages, since it looked as if Sporting was feeding its main rival for free, with one of the most promising players from its youth squad.

VI. JURISDICTION

87. 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".*

88. The jurisdiction of the CAS is not disputed by the Parties. It derives from Art. 67 para. 1 of the FIFA Statutes and Art. 23 para. 3 of the Regulations on the Status and Transfer of Players (Edition 2010; hereinafter the "RSTP"), according to which a decision of FIFA maybe appealed to the Court of Arbitration for Sport in Lausanne.

89. It follows that the CAS has jurisdiction to decide on the two appeals against the Appealed Decision dated 19 March 2014. Under Art. R57 of the Code, the Panel has the full power to review the facts and the law and may issue a de novo decision, partially or entirely, superseding the appealed decision.

VII. ADMISSIBILITY

90. 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".*

91. Both Parties filed their respective appeal on 1 July 2014, i.e. within the deadline of 21 calendar days after receipt of the reasoned decision as set by Art. 67 para. 1 of the FIFA Statutes.

92. It follows that the appeals are admissible.

VIII. APPLICABLE LAW

93. Article R58 of the Code provides as follows:

> *"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, 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".*

94. The nature of the present dispute is contractual, since it concerns the rights and obligations deriving from a contract between two Parties, the Second Transfer Agreement. This contract, in Article 7 and under the heading *"Applicable Law"* states: *"This agreement is governed by FIFA regulations and French law".*

95. Nice submits that in consideration of Article R58 of the Code, Article 66 para. 2 of the FIFA Statutes, Article 25 para. 6 of the RSTP and Article 2 of the FIFA Rules governing the Procedure of the Players' Status Committee and the Dispute Resolution Chamber, the CAS should apply the FIFA Statutes and regulations and Swiss law, whereas also French law shall be taken into consideration where appropriate. Sporting, without referring specifically to the applicability of the respective regulations, relies on the RSTP and Swiss law.

96. The Panel notes that the Second Transfer Agreement first refers to the *"FIFA regulations"* and, as such, the Panel considers that primarily the applicable FIFA laws and regulations have to be taken into account, *i.e.* in particular the FIFA Statutes and the RSTP. As according to Article 66 para. 2 of the FIFA Statutes *"additionally"* Swiss law applies, Swiss law shall be applied should the need arise to fill a possible gap in the FIFA Statutes or the RSTP.

97. The Panel further notes that the Second Transfer Agreement also refers to *"French law"*. Nice, as the party that drafted the agreement, submits that French law should be applied in addition to the FIFA regulations and Swiss law, where appropriate. Nice refers to the application of French law regarding the employment contract between Nice and the Player, while referring to the FIFA regulations and Swiss law with respect to the transfer agreement. Sporting, for its part, considers that the Panel must apply the relevant FIFA rules as well as Swiss law, for the purposes or resolving the dispute regarding the transfer agreement. At the hearing, both Parties continued to make submissions explicitly based on the FIFA regulations and Swiss Law.

98. For this reason, the Panel is satisfied to accept that primarily the FIFA Statutes and regulations and additionally Swiss law apply. French law applies for questions related to the employment relationship between the Player and Nice.

IX. MERITS

99. Sporting's first request for relief concerns the payment of the transfer sum under the Second Transfer Agreement. Nice submits that such payment was not due, since the Second Transfer Agreement did not come into force, because two of the conditions precedent were not fulfilled, namely, delivery of the ITC and homologation of the employment contract.

100. It is not disputed by the Parties that the ITC was not delivered and that the employment contract was not homologated by the LPF. Therefore, and as a general rule according to Article 151 para. 2 CO, the contract could not take effect. However, Sporting rather argues that exceptions to the general rule apply, namely:

- First, according to Article 151 para. 2 CO, the Second Transfer Agreement took effect under the exception that the Parties *intended otherwise* by effecting the agreement without the conditions having been fulfilled;
- Second, Nice breached Article 152 para. 1 CO, because it committed several acts that prevented the due performance of Nice's obligation; and
- Third, that the conditions should be deemed fulfilled according to Article 156 CO, because Nice acted in bad faith.

Therefore, the Panel has to examine, whether one or more of the exceptions apply to the present case.

A. The exception with respect to the intention of the parties

101. Article 151 para. 2 CO reads as follows:

"The contract takes effect as soon as this condition precedent occurs, unless the parties clearly intended otherwise".

102. As a general rule, therefore, a contract that has been concluded subject to one or more conditions precedent, does not take effect if the condition(s) precedent is (or are) not fulfilled. The exception that the Parties intended otherwise refers to situations in which the Parties actually intended that rights and obligations should arise already before the condition is fulfilled.

103. Sporting argues that the Player started training and played friendly matches with Nice, such that Nice essentially effected the transfer agreement before the conditions were fulfilled. However, the Panel is not convinced that the training of the Player constitutes an "other intention" under Article 151 para. 2 CO. This provision requires a "clear" intention of both parties that an agreement should take effect prior to the fulfilment of the condition. The intention of Nice to execute the Second Transfer Agreement prior to the issuance of the ITC is, at least, not "clear". In this respect, Nice tried to obtain the ITC after 1 September and, therefore, expected or hoped to be able to register the Player. In this period, it made sense to let the Player train with the team, in order to be able to use his services as soon as his registration would be completed. However, merely following a sensible approach to allow a player to start to train with his future club cannot lead to the conclusion that a party has consciously waived the conditional nature of the transfer agreement that is expected to bring, legally, the player to the new club. In this respect, no convincing evidence was provided by Sporting which would lead the Panel to conclude that the rather informal inclusion of the Player in the training sessions of Nice or in some friendly matches could represent a form of amendment to the Transfer Agreement, i.e. as a waiver of its conditional nature. Accordingly, the Panel is satisfied that the training of the Player and/or his inclusion in some friendly matches does not evidence any clear intention on the part of Nice to execute the Second Transfer Agreement independently of the conditions precedent agreed with Sporting. Article 151 para. 2 CO is therefore not applicable.

B. The alleged breach of obligations under Article 152 para. 1 CO

104. Article 152 para. 1 CO reads as follows:

"Until such time as the condition precedent occurs, the conditional obligor must refrain from any act which might prevent the due performance of his obligation".

105. The wording of this provision first provides for a negative obligation to *"refrain"* from specific acts. However, under Swiss law it is recognized that in addition to the negative aspect, Article 152 para. 1 CO also establishes positive duties of the parties to do what is appropriate to safeguard the prospect of the fulfilment (cf. MATT I., Der bedingte Vertrag im schweizerischen und liechtensteinischen Privatrecht, ZStP Nr. 260, p. 374). In this respect, the provision requires the parties to act positively in a way that is expected from them in good faith (EHRAT F., Art. 152 und Art. 156, in: HONSELL/VOGT/WIEGAND, Basler Kommentar I, OR Art. 1-529, 5. Aufl., Basel 2011).

106. It follows from the above that both Parties were obliged, in the present case, to refrain from any acts which might prevent the fulfilment of the relevant conditions as well as to act in a way expected of them in good faith to safeguard their fulfilment.

107. Sporting argues that the following acts or omissions constitute a breach of the aforesaid obligation:

- The negligent behaviour on 31 August 2011;
- The withdrawal of the appeal against FIFA's decision to deny the ITC;
- The fact that Nice did not integrate the Player into the training as from 17 October 2011 and the non-payment of his salary; to the contrary, Nice requested the LFP to reject homologation of the employment contract and, therefore, to prevent a condition to be fulfilled;
- The non-performance with respect to a transfer in the winter transfer period.

108. First, the ITC was not issued on 31 August 2011, because not all documents were uploaded into the FIFA TMS before midnight. In the afternoon of 31 August 2011, both Parties proceeded on the basis that the transfer would succeed. Complications arise only after the Player raised the issue of a net versus gross salary payment. However, Nice tried to complete the transfer despite this and negotiated new terms for the employment contract as well as for the Second Transfer Agreement. The Panel notes that Nice tried to finalize both agreements prior to midnight and also tried to upload all documents on time. The signed version of the Second Transfer Agreement was only received at 23:59, so the upload on 0:04 was completed within five minutes after receipt, which was not an undue delay given that an upload of documents in a web-based tool can take several minutes depending on the size of the documents and the performance of the tool. Therefore, it seems to the Panel that, on 31 August 2011, Nice did all that could be expected of it in good faith to safeguard the fulfilment of the condition. However, the Panel notes also that the President of Nice was attending a match in Toulouse and so re-negotiations could not start before approximately 22:30 on 31 August 2011. Whilst this factor cannot be considered in isolation as a breach of Nice's duty to safeguard the fulfilment of the conditions precedent, it may have contributed to the risk and the course of subsequent events.

109. Second, Nice withdrew the appeal against FIFA's decision to deny the ITC, although it could have pursued such appeal. Nice argues that the appeal had little purpose after the CAS refused to grant a provisional registration, since the goal was to make available the Player immediately. However, the Panel considers that it would have been prudent to continue with the appeal. The CAS decision is based on a factual background, according to which Nice could have uploaded the transfer agreement already in the afternoon, since at such time it was in the possession of the document. But it is not clear whether the CAS was aware of the fact that the Player wanted a net payment such that the agreements needed to be re-negotiated (including the transfer agreement, which had been received only at 23:59). This argument could have been made before

CAS, with some chance of success. And even if an Award would not have been rendered in a very short time it could still have been issued in a suitable timeframe. Thus, it could have been expected from Nice to continue the appeal.

110. Third, Nice initially integrated the Player into the training of the club but did not allow him to train after the negative CAS decision on provisional measures. Nor did Nice pay to the Player any salary. As a result, the Player terminated his employment agreement with Nice for just cause. Nice argues that it was not obliged to pay any salary, since the employment contract could not be homologated and did not take any legal effect. In addition, Nice argues that the Player and the Agent were informed about the fact that the Player would not receive any salary, should homologation not occur. However, even assuming these arguments had any validity, the Panel notes that, in the present case, and contrary to more established practice, the Parties did not agree to effect the transfer in a specific transfer period. The Second Transfer Agreement (which was drafted by Nice) does not establish a specific date or registration period for the transfer of the Player. The wording of the agreement does not explicitly require the transfer to take place in the summer transfer window. Nice argues that the date of the Second Transfer Agreement, *31 August 2011*, shows the *intention* of the Parties to effect the transfer only in the summer transfer window. However, the Panel is not convinced by this argument and also notes that Nice, by its own subsequent conduct, admitted the possibility that the transfer could be executed in winter. On this basis, and in accordance with Article 152 para. 1 CO, Nice should have safeguarded the possibility to also complete the transfer in the winter transfer window. In this respect, it is clear, to say the least, that a player may leave a club if he does not receive any salary for several months and this is what happened in the present case. Therefore, the Panel considers that Nice should have discussed and/or proposed an interim solution with the Player until the winter transfer window, as a means of safeguarding fulfilment of the condition precedent. Furthermore, the Panel does not consider that French law would have posed any insurmountable obstacle to finding such an interim solution.

111. Fourth, Nice did not include a counter-instruction into FIFA TMS, in order to complete the transfer in the winter transfer window. Nice argues that, on the one hand, it was ready to complete the transfer in the winter transfer window proposing to conclude new agreements, which Sporting was not ready to do. On the other hand, a counter-instruction was useless, since the Player had already terminated the employment agreement. The Panel notes that, indeed, a simple counter-instruction into FIFA TMS would not have completed the transfer, because the employment contract had been terminated by the Player on 25 November 2011. At the same time, the Panel also notes that there was no attempt by Nice to convince the Player to sign a potential new employment agreement nor did Nice approach the Player in any other way with a view to completing the transfer in winter, for example, by seeking a compromise with respect to the termination of the employment agreement.

112. In conclusion, and in light of all these factors, the Panel considers that Nice did not do all that could have been expected from it in good faith to safeguard the fulfilment of the condition precedent. Although the above acts or omissions might not, taken in isolation, justify this conclusion, the Panel considers that, cumulatively, they support their conclusion that Nice did

not do all that could have been reasonably expected of it to safeguard the fulfilment of the condition precedent.

C. The alleged bad faith

113. Article 156 CO reads as follows:

"A condition is deemed fulfilled where one of the parties has prevented its fulfilment by acting against good faith".

114. This provision includes the elements of preventing the fulfilment as well as acting against good faith. In that respect, Article 156 CO requires more than Article 152 para. 1 CO, i.e. that the party preventing the fulfilment acted against good faith "in a gross manner" (SJ 1961, p. 165 f.; MATT I., Der bedingte Vertrag im schweizerischen und liechtensteinischen Priavtrecht, Zurich 2014, p. 388).

115. As outlined above, the individual acts and omissions of Nice mentioned above might not be very severe ones, but constitute relevant acts and omissions under Article 152 para. 1 CO if assessed altogether. For that reason, the Panel believes that such acts and omissions may not be qualified as "acting against good faith in a gross manner", since they in particular also include the aspect of protecting own interests, e.g. when Nice referred to the invalidity of the agreements concluded with Sporting and the Player and acted accordingly. The element of protecting primarily own interest does generally not speak for bad faith within the meaning of Article 156 CO (EHRAT F., Art. 152 und Art. 156, in: HONSELL/VOGT/WIEGAND, Basler Kommentar I, OR Art. 1-529, 5. Aufl., Basel 2011, p. 869). Consequently, the Panel does not consider Nice's behaviour as preventing the fulfilment of the condition in bad faith according to Article 156 CO.

D. Damages

116. Since the Panel deems the provision of Article 152 para. 1 CO applicable to Nice's behaviour, it now considers the legal consequences of non-compliance with this provision.

117. Under Swiss law, it is admitted that the consequences of non-compliance with the duties arising out of Article 152 are an obligation to compensate the damages caused. This means that Nice would be liable for damages under Article 97 *et seq*. CO (HUGUENIN C., Obligationenrecht, Art. 1-1186, Basel 2014, p. 381/382). Therefore, the general rules on the liability for damages apply.

118. Compensation for breach of an obligation shall generally be based on the principle of *positive interest* meaning that the amount shall be determined that puts the injured party in the position that the same party would have had the obligation been performed properly, a principle recognized by CAS in particular in *CAS 2008/A/1519-1520*, para. 86. Had the obligation to safeguard the fulfilment been executed properly, the condition could have been fulfilled in the

winter transfer window and the transfer fee would have been paid. The Panel considers that a causal link between the potential fulfilment of Nice's obligation under Article 152 para. 1 CO and the fulfilment of the condition can be established. In such a case, Sporting would have received a transfer compensation of € 1,000,000. Consequently, Nice is generally liable for damage of € 1,000,000.

119. Furthermore, Sporting claims damages with respect to the "Sell-on" clause as well as for the loss in sporting image. With respect to the "Sell-on" clause, the Panel notes that Sporting itself intentionally terminated the employment contract with the Player. Sporting argues that there was a *chance* that the Player might have been transferred by Nice later on and Sporting might have received a participation in the transfer compensation. Although compensation for *loss of a chance* might be due in certain countries in certain exceptional circumstances, it is recognised under Swiss law that there must be a *logical nexus* between the damage allegedly suffered and the lost chance, for example, if there was a concrete offer capable of acceptance by the parties (*CAS 2008/A/1519-1520*, para. 117 and 118). The Panel, after careful review of all evidence submitted, is not satisfied that such concrete circumstances are present in this case. Accordingly, Nice is not liable for any lost chance relating to the "Sell-on" clause, independently on whether under Swiss law such loss of a chance would justify a compensation.

120. With respect to the loss in sporting image, similar considerations apply, *i.e.* a *logical nexus* needs to exist between the non-performance and the alleged loss. In the present case, Sporting itself refers to the decision of the Player to sign with the sporting rival Benfica. It was, therefore, the Player's decision that triggered the alleged loss and not Nice's. The previous club cannot influence the choice of next club for a free agent player, and so there is no sufficient nexus between the non-performance and the alleged loss. Besides, the Panel also doubts that the evidence provided is enough to establish a real loss in a certain right of Sporting in that respect. Consequently, Nice is not liable for the alleged loss in sporting image.

121. Having determined the damage to be compensated by Nice, the Panel needs to take into account a potential contribution of Sporting with respect to the non-compliance by Nice with the duty to safeguard the fulfilment of the conditions precedent. The behaviour of Sporting is indeed relevant, because according to Article 44 para. 1 CO, compensation may be reduced if there are circumstances attributable to the injured party that helped to give rise to or increase the damage. The Panel notes that the following circumstances shall be considered in this respect:

- The termination of the employment contract with the Player by Sporting;
- The efforts in the winter transfer window to complete the transfer.

122. Sporting signed a formal termination agreement with the Player on 11 October 2011. At that time, Sporting was well aware that it was unclear, whether the Player could be registered with Nice and whether the Second Transfer Agreement would take effect. At first sight, it may be questioned why Sporting signed a termination agreement in precisely that period of uncertainty,

since maintaining an employment contract with the Player would help secure the possibility to claim a transfer compensation for a future transfer (so-called *"federative transfer right"*) even if the transfer with Nice failed. Sporting argues that, first, it wished to comply with the Second Transfer Agreement, which obliged Sporting to terminate the employment contract, and second, that the employment contract had been terminated on 31 August 2011 *de facto* already when agreeing to the transfer. As such, the termination agreement signed on 11 October 2011 was only executed for "administrative" reasons.

123. The Panel accepts that there was an obligation to terminate the employment contract (as per the Second Transfer Agreement) and that agreeing to a transfer also includes agreeing to the termination of the employment contract. However, the Panel considers that Sporting, knowing the difficulties around the transfer activities on 31 August 2011, could and should have taken precaution with respect to the termination agreement, for example, by agreeing with the Player that the termination was to take place at a later point of time or agreeing on condition of validity of the termination, like for instance the existence of a valid ITC and the homologation of the employment contract with Nice. By doing so, Sporting could have kept the federative transfer rights with respect to the Player and mitigated the damage. In this respect, the Panel considers that termination in the present case is a factor to be taken into consideration under Article 44 para. 1 CO.

124. Sporting urged Nice to complete the transfer in the winter transfer window in several communications in November 2011. On 20 December 2011, Sporting sent a formal email to Nice, informing them that Sporting would now launch a transfer instruction into FIFA TMS and asking for clarification on the employment relationship with the Player. Sporting then completed the transfer instruction. However, in the following weeks, Sporting did not contact Nice and/or the Player again and only addressed FIFA for help shortly before the end of the winter transfer window on 27 January 2012. Sporting argued that it was quite clear that Nice would or could not complete the instruction, since the Player had terminated the employment contract. It is true that there considerable doubts whether Nice, under these circumstances, would complete the transfer instruction. But the Panel believes that also Sporting could have done more in such period, for example contacting the Player to clarify his intentions. This applies to Sporting according to Article 152 para. 1 CO in the same way as to Nice. Sporting could also have asked FIFA for help earlier than on 27 January 2012, since the winter transfer winter already closed on 31 January 2012. Lastly, Sporting could have clarified with Nice, whether Nice really intended to change the modalities of the Second Transfer Agreement, as it apparently feared, and come to a compromise concluding a new transfer agreement with the same terms, as Nice argues to have intended. In consequence, the Panel deems that also the (missing) efforts by Sporting in the winter transfer window constitute a circumstance under Article 44 para. 1 CO.

125. With respect to the extent to which the compensation should be reduced, the Panel considers the acts and omissions of Nice mentioned above as clearly more severe than the circumstances attributable to Sporting. Nice laid the grounds for the damage. Sporting, on the other hand, made many efforts to finally complete the transfer, only the two circumstances mentioned

above are to be attributed to Sporting. For this reason, the Panel deems a reduction of the compensation according to Article 44 para. 1 CO of 20% as being appropriate. Consequently, the Panel holds that Nice has to compensate damages to Sporting in the amount of € 800,000.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by SASP OGC Nice Côte d'Azur on 1 July 2014 with respect to the decision issued by the Bureau of the FIFA Players' Status Committee on 19 March 2014 is partially upheld.
2. The appeal filed by Sporting Clube de Portugal SAD on 1 July 2014 with respect to the decision issued by the Bureau of the FIFA Players' Status Committee on 19 March 2014 is dismissed.
3. The Decision issued on 19 March 2014 by the Bureau of the FIFA Players' Status Committee is confirmed, except for point 2 of this decision in the sense that SASP OGC Nice Côte d'Azur has to pay to Sporting Clube de Portugal SAD an amount of € 800,000.

(…)

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