CAS 2021/A/8099 Málaga Club de Fútbol S.A.D v. Brighton & Hove Albion Football Club Limited

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr. Rui Botica Santos, Attorney-at-law in Lisbon, Portugal

Arbitrators: Prof. Luigi Fumagalli, Attorney-at-law in Milano, Italy

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

in the arbitration between

Málaga Club de Fútbol S.A.D, Spain.

Represented by Mr. José María Muñoz, Judicial Administrator, and Mr. Alberto Díaz Hurtado, Attorney-at-law, Málaga, Spain.

- Appellant -

and

Brighton & Hove Albion Football Club Limited, United Kingdom.

Represented by Mr. John Shea, Mr. Brett Baker and Mr. Alex Henderson, Attorneys-at-Law with Lewis Silkin LLP, London, United Kingdom.

- Respondent -

I. PARTIES

1. Málaga Club de Fútbol, S.A.D. (the "**Appellant**" or "**Málaga**") is a Spanish football club based in Málaga, Spain, affiliated to the Real Federación Española de Fútbol (the "RFEF"), which in turn is affiliated to Fédération Internationale de Football Association (the "FIFA").

2. Brighton & Hove Albion Football Club Limited (the "**Respondent**" or "**Brighton**") is an English professional football club based in Brighton and Hove, United Kingdom, affiliated to the Football Association (the "FA"), which in turn is affiliated to FIFA; The Appellant and the Respondent shall be jointly referred to as the "Parties".

II. FACTUAL BACKGROUND

3. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. This factual background information is given for the sole purpose of providing a synopsis of the matter in dispute. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in this award (the "Award") only to the submissions and evidence it considers necessary to explain its reasoning.

(A) Introduction

4. This appeal case (the "Appeal") is related to the challenging of the decision adopted by the Players' Status Committee of FIFA (the "FIFA PSC") on 18 May 2021 and notified on 9 June 2021, which ordered Málaga to pay Brighton the amount of EUR 125,000, plus interest (the "Appealed Decision").

(B) The transaction between Brighton and Málaga | The transfer of the player Jack Harper

5. On 30 December 2016, Málaga and Brighton concluded a transfer agreement (the "Transfer Agreement") for the transfer of the player Jack Harper (the "Player"). This contract would enter into force if and when the following conditions of its Clause 3 were met:

"3.1.1 The Player and Malaga have entered into a contract of employment in a form satisfactory to Malaga.
3.1.2 Malaga has received a copy of the International Transfer Certificate relating to the Player issued by the English Football Association in order to register the Player with Malaga.
3.2. This Agreement shall terminate automatically if any of the Conditions has not been satisfied before 17:00 (London time) on 15th January 2017 and in that event the Agreement shall cease to have any further effect except for clauses 8, 9, 10 and 11."

6. Pursuant to Clause 2.1. of the Transfer Agreement, Brighton transferred the Player to Málaga *"(...) without payment of an initial transfer fee (...)"*. However, the Parties agreed that Brighton would be entitled to a percentage of any future transfer of the Player from Málaga to a third club (Clause 2.2. of the Transfer Agreement).

7. Clause 2.2. of the Transfer Agreement (the "Sell-on Clause") stated the following:

"2.2 Should the Player's registration be transferred on a permanent basis by Malaga at any time in the future then Malaga will pay to Brighton 12.5% (twelve and a half per cent) of any transfer fee received by Malaga (deducting the amount corresponding to solidarity contribution) up to a maximum sum of €750,000 (seven hundred and fifty thousand euros).
If applicable, payment will be made by Malaga within 30 working days as from the moment Malaga receives the transfer fee of a third club, if the payment is made in several instalments by the third club, the payment to Brighton will be made in proportion to those instalments."

8. On 20 April 2017, Málaga registered the Player and an employment agreement was signed (the "Employment Agreement"). The Employment Agreement was valid until 30 June 2019. However, under its Clause 10, Málaga had the option right to extend its term for another three seasons (the "Option Right Clause"). The Option Right Clause stated the following:

"DECIMA:
Aun cuando la vigencia inicial del presente contrato ha quedado fijada hasta el 30-06-2019, ***el JUGADOR, de manera fehaciente y con expreso consentimiento, otorga al Málaga Club de Fútbol S.A.D. la opción de prorrogar*** *el presente contrato por tres (3) temporadas más (temporadas 2019/2020 a 2021/2022).*
Para ello, el Club deberá comunicar al JUGADOR, siempre antes del día 15 de mayo de 2019, su intención de prorrogar el presente contrato por dichas temporadas 2019/2020 a 2021/2022.

Para el caso de que el Málaga CF. ejercite la opción de prórroga del presente contrato, tanto Málaga C.F. SAD como el JUGADOR ***quedarán obligados a suscribir un nuevo contrato de trabajo de jugador profesional y licencia federativa.***"

FREE ENGLISH TRANSLATION

"***TENTH:***
Even though the initial term of this contract has been fixed until 30-06-2019, ***the PLAYER, in a reliable manner and with express consent, grants Málaga Club de Fútbol S.A.D. the option to extend*** *this contract for three (3) more seasons (seasons 2019/2020 to 2021/2022).*
To this end, the Club must communicate to the PLAYER, always before 15 May 2019, its intention to extend the present contract for the said seasons 2019/2020 to 2021/2022.
In the event that Málaga CF. exercises the option to extend the present contract, both Málaga C.F. SAD and the PLAYER ***will be obliged to sign a new professional player's employment contract and federative licence***".

(Emphasis added by the Panel)

9. On 22 February 2019, the Player sent to Málaga a letter informing if of his intention to negotiate with a new club once the Employment Agreement had ended. In addition to this, the Player also informed Málaga that, according to his legal advisors, the Option Right Clause was prohibited by Spanish Law and, as such, Málaga did not have any right to extend the Employment Agreement after 30 June 2019.

10. On March 20, 2019, Málaga and Getafe Club de Fútbol, S.A.D ("Getafe") reached an agreement by virtue of which the Option Right Clause would be waived by Málaga in exchange for a financial compensation (the "Waiver Agreement"). Clause I of the Waiver Agreement states the following:

En virtud del presente contrato el MÁLAGA CLUB DE FUTBOL, SAD se compromete a desistir de su facultad de renovación sobre el contrato de trabajo con el JUGADOR D. JACK HARPER a efectos de que éste pueda suscribir un contrato con el GETAFE CLUB DE FÚTBOL, S.A.D., al ser agente libre.
(...)
El GETAFE abonará al MÁLAGA CF, por el desistimiento de la facultad de renovación sobre el contrato del JUGADOR y siempre que el JUGADOR sea contratado por GETAFE como agente libre con fecha de efectos del 1 de Julio de

2019, la cantidad de UN MILLÓN QUINIENTOS MIL EUROS (1.500.000 €) más IVA."

FREE ENGLISH TRANSLATION:

"By means of this contract, MÁLAGA CLUB DE FUTBOL, SAD undertakes to waive its right to extend the employment contract of PLAYER JACK HARPER in order to enable him to sign a contract with GETAFE CLUB DE FÚTBOL, S.A.D., as he is a free agent.
(...)
GETAFE shall pay to MÁLAGA CF, for the waiver of the option to extend the contract of the PLAYER and provided that the PLAYER is hired by GETAFE as a free agent with an effective date of July 1, 2019, the amount of ONE MILLION FIVE HUNDRED THOUSAND EUROS (€1,500,000) plus VAT."

11. In addition, the Waiver Agreement established in Clause II, a), the following:

a) En el supuesto que el Jugador Ivan Alejo se reincorpore a la disciplina del GETAFE en la temporada 2019-2020:
• QUINIENTOS MIL EUROS (500.000 €) antes de o el 31 de agosto de 2019
• QUINIENTOS MIL EUROS (500.000 €) antes de o el 31 de agosto de 2020
• QUINIENTOS MIL EUROS (500.000 €) antes de o el 31 de agosto de 2021
• El IVA de esta operación se pagará el día 15 del mes siguiente a la fecha de emisión de la factura

FREE ENGLISH TRANSLATION
a) In the event that the Player Ivan Alejo rejoins the discipline of GETAFE in the 2019-2020 season:
- FIVE HUNDRED THOUSAND EUROS (€500,000) before or on August 31, 2019.
- FIVE HUNDRED THOUSAND EUROS (€500,000) on or before August 31, 2020
- FIVE HUNDRED THOUSAND EUROS (500,000 €) on or before August 31, 2021.
- The VAT for this operation shall be paid on the 15th day of the month following the date of issue of the invoice.

12. On 1 July 2019, the Player signed an employment agreement with Getafe.

13. On 8 July 2020, Brighton enquired Málaga about the terms of the Player's transfer to Getafe and whether a payment was due from Málaga to Brighton.

14. In that email exchange, after confirming that the Player had become a free agent on 1 July 2019, Mr Alberto Díaz Hurtado (from Málaga's legal department) provided the below explanations of the agreement between Málaga and Getafe:

"*Jack Harper's intention to leave Malaga as a free agent on July 1, 2019 was notified to the club by communication from the player himself dated February 22, 2019. Therefore, the player fulfilled the entire duration stipulated in his contract and was linked to Malaga until June 30, 2019. As a result of the above, on July 1, 2019, the player negotiated his incorporation to a new club as free agent.*

Therefore, we proceed to confirm that Malaga did not transfer the player's registration on a permanent basis at any time to Getafe. In other words, Malaga CF did not receive any money from Getafe CF for their registration of Player Jack Harper.

Malaga agreed with Getafe to receive the amount of one million five hundred thousand euros (1,500,000.- €) as compensation for the withdrawal of the right to renewal included in the tenth clause of the Jack Harper player contract which has been made reference above. All this to facilitate the engage of the player as a free agent with Getafe."

(C) The proceedings before the FIFA Player's Status Committee

15. On 3 March 2021, Brighton lodged a claim before the FIFA PSC and requested the payment of the amount of EUR 187,500, plus applicable interest, as a sell on fee which was due under the Sell-on Clause. In addition to this, Brighton also requested that the amount of EUR 62,500 (equal to 12.5% of the final EUR 500,000 instalment due under the Waiver Agreement) be paid within 30 working days after Málaga receives the last instalment agreed upon in the Waiver Agreement from Getafe.

16. Brighton argued in essence that the Player's move from Málaga to Getafe was in fact a transfer of the Player's registration on a permanent basis and that "*any decision to the contrary will set a very dangerous precedent in that it would potentially allow clubs in the future to circumvent the operation of a sell-on clause by artificially engineering a free transfer of a player through the waiving of contractual renewal rights or otherwise.*"

17. Málaga, on the other hand, resisted the Brighton's claim and based its defence mainly on the fact that the contractual relationship between the Player and the Respondent had ended on 30 June 2019 and that the Waiver Agreement did not establish a compensation for the transfer of the Player, rather it was a compensation for the non-exercise of the contract extension clause and the loss of Málaga's assets. The

Respondent explained that no money had been received for the transfer, instead, it had "*received compensation from Getafe for the withdrawal of the right to renewal included in the tenth clause of the Player contract.*"

18. On 9 June 2021, the FIFA PSC communicated the Appealed Decision, which can be summarised as follows:

- Brighton and Málaga concluded a transfer agreement which included a sell-on clause in the event of a future transfer of the Player (the Sell-on Clause);
- Málaga, acknowledging that it had a right to extend the Player's contract until 2022, made the decision to waive this right in exchange for compensation and concluded the Waiver Agreement with Getafe CF. In light of such agreement, it would receive EUR 1,500,000 (in three separate instalments);
- The contractual framework built by Getafe CF and Málaga was, *de facto*, a transfer, since it had similar effects to a transfer agreement and included the payment of a significant amount. The Sell-on Clause was, as such, applicable and the material arguments shall take precedence over the literal and formalistic arguments;
- This conclusion can be reached within the interpretation of Sell-on Clause as these new circumstances do not depart from the contractual intent of the Parties;
- Seeing as Málaga should have already received the two first instalments (in the amount of EUR 500,000 each), Brighton is entitled to receive the total outstanding amount of EUR 125,000 (which is equal to 12.5% of the two aforementioned instalments, pursuant to Sell-on Clause);
- The last instalment (in the amount of EUR 500,000) was not yet due to Málaga and, as such, the remaining 12.5% of that amount could not be awarded by the FIFA PSC.

19. As a result of the above, the decision of the Single Judge of the FIFA PSC finally established the following:

"1. The claim of the Claimant, Brighton and Hove Albion FC, is partially accepted.

2. The Respondent, Malaga FC, has to pay to the Claimant, the amount of EUR 125,000, plus interest as follows:

- 5% interest p.a. over the amount of EUR 62,500 as from 1 September 2019 until the date of effective payment;

- 5% interest p.a. over the amount of EUR 62,500 as from 1 September 2020 until the date of effective payment.

3. Any further claims of the Claimant are rejected.

4. Full payment (including all applicable interest) shall be made to the bank account indicated in the enclosed Bank Account Registration Form.

5. Pursuant to article 24bis of the Regulations on the Status and Transfer of Players if full payment (including all applicable interest) is not paid within 45 days of notification of this decision, the following consequences shall apply:

1. The Respondent shall be banned from registering any new players, either nationally or internationally, up until the due amount is paid. The maximum duration the ban shall be of three entire and consecutive registration periods.

2. The present matter shall be submitted, upon request, to the FIFA Disciplinary Committee in the event that full payment (including all applicable interest) is still not paid by the end of the of the three entire and consecutive registration periods.

6. The consequences shall only be enforced at the request of the Claimant in accordance with article 24bis paragraphs 7 and 8 of the Regulations on the Status and Transfer of Players.

7. The final costs of the proceedings in the amount of CHF 15,000 are to be paid by the Respondent to FIFA (cf. note relating to the payment of the procedural costs below)."

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

20. On 29 June 2021, the Appellant filed its Statement of Appeal with the Court of Arbitration for Sport (the "CAS"), to challenge the Appealed Decision, in accordance with Article R47 and R48 of the Code of Sports-related arbitration (the "Code"). In its Statement of Appeal, the Appellant requested that the present case be submitted to a Sole Arbitrator; in the alternative, if this request was accepted, the Appellant nominated Mr Kepa Larumbe as arbitrator.

21. On 10 July 2021, the Appellant filed its Appeal Brief, pursuant to Article R51 of the Code.

22. On 13 July 2021, the Respondent informed the CAS that it did not agree with the appointment of a Sole Arbitrator and proposed that the Appeal be submitted to a

Panel of three arbitrators, in accordance with Article R50 of the Code. Accordingly, the Respondent nominated Prof. Luigi Fumagalli as arbitrator.

23. On 20 July 2021, the CAS Court Office, on behalf of the Deputy Division President, informed the Parties that the Appeal would be submitted to a three-member Panel in accordance with Article R50 of the Code.

24. On 1 August 2021, the Respondent filed its Answer, pursuant to Article R55 of the Code, and proposed that the appeal should be considered solely on the basis of the Parties' written submissions.

25. On 6 August 2021, the Appellant informed the CAS that a hearing was not necessary and that the Panel could render an award based on the Parties' written submissions, in accordance with Article R57 of the Code.

26. On 6 August 2021, the CAS Court Office informed the Parties that pursuant to Article R54 of the Code, and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the Panel had been constituted as follows:

President:	Mr. Rui Botica Santos, Attorney-at-law, Lisbon, Portugal.
Arbitrators:	Prof. Luigi Fumagalli, Attorney-at-law, Milano, Italy.
	Mr. Kepa Larumbe, Attorney-at-law, Madrid, Spain.

27. On 27 September 2021, the CAS Court Office informed the Parties that the Panel considered itself sufficiently informed with the Parties' written submissions, and therefore that it had decided that a hearing would not be held and that an award would be rendered based solely on the presented written submissions.

28. On this same date, the CAS Court Office issued the Order of Procedure, which was duly signed by the Parties. By signing the Order of Procedure, the Parties confirmed their agreement that the Panel could decide the case based on the Parties' written submissions and that their right to be heard had been respected.

IV. THE PARTIES' SUBMISSIONS

29. The following summary of the Parties' positions is illustrative and does not necessarily comprise each contention put forward by the Parties. The Panel, however, has carefully considered all the submissions made by the Parties, even if no explicit reference is made in what immediately follows.

(A) The Appellant's Submissions

30. In its Appeal Brief the Appellant submits the following prayers and requests the CAS:

"1.- That this appeal be upheld.

2.- That the appealed decision be revoked.

3.- That Málaga does not have to pay any sum to Brighton because of the termination of the Player's contract and his subsequent bound to Getafe as a free agent.

4.- That the application of article 24 bis of FIFA RSTP provided for in the appealed decision be left without effect, while this appeal is resolved.

5.- That the Respondent covers the entire cost of the proceedings."

(A.1) The Termination of the Employment Agreement

31. On 30 June 2019, the Player's contractual relationship with Málaga ended in accordance with the provisions of the Employment Agreement.

32. As such, pursuant to Article 13 of the FIFA Regulations on the Status and Transfer of Players (the "RSTP"), which establishes that contracts may only be terminated upon expiry of their term, the above-mentioned contract between a professional player and a club was totally fulfilled.

33. From that moment on, a professional player is free to conclude a contract with any other club as a "free agent" in accordance with Article 18.3 RSTP.

(A.2) The correct interpretation of the Sell-on Clause

34. The crucial disagreement between the Parties is the application of the Sell on Clause. In essence, two requirements must be met for this provision to be applicable:

"1.- Malaga had to permanently transfer the Player's registration on a permanent basis to another club in the future.

2.- A transfer fee had to be received by Málaga for this concept."

35. Regarding the transfer of the Player, it is necessary to differentiate two situations:

- A permanent transfer, which is conducted when a player is permanently engaged by a new club and the signing of a transfer agreement between the old club and the new club occurs; and

- An out of contract transfer, which is conducted when a player signs for a new club in a moment when he was not contractually bound to any former club and no transfer agreement is concluded. This may happen when the player's contract with the former club has expired; the contract with the former club was unilaterally terminated; the player mutually agreed to an early termination of his contract with the former club or when the player was an amateur and, as such, was not under a contract.

36. On the other hand, it is also crucial to define two concepts regarding the amount of money received:

- *"Sell-on fee: The percentage of a future transfer fee agreed between the two clubs involved in a Permanent transfer with transfer agreement."*

- *"Release fee: Any fee paid in execution of a clause in the Player's contract with his former club providing for compensation for termination of the relevant contract."* (para. 37 of the Appeal Brief)

37. The definition provided above may be found in the Global Transfer Market Report 2020, published by FIFA.

38. Considering the abovementioned concepts and definitions, we must conclude that the Sell-on Clause is not applicable to our case since Málaga did not permanently transfer the Player's registration at any time to Getafe. In fact, the engagement of the Player by Getafe was not conducted through a transfer agreement and therefore a transfer fee has not been agreed.

39. The Player joined Getafe after his Employment Agreement had expired (as a free agent), which means that there *"has been an out of contract transfer through the payment by Getafe to Malaga of a release fee, in compensation for the withdrawal of the right to renewal included in the tenth clause of the Jack Harper player contract"*. In this sense, remember Article 17.1 of the RSTP, which establishes that when a player's contract ends without just cause, the party in breach shall pay compensation.

(A.3) The Literal Interpretation of the Sell-on Clause.

40. Brighton's wide interpretation of the Sell-on Clause is inaccurate and contrary to good faith, as well as contrary to the Parties real intent when it was drafted. Clearly, there was an agreement to refer the payment of 12.5% to the payment of a transfer fee which would have to be received by Málaga. In this case, no transfer fee or money was received for the new registration of the Player; instead, Málaga received only a compensation from Getafe for the withdrawal of the Option Right Clause.

41. Only a literal interpretation of the Transfer Agreement (and, consequentially, the Sell-on Clause) is correct since the specific case in which the player leaves the club without just cause or in the event of the expiration of his Employment Agreement has not been foreseen by the Parties in any agreement. On the contrary, it was agreed that the payment of an amount of money would only occur if Málaga receives a transfer fee, which did not happen.

42. In this sense, it is important to note what the Panel from the case CAS 2017/A/5065 stated in paragraphs 62 and 63, as well as the reasoning put forward in para. 97 of the case CAS 2017/A/5056 & 5069:

"97. Therefore the Panel has to explore the "real and common intent" of the parties, pursuant to the mentioned principles, beyond the literal meaning of the words used, in order to determine the implications of this clause, if any".

43. It is also relevant to note what was stated in paras. 60 and 77 of the award CAS 2016/A/4731:

*"60. The **starting point** of any interpretation of a provision, naturally, **is its wording**. For this, the wording both forms the object as well as the instrument of legal interpretation. Thus, the approach of **literal interpretation of a provision, in principle, has primacy over other methods of interpretation**."*

(...)

*"77. For the same reason, the Appellant's reference to CAS jurisprudence according to which ambiguous terms of contract shall be interpreted against the party which has included the clause, must be rejected. This **jurisprudence, which, in principle, deserves approval, is only applicable in cases where contracts actually contain ambiguous terms**. As pointed out, the clear separation between the types of compensations and their respective taxation does not produce such ambiguous terms.*

Since it becomes clear from a grammatical and literal interpretation *of the Suspension Agreement that solely conditional compensation would be net,* ***there is no further need for any logic or contra stipulatorem interpretation to the contrary***"

(Emphasis added by the Appellant)

44. In the present case, the Parties' intention can be identified by a literal interpretation of the agreement. The wording is clear when it mentions the concept of "transfer fee".

(A.4) The Doctrine of *Pacta Sunt Servanda*

45. In the present case, it also necessary to consider the doctrine of *pacta sunt servanda*, which has been widely recognized on multiple occasions by the Players' Status Committee and the CAS.

46. All parties must, in good faith, respect the executed contracts. Málaga agreed to pay only a percentage of a future transfer fee of the Player, however, in this case, the amount which was received from Getafe had the nature of a compensation paid for the withdrawal of the right to renewal included in Clause 10 of the Player's Employment Agreement.

(A.5) The autonomy of the Parties

47. The RSTP does not limit party autonomy extensively. The parties to an agreement may decide and agree on what will be the amount or percentage to be paid, under what circumstances will the payment proceed and in concept of what.

48. The autonomy of the Parties plays the main role in the business conducted between them.

(A.6) The economic value of the Option Right Clause

49. Málaga's option right to unilaterally renew the Employment Agreement had an important economic value, since its exercise would prevent him from joining Getafe as a free agent. If this right had been exercised, the Player and Getafe would have had to compensate Málaga with an amount between EUR 10,000,000 and EUR 12,000,000.

50. For that reason, the compensation for the withdrawal of the Option Right Clause is considered as just and reasonable, seeing as the Player expressed his intention to leave Málaga at the end of the season.

(A.7) The wrong analysis of the FIFA PSC expressed in the Appealed Decision

51. Contrary to what is stated in the Appealed Decision, Malaga did not "prefer" to refrain from exercising the Option Right Clause. This right was going to be exercised (which was the reason why Málaga did not study any offers for the Player during the winter market), however, the former communication from the Player stating his intention to leave Málaga at the end of the season forced Málaga not to use it and to accept a compensation for such withdrawal.

52. In addition, it is also impossible to agree with the reasoning put forward in point 11 of the Appealed Decision:

"As a result, the Single Judge understood that, regardless of its legal structuring, de facto, the player transferred from Málaga to Getafe in a manner that complies with the sell-on requirements of the agreement concluded between Brighton Hove and Málaga CF, since it resulted in a transfer that included a significant amount paid by the player's new club to his former club (i.e. by Getafe to Málaga). The Single Judge underlines that this interpretation allows to take into account taking new circumstances into account without departing from the contractual intent".

53. There are indeed differences between both legal structures and those differences are relevant insofar as the intention of the Parties reflected in the Transfer Agreement was clearly stated – a percentage was to be paid to Brighton in case of future permanent transfer with the conclusion of a transfer agreement.

54. In this case, a different type of transfer than the one which was foreseen in the Transfer Agreement was concluded, namely because the Player signed for a new club when he was not contractually bound to any former club and without the signing of any transfer agreement. As such, the FIFA PSC's interpretation is clearly contrary to the literal nature of the Transfer Agreement.

(B) The Respondent's Submissions

55. In its Answer, the Respondent seeks the following prayers and requests from the CAS:

"a. Consider the appeal based on the written submission only;

b. Dismiss the appeal;

c. Order that the Appellant pay the arbitration costs and the Respondent its costs pursuant to art. R64.5 of the Code; and

d. Such further and other relief as the CAS Panel sees fit."

(B.1) The Law applicable to the merits

56. The Appellant is silent as to the law applicable to the merits, however, the applicable law in the present proceedings shall primarily be the RSTP and, subsidiarily, English Law in accordance with Article R58 of the Code and Clause 11 of the Transfer Agreement.

57. In case the CAS Panel does not agree that English law shall be subsidiarily applied, the dispute shall be decided based primarily on the RSTP and Swiss Law shall be subsidiarily applicable in accordance with Article R58 of the Code and Article 56.2 of the FIFA Statutes.

(B.2) The conditions upon which the Sell-on Clause is triggered.

58. The Sell-On Clause laid forth in in the Transfer Agreement is triggered if and when the following conditions are met:

a) The Player's registration is transferred on a permanent basis by the Appellant; and
b) A transfer fee is received by the Appellant.

59. The following facts are undisputed:

a) The Transfer Agreement provides for a sell-on clause in the amount equivalent to 12.5% of any transfer fee received by the Appellant by virtue of the transfer, by the Appellant, of the Player's registration on a permanent basis;

b) A written agreement was concluded between Málaga and Getafe pursuant to which Getafe agreed to pay EUR 1,500,000 as compensation for the Appellant's loss of the services of the Player.

c) The Player joined Getafe from Málaga on a permanent basis on 1 July 2019.

60. While the Appellant argues that the abovementioned conditions (see para. 58) were not fulfilled, this argument is flawed due to a number of reasons which will be further explained.

(B.3) Was the Player's registration transferred on a permanent basis by Málaga?

61. It is unquestionable that the Player was transferred from Málaga to Getafe on a permanent basis.

62. The purpose of a sell-on clause is to allow the old club of a player to share the benefit of a subsequent transfer by receiving an additional payment in case the player is transferred from its new club to a third club. This was, indeed, the intention behind the Sell-on Clause, as the Player was transferred to Málaga without the payment of any initial transfer fee; the Appellant was only obliged to pay certain amounts based on the Player's appearances and the Sell-on Clause, which were crucial for the adequate compensation of the Respondent for the loss of the Player's services.

63. The Appellant based its defence on decision no. 07192352-E dated 24 July 2019, rendered by the FIFA Player's Status Committee, and upheld by the CAS on 14 April 2020 (CAS 2019/A/6525). During said proceedings, it was disputed if a sell-on clause had or not been triggered by the exercise of a buy-out clause (also known as a rescission clause). This case was similar to the present one since such a clause would be triggered "*In case a definitive transfer of the player is signed, and the player is transferred from SEVILLA FC to another club*" – Sevilla argued that the exercise of the buy-out clause did not constitute a transfer and, therefore, the sell-on clause was not triggered, however, the CAS did not follow such reasoning:

"The Panel notes (as already underlined in CAS 2010/A/2098) that in the world of professional 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.

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.

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.

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." (paras. 71-74, CAS 2019/A/6525)

64. While the abovementioned jurisprudence of the CAS relates to the exercise of a buy-out clause, the reasoning behind it is entirely applicable to the present case:

a) There was undoubtedly a change of both the Player's registration and employer which took place in July 2019, when he joined Getafe;

b) The transfer of the Player happened within the scheme of a contract. In fact, Málaga and Getafe entered into a transfer agreement even before the Player's Employment Agreement had expired. The Waiver Agreement clearly states that the Appellant "expressed its agreement" to the termination of the Player's Employment Agreement, by virtue of refraining from exercising its right to renew

such contract; this allowed the Player to sign a new employment agreement with Getafe, which was obliged to pay EUR 1,500,000 under the Waiver Agreement, to compensate Málaga for the loss of the Player's services. Whatever the Appellant argues, the agreement concluded between Málaga and Getafe was, for all purposes, a transfer agreement, since a significant sum of money was paid for the services and registration of a player.

c) Even if the Panel accepts the Appellant's arguments to the contrary, the wording of the Sell-on Clause – "*Should the Player's registration be transferred on a permanent basis by Malaga at any time in the future*" – is sufficiently wide to cover any kind of transfer, even if the Appellant decided to put a different "label" on such a deal. This clause was always intended to allow the "*Respondent to share the benefit of any and all subsequent transfers of the Player to a new club*".

65. The principles stated above were also confirmed in CAS 2010/A/2098. The CAS Panel from that case concluded that the specific sell-on clause established in the transfer agreement between the football clubs was not triggered by the exercise, by a player, of his statutory right to buy out his contract; however, this decision was mainly a result of the narrow wording of the sell-on clause analysed in that case (which only referred to a "resale"), the fact that it occurred outside the scheme of a contract and without the consent of the selling club. In this case, however, none of these constraints are present.

66. In addition, paragraph 76 of the decision CAS 2011/A/2356 also provides a good support for the Respondent's position:

"76. The Panel is therefore convinced that the above-described transaction should properly be considered as a transfer in the sense of Article 21 and Article 1 Annex 5 of the FIFA RSTP. ***The fact that this transaction is not identical to the typical or common pattern of transfer*** *(in which the wills and consents of all the parties are declared in the same act by signing a written agreement)* ***does not mean at all that it should not be considered a transfer if the basic elements constituting a transfer concur****. In this respect the Panel shall mention that CAS, in the award 2010/A/2098 has expressly recognised that "a transfer of a player can also take place outside the scheme of a ("sale") contract [...]".* ***In the Panel's view the reality and the substance of the transaction shall prevail on discussions about forms or schemes of transfers****, especially when the FIFA provisions do not impose such schemes or forms for the payment of the solidarity contribution."*

(Emphasis added by the Respondent)

67. For the reasons set out above, the Respondent invites the CAS to consider that the Player's registration was permanently transferred by the Appellant to Getafe on 1 July 2019. Therefore, the first condition established by the Sell-on Clause was fulfilled and "*[a]ny decision to the contrary will set a very dangerous precedent in that it would potentially allow clubs in the future to circumvent the operation of a sell-on clause by artificially engineering a free transfer of a player through the waiving of contractual renewal rights or otherwise*".

(B.4) Did the Appellant receive a transfer fee?

68. As was already explained, Getafe agreed to pay EUR 1,500,000 in accordance with the Transfer Agreement concluded with Málaga.

69. If the CAS Panel agrees with the reasoning stated above, then it must follow that said payment of EUR 1,500,000 was a consideration for the permanent transfer of the Player's registration and, as such, constituted a transfer fee.

70. Since Málaga was not promoted to the La Liga Primera División at the end of the 2018/2019 season and the player Ivan Alejo returned to Getafe on 30 June 2019, the provisions of Part II (a) of the Waiver Agreement between those clubs applied and the payment has to be made in the following manner:

a) EUR 500,000 on or before 31 August 2019;
b) EUR 500,000 on or before 31 August 2020;
c) EUR 500,000 on or before 31 August 2021;

71. The Appellant acknowledged that it has received the first two instalments in the total amount of EUR 1,000,000; therefore, the second condition of the Sell-on Clause was met – the Appellant received a transfer fee.

V. JURISDICTION

72. Article R47 of the Code stipulates:

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

73. In addition, Article 57.1 of the FIFA Statutes states:

"FIFA recognizes 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."

74. Furthermore, Article 58.1 of the FIFA Statutes establishes:

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

75. The jurisdiction of the CAS, which is not disputed by the Parties, derives from Article R47 of the Code and Article 58.1 of the FIFA Statutes in connection with Article 24.2 RSTP. Furthermore, the jurisdiction of the CAS is further confirmed by the Order of Procedure duly signed by all Parties.

76. It follows that CAS has jurisdiction to hear this matter.

77. According to Article R57 of the Code, the Panel has full power to review the facts and the law of the case and can decide the dispute *de novo*. The Panel may issue a new decision which replaces the decision challenged, may annul the decision, or refer the case back to the previous instance

VI. ADMISSIBILITY

78. 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."

79. Article 58 (1) of the FIFA Statutes reads as follows:

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

80. The Panel notes that the admissibility of the Appeal is not contested by the Parties. The grounds of the Appealed Decision were notified to the Appellant on 9 June 2021 and the Statement of Appeal was filed on 29 June 2021, *i.e.* within the 21-day deadline fixed under Article 58 of the FIFA Statutes.

81. It follows that the Appeal is admissible.

VII. APPLICABLE LAW

82. Firstly, a distinction between the *lex arbitri* (the arbitration law at the seat of arbitration) and the *lex causae* (the law applicable to the merits) has to be made: "[w]*hereas procedural issues are governed by the law of the seat of the arbitration, i.e. Switzerland, the law applicable to the merits of the dispute depends on the applicable conflict of law rules.*" (CAS 2017/A/5465, para. 69).

83. CAS has its seat in Lausanne, Switzerland and, as such, the Swiss Private International Law Act (SR 291, *Federal Act on Private International Law,* hereinafter referred to as "PILA") is applicable to the present case as *lex arbitri.* In addition to this, and according to Article 176 (1) of the PILA, the provisions of Chapter 12 apply since this is an international arbitration (both Parties are based outside of Switzerland).

84. The *lex arbitri's* conflict of law provisions is then used to determine the law applicable to the merits. As such, according to Article 187 (1) of the PILA, "[t]*he arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the case has the closest connection*".

85. There is no doubt that by submitting themselves to the CAS, not directly contesting its jurisdiction and by signing the Order of Procedure, the Parties have made an implicit agreement as to the applicable procedural rules, accepting the Code. However, by doing this, the Parties also accept the conflict of laws rules contained in the Code, in particular Article R58 which establishes that:

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

(Emphasis added by the Panel)

86. In interpreting the above-mentioned provisions, the Panel fully subscribes to the doctrine of Prof. Ulrich Haas:

"Like Art. 187 (1) of the PILA, Art. R58 of the CAS Code also distinguishes between whether or not the parties have made a choice of law. In the absence of a choice of law, Art. R58 of the CAS Code stipulates that the Panel shall apply "the law of the country in which the federation, association or sport-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate". This approach is basically no different from the closest connection test provided for in the second alternative of Art. 187 (1) of the PILA. To this extent the two provisions are almost identical.

In the event that the parties have made a choice of law, however, the question of law is different, since in this regard Art. R58 of the CAS Code stipulates that this choice of law is relevant only "subsidiarily". Consequently Art. R58 of the CAS Code serves to restrict the autonomy of the parties, since even where a choice of law has been made, the "applicable regulations" are primarily applied, irrespective of the will of the parties. These are the (autonomous) rules of the association that made the first-instance decision that is being contested in the appeals arbitration procedure. Since in football-related disputes this is the FIFA, under Art. R58 of the CAS Code – regardless of the parties' choice of law – the rules and regulations of FIFA apply accordingly." (HAAS, Ulrich, *Applicable law in football-related disputes: The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law*, in CAS Bulletin 2015/2, p. 11).

87. In fact, this doctrine has also been expressly recognized and applied by the Panels of CAS 2017/A/5465, 2017/A/5374, CAS 2018/A/5624 and others:

"Pursuant to Article R58 of the Code, in an appeal arbitration procedure before the CAS, the "Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision". It follows from this provision that the "applicable regulations", i.e. the statutes and regulations of the sports organisation that issued the decision (here FIFA) are applicable to the dispute irrespective of what law the Parties have agreed upon. In the Sole Arbitrator's view, the Parties cannot derogate from this provision if CAS retains jurisdiction which is the case here. To

conclude, therefore, the Sole Arbitrator finds that Article R58 of the Code takes precedent over the direct choice-of-law clause contained in the Parties' agreements and that, thus, the FIFA rules and regulations apply primarily." (para. 57, CAS 2017/A/5374; para. 57, CAS 2018/A/5624)

88. In the present case, the Transfer Agreement concluded between the Parties (which is at the "heart" of this dispute) contained a provision which addressed applicable law in Clause 11 (the "Clause 11"):

"*This Agreement shall be governed by and construed in accordance with the laws of England and Wales, or the laws of Spain or failing agreement then it shall be governed by CAS/TAS*"

89. While the Appellant stated, in its Statement of Appeal, that the FIFA Regulations should apply primarily and Swiss Law subsidiarily, the Respondent submitted that the subsidiarily applicable law should be English Law.

90. Clause 11 fails to establish if English Law takes precedence or not over Spanish Law, however, when read in full, it appears to indicate that when the Parties do not agree which of those two laws shall apply, then it should be for the CAS/TAS to decide. This is precisely our case. The Parties do not dispute that the FIFA Regulations are to be primarily applied, they only dispute which should be the subsidiarily applicable law.

91. As such, and in accordance with Clause 11, the Parties have agreed that it would be for CAS to decide which law shall apply ("(...) *failing agreement then it shall be governed by CAS/TAS*"). In essence, this means that the apparent choice of law made in Clause 11 does not have any actual effect and no choice can be considered by the Panel.

92. Therefore, Article R58 of the Code applies in full, and the Panel shall apply primarily the Regulations of FIFA, namely the RSTP, and, as the Parties have not chosen any law, subsidiarily Swiss Law, since this is "(...) *the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled"* (which, in this case, is FIFA).

93. As to the question of which version/edition of the RSTP is applicable, the Panel notes that the facts at the heart of the dispute occurred on 1 July 2019 (the date of the alleged "transfer" of the Player) but that the claim was lodged only on 3 March 2021. Pursuant to Article 26 (1) and (2) of the RSTP, the applicable version should be the one with effects on January 2021.

VIII. MERITS

(A) What is this case about?

94. Before assessing the legal issues at stake, the Panel deems it useful to clarify the scope of the Appeal.

95. In this Appeal, Málaga is challenging a decision from the FIFA PSC which considered that the Waiver Agreement concluded between the Appellant and Getafe could legitimately be considered a transfer agreement and that the sum of EUR 1,500,000 received by Málaga triggered the Sell-on Clause. In essence, the Panel is called to decide whether the FIFA PSC rightfully considered that a "transfer" of the Player, in the sense of the Sell-on Clause occurred by virtue of the Waiver Agreement.

(B) The Legal Issues to be decided

96. The main issues to be determined by the Panel are the following:

1) What does the concept of "transfer" encompass in football?
2) How should the Sell-on Clause be interpreted?
3) Does the movement of the Player from Málaga to Getafe trigger the application of the Sell-on Clause?
4) What are the legal consequences resulting from the answer to the previous issue?

97. The Panel will now proceed to address the above issues below.

(C) What does the concept of "transfer" encompass in football?

98. To correctly interpret the meaning of the Sell-on Clause, it is necessary to clarify the meaning of the concept of "transfer" in the legal world of football.

99. According to the Definitions Chapter of the RSTP, a "transfer" may be defined as follows:

"*21. International transfer: the movement of the registration of a player from one association to another association.*
22. National transfer: the movement of the registration of a player at an association from one club to another within the same association."

100. In addition, the jurisprudence of CAS appears to closely abide by this definition, as is clear from CAS 2019/A/6525, para. 71:

"The Panel notes (as already underlined in CAS 2010/A/2098) that ***in the world of professional 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****."*(Emphasis added by the Panel)

101. The transfer of the Player is the equivalent to the movement of the registration of said player, whether to a different association or to a different club "under" the same association. Therefore, the general meaning of the concept of "transfer" is not strictly linked to a specific legal or contractual framework.

102. In fact, the CAS has also recognized that a transfer can occur under a contractual scheme or outside of such a framework:

"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.*

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." (CAS 2019/A/6525, para. 72-73) (Emphasis added by the Panel)

103. From the above, the Panel concludes that (i) a transfer can be simply defined as movement of the Player's registration from an association to another or between clubs under the same association and that (ii) a transfer may be integrated in a contractual scheme or not, depending on the specific circumstances in which the movement of the registration occurs.

104. Having reached a conclusion regarding the concept of "transfer" and the usual meaning of this word in professional football, the Panel is now prepared to interpret the Sell-on Clause.

(D) How should the Sell-on Clause be interpreted?

105. The Panel starts by recalling the specific wording of the Sell-on Clause:

"*Should* ***the Player's registration be transferred on a permanent basis*** *by Malaga at any time in the future* ***then Malaga will pay to Brighton 12.5% (twelve and a half per cent) of any transfer fee received by Malaga*** *(deducting the amount corresponding to solidarity contribution) up to a maximum sum of €750,000 (seven hundred and fifty thousand euros).*" (Emphasis added by the Panel)

106. The main controversy between the Parties resides in knowing what types of transfer the Sell-on Clause is able to encompass.

107. Article 18 of the Swiss Code of Obligations (the "SCO") provides that:

"*As regards both the form and content of a contract, the real intent which is mutually agreed upon shall be considered, and not an incorrect statement or manner of expression used by the parties, whether due to error, or with the intention of concealing the true nature of the contract.*" (Free translation of Article 18 SCO and emphasis added by the Panel)

108. Furthermore, the interpretation of any provision of a contract has to be carried out in accordance with the general rules of contract interpretation. The Panel from CAS 2016/A/4379 briefly summarised this idea in para. 88 of its decision:

"*For the present purposes, the interpretation of the Sell-on Clause must be carried out according to the general rules of contract interpretation. According to the principles established in the applicable Swiss law, the court shall* ***first seek to bring to light the real and common intent of the parties, empirically as the case may be, on the basis of clues without regard to the inaccurate expressions or designations they may have used****. Failing this, it shall then apply the principle of reliance and seek the meaning that the parties could and should give according to the rules of good faith to their reciprocal expressions of will considering all the circumstances (ATF 140 III 134 at 3.2; 135 III 295 at 5.2, p. 302 and the cases quoted, ATF 4A_676/2014 at 3.3). Should the application of this principle fail to bring to a conclusive result, some alternate means of interpretation may be resorted to, such as the so-called rule of ambiguous clauses, pursuant to which, in case of doubt, the contract must be interpreted against the party which drafted it (in dubio contra stipulatorem or proferentem; ATF 124 III 155 at 1b, p. 158 and the cases quoted).*" (Emphasis added by the Panel)

109. In light of the above, the Panel will have to begin its interpretation of the Sell-on Clause by seeking the real and common intent of the Parties, considering the clues which were made available to it.

110. The Sell-on Clause is undoubtedly a "sell-on clause", a type of clause which is usually used in professional football to allow the club which transfers a player to share in the benefits or profits of a future transfer of said Player. These kinds of clauses have also been deeply analysed by the CAS:

"*The Sell-On Clause contains a well-known mechanism in the world of professional football: its purpose is to "protect" a club (the "old club") transferring a player to another club (the "new club") against an unexpected increase, after the transfer, in the market value of the player's services; therefore, the old club receives an additional payment in the event the player is "sold" from the new club to a third club for an amount higher than that one paid by the new club to the old club. In transfer contracts, for that reason, a sell-on clause is combined with the provision defining the transfer fee: overall, the parties divide the consideration to be paid by the new club in two components, i.e. a fixed amount, payable upon the transfer of the player to the new club, and a variable, notional amount, payable to the old club in the event of a subsequent "sale" of the player from the new club to a third club.*" (CAS 2010/A/2098, para. 20) (Emphasis added by the Panel)

111. Seeing as the Sell-on Clause is easily classifiable as a "sell-on clause", in principle, the main intent of the Parties when they agreed to it would be to protect Brighton (the

"old club") from an increase in the value of the Player which would lead to him being transferred to another club by Málaga (the "new club") for a reasonable sum.

112. In the case at hand, it is important to notice that the wording of that clause refers to the "transfer" of the Player's registration; however, no restriction or limitation regarding the meaning of a "transfer" was inserted in the contract concluded between the Parties. Naturally, this forces the Panel to abide by the concept of "transfer" which has been explained above.

113. With this in mind, the fact that said transfer had to be a "permanent" one appears to make reference to the fact that no fees received for any temporary transfer (commonly known as "loans") would be able to trigger the Sell-on Clause.

114. In light of the above, the logical conclusion regarding the interpretation of the Sell-on Clause must be that said provision does not limit its applicability to the conclusion of a "transfer" in a specific manner or under a specific legal framework, instead it is only required that this movement of the Player's registration carried out by Málaga acquires a permanent nature, effectively excluding any kind of temporary movement of said registration.

115. On the other hand, Málaga is obliged to "*pay to Brighton 12,5% (twelve and a half per cent) of **any transfer fee** received (...)*". The wording clearly indicates that the Parties intended the Sell-on Clause to be applicable only in those cases in which the Appellant received a "transfer fee". (Emphasis added by the Panel)

116. While the Parties have conflicting views over the meaning of the expression "transfer fee", the Panel is of the opinion that the Parties were essentially concerned to establish that the Sell-on Clause could only operate when Málaga received a sum for the transfer of the Player. In addition, the term "transfer fee" does not refer, *per se*, to a specific kind of contract or agreement and, as such, cannot be interpreted as a sum which is exclusively paid by virtue of a typical transfer agreement – which may be defined as those agreements by which a club (the "former club") agrees to terminate its employment agreement with a player, the new club agrees to sign a new employment contract with him and the player himself consents to the movement.

117. Therefore, the Panel is now able to clearly determine the conditions necessary to trigger the Sell-on Clause:

a) The Player's registration must be transferred, on a permanent basis, by Málaga – however, this operation does not have to be concluded by virtue of a classic tripartite agreement; and

b) Málaga has to receive a sum in exchange for the conclusion of the transfer operation mentioned in a).

118. It is then safe to assume that, when both these conditions are fulfilled, the Appellant must pay to the Respondent the amount corresponding to 12.5% of the fee received (deducting the sum corresponding to an eventual solidarity contribution due) up to a maximum of EUR 750,000 In addition, if this fee were to be received by Málaga in several instalments, then Brighton would have to be paid in proportion to said instalments, in accordance with the final part of the Sell-on Clause:

"*If applicable, payment will be made by Málaga within 30 working days as from the moment Málaga receives the transfer fee of a third Club,* ***if the payment is made in several instalments by the third club, the payment to Brighton will be made in proportion to those instalments***." (Emphasis added by the Panel)

119. In light of the above, the Panel concludes that the common intent of the Parties when they agreed the Sell-on Clause would be to allow Brighton to profit with a future transfer or "movement" of the Player's registration if Málaga received any sum by virtue of said operation. No other specific conditions, formal or technical requirements were set by the Parties and, as such, the Sell-on Clause agreed by the Parties can encompass transfers concluded without a typical contractual scheme or even with no contractual framework, provided that a fee in exchange for that transfer is due.

(E) Does the movement of the Player from Málaga to Getafe CF constitute a "permanent transfer" in the sense of the Sell-on Clause.?

120. Having established how the Sell-on Clause operates, the Panel must now to turn to assess if the Waiver Agreement may or not be considered as capable of triggering the application of that provision.

(E.1) The circumstances behind the conclusion of the Waiver Agreement

121. To begin understanding the nature of the Waiver Agreement, it is crucial to be aware of the circumstances which gave rise to this contractual framework.

122. The Employment Agreement between Málaga and the Player established an option right which allowed the Appellant to extend the Employment Agreement unilaterally – the Option Right Clause. However, on 22 February 2019, the Player expressly informed the Appellant that he and his legal advisors considered that the Option Right Clause was prohibited under Spanish Law. Consequentially, the Player has decided that, considering Málaga's inability to negotiate his registration with other clubs

during the previous transfer window, he would leave the club at the end of the contract (30 June 2019).

123. Therefore, the legality of the Option Right Clause was put at stake and it is clear that both the Player and Málaga had different views regarding the possibility of it being exercised. This created a situation whereby the Appellant and the Player were very likely faced with conflicting legal opinions and uncertainty regarding the future of their labour relationship.

124. Seeing as Getafe was interested in counting on the Player's services for the following season, Málaga decided to enter into an agreement with said club. At this point, Málaga was likely faced with a complex situation: if the Appellant exercised the Option Right Clause (as it said it would in the Appeal Brief) the Player would have left at the end of the season anyway, as he said he would, and Málaga would be forced to enter into a legal dispute to try and obtain compensation for the Player's breach of contract, the result of which might not have been predictable.

125. In this context, the Waiver Agreement likely appeared as the logical solution to the Appellant's problem, since (i) the sporting season was already close to its finale and (ii) Getafe would likely be very willing to pay a small sum for the Player to avoid any liability arising from a potential future dispute regarding his breach of contract with Málaga, in case he joined Getafe after 30 June 2019 and the Appellant duly exercised the Option Right Clause.

126. In essence, the Panel is reasonably satisfied, in light of the evidence, that the conclusion of the Waiver Agreement can be simply explained as an agreement which greatly benefited Málaga (allowing the club to profit with the inevitable Player's departure), Getafe (allowing this club to avoid any future liability by paying a reasonable sum) and the Player (allowing him to leave the Appellant in "good spirits" and avoid any future legal disputes with Málaga over any possible breach of contract).

(E.2) The nature of the Waiver Agreement

127. Firstly, the Panel recalls the wording of the Clause I of the Waiver Agreement on what is its main purpose (see above the original wording in Spanish, on para. 11):

"By means of this contract, MÁLAGA CLUB DE FUTBOL, SAD undertakes to waive its right to extend the employment contract of PLAYER JACK HARPER in order to enable him to sign a contract with GETAFE CLUB DE FÚTBOL, S.A.D., as he is a free agent.
(...)

GETAFE shall pay to MÁLAGA CF, for the waiver of the option to extend the contract of the PLAYER and provided that the PLAYER is hired by GETAFE as a free agent with an effective date of July 1, 2019, the amount of ONE MILLION FIVE HUNDRED THOUSAND EUROS (€1,500,000) plus VAT (...)"

FREE ENGLISH TRANSLATION BY THE PANEL

128. The Panel notes that, unlike a "typical" transfer agreement, the Waiver Agreement provides that a compensation is due in exchange for the non-exercise of a contractually agreed right of renewal. However, the amount due under the Waiver Agreement must also be considered as a *prima facie* compensation for the loss of the Player.

129. The main issue, however, resides in knowing if (i) the Waiver Agreement operated a permanent transfer of the Player's registration and (ii) if the fee received under that contract constitutes or not a "transfer fee".

(E.2.1) Did the Waiver Agreement operate a permanent transfer of the Player?

130. While the Panel agrees that the Waiver Agreement does not resemble a classic transfer agreement, there is no doubt that its operation raises doubts as to knowing if a transfer in the sense of the Sell-on Clause did or not occur.

131. As explained above (see above para. 120), the Sell-on Clause does not limit what kinds of transfers are capable of triggering the application of this provision. Therefore, and unlike the outcome of the decision in CAS 2010/A/2098, the Transfer Agreement at hand did not use the word "sale" or "resale", and as such the findings of CAS 2019/A/6525, para. 74-75, are fully applicable:

"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.

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." (Emphasis added by the Panel)

132. The Panel is comfortably satisfied, as such, that the true and common intent of the Parties was to not exclude from the scope of the Sell-on Clause transfers which might have occurred outside a standard contractual scheme. Therefore, to understand if the Sell-on Clause is or not applicable, it suffices to establish if a "transfer" in the sense of that provision occurred.

133. In the present case, there remains no doubt that the movement of the Player's registration from Málaga to Getafe was indeed a "transfer" in the meaning of the Sell-on Clause, which does not limit that concept to any specific contractual framework or scheme. Both Parties ended up referring, in their submissions, to this movement of the Player's registration as a "transfer" in a broad sense, however, even though the Appellant argues that the Player moved to Getafe as a free agent, there are striking resemblances between the Waiver Agreement and a typical transfer agreement:

a) Much like in typical transfer agreements, the Waiver Agreement was signed by the Player, Málaga and Getafe (hence, it was a tripartite agreement);
b) When the Waiver Agreement was signed, the Player was still under contract with Málaga and the possibility of this contract being extended had to be considered;
c) By virtue of the Waiver Agreement, Málaga allowed the Player's Employment Agreement to expire at the end of the season (which was only three months away), a situation which is not materially much different from agreeing to the termination of a contract;
d) Málaga acted as the party in control of the Player's registration – the club considered that by not exercising the Option Right Clause, it was allowing the Player to move to Getafe;
e) The Waiver Agreement was conditioned to the signing of a new employment agreement between the Player and Getafe; and
f) The Player waived its right to receive any compensation provided for in Article 13.a) of the Royal Decree 1006/85 and in Article 17.3 of the Collective Bargaining Agreement signed between the Spanish Professional League (L.N.F.P.) and the Player's Union (A.F.E.). According to the said Spanish legal

provisions, when a player is transferred from a club to another, he is entitled to receive, from the new club, the 15% of the transfer fee.

134. There are notorious resemblances between the Waiver Agreement and a "typical" transfer agreement, which the Panel cannot, in good faith, ignore. These characteristics clearly indicate that what Málaga and Getafe agreed was, *de facto*, a true transfer of the Player.

135. The Panel also notes that the Parties' common intent did not deviate from that of a classic transfer agreement since the Waiver Agreement created a situation which, given the circumstances, generated similar effects to that of a typical transfer agreement. Therefore, the Panel is of the opinion that both the form and content of the Waiver Agreement allow for it to be considered as a "transfer agreement". This conclusion is in line with CAS jurisprudence's interpretation of Article 18 SCO, namely CAS 2018/A/5950, para. 76:

"*According to the interpretation given to this article by CAS jurisprudence, "(u)nder this provision, the parties' common intention must prevail on the wording of their contract. If this common intention cannot be determined with certainty based on the wording, the judge must examine and interpret the formal agreement between the parties in order to define their subjective common intention (Winiger, Commentaire Romand – CO I, Basel 2003, n. 18-20 ad Art. 18 CO). This interpretation will first take into account the ordinary sense one can give to the expressions used by the parties and how they could reasonably understand them (Winiger, op. cit., n. 26 ad art. 18 CO; Wiegand, Obligationenrecht I, Basel 2003, n. 19 ad art. 18 CO).* ***The behaviour of the parties, their respective interest in the contract and its goal can also be taken into account as complementary means of interpretation*** *(Winiger, op. cit., n. 33, 37 and 134 ad art. 18 CO; Wiegand, op. cit., n. 29 and 30 ad art. 18 CO)" (CAS 2005/A/871, pg. 19, para. 4.29)."* (Emphasis added by the Panel)

136. Furthermore, the Panel is of the firm opinion that the material effects of a contract must impose themselves on any label which the Parties choose for it. The general principle of good faith implies that the Law aims to achieve concrete and effective results and that the material aspect always takes precedence over the formal aspect. This means, in essence, that contracts and other legal agreements are to be analysed essentially with respect to their content and material effects. In fact, the Panel shares the understanding that "good faith" requires that the exercise of legal positions be carried out in terms of material truthfulness. It does not suffice to assess if there is formal compliance with the law in the actions of a person; rather, there must be a material assessment, so as to give importance and projection to the values which are effectively at stake and the consequences which they entail.

137. In addition, the Panel reminds the Parties that it is not bound by the *nomen iuris* chosen by them in any contracts which they conclude. In fact, the opposite is true: it is for the Panel, pursuant to its power to review the facts enshrined in Article R57 of the Code, to decided exactly what is the nature of a given contract despite the label which was given to it by the Parties. While it is true that CAS Panels are "*not only limited in their review by the principle imposed by Article 190 paragraph 2 (c) PILA (Ne Ultra Petita), but also by the obligation to respect the parties' right to be heard*" (MAVROMATI, Despina; REEB, Matthieu, "The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials", 2015, Kluwer Law International, The Netherlands), such limitations do not comprise any obligation for the Panel to blindly follow the names and expressions used by Parties' in their contracts.

138. Considering the above, the Panel unanimously considers that the Waiver Agreement has produced essentially the same effects that a standard transfer agreement would and, as such, there remains no doubt that the Player was indeed transferred and that this operation still falls under the wording of the Sell-on Clause.

(E.2.2) Does the fee received by Málaga constitute a "transfer fee"?

139. In light of the above and considering that Málaga was supposed to receive a sum of EUR 1,500,000 (of which EUR 1,000,000 have already been received), it would be against the principle of good faith to consider that such amount does not constitute a "transfer fee" in the sense of the Sell-on Clause.

140. In fact, by considering that the Waiver Agreement created a situation similar to a "typical" transfer, the Panel would be going against its own rationale if it did not consider that the sum received by Málaga by virtue of such contract fell under the scope of the Sell-on Clause. Furthermore, the Waiver Agreement, by virtue of its material effects and consequences, may be qualified as a true transfer agreement, even if it uses an uncommon solution to allow the Player to move from one club to another.

141. Therefore, considering that a transfer of the Player occurred and that a fee was received by Málaga in respect to that operation, the total sum of EUR 1,500,000 can be considered as a "transfer fee". In reality, the Panel notes that much like a common transfer agreement, the sum paid to Málaga by virtue of the Waiver Agreement was essentially a compensation for that club's agreement regarding the expiry of an employment agreement and its loss of the Player's services; in fact, in the present circumstances, allowing a contract to expire is not much different from agreeing to its mutual termination.

(F) What is Brighton entitled to receive under the Sell-on Clause?

142. Finally, as both conditions set out by the Parties for the activation of the Sell-on Clause were fulfilled, Brighton is entitled to receive 12.5% of the total sum received by Málaga by virtue of the Waiver Agreement.

143. The Panel notes that the payment to be completed under the Waiver Agreement was to be made in the following manner (Clause II, a), of the Waiver Agreement):

"- *FIVE HUNDRED THOUSAND EUROS (500,000 €) before or on August 31, 2019.*
- *FIVE HUNDRED THOUSAND EUROS (500,000 €) on or before August 31, 2020*
- *FIVE HUNDRED THOUSAND EUROS (500,000 €) on or before August 31, 2021.*"

144. According to the presented evidence, Málaga only received, at the date of the issuance of the Appeal Decision, the first two instalments in the total amount of EUR 1,000,000. Accordingly, Brighton is entitled to 12.5% of that sum:

- EUR 62,500 for the first instalment (i.e. 12.5% of EUR 500,000);
- EUR 62,500 for the second instalment (i.e. 12.5% of EUR 500,000);

145. Consequentially, when the Appellant receives the third instalment, it is expected that, voluntarily and taking into consideration the grounds of this Award, Málaga will pay to Brighton the percentage due in relation to the last instalment of EUR 500,000 that was due on August 31, 2021. In any event, the payment of the percentage relating to the last instalment is not part of the subject matter of the Appeal.

IX. COSTS

146. Pursuant to Article R64.4 of the Code, the CAS Court Office shall, upon conclusion of the proceedings, determine the final amount of the costs of this arbitration, which shall include the CAS Court Office fee, the costs and fees of the arbitrators, computed in accordance with the CAS fee scale, the contribution towards the costs and expenses of the CAS, and the costs of witnesses, experts and interpreters, if any.

147. According to Article R64.5 of the Code, the Panel shall also determine which party shall bear the arbitration costs or in which proportion the parties shall share them.

148. Considering the outcome of the arbitration, in particular the fact that the appeal has been dismissed, the Panel finds it reasonable and fair that the Appellant shall bear

the entire arbitration costs in an amount that will be determined and notified to the Parties by the CAS Court Office.

149. As general rule, the award shall grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with these arbitration proceedings. Pursuant to Article R64.5 of the Code, and in consideration of the outcome of the proceedings, as well as the fact that no hearing has been held, the Panel rules that the Appellant shall bear its own costs and pay a contribution to the Respondent in the amount of CHF 4,000 (four thousand Swiss Francs) toward the legal fees and other expenses incurred in connection with the present arbitration proceeding.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Málaga Club de Fútbol S.A.D. against the decision rendered by the Single Judge of the FIFA Players' Status Committee on 18 May 2021 is dismissed.

2. The decision rendered by the Single Judge of the FIFA Players' Status Committee on 18 May 2021 is confirmed.

3. The costs of these arbitration proceedings, to be determined and served to the Parties by the CAS Court Office, shall be borne entirely by Málaga Club de Fútbol S.A.D..

4. Málaga Club de Fútbol S.A.D. shall pay to Brighton & Hove Albion Football Club Limited the amount of CHF 4,000 (four thousand Swiss Francs) as contribution for legal fees and other expense incurred in connection with these arbitration proceedings.

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

Seat of arbitration: Lausanne, Switzerland

Date: 10 January 2022

THE COURT OF ARBITRATION FOR SPORT

Rui Botica Santos
President

Luigi Fumagalli
Arbitrator

Kepa Larumbe
Arbitrator