Arbitration CAS 2021/A/8319 Beşiktaş AŞ v. Jeremain Marciano Lens, award of 25 November 2022

Panel: Mr Francesco Macri (Italy), Sole Arbitrator

Football
Contractual dispute – outstanding remuneration
COVID-19 and force majeure
Force majeure in Turkish law

1. **FIFA did not determine that the COVID-19 outbreak was a force majeure situation in any specific country or territory or that any particular employment or transfer agreement was affected by the concept of force majeure, this is a case by case analysis considering the national law of the employment agreement and taking into account all the relevant circumstances.**

2. **According to the Turkish Supreme Court, force majeure should occur around the employee, and the reasons arising from the workplace and preventing them to work cannot be evaluated within the scope of force majeure under Turkish law.**

I. PARTIES

1. Beşiktaş AŞ (the "Appellant" or the "Club") is a professional football club with its registered office in Istanbul, Turkey. The Club is registered with the Turkish Football Association (the "TFF"), which in turn is affiliated to the Fédération Internationale de Football Association (the "FIFA")

2. Mr Jeremain Marciano Lens (the "Respondent" or the "Player") is a professional football player of Dutch nationality.

3. The Club and the Player are hereinafter jointly referred to as the "Parties".

II. FACTUAL BACKGROUND

4. Below is a summary of the main relevant facts, as established on the basis of the written submissions of the Parties, and the evidence examined in the course of the proceedings. This background information is given for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion.

A. Background Facts

5. On 8 August 2017, the Parties concluded an employment contract (the "Employment Agreement" or the "Contract") valid from the date of signature until 31 May 2018. According to a Temporary Transfer Agreement, previously signed between the Player, the Club and Sunderland F.C., the Club later exercised its purchase option of the Player's economical and federative rights. Therefore, the Contract was extended until 31 May 2022.

6. According to Article 6.A of the Contract, the Parties agreed the following seasonal salaries ("The Guaranteed Salary of the Player"):

   a) Season 2017/2018: total remuneration of EUR 2,200,000 net, payable in 10 instalments of EUR 220,000 each, due by the last day of each month as from August 2017 until May 2018;

   b) Season 2018/2019: total remuneration of EUR 2,250,000 net, payable in 10 instalments of EUR 225,000 each, due by the last day of each month as from August 2018 until May 2019;

   c) Season 2019/2020: total remuneration of EUR 2,300,000 net, payable in 10 instalments of EUR 230,000 each, due by the last day of each month as from August 2019 until May 2020;

   d) Season 2020/2021: total remuneration of EUR 1,950,000 net, payable in 10 instalments of EUR 195,000 each, due by the last day of each month as from August 2020 until May 2021;

   e) Season 2021/2022: total remuneration of EUR 1,800,000 net, payable in 10 instalments of EUR 180,000 each, due by the last day of each month as from August 2017 until May 2018.

7. On the same date, *i.e.* 8 August 2017, the Parties also signed an Image Rights Agreement (the "Agreement for the Licensing of Image Rights") by means of which the Player granted the Club a non-exclusive license for the use of his image rights, in consideration of an additional remuneration as follows*:*

   a) Season 2017/2018: total remuneration of EUR 400,000 net, payable in two instalments of EUR 200,000 each, due on 30 September 2017 and on 15 February 2018;

   b) Season 2018/2019: total remuneration of EUR 350,000 net, payable in two instalments of EUR 175,000 each, due on 30 September 2018 and on 15 February 2019;

   c) Season 2019/2020: total remuneration of EUR 300,000 net, payable in two instalments of EUR 150,000 each, due on 30 September 2019 and on 15 February 2020.

8. On 11 March 2020, the World Health Organization (the "WHO") declared the COVID 19 disease a pandemic.

9. On 19 March 2020, the Turkish Football Federation decided to suspend all leagues and cup competitions until further notice.

10. On 12 June 2020, the TFF resumed all the championships of the professional football leagues to complete the respective seasons.

11. On 29 June 2020, the Club sent the Player a draft of a settlement agreement containing the following provision:

"The Player explicitly and irrevocably agrees and accepts that, out of his total entitlement of 780.000 EUR as guaranteed salary and image rights payments for the months March, April and May 2020, he waives his entitlement to 390.000EUR which corresponds to half of his remuneration arising from the [employment contract and the image rights agreement] for the months March, April and May 2020. Furthermore, the Player explicitly agrees and accepts that the remaining part of 345.000 EUR for the months March, April and May 2020 will be paid by the Club to the Player on 31 October 2020".

The settlement agreement was not signed either by the Club nor by the Player.

12. On 26 August 2020, the Player put the Club in default for the first time and granted it a ten-day deadline to proceed with the payment of EUR 346,576 regarding his outstanding remuneration for the season 2019/2020, stating the following:

"Pursuant to the aforementioned Contract and the Agreement for Licensing of Image Rights dated 08.08.2017 […] until the date of issuance of this written notification and in relation to the football season of 2019/2020, the Notified Party (i.e., the Club) has not yet paid 346.576,00 Euro net in total of due and payable receivables of the Notifying Party (The Player) without prejudice to rights of request and claim with respect to the surplus".

13. On 3 September 2020, the Club replied that, due to the COVID-19 pandemic, it suffered a severe economic and financial disruption that caused a considerable loss of income. Since the Player refused to reduce his unpaid salaries as proposed, the Club stated that it had no other chance than to apply a unilateral deduction on all the employees' remuneration equal to 15% of their total due remuneration for the 2019/2020 season, variation to be applied on March, April and May 2020 salaries. Therefore, the Club concluded:

"Considering that Mr Lens's total salary for the 2019/2020 season according to the Employment Contract he signed with our Club was 2.300.000 EUR and an additional image rights fee of 300.000 EUR was agreed for the 2019/2020 season (pursuant to Agreement for the Licensing of the Image Rights), 15% of the total amount of 2.600.000 EUR which equals to 390.000 EUR was deducted from Mr Lens's salaries from our Club for the months of March, April and May 2020. […] Consequently, after application of the above mentioned deduction due to COVID-19, according to our accounting records, the only remaining remuneration of Mr Lens from 2019/2020 season is 100.000 EUR individual bonus with the due date of 31 July 2020, which will be paid by our Club in the following days".

14. On 5 February 2021, according to Article 12bis of the FIFA Regulations on the Status and Transfer of Players (the "FIFA RSTP"), the legal representative of the Player sent a second default notice ("Notification for the overdue payables of the Notifying Party") claiming the following:

"2. We would like to state that the Notified Party (The Club) has not yet paid 390.000,00 Euro [..] of the due and payable receivables of the Notifying Party (The Player) in relation with the football season 2019/2020[…]".

Eventually, the Player granted the Club a ten-day deadline to pay him the due outstanding remuneration from the season 2019/2020.

15. On 15 February 2021, the Club replied to the default notice affirming that the pandemic deeply affected its financial means and business planning and severely reduced all the revenues, including ticket selling, broadcasting, and sponsorships. All the while, the Club could not recover the majority of its incomes previously anticipated. Despite this unexpected event, the Club followed the FIFA's guidelines regarding the pandemic and stated that it acted in good faith, offering a settlement agreement to all the players and technical staff to minimize its financial damages, avoiding any excessive hardship in fulfilling its obligations towards the employees: *"In order to guarantee our activities and financial survivability, we decided to apply a deduction on remunerations of all players (including your client) that was equal to %15 of the total remuneration due to each player and technical staff for the 2019/2020 season and this deduction was applied to salaries and other payables of each player and technical staff accordingly.*

This mitigation of the remuneration, which is mandatory for our Club to continue its activities, is applied equally to all members of our Club and importance was given to make sure that each player and technical staff faces minimum damages. Consequently, after application of the above mentioned 15% deduction due to Covid-19, according to our accounting records, your client Mr Jeremain Marcian Lens have been paid all payables arising from the Employment Contract and Agreement for the Licensing of the Image Rights for the related period […]".

B. Proceedings before the FIFA Dispute Resolution Chamber

16. On 18 February 2021, the Player filed a claim against the Club before the FIFA Dispute Resolution Chamber (the "FIFA DRC"), stating that the 15% deduction operated by the Club was unlawful and unjustified and requested the total amount of EUR 390,000 net plus 5% interests *p.a.* as from the due dates: *i.e.* EUR 160,000 net as the payment of April 2020 and EUR 230,000 net as the payment of May 2020.

17. The Club replied that the pandemic created a force majeure situation in Turkey, disrupting everyday life as well as football in general and submitted that:

a) the Player did not attend any training session and matches during the period of suspension, as well as the football season was suspended on 19 March 2020 and only resumed on 12 June 2020. Accordingly, the player *"did not submit any form of*

documentary evidence to support that he played football for the Respondent and he attend the training sessions and training camps during the COVID-19 pandemics";

b) according to Articles 136, 137 and 138 of the Turkish Code of Obligations, exceptional situations, such as a pandemic, can cause the impossibility of complying with the contractual obligations without any consequence for the debtor. Accordingly, in other quoted cases, the Turkish Courts already allowed a reduction of up to 50% of the unpaid amounts.

c) the doctrine of *clausula rebus sic stantibus* should also apply to the case at hand as an exception to the principle of *pacta sunt servanda*.

d) The majority of the A-Team's players accepted the settlement agreements proposed by the Club to recover the 85% decrease in the Club's cash flow.

18. In his rejoinder, the Player stated that there was no valid reason to accept the Club's unilateral deduction and that the amount of EUR 390,000 was still unpaid and overdue. Moreover, the Player played all the season's matches until the end, namely on 26 July 2020, attending all the training sessions and other contractual due activities. The Player observed that Turkish Labour Courts decided that COVID-19 was not a valid reason to make a unilateral deduction of the players' salaries contrary to the Club's submissions. At least, FIFA DRC's previous decisions only allowed a reduction for the relevant months, *i.e.*, March, April and May 2020. Not most of the Players signed the settlement agreement, mainly the U-19 squad players. Therefore, the Player maintained his payment request.

19. The Club briefly replied that the FIFA Chambers already recognised COVID 19 as a force majeure situation, thus allowing the unilateral reduction of the Player's salaries. Furthermore, contrary to the Appellant, Turkish Labour Law was not applicable to athletes as the *"procedure involving national players is different than the one regarding foreigners"*.

20. On 12 August 2021, the FIFA DRC rendered its decision (the "Appealed Decision"), with the following operative part:

"1. The claim of the Claimant, Jeremain Marciano Lens, is partially accepted.

2. The Respondent, Beşiktaş Futbol, has to pay to the Claimant, the following amount:

- *EUR 160,000 net as outstanding remuneration plus 5% interest p.a. as from 1 May 2020 until the date of effective payment, and*

- *EUR 230,000 net as outstanding remuneration plu 5% interest p.a. as from 1 June 2020 until the date of effective payment.*

3. Any further claims of the Claimant are rejected.

[…]

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 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".

21. On 3 September 2021, the grounds of the Appealed Decision were communicated to the Parties, providing, *inter alia*, as follows:

- *"[…] the Dispute Resolution Chamber […] first took note that the present matter was presented to FIFA on 18 February 2021 and submitted for decision on 12 August 2021. Taking into account the wording of art. 21 of the January 2021 edition of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (hereinafter: the Procedural Rules), the aforementioned edition of the Procedural Rules is applicable to the matter at hand.*

- *Subsequently, the Chamber analysed which regulations should be applicable as to the substance of the matter. In this respect, it confirmed that, in accordance with art. 26 par. 1 and 2 of the Regulations on the Status and Transfer of Player (edition February 2021), said edition (hereinafter: the Regulations) is applicable to the matter at hand as to the substance.*

- *The Chamber […] took note of the fact that the player lodged this claim against the club seeking payment of his remuneration from April and May 2020* – and- *the club referred to the COVID pandemic and claimed that (i) there was, at the time, an existing situation of force majeure in Turkey; and (ii) the player's entitlements for the whole 2019/2020 season were validly reduced by 15% in accordance with the pertinent regulations.*

- *[…] the Chamber firstly wished to recall that FIFA issued a set of guidelines, the COVID-19 Guidelines, which aim at providing appropriate guidance and recommendations to member associations and their stakeholders, to both mitigate the consequences of disruptions caused by COVID-19 and ensure that any response is harmonised in the common interest. Moreover, on 11 June 2020, FIFA has issued an additional document, referred to as FIFA COVID-19 FAQ, which provides clarifications on the most relevant questions in connection with the regulatory consequences of the COVID-19 outbreak and identifies solutions for new regulatory matters.*

- *[…] said guidelines – as per the explicit wording of FAQ no. 16, as well as pages 6 and 7 of the FIFA COVID-19 Guidelines – are only applicable to "unilateral variations to existing employment agreements". Therefore, except where a termination of a contract occurred following a unilateral variation made as a result of COVID-19 (in which case the validity of the variation must first be*

assessed under the guidelines), said guidelines do not apply to assess unilateral terminations of existing employment agreements. The Chamber further noted that for the assessment of dispute that are presented before the FIFA judicial bodies concerning the unilateral termination of a contract, the FIFA Regulations as well as the established jurisprudence of the Chamber shall apply.

- *In other words, in any given dispute, it is for a party invoking force majeure to establish the existence of said event under the applicable law/rules as well as the consequences that derive in connection thereto […] in application of said FIFA COVID 19 Guidelines, unilateral decisions to vary agreements will only be recognised where they are made in accordance with national law or are permissible within collective bargained agreements (CBA) structures or another collective agreement mechanism.*

- *[…] the Chamber noted that the club referred to the Turkish Code of Obligations and to the jurisprudence of the Turkish ordinary courts related to effects of the pandemic over contracts. Conversely […] the DRC also took due note […] that the labour courts had an opposite understanding regarding the possibility of unilaterally reducing a player's remuneration.*

- *In view of this dissent between the parties and after carefully analysing their submissions, the DRC unanimously decided that the documentation on file was not sufficient to prove a legal situation of force majeure entitling the club to unilaterally vary the terms of the employment contract under the national law. Equally, the members of the Chamber deemed that the club could not establish to a comfortable satisfaction degree that the reduction of a player's (or any employee's) remuneration was authorized (or even addressed) by the national law.*

- *The DRC […] noted that the Turkish league was suspended for two months only while the club reduced the player's salary for the entire 2019/2020 season and in a retroactive manner, which could not be deemed neither reasonable nor proportionate.*

- *As a consequence, and in light with the DRC's jurisprudence, the DRC decided that the club failed to demonstrate that the unilateral variation of the contract was licit, entailing that on the basis of the principle pacta sunt servanda it should have paid the player's agreed remuneration.*

- *[…] the Chamber decided to award the player interest at the rate of 5% p.a. on the outstanding amounts as from one day after their due dates until the date of effective payment.*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

22. On 20 September 2021, the Club filed a Statement of Appeal with the Court of Arbitration for Sport ("CAS") against the Appealed Decision, in accordance with Articles R47 and R48 of the 2019 edition of the CAS Code of Sports-related Arbitration (the "CAS Code"). In its submission, the Club requested that a Sole Arbitrator be appointed according to Article R50 (1) of the CAS Code.

23. On 23 September 2021, the Player informed the CAS Court Office that he disagreed with the appointment of a Sole Arbitrator.

24. On 2 October 2021, the Club filed its Appeal Brief in accordance with Article R51 CAS Code.

25. On 4 October 2021, the CAS Court Office informed the Parties that the Deputy Division President decided to refer the matter to a Sole Arbitrator.

26. On 4 October 2021, FIFA informed the CAS Court Office that it renounced intervening in the ongoing proceedings between the Club and the Player.

27. On 11 November 2021, the Player filed his Answer in accordance with Article R55 CAS Code. On the same date, he communicated to the CAS Court Office that he preferred the Sole Arbitrator to issue an award based solely on the Parties' written submissions.

28. On 12 November 2021, in accordance with Article R54 CAS Code, and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Arbitral Tribunal appointed to decide the present matter would be constituted as follows:

- Sole Arbitrator: Mr Francesco Macrì, Attorney-at-Law in Piacenza, Italy.

29. On 16 November 2021, the Appellant agreed that the Sole Arbitrator to issue the award in the present matter based only on the Parties' written submission. By the same communication, the Club requested the Sole Arbitrator to stay these proceedings, pending a decision in case CAS 2021/A/7872, allegedly based on the same legal grounds. On the same date, the Respondent replied, objecting to the requested suspension.

30. On 13 December 2021, the CAS Court Office informed the Parties that the Sole Arbitrator rejected the Appellant's request to stay the proceedings. He deemed himself well-informed to decide the case based solely on the Parties' written submissions.

31. On 13 December 2021, with separate communication, the CAS Court Office provided the Parties with an Order of Procedure, duly signed and returned by the Club and the Player on 14 December 2021.

32. On 28 January 2022, the CAS Court Office informed the Parties that, being part of the jurisprudence of the CAS, the Sole Arbitrator admitted the Award CAS 2021/A/7872 into the file provided by the Appellant with its unsolicited letter dated 13 December 2021.

33. The Sole Arbitrator confirms that it carefully heard and took into account in its decision all the submissions, evidence, and arguments presented by the Parties, even if they have not explicitly been summarised or referred to in the present arbitral award.

IV. SUBMISSIONS OF THE PARTIES AND REQUESTS FOR RELIEF

A. The Appellant

34. The Club's submissions, in essence, may be summarised as follows:

- The COVID-19 pandemic severely impacted the world football system, affecting all the Clubs' financial planning, and causing a remarkable decrease in its revenues, including, but not limited to, the incomes from broadcasters, sponsorships, and daily and seasonal ticketing. Turkey's situation worsened since the TFF decided to suspend all the national championships on 15 March 2020.

- In addition to this negative framework, the abovementioned prejudicial situation still maintained its negative financial impacts during the 2020/2021 season since all the matches were still being played behind closed doors, thus depriving the Club of its match day revenues.

- Despite the Club having no fault or negligence in finding itself in this financial disruption, it became impossible to fully comply with its obligations stipulated under the employment agreement signed with players, technical staff and other employees.

- Therefore, the Club's representatives started several negotiations with all its employees, trying to mitigate the damages caused by the pandemic and offering a general deduction of the salaries for the 2019/2020 season up to 15% for each employee. This proposal was accepted by the majority of the Club's A-Team players and the technical staff, excluding the Respondent, who firstly sent a default notice and then filed a claim before the FIFA DRC.

- According to the FIFA's instructions, the Club acted in good faith, particularly to FIFA Circular Letter n. 1714, and the proposed reduction was EUR 390,000, which corresponded to 15% of his total remuneration. The proposal was even more valuable since the Club paid the Player a salary of more than 10,000,000 Euros during the employment relationship.

- In summary, the Club acted lawfully and reasonably since (i) it tried to reach a concrete and amicable solution with the Player, (ii) it suffered a loss of income equal to 85% due to the pandemic, and the remuneration's deduction became necessary, (iii) such deduction of the Player's salary was equal to 15% where its loss was 85% of the total revenues, (iv) despite the economic and financial hardships, it corresponded to the Player more than one million euro during the 2019/2020 season, (v) it applied the same proportional reduction to all the employees, namely the players and the coaches.

- The Club fulfilled all its responsibilities as determined by the FIFA Covid-19 guidelines. Due to the unexpected situation caused by the pandemic, the players' protections under Articles 12bis, 14 and 14bis of the FIFA RSTP shall not fully apply.

- The UEFA Executive Committee introduced additional emergency measures to obtain the license for the clubs participating in the UEFA competitions in the 2021/2022 season, notably amending the consequences of failing to satisfy Articles 50 and 51 provisions (Club licensing and Financial Fair Play Regulations). Therefore, an aggregate amount of overdue payables of no greater than 15% had to be tolerated in

granting the requested license. Once again, the Club's attitude was in line with the guidelines also provided by UEFA.

- The Player did not fulfill its obligations pursuant to Article 5 of the Employment Contract. It is undeniable that he did not train or play during the pandemic; what is more, as a consequence, the Club is not bound to fulfil its obligations towards the Player.

- Articles 136, 137 and 138 of the Turkish Code of Obligations regulate the impossibility of performance of contractual obligations in exceptional situations and, hence, shall be taken into consideration to address the effects of the pandemic. In this respect, some jurisprudence of the Turkish Courts related to the COVID's impacts on contracts and the recognition of the force majeure situation acknowledged the need to review the previous agreed contractual conditions. The Club claimed that *"it would be fair to state that any and all instances of Turkish Courts considered the Covid-19 pandemic as force majeure event and allowed a 50% reduction"* of the monthly payables.

- In addition to the above, the doctrine of *clausula rebus sic stantibus* should also apply to the case at hand as an exception to the principle of *pacta sunt servanda*, since the circumstances at the time of the signature of the employment contract allegedly changed *"in an unforeseeable manner and to a material extend which made performance impossible"*. In a decision dated 29 September 2020, a Judge of FIFA DRC recognized that the spread of the COVID19 pandemic should trigger the application of the force majeure clause stipulated between the parties to allow the reduction of that player's salary.

- The FIFA DRC also ruled in another case concerning the Club, validating its unilateral reduction of 15% of the salaries due to that player for March, April, and May 2020 (CAS 2021/A/7872). The Club appealed the FIFA DRC decision before CAS: consequently, the Sole Arbitrator shall stay these proceedings CAS 2021/A/8319 until the issuing of the final decision in the case described above, *i.e.*, CAS 2021/A/7872, to avoid a violation of Article 190 of PILA.

- On this basis, the Club submitted the following prayers for relief in its Appeal Brief:

  I. Set aside the Decision under Appeal;

  II. Render a new decision (replacing the FIFA DRC decision) and apply a reduction of 390,000 EUR on the annual salary which is equal to 15% of the Respondent's total salary for the season 2019/2020;

  III. Alternatively to "II" above; render a new decision (replacing the FIFA DRC Decision) determining that the Appellant validly applied a reduction of 390.000 EUR on the annual salary which is equal to 15% of the Respondent's total salary for the season 2019/2020;

IV. Alternatively to "I" and "II" above; render a new decision (replacing the FIFA DRC decision) determining that the Respondent has to refund 390.000 EUR and a 5% interest p.a. to accrue from the date of transfer by the Appellant;

V. Order the Respondent to pay all court, office, arbitration and other fees and expenses of CAS;

VI. Order the Respondent, to pay the Appellant, at least CHF 20,000 (Twenty thousand Swiss francs) as the moral compensation and counsel fees.

B. The Respondent

35. The submissions of the Player may be summarised as follows:

- His claim concerns only the outstanding remunerations for football season 2019/2020 due by the Club, without prejudice to rights and claims regarding all the other due amounts according to the Agreement for Licensing of Image Rights dated 8 August 2017.

- Despite the temporary suspension of the Turkish Super League, the TFF announced the new schedule for the remaining part of the 2019/2020 season as of 12 June 2020. The Player took part in all the remaining matches of the football season, which was fully completed, without asking for any additional amount, although he had to stay in Turkey during the summer. Therefore, the Player fully complied with all his contractual obligations providing the due professional services.

- In a dispute related to the same Club's 15% unilateral deduction at stake, the FIFA DRC stated that *"the COVID-19 outbreak is not a force majeure situation in any specific country or territory. What is more, the COVID-19 Guidelines do not exempt an employer from paying a player's salary […] the reasons brought forward by the Respondent in its defence do not exempt the Respondent from its obligation to fulfil its contractual obligations towards the Claimant"* (case Ref. 20-00748).

- Due to Club's default, the Player had no other choice than to grant a ten-day deadline in line with the Article 12bis of FIFA RSTP, asking for the payment of the due amounts of April and May 2020, *i.e.*, EUR 390,000.

- The Turkish Courts' decisions provided by the Club are not related to the employment relationship and with the subject matter at all. On the contrary, the Turkish Labour Courts decided that the *"COVID-19 pandemic is not a justified reason for the football clubs to make unilateral reductions from the players' salaries"*. Namely, in the case between the Club and another teammate, Mr Gokhan Gonul, the Turkish 33rd Labor Court stated that the 15% reduction of the player's salaries was unlawful.

- As to the settlement agreements submitted by the Club, it must be pointed out that most of them were signed with the U-19 squad players; conversely, several A-Team players did not find an amicable solution with the Club. In addition, the Player claimed

that he had no obligation to accept every settlement offered by the Club, especially when it is *"unfair and it is crystal clear that there was no justified reason to accept the said unjust settlement agreement"*.

- UEFA declaration favouring the football clubs is not a valid reason for them to make a unilateral deduction on the players' salaries. Neither did the Club follow FIFA guidelines, as stated in the case Ref. 20-00748.

- Finally, *"the Appellant is facing with financial crisis over many years and the Appellant is obviously trying to cover their financial losses arising from their mismanaged financial decisions with COVID-19"*. Therefore, the alleged Club's financial crisis *"shall not be a justifying reason to make reductions on the salaries of the Respondent and other employees"*.

36. On this basis, the Player submitted the following prayers for relief in his Answer:

i. To reject the allegations of the Appellant,

ii. To ratify the decision of the FIFA Dispute Resolution Chamber dated 12 August 2021,

iii. To state that the Appellant is responsible for the payment of the whole CAS administration costs and the Arbitrators fees,

iv. To condemn the Appellant to pay the legal fees in the amount CHF 35,000 and other expenses of the Respondent in connection with the proceedings.

V. JURISDICTION

37. The jurisdiction of CAS, which is not disputed, derives from Article 57 (1) FIFA Statutes (2021 Edition), as it determines that *"[a]ppeals 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"*, and Article R47 CAS Code which reads: *"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 […]"*. The jurisdiction of CAS is not contested and is further confirmed by the Order of Procedure duly signed by both Parties.

38. Furthermore, Article 9 of the Employment Agreement between the Parties provides *"[…] Any dispute between the parties arising from this Agreement, both legal and practical, including, but not limited to, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, will be decided by the FIFA's Players' Status Committee or FIFA's DRC, against its decision may be appealed before the Court of Arbitration for Sport (CAS) or by CAS as first instance tribunal, against its decision may be appealed before the CAS […]"*.

39. It follows that CAS has jurisdiction to adjudicate and decide on the present dispute.

VI. ADMISSIBILITY

40. The Appeal was filed within the deadline set by Article 58 (1) FIFA Statutes on 20 September 2021. The Appeal complied with all other Article R48 CAS Code requirements, including the CAS Court Office fee payment.

41. It follows that the Appeal is admissible.

VII. APPLICABLE LAW

42. The Club relies on all the Employment Agreement's provisions, including those contained in Article 9 ("Dispute Resolution and Arbitration"); the Player submits that the Panel shall decide in accordance with Article R58 CAS Code dispute according to the FIFA regulations and Swiss Law.

43. Article R58 CAS Code provides as follows:

"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".

44. Article 57 (2) FIFA Statutes provides the following:

"The provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".

45. Article 9 of the Employment Contract provides as follows:

"Parties are required to observe the statutes, regulations and decisions of the competent bodies of FIFA, the confederations and the organs of the Turkish Football Federation, as well as public law provisions governing employment and other laws applicable in Turkey, as well as international law and applicable treaties. Any dispute between the parties arising from this Agreement, both legal and practical, including, but not limited to, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, will be decided by the FIFA's Players' Status Committee of FIFA's DRC, against its decision may be appealed before the Court of Arbitration for Sport (CAS) or by CAS as first instance tribunal, against its decision may be appealed before the CAS[…]".

46. In view of the choice of the Parties to refer their dispute to the FIFA DRC, the Sole Arbitrator finds that the Parties accepted the applicability of Article 57 (2) FIFA Statutes. In accordance with this provision, the regulations of FIFA are primarily applicable (as to the date when the claim was lodged, FIFA RSTP January 2021 edition applies); if necessary, additionally, Swiss Law. Turkish Law should be applied to enforce those provisions regarding employment relationships if needed.

VIII. THE APPELLANT'S REQUEST FOR SUSPENSION OF THE PROCEEDINGS

47. As abovementioned in paragraph 28, the Club filed a request to suspend these proceedings until the appointed Panel would have issued a decision in the procedure registered under *CAS 2021/A/7872*.

48. The Club argued that such a case concerned a unilateral deduction of that player's salaries, applied on the same basis of this dispute, *i.e.*, the financial crisis due to COVID-19 pandemic. Therefore, the Sole Arbitrator shall stay these proceedings, CAS 2021/A/8319, until an award would be issued in *CAS 2021/A/7872* to avoid violation of public policy according to Art 190 of Swiss PILA.

49. The Respondent objected that there were no grounds to grant the Appellant's request since, according to Article 126 of the Swiss Civil Procedural Code (the "SCPC"), the facts and the Parties were not the same, and there was no legal connection between the two proceedings.

50. The Sole Arbitrator notes that the award issued in CAS 2021/A/7872 was already rendered and was even produced in this procedure: therefore, the Appellant's request for suspension of the present proceedings became moot at this stage.

IX. MERITS

A. The Main Issues

51. The main issues to be resolved by the Sole Arbitrator are:

i. Did the Club have just cause to apply any unilateral deduction to the Player's remuneration as a consequence of COVID-19 pandemic?

ii. If not, what are the consequences thereof?

i. Did the Club have just cause to apply any unilateral deduction to the Player's remuneration as a consequence of COVID-19 pandemic?

52. The Sole Arbitrator observes that the core of these proceedings centres around whether the Club had just cause to apply a unilateral reduction of the Player's salaries due to its alleged financial crisis caused by COVID-19 pandemic. Conversely, if the Player had just cause to claim its due payments according to Article 12bis of FIFA RSTP and followed the due procedure to obtain that amount.

53. The Agreement's validity is not in dispute, nor is the total amount of salaries claimed by the Player regarding April and May 2020, *i.e.*, EUR 390,000. The Club submits that it was entitled to make a 15%-deduction of the entire 2019/2020 salary due to the COVID-19 pandemic. The FIFA DRC decided that *"the documentation on file was not sufficient to prove a legal situation of force majeure entitling the Club to unilaterally vary the terms of the employment contract under the national law"*.

Moreover, the Club applied the reduction at stake by calculating the entire seasonal remuneration retroactively, which did not appear reasonable, proportionate, and justified.

54. Therefore, the Sole Arbitrator shall assess if the Club had a justified reason to deduct the 15% of the Player's entire salary for the football season 2019/2020 or not.

55. The Club argues that the COVID-19 outbreak was a *force majeure* situation for all the football clubs, excessively damaging their financial means. Namely, the Appellant states that it lost 85% of its revenues and chose to apply only a 15% deduction on the Players' salaries: given that it paid the Respondent more than EUR 10,000,000, such determination shall be considered fair and reasonable.

56. Moreover, the Club argues that both FIFA and UEFA provided new regulations to support all football stakeholders in making it through such hardships and recovering from all their financial losses due to the pandemic.

57. It is worth noting that, in April 2020, FIFA issued a set of guidelines, the "COVID-19 Guidelines", which aimed at providing appropriate guidance and recommendations to member associations and their stakeholders to both mitigate the consequences of disruptions caused by COVID-19 and ensure that any response is harmonised in the common interest. Moreover, on 11 June 2020, FIFA issued an additional document, referred to as FIFA COVID-19 FAQ, which clarifies the most relevant questions in connection with the regulatory consequences of the COVID-19 outbreak and identifies solutions for new regulatory matters.

58. Regarding the unilateral amendment of employment contracts by the Club, the Covid-19 Guidelines provide the following (the "Proposed Guiding Principles"):

"[…]

(ii) Unilateral decisions to vary agreements will only be recognised where they are made in accordance with national law or are permissible within CBA structures or another collective agreement mechanism.

(iii) Where:

a. clubs and employees cannot reach an agreement, and

b. national law does not address the situation or collective agreements with a players' union are not an option or not applicable,

Unilateral decisions to vary terms and conditions of contracts will only be recognised by FIFA's Dispute Resolution Chamber (DRC) or Players' Status Committee (PSC) where they were made in good faith, are reasonable and proportionate.

When assessing whether a decision is reasonable, the DRC or the PSC may consider, without limitation:

a. whether the club had attempted to reach a mutual agreement with its employee(s);

b. the economic situation of the club

c. the proportionality of any contract amendment

d. the net income of the employee after contract amendment

e. whether the decision applied to the entire squad or only specific employees.

(iv) Alternatively, all agreements between clubs and employees should be "suspended" during any suspension of competitions (i.e. suspension of football activities), provided proper insurance coverage is maintained, and adequate alternative income support arrangements can be found for employees during the period in question".

59. The COVID-19 FAQ provides the following clarification:

"The guiding principles are listed in the preferred order in which FIFA believes clubs and employees should address variations to an employment agreement during any period when a competition is suspended. FIFA strongly recommends that clubs and employees make their best efforts to find collective agreements before following any other guiding principle.

What type of national law is being referred to in this section? The CFRI Document refers, in principle, to national employment law. The parties to an agreement should always take heed of the choice of law which has been made in any agreement; this may differ from the national law in the territory where the club is domiciled".

60. What is more, the Bureau of the FIFA Council did not determine that the COVID-19 outbreak was a force majeure situation in any specific country or territory or that any particular employment or transfer agreement was affected by the concept of force majeure: *"whether or not a force majeure situation (or its equivalent) exists in the country or territory of an MA is a matter of law and fact, which must be addressed on a case-by-case basis vis-à-vis the relevant laws that are applicable to any specific employment or transfer agreement".*

61. To sum up, FIFA only encouraged the football's stakeholders (Member Associations, players, coaches and all other people involved) to reach any possible agreement in order to ensure the mutual maintenance of their financial resources but stated that COVID-19's effects should be assessed considering the national law of the employment agreement and taking into account all the relevant circumstances.

62. The Club quoted some provisions of the Turkish Code of Obligations (the "TCO") regarding the "Impossibility of Performance" according to Articles 136,137, and 138 (freely translated from Turkish):

- Art. 136: *"If it is impossible to perform all the obligations under the contract due to the reasons that are not attributable to the obligor, the obligor shall be released from performing the related obligations".*

- Art. 137: *"When the performance of the obligations under a contract is partially impossible due to the reasons for which the obligor cannot be held responsible, the obligor shall be released from the obligations which became partially impossible".*

- Art. 138*: "An extraordinary situation which is not foreseen by the parties at the time of the contract and which is not expected to be anticipated, arises from a reason not due to the debtor and changes the existing facts at the time against the debtor in such a way as to violate the rules of good faith, if the debtor has not yet fulfilled his/her obligations arising from the excessive difficulty of the performance, the debtor shall have the right to request from the judge the adaptation of the contract to the new conditions and to revoke the contract if it is not possible. In contracts of continuing obligations debtor shall terminate the contract".*

63. According to the Club, these provisions were fully applied in some Turkish Courts where reductions were allowed up to 50% salaries. The Player objected that these findings were adopted by some Turkish Commercial Courts, where the Turkish Labour Courts had an opposite understanding regarding the possibility of unilaterally reducing a player's remuneration. Accordingly, the Turkish 33rd Labour Court explained that the COVID 19 pandemic is not justified for the football clubs to make a unilateral deduction from a player's salaries.

64. The Sole Arbitrator notes that neither the Employment Agreement, nor the Image Rights Agreements (on which the Player reserved any further rights and claims) contain any relevant *"force majeure"* clause that could allow any variation of the terms of the Contract. Much to the contrary, according to Article 9 of the Contract, the Parties purposely agreed first to observe the FIFA Regulations, implemented by those from TFF, and the Turkish Labour Law. No specific reference was made to Turkish Commercial Law or the applicable provisions contained in the TCO.

65. With this in mind, the Sole Arbitrator shares the FIFA DRC's reasoning that this case should not be assessed under a *force majeure* situation, and the Club was not entitled to vary the terms of the employment contract unilaterally, nor the agreed salaries under the national law. In this regard, according to the Turkish Labour Court, as reported by the Player, the COVID-19 pandemic is not a justified reason for the football clubs to make unilateral deductions from the players' salaries.

66. Furthermore, a decision of the 9th Civil Chamber of the Supreme Court dated 9.5.2016 and numbered E. 2016/7175, K. 2016/11446 suggests that *"the reasons that prevent the employee from working must occur around the employee himself. The reasons arising from the workplace and preventing work are not within the scope of this article. For example, the closure of the workplace is not a force majeure" (9th Civil Chamber of the Supreme Court, decision dated 25.4.2008 and numbered 2007/16205 E, 2008/10253 K.)*. That Turkish Court stated that the force majeure should occur around the employee, and the reasons arising from the workplace and preventing them to work cannot be evaluated within this scope. In this regard, the Player only refrained from his contractual duties during the suspension of the Turkish League neither refused to provide his professional services when the 2019/2020 started again on 12 June 2020. Such Player's obligations were solely postponed (and fulfilled) beginning in June 2020 and, consequently, the Club should behave in an equal manner.

67. Therefore, the Club cannot invoke any exemption from its contractual obligations from the outbreak of the COVID-19 pandemic and bear the entire risk in connection with it.

ii. If not, what are the consequences thereof?

68. The Sole Arbitrator turns now his attention to the remaining issue, whether the reduction of 15% of the Player's yearly salary was *"reasonable and proportionate"*.

69. The Club states that it complied with all the procedural rules set by FIFA COVID-19 Guidelines to find an amicable solution. The proposed reduction was meagre compared with its suffered financial losses. Accordingly, the UEFA Executive Committee accepted a partial derogation of Article 16 of the *"Club Licensing and Financial Fair Play Regulations" granting the Clubs the requested license despite the outstanding payables up to a maximum of 15%: "[…] the aggregate amount of overdue payables as a percentage of the total employee benefit expenses is proportional to the decrease in revenues from domestic competitions, as determined by each licensor, and is in any case no greater than 15%"*. Moreover, such deduction was accepted by other thirty-one members of the A-Team.

70. The Club submits that the Sole Arbitrator confirmed this percentage in CAS 2021/A/7872 in a dispute against another player: therefore, the case at stake shall be identically adjudicated to avoid any conflict between the issued awards and violation of public policy.

71. In this regard, the Sole Arbitrator stresses that the Player's salary was agreed on a seasonal basis (EUR 2,300,000were decided for the 2019/2020 season). The Player played all the season, including the remaining season corresponding to March, April and May 2020 when it was resumed, and remained in Turkey during the summertime without claiming any additional amount for his services.

72. Moreover, in CAS 2021/A/7872, the Parties explicitly agreed to a 15% reduction on the monthly salaries of March, April and May 2020; in contrast, the Respondent in these proceedings firmly objected to any variation of his remunerations. On the other side, the Club did not provide any collective agreement that could support his allegations: instead, the Player states, and it was not objected by the Club, that a considerable number of teammates and other professional employees filed several claims to obtain their salaries' payment.

73. The Sole Arbitrator finds that, despite the alleged financial losses, the Appellant failed to provide evidence that the COVID-19 pandemic had a significant impact on its capacity to perform its obligations for the whole season of 2019/2020. Notably, many players were paid in full, and the Club was able to pay a considerable amount of money to the Player (more than one million euros) from July to October 2020, out of the claimed remunerations at stake.

74. Furthermore, it should be pointed out that, from a strict accounting point of view, the negative results of an annual financial cycle (*i.e.*, 2020) are to be found in the following year (*i.e.*, 2021). Still, the Club did not provide any evidence of this continuing negativity. Always keep in mind that, after the restart of the championship, the Club was already able to pay over one million euros to the Player, and not all the figures on the Club's balance sheet appear to have a significant decrease from 2019 to 2020.

75. Finally, the Sole Arbitrator shares the reasoning of the Appealed Decision, since *"the Turkish league was suspended for two months only while the club reduced the player's salary for the entire 2019/2020 season and in a retroactive manner, which could not be deemed neither reasonable nor proportionate"*. Therefore, according to Article 12bis FIFA RSTP, the Player's claim filed on 5 February 2021 was lawful and grounded.

76. As a result, the Sole Arbitrator concurs with the Appealed Decision and finds that the Player is entitled to receive all the remaining agreed remuneration as provided for in the Employment Contract.

X. CONCLUSION

77. As a consequence of all the foregoing, the Sole Arbitrator is satisfied that the Club shall pay the Player the amount of EUR 390,000 as outstanding remuneration plus interest at the rate of 5% p.a. as determined by the FIFA DRC in the Appealed Decision.

78. In light of the above considerations, the Sole Arbitrator rules that the present appeal shall be dismissed and, therefore, confirms the Appealed Decision.

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

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 20 September 2021 by Beşiktaş A.Ş. against the decision issued on 12 August 2021 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is dismissed.

2. The decision rendered by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* on 12 August 2021 is confirmed.

3. (…).

4. (…).

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