Arbitration CAS 2021/A/8511 Wuhan FC v. Leonardo Carrilho Baptistão, award of 25 November 2022

Panel: Mr Espen Auberg (Norway), President; Prof. Mingchao Fan (China); Mr Francesco Macri (Italy)

Football
Termination of an employment contract with just cause by a player
Validity of a choice of law provision
Prayers for relief and scope of the dispute
COVID-19 as a force majeure event
Borders' closure and withholding of a player's salary
Calculation of compensation for damages

1. **A choice of law provision contained in an employment contract is not valid, if it refers abstractly to "related provisions of labour law and contract law" without it being possible to determine with certainty the country involved.**

2. **A fixed-term employment contract may be unilaterally terminated with just cause by a player for outstanding salaries under Article 14bis of the FIFA Regulations on the Status and Transfer of Players (RSTP). The grounds for such termination will not be reviewed by the panel if they are not contested by the club, with the result that the dispute will focus on the amount of overdue payables and compensation that ensues.**

3. **The COVID-19 pandemic may be considered, on a case-by-case basis, as an event of force majeure that exempts a club from liabilities for breach of contract. For that purpose, the club must substantiate to the required standard of proof that it was prevented from complying with its financial obligations due to exceptional circumstances. This is not the case if it merely alleges a loss of revenue from ticket sales, stadium advertising and sponsorship without providing any supporting evidence, and even hired several new foreign football players during that period.**

4. **In principle, a club is not entitled to withhold the salary of its player who is stranded abroad for several months, through no fault of its own, due to the closure of borders for sanitary reasons, on the grounds that he failed to provide services. It has an implicit duty to facilitate and obtain visas and work permits for its players and must bear the consequences of such failure.**

5. **The compensation for damages shall be calculated considering the remuneration due to the player in accordance with the employment contract and its residual duration, subject to any financial gains made after the early termination, including salary and image rights entitlements. An additional compensation of three months' salary may also**

be due, provided that it does not place the player in a more favourable position than he would have been if there had been no termination.

I. PARTIES

1. Wuhan Football Club (the "Appellant" or the "Club") is a Chinese professional football club with its registered seat in Wuhan, China. It is a member of the Chinese Football Association ("CFA") which, in turn, is affiliated with the Asian Football Confederation ("AFC") and the Fédération Internationale de Football Association ("FIFA").

2. Mr Leonardo Carrilho Baptistao (the "Respondent" or "the Player"), born on 26 August 1992, is a professional football player of Brazilian nationality.

3. The Appellant and the Respondent are hereinafter jointly referred to as the "Parties".

II. FACTUAL BACKGROUND

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

A. Background Facts

5. The Club and the Player signed an employment contract (the "Contract") on 31 January 2019. The Contract is drafted in two languages, i.e. Chinese and English. According to the Contract, the Player was employed as a professional football player by the Club as from 31 January 2019 until 31 December 2021. In the Contract, the Club is referred to as Party A, and the Player is referred to as Party B.

6. Article 3 of the Contract states as follows:

"Article 3 Living and Working Conditions and Health Protection

(…)

8. Party A is responsible for obtaining the required visas, working permits or similar for Party B".

7. The Club's financial obligations towards the Player is regulated in Article 7 of the Contract, which reads:

"Article 7 Salary and bonuses

I. Party B's year salary in contract is 3,300,000 Euro net (Three million three hundred thousand Euro NET). The salary will be paid in 12 times at a monthly basis averagely.

2. In any season during this contract, If Party B make the appearance more than 80% of the total play lime in the CSL games or score more than 20 goals in the CSL games, then the salary of Party B in the next year will automatically increase 200,000 Euros net (Two hundred thousand Euro Net).

3. Party A shall pay Party B match bonus according to different match nature, match result and staging time and performance.

(…)

7. The salary distribution date is the 15th Day of each month, and the work first and pay later system is adopted. Which is the following month in the above-mentioned time party A will pay the salary of previous month".

8. The Player's obligations as well as disciplinary issues are regulated in the Contract Article 9, which reads, *inter alia*:

"Article 9 Obligations and Discipline

1. Party B must fulfil the following obligations:

(…)

(6) Participate in Party A's training, matches and related activities and make effort to complete specified training and matches;

(…)

3. Penalty for breaking of discipline

(…)

(4) Without the approval of Party A or the Coaching Staff, Part B is not allowed to leave the team or being absent for training without just cause, the penalty for each absence is 10,000-100,000Euro. If party B being absence for training more than 3 times (including 3 times) per season without just cause, defined as a serious violation. Party A has the right to give a penalty no less than 20%-30% of his annual salary, accumulated being absent more than 2 weeks (including 2 weeks). Party A have the right to cancel the contract meanwhile Party B will pay 20 million Euro to Party A as the compensation for breaching of the contract.(Without the approval of Party A or the Coaching Staff, if party B leaves during the training or with the approval of Party A or the Coaching Staff, left during the training but did not returned in time, all will be defined as being absent for training)

(…)

(6) If party B have the vacation, leave for personal affairs, trails in other teams approved by party A, but do not return in time, will be dealt as above mentioned (4)".

9. The Player's right to terminate the Contract is regulated in Article 10, which reads, inter alia:

"Article 10 Cancellation of the Contract

(…)

3. The contract may be cancelled by Party B by notifying Party A:

(…)

(2) If Party A is behind in payment of salary to Party B for over two months; (…)".

10. In addition, Article 12 provides – in its relevant parts – as follows:

"Article 12 Termination of the Contract

(…)

(2) The Contract is canceled during the contract term for reasons states as aforesaid".

11. Article 13 of the Contract contains provisions regarding breach of contract, and reads as follows:

"Article 13 Liabilities for Breach of Contract

Either party shall undertake the compensation or remedy to the other party according to losses and responsibilities caused by the party's breach of the contract and therefore causing economic losses to the other party".

12. Dispute resolution is regulated in Article 14, which reads:

"Article 14 Settlement of Dispute

1. The disputes arising from the fulfillment of, or in connection with the contract shall be settled through friendly consultations between both parties;

2. In case no settlement can be reached through consultation, the dispute shall be submitted to the Arbitration Commission of FIFA; any disapproval should submit to the Court of Arbitration for Sports (CAS) Shanghai Hearing Center, the decision of Court of Arbitration for Sports (CAS) Shanghai Hearing Center is final and binding. The language to be used in any arbitrary proceedings shall be English".

13. With regards to the choice of law, Article 15 of the Contract states inter alia:

"Article 15 Miscellaneous

(…)

2. The issues not covered in the contract will be executed in accord with related provisions of Labor Law, Contract Law and related regulations of FIFA and China Football Association League Committee, or are written in the supplementary Agreement. The supplementary agreement must be submitted with the contract to China Football Association League Committee for record, otherwise the supplementary agreement will not be acknowledged.

(…)

4. When the clauses of the contract are contradictory to the regulations of FIFA or CFA, the latter prevails. When the clauses of the contract are contradictory to the state laws, regulations and policies, the latter shall prevail".

14. On 26 March 2020, the Chinese government announced the temporary suspension of the entry of foreigners into the country due to the effects of the COVID-19 outbreak.

15. The Club did not pay the Player salaries as from January 2021.

16. Following a vacation in January 2021, the Player was unable to return to the Club as he could not attain a visa. After a visa was finally achieved, the Player returned to China on 24 April 2021. Following his arrival to China, the Player was in quarantine until 26 May 2021, when he returned to the Club.

17. On 6 July 2021, the Player put the Club in default and granted it with a 15-day deadline in order to proceed with the payment of his outstanding salaries as from January 2021, to no avail.

18. On 23 July 2021, the Player notified the Club of the termination of the Contract due to overdue payables. In this regard, the Player informed the Club that he had only received one salary after his notice sent to the Club on 6 July 2021.

19. On 18 August 2021, the Player entered into a new employment relationship with the Brazilian club Santos Futebol Clube ("Santos FC"). Santos FC undertook to pay the Player a total amount of BRL 192,000 – corresponding to approx. EUR 229,033.71 – for the remainder of the year 2021.

20. On the same date, the Player also entered into an image rights agreement with Santos FC according to which FC Santos undertook to pay the Player a total amount of BRL 128,000 – corresponding to approx. EUR 91,613.61 – within the period from 17 August 2021 until 30 April 2022.

21. Between 9 April 2021 and July 2021, the Club signed professional contracts with three foreign players, namely Messrs Stephane Mbia, Yoann Arquin and Anderson Lopez.

B. Proceedings before the FIFA Dispute Resolution Chamber

22. On 28 July 2021, the Player filed a claim against the Club before the FIFA Dispute Resolution Chamber (the "FIFA DRC").

23. The Player submitted the following requests for relief:

"a. EUR 1,576,667 as outstanding remuneration, plus the relevant interest until the date of the effective payment, as follows:

(i) EUR 275,000 net as the salary of February 2021, plus 5% interest p.a. as from 15 March 2021;

(ii) EUR 275,000 net as the salary of March 2021, plus 5% interest p.a. as from 15 April 2021;

(iii) EUR 275,000 net as the salary of April 2021, plus 5% interest p.a. as from 15 May 2021;

(iv) EUR 275,000 net as the salary of May 2021, plus 5% interest p.a. as from 15 June 2021;

(v) EUR 275,000 net as the salary of June 2021, plus 5% interest p.a. as from 15 July 2021;

(vi) EUR 201,667 net as the pro rata salary of July 2021 (i.e. 22 days), plus 5% interest p.a. as from 22 July 2021.

b. EUR 1,448,333 net as compensation for breach of contract, corresponding to the residual value of the employment contract; and

c. EUR 825,000 net as additional compensation of three monthly salaries in accordance with art. 17 of the RSTP".

24. The Club submitted its reply to FIFA DRC on 10 September 2021.

25. A decision of FIFA DRC was rendered 14 October 2021 (the "Appealed Decision") and submitted to the Parties on 15 November 2021.

26. A summary of the FIFA DRC's reasoning in the Appealed Decision is as follows:

- It is undisputed that the Player terminated the Contract on 23 July 2021 due to overdue payables. Furthermore, the Player put the Club in default and granted it a reasonable deadline in order to fulfil its obligations, to no avail. The Club accepted that the Player should be entitled to compensation for breach of contract. Consequently, the FIFA DRC was satisfied with the conclusion that the termination was made with just cause by the Player, in accordance with Article 14bis of the *Regulations on the Status and Transfer of Players* ("FIFA RSTP").

- *"In any given dispute, it is for a party invoking force majeure to establish the existence of said event under the applicable law and rules as well as the consequences that derive in connection thereto. The analysis of whether a situation of force majeure existed has to be considered on a case-by-case basis, taking into account all the relevant circumstances… the club did not provide any evidence capable of demonstrating a legal situation of force majeure in China".* Furthermore, the Club did not demonstrate that the national law addresses the issue of force majeure.

- Against this background FIFA DRC unanimously concluded that the Club's allegations in relation to the COVID-19 pandemic should be set aside.

- Regarding the Club's argumentation that the Player was not entitled to remuneration during the time he was absent from training, pre-season and matches, FIFA DRC *"acknowledged that the club: (i) confessed that it was aware of the restrictions imposed by the Chinese government to entry the country and was in contact with the player in order to remedy the situation; (ii) has never requested the player to avail himself for a specific event / date nor has put him in default for breach of contract; (iii) has never informed the player that he would not be entitled to part of his remuneration; (iv) has never granted the player a deadline to cure any eventual breach; and (v) has not provided any answer of remark to the Player's notice dated 6 and 23 July 2021"*. Having considered the Club's conduct, FIFA DRC *"concluded that the club did not meet its burden of proof in order to demonstrate that any of the Player's remuneration under the Contract should not be delivered"*.

- In accordance with the general legal principle of *pacta sunt servanda*, FIFA DRC unanimously decided to award the Player the total amount of EUR 1,100,000 net as outstanding remuneration, corresponding to the salaries of April, May, June and July 2021 (i.e. EUR 275,000 each), and to award the Player interest at the rate of 5% *per annum* on the outstanding amounts as from the date in which each instalment fell due until the date of effective payment.

- Regarding calculation of the amount of compensation payable to the Player by the Club (the "Mitigated Compensation") FIFA DRC pointed out that in accordance with article 17 paragraph 1 of the FIFA RSTP, such amount shall, *inter alia*, be calculated, unless otherwise provided in the contract, based on the time remaining on the existing contract, i.e. the monies payable to the Player under the terms of the contract from the date of its unilateral termination until its end date. Consequently, FIFA DRC concluded that the amount of EUR 1,375,000 net (i.e. the residual value of the contract comprising the Player's salaries from August to December 2021 of EUR 275,000 each) served as the basis for the determination of the amount of compensation for breach of contract.

- Further, FIFA DRC observed that the Player had signed a new employment contract with Santos FC, and that remuneration under the new employment contract with Santos FC shall be taken into account in the calculation of the amount of compensation for breach of contract in connection with the Player's general obligation to mitigate his damages, pursuant to article 17 paragraph 1 lit. ii) of the FIFA RSTP. FIFA DRC concluded that the Player mitigated his damages in the total amount of approximately EUR 229,033.71 (i.e. EUR 137,420.10 for the employment agreement and EUR 91,613.61 for the image rights agreement).

- Further, FIFA DRC referred to article 17 paragraph 1 lit. ii) of the FIFA RSTP, according to which a Player is entitled to an amount corresponding to three monthly salaries as additional compensation should the termination of the employment contract at stake be due to overdue payables (the "Additional Compensation"). FIFA DRC confirmed that the contract was terminated due to overdue payables by the Club, and therefore decided that the Player should receive additional compensation of EUR 825,000 net, i.e. three times the

monthly remuneration of the Player. However, as the amount of compensation (including any additional compensation) cannot exceed the residual value of the contract, FIFA DRC decided to award the amount of additional compensation of EUR 229,033.71 to the Player.

- Against this background, FIFA DRC decided that the Club must pay the amount of EUR 1,375,000 net to the Player (i.e. EUR 1,375,000 minus EUR 229,033.71 plus EUR 229,033.71), and award the Player interest on said compensation at the rate of 5% *per annum* as of the date of the claim (i.e. 5 August 2021) until the date of effective payment.

27. The operative part of the Appealed Decision reads:

"1. The claim of the Claimant, Leonardo Carrilho Baptistão, is partially accepted.

2. The Respondent, Wuhan FC, has to pay to the Claimant, the following amounts:

- EUR 275,000 net as outstanding remuneration plus 5% interest p.a. as from 16 May 2021 until the date of effective payment;

- EUR 275,000 net as outstanding remuneration plus 5% interest p.a. as from 16 June 2021 until the date of effective payment;

- EUR 275,000 net as outstanding remuneration plus 5% interest p.a. as from 16 July 2021 until the date of effective payment;

- EUR 275,000 net as outstanding remuneration plus 5% interest p.a. as from 5 August 2021 until the date of effective payment; and

- EUR 1,375,000 net as compensation for breach of contract plus 5% interest p.a. as from 5 August 2021 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 art. 24bis of the Regulations on the Status and Transfer of Players if full payment (including all applicable interest) is not made 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 made by the end of the three entire and consecutive registration periods.*

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

7. This decision is rendered without costs".

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

28. On 6 December 2021, the Club filed a Statement of Appeal with CAS, pursuant to Article R47 *et seq.* of the Code of Sports-related Arbitration (2021 edition) (the "Code"), against the Appealed Decision. In the Statement of Appeal, the Club nominated Prof Mingchao Fan, Director of ICC & ADR North Asia in Shanghai, China, as arbitrator.

29. On 10 December 2021, the Club filed its Appeal Brief in accordance with Article R51 of the Code.

30. On 17 December 2021, the Player nominated Mr Francesco Macri, Attorney-at-Law in Piacenza, Italy, as arbitrator. In addition, the Player requested for a 20-day extension of the deadline to file his Answer.

31. On 23 December 2021, the Club agreed to exclude FIFA from the present procedure.

32. On the same date, the CAS Court Office confirmed the exclusion of FIFA as a party to the present procedure. In addition, the CAS Court Office invited the Appellant to comment on the Respondent's extension request by 27 December 2022.

33. On 28 December 2022, the Player filed its Answer in accordance with Article R55 of the CAS Code.

34. On the same date, the CAS Court Office acknowledged receipt of the Respondent's Answer and informed the Parties that the Respondent's extension request became moot.

35. On 29 December 2021, the CAS Court Office provided the Parties with Prof Dr Fan's disclosures in relation to his appointment in this matter. In this regard, Prof Dr Fan stated as follows:

"I serve as chairperson of the Arbitration Commission of the Chinese Football Association but do not consider it a factor that causes questions over my independence or impartiality".

36. On 6 January 2022, the CAS Court Office informed the Parties that no challenge had been filed against the nomination of Prof Dr Fan within the deadline prescribed in Article R34 of the Code.

37. On 28 January 2022, in accordance with Article R54 of the Code and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to this case was constituted as follows:

President: Mr Espen Auberg, Attorney-at-law, Oslo, Norway
Arbitrators: Prof Mingchao Fan, Director in Shanghai, China,
Mr Francesco Macri, Attorney-at-law in Piacenza, Italy

38. On 29 January 2022, the Respondent filed a challenge to Prof. Dr Fan pursuant to Article R34 of the Code.

39. On 6 February 2022, Prof. Mingchao Fan filed his response to the Respondent's challenge.

40. On 17 February 2022, the Appellant filed its response to the Respondent's petition.

41. On 13 June 2022, the Challenge Commission of the ICAS Board dismissed the challenge brought by the Appellant against the appointment of Prof Dr Fan as an arbitrator.

42. On 14 June 2022 the CAS Court Office informed the Parties that the Appellant was ordered to provide translations of all documents submitted in languages other than English within two weeks. No such translations were submitted.

43. On 1 July 2022 the CAS Court Office informed the Parties that, pursuant to Article R29 para. 3 of the Code, untranslated documents would not be considered in these proceedings. In the same letter the Parties were informed that, pursuant to Article R57 para. 2 of the Code, following the Parties requests that no hearing shall be held in this case, the Panel had decided that it was sufficiently well-informed to decide this case based solely on the Parties' written submissions and, therefore, that no hearing would be held.

44. On 5 July, the CAS Court Office issued an Order of Procedure, which was duly signed and returned by the Player on 5 July 2022 and by the Club on 11 July 2022. By signing the Order of Procedure, the Parties confirmed that their right to be heard had been respected.

45. On 8 August 2022, on behalf of the Panel, the CAS Court Office invited the Parties to comment on the applicable law to the merits in this procedure within five days.

46. On 10 and 12 August 2022, respectively, the Parties filed their position in the applicable law to the merits in this matter.

IV. SUBMISSIONS OF THE PARTIES AND REQUESTS FOR RELIEF

47. This section of the Award does not contain an exhaustive list of the Parties' contentions. Its aim is to provide a summary of the substance of the Parties' main arguments. In considering and deciding upon the Parties' claims in this Award, the Panel has accounted for and carefully considered all of the submissions made and evidence adduced by the Parties, including allegations and arguments not mentioned in this section of the Award or in the discussion of the claims below.

A. The Club's Submissions

48. The Club's submissions, in essence, may be summarized as follows:

1. The outstanding remuneration should be reduced due to the absence of the player

- The Player should not be entitled to the remuneration equal to four months' salaries or any compensation.

- The amount awarded to the Player in the Appealed Decision for outstanding remuneration should be deducted with EUR 825,000, corresponding to an amount of three months' salaries, and the Player should only be entitled to EUR 201,667 net as the pro-rata salary of July 2021, i.e. 22 days.

- The Player shall not be entitled to the payment of salaries for the period during which he was away from China and did not work for the Appellant, i.e. from 17 February 2021 to 26 May 2021. The essential duty of the professional football player in the employment contract is engaging in games and training for the club. If the Player fails to fulfil the essential obligations due to reasons not attributed to the Club, the Player will be in default.

2. Force majeure applies to the present matter

- As COVID-19 should be considered as *force majeure* in this case according to the national law of the country concerned, the Club's liability for breach of the Contract should be exempted, which means the Club should not pay the Player any compensation.

- In accordance with Article 17 paragraph 1 of the FIFA RSTP, the amount of compensation shall be calculated with due consideration for the law of the country concerned. However, according to Article 15 of the Contract, the issues not covered in the Contract will be executed according to related provisions of Contract Law.

- Article 177 of Chinese Contract Law states that a party unable to perform a contract due to force *majeure* is exempted from liability in part or in whole in light of the impact of the event of *force majeure*. The same article defines *force majeure* as *"any objective circumstances which are unforeseeable, unavoidable and insurmountable"*.

- After the outbreak of COVID-19, the Supreme People's Court of China issued the document *"Guiding opinions on civil cases related to novel coronavirus pneumonia"* on 16 April 2020. The outbreak of COVID-19 could be considered as a *force majeure* according to Article 3.1 of said document.

- The COVID-19 pandemic hit Wuhan badly (where the Club is based) in the first quarter of 2020 and still has its impacts on the Club and the Chinese Super League (CSL). The Club still cannot get revenue from ticket sales and stadium advertising sponsorship for

the empty stadium policy. And the CSL also changed its schedules several times, which has caused several financial problems for the Club.

- The outbreak of COVID-19 is an unforeseeable, unavoidable and insurmountable situation which should be considered as *force majeure* in accordance with Article 117 of Chinese Contract Law. Consequently, the Club shall be exempt from liabilities for breach of the Contract.

49. On this basis, in its Statement of Appeal dated 2 December 2021, the Club made the following request for relief:

"1. The Appeal submitted by the Club is admissible.

2. The decision taken by DRC on 15 November 2021 has to be partially modified by fixing the debt in the amount of 201,667 euros.

3. The arbitration costs are to be carried out by the respondent".

B. The Player's Submissions

50. The Player's submissions, in essence, may be summarized as follows:

1. The outstanding remuneration cannot be reduced due to the absence of the player

- With regards to the Club's claim that the Player's outstanding remuneration should be deducted with three months' salary because the Player did not work for this period of time, it is the Club that has the burden to prove, in accordance with Article 8 of the Swiss Civil Code, that the Player failed to provide his service due to his fault.

- The Club has not met its burden of proving that the Player willingly failed to provide his services. All the evidence shows that the Player should not be blamed for his absence.

- The Club accused the Player of breaching the contract according to Article 9 of the Contract, which stated that without the Club's approval or the coaching staff, the Player is not allowed to leave the team or be absent for training without just cause. However, the Player left China upon the approval of the Club.

- Article 9 paragraph 6 of the Contract states that if the Player has the vacation, leaves for personal affairs, trails in other teams approved by the Club, but does not return in time, the matter will be dealt with in accordance with the mentioned paragraph.

- However, the Player was available to return to China, but he did not have a valid visa to re-enter into the country. Obtaining the visa/work permit is the obligation of the Club.

- As the Club itself admitted in its answer before FIFA, it tried to help the Player get residence permits for a working visa by providing the Player with two Invitation Letters

in January 2021 and in April 2021 related to the Player's dual nationality. Also, after consulting the foreign affairs office of the provincial government, the Club suggested the Player transit from Spain to return, which worked in the end.

- In this regard, the Club had always been aware that the Player could not return in absence of a valid visa.

- After the arrival of the Player on 24 April 2021, the Club did not propose to him to discuss the potential reduction of his salary during such absent time nor send him any written notice to try to get a mutual understanding.

- After the quarantine, the Player joined the team training on 26 May 2021 and participated in two matches on 19 July and 22 July 2021.

- It was not until the Player terminated the contract due to overdue payables, that the Club started pretending to use the absent time to reduce its obligation.

2. Force majeure does not apply

- The Club is arguing that COVID-19, according to Chinese Contract Law and the Supreme People's Court of China, should be considered as *force majeure*, and that the Club should be exempted from its breach of contract liability.

- Firstly, COVID-19 has not been declared by FIFA a *force majeure* situation in any specific country or territory. Whether or not a *force majeure* situation exists in the country or territory of a member association is a matter of law and fact, which must be addressed on a case-by-case basis.

- The Club has the burden of proof to establish the existence of *force majeure* events in China by that time.

- Article 177 of Chinese Contract Law only stipulates the consequence of a *force majeure* event, and it does not directly declare COVID-19 as *force majeure*.

- With regards to Article 3.1 of the *"Guiding opinions on civil cases related to novel coronavirus pneumonia"* issued by the Supreme People's Court of China on 16 April 2020, the Club had never told the Player that it could not continue the employment contract. Rather, the Club intended to receive the Player's services. Besides, the Player, after his arrival, participated in two matches, but he was forced to terminate the contract because of the overdue payables.

- Further, the concrete situation of COVID-19 in China by the moment of contract termination cannot be considered *force majeure*. The Chinese Super League season 2020 was suspended from January until July 2020, and the season ended in November 2020. The football activities in China generally have been back to normal since July 2020. The

Player played for the Club after the resume of the season 2020. The dispute that caused the termination of the contract was the overdue salaries for 2021.

- The Club argues that the impact of COVID-19 still exists. However, there is a considerable difference between the *force majeure* situation and financial difficulty. It would not surprise anyone that the effects of COVID-19 continues to exist for everyone. However, a contractual party cannot use it to get away with its contractual obligation.

- While the Club is arguing it lost much of its revenues, it signed three foreign players between April 2021 and July 2021. Even if the Club does not need to pay the transfer fee, the Club is still required to bear the salaries of these players.

- Moreover, constant and well-known CAS case law has repeatedly supported the idea that alleged financial difficulties due to an economic crisis is not a valid justification for a club's failure to comply with its financial obligations.

- Against this background, the Club failed to prove the existence of *force majeure*, and it used the COVID-19 pandemic to get away with its financial obligations towards the Player.

51. On these grounds, the Player made the following requests for relief:

"1. To dismiss the appeal filed by the Club against the Player with respect to the Decision passed by the FIFA DRC on 14th October 2021, with reference No. FPSD-3238 communicated to the Parties with the grounds on 15th November 2021;

2. To condemn the Appellant to pay the entire CAS administration cost and the full Arbitrators fees.

3. To fix a sum of 25,000 CHF to be paid by the Appellant to the Respondent to help the payment of his legal fees covering the costs of his legal representation in front of the Court of Arbitration for Sport".

V. JURISDICTION

52. The jurisdiction of CAS derives from Article R47 paragraph 1 of the 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 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".

53. Article 58 paragraph 1 of the FIFA Statutes (2021 edition) states 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".*

54. The Player does not contest CAS jurisdiction.

55. The jurisdiction of CAS is further confirmed by the Order of Procedure duly signed by the Parties.

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

VI. ADMISSIBILITY

57. 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 in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document".

58. Article 58 paragraph 1 of the FIFA Statutes provide that appeals must be lodged within 21 days of receipt of the decision being appealed.

59. The Appealed Decision was communicated to the Parties – with grounds – on 15 November 2021.

60. The Club filed its Statement of Appeal on 6 December 2021 and, therefore, within 21 days from the communication of the Appealed Decision. The Club completed its Appeal per the terms of Article R48 and R51 of the Code and within the deadline set by the CAS Court Office for it to do so. The Appeal complied with all of the requirements of Article R47 *et seq.* of the Code, including the payment of the CAS Court Office fee.

61. It follows that the Appeal is admissible.

VII. APPLICABLE LAW

62. Article R58 of the Code provides as follows:

"Law Applicable to the merits. 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".

63. Article 15 of the Contract states, *inter alia*, that issues not covered in the Contract shall be decided in accordance with *"related provisions of Labor Law, Contract Law and related regulations of FIFA and China Football Association League Committee"* and further that when *"the clauses of the contract are contradictory to the regulations of FIFA or CFA, the latter prevails. When the clauses of the contract are contradictory to the state laws, regulations and policies, the latter shall prevail".*

64. The Appealed Decision was issued by the FIFA DRC in accordance with Article 56 paragraph 2 of the FIFA Statutes, which provides:

"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".

65. The Appellant submits that Chinese law shall apply on subsidiarily basis. In turn, the Respondent submits that Swiss law shall apply in order to fill any gap in the various rules and regulations of FIFA and CFA.

66. In the light of the above, the Panel notes that although the Contract states that issues not covered in the Contract shall be decided in accordance with *"related provisions of Labor Law and Contract Law"*, it does not specify which provisions of labor law and contract law that shall apply. In the case at hand both Chinese and Swiss labor law and contract law could be relevant, as the club, i.e. the employer, where the contractual obligations should be carried out, is based in China, whilst international football disputes fall under the scope of FIFA, which is based in Switzerland, and which in its statutes states that Swiss law shall apply in addition to FIFA regulations. As the Contract lacks clarity in this regard, the Panel finds that the Parties have not agreed on the rules of law, and consequently the Contract's reference to labor law and contract law cannot be taken into account when deciding which law is applicable to the merits.

67. Against this background, the dispute shall primarily be decided according to the applicable regulations, i.e. the various regulations of FIFA and the China Football Association League Committee (the "CFA"). Swiss law shall be considered subsidiarily in case of a *lacuna* in the various regulations of FIFA and CFA, and if the clauses in the Contract are contradictory to the state laws, regulations and policies.

VIII. MERITS

A. The Main Issues

68. The Panel notes that the Club does not dispute the justification of the Player's unilateral termination of the Contract, and that it requests that the Appealed Decision should be partially modified by reducing the amount awarded to the Player, partly as the outbreak of the COVID-19 pandemic should be considered as an event of *force majeure* that exempts the Club from liabilities for breach of the Contract, and partly as the Player was absent from work from 17 February 2021 to 26 May 2021 and as such did not fulfil his contractual obligations.

69. Against this background, the main issues to be resolved by the Panel are:

1. Should the COVID-19 pandemic be considered as *force majeure*, and if so, what are the consequences thereof?

2. Is the Player entitled to remuneration for the period he was absent from work?

3. Is the Player entitled to compensation, and if so, what is the compensation due?

1. Should the COVID-19 pandemic be considered as force majeure, and if so, what are the consequences thereof?

70. With regards to the Club's claim that the COVID-19 pandemic should be considered as an event of *force majeure* that exempts the Club from liabilities for breach of the Contract, the Panel notes that Article 8 of the Swiss Civil Code provides concerning the burden of proof that: *"Unless the law provides otherwise, each party shall prove the facts upon which it relies to claim its right"*. This principle has been applied in CAS jurisprudence, as illustrated in the case CAS 2020/A/6796 (paragraph 98) where the Panel stated:

"[I]n CAS arbitration, any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue. In other words, the party which asserts facts to support its rights has the burden of establishing them (…). The Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one. Hence, if a party wishes to establish some fact and persuade the deciding body, it must actively substantiate its allegations with convincing evidence".

71. The Panel endorses the view of the Panel in the abovementioned case and notes that the Club claims that the COVID-19 pandemic should be considered as an event of *force majeure* that exempts the Club from liabilities for breach of the Contract. Consequently, the Club has the burden of proof in this regard, namely that this event of *force majeure* exempts the Club from liabilities for breach of the Contract.

72. The Panel further notes that the consideration of whether COVID-19 constitutes an event of *force majeure* must be based on national contract law, as stipulated in Article 15 of the Contract. In this context, the Club refers to an alleged document issued by the Supreme People's Court of China, which states, *inter alia*, that the outbreak of COVID-19 should be considered as *force majeure*. Further, the Club refers to Article 177 of Chinese Contract Law which allegedly, *inter alia*, states that a party who is unable to perform a contract due to *force majeure* is partly or fully exempted from liability.

73. The Panel notes that a guidance, issued by the Supreme People's Court of China, states that if the contract cannot be performed directly due to the COVID-19 epidemic situation or its epidemic prevention and control measures, provisions of *force majeure* shall apply.

74. Notwithstanding the above, the Panel finds that, in general, *force majeure* as a legal concept refers to a higher force and covers extraordinary circumstances, which are not under human control and cannot be avoided. Examples of such extraordinary events include wars, riots, natural disasters, etc. Whether the COVID-19 pandemic should be considered as *force majeure* in the relationship between a club and a player can only be considered on a case-to-case basis.

75. Whether the COVID-19 pandemic constituted a *force majeure* event in the case at hand must be considered taking into account the specific circumstances of the case. The Club claims

that the COVID-19 pandemic has affected the Club mainly in terms of lack of revenue from ticket sales and stadium advertising, sponsorship, and that the COVID-19 pandemic is unforeseeable, unavoidable and insurmountable, which should be considered as *force majeure*.

76. The Panel agrees with the Club to the extent that, in principle, the COVID-19 pandemic could create a situation that falls under the scope of *force majeure*. However, the Club has failed to substantiate and proof to the required standard of proof its claim that the COVID-19 pandemic had concrete consequences for the Club that constituted a *force majeure* situation. The Panel notes that the Club has not submitted any exhibits that supports its claim in this regard, and failed to provide any information or claims indicating that it was unable to comply with its financial obligations towards other parties. On the contrary, the fact that the Club signed new professional contracts with three foreign football Players during the same period in which it failed to make payments to the Player suggests that the Club's finances were strong enough to further invest in the Club's squad.

77. Furthermore, the Club never raised the issue of *force majeure* when it failed to make the payments to the Player in accordance with its contractual obligations, and first presented the argument of *force majeure* in the proceedings before FIFA DRC. This conduct, seen in connection with the Club's failure to substantiate its claim, indicates that the Club's non-fulfilment is due to reasons other than *force majeure* and the COVID-19 pandemic.

78. Against this background, the Panel concludes that the Club has failed to meet its burden of proof in establishing that the COVID-19 pandemic should be considered as an event of *force majeure*.

79. As the Panel concludes that the Club has not demonstrated that the COVID-19 pandemic created a situation that falls under the scope of *force majeure*, it is not necessary to consider whether *force majeure* exempts the Club from liabilities for breach of the Contract.

2. Is the Player entitled to remuneration for the period he was absent from work?

80. The Panel observes that following a vacation in January and early February 2021, the Player did not return to China until 24 April 2021. From that date, the Player was in quarantine until 26 May 2021, when he returned to training and matches. As such, the Player was absent from work from February 2021 until 26 May 2021. The Club claims that the Player is not entitled to remuneration for this period, as he did not fulfil his contractual obligations.

81. As a starting point, the Panel notes that, in accordance with the Contract Article 9.1 (6), the Player is obliged to participate in, *inter alia*, training and matches. In general, participation in training and matches must be considered an essential obligation for any football player, and the failure to return to the club in order to participate in training and matches could, in principle, constitute a breach of a player's obligations towards the club as concluded by CAS on numerous occasions, such as in CAS 2003/O/482, where the CAS panel stated (paragraph 11.1):

"Mr Ortega's explanation for not returning to Turkey being inadequate, our conclusion is that he has failed to identify any breach of contract by the Club a fortiori any such breaches would justify Mr Ortega's refusal to return from Argentina or, in the vocabulary of the FIFA rule, 'just cause'. It is therefore inevitable that we should find that Mr Ortega was himself in breach".

82. It is undisputed that the Player did not attend training or matches from February until May 2021 because he could not attain a valid visa. Whether the Player is entitled to remuneration for this period must be assessed taking into consideration if it is the Club or the Player liable that a visa could not be attained.

83. In this regard, the Panel considers that, in general, a club has an implied duty to facilitate and obtain visa and work permit if necessary. Such an approach has been confirmed by CAS. In the case CAS 2015/A/4158 the sole arbitrator stated:

"Although the Employment Contract contains no provision regarding the visa and work permit renewals, the Club, as the employer, had an implied duty to facilitate the renewal of the Coach's visa and work permit. This is the general presumption in employment relationships and if the Club intended to shift this obligation to the Coach, then it ought to have ensured a clause to this effect in the Employment Contract".

84. The Panel concurs with the considerations of the sole arbitrator in the abovementioned case.

85. Further, in accordance with the Article 2.8 of the Contract, it is the Club that is responsible for obtaining required visas and work permits.

86. The Panel notes that the Club has the main responsibility of attaining a visa, and the Player, on the other hand, has an implied duty to contribute to attaining a visa by making any reasonable effort required by the Club in this regard.

87. The Club has not claimed, or provided evidence, that the Player did not cooperate in the process of attaining a visa. Further, there are no indications that the Player failed to fulfil his duty to contribute to attaining a visa.

88. Furthermore, the Panel notes that the Club's claim that the Player was not entitled to remuneration for the period he was absent from work, was presented only after the Player terminated the Contract. During the Player's absence, the Club never requested the Player to return the Club on a specific date, and did not inform the Player that he would not be entitled to part of his remuneration due to his absence. These circumstances indicate that the Club, during the Player's absence, accepted that the Player could not be blamed for being absent for the relevant period.

89. Against this background, the Panel finds that the Player's absence from training and matches from February to 26 May 2021 was the direct consequence of the Club's failure to comply with its obligation to attain a visa for the Player, and that the Player cannot be accused of an unjustified absence from work. Consequently, the Player is entitled to the due remuneration, also for the period he was absent.

90. The Panel concurs with the considerations in the Appealed Decision that in accordance with the general legal principle of *pacta sunt servanda*, the Player is entitled to an amount of EUR 1,100,000 net as outstanding remuneration, corresponding to monthly salaries of EUR 275,000 each for the months April, May, June and July 2021. The Panel notes that this amount corresponds to the amount awarded as remuneration to the Player in the Appealed Decision.

3. Is the Player entitled to compensation for the Club's breach of the Contract, and if so, what is the compensation due?

91. As determined in the Appealed Decision, the Club has accepted that the Player should be entitled to compensation for breach of contract as the termination of the Contract was in accordance with the termination provisions of the Contract, stipulated in its Article 10, and further, that the termination was made with just cause by the Player, in accordance with Article 14bis of the FIFA RSTP.

92. Having established that the Player had just cause to terminate the Contract, it is now up to the Panel to determine the consequences thereof. The Player is in principle entitled to compensation because of the Club's breach of its contractual obligations under the Contract.

93. In the Contract, the Parties have not regulated how compensation for unilateral termination of a contract for just cause shall be calculated by means of a liquidated damages clause. The compensation for breach of contract to be paid to the Player by the Club is therefore to be determined in accordance with Article 17 paragraph 1 of the FIFA RSTP, which provides as follows:

"Consequences of terminating a contract without just cause

The following provisions apply if a contract is terminated without just cause:

1. In all cases, the party in breach shall pay compensation. Subject to the provisions of article 20 and Annexe 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period.

Bearing in mind the aforementioned principles, compensation due to a player shall be calculated as follows:

i. In case the player did not sign any new contract following the termination of his previous contract, as a general rule, the compensation shall be equal to the residual value of the contract that was prematurely terminated;

ii. In case the player signed a new contract by the time of the decision, the value of the new contract for the period corresponding to the time remaining on the prematurely terminated contract shall be deducted from the residual value of the contract that was terminate early (the "Mitigated Compensation". Furthermore,

and subject to the early termination of the contract being due to overdue payables, in addition to the Mitigated Compensation, the player shall be entitled to an amount corresponding to three monthly salaries (the "Additional Compensation"). In case of egregious circumstances, the Additional Compensation may be increased up to a maximum of six monthly salaries. The overall compensation may never exceed the rest value of the prematurely terminated contract.

iii. Collective bargaining agreements validly negotiated by employers' and employees' representatives at domestic level in accordance with national law may deviate from the principles stipulated in the points i. and ii. above. The terms of such an agreement shall prevail".

94. The Panel notes that, although the heading of Article 17 of the FIFA RSTP suggests that it only applies to situations where a contract has been unilaterally terminated *without* just cause, it also applies to situations where a contract has been unilaterally terminated *with* just cause, as established by the Panel in, e.g., CAS 2020/A/6727 paragraph 232 *et seq.*

95. The wording of Article 17 paragraph 1 of the FIFA RSTP states a clear method of calculation. In general, if a player has not signed for a new club, he shall be entitled to an amount equaling the wages for the remainder of the contract. If a player has signed a contract with a new club, these wages shall be deducted from the compensation. The positive difference between the value of the old contract and the new contract in the corresponding time frame, is defined as *"mitigated compensation"*. In addition to mitigated compensation, a player will automatically be entitled to three months wages, defined as *"additional compensation"*. If the player can establish egregious circumstances, the additional compensation may be increased from three up to maximum six-monthly salaries, although the overall compensation cannot exceed the rest value of the prematurely terminated contract.

96. Applying these principles to the case at hand, firstly the Player is entitled to the amount owed to him by the Club for the remainder of the Contract in accordance with Article 17 paragraph 1 lit. i.) of the FIFA RSTP. This amounts to a total of EUR 1,375,000 corresponding to the Player's five monthly salaries between August and December 2021.

97. Secondly, the Player is, pursuant to Article 17 paragraph 1 lit. ii.) of FIFA RSTP, entitled to three monthly wages, i.e. *"additional compensation"*, of the total amount of EUR 825,000.

98. Further, the Player signed a new employment contract with Santos FC. Pursuant to Article 17 paragraph 1 lit. ii.) of the FIFA RSTP, the remuneration under the new employment contract with Santos FC shall, in principle and in accordance with Article 17 paragraph 1 lit. ii.) of FIFA RSTP, be deducted when calculating the compensation due to the Player. The Panel concurs with the calculation made by FIFA DRC in the Appealed Decision, and concludes that the amount of EUR 229,033.71 (i.e. EUR 137,420.10 for the employment agreement and EUR 91,613.61 for the image rights agreement) shall be deducted when calculating the compensation.

99. However, still also in accordance with Article 17 paragraph 1 lit. ii.) of the FIFA RSTP, the overall compensation may not exceed the residual value of the Contract. As such, since the mitigated compensation and the additional compensation exceeds the rest value of the

Contract, the Player is entitled to compensation corresponding to the residual value of the Contract, in the amount of EUR 1,375,000. The Panel notes that this amount corresponds to the amount awarded as compensation to the Player in the Appealed Decision.

B. Interests

100. The Panel observes that the Player requests CAS to adopt an award upholding the Appealed Decision. In the Appealed Decision, the Player is awarded an interest of 5% *per annum* as of the due dates of each instalment. Interest rate is not regulated in the Contract, or in any regulations referred to by the Parties.

101. Article 73 of the Swiss Code of Obligations provides as follows:

"Where an obligation involves the payment of interest but the rate is not set by contract, law or custom, interest is payable at the rate of 5% per annum".

102. The interest rate defined in the abovementioned Article coincides with the Player's request before CAS, as well as the interest awarded to the Player in the Appealed Decision.

103. The Club has not objected to the application of this interest rate. Therefore, the Panel concludes that an interest rate of 5 % *per annum* over the amount of compensation shall be awarded to the Player.

C. Conclusion

104. Based on the foregoing, the Panel finds that:

- The Club has failed to meet its burden of proof in establishing that the COVID-19 pandemic should be considered as an event of *force majeure*.

- The Player is entitled to an amount of EUR 1,100,000 net as outstanding remuneration, corresponding to monthly salaries of EUR 275,000 each for the months April, May, June and July 2021.

- The Player is entitled to compensation corresponding to the residual value of the Contract, in the amount of EUR 1,375,000.

- An interest rate of 5 % *per annum* over the amount of compensation shall be awarded to the Player.

105. The Panel notes that its findings coincides with the operative part of the Appealed Decision.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 6 December 2021 by Wuhan Football Club against the decision issued on 14 October 2021 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association is dismissed.

2. The decision issued on 14 October 2021 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association is upheld.

3. (…).

4. (…).

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