Arbitration CAS 2022/A/8917 Al Ahli Saudi FC v. Josef De Souza Dias, award of 18 April 2023

Panel: Prof. Luigi Fumagalli (Italy), Sole Arbitrator

Football
Contractual dispute: failure to comply with a settlement agreement following the termination of a contract of employment
Financial difficulties due to the COVID-19 pandemic as a justification for failing to comply with contractual obligations
COVID-19 pandemic as force majeure event justifying a failure to comply with contractual obligations
Hardship due to the COVID-19 pandemic as a justification for failing to comply with contractual obligations

1. **Financial difficulties are not an excuse for a failure to pay a debt or a justification in law to obtain the modification of agreed financial terms. Any loss of revenues, therefore, that a club may have sustained because of the COVID-19 pandemic cannot justify a club's failure to pay the amounts due to a player under an agreement.**
2. **The failure to comply with a contractual obligation can be excused if caused by a *"force majeure"* event. Yet, for an event to qualify as *"force majeure"* some conditions have to be satisfied. In fact, the *"force majeure"* concept refers only to extraordinary events occurring beyond the parties' control, which could not reasonably have been foreseen or provided against when the obligation was undertaken. The COVID-19 pandemic and the consequences it brought about cannot be invoked to be *"force majeure"* events justifying its non-compliance with the agreement, if they were already existing or could be easily foreseen when the relevant agreement was signed.**
3. **Under Article 6.2.2 of the UNIDROIT Principles, two of the conditions for a *"hardship"* situation to be found are that the events fundamentally altering the equilibrium of the contract *"occur or become known to the disadvantaged party after the conclusion of the contract"*, and that they *"could not reasonably have been taken into account […] at the time of the conclusion of the contract"*. If the COVID-19 pandemic and the consequences it produced were already existing or could be easily foreseen when the relevant agreement was concluded, hardship cannot be invoked to justify a failure to comply with contractual obligations.**

I. PARTIES

1. Al Ahli Saudi FC (the "Club" or the "Appellant") is a professional football club based in Jeddah, Saudi Arabia. Al Ahli Saudi FC is a member of the Saudi Arabian Football Association ("SAFA"), which in turn is affiliated to the Fédération Internationale de Football Association ("FIFA"), the world governing body of football, headquartered in Zurich, Switzerland.

2. Josef De Souza Dias (the "Player" or the "Respondent") is a professional football player of Brazilian nationality born on 11 February 1989. He currently plays as a midfielder for the Turkish club Beşiktaş.

II. FACTUAL BACKGROUND

3. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions as lodged with the Court of Arbitration for Sport (the "CAS"). Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, he refers in this Award only to the submissions and evidence he considers necessary to explain his reasoning.

4. On 23 August 2018, the Club and the Player entered into an employment contract (the "Employment Contract"), under which the Player would render his services to the Club until 30 June 2021, for a total remuneration of EUR 12,000,000.

5. On 26 June 2020, the Parties entered into a settlement agreement (the "First Settlement Agreement") regarding some outstanding payments due by the Club to the Player.

6. On 30 August 2020, the Player terminated the Employment Contract for Club's violations.

7. On 13 September 2020, the Player filed a claim (the "First Claim") with the FIFA Dispute Resolution Chamber (the "DRC"), seeking the payment of outstanding remuneration and compensation for breach of contract.

8. On 11 March 2021, the DRC rendered a decision (the "First DRC Decision") with respect to the First Claim, finding as follows:

"1. The claim of […] Mr Josef de Souza Dias is accepted.

2. […] Al Ahli Football Club has to pay to the [the Player] the following amounts:

- *EUR 250,000 as outstanding remuneration plus 5% interest p.a. as from 30 August 2020 until the date of effective payment,*
- *EUR 4,450,000 as compensation for breach of contract plus 5% interest p.a. as from 13 September 2020 until the date of effective payment. […]".*

9. On 10 May 2021, the First DRC Decision was notified to the Parties.

10. On 10 June 2021, the Club lodged an appeal to CAS against the First DRC Decision.

11. On 22 June 2021, the Parties concluded a settlement agreement (the "Second Settlement Agreement"). Under Clause 1 of such Second Settlement Agreement the Club agreed to pay to the Player the amount of EUR 3,850,000 on 15 July 2021. In addition, Clause 3 of the Second Settlement Agreement stipulated that:

"if the Club fails to pay the sum agreed on paragraph 1 within the time limit, the sums hereby agreed will be considered

null and void, allowing the Player to enforce the FIFA award in its original amount […]".

12. On 17 July 2021, the Player informed the Club of the details of bank account for the payment due under the Second Settlement Agreement, granting the Club five additional days for the payment.

13. On 31 August 2021, a termination order of the proceedings concerning the First DRC Decision was issued by the Deputy President of the CAS Appeals Arbitration Division.

14. On 10 October 2021, the Player sent a default notice to the Club, requesting the payment of EUR 3,850,000, and granting it a deadline of 10 days to settle the debt.

15. On 29 October 2021, the Claimant filed a second claim before FIFA (the "Second Claim"), seeking a declaration that the Second Settlement Agreement had become *"null and void"* in the absence of a payment of the amount due under it, and that the Club was liable to pay to the Player the amount of EUR 4,700,000, plus 5% interest p.a. as from September 2020 pursuant to the First DRC Decision. In addition, the Player requested that disciplinary sanctions, as defined in Article 12*bis* of FIFA Regulations on the Status and Transfer of Players (the "RSTP"), be applied to the Club to the Respondent considering the Club' repeated offenses.

16. On 24 March 2022, the DRC issued a decision on the Second Claim (the "Appealed Decision"), finding as follows:

> *"1. The claim of the Claimant, Josef Souza Dias, is accepted.*
> *2. The Respondent, Al Ahli, has to pay to the Claimant the following amount:*
> - *EUR 4,700,000 as outstanding amount, plus 5% interest p.a. as from 14 September 2020 until the date of effective payment.*
> *3. A fine in the amount of USD 105,000 is imposed on the Respondent. (cf. note relating to the payment of the fine)*
> *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. 24 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 article 24 par. 7 and 8 and art. 25 of the Regulations on the Status and Transfer of Players. […]".*

17. On 11 May 2022, the Appealed Decision was notified to the Parties.

18. In the Appealed Decision, the DRC considered the merits of the dispute as follows:

i. as to the *"main legal discussion and considerations"*:

"21. The foregoing having been established, the Chamber moved to the substance of the matter, and took note of the fact that the parties strongly dispute whether the non-compliance with the settlement agreement can be upheld against the Respondent, due to the financial difficulties it experienced in view of the outbreak of the COVID-19 pandemic.

22. In this context, the Chamber acknowledged that its task was to determine whether or not in the matter at hand the Respondent is liable to pay the amounts stipulated in the settlement agreement to the Claimant.

23. In this respect, the members of the Chamber noted that the Respondent failed to pay any amounts to the Claimant as agreed upon in the settlement agreement. The Chamber further observed that the Respondent is not contesting the fact that the outstanding amounts as per the settlement agreement are due to the Claimant, it argued that in view of its financial situation as a result of the outbreak of the COVID-19 pandemic, it preferred to conclude an amicable settlement with the Claimant.

24. The Chamber remarked that in its submissions, the Respondent stated that the COVID-19 outbreak had made it difficult to make the payments requested by the Claimant. In this respect, the DRC highlighted that the Respondent had not invoked such circumstances to the Claimant, as it had failed to reply to the default notice sent by the Claimant.

25. In this context, the DRC mentioned that the arguments raised by the Respondent cannot be considered a valid reason for non-payment of the monies claimed by the Claimant, in other words, 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.

26. In view of all the above, bearing in mind its extensive jurisprudence according to which financial difficulties cannot be held as a valid reason to the non-payment of contractually agreed payments, the DRC decided to reject the argumentation put forward by the Respondent in its defence";

ii. as to the *"consequences"* of such finding:

"28. The members of the Chamber remarked that due to the failure by the Respondent to pay the amount of EUR 3,850,000 as per clause 1 of the settlement agreement, clause 3 in combination with recital b) of the settlement agreement came into force, hence the Chamber concluded that instead of an amount of EUR 3,850,000, the Claimant could claim an amount of EUR 4,700,000.

29. As a consequence, and in accordance with the general legal principle of pacta sunt servanda, the Chamber decided that the Respondent is liable to pay to the Claimant the amount of EUR 4,700,000 as per clause 3 in combination with recital b) of the settlement agreement.

30. In addition, taking into consideration the Claimant's request as well as the constant practice of the Chamber in this regard, the latter decided to award the Claimant interest at the rate of 5% p.a. on the outstanding amounts as from 14 September 2020 until the date of effective payment.

31. In addition, the Claimant established that the Respondent had delayed a due payment for more than 30 days without a prima facie contractual basis.

32. In continuation, bearing in mind the foregoing considerations, the Chamber referred to art.12bis par. 2 of the Regulations, which stipulates that any club found to have delayed a due payment for more than 30 days without a prima facie contractual basis may be sanctioned in accordance with art. 12bis par. 4 of the Regulations.

33. The Chamber established that in virtue of art. 12bis par. 4 of the Regulations he has competence to impose sanctions on the Respondent. In this context, the DRC highlighted that, over the past 2 years under case ref. nos. FPSD-2369; FPSD-2384, FPSD-2445, FPSD- 2432, FPSD-2434, FPSD-2777 and FPSD-4576, the Respondent had already been found to have delayed a due payment for more than 30 days without a prima facie contractual basis.

34. Moreover, the Chamber referred to art. 12bis par. 6 of the Regulations, which establishes that a repeated offence will be considered as an aggravating circumstance and lead to a more severe penalty.

35. Bearing in mind the above, the deciding body decided to impose a fine on the Respondent in accordance with art. 12bis par. 4 lit. c) of the Regulations. On account of the above and taking into consideration the total amount of overdue payables due, the Chamber regarded a fine amounting to USD 105,000 as appropriate and hence decided to impose said fine on the Respondent";

iii. as to the *"compliance with monetary decisions"*:

"36. Finally, taking into account the applicable Regulations, the Chamber referred to art. 24 par. 1 and 2 of the Regulations, which stipulate that, with its decision, the pertinent FIFA deciding body shall also rule on the consequences deriving from the failure of the concerned party to pay the relevant amounts of outstanding remuneration and/or compensation in due time.

37. In this regard, the DRC highlighted that, against clubs, the consequence of the failure to pay the relevant amounts in due time shall consist of a ban from registering any new players, either nationally or internationally, up until the due amounts are paid. The overall maximum duration of the registration ban shall be of up to three entire and consecutive registration periods.

38. Therefore, bearing in mind the above, the DRC decided that the Respondent must pay the full amount due (including all applicable interest) to the Claimant within 45 days of notification of the decision, failing which, at the request of the Claimant, a ban from registering any new players, either nationally or internationally, for the maximum duration of three entire and consecutive registration periods shall become immediately effective on the Respondent in accordance with art. 24 par. 2, 4, and 7 of the Regulations.

39. The Respondent shall make full payment (including all applicable interest) to the bank account provided by the Claimant in the Bank Account Registration Form, which is attached to the present decision.

40. The DRC recalled that the above-mentioned ban will be lifted immediately and prior to its complete serving upon payment of the due amounts, in accordance with art. 24 par. 8 of the Regulations".

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

19. On 2 June 2022, the Club transmitted to the CAS Court Office a Statement of Appeal in accordance with Article R47 of the Code of Sports-related Arbitration (the "CAS Code") to challenge the Appealed Decision. In its Statement of Appeal, the Club requested that the matter be submitted to a Sole Arbitrator.

20. On 20 June 2022, the CAS Court Office forwarded the Club's Statement of Appeal to the Player and informed FIFA that an appeal had been lodged against the Appealed Decision, but that the appeal was not directed against FIFA. As a result, the CAS Court Office advised FIFA that, in the event it intended to participate in the proceedings, it had to file an application to that effect.

21. On 20 June 2022, the Player informed the CAS Court Office that he agreed that the appeal be submitted to a Sole Arbitrator.

22. On 7 July 2022, FIFA informed the CAS Court Office that it renounced its right to request its intervention in the arbitration.

23. On 11 July 2022, the Club submitted its Appeal Brief, in accordance with Article R51 of the CAS Code.

24. On 15 August 2022, the Player filed his Answer to the appeal lodged by the Club, in accordance with Article R55 of the CAS Code.

25. On 15 August 2022, the CAS Court Office informed the Parties that Prof. Luigi Fumagalli, Milan, Italy, had been appointed as the Sole Arbitrator by the Deputy President of the CAS Appeals Division, pursuant to Article R54 of the CAS Code.

26. On 20 August 2022, the Club requested that a hearing be held in this case.

27. On 21 September 2022, the CAS Court Office informed the Parties that further to the Appellant's request, the Sole Arbitrator had decided to hold a hearing. As a result, the Parties were consulted with respect to a possible date.

28. On 27 September 2022, the Parties were informed that a hearing would be held on 3 October 2022.

29. On 27 September 2022, the CAS Court Office communicated to the Parties the Order of Procedure issued on behalf of the Sole Arbitrator.

30. On 28 September 2022, the Appellant, in a communication to the CAS Court Office, withdrew its request that a hearing be held and requested that an award be rendered on the basis of the written submissions.

31. On 28 September 2022, the CAS Court Office informed the Parties on behalf of the Sole Arbitrator that no hearing would be held.

32. On 4 October 2022, a revised text of the Order of Procedure was issued by the CAS Court Office on behalf of the Sole Arbitrator, in order to take into account that no hearing would be held.

33. On and 4 and 19 October 2022, the Player and the Club submitted to the CAS Court Office a signed copy of the Order of Procedure.

IV. THE PARTIES' SUBMISSIONS

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

A. The Club

35. In its Statement of Appeal, the Club requested the CAS to:

"Admit the present appeal;

To revoke the Decision, since it provides the payment of the instalment indicated with usual interest without any further consideration of the facts and legal arguments raised by the Appellant.

[…] to grant the renegotiation of the economic terms of the Agreement between the parties including their payment schedule within the framework and provisions set by art. 6.2.3 UNIDROIT: '6.2.3 (Effects of hardship) (1) In case of hardship

the disadvantaged party is entitled to request renegotiations'".

36. Such requests were confirmed in the Appeal Brief.

37. In support of its requests, the Club submits that:

- it is still in a very critical financial situation, characterized by a total absence of income, because of the pre-existence of the effects of the COVID-19 pandemic and the consequent decrease of contributions by sponsor and the total loss of revenues from ticketing;
- the bad situation is the sole cause of the delay of payment;
- COVID-19 has been qualified in Saudi Arabia as a cause of *"force majeure"* and at least has the same effects as *"force majeure"*;
- the prohibition of individual and group training prevented the execution of the employment contracts, and the players no longer carried out their professional activities;
- *"the doctrine of theory of Unpredictability ('rebus sic stantibus clause')"* is generally accepted by international doctrine. In particular, this theory is also accepted by the Swiss legislation applicable in the case and it is also accepted by the UNIDROIT principles, known as the *"hardship"* clause;
- *"the case is framed in the supervening "eccessive onerosity" ('hardship') of the obligations of the Appellant, due to unforeseen facts and circumstances that have altered the equilibrium of the Agreement"*, as per its definition pursuant to Article 6.2.2 of the UNIDROIT Principles;
- *"these difficulties do not be belong"* to the Club only, *"but are part of the general crisis"*, and are *"beyond the control"* of the Club;
- the Appealed Decision granted the Player's claim without any further consideration of the facts and the legal arguments raised by the Appellant.

B. The Player

38. In his Answer, the Player requested the CAS to:

> *"a) Reject the present appeal against the [Decision] passed by the Single Judge of the Dispute Resolution Chamber of FIFA on March 24 2022, grounds of which were notified to the Appellant on May 11 2022, in the case with reference number Ref No. FPSD-4147.*
>
> *b) Order AL AHLY CLUB to pay for all the costs of the present appeal procedure, the whole CAS administration, and the Arbitrators fees.*
>
> *c) Fix a minimum fee of CHF 20,000 (twenty thousand Swiss Francs) to be paid by AL AHLY CLUB to contribute to the legal fees and costs of the Respondent".*

39. In support of his request, the Player submits the following:

i. the Appellant's requests are inadmissible. In an appeal procedure, the appeal tribunal is bound by the limits of the appealed decision, which in turn derive from the scope of the

claims and of the request for relief submitted by appellant in the first instance. In this case, before the DRC, the Club did not dispute the amount the Player was entitled to receive. Instead, it simply requested a "postponement" of its payment. In the appeal to CAS, then, the Club requested a relief beyond the scope of the previous litigation, by submitting a request of renegotiation, such request is not admissible, as it falls outside the scope of the Appealed Decision, which is subject to the review of the Sole Arbitrator, and refers to issues that were not before the DRC;

ii. the *"doctrine of 'rebus sic stantibus' is not applicable to this matter"*. Under Swiss law, a judge may deviate from the principle of *"pacta sunt servanda"*, where the circumstances have changed fundamentally since the conclusion of the contract, causing severe disruption to the parties' ability to perform. Also, the change must be neither foreseeable nor avoidable, and the party seeking to rely on the *"clausula rebus sic stantibus"* has not acted in a manner which is inconsistent with deviation. In the present case, it is clear that there was not a fundamental change in the circumstances after the conclusion of the Second Settlement Agreement. In fact, the Parties entered into the Second Settlement Agreement long after COVID-19 was declared as a pandemic. Hence, when the Club signed the Second Settlement Agreement, it was fully aware of the circumstances. This is even more evident if the Club's submissions are considered:

- all sporting activities in Saudi Arabia were suspended on 15 March 2020, 103 days before the signature of the Second Settlement Agreement;
- the interview of the Saudi Minister of Finance allegedly announcing the reduction of sport-related activities is dated 25 March 2020, 93 days before the signature of the Second Settlement Agreement;
- according to the Club's statement, its main sponsor, "Saudi Airlines", stopped paying the Club following the *"cessation of flights"* in March 2020, 3 months before the signature of the Second Settlement Agreement;
- when the Second Settlement Agreement was signed, the SAFA had already announced that the national championship matches would restart on 12 August 2020, and that the training at the clubs would resume in the first week of July 2020.

It is also clear that the Club and the Player had already renegotiated the original financial terms of employment to adjust them to the pandemic. All these facts were explained in the First DRC Decision. Given the above, the legal principle *"rebus sic stantibus"* has no relevance in this case, as the Club was already fully aware of the circumstances when it entered the Second Settlement Agreement. Thus, because there was no *"fundamental change in the circumstances since the conclusion of the settlement agreement",* the doctrine of *"rebus sic stantibus"* is not applicable in this case.

iii. The *"doctrine of 'force majeure' does not apply to this matter"*. CAS has already considered in a precedent (CAS 2021/A/7878) whether the COVID pandemic was a matter of *"force majeure"* in Saudi Arabia and decided that:

"74. […] the Club cannot simply invoke the Covid-19 Pandemic as a generic defence of force majeure without substantiating exactly how the Pandemic affected its financial situation to such extent that it had rendered the performance of the Employment Contract allegedly impossible.

75. Besides, according to a general and well accepted definition formulated by previous CAS Panels "force majeure

implies an objective (rather than a personal) impediment beyond the control of the obliged party that is unforeseeable, that cannot be resisted and that renders performance impossible" (CAS 2013/A/3471 § 49). In addition, according to a consistent approach taken by CAS case law, the conditions of force majeure should be interpreted strictly and narrowly, since they may introduce an exception to the binding force of an obligation (CAS 2013/A/3471§ 50, CAS 2015/A/3909 § 74). The onus of proof in this respect lies with the Club.

76. For this purpose, the Club submitted a report suggesting that in the period from January 1 to June 30 2020 its aggregate revenues from ticketing, sponsorships, donations, advertising, state financing, sales of merchandise and transfer agreements had plummeted by an average of 60%. The Panel considers the data presented by the Club to be credible and reasonable and finds this an admittedly negative circumstance. Notwithstanding these considerations, however, the Panel does not see how this drastic, yet short-term, drop in revenues had derailed the Club's financial planning to such an extent that the performance of the Employment Contract was no longer possible in the way originally envisaged. In other words, the Club is required to show more than a general economic difficulty in abstract terms. It has to show a real disruption in its financial operation and a total lack of alternative resources that had made it impossible to fulfil its payment obligations to the Player. [...]

77. In the absence of more specific information or data, other than the temporary drop in its revenues, the Club did not prove sufficiently that the Covid-19 crisis had put such a tremendous strain on its finances that threatened its solvency and its financial viability. Similarly, the Panel finds no evidence to suggest that during the lockdown period the Club was essentially deprived of any access to alternative sources of liquidity, either via bank lending, or state aids, or through private and public financing, or through the use of contingency funds. Hence, in the circumstances invoked, the Panel finds that the financial operation of the Club was not shown to have been disrupted to an extreme effect".

In the case at hand, by applying the same findings of the above case, the Appellant's argument that the COVID situation qualified as *"force majeure"* should be rejected.

V. JURISDICTION OF THE CAS

40. Article R47 of the CAS Code provides as follows:

"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.

An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned".

41. Pursuant to Article 56 (1) of the FIFA Statutes, FIFA recognises the jurisdiction of the CAS to *"resolve disputes between FIFA, member associations, confederations, leagues, clubs, players, officials, intermediaries and licensed match agents".*

42. Further pursuant to Article 57 (2) of the FIFA Statutes, *"recourse may only be made to CAS after all other internal channels have been exhausted".* The Appealed Decision was issued by the DRC, and it is not disputed that all internal channels within FIFA have been exhausted.

43. Clause 7 of the Second Settlement Agreement provides the following:

"[…] Parties agree that any dispute that arises out of or in connection with this Agreement must be settled by FIFA judicial bodies and appealed to the Court of Arbitration for Sports ("CAS"). […]".

44. Finally, CAS jurisdiction is not disputed by the Parties and is further confirmed by the signing of the Order of Procedure.

45. It follows that the CAS has jurisdiction to hear the Appeal filed by the Club.

VI. ADMISSIBILITY

46. The admissibility of the Appeal is not challenged. The Statement of Appeal filed by the Club complied with the requirements of Articles R47, R48 and R64.1 of the CAS Code, including the payment of the CAS Court Office fee.

47. It follows that the appeal is admissible.

VII. APPLICABLE LAW

48. Pursuant to Article R58 of the CAS Code, in an appeal arbitration procedure before the CAS:

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

49. Clause 7 of the Settlement Agreement provides the following:

> *"This Agreement shall be governed by Swiss Law and applicable FIFA Regulations. […]".*

50. Pursuant to Article 56(2) of the FIFA Statutes:

> *"[t]he 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".*

51. As a result, the Sole Arbitrator finds that the various regulations of FIFA, and chiefly the RSTP, are primarily applicable. Swiss law applies subsidiary, should the need arise to fill a possible gap in the various regulations of FIFA.

VIII. MERITS OF THE APPEAL

52. The object of these proceedings is the Appealed Decision, which found that the Club had not complied with its obligations under the Second Settlement Agreement, and drew the consequences of such finding pursuant to its Clause 3. As a result, the Club was ordered to pay to the Player the amount of EUR 4,700,000, plus interest, already mentioned in the First DRC Decision, and a fine was imposed on the Club for its repeated breaches of contractual obligations. The Club requested the Sole Arbitrator to set aside the Appealed Decision and *"grant the renegotiation"* of its payment obligations. On the other hand, the Player submitted that the appeal is inadmissible and in any case without merits; therefore, the Appealed Decision should be confirmed.

53. As a result of the foregoing, the Sole Arbitrator would have to deal with an issue of inadmissibility, as well, were the appeal found to be admissible, with the merits of the Appellant's request.

54. The Respondent, in fact, on a preliminary basis, seeks the dismissal of the appeal without further examination, by contending that it should be found to be inadmissible, as the submissions before CAS exceed the limits of the relief requested before the DRC and discussed in the Appealed Decision.

55. The Sole Arbitrator, contrary to the Respondent's contentions, notes that the object of the dispute has not changed. The disputed matter always refers to the compliance by the Appellant with its obligations under the Second Settlement Agreement and revolves around the "justifications" invoked by the Appellant to justify it, and mainly on the impact of the COVID-19 pandemic on its ability to meet the financial obligations due to the Player. The fact, then, that the Appellant may have modified the relief sought, seeking before this Sole Arbitrator a renegotiation it did not request before FIFA, does not fundamentally change the disputed matter. Indeed, even though the dispute on which the Appealed Decision was rendered defines the limits of the matter that can be heard on appeal, the CAS jurisdiction is not confined to review exactly the same relief sought before the instance below. Otherwise, the CAS powers, as defined by Article R57 of the CAS Code (referring in general terms to a *"review of the facts and the law"*), would be unduly restricted.

56. The Sole Arbitrator, however, does not need to reach a final conclusion on the admissibility issue raised by the Respondent. In fact, the appeal, even if found to be admissible, has to be dismissed because it has no merits.

57. The Sole Arbitrator notes that in essence the Appellant invokes the effects of the COVID-19 pandemic as the reason for its request to have the financial terms of the Second Settlement Agreement renegotiated. In the Appellant's opinion, the COVID-19 pandemic (i) created an enduring difficult financial situation that is preventing it from complying with its financial obligations as originally undertaken, (ii) can be considered a *"force majeure"* event, and/or (iii) made the performance excessively onerous, beyond the expectations, relevant under the *"hardship"* doctrine. In support of its case, the Appellant invokes some principles of the *"Unidroit principles"*.

58. The Sole Arbitrator remarks that no specific indications have been offered by the Appellant in this arbitration to substantiate the legal basis of its contention that a *"renegotiation"* should be ordered because of the COVID-19 pandemic. Only in general terms does the Appellant refer to the difficult financial situation caused by the loss of revenues, and to the fact that the pandemic was declared by the Saudi authorities to be an event of *"force majeure"*, relevant under *"international doctrine"* and Swiss law.

59. On the other hand, the Sole Arbitrator understands the mention of the *"Unidroit principles"* as being a reference to the *"UNIDROIT Principles of International Commercial Contracts 2016"* (the "UNIDROIT Principles"), *i.e.* to those rules adopted by the International Institute for the Unification of Private Law (UNIDROIT) for modernising, harmonising and co-ordinating the law of international commercial contracts. More particularly, the Appellant makes reference to

Section 2 of Chapter 6 of the UNIDROIT Principles, devoted to *"hardship"*, which reads as follows:

Article 6.2.1 *(Contract to be observed)*

"Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship".

Article 6.2.2 *(Definition of hardship)*

"There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

(a) the events occur or become known to the disadvantaged party after the conclusion of the contract;

(b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;

(c) the events are beyond the control of the disadvantaged party; and

(d) the risk of the events was not assumed by the disadvantaged party".

Article 6.2.3 *(Effects of hardship)*

"(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.

(2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.

(3) Upon failure to reach agreement within a reasonable time either party may resort to the court.

(4) If the court finds hardship it may, if reasonable,

(a) terminate the contract at a date and on terms to be fixed, or

(b) adapt the contract with a view to restoring its equilibrium".

60. In light of the foregoing, the Sole Arbitrator notes that:

i. financial difficulties are not an excuse for a failure to pay a debt or a justification in law to obtain the modification of agreed financial terms. The principle that the lack of financial means to satisfy an obligation of payment does not excuse the failure to make the required payment is well established in the CAS jurisprudence (*ex multis* CAS 2006/A/1008; CAS 2014/A/3533; CAS 2016/A/4402; CAS 2017/A/5496; CAS 2018/A/5802). Any loss of revenues, therefore, that the Club may have sustained because of the COVID-19 pandemic cannot justify its failure to pay the amounts due to the Player under the Second Settlement Agreement;

ii. nevertheless, CAS case law has recognized that the failure to comply with a contractual obligation can be excused if caused by a *"force majeure"* event. Yet, for an event to qualify as *"force majeure"* some conditions have to be satisfied. In fact, the *"force majeure"* concept refers only to extraordinary events occurring beyond the parties' control, which could not reasonably have been foreseen or provided against (CAS 2018/A/6239; CAS 2018/A/5802) when the obligation was undertaken. In the current case, however, the payment obligations not complied with by the Club were undertaken (in June 2021) more than a year after the COVID-19 outbreak was declared (in March 2020) a pandemic by the World Health Organization, and several days after the losses referred to by the Appellant occurred, as the Respondent aptly noted (§ 39(ii) above). As a result, the

Appellant cannot invoke the COVID-19 pandemic and the consequences it brought about to be *"force majeure"* events justifying its non-compliance with the Second Settlement Agreement, as they were already existing or could be easily foreseen when the Second Settlement Agreement was signed;

iii. the same observations can be made with respect to the *"hardship"* principle. The very provision referred to by the Appellant contradicts its claim. Under Article 6.2.2 of the UNIDROIT Principles, in fact, two of the conditions for a *"hardship"* situation to be found are that the events fundamentally altering the equilibrium of the contract *"occur or become known to the disadvantaged party after the conclusion of the contract"*, and that they *"could not reasonably have been taken into account […] at the time of the conclusion of the contract"*. In the case at hand, as already noted above, such conditions are not satisfied. The COVID-19 pandemic and the consequences it produced were already existing or could be easily foreseen when the Second Settlement Agreement was concluded: they did not occur or become known to the Club only after the conclusion of the Second Settlement Agreement.

61. In summary, the Sole Arbitrator finds that the Club's request cannot be granted, as no reason (be that reason the financial difficulties, *"force majeure"* or *"hardship"*) justify any *"renegotiation"* of the obligations it undertook. The Appealed Decision correctly found that the Club was bound to observe the financial terms he agreed to in the Second Settlement Agreement and that their breach triggered the consequences stipulated at Clause 3, *i.e.* the obligation to pay the amount of EUR 4,700,000, plus interest, indicated in the First DRC Decision.

62. As a result, the Appeal lodged against the Appealed Decision has to be dismissed and the Appealed Decision confirmed. For this reason, any issue regarding the admissibility of the appeal is moot.

63. In the same way, and for the same reasons, any further claims or requests for relief are to be dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 2 June 2022 by Al Ahli Saudi FC against the decision rendered by the FIFA Dispute Resolution Chamber on 24 March 2022 is dismissed.

2. The decision rendered by the FIFA Dispute Resolution Chamber on 24 March 2022 is confirmed.

3. (…).

4. (…).

5. All the other motions or prayers for relief are dismissed.