Arbitration CAS 2014/A/3858 Beijing Guoan FC v. Fédération Internationale de Football Association (FIFA), André Luiz Barreto Silva Lima & Club Esporte Clube Vitória, award of 5 August 2015

Panel: Prof. Luigi Fumagalli (Italy), President; The Hon. Michael Beloff QC (United Kingdom); Mr Jan Räker (Germany)

Football
Termination of a contract of employment without just cause
Contractual penalties under Swiss law
Criteria for assessing the reasonableness of a contractual penalty under Swiss law
The principle pacta sunt servanda in the football system and early termination of a contract for just cause
Principles and method of calculation of the compensation for breach of a contract under Article 17.1 RSTP
Principle of the "positive interest"

1. **Under Swiss law, the parties are free to determine the amount of the contractual penalty. However, the court may reduce penalties that it considers excessive at its discretion. The law does not state clearly what amounts to an excessive penalty, so that it is for the judge to establish, with regard to the merits of the case and all the relevant circumstances, whether the penalty is excessive and, if so, to what extent it should be. In any case, it must be emphasised that the judge should not too readily reduce a penalty and that the principle of contractual liberty, which is essential under Swiss law, has always to be given priority in case of doubt.**

2. **According to the Swiss case law and legal doctrine, a penalty is deemed to be excessive when it is not reasonable and exceeds patently the amount that would seem just and equitable. Thus, the judge may reduce the penalty when it is unreasonable to an extent which cannot be justified. Some criteria to assess the reasonableness of the penalty are the creditor's interest in the performance of the main obligation, the gravity of the debtor's fault and the parties' financial situation. The judge shall generally weigh up the different interests at stake with regard to the amount of the penalty.**

3. **The principle *pacta sunt servanda* lies at the basis of the football system, since it gives legal foundation to the stability of contractual relations, which would be severely jeopardized if the parties to employment contracts could all too easily get rid of the obligations undertaken thereunder: while clubs make investments on players, to be recovered over the term of the contract, the players derive their living from the contract. Only a violation of a certain severity justifies the early termination of a contract; and a breach is sufficiently severe only if it excludes the reasonable expectation of continuation of the employment relationship. By corollary, no termination for just cause can be declared if the provisions of the contract in question provide for a different reaction by a party (such as a disciplinary measure, wage reduction, or else) to the**

breach in question.

4. **Article 17.1 of the FIFA Regulations on the Status and Transfer of Players (RSTP) sets the principles and the method of calculation of the compensation due by one party because of a breach or unilateral and premature termination of a contract. Primary role is played by the parties' autonomy. In fact, the criteria set in that rule apply *"unless otherwise provided for in the contract"*. Then, if the parties have not agreed on a specific amount, compensation has to be calculated *"with due consideration"* for the law of the country concerned, the specificity of sport and any other objective criteria.**

5. **There is a consensus in the CAS jurisprudence as to the application of the "positive interest" principle approach. The criteria indicated by Article 17.1 RSTP should aim at determining an amount which shall basically put the injured party in the position that the same party would have had if the contract was performed properly.**

1. BACKGROUND

1.1 The Parties

1. Beijing Guoan FC (hereinafter referred to as "Beijing Guoan" or the "Appellant") is a football club, with seat in Beijing, People's Republic of China. Beijing Guoan is affiliated to the Chinese Football Association (*Zhōngguó Zúqiú Xiéhuì*), the governing body of football in People's Republic of China (hereinafter referred to as "CFA"). CFA is a member of the Fédération Internationale de Football Association (hereinafter referred to as "FIFA" or the "First Respondent").

2. FIFA is the world governing body of football. It exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials and players, worldwide. FIFA is an association under Swiss law and has its headquarters in Zurich, Switzerland.

3. André Luiz Barreto Silva Lima (hereinafter referred to as "Lima", the "Player" or the "Second Respondent") is a professional football player of Brazilian nationality born on 3 May 1985.

4. Club Esporte Clube Vitória (hereinafter referred to as "Vitória", or the "Third Respondent"; Lima and Vitória are hereinafter jointly referred to as the "Brazilian Respondents") is a football club, with seat in Salvador, Bahia, Brazil. Vitória is affiliated to the Brazilian Football Confederation (*Confederação Brasileira de Futebol*), the governing body of football in Brazil (hereinafter referred to as "CBF"). CBF is also a member of FIFA.

1.2 The Dispute between the Parties

5. The circumstances stated below are a summary of the main relevant facts, as submitted by the parties in their written pleadings or in the evidence given in the course of the proceedings. Additional facts may be set out, where relevant, in connection with the legal discussion which follows.

6. On 15 February 2013, the Player and Beijing Guoan signed an employment contract (hereinafter referred to as the "Contract"), under which the former was to provide to the latter his services as a professional football player for a term starting on 15 February 2013 and ending on 31 December 2014.

7. The Contract defined Beijing Guoan as "Party A" and the Player as "Party B", and contained, *inter alia*, the following provisions[1]:

Article 3 – *"Working Contents"*

1. During the period in Party A's Front Line football team (professional team) Party B shall engage in activities of training, competitions, public events, fan service, media campaigns sponsorship services and other necessary activities arranged by Party A.

2. Party B work hard to achieve the requirements and quality standards of Party A.

3. Party A may adjust Party B's job between professional team and reserve team by virtue of its business requirements as well as Party B's competence, performance and status factors.

Article 5 – *"Labor Remuneration"*

1. Standards, Distribution and Decrease Computation Method of Wages

(1) If Party B meets Party A's requirements of training, games, time or rate, participation in the activities arranged by Party A and does not break Party A's rules and regulations, the attained basic wage is 96,250 U.S. dollars per month (after tax) from February 15th, 2013 to December 31st 2013, Wage Payment time is 20th day of every month since March 20th 2013 (totally 10 months);

(2) If Party B meets Party A's requirements of training, games, time or rate, participation in the activities arranged by Party A and does not break Party A's rules and regulations, the attained basic wage is 91,667 U.S. dollars per month (after-tax) from January 1st, 2014 to December 31st, 2014, Wage Payment time is 20th day of every month since January 20th 2014 (totally 12 months):

(3) If Party B does not meet Party A's requirements of training, games, time or rate, participation in the activities arranged by Party A, or contrary to Party A's rules and regulations, Party A has the rights to reduce the wage of Party B Specific Decrease Computation Method shall be discussed in the "supplementary agreement" of this contract.

(4) Due to work-related injury, or being wounded during the implementation of the mandate at all

[1] Reference is made to the English version of the Contract, which was signed by the parties in both English and Chinese texts. Pursuant to Article 14.5 of the Contract, the English version prevails in the event of disputes as to the construction of its terms.

levels of the national team Party B can not participate in training and competition. Party A shall pay Party B the basic wage.

(5) In the event of illness or suffering non work-related injury, Party B can not participate in training and competition. Party A shall pay sick-level wage or illness and in accordance with relevant state and local regulations for the stipulated medical treatment period.

2. Standards, Distribution and Decrease Computation Method of Bonus

(1) Party A may pay Party B match bonuses in accordance with nature and results of the competition and the different situations of playing time and game performance, the specific payment methods will be listed in "Supplemental Agreement" of this contract.

(2) The tile of match bonus payment is 30 days after the match.

(3) If Party B does not meet Party A's requirements of training, games, time or rate, participation in the activities arranged by Party A, or contrary to Party A's rules and regulations, Party A has the rights to reduce the wage of Party B Specific Decrease Computation Method shall be discussed in the "supplementary agreement" of this contract.

3. Party A shall withhold the personal income tax of wages, bonuses and other costs of this contract for Party B in accordance with the provisions of the State.

4. If any illegal and violation of discipline and public morality, or other misconduct lead to injury, Party B shall not be entitled to the wages and related treatment in the forth and the fifth provision of Article One.

5. In addition to the salaries, bonuses and other costs of this contract, the Party A shall no longer pay any other payment to Party B.

Article 8 – *"Other Rights and Obligations of Party A"*

1. Comply with laws, rules and regulations of the People's Republic of China

2. Comply with the existing and updated statutes, protocols and moral regulations, rules and resolutions of FIFA, AFC, the Chinese Football Association, Chinese Football Super Committee and Chinese Football Super League…

5. In case of Party B breaking the obligations of the contract and rules and regulations of Party A, Party A shall have the right to punish and credit the punishment to the file of Party B and or notify the Chinese Football Super Committee as well as the new club or work place based on the nature and circumstances in accordance with the corresponding provisions of the contract and Party A's rules.

6. During the contract period Party A will be entitled to transfer, lease Party B to other third parties, the specified transfer and lease terms and other related issues may be discussed in the supplemental agreement by both parties.

Article 9 – *"Other Rights and Obligations of Party B"*

1. Comply with laws, rules and regulations of the People's Republic of China.

2. Comply with the existing and updated statues, protocols and moral regulations, rules and resolutions of FIFA, AFC, the Chinese Football Association, Chinese Football Super Committee and Chinese Football Super League.

3. Comply with Party A's existing, updated rules and regulations, and other reasonable requirements after the publicity or inform Party B.

4. Comply with professional ethics, fair competition principle and safeguard the image and reputation of

Party A.

5. *Maintain good health and a good athletic condition to maximize fitness and skill levels.*
6. *Party B participates in all training, competitions and related activities, and takes efforts to complete the prescribed training and competition tasks arranged by Party A according to the requirements of Party A …*
16. *Party B shall not enter into any agreement which will impede the implementation of this contract with a third party.*
17. *Without the written consent of Party A, Party B shall not participate in other advertising or promotional activities.*
18. *Without the written consent of Party A, Party B shall not participate in games on behalf of any third party, any third party's training or any potentially dangerous activities.*

Article 11 – *"Liability for Breach of Contract"*

1. *Any party which causes losses to the other party due to violation of this contract, should bear responsibility for breach of the contract.*
2. *For the foregoing liability for breach of the contract, liquidated damages, compensatory payments and so on, the two sides agreed to discuss in the supplementary agreement.*

Article 12 – *"Amendments, Cancellation and Termination of the Contract"*

1. *A significant change in the objective circumstances relied upon at the time of the conclusion of the work contract renders the work contract unable to be performed and, after consultation both parties reach agreement on changing or terminating the contract.*
2. *Party A may cancel the contract in case any of the following occurs*
   - *(1) Party B concealing significant injuries, can not participate in, or seriously affect the training and competition;*
   - *(2) Due to non work-related injury Party B is no longer involved in football career after the expiry of occupation;*
   - *(3) Party B seriously violates Party A's rules and regulations, competition discipline or Party B's obligations.*
   - *(4) Party B seriously violates professional ethics or the spirit of sport, causing substantial damages to Party A's interests and reputation.*
   - *(5) Party B concurrently has an employment relationship with another party, which materially affects the performance of the contract, and Party B refuses to rectify the matter upon Party A's request …*
   - *(9) Other legal reasons.*

Article 13 – *"Dispute Resolution"*

Any dispute during the performance of this contract shall be solved by negotiation.

In case of unsuccessful negotiation, the parties agree to submit their dispute to the Chinese Football Association Arbitration Committee for arbitration or directly to FIFA's competent bodies, at their own discretion. If the parties submit the dispute first to Chinese Football Association and its Arbitration Committee cannot solve the dispute, then the parties can submit the dispute to FIFA in both cases. FIFA's decision shall be final.

Article 14 – *"Miscellaneous"* …

2. Party A and Party B can sign "supplementary agreement", both "supplementary agreement" and the rules and regulations of Party A are the appendixes to this contract, the appendixes as well as this contract shall be signed and confirmed by both parties and then submitted to the Chinese Football Association for the record.

5. The contract applies to Chinese laws, rules, regulations and relevant provisions of FIFA, and the Chinese Football Association.

8. On the same 15 February 2013, Beijing Guoan (Party A) and the Player (Party B) signed a supplemental agreement (hereinafter referred to as the "Supplemental Agreement") providing *inter alia* the following:

Article V – *"Liability for breach of contract"*

1. If Party B breaches contract and causes losses to Party A, Party B shall compensate all the losses suffered by Party A.

2. If Party B breaches the agreement to cancel the contract, leaves the team without permission or the working contract be of no effect because of Party B, Party B shall pay a penalty of US dollars 500,000. …

12. If penalty above mentioned … can not enough compensate the losses of Party A, Party B shall continue to compensate all the losses to Party A. …

9. On 15 July 2013, Beijing Guoan, Vitória and the Player entered into a "Player Loan Contract" (hereinafter referred to as the "Loan") under which the Player would be transferred, on a loan basis, from Beijing Guoan (Party A in the Loan) to Vitória (Party B in the Loan) for a period starting on 15 July 2013 and ending on 31 December 2013. The Loan contained, *inter alia*, the following provisions[2]:

Article 1 – *"Contract Nature"*

The contract is a loan contract, the ownership of Player still belongs to Party A, and Party B only has the usage right of Player during the loan period.

Article 2 – *"Loan"*

1. All parties agree that Party A's Player will be loaned from Party A to Party B temporarily. This contract is valid from July 15th, 2013 to December 31th, 2013

2. The player is belong to Party A within the loan period, the ownership of player shall not Be changed.

Article 3 – *"Loan Fee and payment method"*

1. Party B shall pay Party A zero U.S. dollars as loan fee. …

Article 5 – *"Party B's Duties and guaranties"*

1. *Party B shall guarantee it's legitimate.*

2. Party B shall guarantee to complete all the procedures to ensure player can return back to Party A before January 10th,2014 (include but not limit all procedures make Player come back to Party A). Otherwise,

---

2 English version, prevailing over the Chinese text in the event of disputes.

Party B shall pay 900,000 U.S. dollars to Party A as compensation.

3. *Party B shall not transfer or loan the player to third party without written permission of Party A, otherwise, Party B shall pay 1,200,000 U.S. dollars to Party A as compensation.*
4. *Party B shall undertake player's insurance which is more than 1,200,000 U.S. Dollars. The insurance shall cover all risks which may occur during the loan period (include but not limit injuries, accidental injuries, medical expense, rehabilitation, death, compensation to any third parties due to player's disability or death, and compensation for player's absence of Party A's Matches)*
5. *Undertake player's remuneration from July 15th 2013 to December 31th 2013, and player's board, travel, insurance and medical expense during the loan period, total remuneration will be 275,000 US dollar (net).*
6. *Party B shall pay Party A 1,200,000 U.S. Dollars as compensation if player terminates the work contract and Loan agreement with Party A due to Party B's fault.*
7. *Party B will pay player's monthly salary in case player gets injured during the loan period (July 2013-December 2013) till player's recover.*
8. *Party B will undertake the liabilities of insurance which are set forth in Article 5 clause 4 (include compensation may be claimed by any third parties towards to Party A) if Party B fails to purchase abovementioned insurance or fails to pay the insurance fee, in addition, Party B will pay Party A 1,200,000 U.S. dollars as insurance compensation due to Party B's failure of its duties.*

Article 6 – *"Player's Duties and guaranties"*

1. *Shall guarantee to complete all the procedures to ensure player can return back to Party A before January 10th, 2014 (include but not limit the all procedures to come back to Party A), and return back to Party A before January 10th, 2014. Otherwise, player shall pay 1,200.000 U.S. dollar as compensation.*
2. *Player Shall not agree Party B's request to transfer or loan the player to third party without written permission of Party A, otherwise, player shall pay 1,200,000 U.S. dollars to Party A as compensation.*
3. *Player agrees Party A shall undertake player's monthly remuneration 46,250 U.S. Dollars within the loan period (totally 5.5 months, 254,375 U.S. dollars net); Party B shall undertake player's monthly remuneration 50,000 U.S. Dollars net within the loan period (totally 5.5 months, 275,000 U.S. dollars net); Party A shall not undertake player's any other sorts of bonus, insurance, medical expense, board and travel expense which are regulated in work contract between Party A and player within the loan period.*
4. *Player has the duty to report injury and suspension events to Party A.*

Article 7 – *"Termination of the Contract"*

1. *The Contract shall terminate upon the expiration of the loan period agreed in Article 2 in this Contract.*
2. *Party A may terminate the contract unilaterally without any liability in case that Party B breaches any clause of Article 2, 5 or 6.*
3. *The termination of this Contract (including but not limited to the termination of this Contract due to the expiration of the loan period or Contract being terminated) does not affect that Party A claim Party B or player to continue to bear the corresponding responsibility.*
4. *On the date of the termination of the Contract, Party B and the player shall conduct all the matters for the player's return to Party A immediately and unconditionally (including but not limited to complete the*

transaction within [10] days after the termination of this Contract). And Party B shall guarantee that the player returns to Party A within [10] days after the termination of this Contract. Otherwise Party B shall pay a penalty of 1,200,000 U.S. dollars.

Article 8 – *"Application of law and Resolution of dispute"*

1. *This contract applies to Chinese laws, relevant provisions of the Chinese Football Association and FIFA.*
2. *Any dispute during the performance of this contract shall be solved by negotiation. In case of unsuccessful negotiation, the parties agree to submit their dispute to the Chinese Football Association for arbitration. In case of discontentment for the arbitrament of Chinese Football Association, the parties should appeal to the FIFA, and FIFA's decision is final.*

Article 9 – *"Miscellaneous"*

1. *Party B and Player shall undertake the Joint and several liabilities according to the contract.*
2. *The loan period should include the period of round-trip journey. …*
5. *The amount of any Compensation that shall be paid to Party A which is titled in the Contract should be paid in full by Party B and the player within [15] days after receiving the notification of Party A. Otherwise Party B and player shall pay a penalty of [10.000] U.S. dollars for every expired day.*
6. *If Party B wish to transfer player from Party A after the loan period (July 2013-December 2013), the transfer fee shall be not less than 1,200,000 U.S. dollars. …*

10. On July 28 2013, while playing for Vitória, the Player had an accident, which resulted in an injury to his left leg.

11. On 31 July 2013, Vitória sent a letter to Beijing Guoan informing it of his accident, as follows (unchallenged English translation of Portuguese original):

"By this letter, we inform that the player André Luiz Barreto Silva Lima, temporary loaned by this Club to Esporte Club Vitória, with contract until 31/12/2013, suffered a serious injury in the match held on 28/7/2013, as can be seen on the enclosed medical report.

Esporte Club Vitória intends to adopt all the medical arrangements for the performance of surgery and recovery of the athlete.

However, considering that the player's main contract is the one with this Club, we are communicating the fact to your attention for the following purposes:

a) Indicate, if you consider necessary, a professional to evaluate the clinical status of the player and recommend the arrangements to the player's recovery;

b) Indicate, if deemed convenient, a professional who has the reliability of this Club, so that he can perform the surgery and follow with the full recovery of the player;

Or

c) Authorize Esporte Club Vitória to provide the surgery and postoperative monitoring by its professionals of trust".

12. Attached to the letter of 31 July 2013 was the following *"Medical Report"*, signed by Dr Wilson Vasconcelos, orthopaedist (unchallenged English translation of Portuguese original):

"In the match held on July 28, 2013, occurred in the city of Curitiba/PR/Brazil, between the first squad of Coritiba Foot Ball Club and Esporte Club Vitória, the player André Luiz Barreto Silva Lima entered into the field when the timer marked 33 minutes of the second half and, following the match, at 45 minutes of the second half, the player had a direct trauma to the left knee (jumping competition during air ball), which has an main mechanism the axial compression and valgus-recurvation of lower limb deviation. The player began to evolve a significant edema on the leg associated with progressive worsening of pain and disability for locomotion. The player, still in the city of Curitiba, was conducted to a clinic for performing x-rays, which found a fracture of the tibial plateau. After the diagnosis of such injury, the player had to immobilize the lower limb and have taken medicines for pain, being advised to prevent carrying load on his left leg until the complementation of the diagnosis to be performed by imaging exams. He returned to Salvador on the night of July 29, 2013, and, in the next morning, underwent to a new x-ray exam, magnetic resonance imaging – MRI (photo enclosed) and computed tomography of the knee. These tests confirmed the fracture of the tibial plateau of Type II Schatzker, with lateral shear and central depression of about 8mm. Thus, the player was indicated to perform a surgery. The routine procedure to this type of injury involves the correction of bone depression lifting articular surface accompanied by subchondral bone grafting and fixation with plate and screws. The postoperative follow-up will be done without immobilization but the player shall be kept out of loads for about 8 weeks. The average healing time for this type of fracture occurs about 18 to 20 weeks. After that, the player will be applied to combat muscle atrophy strengthening and return to sports activities after about 6 months".

13. In a letter of 8 August 2013, Beijing Guoan answered the letter of Vitória dated 31 July 2013. After referring to some provisions of the Loan *"to protect the right of player and Beijing Guoan"*, Beijing Guoan stated the following:

"… we request Esporte Clube Vitoria to fulfill its duties to offer the evidence of the player's insurance which shall be provided by Esporte Clube Vitoria. And we agree Esporte Clube Vitoria to find appropriate hospital for the player to have the surgery in Brazil, in addition, we request Esporte Clube Vitoria to cover all expense of player's medical treatment, rehabilitation and player's remuneration until his recover".

14. On 9 August 2013 the Player underwent surgery to deal with the injury he had suffered. A medical report, signed by Dr Marcelo Côrtes, orthopaedics and traumatology foot and ankle surgeon, dated 5 September 2013, reads (unchallenged English translation of Portuguese original):

"The above-mentioned player suffered trauma on his left knee, during an official match for Esporte Clube Vitória. The player was diagnosed with a fracture of the proximal end of the tibia. The surgical treatment was indicated, and had been performed an osteosynthesis of the proximal tibia, on 09 August 2013. The player must remain away from his professional activities for 180 (one hundred eighty) days for medical treatment and functional rehabilitation".

15. On 9 January 2014, Vitória sent to Beijing Guoan the following letter (unchallenged English translation of Portuguese original):

"Considering that the Player André Luiz Barreto Silva Lima, whose loan agreement expired on 31/12/2013, had undergone surgery on his left knew, as you have knowledge, we would like to inform you that the player is not yet entirely recovered on his full physical condition, requiring additional thirty (30) days for his complete recovery.

Therefore, we ask your authorization for the player to stay in Salvador/Brazil for the period of additional 30 (thirty) days in order to complete his treatment, whereas Esporte Clube Vitória shall remain responsible for paying all expenses for the treatment, as well as the wages of the player during the period of recovery, according to the terms of the Loan Agreement".

16. On 9 January 2014,

- at 16:42:11 CET, Beijing Guoan inserted in the Transfer Matching System (TMS) kept by FIFA the request for the return of the Player's International Transfer Certificate (ITC) from the loan; however,
- at 17:01:34 CET, Beijing Guoan cancelled such request.

17. On 20 January 2014, Beijing Guoan wrote the following letter intended for Vitória (emphasis in the original)[3]:

"We contact you because of the breach of the contract signed on date 15th of July 2013, between us, Beijing Guoan FC Ltd. Mr. Barretto and your Club to conclude the transfer by loan of the Player.

According to art. 2 of the Contract, the loan period was agreed between the 15th of July and the 31st of December of 2013. And both parties agreed on art. 5 (Party B's Duties and guarantees) that once this period ends:

2. Party B shall guarantee to complete all the procedures to ensure player can return back to Party A before January 10th, 2014 (include but not limit all procedures make Player come back to Party A). Otherwise, Party B shall pay 900,000 U.S. Dollars to Party A as compensation.

Moreover, in article 7, the parties agreed that:

4. On the date of termination of this contract, Party B and the player shall conduct all the matters for the player's return to Party A immediately and unconditionally (including but not limited to complete the transaction within [10] days after the termination of this contract). And Party B shall guarantee that the player returns to Party A within [10] days after the termination of this Contract. ***Otherwise Party B shall pay a penalty of 1,200,000 U.S. dollars.***

Considering that under art. 9.2 of the contract, ***the loan period should include the period of round trip journey, and that the extra 10 days have already elapsed since the end of the loan period****, we consider absolutely unjustified the absence of the player from the trainings of the Beijing Guoan FC first team and we give you the chance, under art. 9.5 of the contract) to solve this dispute amicably* ***by contacting us to pay the 1,200,000 U.S. dollars agreed as compensation within the next 15 days in application of art. 7.4.***

On the contrary, the daily 10,000 U.S. dollars sanction included in the same art. 9.5 will be applied increasing the aforementioned amount and we will initiate all the procedures needed to defend our interests".

18. On the same date another letter of equivalent content was sent to the Player[4].

---

3 This letter, as well as a letter of equivalent content, intended for the Player (§ 18 below), was attached to a message for an email address of an employee of Vitória (msilva@ecvitoria.com.br). The Player and Vitória deny having ever received this letter.

4 See the preceding footnote.

19. On 10 February 2014, Beijing Guoan sent another letter to Vitória (with a similar letter again also sent to the Player), which reads[5]:

"For the second time we come into contact with you regarding the breach in the fulfilment of your obligations towards us.

A month and a half elapsed since the end of the Loan period agreed between Esporte Clube Vitoria, Guoan Beijing and the player Barretto and a whole month has elapsed since the end of the grace period granted to your Club to ensure the return of the Player to China.

Considering that two weeks ago we sent you a fax to offer an amicable solution and that you never answered our communication, we must consider that you have rejected our offer and breached the Loan Agreement signed the 15th of July 20132 and induced the Player to breach his employment contract with Beijing Guoan FC Ltd.

In order to protect our interests and rights we will present a Claim before FIFA to request compensation of the damages caused to us and impose over Esporte Club Vitoria the Sporting Sanctions provided in art. 17.4 of the FIFA RSTP".

20. In a letter dated 10 February 2014, but sent on 12 February 2014, the Player wrote to Beijing Guoan the following:

"This is to inform you that the term of my loan contract to E.C. Vitoria is ended, and I am completely ready to fulfill my obligations towards my Employment Contract with Beijing Guoan F.C.

In order to arrange my presentation at the training ground of Beijing Guoan F.C., please contact me in my mobile phone … or on my e-mail address … with the details of the flight that the club booked for me, departing from the city of Rio de Janeiro, Brazil, to Beijing, China.

Finally, I am looking forward to my return to China and I am very enthusiastic to participate on training sessions and matches with my teammates".

21. On 14 February 2014, Beijing Guoan sent the following communication to the Player:

"After the second submission sent to you on date 10th of February 2014, we are astonished after the reception of your fax dated 12th of the current.

With no explanation you failed absolutely in the fulfilment of your obligations towards the club and breached without any reason both the Loan Contract and the Employment agreement signed the 15th of July 2013 and the 15th of February 2013 respectively.

As you were supposed to be in China since the 10th of January even if your teammates, only those foreigners, were bound to return training the 5th of January, you should have asked the Club to remain in Brazil, because since the 31st of December, Vitoria had no rights over you.

On date 20th of January, so 10 days after the date you were supposed to return in China, the Club sent you and the Brazilian Club a letter claiming for delay. This letter remains actually unanswered.

A second letter was sent to you this past 10th of January with the same silent answer.

---

5 These letters were sent also by fax: Vitória conceded that it received it; the Player maintains that he only became aware of it after 14 February 2014.

As has been already said, a month, and a half has elapsed since the end of the Loan period agreed and a whole month has elapsed since the end of the grace period granted in the same agreement in order to give you some more days to come back to China.

Considering all those facts, we have no other option but to understand that you have terminated without just cause the Employment Contract signed the 15th of February 2013 as you have missed the last 40 days of training without any explanation.

In order to protect our interest and rights we will present a Claim before FIFA to request the payment of a Compensation and the Sporting Sanctions provided in art. 17 of the FIFA RSTP".

22. On 17 February 2014, Beijing Guoan lodged a claim with FIFA against the Player and Vitória, requesting the imposition of disciplinary sanctions on them, as well as compensation in the total amount of USD 4,950,066, plus interest, arising out of the Player's alleged breach of contract.

23. On 21 February 2014, the Player lodged a counter claim with FIFA requesting that Beijing Guoan be ordered to pay the amount of USD 963,504, plus interest, and the imposition of sporting sanctions on it.

24. On 16 October 2014, the FIFA Dispute Resolution Chamber (hereinafter referred to as the "DRC") issued a decision (hereinafter referred to as the "Decision"), holding as follows (emphasis in the original):

    "1. The claim of the Claimant/Counter-Respondent, Beijing Guoan FC, is rejected.

    2. The claim of the Respondent I / Counter Claimant, Mr André Luiz Barreto Silva Lima, is partially accepted.

    3. The Claimant / Counter-Respondent is ordered to pay to the Respondent I / Counter-Claimant compensation in the amount of USD 962,504, plus 5% interest p.a. as from 21 February 2014 until the date of effective payment, ***within 30 days*** *as from the date of notification of this decision.*

    4. In the event that the amount due to the Respondent I / Counter Claimant in accordance with the above-mentioned number 3., plus interest, is not paid by the Claimant / Counter-Respondent within the stated time limit, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee for consideration and a formal decision.

    5. Any further claims lodged by the Respondent I / Counter-Claimant are reject.

    6. The Respondent I / Counter-Claimant is directed to inform the Claimant / Counter-Respondent immediately and directly of the account number to which the remittance is to be made and to notify the Dispute Resolution Chamber of every payment received".

25. On 3 December 2014 the Decision, together with the grounds supporting it, was notified to the Appellant.

26. In the Decision, the DRC first found that the 2012 edition of the Regulations on the Status and Transfer of Players (hereinafter referred to as the "RSTP") was applicable to the merits of the dispute. The DRC, next, in support of the Decision stated the following:

"5. The members of the Chamber acknowledged that it was undisputed by the parties that they were contractually bound by the loan, valid as from 15 July 2013 until 31 December 2013, and that the Claimant / Counter-Respondent and the Respondent I / Counter-Claimant, were contractually bound by means of the contract and the agreement, both valid as from 15 February 2013 until 31 December 2014.

6. In addition, the DRC pointed out that the parties did not dispute that the Respondent I / Counter-Claimant suffered an injury on 28 July 2013 and that the Claimant / Counter-Respondent was informed that the Respondent I / Counter-Claimant would require a recovery period of six months, in principle. It is also undisputed that the Respondent II requested on 9 January 2014 authorization from the Claimant / Counter-Respondent in order for the Respondent I / Counter-Claimant to stay in Brazil until 8 February 2014 and complete his recovery program.

7. Finally, the DRC also noted that the parties did not dispute that the Claimant / Counter-Respondent terminated the contract on 14 February 2014, in spite of having being warned by the Respondent I / Counter-Claimant on 13 February 2014, by means of his letter dated 10 February 2014, of his readiness to fulfil the contract.

8. The Chamber further noted that the Claimant / Counter-Respondent, on the one hand, lodged a claim against the Respondent I / Counter-Claimant and the Respondent II for breach of contract and inducement, respectively, arguing that it terminated the contract and the loan with just cause since the Respondent I / Counter-Claimant breached art. 7.4 of the loan by failing to return to the Claimant / Counter-Respondent within the respective deadline, i.e. 10 January 2014.

9. The Chamber also noted that the Respondent I / Counter-Claimant, on the other hand, lodged a claim against the Claimant / Counter-Respondent for breach of contract, arguing that the latter terminated the contract and the loan without just cause since it failed to put him in default and because his alleged failure to comply with art. 7.4 of the loan was due to the length of his rehabilitation process, which was previously known and authorized by the Claimant / Counter-Respondent.

10. Having established the aforementioned, the Chamber deemed that the underlying issue in this dispute, considering the respective claims of the Claimant / Counter-Respondent and the Respondent I / Counter-Claimant, was to determine whether the employment contract had been unilaterally terminated with or without just cause by the Claimant / Counter-Respondent.

11. In view of the above, the DRC first of all took into consideration the content of art. 14 of the Regulations, which provides that "a contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause".

12. The Chamber stressed that the definition of just cause and whether just cause exists shall be established in accordance with the merits of each particular case.

13. In this sense, the members of the DRC recalled the content of art. 7.4 of the loan, which provides that "on the date of […] termination of the [the loan], [the Respondent I / Counter-Claimant] shall return to [the Claimant / Counter-Respondent] immediately and unconditionally (including but not limited to complete the transaction within 10 days after the termination of this Contract) […]". Therefore, the Chamber took due note that the original agreement of the parties was for the Respondent I / Counter-Claimant to return from the loan by no later than 10 January 2014.

14. The Chamber noted, however, that the Respondent II requested the authorization of the Claimant / Counter-Respondent for the Respondent I / Counter-Claimant to stay in Brazil in order to complete his recovery before the aforesaid deadline expired, i.e. on 9 January 2014.

15. In connection with the abovementioned request, the Dispute Resolution Chamber found it important to note that the Claimant / Counter-Respondent argues that it never agreed to such request. Nevertheless, according to the information contained in the Transfer Matching System (TMS), the Claimant / Counter-Respondent entered a transfer instruction, requesting on 9 January 2014 the International Transfer Certificate of the Respondent I / Counter-Claimant for his return after the loan, which it cancelled on the same day. The Chamber formed the belief that, by doing so, it can be established that the Claimant / Counter-Respondent tacitly consented to the request of the Respondent II referred to in point II, 14, above.

16. Moreover, the members of the DRC took note that the Respondent I / Counter-Claimant asserts that, between the request for authorization made on 9 January 2014 and the termination of the contract on 14 February 2014, the Claimant / Counter-Respondent did not warn the Respondent I / Counter-Claimant of any breach, neither requested his return.

17. On the other hand, the Claimant / Counter-Respondent argues that it warned the Respondent I / Counter-Claimant of his misconduct in respect of art. 7.4 of the loan by means of two letters dated 20 January 2014 and 10 February 2014 allegedly sent to the Respondent I / Counter-Claimant and the Respondent II (cf. points I.10 and I.11 above).

18. At this point, the members of the Chamber deemed it appropriate to refer the parties to art. 12 par. 3 of the Procedural Rules, which stipulates that "any party claiming a right on the basis of an alleged fact shall carry the burden of proof".

19. In this regard, the DRC pointed out that the Claimant / Counter-Respondent submitted a copy of a letter dated 20 January 2014 addressed to the attention of the Respondent I / Counter-Claimant via the Respondent II but no proof of its delivery. In light of the counterstatement of both the Respondent I / Counter-Claimant and the Respondent II that may be found on file, the DRC deemed that no substantial proof was provided in order to evidence that the alleged email to which the letter would have being attached was actually received by its addressee. For the avoidance of doubt, the members of the DRC deemed it appropriate to emphasise that the addressee of such email is not the Respondent I / Counter-Claimant, who was the party in need to be warned of any alleged breach.

20. Likewise, the Chamber pointed out that the Claimant / Counter-Respondent was not able to provide any proof of delivery of the fax allegedly sent to the Respondent I / Counter-Claimant on 10 February 2014.

21. Consequently, the DRC concluded that the Claimant/Counter-Respondent was not able to prove that it had indeed warned the Respondent I / Counter-Claimant of a breach or misconduct that could justify the termination of the contract. In other words, the Claimant/Counter-Respondent failed to put the Respondent I / Counter-Claimant in default of his alleged breach and never requested his return.

22. In continuation, the Chamber was eager to emphasise that only a breach or misconduct which is of a certain severity justified the termination of a contract without prior warning. In other words, only when there are objective criteria which do not reasonably permit to expect a continuation of the employment relationship between the parties, a contract may be terminated prematurely. Hence, if there are more lenient

measures which can be taken in order for an employer to assure the employee's fulfilment of his contractual duties, such measures must be taken before terminating an employment contract. A premature termination of an employment contract can always only be an ultima ratio.

23. *Moreover, the DRC observed that, in any case, there would have been more lenient measures to be taken (e.g., among others, a suspension or a fine) in order to sanction the alleged misconduct of the Respondent I / Counter-Claimant in respect of art. 7.4 of the loan, which would have consisted of an absence of less than a week, considering that the Claimant/Counter-Respondent tacitly accepted the extension of the Respondent I / Counter-Claimant's recovery treatment.*

24. *On top of that, the members of the Chamber observed that the Respondent I / Counter-Claimant notified the Claimant/Counter-Respondent of his readiness to fulfil the contract on 13 February 2014. However, the Claimant/Counter-Respondent terminated the contract one day later, i.e. on 14 February 2014.*

25. *In view of the abovementioned notification, the Chamber was of the opinion that on 13 February 2014, as the Claimant/Counter-Respondent received the Respondent I / Counter-Claimant's letter, there was clear and objective evidence that reasonably permitted the parties to expect a continuation of the employment relationship.*

26. *Overall, the Chamber decided that the Claimant/Counter-Respondent had no just cause to unilaterally terminate the employment relationship with the Respondent I / Counter-Claimant on 14 February 2014 and that, therefore, the Claimant/Counter-Respondent had breached the employment contract without just cause.*

27. *In continuation, the Chamber turned its attention to the consequences of the breach of contract without just cause by the Claimant/Counter-Respondent in accordance with art. 17 par. 1 of the Regulations.*

28. *Taking into consideration art. 17 par. 1 of the Regulations, the DRC decided that the Respondent I / Counter-Claimant is entitled to receive compensation from the Claimant/Counter-Respondent for the termination of the contract without just cause on 14 February 2014.*

29. *The members of the Chamber firstly recapitulated that, in accordance with art. 17 par. 1 of the Regulations, the amount of compensation shall be calculated, in particular and unless otherwise provided for in the contract at the basis of the dispute, with due consideration for the law of the country concerned, the specificity of sport and further objective criteria, including, in particular, the remuneration and other benefits due to the Respondent I / Counter-Claimant under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, and depending on whether the contractual breach falls within the protected period.*

30. *In application of the relevant provision, the Chamber held that it first of all had to clarify as to whether the pertinent contracts contain any provision by means of which the parties had beforehand agreed upon an amount of compensation payable by the contractual parties in the event of breach of contract. In this regard, the DRC noted that the contract, the agreement and the loan did not contain any clause regarding the amount of compensation payable to the Respondent I / Counter-Claimant by the Claimant/Counter-Respondent in case of breach of contract.*

31. *As a consequence, the members of the Chamber determined that such amount of compensation payable by the Claimant/Counter-Respondent to the Respondent I / Counter-Claimant had to be assessed in application of the other parameters set out in art. 17 par. 1 of the Regulations. The Chamber recalled*

that said article provides for a non-exhaustive enumeration of criteria to be taken into consideration when calculating the amount of payable compensation. Therefore, other objective criteria may be taken into account at the discretion of the deciding body. In this regard, the Dispute Resolution Chamber emphasised beforehand that each request for compensation for contractual breach has to be assessed by the Chamber on a case-by-case basis taking into account all specific circumstances of the respective matter.

32. *In order to estimate the amount of compensation due to the Respondent I / Counter-Claimant in the present case, the members of the Chamber first turned their attention to the remuneration and other benefits due to the Respondent / Counter-Claimant under the existing contract and/or the new contract, which criterion was considered by the Chamber to be essential. The members of the Chamber deemed it important to highlight that the wording of art. 17 par. 1 of the Regulations allows the Chamber to take into account both the existing contract and the new contract, if any, in the calculation of the amount of compensation.*

33. *Bearing in mind the foregoing, the Chamber proceeded with the calculation of the receivables of the Respondent I / Counter-Claimant under the contract as from its date of termination without just cause by the Claimant/Counter-Respondent, i.e. 14 February 2014, until 31 December 2014, and concluded that the Respondent I / Counter-Claimant would have received in total USD 962,504 as remuneration, had the contract been executed until its expiry date. Consequently, the Chamber concluded that the amount of USD 962,504 serves as the basis for the final determination of the amount of compensation for breach of contract in the case at hand (cf. point I.2.b) above).*

34. *In continuation, the Chamber verified as to whether the Respondent I / Counter-Claimant had signed an employment contract with another club during the relevant period of time, by means of which he would have been able to reduce his loss of income. According to the constant practice of the DRC, such remuneration under a new employment contract shall be taken into account in the calculation of the amount of compensation for breach of contract in connection with the Respondent I / Counter-Claimant's general obligation to mitigate his damages.*

35. *In this regard, the members of the Chamber noted that the Respondent I / Counter-Claimant had not signed any new employment contract within the period of time between the termination of the contract and its original date of expiry and, thus, had not been able to mitigate damages. In this context, the Chamber found it reasonable that the Respondent I / Counter-Claimant had not been able to find new employment within the relevant period of 10 (ten) months only.*

36. *Taking into account the Respondent I / Counter-Claimant's request and considering that his claim was lodged on 21 February 2014, the Chamber concluded that the Claimant/Counter-Respondent must pay to the Respondent I / Counter-Claimant USD 962,504, as compensation for breach of contract, plus interest of 5% p.a. on such amount as from 21 February 2014 until the date of effective payment.*

37. *With regard to the Respondent I / Counter-Claimant's claim for legal costs and procedural costs, the Chamber recalled the contents of art. 18 par. 4 of the Procedural Rules as well as to its long-standing and well-established jurisprudence, which clearly stipulates that no procedural compensation is awarded in proceedings in front of the Dispute Resolution Chamber. Therefore, the members of the Chamber had no other alternative than to reject this part of the claim.*

38. *Consequently, on account of all of the above-mentioned considerations and the specificities of the case at hand, the Chamber decided to partially accept the Respondent I/Counter-Claimant's claim and that the Claimant/Counter-Respondent must pay the amount of USD 962,504 as compensation for breach of*

contract in the case at hand, plus 5% interest p.a. as from 21 February 2014 until the date of effective payment.

39. The Dispute Resolution Chamber concluded its deliberations in the present matter by establishing that any further request filed by the Respondent I / Counter-Claimant is reject and that the claim of the Claimant/Counter-Respondent is rejected".

2. THE ARBITRAL PROCEEDINGS

2.1 The CAS Proceedings

27. On 17 December 2014, the Appellant filed a statement of appeal with the CAS pursuant to Article R47 of the Code of Sports-related Arbitration (hereinafter referred to as the "Code") against FIFA, the Player and Vitória (hereinafter jointly referred to as the "Respondents") to challenge the Decision. The statement of appeal, accompanied by 3 exhibits, stipulated the appointment of The Hon. Michael J. Beloff M.A. Q.C. as arbitrator.

28. On 13 January 2015, the President of the CAS Appeals Arbitration Division granted the Appellant an extension of the deadline to file its appeal brief.

29. In a letter dated 13 January 2015, the Brazilian Respondents designated Dr Jan Räker to be an arbitrator in this case.

30. On 14 January 2015, FIFA agreed to such designation.

31. On 27 June 2014, the Appellant lodged with CAS his appeal brief, together with 9 exhibits, pursuant to Article R51 of the Code.

32. By communication dated 25 February 2015, the CAS Court Office informed the parties on behalf of the President of the CAS Appeals Arbitration Division, that the Panel had been constituted as follows: Prof. Luigi Fumagalli, President of the Panel; The Hon. Michael J. Beloff M.A. Q.C., and Dr Jan Räker, arbitrators.

33. On 12 March 2015, all the Respondents lodged with CAS their answers in accordance with Article R55 of the Code. The First Respondent's answer had attached 3 exhibits. The answer jointly lodged by the Brazilian Respondents had attached 14 exhibits and contained, *inter alia*, the request that the Appellant be ordered:

"to produce any and all documents related to the transfer of the Argentinean football player P. from Bursaspor, as well as to order FIFA to produce the TMS-page elated to such a transfer and all documents uploaded in the TMS in connection to the same".

34. In a letter of 30 March 2015, the CAS Court Office, on behalf of the President of the Panel, invited the Appellant to comment on the request for production of documents contained in answer of the Brazilian Respondents, and *"either produce the documents or state the reason of its objection".*

35. On 8 April 2015, the CAS Court Office, on behalf of the President of the Panel, issued an order of procedure (hereinafter referred to as the "Order of Procedure"), which was accepted and countersigned by the parties.

36. On 8 April 2015, the Appellant filed with CAS a copy of the employment contract dated 17 February 2015 with P., as well of the transfer contract of P. from the Turkish club Bursaspor

37. On 17 June 2015, pursuant to notice given to the parties in the letter of the CAS Court Office dated 7 April 2015, a hearing was held at the CAS offices in Chateau de Bethusy. The Panel was assisted at the hearing by Mr William Sternheimer, Counsel to CAS. The following persons attended the hearing:

i. for the Appellant:	Mr Sihua Zhang, representative of Beijing Guoan, Mr Juan de Dios Crespo Perez, Mr Eric Ripoll and Mr Paolo Torchetti, counsel;
ii. for the First Respondent:	Ms Livia Silva Kägi and Mr Felipe Saona, members of the Players' Status and Governance Department;
iii. for the Brazilian Respondents	Mr Marcos Motta and Mr Stefano Malvestio, counsel.

38. At the opening of the hearing, both parties confirmed that they had no objections to the composition of the Panel. Thereafter, the Panel heard the declarations of the Player (via Skype connection) and of Mr Zhang, and the testimony given by Dr Vasconcelos (via Skype connection), as follows[6]:

i. the Player declared that:

- in the period between February 2013 and June 2013, after a good start, he was no longer playing well. Therefore, he was offered by Beijing Guoan the opportunity to return to Brazil;
- for almost the period he remained in China, his family, who had joined him only a few weeks after he had moved to Beijing Guoan was with him;
- after the accident he suffered on 28 July 2013 and during the period he was treated, no representative of Beijing Guoan ever contacted him with respect to his medical conditions and the treatment he was undergoing;
- his only concern, while being treated, was to fully recover from the injury, as his career was at stake. In January 2014 he did not know what sort of treatment he would have received, if he had returned to China;
- in January/February 2014 he did not play any training match with Vitória. However, he was training daily at the Vitória's facilities until 10 February 2014, when the letter was sent to Beijing Guoan stating that he was ready to return to

[6] The summary which follows is intended to give an indication of only a key few points touched at the hearing. The Panel emphasises that it considered the entirety of the declarations made at the hearing and/or contained in the relevant witness statements.

China;

ii. Mr Zhang declared that:

- in the period of 2013 during which the Player was with Beijing Guoan, his family could not adapt to living in China. In point of fact, the Player's family remained with him only one month, and then returned to Brazil, to where also the Player wanted to return;
- in the period the Player was in Brazil, and also following his accident, Beijing Guoan fully complied with its obligations, by paying the 50% of the salary due to him: Beijing Guoan did not send *"flowers"*, but money. In addition, during that period, Beijing Guoan had no duty to contact the Player; on the contrary it was the Player who had the duty to inform Beijing Guoan of his physical conditions;
- Beijing Guoan never consented to the Player's remaining in Brazil for longer than stipulated in the Loan: in the letter of 8 August 2013, Beijing Guoan was doing no more than reminding Vitória of its contractual obligations. Indeed, Beijing Guoan wanted the Player to return in order to assess his physical conditions and treat him. In the period between December 2013 and March 2014 there were no official matches to be played by Beijing Guoan;
- Beijing Guoan has first rate medical facilities available to treat its players. The Player could therefore have enjoyed the best possible assistance in China to complete his recovery, had he returned to Beijing Guoan when due;
- on 9 January 2014, he, as TMS manager for Beijing Guoan, accessed the TMS, in order to verify whether any instructions had been entered by Vitória for the return of the Player. Having found nothing, he cancelled the instructions he had inserted, after contacting the driver designated to assist the Player on his anticipated return to China and discovering that the driver too had no information about the Player. In any case, new instructions if required could be easily and swiftly be re-inserted
- the letter of Vitória dated 9 January 2014 was received on 9 January 2014, but taken note of only on 10 January 2014, a Friday. He therefore had to wait until the following Monday to contact the management of Beijing Guoan to discuss the next steps, and only after such internal discussions, protracted over several days, was the letter dated 20 January 2014 sent;
- the letter dated 20 January 2014 was sent also to the Asian agent who had arranged the transfer of the Player;
- Beijing Guoan paid the portion of the salary due to the Player until the end of January 2014;

iii. Dr Vasconcelos testified that:

- the Player was not ready, in January 2014, to return to China and play for Beijing Guoan. At that time, it remained important for the Player to continue the rehabilitation treatment under the same medical supervision and assistance he had received in the preceding months. Only at the beginning of February 2014 was the Player ready for group training, and only at the end of February 2014 was he fit for

playing;

- during the treatment of the Player no representative of Beijing Guoan offered any support, nor was the doctor himself contacted in respect of the Player's condition.

39. The parties next, by their counsel, made cogent submissions in support of their respective cases. At the conclusion of the hearing, finally, the parties expressly stated that their right to be heard and to be treated equally in the proceedings had been fully respected.

2.2 The Position of the Parties

40. The following outline of the parties' positions is illustrative only and does not necessarily comprise every submission advanced by the Appellant and the Respondent. The Panel has nonetheless carefully considered all the submissions made by the parties, whether or not there is specific reference to them in the following summary.

a. The Position of the Appellant

41. In its appeal brief, the Appellant requested the CAS:

"a) To accept the present Appeal Brief

b) To set aside the decision of the FIFA DRC on this matter and after the study of the argument presented to render an Award establishing;

c) That Mr. Lima and Esporte Club Vitória have breached the Loan Agreement concluded with the Appellant.

d) As a result of said breach, that the Player shall pay the Compensation of:

i. USD 1,200,000 plus a daily penalty of USD 10,000 since the communication sent the 20th of January [2014][7]

e) As a result of said breach, that the Esporte Club Vitória shall pay Compensation of:

i. USD 900,000 plus a daily penalty of USD 10,000 since the communication sent the 20th of January [8]

f) That the Player also breached the Employment Contract and for this breach he shall pay the amount of amount of USD 1,650,006 and Esporte Club Vitória being the Respondent jointly and severally liable for its payment.

g) To send back the case only and merely on the request for sporting sanctions, and thus according to art. 17 of RSTP condemn the Respondents to the sporting sanctions provided, a four-month restriction on playing in official matches for the Player and the Club shall be banned from registering any new players, either nationally or internationally, for two entire and consecutive registration periods.

---

7 At the Panel's request, the Appellant confirmed at the hearing that such date (as well as the date mentioned at point (e)(i) of the request for relief) was intended to refer to 20 January 2014.

8 See the preceding footnote.

h) That the Respondents cover all costs of the proceedings.

i) That the Respondents pay the legal fees of the Club in regards to this procedure in amount of 40.000 CHF

j) That both Respondents pay an additional 5% annual interest on the amounts owed to the Appellant from the date in which the breach occurred".

42. At the hearing, however, the Appellant withdrew its request that Vitória be treated, for the purposes of the RSTP, as the "new club" of the Player after the breach of the Contract, and therefore in consequence no longer sought against Vitória compensation on the basis of joint liability with the Player or the imposition of sporting sanctions on it.

43. The case of the Appellant in support of its request is based on the contention:

"1. That the Respondents breached the Loan Agreement.

2. That having breached the Loan Agreement, the Respondent shall pay the penalties established in it.

- *The Player shall pay the Appellant the amount of USD 1,200,000 as compensation for its delay in returning back to China, plus a daily penalty of USF 10,000 since the communication sent the 20th of January* [2014].
- *The Club Vitória shall pay the Appellant the amount of USD 900,000 as compensation for its delay in returning back to China, plus a daily penalty of USD 10.000 since the communication sent the 20th of January* [2014].

3. The Player breached the Employment contract signed the 15th of February 2013, without just cause.

4. According to art 17 of the FIFA RSTP the Respondents must be condemned for the breach of the contract to pay compensation to the Appellant and in such a case the proceeding should be sent back to FIFA but MERELY and ONLY for the issuance of the sporting sanctions of art. 17.4".

44. In short, the position of the Appellant is that it did not commit any breach of contract with the Player, but that, on the contrary, *"the Player is the one who committed breach of contract and, as a consequence, the Appellant's unilateral termination of the … contract … has to be deemed as a termination with just cause".*

45. More specifically, the Appellant based its request on the following grounds:

i. *"wrong evaluation of facts"* by the DRC, since:

- the Contract was terminated by Beijing Guoan on 10 February 2014, and not on 14 February 2014, by means of a letter sent to Vitória;
- the Player was notified by Beijing Guoan *"in the best possible way"*, since it could be assumed that Vitória was in the best position to know his contact details;
- the absence of a request for an ITC does not prove any intention of Beijing Guoan to consent to the request of Vitória that the Player remain longer in Brazil, since no ITC was necessary for physical return of the Player from the loan;
- the Appellant never gave its permission to Vitória or the Player to remain in Brazil;

ii. the *"breach of the Loan … by the Player caused termination"* by Beijing Guoan *"with just cause"*. In fact, the Player and Vitória ignored the Player's duty to return to the Appellant by 10 January 2014, as provided for in the Loan: the terms of the Loan were never modified and even after 10 January 2014 the Appellant never consented to the Player's staying in Brazil until his full recovery. In addition, when the letter of 9 January 2014 was sent by the Club, it was already clear that the Player could not return to China before 10 January 2014, as he was obliged to under the Loan;

iii. the *"Player has breached the … Contract"* and not only the Loan, as he was absent, with no excuse, for more than 40 days after the Loan had expired and more than 30 days after the deadline for his return to China, notwithstanding the warning of 20 January 2014 and the fact that at the end of January 2014 he was fit to play, having participated in a training match with Vitória. As a result, the Contract could be terminated by Beijing Guoan, with the consequences provided for in the Supplementary Agreement;

iv. *"Vitória breached the Loan"*. In fact, only after the Loan had expired did Vitória request permission for the Player to remain in Brazil, and did not comply with their duty to ensure that the Player return to China.

46. With respect to the compensation claimed, the Appellant submitted:

i. as to the compensation for breach of the Contract, that the Player[9] should be ordered to pay the total amount of USD 1,650,006, corresponding to:

- USD 1,100,004 determined pursuant to Article 17 of the RSTP, as interpreted in the CAS jurisprudence, taking into account that the breach occurred during the *"Protected Period"* (as defined in the RSTP), and on the basis of the *"remaining value of the Contract"*, plus
- USD 550,002 *"in application of the specificity of sport"*, calculated on the basis of *"six months average salaries"* adopted in CAS precedents;

ii. as to the compensation for breach of the Loan, that:

- the Player should pay the amount of 1,200,000, plus USD 10,000 *"per every day after the notification sent … on 20th January 2014"*, pursuant to its Article 9.5, and
- Vitória should pay an amount calculated pursuant to Articles 5.2 and 9.5 thereof, equal to USD 900,000, plus *"additional penalty for every day of delay of Player's return in amount of USD 10,000 per every day of delay"*.

[9] As mentioned, the Appellant originally claimed that Vitória be held jointly liable with the Player, pursuant to Article 17.4 RSTP. At the hearing, however, the Appellant withdrew its request that Vitória be treated, for the purposes of the RSTP, as the "new club" of the Player after the breach of the Contract, and therefore renounced any relief requested against Vitória for joint liability.

b. The Position of the Respondents

b1. The Position of FIFA

47. In its answer, the First Respondent requested:

> *"1. That the CAS rejects the present appeal and confirms the presently challenged decision passed by the Dispute Resolution Chamber on 16 October 2014 in its entirety.*
>
> *2. That the CAS orders the Appellant to bear all the costs of the present procedure.*
>
> *3. That the CAS orders the Appellant to cover all legal expenses of FIFA related to the proceedings at hand".*

48. In support of its requests, FIFA, after recalling in chronological order the facts and the evidence considered by DRC, focussed on the question of the date of termination of the Contract, raised by the Appellant, and confirms *"the perfectly correct reasoning behind the … Decision … with regard to the lack of just cause of the Appellant's termination on the employment contract in February 2014"*, as follows:

i. as to the termination date of the Contract by the Appellant, the First Respondent emphasised that the Appellant's letter dated 10 February 2014 was not sent directly to the Player, and that the Appellant did not provide any evidence that the letter actually reached the Player before 14 February 2014. The First Respondent also emphasized that the letter dated 14 February 2014 was sent directly to the personal email address of the Player, who acknowledged its receipt. As a result, the DRC correctly concluded that the Contract was terminated only on 14 February 2014;

ii. as to the reasoning contained in the Decision, FIFA insisted that:

- the Appellant was aware of the Player's serious injury and of the need of treatment for about six months;
- the Appellant was aware of the Brazilian Respondents' request to have the stay of the Player in Brazil extended for one month;
- the Appellant did not answer the letter requesting such extension, but cancelled the request for the return of the Player's ITC, thereby impliedly accepting the requested extension;
- the Appellant only on 20 January 2014 allegedly manifested its disagreement with any extension of the Player's stay in Brazil, *i.e.* 10 days after the Player was supposed, according to it, to resume his training with the Appellant;
- the letter of 10 February 2014 was sent at the end of the extension period and cannot therefore be construed as a refusal of such extension;
- assuming that by such letter the Appellant purported to terminate the Contract, such termination was without justification, since it was not communicated directly to the Player and was not preceded by any warning;
- not only was the unilateral termination of the Contract without just cause, but there are strong indications that it was effected with the sole aim of obtaining financial

advantage from it. The amount claimed (totalling USD 4,950,006) was requested as compensation for breach of contract by a party, i.e. the Appellant, which had not even replied to Vitória's inquiry of 9 January 2014, had cancelled its request for the return of the Player's ITC and reacted to the Player's alleged delay a full month after the Player's return was allegedly expected. As made clear by the content of the letter of 20 January 2014 (whose receipt by the Player and Vitória has not been confirmed by any evidence), the Appellant's interest in obtaining financial compensation was stronger than its interest in enjoying again the Player's services.

49. In conclusion, according to the First Respondent, *"the challenged decision already exhaustively addressed all of the Appellant's arguments as to the alleged existence of a just cause for Beijing to have prematurely terminated the employment contract it had signed with the player. And justly decided to reject them entirely after individually analyzing each of them. None of the arguments brought up by the Appellant in this regard could possibly lead to a different outcome in the context of the current appeal procedure, and we respectfully submit that the DRC was perfectly right in concluding that the Appellant did not have a just cause to terminate the relevant employment contract with the player, and therefore it was liable to pay the latter the pertinent amount of compensation. Consequently, the Appellant's requests should be rejected by the honorable Panel and the decision of the DRC of 16 October 2014 should be fully upheld by the CAS"*.

b2. The Position of the Player and Vitória

50. The request for relief in the merits[10] submitted jointly by the Brazilian Respondents was the following:

"[…]

III. Dismiss the appeal filed by Beijing Guoan entirely;

IV. Uphold the decision of the FIFA Dispute Resolution Chamber of 16 October 2014;

V. Order that Beijing Guoan pay Lima USD 962,504, plus 5% interest p.a., starting to count from 14 February 2014 until effective payment, for terminating Lima's Employment Contract without just cause;

VI. Subsidiarily, in the unlikely event that this Honourable Court finds that Beijing Guoan terminated Lima's Employment Contract with just cause, rule that no compensation should be due since Beijing Guoan did not actually suffer any damage;

VII. Subsidiarily, in the unlikely event that this Honourable Court finds that Beijing Guoan terminated Lima's Employment Contract with just cause and that it suffered damage, declare that E.C. Vitória is not the new club of the Player and shall therefore not be joint and severally liable; &

VIII. In any case, reject Beijing Gouan's request for imposition of sporting sanctions against Lima and E.C. Vitoria;

IX. Order that Beijing Guoan reimburse both Lima and E.C. Vitória for all legal expenses incurred, or alternatively, determined by this Honourable Court ex aequo bono at an amount in any case not inferior

---

10 The Brazilian Respondents in fact included in the relief requested also an order relating to some evidentiary matters, that the Panel dealt with in the course of the arbitration (§ 34 above).

than EUR 20,000 for each Respondent, added to any and all FIFA and CAS administrative and procedural costs already incurred or eventually incurred by Lima and E.C. Vitória".

51. In support of their answer and the request to have the Decision confirmed, the Brazilian Respondents emphasised that, contrary to the Appellant's assertion, the *"DRC was correct in partially accepting Lima's claim since Beijing Guoan unilaterally terminated the employment relationship with Lima without just cause".*

52. More specifically, as to the Appellant's claims, the Brazilian Respondents emphasised that:

    i. the Appellant had initially authorized Vitória to take care of the Player's rehabilitation until his full recovery and later cancelled the instructions for the return of the ITC, *"presumably after receiving … [the] … request for Lima to stay in Brazil"*;

    ii. the letters allegedly sent by the Appellant on 20 January 2014 were never received by the Brazilian Respondents; and

    iii. the Appellant was aware of the Player's contact details in Brazil, since they were mentioned in the first page of the Contract. Therefore there was no reason for the Appellant to send to Vitória the communications intended for him.

53. As to the merits, the Brazilian Respondents submitted therefore that the appeal brought by Beijing Guoan should be dismissed because:

    i. *"Beijing Guoan Breached Both The Loan Agreement And Employment Contract When It Failed To Negotiate As Required In Both Agreements"*, respectively at Article 8.2 of the Loan and Article 13 of the Contract. Beijing Guoan breached those provisions when it took the position that the Player's duty to return to China was not negotiable, notwithstanding the letter of 8 August 2013 and the Player's injury;

    ii. *"Beijing Guoan Terminated the Employment Contract Without Just Cause"*, since the Player's actions did not constitute a breach of Contract and the Appellant had no right to terminate it: *"just cause"*, in fact, exists only when objective circumstances do not give rise to a reasonable expectation of the continuation of an employment relationship. According to the CAS jurisprudence, a player's inability to provide his services because of an injury does not constitute a breach of contract or give rise to a right of termination for just cause. In the case at hand, no such objective circumstances existed, since at the beginning of January 2014 the Player was not yet, because of his injury, in a position to provide his services as a footballer. Moreover Beijing Guoan gave him no prior warning about his possible dismissal, since the letters of 20 January 2014 were never received. There were *"more lenient measures"* available to Beijing Guan to ensure that the Player continued to fulfill his contractual duties, as he had notified the Appellant of his readiness to do so *"after being declared asymptomatic"*;

    iii. *"Whether Beijing Guoan Terminated the Employment Contract on 10 February 2014 or 14 February 2014 Is Immaterial"*, since Beijing Guoan had no legal grounds to terminate the Contract;

    iv. *"Beijing Guoan Terminated the Employment Contract Without Informing Lima Directly"*, although

it was open to it to contact him at his address in Brazil;

v. *"Beijing Guoan Is Precluded From Arguing That It Did Not Accept E.C. Vitória's 09 January 2014 Request Since It Withdraw Its Transfer Instruction For Lima's ITC On The Same Day"*. On that basis, it should be held that Beijing Guoan *"tacitly consented"* to the Vitória's letter of 9 January 2014, and is precluded from arguing that Vitória never received permission for the Player not to return to China before 10 January 2014;

vi. *"Neither Lima Nor E.C. Vitória Breached the Loan Agreement"*. In fact, the Player cannot be stigmatized as *"unprofessional and irresponsible"* given that he informed on 10 February 2014 that he had completed his recovery and was available to return to China. In addition, on 9 January 2014, the Player was still undergoing a rehabilitation process, of which Beijing Guoan was aware, and the Player *"could have risked suffering further harm by returning to China when he still had an additional 30 days remaining in his recovery process and would have likely been sent back to Brazil to complete his rehabilitation with the same treating physicians and trainers already assigned to his case"*;

vii. *"Beijing Guoan Could Have Responded To E.C. Vitória's Request"* of 9 January 2014, submitted on behalf of the Player. Indeed, Beijing Guoan had already on 8 August 2013 authorized the Player to remain in Brazil until his full recovery, and confirmed its consent by withdrawing the instruction for the return of the ITC. In that context the letter of 9 January 2014 was only a courteous and respectful provision of information to Beijing Guoan that the Player had 30 days to complete his rehabilitation;

viii. *"Lima Did Not Breach the Employment Contract"*;

ix. *"Vitória's is not a New Club Under the FIFA Regulations and Did Not Induce The Player to Breach Any Contract"*.

54. On such basis, the Brazilian Respondents emphasized that the conduct of Beijing Guoan shows its *"irreverent attitude … to perform its contractual obligations and reluctance to carry on the employment relations with the Player"*:

i. the letter of 20 January 2014 was never received. Therefore, Beijing Guoan failed to comply with the obligation to communicate instructions to the Player its employee with requisite clarity;

ii. the letter of 8 August 2013 should fairly be interpreted as a request that Vitória take care of the Player's rehabilitation in all its aspects until his full recovery;

iii. *"Beijing Guoan did not show and did not have the minimum sporting interest in the Player, being merely seeking for an economic compensation since the very first letter it allegedly sent"*, and when it requested the payment of an unreasonable amount from an injured player who was at that time only a few days late in his return, and from Vitória, which was only offering its assistance to rehabilitate the Player;

iv. it was reasonable and consistent with common practice to let the Player complete his rehabilitation where he had been treated and in his own country;

v. Beijing Guoan's interest was only that of having a "slot" open to hire a foreign player:

what it actually did, when it hired P., only a few days after the termination of the Contract.

55. Beijing Guoan therefore breached the Contract without just cause and should be ordered to pay compensation in the amount established under the RSTP, in the amount of USD 962,504, as established in the Decision, plus interest starting on 14 February 2014, date of the breach.

56. In any case, the Appellant's request for compensation cannot be accepted, as they are *"disproportionate and include damages calculated in a distorted way"*. According to the Brazilian Respondents, in fact, the Appellant is requesting a double compensation (under the Loan and under the Contract) for the same alleged violation, *i.e.* the Player's failure to return timeously to China. In addition, the penalty clause contained in the Loan and invoked by the Appellant is excessive and should be reduced under Swiss law. Likewise, the request for compensation for the breach of the Contract should be dismissed, since, *inter alia*, the Appellant failed to prove the existence of any damage. Finally in the light of all the circumstances of the case, no sporting sanctions should be imposed.

3. LEGAL ANALYSIS

3.1 Jurisdiction

57. CAS has jurisdiction to decide the present dispute between the parties.

58. In fact, the jurisdiction of CAS is not disputed by the parties, has been confirmed by the Order of Procedure, and is contemplated by the Statutes of FIFA which provide materially as follows:

Article 66

"1. FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, clubs, Players, Officials and licensed match agents and players' agents.

2. 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".

Article 67

"1. Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question.

2. Recourse may only be made to CAS after all other internal channels have been exhausted.

3. CAS, however, does not deal with appeals arising from:

(a) violations of the Laws of the Game;

(b) suspensions of up to four matches or up to three months (with the exception of doping decisions);

(c) decisions against which an appeal to an independent and duly constituted arbitration tribunal recognised under the rules of an Association or Confederation may be made.

4. The appeal shall not have a suspensive effect. The appropriate FIFA body or, alternatively, CAS may

order the appeal to have a suspensive effect. […]".

3.2 Appeal Proceedings

59. As these proceedings involve an appeal against a decision rendered by FIFA, brought on the basis of rules providing for an appeal to the CAS, in a dispute relating to a contract, they are considered and treated as appeal arbitration proceedings in a non-disciplinary case, within the meaning, and for the purposes, of the Code.

3.3 Admissibility

60. The admissibility of the appeal is not challenged by the Respondents. The statement of appeal was filed within the deadline set in Article 67.1 of the FIFA Statutes. No further internal recourse against the Decision is available to the Appellant within the structure of FIFA. Accordingly, the appeal is admissible.

3.4 Scope of the Panel's Review

61. According to Article R57 of the Code,

"the Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. …".

3.5 Applicable Law

62. The law applicable in the present arbitration is identified by the Panel in accordance with Article R58 of the Code.

63. Pursuant to Article R58 of the Code, the Panel is required to decide the dispute

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

64. In the present case the *"applicable regulations"* for the purposes of Article R58 of the Code are, indisputably, the FIFA's regulations, because the appeal is directed against a decision issued by FIFA, which was passed applying FIFA's rules and regulations. More specifically, the Panel agrees with the DRC that the particular regulations concerned – apart from the FIFA Statutes – are the RSTP in their 2012 edition, in force since 1 December 2012, given that the petitions to FIFA by the Appellant and the Player were received in February 2014, before the entry into force (on 1 August 2014) of the subsequent edition the same regulations.

65. The Panel notes that, pursuant to Article 66.2 of the FIFA Statutes,

"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".

66. The Panel has borne in mind that the Contract (Article 14.5) and the Loan (Article 8.1) are governed by Chinese law. However, by submitting to FIFA a request for the settlement of a dispute concerning the Contract and the Loan, and thereafter by appealing to CAS, the parties became bound by Article 66.2 of the FIFA Statutes, which provides for the application of Swiss law. In addition, all the parties made submissions before this Panel with respect to Swiss law, while no party led any evidence of the content of Chinese law, or contended if, and, if so, how, it differed from Swiss law in any relevant way. Indeed the Panel was not asked to consider or apply any provision of Chinese law.

67. As a result, in addition to FIFA's regulations, the Panel shall apply Swiss law to the merits of the dispute.

3.6 The Dispute

68. The object of these proceedings is the Decision, which dismissed the Appellant's claims against the Brazilian Respondents and ordered it to pay to the Second Respondent the amount of USD 962,504, plus 5% interest p.a. as from 21 February 2014 until the date of effective payment, for breach of the Contract. The Decision, in fact, is challenged by the Appellant and defended by the Respondents: the former seeks to have it set aside; the latter to have it confirmed.

69. In the Decision, the DRC found that Beijing Guoan had breached the Contract and that compensation had to be paid. More specifically:

    i. as to the first point, it was held that:
        - Beijing Guoan terminated the Contract on 14 February 2014, and
        - there was no *"just cause"* for termination;

    ii. as to the second point, the DRC concluded that:
        - compensation has to be established on the basis of the criteria set by Article 17 RSTP,
        - in the absence of a *"compensation clause"* in the Contract, the application of those criteria leads to the amount of EUR 962,504, corresponding to the salaries that the Player would have earned under the Contract had it been fully complied with by the Appellant.

70. Contrary to the approach taken by the DRC in the Decision, the Appellant submits that two distinct questions are involved in this dispute: the first concerns the Loan; the second regards the Contract. According to the Appellant, as to the first the Player and Vitória breached the Loan: Vitória did not complete the procedure necessary for the return of the Player to Beijing Guoan before 10 January 2014 (Article 5.2 of the Loan), while the Player did not return to Beijing Guoan before 10 January 2014 (Article 6.1 of the Loan); as to the second the Player

breached the Contract, then, because he did not return to China even after 10 January 2014, notwithstanding the warning of 20 January 2014 and the fact that at the end of January 2014 he was fit to play.

71. The points so listed identify the issues that this Panel has to examine for the determination of the dispute. More specifically, the Panel has to answer the following main questions:

i. with respect to the Loan:

a. was the Loan breached by Vitória and/or the Player?

b. what are the financial consequences of the Panel's answer to such question?

ii. with respect to the Contract:

a. did the Appellant terminate the Contract with or without just cause?

b. what are the financial consequences of the Panel's answer to the first question?

72. The Panel shall answer each of those questions separately.

i. The Breach of the Loan

a. Was the Loan breached by Vitória and/or the Player?

73. The first question to be addressed by the Panel concerns the Appellant's claim, dismissed by the DRC, that the Loan had been breached by Vitória and the Player. In the Panel's opinion, the position of each of the Brazilian Respondents has to be assessed independently, with regard to the distinct obligations binding the Player and Vitória allegedly breached.

74. With respect to Vitória, the Appellant refers to Article 5.2 of the Loan and submits that the Third Respondent did not complete the procedures necessary for the return of the Player to Beijing Guoan before 10 January 2014.

75. Contrary to the Appellant's claim, the Panel finds that such obligation was not breached. Indeed, the Appellant, in support of its claim, notes only that on 9 January 2014 Vitória requested permission for the Player to spend an additional month in Brazil *"after expiry of the loan period and obviously without complying with provisions of article 5.2 of the agreement"*. The Panel however remarks that the only procedure that Vitória could have been required to complete was the entry into the TMS of the instructions for the issuance of an ITC allowing the return to China of the Player. As to this the Panel observes that in the absence of any instructions from the Appellant, requesting the issuance of such ITC, no procedure could be completed by Vitória and the actual request inserted by Beijing Guoan in TMS on 9 January 2014 was cancelled on the same date and only a few minutes later. As a result, Vitória could do nothing further. In particular, Vitória was not and could not be obliged under Article 5.2 of the Loan to take any further steps to coerce the Player to return to China beyond complying with the necessary steps for the return of the Player's registration to Beijing Guoan.

76. With respect to the Player, the Appellant refers to the Second Respondent's obligation to return to China before 10 January 2014, set by Article 6.1 of the Loan.

77. The fact that by 10 January 2014 the Player had not returned to China to join Beijing Guoan is not itself disputed. The question, then, is whether his non return amounts to a breach of the obligation imposed by Article 6.1 of the Loan and, if so, whether any failure to fulfil it can somehow be justified.

78. With respect to the first point (*i.e.*, whether the fact that by 10 January 2014 the Player had not returned to China to join Beijing Guoan amounts to a breach of Article 6.1 of the Loan), the parties are in dispute as to the relevance of the stance taken by the Appellant, specifically as to whether Beijing Guoan tacitly consented (as the Decision found) to the Player's remaining in Brazil past that date.

79. According to the Respondents, the Appellant's consent may be discerned from *(a)* the letter of 8 August 2013, whereby Beijing Guoan agreed that the Player be operated in Brazil and be treated at the Vitória's expenses *"until his recover[y]"* (§ 13 above), *(b)* the Beijing Guoan's failure to react to the request submitted by Vitória that the Player be allowed to remain in Brazil also past the deadline indicated in the Loan (§ 15 above), and *(c)* the actions taken by Beijing Guoan on 9 January 2014, when it first inserted and immediately thereafter cancelled the instructions for the return of the ITC (§ 16 above).

80. The Panel does not agree with the Respondents' contentions. In fact, in the Panel's opinion:

i. the plain reading of the letter of 8 August 2013 makes it clear that it refers only *(a)* to the possibility for the Player to undergo surgery in Brazil and *(b)* to the Appellant's request that Vitória covers all the expenses for the Player (treatment, rehabilitation, etc.) *"until his recover[y]"*. In other words, the letter deals with the costs and not with the place of recovery: more specifically, no indication is given in that letter that that the Player could remain in Brazil *"until his recover[y]"*; and no evidence is even offered that the letter of 8 August 2013 was understood to contain such authorization at the time it was received. Indeed, the request, sent by Vitória on 9 January 2014, that the Player be authorized to stay in Brazil after the expiry of the Loan appears to be a confirmation that such authorization was not considered beyond doubt by Vitória as being implied in the Appellant's letter of 8 August 2013;

ii. Beijing Guoan's failure to react to the request submitted by Vitória on 9 January 2014 that the Player be allowed to remain in Brazil also beyond the deadline indicated in the Loan cannot be construed to evince consent to the requested extension, since, in any case, at the time the Vitória's letter was sent, the Player was already in breach of the obligation to return to China before 10 January 2014;

iii. the actions taken by Beijing Guoan on 9 January 2014 with respect to the instructions for the return of the ITC cannot be construed clearly to mean that the Player was allowed to remain in Brazil, as in any case such instructions could also be inserted in the TMS after the "physical" return of the Player.

81. Likewise, the Panel finds that no excuse offered by the Player to justify his failure to return to China before 10 January 2014 can be accepted. Indeed, the Player did not provide proof that his medical conditions prevented him from travelling to China at the beginning of January 2014, months after the surgery he had undergone. In that respect, the declarations of Dr Vasconcelos at the hearing, that the Player could conclude his rehabilitation training better in Brazil, do not have as its corollary that adequate medical and training support could not be offered by Beijing Guoan.

82. In summary, the Panel finds that the Player was obliged to return to China and join Beijing Guoan before 10 January 2014. Having failed to comply with such obligation, the Player breached Article 6.1 of the Loan.

b. What are the financial consequences of the answer to such question?

83. In light of the foregoing conclusion, it is necessary for the Panel to establish the financial consequences of the Player's breach of Article 6.1 of the Loan.

84. In that respect, the Appellant invokes the Player's obligation, contained in the same Article 6.1 of the Loan, to pay the amount of *"1,200,000 U.S. dollars as compensation"* in the event of breach of the obligation to return to China before 10 January 2014, and the obligation to pay a penalty of USD 10,000 *"for every expired day"* pursuant to Article 9.5 of the Loan.

85. The Panel notes that the penalty clauses contained at Articles 6.1 and 9.5 of the Loan qualify as contractual penalties (*"clause pénale"* or *"Konventionalstrafe"*) under Swiss law (Article 160 CO), *i.e.* under the law applicable to the merits of the dispute in this arbitration. Since, they contain all the necessary elements required for such purpose: *(a)* the parties bound thereby are mentioned, *(b)* the kind of penalty has been determined, *(c)* the conditions triggering the obligation to pay it are set, *(d)* its measure is identified (COUCHEPIN G., *La clause pénale*, Zürich, 2008, § 462).

86. The Panel remarks that, in principle, under Swiss law, the parties are free to determine the amount of the contractual penalty (Article 163.1 CO). However, the court may reduce penalties that it considers excessive at its discretion (Article 163.3 CO). The law, on the other hand, does not state clearly what amounts to an excessive penalty, so that it is for the judge to establish, with regard to the merits of the case and all the relevant circumstances, whether the penalty is excessive and, if so, to what extent it should be reduced (ATF 82 II 142 consid. 3, *JdT* 1957 I 104). In any case, it must be emphasised that the judge should not too readily reduce a penalty and that the principle of contractual liberty, which is essential under Swiss law, has always to be given priority in case of doubt (MOOSER M., *Commentaire Romand du Code des obligations*, Basel, 2003, n. 7 ad art. 163; COUCHEPIN G., *op. cit.*, § 934).

87. The Panel notes that, according to the Swiss case law and legal doctrine, a penalty is deemed to be excessive when it is not reasonable and exceeds patently the amount that would seem just and equitable (ATF 82 II 142 consid. 3, *JdT* 1957 I 104). Thus, the judge may reduce the penalty when it is unreasonable to an extent which cannot be justified (COUCHEPIN G., *op. cit.*, § 840 ff.). The following criteria to assess the reasonableness of the penalty can be taken into account

(COUCHEPIN G., *op. cit.*, § 844):

i. the creditor's interest in the performance of the main obligation and in the sanctioning of default,

ii. the gravity of the debtor's fault, from an objective and subjective standpoint,

iii. the parties' financial situation.

The judge shall generally weigh up the different interests at stake with regard to the amount of the penalty (ATF 114 II 264 consid. 1a, *JdT* 1989 I 7).

88. In addition, it has been underlined that the creditor's interest in the performance of the main contractual obligation must be interpreted broadly: parameters such as subjective interests might be taken into account albeit not usually considered in relief by way of damages under Swiss law (COUCHEPIN G., *op. cit.*, § 864 ff.). The penalty is not excessive merely because it exceeds the amount of damages which might be sought by the creditor (COUCHEPIN G., *op. cit.*, § 864; ATF 133 III 43 consid. 4.1, *JdT* 2007 I 236). However, if the purpose of the penalty is essentially preventive and not only punitive or compensatory, the penalty amount must be greater than the damages which might be (judicially) granted (ATF 116 II 302 consid. 4, *JdT* 1991 I 173). The more severe the debtor's fault, the less the reduction of the penalty (COUCHEPIN G., *op. cit.*, § 882). In any case, the penalty cannot be reduced to an amount which is lower than the measure of the damages that might properly be sought (*idem*, § 936).

89. Against that background, defined by Swiss law, and weighing all the relevant factors, the Panel finds that the measure of the penalties stipulated in the Loan is excessive with respect to the breach imputed to the Second Respondent, and the interest of the Appellant to secure performance of the breached obligation. Indeed, there is a patent disproportion between the penalty set by Article 6.1 of the Loan (USD 1,200,000) and the damage caused by the Player's failure to comply with the obligation to return to China before 10 January 2014, and one which is far too extreme to be justified by the circumstances of the case. Notably: the amount of USD 1,200,000 is equal to the amount stipulated in Article 5.3 of the Loan, which in accordance with its wording should be read as to contain a liquidated damages clause as provided for in Article 17.2 RSTP and which would accordingly be a representation of the parties valuation of the entire transfer value of the Player and therefore be an excessive compensation amount for the loss of one month's services; in January 2014, in fact, no official match was to be played by Beijing Guoan, and the Player had not yet fully recovered from his injury and was accordingly unable to provide his services to Beijing Guoan as a football player in any other way than by continuing his medical rehabilitation programme; furthermore Beijing Guoan substantially contributed to the length of the Second Respondent's absence by not answering to Vitória's letter dated 9 January 2014, at least, before 20 January 2014 and by not even attempting to direct any communication prior to 14 February 2014 directly to the Second Respondent.

90. As a result, the measure of the penalty set by Article 6.1 of the Loan must be reduced in accordance with Article 163.3 CO. The Panel finds that an equitable measure could correspond to an amount roughly equal to one month's salary, *i.e.* to an amount of USD 90,000. This amount is deemed as an adequate compensation in light of the fact that the main interest of

Beijing Guoan in the presence of the Player during the unwarranted extension of his absence from Beijing Guoan lay in the instruction and supervision of the final part of the Player's medical rehabilitation process. The violation of such interest is deemed to be worth less than the value of a month's full services which is represented in the agreed monthly wage. Despite such lower value, the adequate compensation is still set at a value very close to the monthly wage amount in recognition of the deterrent purpose of the penalty clause. The Player is therefore to be ordered to pay that amount to the Appellant, with interest at 5% per annum starting on 17 February 2014, date on which Beijing Guoan lodged a claim with FIFA requesting that payment.

91. At the same time, the Panel finds that no issue arises in this case with regard to the penalty of USD 10,000 *"for every expired day"* requested pursuant to Article 9.5 of the Loan. In fact, as it will be underscored below (§ 91.i), no evidence has been offered in this arbitration that the Appellant actually requested from the Player the payment of the penalty stipulated at Article 6.1 of the Loan. Therefore, the mechanism described at Article 9.5 of the Loan does apply. In other words, the conditions established for the existence of a claim under Article 9.5 of the Loan are not satisfied. As a result, the Appellant's request that the Player be ordered to pay USD 10,000 per day *"since the communication of 20 January [2014]"* must be dismissed, without the need for the Panel to consider whether the penalty set at Article 9.5 of the Loan has to be reduced pursuant to Article 163.3 CO.

ii. The Termination of the Contract

a. Did the Appellant terminate the Contract with or without "just cause"?

92. The second question to be addressed by the Panel concerns the termination of the Contract, as declared by Beijing Guoan in February 2014. In essence, Beijing Guoan argues that, contrary to the Decision's findings, it was entitled to terminate the Contract with just cause because the Player had failed to return to China at the expiration of the Loan, notwithstanding the obligation he had and the warning given to him in a letter of 20 January 2014.

93. As such, therefore, the question turns on the existence of the asserted "just cause" (The Panel notes that it is common ground between the parties that, in the absence of a just cause, the termination declared by Beijing Guoan would amount to a breach of the Contract).

94. In that regard, and by way of preliminary observation, the Panel emphasises that the principle *pacta sunt servanda* lies at the basis of the football system, since it gives legal foundation to the stability of contractual relations, which would be severely jeopardized if the parties to employment contracts could all too easily get rid of the obligations undertaken thereunder: while clubs make investments on players, to be recovered over the term of the contract, the players derive their living from the contract. Both parties' expectations, objectively understood, are therefore that contracts are respected until their expiry. As a result, and as noted also by the Decision, only a violation of a certain severity justifies the early termination of a contract; and a breach is sufficiently severe only if it excludes the reasonable expectation of continuation of the employment relationship. By corollary, no termination for just cause can be declared if the

provisions of the contract in question provide for a different reaction by a party (such as a disciplinary measure, wage reduction, or else) to the breach in question.

95. In light of the foregoing, the Panel finds that no "just cause" existed for Beijing Guoan to terminate the Contract with the player. The Panel reaches this conclusion for a number of reasons:

i. Beijing Guoan did not offer any evidence to prove that the letter of 20 January 2014 was sent, and thereafter received, by the Player. Indeed, at the hearing an indication was given that Beijing Guoan sent the letter also to another agent, but Beijing Guoan failed to adduce evidence from that agent about the receipt or onward transmission of the letter. Therefore, the Panel notes that no evidence was given that the Player had been warned of a possible termination of the Contract;

ii. the Player, in the period he was absent from Beijing Guoan, was still undergoing a period of rehabilitation, and was not yet ready to play. Only when that period was completed, was the Player eventually available to join and play for Beijing Guoan. In addition, no official match was scheduled to take place during that period;

iii. the Player informed Beijing Guoan of his readiness to fulfil the contract immediately upon his full recovery from injury. The Panel rejects the notion that the Player in bad faith claimed such readiness in order to avoid exposure to legal remedies at the suit of Beijing Guoan;

iv. the Contract provides for more lenient measures, in the form of wage reduction, available to Beijing Guoan, in the event of non participation of the Player in the training activities organized by Beijing Guoan.

96. It is not possible for the Appellant to pray in aid the Panel's finding that, by not returning to China before 10 January 2014, the Player violated the Loan. In the Panel's opinion, even though the Player, by failing to immediately join Beijing Guoan upon expiry of the Loan, committed a violation of the Contract (as he had to return and was not allowed to stay in Brazil), his violation was not serious enough to justify the termination of the Contract.

97. The above conclusion makes it irrelevant for the Panel to determine the date on which the Contract was terminated: on 10 or 14 February 2014. In both cases, the termination would not be justified.

98. As a result, the Panel concludes that the Appellant terminated the Contract without "just cause", and therefore that Beijing Guoan is responsible for a breach of Contract. The Appellant's petitions deriving from the Player's violations of the Contract have therefore to be dismissed.

b. What are the financial consequences of the answer to such question?

99. Article 17.1 RSTP sets the principles and the method of calculation of the compensation due by one party because of a breach or unilateral and premature termination of a contract. In light of the conclusion reached above, the Panel finds that the termination of the Contract by Beijing

Guoan falls within the scope of application of Article 17 RSTP: Beijing Guoan has to compensate for the damages caused by its breach of the Contract.

100. According to Article 17.1 RSTP, primary role is played by the parties' autonomy. In fact, the criteria set in that rule apply *"unless otherwise provided for in the contract"*. Then, if the parties have not agreed on a specific amount, compensation has to be calculated *"with due consideration"* for:

- the law of the country concerned,
- the specificity of sport,
- any other objective criteria, including 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.

101. Against that framework, the DRC:

i. decided that the Contract did not provide for an amount agreed by the parties to be paid in the event of breach;

ii. assessed the compensation to be paid to the Player on the basis of the remuneration payable to the Player under the Contract until its expiry date (31 December 2014), having found that the Player had not signed a new contract with a different club in the same period.

102. The Panel upholds the DRC's reasoning as correct.

103. Indeed, the Panel notes that there is a *consensus* in the CAS jurisprudence as to the application of the "positive interest" principle approach followed in the case CAS 2008/A/1519 & 1520, and applied in CAS 2009/A/1880 & 1881. This Panel agrees with such approach and emphasises that the application of the criteria indicated by Article 17.1 RSTP should *"aim at determining an amount which shall basically put the injured party in the position that the same party would have had if the contract was performed properly"* (CAS 2008/A/1519 & 1520, § 86).

104. For such purposes, it is this Panel's role to consider each of the criteria within Article 17.1 RSTP and any other objective criteria, in the light of the specific facts of this case and to determine how much weight, if any at all, to apply to each in determining the amount of compensation due in this particular case and to ensure that *"the calculation made … shall be not only just and fair, but also transparent and comprehensible"* (CAS 2008/A/1519 & 1520, § 89), with a view to putting the injured party in the position it would have been in had no breach occurred.

105. In this case, however, in which a breach by the club (and not by a player) is involved, the *"remuneration factor"*, together with *"the time remaining on the existing contract"* plays a major role. On

their basis, considering the monthly salary to be paid to the Player (USD 91,667) and the time remaining (eleven and a half months) under the term of the Contract before its expiration, the Panel finds that a total compensation of USD 962,504, as determined by the DRC, corresponds to a measure suitable to put the Player in the position he would have been in had no breach occurred. Such measure is therefore to be applied.

106. In fact, the Panel sees no reason either to reduce or to increase such measure in light of the *"specificity of sport"* or of the *"law of the country concerned"*: no compelling indications have been given by the parties as to any role any of such factors might have on the calculation of the damages to be compensated by the Appellant. In particular, the Second Respondent remained unable to find any other club willing to employ him for the entire remaining period of his Contract at Beijing Guoan and accordingly was unable to mitigate his damage by earning other income.

107. As a result, the Panel concludes that the Appellant has to pay to the Player an amount of USD 962,504 as compensation for breach of contract, plus interest at 5% *per annum* starting on 21 February 2014, date on which the Player lodged a claim with FIFA requesting that payment.

3.7 Conclusion

108. In light of the foregoing, the Panel holds that the appeal brought by Beijing Guoan is to be (very) partially upheld and the Decision to be modified so that the Player is ordered to pay to the Appellant an amount of USD 90,000, with interest at 5% *per annum* starting on 17 February 2014, date on which Beijing Guoan lodged a claim with FIFA requesting that payment. All other Appellant's prayers for relief are to be dismissed. Therefore, the Decision is to be confirmed insofar as it held that Beijing Guoan, by terminating the Contract without just cause, breached the Contract and that it has to pay to the Player an amount of USD 962,504 as compensation for breach of contract, plus interest at 5% *per annum* starting on 21 February 2014, date on which the Player lodged a claim with FIFA requesting that payment.

109. The Panel indicates that the reciprocal payments may be set off, so that from the amount of USD 962,504 a deduction is made for USD 90,000 plus interest at 5% p.a. between 17 February 2014 and 21 February 2014. On the resulting amount, interest at 5% *per annum* starting on 21 February 2014 until the date of final payment shall have to be paid.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed on 17 December 2014 by Beijing Guoan FC against the decision taken by the Dispute Resolution Chamber of the Fédération Internationale de Football Association (FIFA) on 16 October 2014 is partially upheld.

2. The decision taken by the Dispute Resolution Chamber of the Fédération Internationale de Football Association (FIFA) on 16 October 2014 is modified as follows:

   i. Mr André Luiz Barreto Silva Lima is ordered to pay to Beijing Guoan FC an amount of USD 90,000 (ninety thousand), with interest at 5% per annum starting on 17 February 2014;

   ii. Beijing Guoan FC is ordered to pay to Mr André Luiz Barreto Silva Lima an amount of USD 962,504 (nine hundred sixty-two thousand, five hundred four), with interest at 5% per annum starting on 21 February 2014.

(…)

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