Arbitration CAS 2021/A/7820 Hyderabad FC v. Nestor Jesus Gordillo Benitez, award of 21 September 2022

Panel: Mr Francesco Macri (Italy), Sole Arbitrator

Football
Termination of the employment contract without just cause by the club
Covid-19 as force majeure justifying termination of contract
Acceptance of an offer under Indian law

1. **According to the Bureau of the FIFA Council, whether or not a force majeure situation (or its equivalent) exists in the country or territory of a member association is a matter of law and fact, which must be addressed on a case-by-case basis vis-à-vis the relevant laws that are applicable to any specific employment or transfer agreement. Therefore, FIFA does not consider that the COVID-19 outbreak is a force majeure situation in any specific country or territory or that any particular employment or transfer agreement is affected by the concept of force majeure. FIFA only encourages the football's stakeholders to reach any possible agreement to ensure the mutual maintenance of their financial resources but states that COVID-19's effects should be assessed considering the national Law of the employment agreement and taking into account all the relevant circumstances.**

2. **According to Indian law, an "agreement" is a contract if it is made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and is not expressly declared to be void. Acceptance is thus, the second stage of completing a contract. An acceptance is the act of manifestation by the offeree of his assent to the terms of the offer. It signifies the offeree's willingness to be bound by the terms of the proposal communicated to him. To be valid an acceptance must correspond exactly with the terms of the offer, it must be unconditional and absolute and it must be communicated to the offeror.**

I. PARTIES

1. Hyderabad Football Club (the "Appellant" or the "Club") is a professional football club with its registered office in Mumbai, India. The Club is registered with the All India Football Association (the "AIFF"), which in turn is affiliated to the *Fédération Internationale de Football Association* (the "FIFA").

2. Mr Nestor Jesus Gordillo Benitez (the "Respondent" or the "Player") is a professional football player of Spanish nationality.

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

II. FACTUAL BACKGROUND

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

A. Background Facts

5. On 20 August 2019, the Parties concluded an employment contract (the *"Employment Agreement"* or the *"Contract"*) valid from 1 September 2019 until 30 April 2021 where the Player was obliged: *"to represent the [Appellant] in Competitions for the Term including but not limited to any league tournament, cup, friendly match or any other competition including the Super Cup or Pre Season in which the [Appellant] participates or sends the Player to participate, whether in India or abroad and the [Respondent] agrees to such engagement in each case in accordance with this Agreement".*

6. Attached to the Contract, the Parties also signed three annexes, namely the "Schedule 1" ("Player Fee and Other Facilities"), the "Schedule 2" ("General Provisions") and the "Schedule 3" ("Definitions and Interpretation").

7. According to the Schedule 1, the Parties agreed on the following seasonal salaries:

"1. Fee":

a) 2019-20 Season: USD 110,000 (one hundred and ten thousand US Dollars), net of withholding tax, payable in equal monthly instalments from September 2019 to May 2020, on the last day of every month;

b) 2020-21 season: USD 145,000 (one hundred and forty-five thousand US Dollars), net of withholding tax, payable in equal monthly instalments from August 2020 to May 2021, on the last day of every month.

8. According to Schedule 2, the Parties agreed that:

"Article 5.5 (Force Majeure): Subject to the other provisions of this Agreement, the failure by a party to fulfil any of its obligations under this Agreement shall not be considered to be a breach of, or a default under, this Agreement insofar as the inability arises from an event of Force Majeure, provided that the party affected by that event has taken reasonable precautions, has duly communicated the occurrence of the event to the other party, and has taken due care and attempted to mitigate the consequences of such event, all with the objective of carrying out the terms of this Agreement without delay. For the purposes of this Agreement, "Force Majeure" means an event or circumstance which is beyond the reasonable control of a party and which makes a party's performance of its obligations impossible and includes but is not limited

to…epidemics, acts of God, Court orders or governmental restrictions, acts and decisions of regulatory and sports authorities".

"Article 6 (Law and Dispute Resolution):

7.1[1] This Agreement shall be governed by and construed in accordance with Indian Law.

7.2 In the event a dispute arises between the Club and the Player regarding any other issue than termination, both parties agree to seek to resolve the dispute in good faith through a process of good faith negotiations and discussions.

7.3 If a dispute between the Club and the Player is not resolved within 10 days of the process contemplated in paragraph 7.2 then the dispute will be referred for solution to mediation under the relevant procedure set out in the League Rules (which form part of the Regulations). If a solution is not achieved within another 10 days of it being referred for mediation, the dispute shall be submitted to the FIFA Player Status Committee for adjudication.

7.4 All disputes relating to termination shall be referred to the FIFA Player Status Committee for adjudication directly without undergoing the process of the good faith negotiations and mediation referred to in paragraphs 7.2 and 7.3 unless both the Player and the Club mutually decide otherwise.

7.5 At any stage of the good faith negotiation process or the mediation process referred to in paragraphs 7.2 and 7.3 both the Player and Club can mutually agree to refer the matter to the FIFA Player Status Committee for an urgent decision and, in such circumstances the requirement for the 10 day windows for good faith negotiations and mediation under paragraphs 7.2 and 7.3 will not apply.

7.6 If is the dispute is not within the jurisdiction or scope of the FIFA Player Status Committee then it shall be referred to arbitration under a sole arbitrator appointed by mutual consent under the provisions of the Arbitration and Conciliation Act 1996 or any modification thereof then in effect. The Arbitration shall be in English and the seat and venue of Arbitration shall be Mumbai. Subject to the above, the Courts at Mumbai shall have sole and exclusive jurisdiction in respect of all matters addressed under this paragraph 7.6".

9. On 11 May 2020, the Club sent a letter to the Player, requesting him to accept *"an offer of 30 % of the total amount due for April and May 2020"* due to its financial crisis caused by COVID-19 pandemic. Later, on the same date, the Player rejected the Club's proposal, asking for the payment of the unpaid salaries from February to May 2020.

10. On 20 May 2020, the Club sent a notice (*"the Termination Notice"*) where it informed the Player that, due to the rapid spread of the pandemic and the consequent disruption of economic activities in India, the Club would be no more in a position to pay the outstanding salaries due to such force majeure event. Therefore, *"considering Force Majeure event due to COVID 19 with effect from March 2020"* the Club offered the Player the payment of USD 24,444 corresponding to February and March 2020 within the 31 May 2020, and a lump sum of USD 43,500 corresponding to 30% of the total due amount of USD 145,000 for the Season 2020-2021. With the same communication, the Club terminated the

[1] Numbering as in the original contract [ndr.].

employment contract with effects from 23.03.2020 *"as it has become physically or commercially impossible to fulfil the Agreement in the way it was designed and anticipated originally"*.

11. After receiving the notice, the Player informed the All India Football Federation (AIFF) about the Club's premature decision to terminate the contract and reported the Appellant's failure to comply with its contractual obligations.

12. On 1 June 2020, the AIFF PSC requested a status update on those outstanding payments. On 2 June 2020, the Club informed the AIFF PSC that it had attempted to engage in good faith negotiations and to arrive at an amicable solution concerning the overdue payables.

13. On 24 June 2020, the Player replied that the Club's proposal was not acceptable and that the due salaries until 30 April 2021 had not been paid: *"Your Club terminated the employment contract without just cause and made a ridiculous proposal to the Player in respect of his outstanding salaries and due compensation. Said good faith negotiations should be held prior to any termination whatsoever, not subsequently. No such continuous attempts from your end have existed"*.

B. Proceedings before the FIFA Dispute Resolution Chamber

14. On 7 July 2020, the Claimant lodged a claim before the FIFA Dispute Resolution Chamber (the "FIFA DRC") and requested the payment of the following amounts, plus 5% interest p.a. as from the due dates:

- USD 48,888 as outstanding remuneration at the time of termination of the Contract, for his salaries from February 2020 until May 2020 (i.e., 12,222*4);

- USD 226,025 as compensation, further detailed as follows:

  USD 145,500 as of the residual value of the Contract regarding the 2020-2021 season;

  USD 80,526 *"as six-monthly salaries under the specificity of sport due to the most abusive and discriminatory attitude displayed by the Club causing an irreparable harm to the Player"*.

- To impose a ban on the Club from registering new players for two consecutive registration periods and any other disciplinary sanctions deemed pertinent.

- To condemn the Club to provide the Player with the relevant tax certificates attesting the payment of the due taxes to the competent tax authorities in relation to all the contractual salaries and the granted compensation for the Contract termination without just cause.

15. On 22 July 2020, the Club replied to some previous messages of the Player's Agent stating that *"[it] have processed your salaries for the month of February, March, April and May 2020. Like our earlier attempts, we have always wanted to settle this issue amicably and worked towards setting this issue smoothly and would like to confirm to you that your pending salaries shall be credited in your account by 31 July 2020"*. With the same communication, the Club blamed the Player for his unprofessional behaviour in and off the pitch and asked again if he would accept 30% of

the total due amount for the 2020-2021 season as full and final settlement of the mutual contractual obligations.

16. On 1 August 2020, the Club filed its answer before FIFA DRC objecting to its competence in favour of the AIFF's Dispute Resolution Mechanism, which comprised *"independent members guaranteeing fair proceedings under Article 38 of the AIFF RSTP"*. As to the merits, the Club affirmed that, due to the COVID-19 pandemic, it *"had been unable to get necessary signatories to sign on relevant documentations, submit remittance forms to the banks specially required for international remittances on account of both the heavily impacting issues the Club had to deal with during the tough global times"*. In relation to the termination notice, the Respondent explained that it was superseded and hence null and void due to the achieved settlement between the Player's Agent and the Club. Therefore, the latter requested to dismiss the claim without any costs and/or sanctions. Further, it *"intends to continue its attempt to arrive at an amicable solution with the Player for the 2021 season which yet has to commence"*.

17. On 26 September 2020, the Parties exchanged communications about a possible dispute settlement to finalize between them.

18. On 29 September 2020, the Player's Agent wrote to the Club attaching an invoice of USD 5,500 in respect of an agreed commission owed to him. He informed the Club that the Player would have been available to withdraw the claim before FIFA and return to India, provided that the Club would have paid the agency fees, the salaries of August and September 2020 and issued the flight tickets to India for the Player.

19. On 30 September 2020, the Club acknowledged the availability of the Player to withdraw the claim before FIFA, as communicated by his Agent, and declared its intention to withdraw the effects of the Termination notice dated 20 May 2020. The Club also stated that the contractual agreement would have been reinstated.

20. On 10 October 2020, the Club sent a notice to the FIFA Player's Status informing that:

> *"1. All pending dues of the Player for the Season2019-20 have been paid and proof of the same has already been intimated to your office via our email dated 12th August 2020 on behalf of our Client Hyderabad […] 2. Further with regard to the Season 2020-2021 the Club and the Player have arrived at a settlement […] Consequently as agreed the Original Player Contract dated 20.08.2019 signed between the Club and Mr Nestor Gordillo Benitez with regard to the Season 2020-21 has been reinstated"*.
>
> Because of this, the Club requested the case file 20-009858 to be closed *"as no cause of action remains and we are honouring our settlement arrived with the Player"*.

21. On 3 November 2020, the Player's Counsel informed the FIFA Player's Status Department (the "PSC") and the FIFA Dispute Resolution Chamber (the "DRC") that: *"as per the Club having agreed to satisfy the Player's pending financial entitlements, and pending his reinstatement in full rights with the Respondent's A team, as a gesture of good will, the player has decided it will renounce to enforce the relevant FIFA Decision should say stance from the Club remain in place"*.

22. On 6 November 2020, the legal representative of the Player sent an email to FIFA and the Club stating the following *"In furtherance to the letter dated 3rd of November 2020 in respect of which we herein clarify, that the only settlement that has taken place between the parties is in accordance with the email dated 29.09.2020, the Club has fulfilled its obligations and the Employment Contract of the Player signed between the Parties on the 20th of August 2019 is still valid and binding in its original form as part of the settlement between the parties. Both the parties are bound by the terms and conditions of the Player Agreement dated 20th of August 2019. In view of the same the Player hereby withdraws the claim and decision against the Club"*.

23. On 9 November 2020, the legal counsel of the FIFA Players' Status asked the Parties to clarify their employment situation *"as from the alleged termination of the contract until today […]"*.

24. On 9 November 2020, the Club replied to the FIFA's letter stating that an agreement was concluded with the Player and *"the matter Ref. No. 20-00958 stands completely withdrawn by the Player as part of the settlement agreement and the Player Agreement dated August 20th 2020 has been reinstated and the Player is currently in employment with the Club on the original terms on the Player contract. Therefore, kindly confirm closure of the matter through your esteemed office"*.

25. On 11 November 2020 the Player informed FIFA that he received the due salaries until September 2020, but the Club failed to fulfil its agreed obligations, making him difficult to pursuing his sporting career, threatening and isolating him far from the A team. Therefore, the Player concluded that, left out the abovementioned payments: *"[…] everything further together with the relevant compensation such as any other entitlements due to the Player under the Employment Contract remaining fully due, whereas the coercion having been suffered by the Player even more reinforces our request for sporting sanctions and an additional head of compensation of six monthly salaries under the specificity of sport […]"*. Consequently, the Player amended his request for relief, asking for compensation in the total amount of USD 209,406, consisting of the residual salaries amounting to USD 116,400 net, plus the agency commission fee (USD 12,750) and the additional supplement of six-monthly salaries under specificity of sport (USD 80,526).

26. On 22 February 2021, after further exchange of communications and written submissions before FIFA in between the Parties, the Club informed FIFA that the Player entered in a new employment relationship with the Polish Club, Kaliski Kub Sportowy as of 30 January 2021 and requested this information to be taken into account.

27. On 26 February 2021, the FIFA DRC rendered its decision (the "Appealed Decision") (under the reference number 20-00959), with the following operative part:

1. *The claim of the Claimant, Nestor Jesús Gordillo Benítez, is admissible.*

2. The claim of the Claimant is partially accepted.

3. The Respondent, Hyderabad FC, has to pay to the Claimant, the following amount:

- USD 115,100 as compensation for breach of contract without just cause, plus 5% interest p.a. as from 7 July 2020 until the date of effective payment.

4. The Respondent shall provide a tax certificate to the Claimant.

5. Any further claims of the Claimant are rejected.

[…]

8. In the event that the amount due, plus interest as established above is not paid by the Respondent within 45 days, as from the notification by the Claimant of the relevant bank details to the Respondent, the following consequences shall arise:

1. The Respondent shall be banned from registering any new players, either nationally or internationally, up until the due amount is paid and for the maximum duration of three entire and consecutive registration periods. The aforementioned ban mentioned will be lifted immediately and prior to its complete serving, once the due amount is paid. (cf. art. 24bis of the Regulations on the Status and Transfer of Players).

2. In the event that the payable amount as per in this decision is still not paid by the end of the ban of three entire and consecutive registration periods, the present matter shall be submitted, upon request, to the FIFA Disciplinary Committee".

28. On 8 March 2021, the grounds of the Appealed Decision were communicated to the Parties, providing, *inter alia*, as follows:

- *"First of all, the Dispute Resolution Chamber (hereinafter also referred to as Chamber or DRC) analysed whether it was competent to deal with the case at hand. Taking into account the wording of art. 21 of the January 2021 edition of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (hereinafter: the Procedural Rules), the aforementioned edition of the Procedural Rules is applicable to the matter at hand.*

- *Subsequently, the Dispute Resolution Chamber referred to art. 3 par. 1 of the Procedural Rules and emphasised that, in accordance with art. 24 par. 1 in combination with art. 22 lit. b) of the Regulations on the Status and Transfer of Players, the Dispute Resolution Chamber is competent to deal with matters which concern employment-related disputes with an international dimension between players and clubs. As a result, the DRC would be, in principle, competent to deal with the present matter, which concerns a Spanish player and an Indian club.*

- *However, the Chamber acknowledged that the Respondent contested the competence of FIFA's deciding bodies as, according to the Respondent, the present matter shall be adjudicated by the Arbitration Tribunal of the AIFF. In relation to the above, the Chamber also deemed it vital to outline that one of the basic conditions that needs to be met in order to establish that another organ than the DRC can settle an employment-related dispute between a club and a player of an international dimension, is that the competence of the relevant arbitration tribunal, respectively national court, derives from a clear reference in, inter alia, the employment contract at the basis of the dispute.*

- *Therefore, while analysing whether it was competent to adjudicate the present matter, the Dispute Resolution Chamber considered that it should, first and foremost, analyse whether the employment contract at the basis of the present dispute actually contained a clear and exclusive jurisdiction clause in favour of the Arbitration Tribunal of the AIFF.*

- *After carefully examining the aforementioned clauses, the Chamber concluded that, undoubtedly, the parties agreed beforehand that the disputes arising from the aforementioned contract shall be settled before FIFA. As a result, the Chamber rejected the argument of the Respondent in this regard and confirmed that it is competent to deal with the present matter.*

- *[…] the Chamber noted that, on 6 November 2020, the legal representative of the player sent a confusing correspondence to FIFA, referring to a settlement agreement. The Chamber noted, however, that said possible settlement agreement was not provided.*

- *In this respect, the Chamber noted that, on 11 November 2020, the legal representative of the player went back on his words and denied the existence of any settlement, arguing that it was "misled".*

- *[…] The Chamber acknowledged that, indeed, the Claimant acted in a confusing manner. However, considering that no documentary evidence was provided concerning a possible settlement, the Chamber understood that there is no legal basis to assume that the claim was withdrawn […].*

- *[…] , the Chamber observed that the player lodged a claim before FIFA against the club for breach of contract without just cause, noting that the club terminated the contract on 20 May 2020 (with retroactive effect as of 23 March 2020) via a "Termination Notice".*

- *Conversely, the Chamber took note of the Respondent's position, according to which the aforementioned notice was "superseded".*

- *[…] the Chamber concluded that, de facto, it appears that the player never returned to the club after the notice of 20 May 2020. Hence, the Chamber considered that the contract was terminated as of said date, regardless of its presumed retroactive effects.*

- *This being established, the Chamber went on to examine whether the Respondent would have had a just cause to terminate the contract as of 20 May 2020.*

- *[…] the Chamber was eager to emphasise that only a breach or misconduct which is of a certain severity justifies the termination of a contract. 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 ensure 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 only ever be an ultima ratio measure.*

- *In relation to said principle, the Chamber analyzed the contents of the letter of 20 May 2020, and noted that the Respondent fundamentally grounded its decision on the basis of force majeure and the outbreak of the COVID-19 pandemic.*

- *However, in relation to said letter, the Chamber first of all observed that the Respondent had unilaterally terminated the contract on 20 May 2020, without any prior indication or warning towards the player. What is more, the Respondent did not undertake any attempt to find an amicable solution with the player, and rather unilaterally terminated the contract with the player form the one day to the other.*

- *[…] regardless of the question whether the Claimant or the Respondent was to be held responsible for the effects of the COVID-19 pandemic on the contract, the Chamber was of the firm opinion that the Respondent, since such circumstance, in this particular situation could not legitimately be considered as being severe enough to justify the termination of the contract […].*

- *On account of all the abovementioned considerations, the Chamber decided that the Respondent had no just cause to unilaterally terminate the employment relationship between the Claimant and the Respondent and, therefore, concluded that the Respondent had terminated the employment contract without just cause on 20 May 2020. Consequently, the Respondent is to be held liable for the early termination of the employment contact without just cause.*

- *In this context, the Chamber outlined that, in accordance with said provision, 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 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.*

- *[…] in order to evaluate the compensation to be paid by the Respondent, the members of the Chamber took into account the remuneration due to the Claimant […] In this respect, the Chamber pointed out that at the time of the termination of the employment contract on 20 May 2020, the contract would run until 30 April 2021. Consequently, taking into account the financial terms of the contract, the Chamber concluded that the remaining value of the contract as from its early termination by the Respondent until the regular expiry of the contract amounts to USD 145,000 (season 2020-2021, cf. point I.2 above) and that such amount shall serve as the basis for the final determination of the amount of compensation for breach of contract.*

- *In continuation, the Chamber remarked that following the early termination of the employment contract at the basis of the present dispute, the Claimant was not able to find new employment. As a result, no further amounts will be deducted from the compensation the player would be entitled to.*

- *Nevertheless, the Chamber noted that the player acknowledged that the Respondent subsequently paid him the amounts of USD 29,900.*

- *In view of all of the above, the Chamber decided that the Respondent must pay the amount of USD 115,100 (i.e., 145,000-29,900) to the Claimant as compensation for breach of contract without just case, which is considered by the Chamber to be a reasonable and justified amount as compensation.*

- *In addition, taking into account the Claimant's claim and the longstanding jurisprudence of the Chamber in this respect, the Chamber decided to award the Claimant interest of 5% p.a. as of the date of the claim.*

- *Furthermore, the Chamber examined the Claimant's request, to be awarded with 5% over the full employment contract in accordance with clause 5.7 of the schedule 2, i.e. USD 12,750.*

- *However, after duly examining the aforementioned contract, the Chamber considered that said amount was not due to the player, and consequently decided to reject this part of the claim.*

- *Besides, the Chamber also took note of the Claimant's request to be provided with his tax certificate. In this regard, the Chamber noted that art. 7 par (b) of the contract stipulated that the club shall "provide the Player with copies of all the Regulations (…) and any other rules/regulations which affect the Player and of the terms and conditions of any policy of insurance in respect of or in relation to the Player with which the Player is expected to comply.*

- *Hence, in accordance with the aforementioned stipulation, the Chamber established that the Respondent shall provide the player with his tax certificate".*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

29. On 26 March 2021, the Club filed a Statement of Appeal with the Court of Arbitration for Sport ("CAS") against the Appealed Decision, in accordance with Articles R47 and R48 of the CAS Code of Sports-related Arbitration (the "CAS Code"). In its submission, the Club requested that a Sole Arbitrator be appointed according to Article R50 (1) of the CAS Code. Furthermore, the Club asked for disclosure of documents from FIFA and the Player as detailed in its submissions.

30. On 6 April 2021, the Player informed the CAS Court Office that he disagreed with the appointment of a Sole Arbitrator and objected the Club's request for the disclosure of some documents from FIFA and the Player himself.

31. On 8 April 2021 FIFA informed the CAS Court Office that it renounced intervening in the ongoing proceedings between the Club and the Player.

32. On 16 April 2021, the CAS Court Office informed the Parties that the Deputy Division President had decided to refer the matter to a Sole Arbitrator.

33. On 14 May 2021, in accordance with Article R54 CAS Code, and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Arbitral Tribunal appointed to decide the present matter would be constituted as follows:

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

34. On 3 June 2021, the Cas Court Office requested that FIFA provide case file no. 20-00959 and clarify if there was another case with the same Parties and object of an alleged procedure under reference number 20-00958. By the same communication, the Player was invited to provide a copy of the employment contract with the Polish Club, Kalisz KS Sportowy.

35. On 15 July 2021, FIFA provided the CAS Court Office with the case file before DRC, including a letter from FIFA to the Parties dated 14 January 2021 where it was stated: *"Within this context, we would first wish to clarify that the reference number of the present matter is 20-00959. Any other reference number is the result of a typographical error. We regret any confusion in this respect"*. The same content was confirmed by FIFA with the following communication dated 5 August 2021, where this was stated: *"There has been no other decision rendered in the proceeding 20-00959, apart from the one appealed"*.

36. On 26 August 2021, the Club filed its Appeal Brief in accordance with Article R51 CAS Code.

37. On 15 October 2021, the Player filed his Answer in accordance with Article R55 CAS Code, asking the Club, *inter alia,* to provide the tax certificates in connection with all the sums paid to the Player upon the employment contract. In this regard, on 16 December 2021, the Club provided a Tax payment receipt for the deposit of the withholding tax of the Club's foreign players for the assessment year 2020-2021.

38. On 25 October 2021, upon being invited by the CAS Court Office to express their views, the Player informed the CAS Court Office about its preference for a hearing, whereas the Club replied that it did not deem it necessary to hold a hearing.

39. On 5 November 2021, the CAS Court Office informed the parties that the Sole Arbitrator had decided to hold a hearing, in accordance with Article R57 of the Code.

40. On 9 February 2022, the Club and the Player returned duly signed copies of the Order of Procedure to the CAS Court Office.

41. On 10 February 2022, a hearing by video conference was held. At the outset of the hearing, both parties confirmed that they had no objection to the constitution and composition of the Panel.

42. In addition to the Sole Arbitrator and Ms Sophie Roud, Counsel to the CAS, the following persons attended the hearing:

For the Appellant:

- Mr Hemant Phalpher, Counsel;
- Ms Jaya Phalpher, Counsel;

For the Respondent:

- Mr Nestor Jesus Gordillo Benitez, Player;
- Mr Alfonso Leon Lleo, Counsel
- Mr Pedro Guilherme da Mota Dutra, Counsel;
- Mr Miguel Recio de Mu, Counsel;
- Mr Xenia Campàs Gené, Counsel.

43. The Sole Arbitrator heard evidence from Mr Sujay Sharma, Director at Hyderabad F.C., summoned by the Respondent. The Sole Arbitrator invited the witness to tell the truth subject to the sanctions of perjury under Swiss Law. Both parties and the Sole Arbitrator had the opportunity to examine and cross-examine the witness in person, such as the Player attending the hearing.

44. The parties were afforded ample opportunity to present their case, submit their arguments and answer the questions posed by the Sole Arbitrator. Before the hearing was concluded, both parties expressly stated that they did not object to the procedure adopted by the Sole Arbitrator and that their right to be heard had been respected.

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

IV. SUBMISSIONS OF THE PARTIES AND REQUESTS FOR RELIEF

A. The Appellant

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

As to the facts:

- The COVID-19 pandemic severely impacted the world football system, affecting all the Clubs' financial planning and causing a remarkable decrease in revenues. On 23 March 2020, the Government of India imposed a national lockdown, which worsened the Club's weak financial situation.
- Due to its alleged disruption, the Club tried to reach a settlement with the Player regarding his unpaid salaries, offering him the payment of the outstanding amounts due up to March 2020 and the 30% of the contractual remuneration agreed for the following football season, i.e. 2020/2021.

- Since the Player refused the Club's settlement proposal, the Club had no other chance than terminate the Contract based on the force majeure clause inserted in the employment agreement, affirming that the COVID-19 pandemic constituted one of the events listed in Article 5.5. of the Contract: *"epidemics, government restrictions and actions, acts and decisions of regulatory and sports authorities"*, among other scenarios.

- The Club also maintained the same position before the judicial bodies of AIFF when such Federation asked for clarifications about the Player's outstanding salaries. In this regard, the Club stated that it tried to find an amicable solution in good faith, which was not possible due to the steadfast refusal of the Player.

- During July 2020, the Club and the Player's Agent, Mr Fernando Gomez, exchanged some WhatsApp messages where the second submitted a new settlement proposal, asking for the payment of the entire outstanding amounts for the 2019-2020 season and the extension of the Contract for two more years with the requested season salaries therein. The Club was happy with such Player's attitude, but it had to deny the proposal of the Player given its aggrieved financial situation.

- Despite these new contacts, the Player surprisingly filed a first claim before FIFA DRC under the reference number 20-00958, asking for compensation as detailed. The Club stated that all the due salaries would have been paid within the deadline granted by AIFF, i.e., 31 July 2020.

- As the Club paid the unpaid salaries on 7 August 2020, the Parties started new negotiations for maintaining their contractual relationship for the 2020-21 football season. In this regard, the Player's Agent confirmed that the claim before would have been withdraw: *"subject to August and September 2020 salaries and being provided the relevant flight tickets to return to Hyderabad we confirm the claim before the FIFA judicial bodies will be withdrawn and Nestor's employment contract with yourselves will be again fully valid"*.

- Following the Agent's statement, the Club informed the Player that the termination notice was withdrawn, and the contract reinstated. Moreover, the Club confirmed that it would pay the salaries for August, September and October 2020, also preparing the needed documents for the transfer of the Player to India. Consequently, on 10 October 2020, the Club notified FIFA of the settlement and asked to close the proceedings no. 20-00958 *"as no cause of action now remains […]"*.

- After the Player's return to India, new quarrels arose between the Parties, since the Player's Agent accused the Club of contravene the reached agreement, not paying the October 2020 and not joining the Player with the first team. The Club rejected these new allegations, and eventually, the Player's counsel informed FIFA to consider the claim not withdrawn.

- Following the content of this notice, FIFA asked the Parties new information about the dispute with a different reference number, i.e., 20-00959. In response to that

request, the Parties stood on opposite positions: the Player filed for new and further claims whereas the Club stated that the Player breached the agreed settlement.

As to the merits:

- The Club complains about the FIFA DRC's decision since, due to the financial disruption caused by COVID-19 pandemic, it acted lawfully and reasonably. Namely, (i) it tried to reach a concrete and amicable solution with the Player, (ii) it offered a reasonable deduction of the agreed salaries for the 2020-2021 season up to 30%; iii) it terminated the contract under the force majeure clause stipulated in the employment agreement.

- Moreover, the Player accepted the Club's proposal for variation of the 2020-2021 season salary since it did not reply to such an offer, only rejecting the sole proposed settlement for the 2019-2020 season.

- In any case, a settlement agreement was reached between the Parties and the Player's claim shall be considered withdrawn and the employment contract reinstated. On this basis, the Player, was barred from reiterating his requests for relief and, at most, he should have lodged a new claim before FIFA DRC.

- Those requests for relief were contrary to (i) the doctrine of estoppel under Indian Law, (ii) the SCC and Swiss law, (iii) the principle of *venire contra factum proprium*, and (iv) CAS and Swiss Federal Tribunal jurisprudence. Moreover, the Player's conduct violated the principle of *pacta sunt servanda.*

- The Club did not have any duty in training and fielding the Player with the first team. Besides, the Player was included in the reserve team's training camp in Calicut where it was found that his fitness was not up to the standard of even the reserve team.

- The Player's notices for the payment of November and December 2020 did not comply with the payment's terms as agreed in the employment agreement. Therefore, the Player breached the contract and left India, and the Club, without just cause.

- Even if the Player was entitled to receive compensation, the amount payable should be lower than that awarded in the Appealed Decision. Namely, the Club paid 100% of the due salaries for the 2019-20 season and 100% of his salary from August to October 2020 of the relevant season.

- Consequently, as of January 2021, the Player had four months left on the employment contract; considering the value of the new contract with the Polish Club Kalisz, i.e., USD 13,428.28, the remaining amount due to the Player had to be calculated as USD 88,071,72.

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

"Primarily:

a. Set aside the Appealed Decision; and

b. Determine that the Respondent terminated the contract without just cause in January 2021. As such, the Appellant is not required to pay any compensation to the Respondent whatsoever;

In the alternative:

c. In the event that the Appellant is required to pay compensation to the Respondent, reduce the amount awarded in the Appealed Decision (i) entirely, or (ii) significantly, to an amount the Sole Arbitrator considers reasonable taking into account:

- *The Respondent's bad faith in failing to abide by the terms of the settlement agreed to between the Parties;*
- *The Respondent's bad faith in misleading FIFA;*
- *The Respondent's termination of the reinstated Contract without just cause, by leaving India/the Appellant in January 2021 with no notice; and*
- *The Respondent's mitigation of losses, due to amounts earned under the contract with Kalisz.*

In any event:

d. Order the Respondent to bear the costs of the arbitration, in accordance with Article R64 of the CAS Code; and

e. Order the Respondent to make a contribution to the legal costs incurred by the Appellant, in an amount to be determined by the Sole Arbitrator".

B. The Respondent

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

- The Player was forced to file his claim before FIFA DRC after receiving an unacceptable proposal from the Club to pay a reduced amount of salary for the season 2019-2020 and only 30% of due remuneration for season 2020-2021. The Club terminated the contract without just cause and shortly after tried to enter in a negotiation with the Player regarding hi outstanding salaries: this was an unlawful behaviour and, in any case, no settlement was reached with the Club.

- More specifically, according to FIFA guidelines, COVID-19 pandemic cannot be considered a force majeure event. The DRC treated the topic on a case-by-case basis, and namely, in the present matter, the DRC considered in the appealed decision that, *"regardless of the question whether the Claimant or the Respondent was to be held responsible for the effects of the COVID-19 pandemic on the contract"*, the situation could not legitimately be considered as being severe enough to justify the termination of the contract. The DRC considered that the Club had much more lenient measures to take, such as a temporary amendment of the salary or a temporary suspension of the contract, to find a solution for the circumstances occurred from March 2020.

- At the moment of the notice of termination of the contract by the Appellant, there was no public information available stating that the football season 2020-2021 was withheld in India. Hence, the Club had no reason to prematurely announce the contract's termination, considering that the season 2020-2021 of the Indian Super League was played in full.

- The Club had the duty to undertake good faith efforts to find a reasonable and proportionate settlement. Conversely to these guidelines, the Club's proposal to accept only 30% of the due salaries was unfair and unacceptable. The fact that, after the filing of the claim before the FIFA DRC, the Club offered the Player to maintain the contract at the same previous conditions (without any reduction) confirmed that the Club had the means to comply with its contractual obligations since the very beginning and the alleged financial restrictions were merely an attempt to circumvent the Player's will.

- The Player never accepted the proposed variation regarding the salaries for the 2020-2021 season as he never expressed whatsoever availability. When the Player rejected the proposal for the 2019-2020 season, it was obvious that such refusal was referred to the whole proposal since that offer needed to be entirely accepted according to Articles 1 and 3 of the Swiss Civil Code.

- The Club negotiated in bad faith and did not respect the declared promise to satisfy in full the employment contract as requested by the Player, which consequently was forced no to withdraw the filed claim before the FIFA DRC. Notably, the Club showed its bad faith since: i) after his return to India, the Player was put aside by the Club, which chose not to bring him to Goa with the first team; ii) no training plan was given to him; iii) he was excluded from the WhatsApp Messenger group of the team; iv) he was forced to train with juvenile kids not even under contract with the Club; v) he was not being paid; vi) he was isolated thousands of kilometers away from the first team and not being treated at all as professional football players.

- The Player was legitimate to reinstate the claim before the FIFA DRC since the withdrawal was conditioned to the Club respecting the settlement. Since the Club refused to reinstate the player in its A team and pay him in full, the claim was still valid and shall be considered an existing matter in the 9 par. 4 article of the FIFA Procedural Rules. Furthermore, the FIFA DRC asked for new information about

the Player's employment situation, and the Club never objected that such proceedings be considered closed.

- The Player was unlawfully relegated to the Club's juvenile team in Calicut, allegedly because his fitness results were not up to the standard of the first team. In this regard, he was never informed of his fitness results by the Club and such documents were untrustworthy. Conversely, the Player was not being paid, was not registered in the A-team, could not take advantage of proper training facilities, and was forced to train with a juvenile team, among which many players were not even under contract with the Club. Consequently, his claim before FIFA was fully justified and also monthly salaries of October and November 2020 were due.

- The Player left India with just cause, noticing the Club more than once about his requests. Consequently, he was legitimate to sign a new contract with the Polish Club Kaliski Kub Sportowy, also according to clause 1.4 of Schedule 2 of the employment contract, regarding the Club's breach of obligations.

- The Player is entitled to receive the tax certificates related to the Club's payment for season 2019-2020 together with the agreed remuneration for season 2020-2021, which was USD 145,000 net, plus the 5% agency commission fee for USD 7,250, totally amounting at USD 152,250.

- Such amount shall be partially reduced according to the new employment contract signed with Kalisz stating that the overlapping remuneration amounted at EUR 8,625,00.

- Furthermore, according to Article 17 of the FIFA RSTP, the Player was entitled to receive an additional compensation between three- or six-monthly salaries (in case of egregious circumstances). Therefore, considering the sums previously paid by the Club, the Player stated that he would have been entitled to receive an overall compensation between USD 143,651 NET and USD 187,151 NET. Regrettably, he submitted that he did not have the financial means to appeal the FIFA DRC decision to ask for a higher due amount.

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

  i. To confirm in full the FIFA decision;

  ii. To order the Appellant to assume the entirety of the CAS administration and procedural fees;

  iii. To order the Appellant to contribute with at least CHF 20,000 (twenty thousand Swiss Francs) to the legal fees the Respondent has been forced to incur.

V. JURISDICTION

48. The jurisdiction of CAS, which is not disputed, derives from Article 57 (1) FIFA Statutes (2021 Edition), as it determines that *"[a]ppeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question"*, and Article R47 CAS Code which reads: *"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide […]"*. The jurisdiction of CAS is not contested and is further confirmed by the Order of Procedure duly signed by both Parties.

49. Furthermore, Article 7.3 of the Employment Agreement between the Parties provides *"[…] If a dispute between the Club and the Player is not resolved within 10 days, of the process contemplated in paragraph 7.2 then the dispute will be referred for solution to mediation under the relevant procedure set out in the League Rules (which form part of the Regulations). If a solution is not achieved within another 10 days of it being referred for mediation, the dispute shall be submitted to the FIFA Player Status Committee for adjudication.*

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

VI. ADMISSIBILITY

51. The Appeal was filed within the deadline set by Article 58 (1) FIFA Statutes on 26 March 2021. The Appeal complied with all other Article R48 CAS Code requirements, including the CAS Court Office fee payment.

52. It follows that the Appeal is admissible.

VII. APPLICABLE LAW

53. The Club states that FIFA regulations apply to the dispute. Pursuant to Article 7.1 of the contract, Indian Law principles of contractual interpretation apply if needed. The Player submits that the Sole Arbitrator shall decide in accordance with Article R58 CAS Code dispute according to the FIFA regulations and Swiss Law subsidiarily.

54. Article R58 CAS Code provides as follows:

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

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

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

56. Article 6 of the Employment Contract (Law and dispute resolution) provides as follows:

"7.1 This agreement shall be governed by and construed in accordance with Indian Law.

7.3 If a dispute between the Club and the Player is not resolved within 10 days, […] If a solution is not achieved within another 10 days of it being referred for mediation, the dispute shall be submitted to the FIFA Player Status Committee for adjudication.

7.4 All disputes relating to termination shall be referred to the FIFA Player Status Committee for adjudication directly without undergoing the process of good faith negotiations and mediation referred to in paragraphs 7.2. and 7.3 unless both the Player and the Club mutually decide otherwise".

57. In view of the choice of the Parties, the Sole Arbitrator acknowledges and shares the findings of the FIFA DRC that, in principle, the Parties agreed to refer their dispute to the FIFA judicial bodies; therefore, the Sole Arbitrator finds that the Parties accepted the applicability of Article 57 (2) FIFA Statutes. In accordance with this provision, the regulations of FIFA are primarily applicable (as to the date when the claim was lodged, FIFA RSTP January 2020 edition applies); if necessary, additionally, Swiss Law. Indian Law should be applied to enforce those provisions regarding employment relationships if needed.

VIII. MERITS

A. The Main Issues

58. Firstly, the Sole Arbitrator wishes to underline that, despite the occurred confusion with the FIFA reference numbers, FIFA itself clarified two times (on 14 January 2021 and on 5 August 2021) that only one case file was opened in connection with this dispute (and only one decision was rendered), and that was the one following the claim of the Player on 7 July 2020 with the reference number 20-00959.

59. FIFA further confirmed this with its letter dated 14 January where a further investigation was requested: *"after an analysis of the correspondence remitted by Hyderabad FC, we understand that further investigation is necessary in order to submit a full and complete file to the consideration of the Dispute Resolution Chamber".*

60. Considering the above and the understandable clarifications requested by the Appellant, the Sole Arbitrator finds that the FIFA DRC set up only one file case in the dispute between these Parties, and these proceedings were never declared closed by FIFA until the issuing of the Appealed Decision.

61. Therefore, the Sole Arbitrator deems that he is bound to examine the merits of the Appealed Decision with reference no. 20-00959 and assess whether such a decision needs to be confirmed or set aside.

62. This having stated, the main issues to be resolved by the Sole Arbitrator are:

i. Did the Club have just cause to the terminate the employment contract with the Player as a consequence of COVID-19 pandemic?

ii. Was the employment contract amended or reinstated between the Parties after the Club's notice of termination?

iii. If not, what are the consequences thereof?

i. Did the Club have just cause to the terminate the employment contract with the Player as a consequence of COVID-19 pandemic?

63. The Sole Arbitrator observes that the core of these proceedings centres around whether the Club had just cause to terminate the contract with the Player on 20 May 2020 due to its alleged financial crisis caused by COVID-19 pandemic. Conversely, if that contract was never reinstated between the Parties in the following months.

64. The Employment Agreement's validity is not in dispute, nor is the total amount of salaries thereto agreed by the Parties. The Club submits that it was entitled to terminate the contract on 20 May 2020 due to the COVID-19 pandemic. The FIFA DRC decided that *" […] the Respondent fundamentally grounded its decision on the basis of force majeure and the outbreak of the COVID 19 pandemic […] but […] had no just cause to unilaterally terminate the employment relationship […]"*. Moreover, the FIFA DRC considered that the contract was never reinstated between the Parties and therefore awarded the Player with the sum indicated in the Appealed Decision.

65. Therefore, the Sole Arbitrator shall examine the content of the letter dated 20 May 2020 (*"Invocation of Force Majeure due to Covid 19 Pandemic as Declared under the National Disaster Act, 2005 and Consequent Termination of the Player Agreement"* dated August 20, 2019) that *inter alia* stated:

> *"As you know that there is a National Emergency not just in India but also globally due to the massive spread of Covid19/ Coronavirus. The massive spread of the virus has led to a complete lockdown of all businesses in India. Very few businesses which are essential in nature have been allowed to do their business by the Government of India ("GOI"). The GOI has issued various circulars and orders during the course of this lockdown and National Emergency.*
>
> *[…]*
>
> *To mention a few relevant ones Additionally, you may also note the following developments, which clearly indicate that COVID-19 has been recognised and considered as a natural calamity / Force Majeure Event:*

[…]

In view of the force majeure event from 24.03.2020, Hyderabad FC will not be in a position to pay you your entire fees as intended under our Agreement originally termed till April 2021 as the club is unable to operate any business or generate revenues during these months of global and national emergency and a complete lockdown of business for reasons beyond our control. Under the terms of our agreement - epidemic, government orders and restrictions are defined as part of the Force majeure Clause and neither of the non-performance of the obligations in such force Majeure conditions can be considered a breach or default under the Agreement as well as in light of the various Emergency Orders and Notifications issued by the Government of India.

[…]

Considering Force Majeure event due to COVID 19 with effect from 24 March 2020 we offer to put to rest all our impending dues and obligations:

a. Dues till March 2020 – Your balance amount for the month of February 2020 and March 2020 amounting to a total of USD 24,444 will be paid to you within 10 working days from the last date of the lockdown i.e. 31.05.2020 unless and otherwise extended by the GOI or the state of Telangana.

b. For the 2020 - 21 season – We would be giving you 30 % i.e. USD 43,500 only, of the total amount of USD 1,45,000 as full and final settlement payable to you by 31 August 2020.

Kindly also treat the current notice as a Termination Notice of the said Agreement w.e.f. 23.03.2020".

66. The Club argues that the COVID-19 outbreak was a *force majeure* situation for all the football clubs, excessively damaging their financial means. Nevertheless, the Sole Arbitrator stresses that the Club failed to prove how much the pandemic affected its revenues, simply declaring its financial crisis without submitting any proof of that status. In this regard, the decision of the AIFF Appeals Committee Decision, dated 20 July 2020, confirms that the Club was simply late in complying with the PSC's decisions rendered in the disputes towards other players and coaches, without any explanation about the reasons of such non-fulfilment.

67. The Sole Arbitrator finds that the Club stands its position on the new regulations issued by both FIFA and UEFA to support all football stakeholders in making it through such hardships and recovering from all their financial losses due to the pandemic, and on the statement of the Government of India (the "GOI"), dated 19 February 2020, about considering COVID-19 as a *"natural calamity"* and a possible *"force majeure event"*.

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

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

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

(iii) Where:

a. clubs and employees cannot reach an agreement, and

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

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

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

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

b. the economic situation of the club

c. the proportionality of any contract amendment

d. the net income of the employee after contract amendment

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

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

70. The COVID-19 FAQ provided the following clarification:

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

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

71. What is more, the Bureau of the FIFA Council did not determine that the COVID-19 outbreak was a force majeure situation in any specific country or territory or that any particular employment or transfer agreement was affected by the concept of force majeure:

"whether or not a force majeure situation (or its equivalent) exists in the country or territory of an MA is a matter of law and fact, which must be addressed on a case-by-case basis vis-à-vis the relevant laws that are applicable to any specific employment or transfer agreement".

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

73. This having stated, the Club states that, under Indian Law, the COVID-19 pandemic should trigger the Force Majeure clause contained in the employment contract and quotes some decisions of the Indian Courts in this regard.

74. Contrary to the Appellant's position, the Sole Arbitrator finds that on 19 February 2020 the Ministry of Finance of the GOI provided an Office Memorandum where it was stated that the application of the Force Majeure clause was not automatically applicable, and it could be invoked as a case of *"natural calamity […] following the due procedure as above"*. Moreover, this was submitted:

"[…] an FM clause does not excuse a party's non-performance entirely, but only suspends it for the duration of FM. The firm has to give notice of FM as soon as it occurs an it cannot be claimed ex-post facto".

75. While it must be stressed that such provision does not consider Force Majeure as a cause of termination of the contract, rather sufficient to determine the suspension of the agreed obligations, the Sole Arbitrator points out that the Club, on 11 May 2020, offered a settlement to the Player on very undefined, and therefore unacceptable, deadlines: "[for the 2019-2020 season] *the offered 30% amount will be payable to you by 31 July 2020 or at the time when the situation gets normal, whichever is later. For the 2020-21 season, […] the payment may be worked out mutually considering the situation after lockdown gets over in India and the start of the football season in India".* As the Player rejected such an offer on the same date, the Club did not try to enter into further negotiations but terminated the contract shortly after, as of 20 May 2020, simply modifying and offering a defined payment date of the exact previously provided amounts.

76. In this regard, the Sole Arbitrator finds that the Club, which carried the burden of proof according to Art. 12 par. 3 of the FIFA Procedural Rules, failed to prove whether or not the COVID-19 pandemic affected its financial means, as stated by CAS jurisprudence: *"Article R51 para. 1 of the Code provides that in the appeal brief an appellant has to submit the facts and legal arguments giving rise to the appeal, together with all exhibits and specification of other evidence upon which he intends to rely; Article R55 para. 1 of the Code provides a similar duty of a respondent. This is in line with the generally accepted principle that each party must provide evidence for any fact which supports its notions. This is set out, for instance, in Article 8 of the Swiss Civil Code"* (CAS 2013/A/5216). Therefore, the Player was right to refuse such a proposal.

77. For the avoidance of any doubt, the "Termination Notice" on 20 May 2020, as this was the subject of such communication, cannot be considered as a further Club's attempt to enter into negotiations with its counterparty but rather a final statement without any possible reply from the Player.

78. With this in mind, the Sole Arbitrator shares the FIFA DRC's reasoning that this case should not be assessed under a *force majeure* situation, and the Club was not entitled to vary the employment contract terms unilaterally, nor the agreed salaries under the National Law. Additionally, considering that the season 2020-21 of the Indian Super League (in which Hyderabad took part) was played in full, it can be stated that there would have been more lenient measures to be taken than the termination of the contract.

79. Therefore, the Club had no just cause to terminate the employment relationship on the date mentioned above, and it cannot invoke any exemption from its contractual obligations from the outbreak of the COVID-19 pandemic, bearing the entire risk in connection with it.

ii. Was the employment contract amended or reinstated between the Parties after the Club's notice of termination?

80. The Sole Arbitrator now turns his attention to the chain of exchanged communications and negotiations between the Parties after the claim was filed before FIFA DRC, to ascertain if such events somehow affected the employment relationship amending or reinstating it.

81. Firstly, the Club submitted in its Appeal Brief that *"the Respondent's silence in relation to the Appellant's proposal for the 2020-21 season amounted to an acceptance of the variation of the Contract. Therefore, he was unable to claim the 2020-21 season salaries in the FIFA Claim" […]" In fact, in explicitly rejecting the Appellant's proposal for a full and final settlement for the 2019-20 season, the Respondent tacitly accepted the proposal for the 2020-21 season"*. The Sole Arbitrator finds that this interpretation submitted by the Club cannot be accepted as the Player rejected the proposal for season 2019-2020, without expressing any intention about the remaining part of the Club's offer: this lack of statement from the Player probably should be interpreted as a refusal of the entire offer of the Club, but surely it cannot be considered as an acceptance.

82. It is a general principle under Swiss Law that an agreement is concluded as the Parties manifestly express their will: *"the contract is perfectly concluded when the parties mutually and concordantly manifested their will"* (Article 1 of the Swiss Civil Code of Obligations, "SCO").

83. The Indian Contract Act, 1872, Section 1, shares the same principles according to Article 7 *"Acceptance must be absolute. In order to convert a proposal into a promise, the acceptance must 1) be absolute and unqualified; 2) be expressed in some usual and reasonable manner […]"*. The Player's silence on that issue cannot be otherwise considered as Indian scholars affirmed: *"An "agreement" is a contract if 'it is made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and is not expressly declared to be void'. Acceptance is thus, the second stage of completing a contract. An acceptance is the act of manifestation by the offeree of his assent to the terms of the offer. It signifies the offeree's willingness to be bound by the terms of the proposal*

communicated to him. To be valid an acceptance must correspond exactly with the terms of the offer, it must be unconditional and absolute and it must be communicated to the offeror" (www.netlawman.co.in).

84. Therefore, lacking an explicit declaration of the Player's will to do so, it cannot be stated that the Player did accept the lower Club's offer for the season 2020-2021.

85. Moreover, the Club argues that, by some exchange communications in November 2020, the Parties entered into a settlement upon which the employment contract was reinstated, and the Player unlawfully asked FIFA to insist on its requests for relief before FIFA.

86. Between September and November 2020, the Parties exchanged some communications, by which it can be inferred that they agreed to reinstate the former contractual obligations if the Club would have paid the Player in full, together with the agency fee to the Player's Agent, Mr Fernando Gomez Parras (the "Agent"), and re-joined him with the A-Team in India. In this regard, on 29 September 2020, the Agent stated the following:

> *"Dear Sujay, find herein attached the invoice request from my side in the amount of USD 5,500. Subject to its payment and payment to Nestor of August and September 2020 salaries and being provided the relevant flight tickets to return to Hyderabad we confirm the claim he filed before the FIFA judicial bodies will be withdrawn and Nestor's employment contract with yourselves will be again fully valid".*

On 30 September 2020, the Club provided this response:

> *"Dear Fernando,*
>
> *Thank you for the confirmation to withdraw the claim before the FIFA DRC and for sending the invoice of the Agency Agreement. The Agent Fee of $ 5500/ shall be paid within 2 weeks as per our agreement.*
>
> *We hereby as agreed between us withdraw the Termination Notice dated 20.05.2020 sent to Mr Nestor Jesus Gordillo Benitez. Mr Nestor Jesus Gordillo Benitez is contracted with the Club as per the Player Contract dated 20.08.2019 signed […].*
>
> *As per the current COVID 19 situation in India and the strict restrictions on travel to India from abroad, the flight tickets and visas can only be done once the Government gives clearance for the same. As soon as it is possible, we shall arrange for the VISAS and Flight Tickets to Hyderabad for Nestor".*

On 1 October 2020, this was replied by the Agent:

> *"Dear Sujay thank you again for everything, we hope that soon the whole situation about Covid will normalize, we await documentation and tickets, when possible, a greeting".*

87. On 10 October 2020, although the Club was eager to communicate to FIFA that it withdrew its termination notice, the same availability and intention to settle the dispute could not be found by the Player. Despite the confusing content of the letter sent on 6

November 2020, the Player showed his disappointment for the Club's decision to relegate him to a different location from the A-team once he returned to India.

88. On 5 November 2020, this was stated by the Player's counsel: *"Dear Sujay […] your most esteemed club shall immediately as agreed reinstate in full the Player with the rest of his teammates and cannot be put on a different location isolated, while he will get the full training program, assistance from the coaches and rest of the clubs employees, players and staff will no longer be prohibited from interacting with him".*

89. The Player's intention was further clarified by his following communication to FIFA on 11 November 2020, through which he complains about being deceived by the Club and states that *"no any settlement agreement whatsoever was concluded. Negotiations were indeed ongoing and that is indeed why the Player was misled by the Respondent in flying to India"*. By the following communications, the Player also claimed his unpaid salaries for November and December 2020 and repeatedly complained about his situation in India, as joined incomprehensibly with a juvenile team in Calicut.

90. Considering the above, the Sole Arbitrator stresses that neither a settlement agreement was found between the Parties, nor, at least, they did agree on the same conditions to settle the dispute as to the Player, from the very beginning after his return to India, began to complain about the Club's failure to respect the agreements reached. Therefore, being already terminated the contract, the Player was not obliged to file a new claim towards the Club, rightly maintaining the previous one before the FIFA DRC.

91. In this regard, the Sole Arbitrator is satisfied in interpreting the will of the Parties accordingly to the provision of Article 18 of the SCO:

"When assessing the form and terms of a contract, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement".

Furthermore: *"According to the principle of objective interpretation, a declaration of intention is to be understood the way the other party of the contract could and did in good faith understand it […] If the diverging interpretation of both parties are equally admissible, there is no consent but rather dissent and therefore no contract has ever come into legal existence"* (HUBER-PURTSCHERT T., Law of Obligations, in THOMMEN M. (ed), Introduction to Swiss Law, Berlin/Bern 2018, p. 314 f.).

92. Therefore, the Sole Arbitrator finds that left apart from any consideration if the Club had the right or not to leave the Player with a different team, it is clear that the Respondent's intention to be reintegrated with the Club's first team was an essential condition to consider the contract fully reinstated. That did not happen, and the employment agreement cannot be considered amended or reinstated. In the absence of any other evidence, the Club shall bear the consequences of terminating the contract without just cause on 20 May 2020.

iii. If not, what are the consequences thereof?

93. The Sole Arbitrator acknowledges that, despite the Player assuming that he would be entitled to be granted a higher compensation, also according to Article 17 of the FIFA RSTP, he expressly declared to renounce to appeal the FIFA DRC Decision: *"in short, the Decision should have been granted a substantially higher compensation to the Player, however, his lack of financial means unfortunately prevented him from appealing it"*. Therefore, the Player only concluded to confirm the Appealed Decision.

94. In this regard, the Sole Arbitrator finds that the FIFA DRC granted the Player the so-called "Mitigated Compensation" as a consequence of the early termination of the employment contract without just cause by the Club, according to Article 17.1 of the FIFA RSTP, which reads:

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

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

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

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

ii. in case the player signed a new contract by the time of the decision, the value of the new contract for the period corresponding to the time remaining on the prematurely terminated contract shall be deducted from the residual value of the contract that was terminated early (the "Mitigated Compensation"). Furthermore, and subject to the early termination of the contract being due to overdue payables, in addition to the Mitigated Compensation, the player shall be entitled to an amount corresponding to three monthly salaries (the "Additional Compensation"). In case of egregious circumstances, the Additional Compensation may be increased up to a maximum of six monthly salaries. The overall compensation may never exceed the rest value of the prematurely terminated contract […]".

Therefore, as the Player only asked to confirm the Appealed Decision, the Sole Arbitrator is refrained from adjudicating whether the "Additional Compensation" due to overdue payables should be awarded.

95. This having stated, the amount granted in the Appealed Decision (USD 115,100) shall be conveniently reduced by the additional amount of USD 14,487 paid by the Club on 3rd

December and not considered by the FIFA DRC. Therefore, the remaining due amount as to the value of the terminated contract is USD 100,613 net plus taxes.

96. Furthermore, the Player signed a new employment contract with the Polish Club, Kalisz, valid as of *"1 February 2021 to the end of the 2020/2021 season or to June 30,2021 […]"*, with a monthly salary of EUR 2,875 (approximately USD 3.023,00 at that time). Therefore, the overlapping salaries *"corresponding to the time remaining on the prematurely terminated contract"* shall be calculated until 30 April 2021 (the date of validity of the employment relationship, according to Article 2 of the Player Contract), and they amount to EUR 8,625 (approx. USD 9,069). Consequently, the sum due to Player shall be reduced to USD 91,544 net, plus interests.

97. Moreover, during these proceedings, the Club provided the CAS Court office and the counterparty with one alleged tax certificate stating that *"since the Player is non resident of India, the withholding tax of all foreign players is deposited by the club consolidated in an assessment year. Please find attached the Tax payment receipt for the deposit of the withholding tax of the foreign players of the club for the assessment year 2020-2021"*. The Sole Arbitrator acknowledges the content of this declaration, stating that, if the provided documents and statements would not be considered valid by the competent tax Authorities, the Club is still bound to provide the Player with the due tax certificates regarding all the amounts paid to Player during and after the termination of the employment relationship.

IX. CONCLUSION

98. As a consequence of all the foregoing, the Sole Arbitrator finds that:

   i. the Club terminated the Employment Contract without just cause on 20 May 2020;

   ii. the Club shall pay an amount of USD 91,544 to the Player as compensation for the termination of the contract without just cause, plus interests at the rate of 5% p.a. as from 7 July 2020 (the date determined by the FIFA DRC in the Appealed Decision) until the date of effective payment.

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

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 26 March by Hyderabad FC against the decision issued on 26 February 2021 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is partially upheld.

2. The decision rendered by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* on 26 February 2021 is confirmed save for point no. 3 of the operative part, which shall read as follows:

   "Hyderabad FC has to pay to Mr Nestor Jesus Gordillo Benitez, the amount of USD 91,544 as compensation for breach of contract without just cause, plus 5% interests p.a. as from 7 July 2020 until the date of effective payment".

3. (…).

4. (…).

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