Arbitrations CAS 2020/A/6996 Barcelona SC v. Al Nassr Saudi Club & CAS 2020/A/7006 Victor Hugo Ayala Núñez v. Al Nassr Saudi Club, award of 21 October 2021

Panel: Mr João Nogueira da Rocha (Portugal), President; Mr Michele Bernasconi (Switzerland); Mr Jordi López Batet (Spain)

Football
Termination of the employment contract without just cause by the player
Conditions for terminating the employment contract with just cause
Calculation of the compensation for damages
Joint and several liability of the new club

1. **Non-payment or late payment of remuneration by an employer does in principle – and particularly if repeated – constitute "just cause" for termination of the contract. However, the latter applies only subject to two conditions. Firstly, the amount paid late by the employer may not be "insubstantial" or completely secondary. Secondly, a prerequisite for terminating the contract because of late payment is that the employee must have given a warning.**

2. **Article 17 of the FIFA Regulations on the Status and Transfer of Players (RSTP) provides that the party in breach terminating a contract without just cause shall pay a compensation calculated with due for the law of the country concerned, the specificity of sport, and any other objective criteria, which may include, among others, 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 and the fees and expenses paid or incurred by the former club. Swiss law, applicable subsidiarily, also provides that, according to Article 44 para. 1 of the Swiss Code of Obligations, *"[w]here the person suffering damage consented to the harmful act or circumstances attributable to him helped give rise to or compound the damage or otherwise exacerbated the position of the party liable for it, the court may reduce the compensation due or even dispense with it entirely"*.**

3. **Article 17 para. 2 RSTP plays an important role in the context of the compensation mechanism set by Article 17 RSTP. It is aimed at avoiding any debate and difficulties of proof regarding the possible involvement of the new club in the player's decision to terminate his former contract, and at better guaranteeing the payment of whatever amount of compensation the player is required to pay to his former club on the basis of Article 17 RSTP. The joint and several liability of Article 17 para. 2 RSTP is of an objective nature and does not require that the new club be considered as instigator of the player's breach. As long as a club can be identified as the *"new club"* of a player, joint liability is established.**

I. PARTIES

1. Barcelona Sporting Club ("Barcelona SC" or the "First Appellant") is a football club with its registered office in Guayaquil, Ecuador. The Club is a member of the Ecuadorian Football Federation (the "EFF"), which in turn is affiliated to Fédération Internationale de Football Association ("FIFA").

2. Víctor Hugo Ayala Núñez (the "Player" or the "Second Appellant") is a professional football player born in Eusebio Ayala, Paraguay on 1st January 1988 who currently plays for Club de Gimnasia y Esgrima La Plata, in Argentina.

3. Al Nassr Saudi Club (the "Club" or the "Respondent") is a football club with its registered office in Riyadh, Saudi Arabia. The Club is a member of the Saudi Arabia Football Federation (the "SAFF"), which in turn is affiliated to FIFA.

II. FACTUAL BACKGROUND

4. Below is a summary of the main relevant facts and allegations based on the Parties' oral and written submissions on the file and relevant documentation produced in these appeals. Additional facts and allegations may be set out, where relevant, in connection with the further legal discussion. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in this award only to the submissions and evidence it considers necessary to explain its reasoning.

5. On 3 August 2016, the Player and the Club concluded an employment contract (the "Contract") valid as from 3 August 2016 until 2 August 2018.

6. The Player was transferred from Club Atlético Lanús ("Lanús"), Argentina, according to a transfer agreement of 4 August 2016 between the Club and Lanus.

7. According to item 4 of the Contract, the Player was entitled to receive the following amounts:

*"**Item 4: Obligations of the First Party:***

According to the content of Article 6 of Professionalism Regulations, the first party shall comply with the following:

1) For first season (2016/2017)

A wage of USD 125,000 (One hundred twenty five thousands US Dollars net) during twelve month of the first year equivalent to an annual salary USD 1,500,000 net (Only One Million Five Hundred Thousand US Dollars net) for the first season payable as follows:

a. USD 500,000 (Only Five Hundred Thousand US Dollars net) in advance on signing the contract.

b. USD 200,000 (Two Hundred Thousand US Dollars net) in advance on 01/02/2017.
c. The remaining wage is payable in equal twelve installment of USD 66.666 (Only Sixty Six Thousand Six Hundred Sixty Six US Dollars net) at the end of each subsequent month.

2) For the second season (2017/2018)

A wage of USD 141,666 (One forty one thousand and Six Hundred Sixty Six US Dollars net) during twelve month of the first year equivalent to an annual salary USD 1,700,000 net (One Million seven Hundred Thousand US Dollars net) for the second year payable as follows:

a. USD 500,000 (Five Hundred Thousand US Dollars net) in advance of wage on 01/08/2017
b. USD 300,000 (Three Hundred Thousand US Dollars net) in advance of wage on 01/02/2018.
c. The remaining wage is payable in twelve equal twelve installment of USD 75.000 (Seventy Five Thousand US Dollars net) at the end of each subsequent month

3) Any other benefits:

a. Housing allowance: Provided by the club.
b. Transportation: Provided by the club (a car).
c. The Second Party will get (Four) round trip air-Tickets for him and his family for each year.
d. Annual vacation as agreed by the two parties.
e. Insurance covering injury, medical treatment, sickness disability or death during the term of his contract with the first party, provided that it shall include insurance coverage for the cases whose effects extend after the end of the contract.
f. Allow the player chosen within the national team to join playing or training immediately when requested by the association concerned in accordance with the regulations".

8. The Contract provided also for the following clause:

*"**Item 8: Imposition of Sanctions:***

The first party may take decisions and issue sanctions against the second party in case of violating his obligations stipulated in the contract without prejudice to regulations, provided that he shall inform the second party in writing, and the latter may object according to regulations and rules".

9. According to written instructions apparently signed by the Player, the Player requested that the Club pay the sum of USD 500,000 due on the signing of the Contract on the following accounts:

- USD 180,000 to a bank account in Shangai, China, in the name of *"EAST STAR CHINA IMPORT AND EXPORT LIMITED"*;

- USD 124,000 to a bank account in Hong Kong, in the name of *"JIEYU (HONGKONG) TRADE CO., LIMITED"*;

- USD 196,000 to a bank account in New York, USA, in the name of *"CLUB ATLETICO LANUS"*.

10. Apparently, shortly after, and due to an issue with the payment of USD 196,000 to *"CLUB ATLETICO LANUS"*, the Player requested in written the Club to make the following payments:

    - USD 98,000 to a bank account in Florida, USA, in the name of Mr Fabián Andrés Bustos;

    - USD 98,000 to a bank account in Virginia Gardens, USA, in the name of Mr Juan Pablo Favano;

    indicating however to the Club that bank charges should need exceed 8% of the amounts to be paid.

11. The following payments were apparently made by the Club:

    - USD 180,000 to *"EAST STAR CHINA IMPORT AND EXPORT LIMITED"*;

    - USD 124,000 to *"JIEYU (HONGKONG) TRADE CO., LIMITED"*;

    - USD 90,160 to Mr Fabián Andrés Bustos;

    - USD 90,160 to Mr Juan Pablo Favano.

12. The Player however alleged that, at the end of August 2016, the Club did not make any payment in its favour, in particular the sum of USD 500,000 which was due on signing of the Contract on 3 August 2016.

13. The Player alleged that he asked orally the Club if there were any issues with the payments and that the Club answered that all payments would be made together with the September salary.

14. On 21 August 2016, the Player travelled to South America to play for its national team the qualifying games for the 2018 FIFA World Cup in Russia against Chile in Asunción, on 1st September 2016 and against Uruguay in Montevideo on 6 September 2016. The Player came back in Riyadh, Saudi Arabia on 9 September 2016, flying from Asunción on 7 September 2016 through Sao Paulo and Dubai.

15. The Club alleged that the Player did in fact not return to the Club until 12 September 2016 which was not authorized by the Club.

16. The Player also played for its national team in the qualifying game for the 2018 FIFA World Cup in Russia against Colombia on 6 October 2016.

17. The Player alleged that no payments were made by the Club in September and October 2016 despite oral complaints by the Player and the fact that the Player continued to fulfil its obligations under the Contract.

18. The Player alleged that he told the Club – like other players in the same situation – that he would not play the game against Al Raed on 3 November 2016 if he did not get paid.

19. On 3 November 2016, the Club paid USD 10,000 in cash to the Player and, on 6 November 2016, USD 54,418.86 via bank transfer, which corresponded to the August salary.

20. On 17 November 2016, the Club paid USD 66,666 to the Player via bank transfer, which corresponded to the September salary.

21. The Player alleged that the Club did not assist him in relation with the relocation of his family in Riyadh as provided by item 4.3 c. of the Contract.

22. The Player alleged that, at the end of December 2016, he informed the manager of the Club that he wanted to leave the Club considering that his signing fee of USD 500,000 was not paid, as well as three months of salaries.

23. On 27 December 2016, the Player travelled to Paraguay to meet his youngest child and help his family with the relocation in Riyadh, with the authorisation from the Club which granted holidays to the Player until 12 January 2017.

24. The Player alleged that, at the same time, the Club promised him that it would arrange the relocation of his family in Riyadh and the payment of the due salaries, which it did not according to the Player.

25. On 9 January 2017, the Club paid USD 66,666 to the Player via bank transfer, which corresponded to the October salary.

26. The Player alleged that he complained orally about the other due salaries but that he was forced to go back to Riyadh, Saudi Arabia to fulfil its obligations with the Club, because he had no other job offer at this time and needed the money to take care of his family.

27. On 12 January 2017, the Player received visas for his entire family which allowed them to travel to Riyadh, Saudi Arabia.

28. On the same day, the Club sent a letter to the Player as follows:

*"**Absenteeism warning letter for unauthorised extension leave***

Dear Sirs,

I refer to the authorised leave from 27 December 2016 to 11 January 2017 delivered by the club under your request.

The purpose of this letter is to notify you that your absence beginning on 11 January 2017 when you decide unilaterally to extend your leave without written prior permission for the visa of your family.

In this context, please be aware that as such the club has provided you with a visa copies and the tickets for all your family members in a timely manner and you have been released on 27 December 2016 with a few days before the start of the break and thus the club has treated you in an exceptional circumstance to be accompanied with your family.

Therefore Mr Ayala is hereby invited to return immediately to his work without any further delay for the reason that failure of the family visas application "is not a valid cause" to delay a professional player from joining his team on the basis that the family is dully [sic] accompanied with your legal representative (here Matias Favano) for the visas procedures, as well there is "no legal contractual basis" to be absent from duties for any difficulty regarding the family visas' applications.

I thank you for taking note of the above".

29. On 18 January 2017, the Player came back to Riyadh, Saudi Arabia with his entire family, a return which could not have been organized earlier according to the Player considering the issues with the visas for his family.

30. On 21 January 2017, the Club sent a letter to the Player inviting him for a disciplinary hearing to take place on 24 January 2017 at 8:00pm.

31. On 25 January 2017, the Club sent a letter to the Player that its failure to attend the disciplinary hearing was kept in its disciplinary record.

32. On 1st February 2017, the Player sent the following letter to the Club allegedly following the advice from its agent (the "Apology Letter"):

*"**Apology letter – Commitment to avoid any further misconduct***

Ref: disciplinary hearing of Tuesday 24 January 2017 at 8:00 p.m for repetitive unauthorised extension leave

Dear Mr. General Secretary,

I refer to the last incident due my extension of leave to bring my family without written or verbal consent of the club.

You are aware that I am an extremely responsible individual to fix the visas of my family issue and do not however; the circumstances that transpired on 18 January 2017 left me no choice but to make it appear as if I was irresponsible. In such situation, I found myself responsible of repetitive unauthorized extension leave for the third time during the first six months of my contract without taking the due care and diligence which rendered me guilty of misconduct.

*As such I usually display negligent behavior during any of my leave any – I genuinely apologize for that. If you would like, I will ask to deduct from my salary a compensation from my salary lost due to the absence for a 22 days to cover the missed time **from 27 December 2016 to 18 January 2017**.*

To that regard, I hereby commit myself that in any subsequent days of unjustified absence for whatsoever reason during the current season 2016/2017:

*1. a disciplinary action will be subject to an **irrevocable** deduction of the above 22 unworked days from my monthly Salary without any objection or right to appeal it;*

2. if I leave Saudi Arabia without permission form the Club or/and extend any authorized leave without the club's permission or/and I don't come back to the training session on the due date, it will be a just cause for the club as it is uncooperative repetitive behavior for breaching my contractual obligations.

Thank you for understanding my predicament".

33. On 8 February 2017, the Club paid USD 66,666 to the Player via bank transfer, which corresponded to the November salary.

34. Allegedly, around 10 February 2017, the Player complained – with other players – about the salaries unpaid and met with the club management.

35. Still no payments were made in March and April according to the Player who indicated to the media that playing in Saudi Arabia was hard and, on 16 April 2017, expressed his desire to play with Boca Juniors in Argentina.

36. Allegedly, after the game against Al-Hilal on 4 May 2017, the Player told the Club that he would leave with his family for good and terminate the Contract and asked the Club to organise the appropriate flight tickets.

37. According to the Player, the Club took note of that decision and promised to organise the flight tickets for 5 May 2017, which it did not. The Club paid USD 5,000 to the Player for the costs related to his luggage.

38. On 3 May 2017, the Paraguayan Football Association informed the Club that the Player was invited to participate to friendly games against France on 2 June 2017 and against Peru on 8 June 2017, which the Club allegedly refused to respect, arguing that it was not an official international window as provided in the FIFA regulations.

39. On 7 May 2017, the Player left Riyadh by plane for South America, according to the Club without any authorization and explanations; thereafter, the Player never returned to the Club.

40. On 8 May 2017, the Club paid USD 199,898 to the Player via bank transfer, which corresponded to the salaries of December 2016, January and February 2017.

41. On 18 May 2017, the Club sent a letter to the Player, notifying him of his *"**unauthorized leave**"* from 6 May 2017 and failure *"to comply with Item.5 par.4"* of the Contract and informing him that he was not entitled to any salary for the period of the unauthorized absence and, with reference to the Apology Letter, that a deduction of 22 days of salary (corresponding to USD 48,880.40) would be applied as disciplinary sanction.

42. On 22 May 2017, the Club paid USD 133,322 to the Player via bank transfer, which corresponded to the salaries of March and April 2017.

43. On 7 June 2017, the Club sent a letter to the Player to notify him about the pre-season training 2017/2018, which would start on 14 June 2017 in Riyadh and to request him to appear, failure of which would constitute a breach of his contractual obligations.

44. On 19 June 2017, the Club sent a letter to the Player informing him that his unauthorized absence was a breach of his contractual obligations and requesting him to come back within 72 hours.

45. On 27 June 2017, the Club sent a letter to the Player granting him an additional time limit of 72 hours to provide his position whether he wished to fulfil the Contract or not.

46. On 1 July 2017, the Club sent a letter to the Player indicating this his behaviour constituted *"**job abandonment** (here as of 6 May 2017)"*, that the club no longer had to pay any salary for his unauthorized absence and that the club would take appropriate legal remedies.

47. On 21 July 2017, the Club sent a letter to the Player – with the title *"termination without further notice for unjustified breach of the employment contract by the player"* – indicating that his long-lasting absence without authorization from 6 May 2017 was an unjustified breach of the Contract and that the Contract was *"**deemed terminated by you as 6 May 2016** accordingly **for Job abandonment**"*.

48. On 24 July 2017, the Player sent a letter to the Club indicating that he changed his legal team and raising the various delays in payments of salaries and the due salaries, including the sum of USD 200,000 which was due on 1 February 2017 according to Item 4.1 b. of the Contract. The Player also indicated that during the months of May and June his son was at the hospital for very complicated issues but that, in any case, the Player could not return to Riyadh considering that his economic status was not secured. Finally, the Player presented his excuses to the Club and thanked it for its hospitality, and informed the Club that he was open for discussion to solve the situation.

49. On 27 July 2017, the Club sent a letter to the Player – with the title *"RE: termination without further notice for unjustified breach of the employment contract by the player"* – in which it disputed the content of the letter of 24 July 2017 and, on one hand, acknowledging that the Player *"abandoned or voluntarily resigned"* from his employment with the Club and that *"the contract had been fairly terminated without dismissal"* and, on the other hand, indicating that *"the Player's unauthorized absences in such circumstances are considered as a just cause to terminate the Contract as of 6 May 2017"*. Additionally, the Club indicated that it had already taken the appropriate legal measures to claim for a compensation *"amounting to the remaining value of the contract as* ***from or its early termination by you [i.e. the Player] (i.e. 6 May 2017) until its expiry terms as per se in Item.2 of the contract (i.e. on 2 August 2018)****"*.

50. On 31 August 2017, the Club lodged a claim against the Player, and Club Atlético Boca Juniors (Argentina) ("Boca") and Lanús for inducement, in front of the FIFA Dispute Resolution Chamber (the "DRC") requesting that the Player be ordered to pay the amounts of USD 5,846,275.86, plus interest, as a compensation for breach of contract, and SAR 69,485 *"for the aircraft provided to the player and his substitute player"*, with Boca and Lanús being jointly liable for such payment, and disciplinary sanctions to be imposed against the Player, Boca and Lanús.

51. On 2 December 2017, the Player lodged an answer and counterclaim against the Club in front of the DRC requesting that the Club be ordered to pay a total amount of USD 2,640,539.14, plus interest, as outstanding remuneration, compensation for breach of contract and reimbursement of flight ticket costs.

52. On 2 January 2018, the Player and Barcelona SC (together the "Appellants") concluded an employment contract valid as from the date of its signing until 31 December 2020.

53. On 12 January 2018, a letter of the Player's counsel was uploaded in the FIFA TMS indicating *inter alia* that the Player terminated the Contract with the Club with just cause.

54. On 26 June 2018, the Player and the First Appellant concluded a termination agreement regarding the employment contract of 2 January 2018.

55. Shortly after, the Player signed an employment contract with Club de Gimnasia y Esgrima La Plata, Argentina.

56. On 9 December 2019, following a request from FIFA, Barcelona SC sent a letter to FIFA denying having had any influence on the termination of the contractual relationship between the Player and the Club and having influenced the Player in any way.

57. On 17 January 2020, the DRC issued a decision (the "Appealed Decision") as follows:

"1. The claim of the Claimant/Counter-Respondent, Al Nassr, is partially accepted.

2. The Respondent/Counter-Claimant, Victor Hugo Ayala Nuñez, has to pay to the Claimant/Counter-Respondent, within 30 days as form [sic] the date of the notification of this decision, compensation for breach of contract in the amount of USD 1,263,375, plus 5% interest p.a. as from 31 August 2017 until the date of effective payment.

3. The Intervening party, Barcelona SC, is jointly and severally liable for the payment of the aforementioned compensation.

4. Any further claim lodged by the Claimant/Counter-Respondent is rejected.

5. In the event that the aforementioned sum plus interest is not paid within the stated time limit, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.

6. The Claimant/Counter-Respondent is directed to inform the Respondent/Counter-Claimant, 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.

7. The claim of the Respondent/Counter-Claimant, Victor Hugo Ayala Nuñez, is partially accepted.

8. The Claimant/Counter-Respondent, Al Nassr, has to pay to the Respondent 1/ Counter-Claimant, within 30 days as form [sic] the date of the notification of this decision, outstanding remuneration in the amount of USD 702,830, plus interest at the rate of 5% p.a. until the date of effective payment, as follows:

i. as from 4 August 2016 on the amount of USD 500,000;

ii. as from 2 February 2017 on the amount of USD 200,000;

iii. as from 7 May 2017 on the amount of USD 2,830.

9. Any further claim lodged by the Respondent 1/ Counter-Respondent is rejected.

10. In the event that the aforementioned sum plus interest is not paid within the stated time limit, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.

11. The Respondent 1 /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".

58. On 1st April 2020, FIFA notified the grounds of the Appealed Decision to the Parties.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

59. On 22 April 2020, in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the "CAS Code"), both the Player and Barcelona SC filed a Statement of Appeal at the CAS against the Respondent and FIFA challenging the Appealed Decision. The Player selected English as the language of the arbitration and nominated Mr Michele A.R. Bernasconi as arbitrator.

60. On 27 April 2020, the Player requested that the matter be decided by a sole arbitrator, instead of a three-member Panel, considering his financial situation.

61. On 29 April 2020, the CAS Court Office acknowledged receipt of the two Statements of Appeal filed by the Player and Barcelona SC and indicated that, unless the Parties filed an objection until 4 May 2020, the procedures 6996 and 6706 would be consolidated and referred to the same Panel (or to the same sole arbitrator).

62. On the same day, pursuant to Article 41.3 of the CAS Code, and because Barcelona SC designated Club de Gimnasia y Esgrima La Plata as "Third Interested Party", the CAS Court Office indicated to Club de Gimnasia y Esgrima La Plata that it should file with the CAS an application if it was interested to participate to the proceedings.

63. On 30 April 2020, Barcelona SC requested that the matter be decided by a sole arbitrator.

64. On 1 May 2020, FIFA requested to be excluded from the present proceedings arguing that it could not be considered as a respondent.

65. On 8 May 2020, the CAS Court Office informed the Parties that Club de Gimnasia y Esgrima La Plata indicated that it had no interest to intervene in the present proceedings.

66. On 12 May 2020, the CAS Court Office informed the Parties that FIFA was no longer a party to the proceedings considering that Barcelona SC agreed to exclude FIFA as respondent.

67. On the same day, the Club informed the CAS Court Office that it wished that the dispute be submitted to a panel of three arbitrators and, in this context, appointed Mr Jordi López Batet as arbitrator.

68. On 14 May 2020, the Club further informed the CAS Court Office that its intention was to pay its share of the advance of costs.

69. On the same day, in accordance with Article R51 of the CAS Code and the extension of the time limit granted by CAS, Barcelona SC submitted its Appeal Brief to the CAS Court Office.

70. On 15 May 2020, the CAS Court Office informed the Parties that the Deputy Division President decided to submit the proceedings to a three-member Panel pursuant to Article R50 of the CAS Code and invited Barcelona SC to inform it by 20 May 2020 whether it agreed to nominate Mr Michele A.R. Bernasconi as arbitrator, failing which it would be considered that it agreed.

71. On 16 May 2020, in accordance with Article R51 of the CAS Code and the extension of the time limit granted by CAS, the Player filed his Appeal Brief with the CAS Court Office.

72. On 20 May 2020, Barcelona SC informed the CAS Court Office that it agreed to nominate Mr Michele A.R. Bernasconi as arbitrator.

73. On 17 June 2020, the CAS Court Office informed the Parties of the appointment of Mr João Nogueira da Rocha as President of the Panel.

74. On 13 July 2020, the CAS Court Office informed the Parties that the Panel appointed to decide this case was constituted as follows:

President:	Mr João Nogueira da Rocha, Attorney-at-law in Lisbon, Portugal
Arbitrators:	Mr Michele A.R. Bernasconi, Attorney-at-law in Zurich, Switzerland
	Mr Jordi López Batet, Attorney-at-law in Barcelona, Spain

75. On 27 August 2020, the Respondent submitted its Answers to the Appeal Briefs of the Appellants in accordance with Article R55 of the CAS Code and the extension of the time limit granted by CAS.

76. On 9 September 2020, the CAS Court Office, pursuant to Article R57 of the CAS Code, after having consulted the Parties, informed them that the Panel had decided that a hearing would be held.

77. On 24 September 2020, the CAS Court Office informed the Parties that the hearing would take place on 16 December 2020 by videoconference.

78. On 25 September 2020, the CAS Court Office sent the Order of Procedure to the Parties for signature, which was duly signed by them.

79. On 27 November 2020, the CAS Court Office informed the Parties of the appointment of Mr Pierre Turrettini as *Ad Hoc* Clerk.

80. On 16 December 2020, a hearing took place by videoconference. At the hearing, besides the Panel, the *Ad Hoc* Clerk and Mr Antonio de Quesada, Head of Arbitration to the CAS, the following persons were present:

i. For Barcelona SC: Mr Arnaldo Bismark Alaña Garcés, Mr Alfredo Parra Guillén and Mr Mauricio Soledispa Morán, Barcelona SC's legal counsels.

ii. For the Player: Mrs Melanie Schärer, counsel.

iii. For the Club: Mr Daniel Muñoz Sirera, counsel.

81. At the outset of the hearing, the Parties confirmed that they had no objections in respect to the formation of the Panel and that the Panel has jurisdiction over the present dispute. During the hearing, the Parties had the opportunity to present and defend their respective positions and reiterate the arguments already put forward in their respective written submissions.

82. Before the hearing was concluded, the Parties expressly stated that they did not have any objection with the procedure adopted by the Panel and that their right to be heard and to be treated equally had been duly respected.

IV. SUBMISSIONS OF THE PARTIES

83. The following outline is a summary of the Parties' arguments and submissions which the Panel considers relevant to decide the present dispute and does not necessarily comprise each and every contention put forward by the Parties. The Panel has nonetheless carefully considered all the submissions made by the Parties, even if no explicit reference has been made in the following summary. The Parties' written and oral submissions, documentary evidence and the content of the Appealed Decision were all taken into consideration.

A. The First Appellant's Submissions and Requests for Relief

84. The First Appellant's submissions in its appeal brief and during the hearing may be summarized as follows:

- The facts subject to the dispute between the Club and the Player occurred almost a year before the arrival of the Player in the team of the First Appellant where the Player played only 350 minutes for a contractual relationship that lasted only from 2 January 2018 until 26 June 2018. In particular, the claim before the DRC was filed by the Respondent in August 2017, at a time when the First Appellant was not even in contact with the Player.

- The Player was recruited to reinforce the 2018 team and therefore the First Appellant could not have interfered in the contractual relationship between the Player and the

Respondent which was terminated at least six months earlier. The burden of proof regarding a possible interference falls with the person who claims it in accordance with Article 12 para. 3 of the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber. Additionally, the First Appellant has never conflicted with the Respondent.

- Any club in good faith could have hired the Player considering the documents showed in the FIFA TMS which evidenced that the Player terminated his Contract with cause on 7 May 2017. In this respect, a Player cannot be stigmatized for an indefinite period because of a dispute with his former employer, which puts into question the validity of Article 17 of the FIFA Regulations on the Status and Transfer of Players ("RSTP").

- The First Appellant could participate to the proceedings before FIFA only in the last moment and its position was not analysed in the Appealed Decision.

- The Respondent authorized the transfer of the Player to the First Appellant and did not oppose to the delivery of the International Transfer Certificate ignoring Article 8.2.7 of Annex 3 of the RSTP. FIFA should have sanctioned the First Appellant within the time limit set out in such provision and therefore sanctioning the First Appellant, who was not involved when the Respondent filed its claim before the DRC, constitutes a breach of the *ultra petita* principle.

- After the termination of the Contract, the Player played with Club Gimnasia y Esgrima La Plata, Argentina, which really benefited from the earlier release of the Player. The definition of *"new club"* in the RSTP is *"the club that the player is joining"*, which in the present case is Club Gimnasia y Esgrima La Plata.

- In the event that the Panel should consider that the First Appellant is jointly and severally liable, it would become necessary to count the exact time the Player was part of the First Appellant and, possibly, distribute the solidarity liability with Club Gimnasia y Esgrima La Plata, being specified that the Player spent 175 days with the First Appellant (from 2 January 2018 to 26 June 2018) while he spent 679 days with Club Gimnasia y Esgrima La Plata (from 5 July 2018 until now).

85. The First Appellant submitted the following requests for relief:

"1. Reversing the Appeal Decision, specifically that determined in number 3, which condemns Barcelona Sporting Club as "(…) jointly and severally liable for the payment of the aforementioned compensation".

2. In the event that the CAS considers that, despite our arguments, there is to some extent joint responsibility of BSC, it would become necessary to count the real time that the player was part of our Club, and distribute proportionally possible solidarity liability with the Club Gimnasia y Esgrima La Plata.

3. Condemn to the repayment of all the costs that correspond".

B. The Second Appellant's Submissions and Requests for Relief

86. The Second Appellant's submissions in his statement of appeals and appeal brief and during the hearing may be summarized as follows:

- In the Appealed Decision, the DRC rightly calculated the salaries due to the Player under the Contract from 3 August 2016 to 7 May 2017 (*i.e.* until 30 April 2017 because salaries were to be paid at the end of each month) which amount to USD 1,299,994.

- The DRC also rightly observed that the Club failed to pay USD 200,000 which were due on 2 February 2017, such amount being therefore due plus 5% interest from 2 February 2017, and that the Club failed to prove that the signing fee of USD 500,000 was paid to the Player. The three payment confirmations that the Club submitted were allegedly made in favour of Lanús, *"EAST STAR CHINA IMPORT AND EXPORT LIMITED"* and *"JIEYU (HONGKONG) TRADE CO., LIMITED"* but not in favour of the Player who did not give instructions of payment in this respect, contrary to the alleged payment instruction filed by the Respondent which authenticity is not recognized by the Player. In addition, since the payment of USD 500,000 has not been recognized by the DRC and that the Club did not appeal the Appealed Decision, this issue shall not be examined by the Panel. In accordance with Article 74 para. 1 of the Swiss Code of Obligations ("SCO") and CAS jurisprudence (CAS 2018/A/5537 and CAS 2015/A/4342), performance of a payment obligation takes effect, when the due amount is credited at the creditor's domicile or in the account indicated by the creditor, the debtor being responsible for ensuring that the creditor has or can have access to the money on the relevant performance date.

- The DRC rightly explained that the Club was not allowed to make any deduction from the Player's remaining remuneration due, claiming to apply unfounded disciplinary sanctions. The absences of the Player were justified by the fact that he was playing for his national team (and therefore allowed in accordance with Annex 1 of the RSTP and item 4.3.f of the Contract) and because he had to help his family for its relocation to Riyadh (which was important because the Player's wife was expecting a third child), being specified that the Player missed only one game (won by the Club) during his absence in January 2017. In any case, the Player was entitled to be absent without authorization from the Club – and to refuse performance of his obligations – considering that he was not paid, in accordance with Articles 82 and 324 para. 1 SCO.

- The Apology Letter signed by the Player – which he did not clearly understand because he is not proficient in English and which was an idea from his agent who wanted to do business – does not justify any deduction from his outstanding remuneration considering that the Player could not legally waive his salary during the employment relationship as provided by Article 341 para. 1 SCO and in accordance with CAS 2018/A/5896.

- The DRC correctly decided that the Club should pay the Player an amount of USD 702,830 plus interests based on the *pacta sunt servanda* principle and therefore point 8 of the Appealed Decision is *res judicata*, because the Club did not appeal it, and shall be confirmed.

- Article 14bis of the RSTP entered into force on 1 June 2018 and was therefore not in force when the Club filed its claim before the DRC on 31 August 2017. Such provision cannot be applied retroactively to the present dispute as wrongly done by the DRC and therefore its conclusion that the Player had to put the Club in default notice in writing to invoke the termination of the Contract for just cause shall be dismissed. In any case, assuming that Article 14bis of the RSTP was applicable, such provision is an indication of what can constitute just cause but not a requirement considering that it was implemented to help the players who were not paid and to embody the DRC's jurisprudence. Article 14 para. 1 of the RSTP establishes that a contract may be terminated by either party without consequences of any kind when there is just cause. Such provision is applicable to the present case.

- The default notices sent by the Club to the Player should not be considered. The one sent on 12 January 2017 by the Club is irrelevant because the Player's delay in returning to Riyadh was caused by the Club who did not send the invitation letters for his family to obtain the visas. In addition, after having terminated the Contract on 7 May 2017, the Player had no obligation to answer to the numerous unfounded correspondences of the Club since the contractual relationship already ended.

- During the relationship between the Club and the Player, the Club paid the agreed salaries to the Player with significant delays and only when the Player had put pressure on the Club. On 7 May 2017 when the Player terminated the Contract with just cause, the Player had only received 20,31% (USD 264,016.85) of the entire agreed remuneration (USD 1,299,994). Consequently, 8.28 months of salaries were outstanding when the Player left the Club, which is sufficient to constitute just cause to terminate an employment contract in accordance with Article 337 SCO, the jurisprudence of FIFA (DRC decision n° 0816720 of 18 August 2016), CAS (CAS 2016/A/4590, para. 93, 96 and 102 to 104) and the Swiss Federal Tribunal. The non-payment of three months of salary was considered as a just cause by DRC and CAS in the past for terminating an employment agreement without notice. The Club is a repeated offender which often does not pay its players.

- In addition, there was in any case no need to send any default notice to the Club considering that the dates of payment were contractually agreed in the Contract and that Article 102 para. 2 SCO provides that where a deadline for performance of the obligation has been set by agreement, the obligor is automatically in default on expiry of the deadline.

- The Club shall pay a compensation to the Player for breach of contract, corresponding to the remaining value of the Contract amounting to USD 1,899,999, *i.e.* USD 199,999 for the salaries of May, June and July 2017 (each of USD 66,666) and USD 1,700,000 for the remaining 2017/2018 season. In this respect, there should be no obligation for the Player to mitigate the damage or, if so, for a maximum amount of USD 3,500 (which the DRC confirmed that the Player had earned with the First Appellant).

- The Club shall also reimburse to the Player the flight costs of USD 37,694 for him and his family to return to Paraguay, based on item 4.3.c of the Contract, which was requested in the counterclaim of 2 December 2017 before the DRC but not dealt with in the Appealed Decision, in breach of the right to be heard principle and the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber.

87. The Second Appellant submitted the following requests for relief:

"1. To review the present case as to the facts and to the law, in compliance with Article R57 of the Code of Sports-related Arbitration and Mediation Rules ("CAS-Code").

2. To issue a new decision, which sets aside the decision passed by the Dispute Resolution Chamber (DRC) of FIFA, confirming that

i. Al Nassr SC shall be obliged to pay to Víctor Ayala the amount of USD 500,000 net, as outstanding salary, plus interest over said amount at the rate of 5% per year as of 4 August 2016 until the date of effective payment;

ii. Al Nassr SC shall be obliged to pay to Víctor Ayala the amount of USD 200,000 net, as outstanding salary, plus interest over said amount at the rate of 5% per year as of 2 February 2017 until the date of effective payment;

iii. Al Nassr SC shall be obliged to pay to Víctor Ayala the amount of USD 2,830, as outstanding portions of monthly salaries, plus interest over said amount at the rate of 5% per year as of the end of the employment relationship, i.e. as of 7 May 2017 until the date of effective payment;

iv. Al Nassr SC shall be obliged to pay to Víctor Ayala the amount of USD 1,899,998 (3x USD 66,666 = USD 199,998 + USD 1,700,000; eventualiter: USD 1,896,498) net, as compensation for Al Nassr SC having violated the employment contract;

v. Al Nassr SC shall be obliged to pay to Víctor Ayala the amount of USD 37,694, as reimbursement of flight costs.

3. Al Nassr SC shall be ordered to bear all costs and legal expenses incurred during this appeal procedure".

C. The Respondent's Submissions and Requests for Relief

88. The Respondent's submissions in its answers and during the hearing may be summarized as follows:

- The Player terminated the Contract without cause on 6 May 2017 for job abandonment as outlined by the jurisprudence of CAS (CAS 2014/A/3707) by leaving the Club without authorization and without notice and with no intention to return to the Club.

- The Club made the advance payment of USD 500,000 to the Player in accordance with a written request signed by the Player, which is evidenced by the exhibits submitted by the Club. In this respect, the Player authorized the Club to transfer the sum of USD 196,000 to Mr Fabián Bustos and Mr Juan Pablo Favano – the agents of the Player who were copied in many communications – in two equal instalments, discounting the 8% of bank charges. Until the dispute, namely for more than a year, there was no formal complaint about the non-payment of the sum of USD 500,000. Additionally, the Player never filed a criminal complaint for the alleged forged signature on the written instructions regarding the advance payment. The Club did not appeal the Appealed Decision which did not recognize such payment because it was satisfied with the general outcome of the case.

- The Club paid the monthly salaries of USD 66,666 to the Player for the months of August, September, October, November and December 2016, and January, February, March and April 2017. The Player acknowledged receipt of such payments in his letter of 24 July 2017. Contrary to the Player's allegations, there was no late payment for the months of March and April 2017 because the Contract provided that the monthly salary should be paid *"at the end of each subsequent month"*, which means that the March salary should be paid by 30 April and the April salary should be paid by 31 May which was complied with by the Club. Thus, the Player received all monthly salaries he was entitled to until his unlawful termination of the Contract on 6 May 2017.

- The Club disputes that it owed the advance payment of USD 200,000 in full. Firstly, at the time of the termination of the Contract by the Player on 6 May 2017, the Club had paid USD 66,666 as salary to the Player for the month of April 2017, which was not yet due. Secondly, in the Apology Letter (for which the Player did not prove that he was forced or advised to send), the Player agreed that the Club deduct 22 days of salary *"in any subsequent days of unjustified absence for whatsoever reason during the current season 2016/2017 (…) without any objection or right to Appeal it"* in accordance with the disciplinary sanctions provided by the Contract. Considering a daily salary of USD 4,109.58 agreed in the Contract, the Club deducted USD 90,410.95. This latter amount plus the salary of April not due but paid correspond to a sum of USD 157,076.95. Therefore, the remaining amount due for the advance payment of USD

200,000 corresponded to USD 42,923.04 when the Player terminated the Contract on 6 May 2017.

- The Commentary of the RSTP indicates that a *"behavior that is in violation of the terms of an employment contract cannot justify the termination of a contract for just cause"*. Therefore, the breach of contract shall be very severe to justify the termination of an employment, which is confirmed by Article 337 para. 2 SCO (*"good cause is any circumstance which renders the continuation of the employment relationship in good faith unconscionable for the party giving notice"*) and the CAS jurisprudence (CAS 2006/A/1180). In this context, the Player did not have a reason so compelling that would justify the termination of the Contract for just cause, which means that the termination of the Contract occurred without just cause.

- Additionally, the Player constantly and regularly breached his contractual obligations during the short period of the relationship with the Club. In particular, after his last match with his national team on 6 September 2016, the Player returned to the Club only on 12 September 2016, namely four days too late according to Article 1 para. 9 of Annex 1 of RSTP (*"Players complying with a call-up from their association under the terms of this article* ***shall resume*** *duty with their clubs no later than 24 hours* ***after the end of the period for which they had to be released***. *This period shall be extended to* ***48 hours*** *if the representative teams' activities concerned took place in a different confederation to the one in which the player's club is registered"*). The exhibit submitted by the Player does not evidence that the Player returned to Riyadh on 9 September 2016 as it does only show that flight tickets were planned but not necessarily bought. In addition, the Player and the Club agreed for a holiday period from 27 December 2016 and 11 January 2017 and the Player only returned to Riyadh on 18 January 2017, without any prior authorization or valid explanations and despite a formal notice letter sent by the Club to the Player on 12 January 2017. After having failed to appear at a disciplinary hearing on 24 January 2017, the Player even recognized in the Apology Letter his breaches of the Contract. The Player left Saudi Arabia on 6 May 2017, again without authorization, which constituted a third unauthorized absence considering in particular that the Club was not obliged to release the Player for friendly matches of his national team. Despite several notices, the Player then never returned to the Club which constitutes additional breaches of the Contract still in force at that time, in the opinion of the Club, reason why it continued to make payments in favour of the Player.

- The Player was fully paid for his services to the Club, considering that he received a total amount of USD 1,082,066.86 during his first and only season while he effectively worked only 248 days which, according to the Contract, should correspond to a remuneration of USD 1,019,175.84 (USD 4,109.58 per day according to an annual salary of USD 1,500,000).

- The Appellant never put the Club in default for any alleged breach of the Contract as required by Article 14 RSTP and CAS jurisprudence (CAS 2005/A/893; CAS

2006/A/1180; CAS 2006/A/1100; CAS 2016/A/4679; CAS 2016/A/4679). In particular, he never raised the issue of the late payments by the Club and granted the latter a reasonable time to settle its (alleged) debts. Therefore, the Player did not rightfully terminate the Contract because the two conditions to justify a termination of the Contract for just cause (substantial amount due and default notice sent) were not met.

- The Player did not terminate the Contract for financial reasons but for other reasons. In particular, the Player and his family never got used to the life in Saudi Arabia because of the cultural differences, what he expressed several times to the media. He also indicated to media that he wanted to play with Boca Juniors in Argentina, which was interested in having him in the team.

- The consequences of the termination of the Contract without cause by the Player are described in Article 17 RSTP. In the Appealed Decision, the DRC rightly decided to consider for the calculation of the compensation (i) the remaining value of the Contract (USD 1,900,000), (ii) the value of the contract of the Player with the First Appellant (USD 3,500), – which correspond to an average value of USD 951,750 as a basis for the compensation – (iii) the non-amortized portion of the transfer fee that the Club paid to Lanús for the transfer of the Player (USD 1,250,000), and (iv) the non-amortized agents' fees paid by the Club to make the transfer of the Player possible (USD 325,000). The Player did not dispute the calculation made by the DRC – retaining USD 1,263,375 as compensation – which means that the Club is entitled to receive the amount calculated by the DRC in the event the Panel considers that the Player did not have just cause to terminate the Contract.

- The First Appellant, as the immediate next club registering the Player after the termination of the Contract, must be considered as the Player's *"new club"* in the meaning of Article 17 para. 2 RSTP and related CAS jurisprudence (CAS 2016/A/4843; CAS 2013/A/3149). The *raison d'être* of this provision is to protect clubs affected by a termination of a contract without just cause by a player. Thus, the First Appellant – which was a procedural party in the case before the DRC – must be held jointly and severally liable for the payment of the due compensation, even if it has not induced the Player to terminate the Contract and also considering that *"The delivery of the ITC shall be without prejudice to compensation for breach of contract"* (Art. 8.2 para. 7 of Annex 3 of RSTP).

- More generally, the Player acted in bad faith with the Club showing total disregard of his obligations as a professional football player without being transparent with the Club regarding his plans and motivations, which should not be tolerated.

89. The Respondent submitted the following requests for relief:

In relation with CAS 2020/A/7006 Victor Hugo Ayala v. Al Nassr Saudi Club

"a. To fully dismiss the Appeal filed by ***MR. VICTOR HUGO AYALA*** *against the Decision issued by the FIFA Dispute Resolution Chamber (FIFA DRC) on 17 January 2020, grounds of which were notified to the parties on 1 April 2020, in the procedure with Ref. No. 17-01464/iml and consequently uphold the said FIFA Decision in its entirety.*

b. To fix a minimum amount of CHF 20,000 (Twenty thousand Swiss francs) to be paid by ***the Appellant MR. VICTOR HUGO AYALA*** *to* ***the Respondent AL NASSR SAUDI*** *as contribution to its legal fees and costs.*

c. Condemn ***the Appellant MR. VICTOR HUGO AYALA*** *to pay the whole CAS administration and the Arbitrators fees".*

In relation with CAS 2020/A/6996 Barcelona SC v. Al Nassr Saudi Club

"a. To fully dismiss the Appeal filed by ***BARCELONA SC*** *against the Decision issued by the FIFA Dispute Resolution Chamber (FIFA DRC) on 17 January 2020, grounds of which were notified to the parties on 1 April 2020, in the procedure with Ref. No. 17-01464/iml and consequently uphold the said FIFA Decision.*

b. To fix a minimum amount of CHF 20,000 (Twenty thousand Swiss francs) to be paid by ***the Appellant BARCELONA SC*** *to* ***the Respondent AL NASSR SAUDI*** *as contribution to its legal fees and costs.*

c. Condemn ***the Appellant BARCELONA SC*** *to pay the whole CAS administration and the Arbitrators fees".*

V. JURISDICTION

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

"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body".

91. The jurisdiction of the CAS, which was not disputed, derives from Article 58 para. 1 of the FIFA Statutes and Article 24 para. 2 RSTP.

92. The jurisdiction of the CAS was further confirmed by the Order of Procedure duly signed by the Parties.

93. Accordingly, the Panel is satisfied that CAS has jurisdiction to hear the present case.

VI. ADMISSIBILITY OF THE APPEAL

94. According to Article 58 para. 1 of the FIFA Statutes: *"Appeals 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"*.

95. The Panel notes that the DRC rendered the Appealed Decision on 17 January 2020 and that the Appealed Decision was communicated to the Parties by email on 1 April 2020. Considering that the First Appellant filed its statement of appeal on 22 April 2020 and that the Second Appellant filed his statement of appeal on 22 April 2020, *i.e.* both within the deadline of 21 days set in the FIFA Statutes, the Panel is satisfied that the present two appeals were filed timely and are therefore admissible.

VII. APPLICABLE LAW

96. Article R58 of the CAS Code provides the following:

> *"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"*.

97. Article 57 para. 2 of the 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"*.

98. In the present case, the Panel notes that the Parties agree that the various regulations of FIFA shall apply, with Swiss law applying on a subsidiary basis.

99. The Panel remarks however that, in the Appealed Decision, the DRC considered Article 14bis RSTP, which was introduced in the RSTP in its June 2018 version, to be applicable, while stating that the RSTP (2016 edition) should apply. The Second Appellant stated in this respect that the RSTP (2016 edition), which did not include the new Article 14bis, shall apply to the present dispute considering that the Club filed its claim with the DRC on 31 August 2017, namely before the entry into force on 1 June 2018 of the new edition of the RSTP (*i.e.* the June 2018 edition).

100. In this respect, the Panel notes that the transitional measures of RSTP (June 2018 edition) provide at Article 26 para. 1 that *"[a]ny case that has been brought to FIFA before these regulations come into force shall be assessed according to the previous regulations"*.

101. In light of the above, the Panel holds that the present dispute shall be decided according to the FIFA Regulations – namely the RSTP (2016 edition) –, with Swiss law applying subsidiarily.

VIII. MERITS

A. The Dispute

102. The object of these proceedings is the Appealed Decision, which ordered:

- the Second Appellant to pay to the Respondent the amount of USD 1,263,375, plus 5% interest *p.a.* as from 31 August 2017 until the date of effective payment, for breach of contract, the First Appellant being jointly and severally liable for such payment; and

- the Respondent to pay as outstanding remuneration to the Second Appellant the amount of USD 702,830, plus 5% interest *p.a.* until the date of effective payment, as follows: as from 4 August 2016 on the amount of USD 500,000, as from 2 February 2017 on the amount of USD 200,000 and as from 7 May 2017 on the amount of USD 2,830.

103. The Appealed Decision is challenged by the Appellants and defended by the Respondent.

104. In the Appealed Decision, the DRC found that the Player terminated the Contract without just cause on 7 May 2017 because he left the Club without authorization, he did not put the Club in default of payment, and he did not reply to several default notices sent by the Club. For these reasons, a compensation for breach of contract had to be paid to the Respondent, for an amount to be established based on the criteria set by Article 17 RSTP, which the DRC quantified in the amount of USD 1,263,375.

105. Further, the DRC found that the Club was liable to pay to the Player an outstanding remuneration of USD 702,830, which corresponds to the signing fee of USD 500,000, which the Club did not prove having paid, an amount of USD 200,000, stipulated in Item 4.1.b. of the Contract, that the Club did not prove having paid either and an amount of USD 2,830 that remained unpaid for the salaries of August 2016 and April 2017.

106. The Panel shall therefore answer to the following main issues of the present dispute:

i. did the Player terminate the Contract on 7 May 2017 with or without *"just cause"*?

ii. what are the financial consequences of the Panel's answer to the first question in this specific case?

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

i. Did the Player terminate the Contract on 7 May 2017 with or without "just cause"?

108. The first question to be addressed by the Panel concerns the finding of the DRC that the Player terminated the Contract *without* just cause. According to the Appealed Decision, the DRC considered that, on 7 May 2017, the Player terminated the Contract without just cause because he left the Club without any authorization, he had not put the Club in default of payment of the alleged outstanding amounts and he had not replied (or replied late) to the several default notices sent by the Club.

109. On this aspect, the Player sought to show, in these CAS proceedings, that (i) at the time of the termination on 7 May 2017, he only had received 20,31% (USD 264,016.85) of the entire agreed remuneration (USD 1,299,994), namely 8.28 months of salaries remained unpaid, which constituted therefore *"just cause"* to terminate the Contract in accordance with Article 337 SCO and the jurisprudence of FIFA, CAS and the Swiss Federal Tribunal, and (ii) Article 14bis RSTP, which requires that the player has to put the debtor club in default in writing in the terms foreseen therein, was not applicable. Such argumentation took notably into consideration the fact that the payment of the signing fee of USD 500,000 and of the amount of USD 200,000 was not proved by the Club nor recognized by the DRC.

110. On its hand, the Club submitted evidence that it paid the signing fee of USD 500,000 in accordance with the instructions of the Player and asserted that it paid all monthly salaries due to the Player until April 2017 and that only an amount of USD 42,923.04 was overdue when the Player terminated the Contract on 7 May 2017, considering the deduction of USD 90,410.95 as disciplinary sanction and the fact that the salary of April 2017 was only due at the end of May 2017. Therefore, the Player had no *"just cause"* to terminate the Contract on 7 May 2017.

111. The Club and the Player both agreed that the Contract was terminated by the Player on 7 May 2017.

112. In light of the foregoing, the Panel shall consider the payments that were actually made, in order to determine what sums were due on 7 May 2017 and whether these could ground a *"just cause"* to terminate the Contract.

113. As a general comment, the Panel is satisfied that the Club did not pay in time the salaries to the Player on a rather regular basis. The monthly salary of USD 66,666 was indeed due *"at the end of each subsequent month"* but the Club was – except for the September 2016 and March and April 2017 salaries – always at least one month late in the payments.

114. The Panel notes that, as of 7 May 2017, the salaries of August, September, October and November 2016 were paid, for a total amount of USD 264,416.86, which is recognized by the Player, the salary of August being short of USD 2,247.15.

115. There is however a dispute regarding the alleged payment of the signing fee of USD 500,000

by the Club to the Player. In this respect, the Panel notes that the Club submitted evidence that it received written instructions from the Player regarding the destination of the funds and remarks also that the Club has provided related debit advices. Additionally, the Panel considered that some beneficiaries of the payments were Mr Fabián Andrés Bustos and Mr Juan Pablo Favano, apparently agents of the Player, who were also recipients of emails sent by the Club to the Player. The Player's counsel during the hearing alleged that there was a forged signature in the instructions of payment regarding the sum of USD 500,000. Nevertheless, as raised by the Respondent, the Player did not file a criminal complaint in this respect nor could prove that Mr Fabián Andrés Bustos and Mr Juan Pablo Favano were not his agents. Therefore, the Panel is comfortably satisfied that, as of 7 May 2017, the payment of the signing fee of USD 500,000 was made in accordance with the instructions of the Player, (USD 500,000 minus the 8% bank charges on USD 196,000, *i.e.* USD 484.320).

116. In the light of the foregoing, it appears to the Panel that, as of 7 May 2017, the Club owed to the Player a total amount of USD 466,664, namely the fee of USD 200,000 due on 2 February 2017 and USD 266,664 for the salaries of December 2016, January, February and March 2017.

117. In that respect, the Panel notes that, according to CAS jurisprudence applicable to Article 14 RSTP (2016 edition), the *"non-payment or late payment of remuneration by an employer does in principle - and particularly if repeated as in the present case - constitute "just cause" for termination of the contract (ATF 2 February 2001, 4C.240/2000 no. 3 b aa; CAS 2003/O/540 & 541, non public award of 6 August 2004); for the employer's payment obligation is his main obligation towards the employee. If, therefore, he fails to meet this obligation, the employee can, as a rule, no longer be expected to continue to be bound by the contract in future. Whether the employee falls into financial difficulty by reason of the late or non-payment, is irrelevant. The only relevant criteria is whether the breach of obligation is such that it causes the confidence, which the one party has in future performance in accordance with the contract, to be lost. This is the case when there is a substantial breach of a main obligation such as the employers obligation to pay the employee. However, the latter applies only subject to two conditions. Firstly, the amount paid late by the employer may not be "insubstantial" or completely secondary. Secondly, a prerequisite for terminating the contract because of late payment is that the employee must have given a warning"* (CAS 2006/A/1180, para. 26).

118. To the Panel's view, there is no doubt that the first condition is met considering that the Club owed four months of salaries (USD 266,664) to the Player, plus a fee of USD 200,000, which together represent a substantial amount, notwithstanding the right (valid or not) for the Club to deduct an amount of USD 90,410.95 as disciplinary sanction. Thus, the breach of the Contract by the Club should be sufficient to constitute *"just cause"* in the meaning of Article 14 RSTP.

119. However, the Panel doubts that the Player has given warnings to the Club that it would terminate the Contract if the payments were not made. The Panel observes indeed that the Player has not met its burden of proof in this respect (in accordance with the well-established CAS jurisprudence: CAS 2016/A/4580; CAS 2015/A/3909; CAS 2007/A/1380 with further references) because he did not produce any conclusive evidence showing that he claimed at any time the payment of his remuneration (unlike it happened for instance in the case of his

teammate Mr Ivan Tomecak, which gave rise to the award CAS 2018/A/5677, in which the player sent several written notices of default to the Club before terminating his employment relationship). Additionally, the Player did not attend the hearing before the CAS, nor any other witness has been offered by the Player to prove his position. The Panel further notes that, until 24 July 2017, the Player never answered to the various letters from the Club during the Contract and after its termination, nor attended the disciplinary hearing organized by the Club on 24 January 2017, which is not a professional behavior and cannot be accepted.

120. Thus, it was not sufficiently proven that the Club was informed or warned by the Player that he would terminate the Contract in the event of an additional late payment of the salaries. The Player has also not proven that he was in such exceptional circumstances that a formal notice letter was not required to terminate the Contract immediately. He seemed indeed to have accepted this situation from the very beginning of the Contract and never formally complained about the late payments, which one could expect from a professional football player considering the amounts at stake. The Panel finds therefore that under the present circumstances, even applying the 2016 edition of the RSTP, there is no room for the Panel to consider as rightful a unilateral termination of the Contract without any prior warning of the Club by the Player.

121. As a result, the Panel is not satisfied that the Player had just cause to unilaterally terminate the Contract on 7 May 2017. The respective request for relief of the Player to condemn the Club to pay a compensation for breach of contract shall be dismissed.

122. The request for relief of the Player to condemn the Club to reimburse an amount of USD 37,694 for the flight costs shall also be dismissed considering that such trip, at that time of the season, was not authorized by the Club.

ii. What are the financial consequences of the Panel's answer to the first question?

123. Before entering into these financial consequences, the Panel firstly notes that the Respondent did not file an appeal against the Appealed Decision which found that the Respondent must pay an amount of USD 702,830 to the Player as outstanding remuneration. Therefore, the Panel cannot go against the principle *"non ultra petita"* – which provides that a party may not be awarded anything more than or different from what it has requested, nor less than what the opposing party has acknowledged – and review the amount granted by the DRC in favour of the Player. Consequently, even if, in the Panel's view, the outstanding remuneration amounted to USD 466,664 on 7 May 2017 (notwithstanding any disciplinary sanction which could reduce even more such outstanding amount), the Panel cannot diverge from the Appealed Decision in this respect. The Respondent shall therefore be condemned to pay an amount of USD 702,830 to the Player as outstanding remuneration plus interest as established in point 8 of the Appealed Decision.

124. This being said, the Panel has to decide on the financial consequences of a termination without notice, taking into account all circumstances of the case, considering in particular that the

Player claimed that no compensation shall be due to the Club because of his termination of the Contract with just cause.

125. The Panel reminds that Article 17 RSTP provides that the party in breach terminating a contract without just cause shall pay a compensation *"calculated with due for the law of the country concerned, the specificity of sport, and any other objective criteria"*, which may include, among others, 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 and the fees and expenses paid or incurred by the former club. Swiss law, applicable subsidiarily, also provides that, according to Article 44 para. 1 SCO, *"Where the person suffering damage consented to the harmful act or circumstances attributable to him helped give rise to or compound the damage or otherwise exacerbated the position of the party liable for it, the court may reduce the compensation due or even dispense with it entirely"*.

126. In the Appealed Decision, to quantify the damage of the Respondent the DRC firstly considered (i) the amount of USD 1,900,000, which is the one that in the DRC's view, would have been due to the Player had the Contract been executed until its regular expiry date, *i.e.* 2 August 2018, and (ii) the amount of USD 3,500 corresponding to the value of the subsequent contract between the Player and Barcelona SC. According to the DRC, the average between such two sums amounting to USD 951,750 served as basis for the compensation due. The DRC further considered to the aforementioned purpose the non-amortized part of the transfer fee paid by the Club to Lanús (USD 2,000,000), which corresponded to USD 1,250,000, and the non-amortized part of the agent fees for the transfer of the Player from Lanús to the Club amounting to USD 325,000. Consequently, the DRC concluded that the amount of USD 2,526,750 (951,750 + 1,250,000 + 325,000) would serve as the amount of compensation due by the Player to the Club but, considering the behaviour of the Club in what concerns the payments to be made to the Player, decided to reduce such amount by 50%, so that the compensation due by the Player to the Club is fixed in USD 1,263,375.

127. The Panel, especially taking into account that the rationale followed by the DRC to determine the compensation has not been duly contested by the Respondent as it did not appeal the DRC decision, sees no reason in this specific case to deviate from the quantification of the damage made by the DRC. However, it is the Panel's view that in accordance with Article 17 RSTP and Article 44 of the SCO, this compensation granted by the DRC should be further reduced, considering the Respondent's conduct towards the payment of salaries to the Player while the Contract was in effect. The Panel notes that even if the Player did not send notices to the Club with respect to the payment of his salaries and did not give a prior warning before terminating the employment relationship, the Club contributed to the termination of the Contract by the Player, by being constantly late in the payments of monthly salaries and considering the important due amounts at the time of the termination, such behaviour being clearly in breach of the contractual obligations. In other words, the Panel is satisfied that while the Player was not able to prove the existence of just cause, having terminated the Contract without any prior warning to the Club, it is also true that the specific circumstances of the present case show that the Club was not acting in full compliance of its contractual duties.

128. As a result, the Panel finds it proper to reduce the compensation for the termination without just cause to an amount similar to what the Player is entitled to receive as outstanding remuneration according to the Appealed Decision. Hence, taking into account the interests running until 31 August 2017 on the sum of USD 702,830 as established in the Appealed Decision, the Panel resolves that the Player shall be ordered to pay to the Club an amount of USD 735,477.65. Interest shall accrue on that amount at the rate of 5% *p.a.* starting from 31 August 2017.

129. Having established that the Player shall pay an amount of USD 735,477.65 as a compensation to the Club, the Panel shall now determine whether Barcelona SC can be considered as a new club in the meaning of Article 17 para. 2 RSTP and therefore jointly and severally liable for the payment of such amount to the Respondent.

130. In this respect, the Panel notes that, when the Respondent filed its claim with the DRC on 31 August 2017, the Player had not concluded an employment contract with Barcelona SC. It also remarks that there is no evidence in the file that the Player was in contact with the Barcelona SC at the time of the termination of the Contract on 7 May 2017 or even later when the Respondent filed its claim before the DRC.

131. The Panel further considers that Barcelona SC asserted that Club Gimnasia y Esgrima La Plata shall be considered as the *"club that the player is joining"* because it is the club which really benefited from the earlier release of the Player.

132. Pursuant to Article 17 para. 2 RSTP *"[i]f a professional is required to pay compensation, the professional and his new club shall be jointly and severally liable for its payment"*.

133. This provision plays an important role in the context of the compensation mechanism set by Article 17 RSTP. As established by CAS jurisprudence (CAS 2016/A/4843, para. 124; CAS 2013/A/3149, para. 99), it is aimed at avoiding any debate and difficulties of proof regarding the possible involvement of the new club in the player's decision to terminate his former contract, and at better guaranteeing the payment of whatever amount of compensation the player is required to pay to his former club on the basis of Article 17 RSTP. As generally admitted by CAS jurisprudence, the joint and several liability of Article 17 para. 2 RSTP is of an objective nature and does not require that the new club be considered as instigator of the player's breach. As long as a club can be identified as the *"new club"* of a player, joint liability is established.

134. In the present case, it is indisputable that Barcelona SC (and not Club Gimnasia y Esgrima La Plata) is the club that the Player joined and with which the Player was registered following the termination of the Contract. The duration of almost eight months between the termination of the Contract and the conclusion of the employment agreement between the Player and Barcelona SC (who at that time knew about the termination of the Player's former agreement with the Club and about the existence of the relevant dispute in FIFA in such respect as it appears from the letter of 12 January 2018 attached to the First Appellant's appeal brief as

Exhibit 6) and the fact that Barcelona SC did not induce the Player to leave the Club is not relevant herein for the application of Article 17 para. 2 RSTP.

135. In addition, the fact that the Club did not oppose to the transfer of the Player and the issuance of the ITC is not relevant to this purpose, as well as Annex 3 of the RSTP which does not govern the compensation mechanism of Article 17 para. 2 RSTP.

136. In light of the foregoing, Barcelona SC is jointly and severally liable for payment of the compensation due by the Player to the Club following the termination of the Contract without cause.

137. The Panel wishes to note that this finding does not, in any way, means that Barcelona SC did not act *bona fide* or that it instigated the Player to terminate the Contract. This is however not a matter of the present dispute.

B. Conclusion

138. Based on the foregoing, and after taking into due consideration all the evidence produced and all submissions made, the Panel partially upholds the appeal of the Player and confirms the Appealed Decision, save for para. 2 of the operative part, which shall read as follows:

"2. The Respondent / Counter-Claimant, Victor Hugo Ayala Núñez, has to pay to the Claimant/ Counter-Respondent, within 30 days as from the date of the notification of this decision, compensation for breach of contract in the amount of USD 735,477.65, plus 5% interest p.a. as from 31 August 2017 until the date of effective payment".

139. Considering that the Respondent did not file an appeal against the Appealed Decision, the Respondent remains condemned to pay an amount of USD 702,830, plus interests, in accordance with para. 8 of the Appealed Decision. Therefore, the Panel observes that the Player's and the Club's debts against each other could be fully compensated, should the Parties wish to do so.

140. The above conclusion makes it unnecessary for the Panel to consider the other requests and submissions presented by the Parties. Accordingly, all other prayers for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr Víctor Hugo Ayala Núñez against the decision issued on 17 January 2020 by the FIFA Dispute Resolution Chamber is partially upheld.

2. The appeal filed by Barcelona SC against the decision issued on 17 January 2020 by the FIFA Dispute Resolution Chamber is dismissed.

3. The decision issued on 17 January 2020 by the FIFA Dispute Resolution Chamber is confirmed, save for para. 2 of the operative part, which shall read as follows:

   "2. The Respondent / Counter-Claimant, Víctor Hugo Ayala Núñez, has to pay to the Claimant/ Counter-Respondent, within 30 days as from the date of the notification of this decision, compensation for breach of contract in the amount of USD 735,477.65, plus 5% interest p.a. as from 31 August 2017 until the date of effective payment".

4. (…).

5. (…).

6. (…).

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