



**Arbitration CAS 2020/A/7012 Besiktas Futbol Yatirimlari Sanayi ve Ticaret A.S. v. José Maria Gutierrez Hernandez & Fédération Internationale de Football Association (FIFA), award of 30 April 2021**

Panel: Mr Cesare Gabasio (Italy), Sole Arbitrator

*Football*

*Termination of the employment contract with just cause by the coach*

*Reasons for avoiding to pay compensation for damages*

*Standing to be sued of FIFA and request to reallocate procedural costs*

1. **In order to determine whether or not a club has to pay compensation for the termination of an employment contract with a coach or a player, it is irrelevant that the failure to pay that caused the termination has not been intentional. It is also irrelevant that a new employment contract signed by the coach or the player after the termination could be considered an “improvement” of his career. Therefore, the compensation shall in any case be paid by the club.**
2. **A dispute between a club and a coach, pertaining to an employment contract, in which FIFA was not a party to the first-instance proceeding and solely acted in its role as the competent deciding body, is of a so-called “horizontal” nature. If FIFA has not added a “vertical” element by exercising its power to impose sporting sanction on one of the parties, FIFA has no standing to be sued in the dispute. The request to reallocate procedural costs does not alter the horizontal nature of the dispute and FIFA does not need to be a party in the CAS proceedings in order for the issue of procedural costs to be addressed.**

**I. PARTIES**

1. Beşiktaş Futbol Yatırımları Sanayi ve Ticaret A.S. (the “Club” or the “Appellant”) is a football club with its registered office in Istanbul, Turkey. It is a member of the Turkish Football Federation (the “TFF”), which itself is affiliated with the Fédération Internationale de Football Association (“FIFA”).
2. Mr José María Gutiérrez Hernández (the “Coach” or the “First Respondent”) is a Spanish professional coach, born on 31 October 1976.
3. FIFA (the “Second Respondent”) is an association under Swiss law that has its registered office in Zurich, Switzerland. FIFA is the world governing body of international football. It

exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials and football players worldwide.

4. The Appellant, the First Respondent and the Second Respondent are referred together as the “Parties”. The Coach and FIFA are jointly referred to as the “Respondents”.

## II. INTRODUCTION

5. This appeal is brought by the Club against the decision rendered by the FIFA Players’ Status Committee on 22 January 2020 (the “Appealed Decision”), regarding an employment-related dispute between the Appellant and the Coach.

## III. FACTUAL BACKGROUND

### A. Background facts

6. Below is a summary of the main relevant facts, as established on the basis of the Parties’ written submissions on the file and relevant documentation produced in this appeal. Additional facts and allegations found in the Parties’ submissions may be set out, where relevant, in connection with the further legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, this Award refers only to the submissions and evidence considered necessary to explain its reasoning.
7. On 2 July 2018, Beşiktaş and the Coach signed an employment contract valid from 1 July 2018 until 30 June 2020 (the “Employment Contract”).
8. The Employment Contract contains, *inter alia*, the following relevant terms:

“ARTICLE 5 Salary and Bonuses

*5.1. CLUB shall unconditionally pay COACH for each year contract a basic salary (net of Turkish taxes as specified in Article 5.5) of EUR 300,000.00 net of taxes as specified in article 5.5 and paid divided in 12 monthly equal instalments net of Turkish taxes to be paid within the last five (5) business days of each month.*

*COACH commits to provide CLUB with the full bank account details of COACH’s account in Turkey or abroad, so CLUB can fulfill with his payment obligations in time. Every payment should be made by CLUB in Euros.*

*The CLUB agrees to pay the COACH the following fees net of taxes as specified in article 5.5:*

- EUR 14.400 net on 15 January 2019
- EUR 14.400 net on 15 January 2020

*5.2. (...)*

5.3. *In addition to salary, bonuses and subsidies, CLUB shall pay a prepaid monthly rent support of EURO 3.000 to COACH.*

5.4. (...)

5.5. *The amounts to be paid under the present contract are net of taxes (including, but not limited to personal income tax, regional tax, municipal tax, or any other tax according to the legislation in force) and withholding tax. Therefore, CLUB will be responsible for any tax liability derived from the payments to be made to COACH pursuant to this Contract. CLUB would have to make corresponding gross up in order to pay COACH the net amount agreed. This clause is essential for the validity of the contract. For that reason, should the Turkish Tax Authorities request from COACH any amount as tax, withholding, surcharge, sanction, interest or any other tax liability, as a result of the payments arising from this contract, then the COACH shall be entitled to claim these amounts to CLUB. For the avoidance of doubts, should CLUB fail to pay the amounts agreed to COACH, COACH shall have the rights to claim such amount against CLUB and if necessary to initiate legal actions against CLUB. CLUB will provide each year with to COACH the tax residence certificate as well as the tax withholding certificate in order to comply with its tax obligations before the tax authorities. This clause constitutes an essential and determining factor of this Contract, without which the present document would not have been executed by the Parties.*

5.6. *COACH will be entitled to terminate the contract if CLUB is in default of the payment in more than sixty (60) days and, under such circumstance, CLUB has not regularized the payments 15 days after COACH have put CLUB in default in writing. Should this occur, and pursuant to Article 17 of Regulations on the Status and Transfer of Players of the FIFA, COACH will be entitled to terminate the contract with a just cause reason and consequently CLUB shall pay COACH all the salaries and bonuses pending at the date of termination until 30 of June 2020 in accordance with Article 5. In case the COACH enters into a new employment relationship with a third club after such termination, the remuneration that will be received by the COACH from the third club until 30 June 2020 will be deducted from the total pending salary and bonus payments that will be paid by the CLUB to the COACH. In case of termination of the Contract, the Club's Turkish tax obligation (as described in detail under clause 5.5) shall continue to be applicable for the payment of the pending salary and bonus payments. This clause constitutes an essential and determining factor of this Contract, without which the present document would not have been executed by the Parties.*

(...)

#### ARTICLE 9 Liabilities for Breach of Contract

1. *If CLUB or COACH cancel (terminates) this contract prematurely without just cause, or if COACH terminates this contract prematurely but with just cause (unless just cause emanates from a force major circumstances, e.g. Flood, earthquake, state of emergency or attempted coup etc.), pursuant to Article 17 of Regulations on the Status and Transfer of Players of the FIFA, the fulfilling party will be entitled to terminate the contract with a just cause reason and request the breaching party the amount all the salaries and bonuses pending at the date of termination until 30 of June 2020 in accordance with Article 5. In case the COACH enters into a new employment relationship with a third club until 30 June 2020 will be deducted from the total pending salary and bonus payments that will be paid by the CLUB to the*

*COACH. In case of termination of the Contract, the Club's Turkish tax obligation (as described in detail under clause 5.5) shall continue to be applicable for the payment of the pending salary and bonus payments.*

*As to the above amounts and method of payment the Parties declare as fair and just and therefore undertake not to dispute in front of any authority or to attempt to denounce or annul for no other reason other than those, and only those, mentioned in the present Contract.*

*This clause constitutes an essential and determining factor of this Contract, without which the present document would not have been executed by the Parties" (underline in original).*

9. On 12 February 2019, the Coach sent a default notice to the Club requesting payment of outstanding remuneration of net EUR 125,400.00 and granting 15 days to pay the outstanding amount.
10. On 7 May 2019, the Coach sent a second default notice to the Club requesting payment of outstanding remuneration of net EUR 112,000.00 and granted 15 days to pay the outstanding amount.
11. On 24 May 2019, the Coach sent a termination letter (the "Termination Letter") to the Club whereby the Coach declared that he unilaterally terminated the Employment Contract with just cause. In the termination notice, the Coach held that the Club failed to pay him the total amount of EUR 126,400.00, corresponding to the monthly salaries of January 2019 until April 2019, as well as the amount of EUR 14,400.00 due on January 2019. In addition, the Coach requested the payment of EUR 406,400.00 corresponding to the compensation for the early termination of the Employment Contract with just cause.

## **B. Proceeding before the FIFA Players' Status Committee**

12. On 29 July 2019, the Coach filed a claim against the Club in front of FIFA Players' Status Committee (the "FIFA PSC") requesting the following:
  - EUR 129,400.00 as outstanding remuneration, plus 5% interest p.a.:
    - EUR 3,000.00 corresponding to rent support for January 2019 (interest as from 1 January 2019);
    - EUR 14,400.00 corresponding to the instalment due on 15 January 2019 (interest as from 15 January 2019);
    - EUR 25,000.00 corresponding to the January 2019 salary (interest as from 1 February 2019);
    - EUR 3,000.00 corresponding to rent support for February 2019 (interest as from 1 February 2019);
    - EUR 25,000.00 corresponding to the February 2019 salary (interest as from 1 March 2019);
    - EUR 3,000.00 corresponding to rent support for March 2019 (interest as from 1 March 2019);

- EUR 25,000 corresponding to the March 2019 salary (interest as from 1 April 2019);
  - EUR 3,000.00 corresponding to rent support for April 2019 (interest as from 1 April 2019);
  - EUR 25,000.00 corresponding to the April 2019 salary (interest as from 1 May 2019); and
  - EUR 3,000.00 corresponding to rent support for May 2019 (interest as from 1 May 2019).
- EUR 403,400.00 as compensation for breach of contract, plus 5% interest p.a. as from 25 May 2019.
  - The Coach also requested that the Club bear all the costs of the proceedings.
13. On 7 October 2019, in its response submitted before the FIFA PSC, the Club argued that on 12 July 2019 it paid the Coach EUR 149,331.14, corresponding to his salary between January and June 2019 (equal to EUR 150,000) minus EUR 668.86, which “*reflects the total expenses incurred by the [Club] on behalf of the [Coach]*”. Furthermore, the Club held that on the same day (i.e. 12 July 2019), it also paid in favour of the Coach the sum of EUR 14,400.00, corresponding to the instalment due on 15 January 2019, and the sum of EUR 15,000.00 reflecting the monthly rent support of the Coach between January 2019 and May 2019.
14. In support of the above, the Club submitted Turkish bank statements explaining that it “*was unable to translate these documents in time*”. Consequently, the Club requested the FIFA PSC: (i) to “*decline the request of the [Coach] for overdue amount of 129,400 EUR as well as the accrued interest*”; (ii) to “*decline the request of the [Coach] for compensation of 403,400 EUR*”; (iii) in case the request under point (ii) is rejected to “*establish that the maximum base compensation to be payable by the [Club] to the [Coach] by at least 50% as a result of the termination of the Employment Contract by the [Coach], taking into consideration the failure of the [Coach] to mitigate his damages, although he had reasonable time to do so*”; and (iv) to “*order the [Coach] to pay the legal costs and all other expenses of the present proceedings*”.
15. On 10 December 2019, the Coach informed the FIFA PSC that he concluded an employment agreement with the Spanish club UD Almeria S.A.D., valid from 5 November 2019 until 30 June 2020. In accordance with said document, the Coach is entitled to 8 monthly instalments of EUR 18,750.00.
16. On 22 January 2019, the FIFA PSC rendered its decision with the following operative part (the “*Appealed Decision*”):
- “1. The claim of the [Coach], José María Gutiérrez Hernández, is partially accepted.*
- 2. The [Club], Besiktas J.K., has to pay to the [Coach], **within 30 days** as from the date of notification of the present decision, outstanding remuneration in the amount of EUR 129,400, plus interest at the rate of 5% p.a. until the date of effective payment, as follows:*

- a) From 1 January 2019, on the amount of EUR 3,000;
- b) From 16 January 2019, on the amount of EUR 14,400;
- c) From 1 February 2019, on the amount of EUR 28,000;
- d) From 1 March 2019, on the amount of EUR 28,000;
- e) From 1 April 2019, on the amount of EUR 28,000;
- f) From 1 May 2019, on the amount of EUR 28,000.

3. The [Club] has to pay to the [Coach] **within 30 days** as from the date of notification of the present decision, compensation for breach of contract in the amount of EUR 256,400 plus 5% interest p.a. on said amount as from 29 July 2019 until the date of effective payment.

(...)

6. The final costs of the proceedings in the amount of CHF 25,000 are to be paid by the [Club], Besiktas J.K., as follows:

6.1 The amount of CHF 20,000 has to be paid to FIFA (...).

6.2 The amount of CHF 5,000 has to be paid directly to the Claimant.

(...)" (emphasis in original).

17. On 8 April 2020, the grounds of the Appealed Decision were communicated to the Parties determining, *inter alia*, the following:

- The FIFA PSC acknowledged that on 2 July 2018 the Coach and the Club signed an Employment Contract valid from 1 July 2018 until 30 June 2019, pursuant to which the Club undertook to pay to the Coach the amounts as stipulated in the Employment Contract.
- In particular, the FIFA PSC recalled the content of Article 5.6 of the Employment Contract, which stipulates that the Coach “*will be entitled to terminate the contract if the Club is in default of the payment in more than sixty (60) days and [the Club] has not regularized the payments 15 days after Coach have put Club in default writing. Should this occur, [the] Coach will be entitled to terminate the contract with a just cause [...]*”.
- In addition, the FIFA PSC further acknowledged that the Coach put the Club in default of payment twice, granting it 15 days to cure it.
- The FIFA PSC also noted that the Coach unilaterally terminated the Employment Contract on 24 May 2019, “*invoking the non-payment of 4 monthly salaries as well as the amount of EUR 14,400*”.
- Consequently, when the Coach terminated the Employment Contract “*four monthly salaries and four monthly rent support were outstanding in favour of the Coach, which is considerably more than the 60 days as set out in Art. 5.6 of the contract*”.

- Therefore, the FIFA PSC established that the Club had to be held liable for the early termination of the Employment Contract. The FIFA PSC decided that the Club *“must pay to the [Coach] interest of 5% p.a. on the amount of EUR 129,400 as from the due dates until the effective date of payment”*. As a consequence, the FIFA PSC considered that the amount of EUR 668.86 should not be taken into account since *“no contractual basis or any other form of evidence justified the deduction of said amount from the outstanding remuneration due to the [Coach]”*.
- Furthermore, with regard to the compensation payable by the Club to the Coach following the termination with just cause by the latter, the FIFA PSC determined that said amount *“had to be assessed on the basis of the residual value of the contract in line with the jurisprudence of the Players’ Status Committee”*, which is equal to EUR 406,400.00. However, the FIFA PSC took note that the Coach *“had concluded a new employment contract with the Spanish Club UD Almeria S.A.D., valid as from 5 November 2019 until 30 June 2020, according to which he was entitled to eight monthly instalments of EUR 18,750”*.
- In light of the above, the FIFA PSC *“concluded that the amount of EUR 256,400 is to be paid by the Club to the Coach as compensation for breach of contract”*.
- Lastly, the FIFA PSC ordered the Club to pay the costs of the proceeding in front of FIFA amounting to EUR 25,000.00.

#### IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

18. On 30 April 2020, the Club filed a Statement of Appeal with the Court of Arbitration for Sport (“CAS”) in accordance with Article 58 of the FIFA Statutes and Articles R47 and R48 of the Code of Sports-related Arbitration (2019 edition) (the “CAS Code”). Furthermore, the Club requested that the appeal be decided by a Sole Arbitrator and selected English as the language of the present proceedings.
19. On 1 May 2020, the First Respondent informed the CAS that he agreed to submit the dispute to a Sole Arbitrator as well as to accept English as the language of the proceedings.
20. On 4 May 2020, the Second Respondent requested to be excluded as a respondent in this proceeding.
21. On 8 May 2020, the Appellant replied that *“the present appeal is also brought against FIFA as Second Respondent for reimbursement of the procedural costs paid to FIFA by the Appellant to obtain the grounds of the appealed decision”* and therefore maintained its claim against the Second Respondent.
22. On 12 May 2020, the Second Respondent informed the CAS that it agreed to submit the present procedure to a Sole Arbitrator and to conduct this proceeding in English. Furthermore, on the same date, the Second Respondent asked the Appellant to reconsider the Second Respondent’s request to be excluded as a respondent, with no success.

23. On 22 May 2020, the Club filed its Appeal Brief pursuant to Article R51 of the CAS Code.
24. On 29 May 2020, the First Respondent requested that the time limit to file its Answer to the Appeal Brief be fixed after the payment by the Appellant of its share of the advance of costs, further to Article R55 of the CAS Code.
25. On 2 June 2020, the Second Respondent also requested that the time limit to file its Answer to the Appeal Brief be fixed once the Appellant had paid its share of the advance of costs, further to Article R55 of the CAS Code.
26. On 4 June 2020, CAS informed the Respondents that the Club paid the advance costs and reset the Respondents' Answer deadlines.
27. On 8 June 2020, the Parties were informed in accordance with Article R54 of the CAS Code and on behalf of the Deputy President of the CAS Appeals Arbitration Division, that the Sole Arbitrator had been constituted as follows:  
  
Sole Arbitrator: Mr Cesare Gabasio, Attorney-at-Law in Turin, Italy
28. On 12 June 2020, the Second Respondent filed its Answer to the Appeal Brief pursuant to Article R55 of the CAS Code.
29. On 27 July 2020, after several extensions, the First Respondent filed its Answer to the Appeal Brief pursuant to Article R55 of the CAS Code.
30. On 8 August 2020, the Parties were informed that the Sole Arbitrator had considered the Parties' preference that the Award be issued on the basis of their written submissions, without holding a hearing, and had deemed himself sufficiently well-informed to issue the Award on the basis of the Parties' written submissions, further to Article R57 of the CAS Code.
31. On 28 August 2020, the Appellant submitted the duly signed Order of Procedure to the CAS Court Office.
32. On 31 August 2020, both Respondents submitted the duly signed Order of Procedure to the CAS Court Office.
33. On 11 February 2021, Mr Koray Akalp informed the CAS Court Office that he was no longer acting as the representative of the Appellant.

## **V. PARTIES' SUBMISSIONS**

34. The Appellant's submission, in essence, may be summarised as follows:



- The Club is not arguing whether the termination of the Employment Contract by the Coach was with just cause or not, but is contesting the amount due to the First Respondent as outstanding remuneration and as compensation for breach of contract. With regard to the outstanding remuneration, the Club argues that such amount was paid to the Coach “before the claim [in front of PSC] was even launched”. On the other hand, as far as the compensation for breach of contract is concerned, the Club (i) claims that such compensation is not due and, secondarily (ii) claims that the calculation of the residual value of the Employment Contract made by the FIFA PSC in the Appealed Decision is wrong and that the monthly rent support in favour of the Coach, for the term after the termination of the Employment Contract, should not be taken into consideration when calculating the residual value of the contract.
  
- Furthermore, the Club requests CAS to order the Respondents to reimburse the procedural costs incurred by the Appellant before the FIFA PSC since the First Respondent did not inform the FIFA PSC about the receipt of the payment of the outstanding remuneration and the Second Respondent did not take into consideration the untranslated document proving the payment of said outstanding remuneration.

35. The Appellant submitted the following requests for relief:

- a. *“To accept the present appeal against the decision of the Single Judge of the Players’ Status Committee dated 22 January 2020;*
- b. *To set aside the decision of the Single Judge of the Players’ Status Committee dated 22 January 2020;*
- c. *To establish that the Appellant does not have to pay EUR 129.400. – as outstanding remuneration to the First Respondent.*
- d. *To establish that the Appellant does not have to pay compensation to the First Respondent for breach of contract.*
- e. *To condemn the First Respondent to pay the Appellant EUR 4,700 as reimbursement of the procedural costs incurred before FIFA Players’ Status Committee.*
- f. *To condemn the Second Respondent to pay the Appellant CHF 20,000 as reimbursement of the procedural costs incurred before FIFA Players’ Status Committee.*
- g. *To jointly condemn the Respondents to the payment of CHF 10.000 in the favour of the Player of the legal expenses incurred,*
- h. *To establish that the costs of the arbitration procedure shall be borne jointly by the Respondents.*

*Alternatively, in case the above request is not accepted,*

- a. *To accept the present appeal against the decision of the Single Judge of the Players' Status Committee dated 22 January 2020;*
- b. *To set aside the decision of the Single Judge of the Players' Status Committee dated 22 January 2020;*
- c. *To establish that the Appellant does not have to pay EUR 129,400. – as outstanding remuneration to the First Respondent.*
- d. *To establish that the total compensation payable by the Appellant to the First Respondent for breach of contract shall be maximum EUR 164,400.*
- e. *To condemn the First Respondent to pay the Appellant EUR 4,700 as reimbursement of the procedural costs incurred before FIFA Players' Status Committee.*
- f. *To condemn the Second Respondent to pay the Appellant CHF 20,000 as reimbursement of the procedural costs incurred before FIFA Players' Status Committee.*
- g. *To jointly condemn the Respondents to the payment of CHF 10,000 in the favour of the Player of the legal expenses incurred,*
- h. *To establish that the costs of the arbitration procedure shall be borne jointly by the Respondents”.*

36. The submissions of the First Respondent may be summarized as follows:

- As to the outstanding remuneration, the Coach recognizes the payment of EUR 178,731.14 made by the Club on 12 July 2019. He also recognizes that all costs incurred by the Club on behalf of the Coach, amounting to EUR 668.86, were correctly deducted.
- Regarding the amount of compensation due for the premature termination of the Employment Contract, the First Respondent requests the CAS to take into consideration the “*prepaid monthly rent support*” of EUR 3,000.00 when calculating the total compensation, pursuant to Article 5 and Article 9 of the Employment Contract.
- Finally, the Coach states that no reimbursement of procedural costs shall be granted to the Club since “*The Coach has always acted in good faith when filing the claim and only noticed the payments made by the Besiktas at a later stage. In any event and after having paid, Besiktas (i) never notified the Coach about this payment, (ii) the coach was never requested to confirm whether or not such payments were made and, (iii) despite its means and experience in previous litigations, it was Besiktas who failed to provide the FIFA PSC with the corresponding translations into one of the four FIFA official languages, breaching the FIFA Procedural Rules*”.

37. The First Respondent submitted the following requests for relief:

A. *“To partially upheld [sic] the appeal filed by the Besiktas and consider the payments made after the termination of the Employment Agreement that has been recognized by the First Respondent, solely for the purpose of amortization of the total debt existent, amending the FIFA PSC Decision only as to the amount of the outstanding (III. 2 of the Decision) and compensation (III.3. of the Decision) as follows:*

*A.1) The Appellant has to pay to the First Respondent, the outstanding net sum of TWO THOUSAND TWO HUNDRED FORTY EUROS AND EIGHT-FIVE CENTS (2,240.85 EUR) corresponding to the interests for late payment (see par. 17 above);*

*A.2) The Appellant shall pay the First Respondent compensation for breach of contract in the net amount of TWO HUNDRED THREE THOUSAND FOUR HUNDRED EUROS (203,400.00 EUR) as well as 5% interest per annum on said amount from July 29<sup>th</sup>, 2019, until the full payment;*

B. *In any case, ordering BESIKTAS to pay the costs and other expenses of this arbitration.*

C. *In any case, ordering BESIKTAS to pay the legal fees and other expenses incurred by the Coach in an amount to be determined at the discretion of this Hon. Sole Arbitrator and no less than CHF 7,000.00”.*

38. The submissions of the Second Respondent may be summarized as follows:

- The dispute in the case-at-hand is of a so-called horizontal nature (i.e. exclusively between the Club and the Coach) and, therefore, FIFA has no standing to be sued. Furthermore, FIFA states that the Appellant’s claim for procedural costs also fails on the merits for the following reasons: (i) the Club has not complied with the procedural rules set forth by FIFA by not submitting the translation of the bank statement in one of the four official languages of FIFA; (ii) the FIFA PSC would have charged the full procedural costs to the Appellant even if it had taken into account the Appellant’s payment of outstanding salaries to the Coach made on 12 July 2019; (iii) the Club would in any case have asked for the grounds of the Appealed Decision and, thus, paid the procedural costs since the Appellant also wished to challenge the compensation for breach of contract; and (iv) there were no contradictions in the FIFA PSC’s evaluation of untranslated evidence produced by the Club.

39. The Second Respondent submitted the following requests for relief:

- (a) *“rejecting the reliefs sought by the Appellant;*
- (b) *confirming the Appealed Decision;*
- (c) *ordering the Appellant to bear the full costs of these arbitration proceedings; and*

(d) *ordering the Appellant to make a contribution to FIFA's legal costs*".

## **VI. JURISDICTION**

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

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

41. The jurisdiction of CAS derives from Article 58.1 of the FIFA Statutes, which reads:

*"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"*.

42. The Parties do not dispute the jurisdiction of the CAS and, moreover, confirmed it by signing the Order of Procedure. Furthermore, Article 10 of the Employment Contract provides that *"(...) any disputes related to the contract should be submitted in first instance to the Player Status Committee of FIFA (...) and in appeal to the Court of Arbitration for Sport (...)"*.

43. In light of the foregoing, the Sole Arbitrator holds that the CAS has jurisdiction to hear the present dispute.

## **VII. ADMISSIBILITY**

44. Article R49 of the CAS Code provides as follows:

*"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after considering any submission made by the other parties"*.

45. Article 58 of the FIFA Statutes provides a time limit of 21 days after notification to lodge an appeal against a decision adopted by one of FIFA's legal bodies, such as the FIFA PSC.

46. The Appealed Decision was notified with grounds to the Appellant on 8 April 2020. The Appellant filed its Statement of Appeal on 28 April 2020, which is within the 21-day deadline allotted under the aforementioned provision.

47. Therefore, the appeal was timely submitted and is admissible.

### VIII. APPLICABLE LAW

48. Article R58 of the 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”.*

49. Article 57.2 of the FIFA Statutes so provides:

*“The provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law”.*

50. In addition, the Sole Arbitrator notes that the Employment Contract also refers to Swiss law and FIFA regulations as applicable law.

51. Accordingly, the present dispute must be decided in accordance with the FIFA rules and regulations, such as in particular FIFA Regulations on the Status and Transfer of Players (the “FIFA RSTP”) as well as, additionally, Swiss law.

### IX. MERITS

52. The Sole Arbitrator notes that the main issues before him are:

- a) What are the financial implications of the breach of the Employment Contract?
- b) Is the Appellant entitled to the reimbursement of the procedural costs incurred before the PSC?

53. The Sole Arbitrator further notes that the evaluation of these issues will also necessitate the examination of several subsidiary issues, for example the standing of FIFA to be sued.

#### a) What are the financial implications of the breach of the Employment Contract?

54. Preliminary, the Sole Arbitrator observes that the Appellant is not arguing whether the termination of the Employment Contract by the Coach was with just cause but is rather contesting (i) the amount due to the First Respondent as outstanding remuneration and (ii) the amount due as compensation for breach of contract, as awarded in accordance with the Appealed Decision.

55. The above is to make clear that although the Sole Arbitrator has the power to review the appealed decision *de novo*, the scope of the appeal shall be limited to the Parties' submissions and, ultimately, requests for relief. In this regard, the Appellant did not appeal the findings of the FIFA PSC as to the termination of the Employment Contract with just cause and no such request is to be found in its requests for relief. Therefore, the Sole Arbitrator is bound to respect the scope of the appeal as determined by the Parties. Otherwise, the award would be *ultra petita* and subject to further review (CAS 2017/A/5228).

**(i) Outstanding Remuneration**

56. As it became clear during the CAS proceedings, the Sole Arbitrator notes that the Coach lodged his claim before the FIFA PSC requesting, *inter alia*, outstanding remuneration although the Club had already paid his outstanding remuneration. More specifically, the Coach initiated the FIFA proceedings on 29 July 2019, while on 12 July 2019 the Club had paid the Coach outstanding remuneration in the amount of EUR 178,731.14. Such amount corresponds to: (i) the Coach's monthly salary from January 2019 until June 2019, minus the expenses incurred by the Appellant on behalf of the First Respondent; (ii) the fee due on 15 January 2019; and (iii) monthly rent support for the months between January 2019 and May 2019. This was also recognized by the First Respondent in his Answer to the Appeal Brief and is, therefore, no longer in dispute between the Club and the Coach.

57. As such, and in line with Article 104 of the Swiss Civil Code, the Appellant has to pay to the First Respondent 5% interest for late payment of the amounts indicated above, corresponding to EUR 2,240.85.

**(ii) Compensation for breach of contract**

58. Next, the Sole Arbitrator shall assess the request of the Appellant to pay no compensation for the termination of the Contract by the Coach. Such request does not deserve to be upheld.

59. As a matter of fact, the arguments of the Appellant in order to avoid paying this compensation are not convincing, namely: (i) it is irrelevant that the failure to pay the Coach has not been intentional by the Appellant; and (ii) it is irrelevant (and not proved or argued in any articulate way) that the new employment of the Coach could be considered an "improvement" of his career. Therefore, the compensation (that qualifies as a valid penalty under Swiss law) shall be paid by the Appellant.

60. The second issue in relation to the amount due as compensation for breach of contract concerns the "monthly rent support of EURO 3.000" provided for in Article 5.3 of the Employment Contract. In fact, the Appellant and the First Respondent do not agree on the interpretation of Article 9 of the Employment Contract, which states that "If CLUB or COACH cancel (terminates) this contract prematurely without just case, or if COACH terminates this contract prematurely but with just case (unless just case emanates from a force major circumstances, e.g. Flood, earthquake, state of emergency or attempted coup etc.), pursuant to Article 17 of Regulations on the Status and Transfer of Players of the FIFA, the fulfilling party will be entitled to terminate the contract with a just

*cause reason and request the breaching the party the amount all the salaries and bonuses pending at the date of termination until 30 of June 2020 in accordance with Article 5. (...)*

61. In this regard, the following should be observed. To interpret Article 5 and Article 9 of the Employment Contract, it is necessary to make reference to Article 18(1) of the Swiss Code of Obligations which provides: *“When interpreting the form and the contents of a contract, the mutually agreed real intention of the parties must be considered and not incorrect terms or expressions used by the parties by mistake or in order to conceal the true nature of the contract [...]”*. In the case at stake the *“common intention”* of the Parties can be determined with certainty based on the wording of the Employment Contract. In fact, Article 5 of the Employment Contract provides for: (i) salary (Article 5.1); (ii) bonuses (Article 5.2); (iii) monthly rent support (Article 5.3); and (iv) other benefits (Article 5.4). It appears clearly from the wording of Article 5.3 that the monthly rent support is not part of the salary, nor are the bonuses (*“In addition to salary, bonuses and subsidies, CLUB shall pay...”*). Such monthly rent support, therefore shall not be considered included in the *“amount (of) all the salaries and bonuses pending”* described by the applicable Article 9 of the Employment Contract.
  62. Furthermore, it is undisputed between the Appellant and the First Respondent that, following the Termination Letter, the Coach left Turkey and, therefore, no longer incurred the rent costs. As such, no rent support is due to the First Respondent from June 2019 until June 2020.
  63. According to the above, the residual value of the Employment Contract must be calculated on the compensation due to the Coach from July 2019 until June 2020, corresponding to EUR 300,000.00. In addition, the fee due on 15 January 2020, equal to EUR 14,400.00, must be taken into account. The amount of EUR 314,400.00 must be reduced by the amount of EUR 150,000.00, corresponding to the salary of the Coach with the new Club, UD Almeria S.A.D., which is also undisputed between the Appellant and the First Respondent.
  64. In light of the foregoing, the Sole Arbitrator concludes that the amount of EUR 164,400.00 is to be paid by the Club to the Coach as compensation for breach of contract.
- b) Is the Appellant entitled to the reimbursement of the procedural costs incurred before the FIFA PSC?**
65. In order to answer to the question under point b), it is necessary, first of all, to establish if FIFA has standing to be sued. Afterward the Sole Arbitrator will enter into the merits of the dispute-at-stake, which are applicable to both Respondents.
- (i) Does FIFA have standing to be sued?**
66. The Sole Arbitrator notes that the present appeal relates to a dispute between the Club and the Coach, pertaining to an employment-related dispute that arose between the two aforementioned Parties. FIFA was not a party to the first-instance proceeding and solely acted in its role as the competent deciding body. Therefore, the dispute in the case-at-hand is of a so-called *“horizontal”* nature (CAS 2016/A/4602).

67. However, in the case-at-stake, FIFA has been included as a Respondent based on the Appellant's request for the reimbursement of the Procedural Costs incurred by the latter in the proceeding of first instance before the FIFA PSC.

68. In this regard, the Sole Arbitrator finds guidance in *CAS 2013/A/3054* (followed in *CAS 2016/A/4387*) where the panel held that:

*"The Panel considers that it is not for CAS to reallocate the costs of the proceedings before previous instances, and that therefore the appeal shall be dismissed in this respect".*

69. What is more, in *CAS 2013/A/3054*, FIFA was not a party in the proceedings before the CAS, which demonstrates that the request to reallocate procedural costs does not alter the horizontal nature of the dispute and that FIFA does not need to be a party in the CAS proceedings in order for the issue of procedural costs to be addressed.

70. In addition to the above, the Sole Arbitrator notes that FIFA, in the Appealed Decision, has not added a "vertical" element to what initially was a horizontal dispute. As established by *CAS 2017/A/5359*, that may be the case when FIFA applies in its decision a sporting sanction to one of the parties involved in the dispute. In the case-at-hand, however, FIFA acted as dispute resolution body and did not exercise its power to impose sporting sanction on one of the parties.

71. Therefore, the Sole Arbitrator is of the opinion that FIFA does not have standing to be sued.

***(ii) Does the First Respondent have to reimburse the Procedural Costs incurred by the Appellant before the FIFA PSC?***

72. Entering into the merits of the dispute regarding the reallocation of the Procedural Costs, the Sole Arbitrator observes the following.

73. According to Article 9, par. 1, lit. e), of the FIFA Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (the "FIFA Procedural Rules") *"documents of relevance to the dispute, such as contracts and previous correspondence with respect to the case in the original language and, if applicable, translated into one of the official FIFA languages (evidence)"*.

74. According to Article 9 of the FIFA Statutes *"English, Spanish, French and German are the official languages of FIFA"*.

75. It follows that the FIFA PSC correctly did not take into account the bank statements submitted by the Club which were not translated into one of the four official languages of FIFA. Therefore, it is neither FIFA's nor the Coach's fault if the FIFA PSC has not deducted the amount of EUR 178,731.14 from the compensation payable by the Appellant to the First Respondent following the Termination Letter.



76. Moreover, the Sole Arbitrator finds that there were no contradictions in the FIFA PSC's evaluation of the evidence on file. In particular, there were no contradiction between the evaluation of the Turkish bank statements and the documentation filed in Turkish concerning the expenses incurred by the Club on behalf of the Coach. In fact, the FIFA PSC discarded any evidence that was not translated into one of the four official languages of FIFA.
77. Lastly, it shall be taken into account that the Appellant has not only challenged the Appealed Decision on the grounds that it did not take into consideration the payments made by the Appellant on 12 July 2019, but also on the grounds (hereby upheld) that monthly rent support should not have been included in the compensation for the termination of the Contract and on the grounds (hereby not upheld) that no compensation at all was due to the Coach. Therefore: (i) it is unlikely that the Appellant would not have paid the FIFA Procedural Costs in order to obtain the grounds of the Appealed Decision, had such Appealed Decision taken into account the payments made by the Appellant on 12 July 2019; and (ii) the grounds of the Appealed Decision have been utilized by the Appellant on a wider basis than the mere challenge related to such payments.

**c) Conclusions**

78. Based on the foregoing the Sole Arbitrator finds that:
- a. the Club's Appeal is partially upheld;
  - b. the Appealed Decision is amended as follows: the Appellant has to pay to the First Respondent 5% interest for late payment of the outstanding remuneration, amounting to a total of EUR 2,240.85. In addition, the Club has to pay to the Coach compensation for breach of contract corresponding to EUR 164,400.00, net of any Turkish tax, plus 5% interest on said amount from 29 July 2019 until the date of effective payment.

## ON THESE GROUNDS

### The Court of Arbitration for Sport rules that:

1. The appeal filed on 30 April 2020 by Beşiktaş Futbol Yatirimlari Sanayi ve Ticaret A.S. against José María Gutiérrez Hernández and the Fédération Internationale de Football Association with respect to the decision passed on 22 January 2020 by the FIFA Players' Status Committee is partially upheld.
2. The decision rendered by the FIFA Players' Status Committee on 22 January 2020 is confirmed, except for paragraphs 2 and 3 of the Operative Part, which are amended as follows:

*“2. Beşiktaş Futbol Yatirimlari Sanayi ve Ticaret A.S. has to pay to José María Gutiérrez Hernández, within 30 days as from the date of notification of the present decision, 5% interest for late payment of outstanding remuneration in the amount of EUR 2,240.85, net of any Turkish tax, plus interest at the rate of 5% p.a. until the date of effective payment.*

*3. Beşiktaş Futbol Yatirimlari Sanayi ve Ticaret A.S. has to pay to José María Gutiérrez Hernández, within 30 days as from the date of notification of the present decision, compensation for breach of contract in the amount of EUR 164,400.00, net of any Turkish tax, plus 5% interest p.a. on the said amount from 29 July 2019 until the date of effective payment”.*
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.