

**Arbitration CAS 2021/A/8277 Yeni Malatyaspor FK v. A., award of 27 April 2022**

Panel: Prof. Ulrich Haas (Germany), Sole Arbitrator

*Football**Termination of the employment contract with just cause by the player**FIFA COVID-19 Guidelines as legal basis to unilaterally amend binding employment contracts**Definition of force majeure**Consequences of force majeure**Standard of proof**Need for proof of impossibility to perform contractual obligations**Calculation of the compensation for damages*

- 1. Whether or not a party is entitled – based on the COVID-19 pandemic – to unilaterally change the contents of a binding contract is a matter of law and fact, which must be addressed on a case-by-case basis vis-à-vis the relevant laws that are applicable to any specific employment or transfer agreement. The FIFA Guidelines are clear to the extent that the COVID pandemic does not trigger an event of force majeure and they do not determine that COVID-19 was a force majeure situation in any specific country exempting a club from paying players pursuant to a specific employment agreement. Thus, the FIFA COVID-19 Guidelines are not by themselves a sufficient basis to unilaterally amend binding employment contracts.**
- 2. Force majeure takes place in the presence of extraordinary and unforeseeable events that occur beyond the sphere of activity of the person concerned and that impose themselves on him/her in an irresistible manner. It implies an objective (rather than a personal) impediment, beyond the control of the “obliged party”, that is unforeseeable, that cannot be resisted and that renders the performance of the obligation impossible. The unforeseen event must have been unavoidable in the sense that the party seeking to be excused from performing could not have prevented it. Moreover, force majeure is not intended to excuse any possible negligence or lack of diligence from a party, and is not applicable in cases where a party does not take reasonable steps or specific precautions to prevent or limit the effects of the external interference. As force majeure introduces an exception to the binding force of an obligation, the conditions for the occurrence of force majeure are to be narrowly interpreted.**
- 3. According to Swiss law, the legal consequences of non-performance of a contract depend on whether the impossibility to discharge the obligation because of force majeure is temporary or permanent and whether one of the contractual parties is at fault. Should the impossibility be of a permanent nature, Article 119 of the Swiss Code of Obligations (CO) applies. Should the impossibility to fulfil the obligations be only temporary, the counterparty can, at its discretion, a) set an appropriate time limit for**

subsequent performance or ask the court to set such time limit (Article 107 CO), b) under certain circumstances, insist on performance without delay (Article 108 CO), c) waive performance and claim damages (Article 107(2) CO or d) terminate the agreement and demand the return of any performance already made. In addition, it may claim damages for the lapse of the contract, unless the debtor can prove that he was not at fault (Article 109 CO). In accordance with Article 97 CO, the debtor's fault is presumed. Pursuant to Article 99(1&2) CO, the debtor is generally liable for any fault attributable to him. The scope of such liability is determined by the particular nature of the transaction and in particular is judged more leniently where the obligor does not stand to gain from the transaction.

4. The standard of proof describes the degree to which a judge / arbitral tribunal needs to be persuaded in order to accept or not to accept an alleged fact. The question of the standard of proof is a procedural question governed in an international arbitration by Article 182 of the Swiss Private International Law Act. According to Swiss law absolute certainty is not required. Instead, it suffices if the judge / arbitral tribunal has no serious doubt about the existence of the alleged facts or if any remaining doubt appears to be tenuous.
5. The COVID-19 pandemic has led to major upheavals in organized sport, plunged many clubs and sports organisations into economic crisis or let them to the economic abyss. But it is simply not enough to invoke a pandemic in general to suspend one's contractual obligations. Rather, the debtor must substantiate and, if necessary, also prove to the required standard of proof that it was temporarily or permanently impossible to personally meet its obligations because of the pandemic. The debtor can easily provide such evidence by submitting a liquidity plan showing the payment flows over the relevant periods of time.
6. Compensation for damage is to be calculated – absent any liquidated damage clause in the contract – taking into account the remuneration due to the player in accordance with the employment contract as well as the time remaining on the same contract, along with the professional situation of the player after the early termination occurred.

## **I. PARTIES**

1. Yeni Malatyaspor FK (“Appellant” or “Club”) is a professional football club with its registered office in Malatya, Turkey. The Club is a member of the Turkish Football Federation (“TFF”), which is in turn affiliated with the Fédération Internationale de Football Association (“FIFA”).
2. A. (“Respondent” or “Player”), is a French professional football player, born [in] 1995, currently registered with Sporting Kansas City (“Sporting KC”) in the Major League Soccer, L.L.C. (“MLS”).

3. The Club and the Player are jointly referred to as the “Parties”.

## II. FACTUAL BACKGROUND

### A. Introduction

4. The dispute in the present proceedings revolves around the decision rendered by the FIFA Dispute Resolution Chamber (“FIFA DRC”) on 18 June 2021 (“Appealed Decision”). In its decision, the FIFA DRC found that the Club is, *inter alia*, liable to pay the Player :

- outstanding remuneration in the amount of EUR [...] plus 5% interest p.a.
  - on the amount of EUR [...] as from 21 April 2020 until the date of effective payment,
  - on the amount of EUR [...] as from 21 April 2020 until the date of effective payment,
  - on the amount of EUR [...] as from 1 May 2020 until the date of effective payment,
  - on the amount of EUR [...] as from 31 May 2020 until the date of effective payment,
  - on the amount of EUR [...] as from 30 June 2020 until the date of effective payment and
- compensation for breach of contract in the amount of EUR [...] plus 5% interest as from 4 August 2020 until the date of effective payment.

5. Below is a summary of the main relevant facts and allegations based on the Parties’ written submissions, pleadings and evidence adduced during these proceedings. Additional facts may be set out, where relevant, in connection with the legal discussion that follows. Although the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, he refers in this Award only to the submission and evidence he considers necessary to explain his reasoning.

### B. Background facts

6. On 22 January 2020, the Club and the Player entered into a PROFESSIONAL FOOTBALLPLAYER CONTRACT (“Employment Contract”), which was valid from 22 January 2020 until 31 May 2021.

7. Article 3 (PAYMENT AND SPECIAL PROVISIONS) of the Employment Contract reads – in its pertinent parts – as follows:

*“For 2019-2020 Football Season: [...] Euro ([...] euro) net  
Down payments  
[...] -Euros of the above mentioned amount has to be paid 22<sup>nd</sup> Jan 2020 by club cheque.*

*The rest of the aforementioned amount ([...] Euros) is to be paid to the PLAYER by the CLUB in 5 (five) equal instalments on the below mentioned dates:*

1. [...] Euros on 30<sup>th</sup> January 2020
2. [...] Euros on 28<sup>th</sup> February 2020
3. [...] Euros on 30<sup>th</sup> March 2020
4. [...] Euros on 30<sup>th</sup> April 2020
5. [...] Euros on 30<sup>th</sup> May 2020

*“For 2020-2021 Football Season: [...] -EUROS ([...] euro) net  
Down payments*

*[...] -Euros of the above mentioned amount has to be paid 30<sup>th</sup> June 2020 by the club cheque.*

*The rest of the aforementioned amount ([...] Euros) is to be paid to the PLAYER by the CLUB in 10 (ten) equal installments on the below mentioned dates:*

1. [...] Euros on 30<sup>th</sup> August 2020
2. [...] Euros on 30<sup>th</sup> September 2020
3. [...] Euros on 30<sup>th</sup> October 2020
4. [...] Euros on 30<sup>th</sup> November 2020
5. [...] Euros on 30<sup>th</sup> December 2020
6. [...] Euros on 30<sup>th</sup> January 2021
7. [...] Euros on 28<sup>th</sup> February 2021
8. [...] Euros on 30<sup>th</sup> March 2021
9. [...] Euros on 30<sup>th</sup> April 2021
10. [...] Euros on 30<sup>th</sup> May 2021”.

8. On 22 January 2020, the Club paid the Player the first instalment in the amount of USD [...] (corresponding to EUR [...] which is the amount due according to the first instalment).
9. On 12 February 2020, the Club paid the Player the second instalment in the amount of EUR [...].
10. On 21 April 2020, the Player sent a default notice to the Club demanding payment of the outstanding remuneration in the total amount of EUR [...] (equivalent to half of the salary for January 2020 and full salaries for the months of February and March 2020).
11. On 30 April 2020, the Club paid the Player an amount of EUR [...].
12. On 6 May 2020, the Club replied, stating that the delay of the payment is due to a *force majeure* as a consequence of the global COVID-19 outbreak and the subsequent suspension of the league. In addition, the Club assured to pay to the Player the rest of the salary for January 2020 until the end of May 2020 and the salary for February 2020 by check offer in July 2020.
13. On 26 June 2020, the Club paid the Player an amount of EUR [...].
14. On 2 July 2020, the Player replied to the Club, denying that the concept of *force majeure* would be applicable in the present case and insisted on the payment of EUR [...] within the next 15 days.

15. On 20 July 2020, the Player unilaterally terminated the Employment Contract pursuant to Article 14bis of the FIFA Regulations on the Status and Transfer of Players (“RSTP”).
16. On 21 December 2020, the Player concluded a Standard Players Agreement with Major League Soccer, L.L.C., which is valid from 1 January 2021 until 31 December 2023. According to this Agreement, the Player earns the following remuneration:
  - USD [...] per month from 1 January 2021 until 31 December 2021
  - USD [...] per month from 1 January 2022 until 31 December 2022
  - USD [...] per month from 1 January 2023 until 31 December 2023.
17. Furthermore, the agreement mentioned that the MLS will “*automatically withhold from your compensation any applicable income and/or payroll taxes and shall make any deductions as directed by you*”. With respect to the withholding of taxes, the Player provided two earning statements for the period from 1 to 15 April 2021 and 16 to 30 April 2021, according to which the Player’s net salary was USD [...] + USD [...]. Accordingly, the Player’s net monthly remuneration with Sporting KC in 2021 amounts to USD [...].
18. Following a decision of the Single Judge of the Players’ Status Committee dated 14 April 2021, the Player registered with Sporting KC.

### III. PROCEEDINGS BEFORE THE FIFA DISPUTE RESOLUTION CHAMBER

19. On 4 August 2020, the Player lodged a claim before the FIFA DRC against the Club for outstanding remuneration and compensation for breach of Employment Contract.
20. In light of the above the Player/First Counter-Respondent requested the following prayers for relief:
  - “*Outstanding remuneration: EUR [...] (corresponding to the due amounts for the season 2019-2020, i.e. EUR [...], minus the amounts received until the termination, i.e. EUR [...])*”
  - *Compensation for breach of contract: EUR [...] as residual value of the contract + EUR [...] as additional (moral) damage,*
  - *EUR [...] as legal fees,*
  - *5% interest on all amounts as from 21 April 2020”.*
21. The Club, in turn, contested the Player’s claim and lodged a counterclaim with the following requests for relief:
  - “*EUR [...] plus 5% interest as from 20 July 2020”.*

22. In light of the counterclaim and the possible consequences arising from in light of the provisions of Article 17 par. 2 and Article 17 par. 4 of the RSTP, the FIFA administration extended such counterclaim to the Player's football club, i.e. Sporting KC.
23. On 18 June 2021, the FIFA DRC rendered the Appealed Decision.
24. The operative part of the Appealed Decision reads – in its relevant parts – as follows:

*“1. The claim of the Claimant / Counter-Respondent-1, A., is partially accepted.*

*2. The Respondent / Counter-Claimant, Yeni Malatyaspor, has to pay to the Claimant the following amounts:*

*- EUR [...] as outstanding remuneration plus 5% interest p.a. as follows:*

- 5% interest p.a. on the amount of EUR [...] as from 21 April 2020 until the date of effective payment,*
- 5% interest p.a. on the amount of EUR [...] as from 21 April 2020 until the date of effective payment,*
- 5% interest p.a. on the amount of EUR [...] as from 1 May 2020 until the date of effective payment,*
- 5% interest p.a. on the amount of EUR [...] as from 31 May 2020 until the date of effective payment,*
- 5% interest p.a. on the amount of EUR [...] as from 30 June 2020 until the date of effective payment,*

*- EUR [...] as compensation for breach of contract plus 5% interest as from 4 August 2020 until the date of effective payment.*

*3. Any further claims of the Claimant / Counter-Respondent 1 are rejected.*

*4. The counter-claim of the Respondent / Counter-Claimant is rejected.*

*5. The Claimant / Counter-Respondent 1 must return the cheque no. 1401649 dated 30 July 2020 for the amount of USD [...] to the Respondent / Counter-Claimant.*

*[...]*

*8. In the event that the amount due, plus interest as established above is not paid by the Respondent / Counter-Claimant within 45 days, as from the notification by the Claimant / Counter-Respondent 1 of the relevant bank details to the Respondent / Counter-Claimant, the following consequences shall arise:*

1. *The Respondent / Counter-Claimant shall be banned from registering any new players, either nationally or internationally, up until the due amount is paid and for the maximum duration of three entire and consecutive registration periods. The aforementioned ban mentioned will be lifted immediately and prior to its complete serving, once the due amount is paid.*

*(cf. art. 24bis of the Regulations on the Status and Transfer of Players).*

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

25. On 11 August 2021, the grounds of the Appealed Decision were notified to the Parties. The grounds of the Appealed Decision read in their pertinent parts as follows:

*“65. In order to assess the issue of the player having unilaterally terminated the contract with or without just cause, the Chamber held that it must determine whether the Respondent / Counter-Claimant had any overdue payables towards the player at the time of termination of the contract and if so, to which extent.*

*[...]*

70. *With this in mind and having thoroughly analysed the entire documentation provided by the parties, the Chamber established that, in the season 2019/2020, the player only received a total amount of EUR [...] whereas, according to the relevant employment contract, he should have received a total of EUR [...].*

71. *It follows that the amount of EUR [...] was overdue at the time the player terminated the contract with Yeni Malatyaspor unilaterally, i.e. on 20 July 2020.*

72. *At this point, the Chamber recalled the provisions of art. 14bis of the Regulations, according to which a player is deemed to have just cause to terminate an employment contract if his/her club finds itself in default of payment of at least two month of salary and the player has put the club in default and granted the club at least 15 days to remedy the default.*

73. *Bearing the aforementioned principles in mind, the DRC found that the Claimant player had followed the criteria set in art. 14bis of the Regulations prior to terminating the contract. Thus, in principle, the Claimant terminated the respective contract with just cause.*

74. *The Chamber then moved on to the reasons provided by Yeni Malatyaspor as to why it had failed to proceed to the player’s timely payment of his remuneration, this is, the financial difficulties it was experiencing due to the Covid-19 pandemic.*

75. *In this regard, the Chamber referred to the fact that, in light of the worldwide COVID-19 outbreak, FIFA issued a set of guidelines, the COVID-19 Guidelines, which aim at providing appropriate guidance and recommendations to member associations and their stakeholders, to both mitigate the consequences of disruptions caused by COVID-19 and ensure that any response is harmonised in the common interest. Moreover, on 11 June 2020, FIFA has issued an additional document, referred to*

as FIFA COVID-19 FAQ, which provides clarification about the most relevant questions in connection with the regulatory consequences of the COVID-19 outbreak and identifies solutions for new regulatory matters.

76. *Analysing the concept of a situation of force majeure, the members of the Chamber noted that, based on the contents of the FIFA COVID-19 Guidelines and the FIFA COVID-19 FAQ, the COVID-19 outbreak was not to be considered a force majeure situation in any specific country or territory. Also, in line with the aforementioned guidelines, no specific employment or transfer agreement was impacted by the concept of force majeure.*
77. *Turning to the content of the file, the Chamber were eager to emphasize that, in this particular matter, the Respondent / Counter-Claimant did not submit any documentary evidence that the situation it faced was to be considered a situation of force majeure, nor that the Covid-19 pandemic was declared a situation of force majeure in Turkey.*
78. *Furthermore, and as to an alleged proposal sent to the player regarding the reduction of his salaries, the Chamber noted that, according to the Respondent / Counter-Claimant, it had sent an email to the player on 19 April 2020 with the intent to start negotiations. In this regard, the Chamber noted that the email in question, as produced by Yeni Malatyaspor in support of its statement of defence, did not contain any attachment. Furthermore, the player had denied having received an email from the said club. As a consequence, the Chamber held that it could not assess the existence of such email or Yeni Malatyaspor's alleged will to find a solution with the player regarding the payment of his remuneration.*
79. *In conclusion, the DRC found that Yeni Malatyaspor could not prove having, in good faith, contacted the player in order to discuss the possibility of a reduction of his salaries.*
80. *Furthermore, the Chamber also wished to the explicit wording of FAQ no. 16, as well as pages 6 and 7 of the FIFA COVID-19 Guidelines, according to which said guidelines are only applicable to "unilateral variations to existing employment agreements". Therefore, the guidelines do not apply to unilateral terminations of existing employment agreements, as was the case in the matter at hand. The members of the Chamber further noted that for the assessment of disputes that arise before the FIFA judicial bodies concerning unilateral termination of a contract, the FIFA Regulations as well as the established jurisprudence of the Chamber, shall apply.*
81. *In view of the above, and reverting to the facts of the present matter, the DRC established that at the time of termination, a substantial part of the outstanding remuneration due to the Claimant had fallen due prior to the Covid-19 pandemic. In fact, Yeni Malatyaspor's default in payment started before the Covid-19 outbreak since the player's first default notice dated 21 April 2020 pertained to the salaries of January, February and March 2020. In this regard, the Chamber wished to underline that the Covid-19 outbreak may not be used as an opportunity to escape from debts that arose before its outbreak.*

[...]

84. *In conclusion, the Chamber decided that the Claimant / Counter-Respondent 1 had just cause to unilaterally terminate the employment contract with the Respondent / Counter-Claimant on 20 July 2020”.*

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

26. On 31 August 2021, the Club filed its Statement of Appeal before the Court of Arbitration for Sport in accordance with Article R47 et seq. of the Code of Sports-related Arbitration (“CAS Code”). The Appellant requested to refer this matter to a sole arbitrator.
27. By letter of 9 September 2021, the Respondent agreed to submit the case to a sole arbitrator. Additionally, he objected to English as the language of these proceedings.
28. On 9 September 2021, the Club filed its Appeal Brief in accordance with Article R51 of the CAS Code.
29. On 21 September 2021, the CAS Court Office acknowledged Respondent’s letter dated 9 September 2021 and invited the Appellant to indicate, by 24 September 2021, whether it would accept the present procedure to be conducted in French. Furthermore, both Parties were invited to indicate, whether they would accept to conduct a bilingual English and French procedure.
30. On the same date, the Appellant advised the CAS Court Office that it wished to proceed in English.
31. On 23 September 2021, the Respondent submitted that he would agree to a bilingual procedure.
32. On 27 September 2021, the CAS Court Office invited the Appellant to state, by 30 September 2021, whether it would agree to conducting the proceedings in English and French. The Appellant failed to respond to the CAS Court Office letter within the given deadline.
33. The CAS Court Office again invited the Appellant to provide an answer to its letter by 6 October 2021.
34. On 1 October 2021, the Appellant declared that the proceedings shall be solely conducted in English.
35. On 4 October 2021, the CAS Court Office informed the Parties that in absence of an agreement between them on the language of the procedure, this issue would be decided by the President of CAS Appeals Arbitration Division (“Division President”).
36. On 25 October 2021, the President of the CAS Arbitration Division issued an Order on Language and decided therein that the proceedings shall be conducted in English.

37. On the same date, the CAS Court Office notified a copy of the Appellant Brief to the Respondent, who was invited to submit his Answer by 15 November 2021.
38. On 12 November 2021, the Respondent submitted his Answer in accordance with Article R55 of the CAS Code.
39. On the same date, the CAS Court Office acknowledged receipt of the Respondent's Answer and invited the Parties to inform it by 19 November 2021, whether they wished that a hearing to be held in this matter.
40. On 18 November 2021, the Respondent informed the CAS Court Office of his preference to hold a hearing in the present matter.
41. On 22 November 2021, the CAS Court Office noted that the Appellant failed to state its position within the granted time limit. Furthermore, the CAS Court Office invited the Parties to state, by 29 November 2021, if they would prefer such hearing to be held in person or by videoconference.
42. On 24 November 2021, the Respondent requested a hearing to be held by videoconference.
43. On 25 November 2021, the Appellant requested a hearing to be held in person.
44. On 21 December 2021, the CAS Court Office acknowledged the Appellant's timely payment of its share of the advance of costs. In addition, the CAS Court Office informed the Parties that, pursuant to Article R54 of the CAS Code and on behalf of the Division President, the arbitral tribunal to hear the appeal was constituted as follows:

Sole Arbitrator: Prof Dr Ulrich Haas, Professor of Law and Attorney-at-Law in Zurich, Switzerland
- For the sake of transparency, the Parties were further informed that Prof. Dr. Ulrich Haas was also acting as Sole Arbitrator appointed by the Division President, in the pending case CAS 2021/A/8321, which also involves the Appellant
45. On 22 December 2021, the Respondent asked to be provided with evidence that the Appellant had paid its share of the advance of costs. Furthermore, the Respondent asked to be provided with all relevant information regarding the appointment of Prof Dr Ulrich Haas in the case CAS 2021/A/8321, which also involved the Appellant.
46. On 22 December 2021, the CAS Court Office reiterated that the advances of costs were timely paid and informed the Respondent that any banking documents would not be disclosed to the Parties. Regarding the case CAS 2021/A/8321, the CAS Court Office informed that the case deals with the appeal brought by the Appellant against another FIFA decision, which is publicly available.
47. On 21 January 2022, the CAS Court Office informed the Parties of the Sole Arbitrator's decision to hold a hearing in this matter. Furthermore, the letter stated as follows:

*“The Sole Arbitrator has further taken due note of the Respondent’s requests for relief aiming at obtaining a higher amount than the one granted by FIFA. On this point, he kindly draw the Parties’ attention to the CAS jurisprudence, according to which, counter-claims or cross-appeals are not allowed since the 2010 revision of the CAS Code (see, inter alia, CAS 2020/A/6753, paras. 99-102 and the quoted references. On behalf of the Sole Arbitrator, the parties are granted with the opportunity to submit their comments, if any, strictly limited to this issue by email on or before 28 January 2022”.*

48. On 27 January 2022, the Respondent confirmed his availability on the proposed hearing date.
49. On 1 February 2022 and after consultation with the Parties, the CAS Court Office informed the Parties that the hearing would be held on 22 March 2022 via videoconference.
50. On 11 March 2022, the CAS Court Office noted that none of the Parties submitted any comment on the admissibility of the Respondent’s requests for relief aiming at obtaining a higher amount than the one granted by FIFA and issued an Order of Procedure (“OoP”), which was duly signed by the Parties on 11, respectively 12, March 2022.
51. The hearing was held on 22 March 2022 via videoconference. The Sole Arbitrator was assisted by Ms Pauline Pellaux, Counsel to the CAS. The following persons attended the hearing

For the Appellant:

- Mr Burak Çakir, Counsel

For the Respondent:

- Mr A.
- Mr Christophe Bertrand, Counsel
- Mr François Glevarec, Counsel.

52. At the closing, the Parties expressly stated that they had the opportunity to present their factual and legal arguments, as well as to answer the Sole Arbitrator’s questions. Additionally, all Parties confirmed that their respective rights to be heard and to be treated equally had been respected in the present proceedings. The Sole Arbitrator has carefully taken into account in his subsequent deliberations all the evidence and the arguments presented by the Parties, both in their written submissions and at the hearing, even if they have not been summarized in the present Award.

## **V. SUBMISSIONS OF THE PARTIES**

53. This section of the award does not contain an exhaustive list of the Parties’ contentions, its aim being to provide a summary of the substance of the Parties’ main arguments. In considering and deciding upon the Parties’ claims in this Award, the Panel has accounted for and carefully considered all of the submissions made and evidence adduced by the Parties, including allegations and arguments not mentioned in this section of the Award or in the discussion of the claims below.

**A. The Appellant's Position**

54. On 31 August 2021, in its Statement of Appeal, and in its Appeal Brief dated 10 September 2021, the Club requested the following for relief:

*"5. We request from the Court of Arbitration for Sport the annulment of the decision given by FIFA DRC dated 18 June 2021 and notified to the parties on 11 August 2021".*

55. The Appellant's submissions in support of its Appeal may, in essence, be summarized as follows:

- During the season 2019 – 2020 all national and international football organizations were suspended throughout March, April, May 2020 due to the COVID-19 outbreak worldwide. A working group was established, including the representatives from FIFA, its member national football federations, the European Clubs Association, FIFPRO and the World Leagues Forum. As a result of such discussions, the COVID-19 outbreak was recognized as a *force majeure* state.
- The Club has suffered serious financial loss due to the COVID-19 outbreak. As a result of a financial study carried out by the Club, it has been determined that there has been a 30% decrease in seasonal revenues.
- The Player has unilaterally terminated the Employment Contract on 20 July 2020 at a time when the Club's sources of income were completely suspended due to the COVID-19 outbreak.
- The Club has suffered serious financial loss due to the COVID-19 pandemics. The impact of the COVID-19 outbreak on the EURO/TL Exchange rate has put the Club to the brink of bankruptcy. As the payments made by the TFF are in Turkish Lira, there has been significant loss in the Club's income sources.
- The Club does not have a case that was subject to unilateral termination in previous periods.
- The Club approached the Player in good faith and declared that it would fulfil its contractual obligations at the start of the professional football leagues in Turkey.
- The Player is under the obligation to mitigate his loss due to unilateral termination of the Employment Contract. After the termination of the Employment Contract, the Player has signed a new contract with Sporting KC valid from 1 January 2021 to 31 December 2023. The Club never had the opportunity to proof the new contract of the Player although according to the Appealed Decision there are considerable differences between the two contracts (Club and Sporting KC). FIFA did not share with the Club the financial terms of the new contract of the Player with Sporting KC, whereby the Club had no possibilities to make comments on the conditions and remuneration of the new contract. Therefore, the Club's right to be heard had been violated by FIFA during the procedure before the FIFA

DRC. The FIFA DRC did not discuss and evaluate the reality and genuineness of financial terms of the new contract between the Player and Sporting KC and did not share the document with the Club. Hence, the Club was not able to make comments to the new contract with Sporting KC. In order to discover the truth at least Player's contracts have to be compared before his transfer to the Club and his second contract after termination of his contract with the Club.

- Therefore, mitigated compensation issue should be addressed when calculating the adequate compensation. Financial part of Player's new contract has not been submitted to the file. The Appealed Decision did not evaluate with adequate degree of proof that the Player had respected his mitigation obligation of the contract.

## B. The Respondent's Position

56. In his Answer dated 12 November 2021, the Respondent sought the following prayers for relief:

- “- **DECLARE** Mr. A. well-founded in his argumentation against YENI MALATYASPOR;  
 - **FIND** YENI MALATYASPOR guilty of default in payment of Mr. A.'s salaries and breaches of contract;  
 - **CONFIRM** the termination for just cause of his employment contract by Mr. A. against his club MALATYASPOR;  
 - **CONFIRM**, if needed the sporting freedom of the player;  
 - **CONFIRM** the decision of the FIFA Dispute Resolution Chamber of 18 June 2021 in that it :  
 - Ordered YENI MALATYASPOR to pay to Mr. A. the following amounts:
- [...] euros as outstanding remuneration plus 5% interest p. a. as follows:
    - 5% interest p. a. on the amount of [...] euros as from April, 21<sup>th</sup>, 2020 until the date of effective payment;
    - 5% interest p. a. on the amount of [...] euros as from April, 21<sup>th</sup>, 2020 until the date of effective payment
    - 5% interest p. a. on the amount of [...] euros as from May, 1<sup>th</sup>, 2020 until the date of effective payment;
    - 5% interest p. a. on the amount of [...] euros as from May, 31<sup>th</sup>, 2020 until the date of effective payment;
    - 5% interest p. a. on the amount of [...] euros as from June, 30<sup>th</sup>, 2020 until the date of effective payment;
  - [...] euros as compensation for breach of contract plus 5% interest as from August, 4<sup>th</sup>, 2020 until the date of effective payment;
- Rejected the claims made by YENI MALATYASPOR against A.;  
 - Held that Mr A. should return cheque #1401649 dated July, 30<sup>th</sup>, 2020 for the sum of USD [...] to YENI MALATYASPOR ;  
 - **REVERSE** the decision of the FIFA Dispute Resolution Chamber of 18 June 2021, in that it:  
 - Dismissed the remainder of Mr. A.'s claims,

And, in addition to:

- **FIND** that YENI MALATYASPOR has not respected all of its contractual obligations towards Mr. A., and that this has caused numerous additional prejudices for the latter;
- **FIND** that the MALATYASPOR club has no right to compensation due to the lack of damage suffered by the club;
- **FIND** the appeal of YENI MALATYASPOR is not argued, abusive and dilatory;
- **SENTENCE** YENI MALATYASPOR to pay to Mr A. the sums of:
  - [...] ([...]) euros as compensation for the additional damages suffered,
  - [...] ([...]) Euros for dilatory appeal and additional costs.  
with interest at a rate of 5% p.a. starting from the request to the FIFA Dispute Resolution Chamber dated August, 3<sup>rd</sup>, 2020 until the date of effective payment;
- **DISMISS** all YENI MALATYASPOR's claims and demands against Mr. A.;
- **CHARGE** YENI MALATYASPOR with all the costs of the proceedings before FIFA as well as before CAS;
- **ORDER** YENI MALATYASPOR to pay to Mr A. the sum of [...] ([...]) euros for the latter's legal fees".

57. The Respondent submissions may, in essence, be summarized as follows:

- The principle of force of contracts implies that the parties to a contract must comply with the obligations arising from it. This is the case for a fixed-term employment contract concluded between a soccer club and a professional player. This is also stated in Article 13 of the RSTP.
- Articles 14 and 14a of the RSTP provide for situations where one party may terminate a contract prematurely for just cause.
- The Player was entitled on the basis of Article 14bis of the RSTP to terminate the Employment Contract with just cause because the Club did neither respond nor pay the outstanding remunerations within the grace period of 15 days. The Club did not even attempt to reach an agreement with the Player.
- The Club tried to justify its breach of its financial duty towards the Player by relying on the concept of *force majeure* and refers the global health situation and the COVID-19 outbreak.
- Concept of *force majeure* is not applicable to the case.
- In French law, the notion of *force majeure* is defined by Article 1218 of the Civil Code:

*"Force majeure in contractual matters occurs when an event beyond the control of the debtor, which could not reasonably be foreseen at the time of the conclusion of the contract and the effects of which cannot be avoided by appropriate measures, prevents the debtor from performing his obligation.*

*If the impediment is temporary, performance of the obligation is suspended unless the resulting delay justifies termination of the contract. If the impediment is definite, the contract is terminated by operation of law and*

*the parties are released from their obligations under the conditions provided for in Articles 1351 and 1351-1”.*

- The recognition of a case of *force majeure* requires three cumulative criteria: exteriority, unforeseeability and irresistibility. Regarding the last criteria, it is specified in Article 1218 of the Civil Code that in order to retain irresistibility, the event must result in “*effects which cannot be avoided by appropriate measures*”.
- Swiss law recognizes the concepts of impossibility (Article 119 of the Swiss Code of Obligation) (“CO”), withdrawal and damages subject to time limit (Article 107 paragraph 2 CO) as well as the theory of frustration.
- None of these concepts are applicable to the present case.
- In sporting matters, the CAS clarified its definition of *force majeure* in CAS 2018/A/5779.
- Furthermore, the concept of *force majeure*, used in cases of non-payment of player’s salaries, has been rejected by the CAS in different cases (CAS 2014/A/3533; CAS 2016/A/4692; CAS 2016/A/4874; CAS 2010/A/2144; CAS 2015/A/3909; CAS 2007/A/1264; the 2014-2016 Ebola outbreak that lead Royal Moroccan Football Federation to attempt to postpone the 2015 African Cup of Nations, see CAS Bulletin 2016/1, p. 76).
- Moreover, FIFA’s position is in line with the position of the CAS.
- According to the FIFA DRC, *force majeure* is applicable to unforeseeable situations, extraordinary and unexpected facts or circumstances. According to this, the FIFA DRC rejected a club’s argument according to which the cancellation of a championship by the national federation constituted *force majeure* so that it was released from its obligations towards the player.
- Furthermore, one of Player’s former teammates in the Club, Mr Ghaylenn Chaaleli, found himself in a similar situation. He was a professional player of Tunisian nationality who evolved within the Club under the sports season 2019-2020. He was forced to terminate his employment contract for similar reasons as the Player and the FIFA DRC was seized of the dispute between the CLUB and Mr Chaaleli. The FIFA DRC granted Mr Chaaleli’s requests and rejected Club’s counterclaims as well as Club’s argument based on the notion of *force majeure*.
- Moreover, this is contradictory to the Club’s statement that no player had unilaterally terminated the employment contract to the detriment of the Club.
- The Club's default began as early as January 2020, long before the COVID-19 outbreak forced sports authorities, and the TFF in particular, to suspend competitions during the 2019-2020 sports season.

- The Club has never given an explanation to justify the breach of its contractual obligations between January and March 2020, i.e. before the championships were affected by the pandemic. The Club never initiated to contact the Player to discuss difficulties it claimed to be experiencing.
- The Club has not provided any evidence of *force majeure*.
- Although, the Turkish Championship was effectively suspended for several weeks between March and May 2020, the rest of the activities of the Club could be continued. The Player took part in trainings sessions during this period (collective training sessions were able to resume from 12 May 2020). The Player always respected his contractual obligations towards the Club. The suspended matches were played between 13 June and 25 July 2020. The Turkish first division championship was completed.
- Neither FIFA nor TFF have established the existence of *force majeure*.
- In the introduction of the document “COVID-19: Regulatory Issues in Football FAQ” it is stated that the “Bureau did not determine that the COVID-19 outbreak was a *force majeure* situation in any specific country or territory, or that any specific employment or transfer agreement was impacted by the concept of *force majeure*. For clarity: clubs or employees cannot rely on the Bureau decision to assert a *force majeure* situation (or its equivalent). Whether or not a *force majeure* situation (or its equivalent) exists in the country or territory of an MA is a matter of law and fact, which must be addressed on a case-by-case basis vis-à-vis the relevant laws that are applicable to any specific employment or transfer agreement”.
- The TFF has not established the existence of a case of *force majeure*. The recommendations issued by the TFF on 8 May 2020 merely states that the parties to a contract are invited to negotiate the terms of their agreement, in particular through collective bargaining agreements. The Club has never contacted the Player to discuss the terms of their contractual obligations. No agreement between the Parties or collective agreement within the Club had validated a possible reduction of the Player’s remuneration.
- The Player has never agreed to a possible reduction of his remuneration.
- The Player never received the sum of USD [...] on 30 July 2020 from the Club, as the Club claims. This claimed payment belongs to a post-dated cheque that had been given to the Player as early as January 2020. The cheque dated 23 January 2021 is numbered 1401650 and the cheque dated 30 June 2020 is numbered 1401649. Therefore, the cheque dated 30 July 2020 was issued prior to or at least concurrently with the cheque dated 23 January 2020.
- The Player could not cash the check because its date was after the date of termination of the Employment Contract and the Turkish bank informed the Player that the funds available on the Club’s account were insufficient to pay the check and that the Club had objected to the cashing of the cheque.

- The FIFA DRC ruled that the Player was entitled to receive compensation equal to the amount of the outstanding Employment Contract, i.e. EUR [...].
- The Club's conduct has caused numerous additional damages to the Player. Examples of such damages include:
  - the obligation to rent a car to travel in France and the US;
  - the obligation to seek the intervention of a physical and mental trainer following the termination of his contract, in order to maintain a high level of performance;
  - the obligation to sell his personal vehicles to meet the expenses incurred by the termination of his contract at the Club's expense;
  - damage to property in the Player's home in Turkey;
  - the postponement of the festivities related to his wedding scheduled for May 2021;
  - the obligation to proceed with the purchase of supplies and furniture for his installation in the US, for an amount of approximately USD [...];
  - the significant drop in salary between his salary from the Club and Sporting KC;
  - the obligation to pay for accommodation (USD [...] per month) and car expenses (USD [...] per month, excluding insurance) in the US, whereas these were paid by the employer under the contract with the Club.
- Furthermore, the Player has suffered significant moral damages, which he can prove by providing a medical certificate emphasizing the existence of an anxiety-depression syndrome.
- The Club does not expose real arguments not criticizes if the FIFA DRC position regarding force majeure and the just cause termination by the Player.

#### 1. The Club's counterclaim before the FIFA DRC

- The Player was not in breach of the Employment Contract with the Club. The Player fully complied with his contractual obligations, responded to all requests from the Club with professionalism. Besides, the Club has not submitted anything to the contrary in this regard before the FIFA DRC. The Club did not issue any warning to the Player.
- The Club alleged that it sent to the Player an email on 19 April 2020, in which it informed the Player of its intention to begin settlement negotiations and that the Player never responded to its proposal. During the FIFA DRC, the Club did not provide evidence of the Player's receipt of this email nor did it provide evidence of the document allegedly attached. Furthermore, the Player was not the recipient of this email.

- Thus, it is demonstrated that the Club never contacted the Player.
- 2. Violation of the right to be heard invoked by the Club
- The arguments by the Club seem to be addressed to the Appealed Decision.
- None of the statements were made against the Player who communicated all elements, including his agreement with Sporting KC to the FIFA DRC.

## VI. JURISDICTION

58. In accordance with Article 186 of the Swiss Private International Act (“PILA”), the CAS has the power to decide upon its own jurisdiction.
59. Article R47 para. 1 of the CAS Code stipulates that
- “An appeal against the decision of a federation may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body”.*
60. Article 57(1) of the FIFA Statutes (2021 edition) states as follows:
- “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”.*
61. Article 23(4) of the FIFA RSTP reads – in its pertinent parts – as follows:
- “...Decisions reached by the single judge or the Players’ Status Committee may be appealed before the Court of Arbitration for Sport (CAS)”.*
62. In addition, the Appealed Decision provides as follows:
- “According to article 58 par. 1 of the FIFA Statutes, this decision may be appealed against before the Court of Arbitration for Sport (CAS) within 21 days of receipt of the notification of this decision”.*
63. Moreover, the Parties do not dispute the jurisdiction of the CAS in the present case, as confirmed at the hearing of 22 March 2022 and in the signed OoP.
64. It follows from all of the above that the CAS has jurisdiction to adjudicate and decide on the present dispute.

## VII. ADMISSIBILITY

65. 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”.*

66. According to Article 57(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”.*

67. In addition, the Appealed Decision provides – in its pertinent parts – as follows:

*“According to article 58 par. 1 of the FIFA Statutes, this decision may be appealed against before the Court of Arbitration for Sport (CAS) within 21 days of receipt of the notification of this decision”.*

68. The Appellant filed its Statement of Appeal on 31 August 2021 and therefore within the 21-day time limit prescribed by Article 57(1) of the FIFA Statutes. The Appeal was, thus, filed in time and further complied with all the formal requirements required by Article R48 of the CAS Code.

## VIII. OTHER PROCEDURAL ISSUES

69. The Respondent has filed a counterclaim in these proceedings. He requests the Sole Arbitrator to

*“**REVERSE** the decision of the FIFA Dispute Resolution Chamber of 18 June 2021, in that it:  
- Dismissed the remainder of Mr. A.’s claims,*

*And, in addition to:*

*- **FIND** that YENI MALATYASPOR has not respected all of its contractual obligations towards Mr. A., and that this has caused numerous additional prejudices for the latter;*

*...*

*- **FIND** the appeal of YENI MALATYASPOR is not argued, abusive and dilatory;*

*- **SENTENCE** YENI MALATYASPOR to pay to Mr A. the sums of:*

*- [...] [...] euros as compensation for the additional damages suffered,*

*- [...] [...] Euros for dilatory appeal and additional costs.*

*with interest at a rate of 5% p.a. starting from the request to the FIFA Dispute Resolution Chamber dated August, 3<sup>rd</sup>, 2020 until the date of effective payment”.*

70. With letter dated 21 January 2022, the CAS Court Office advised the Respondent on behalf of the Sole Arbitrator of the CAS jurisprudence according to which counterclaims and cross-appeals are no longer admissible following the 2010 amendments of the CAS Code. In fact the sole arbitrator in CAS 2020/A/6753 stated as follows (para. 100 et seq.):

*“The Sole Arbitrator observes that legal scholars have commented as follows in respect of the possibility to file a counterclaim in appeal arbitration proceedings before CAS following the 2010 revision of the CAS Code:*

*‘It must be noted that, since 2010, counterclaims are no longer possible in appeal procedures. This means that, if a potential respondent wants to challenge part or all of a decision, it must file an independent appeal with the CAS within the applicable time limit for appeal’ (MAVRROMATI/REEB, The Code of the Court of Arbitration for Sport, 2015, p. 249 and 488, with further references to CAS 2010/A/2252, para. 40, CAS 2010/A/2098, para. 51-54, CAS 2010/A/2108, para. 181-183; see also CAS 2013/A/3432 para. 54-57 with reference to a decision of the Swiss Federal Tribunal).*

*The Sole Arbitrator shares the view cited above and finds that Respondents’ claims seeking compensation from the Appellant for having induced a breach of contract with associated procedural requests, as well as to assess associated damage, the application of the FIFA Code of Ethics to the Appellant for alleged forgery, and the application of sporting sanctions on the Appellant go beyond a mere statement of defence. Accordingly, such claims are declared inadmissible. In order for the Respondents to have validly raised such claims they should have filed an independent appeal against the Appealed Decision”.*

71. The Respondent at the hearing invited the Sole Arbitrator to reconsider this jurisprudence stating that he already brought these claims before FIFA and that the appeal lodged by the Appellant was dilatory and without merit from the outset and that the behaviour displayed by the Appellant merits to be sanctioned. The Sole Arbitrator sees no reason to depart from the above jurisprudence. Even if the Player’s claims were already brought before FIFA and if the appeal filed pursues a dilatory purpose this cannot justify a deviation from the CAS Code. The Sole Arbitrator in light of all of the above concludes that the Respondent’s counterclaim inadmissible.

## **IX. THE MANDATE OF THIS PANEL**

72. Article R57 para. 1 of the CAS Code provides as follows:

*“The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. ...”.*

73. It follows from the above that should the Sole Arbitrator conclude that the Appealed Decision is legally flawed he has a wide margin of discretion to either replace the decision or annul it

and send it back to FIFA. As confirmed by many CAS Panels such full power of review also means that any violations of the parties' procedural rights at the previous instance can be "cured" by the appeal before CAS (see MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials, Article R57, no. 29 with references to CAS case-law). Accordingly, even if it was established, *quod non*, the alleged violation of the Appellant's right to be heard before the FIFA DRC would in any event be cured by the present procedure (see for instance CAS 2018/A/6027, para. 53) and there is thus no need for the Sole Arbitrator to review this issue.

## **X. APPLICABLE LAW**

74. 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".*

75. Article 56(2) of the FIFA Statutes reads as follows:

*"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".*

76. The Sole Arbitrator notes that the Employment Contract does not contain any choice-of-law provision. However, the Parties have submitted to Article R58 of the CAS Code. Accordingly, the Sole Arbitrator shall primarily apply the various rules and regulations of FIFA to the merits of this Appeal. Subsidiarily, Swiss law will apply should the need arise to fill a lacuna in the various FIFA regulations.

## **XI. MERITS**

77. The relevant questions that the Sole Arbitrator needs to answer in this Appeal can be grouped as follows:

- (i) Was the Appellant entitled to withhold payments to the Respondent?
- (ii) What are the consequences of the above?

### **A. Was the Appellant entitled to withhold payments?**

78. The Appellant submits that it was in financial difficulties due to the COVID-19 outbreak and that the latter is recognized as a situation of *force majeure*. Furthermore, the Appellant submits that the COVID-19 pandemic also affected the EUR/TL exchange rate. Since the Club's

income is in Turkish Lira this seriously impacted the Club's ability to pay the amounts due under the Employment Contract. The Respondent submits that the concept of *force majeure* is not applicable to the case at hand and that the Appellant was under the obligation to pay all amounts due under the Employment Contract, which the Appellant failed to do.

### 1. ***The Relevant Legal Provisions***

79. In the case at hand, the entitlement of the Appellant to reduce or withhold the monthly salaries does not arise from the Employment Contract. The latter does not grant the Appellant a right to unilaterally adapt or change its contents. In the absence of a contractual basis, the entitlement to unilaterally adapt or change the Employment Contract can only arise from the applicable law, i.e. either from the FIFA rules and regulations or from statutory provision of Swiss law.
80. The Appellant – *inter alia* – refers to the FIFA COVID-19 Guidelines and submits that the latter entitle it – under certain conditions – to unilaterally reduce or withhold the monthly salaries due to the Respondent. The FIFA COVID-19 Guidelines read – *inter alia* – as follows:

#### ***“Agreements that cannot be performed as the parties originally anticipated***

*It is clear that the COVID-19 outbreak might lead to situations whereby agreements cannot be performed worldwide as the parties originally anticipated. The obligations placed on the parties will potentially be made impossible: player and coaches will be unable to work, and clubs will be unable to provide work.*

*Ultimately, national employment and/or insolvency laws (or collective bargaining agreements (CBAs), where in force) will answer immediate questions regarding the viability of a football employment agreement that can no longer be performed.*

*What must be avoided is football stakeholders receiving drastically different treatment or resolution on a global basis despite being in similar circumstances, whether from national courts, employment tribunals, or the FIFA judicial bodies.*

*It is incumbent on FIFA to recommend guiding principles which find a fair solution for clubs and employees, while protecting jobs as much as possible.*

#### ***Proposed Guiding Principles:***

*(i) Clubs and employees (players and coaches) be strongly encouraged to work together to find appropriate collective agreements on a club or league basis regarding employment conditions for any period where the competition is suspended due to the COVID-19 outbreak.*

*[...]*

*(ii) Unilateral decisions to vary agreements will only be recognised where they are made in accordance with national law or are permissible within CBA structures or another collective bargaining agreement mechanism.*

*(iii) Where:*

*a. clubs and employees cannot reach an agreement, and*

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

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

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

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

*b. the economic situation of the club;*

*c. the proportionality of any contract amendment;*

*d. the net income of the employee after contract amendment;*

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

81. Whether the FIFA COVID-19 Guidelines are by themselves a sufficient basis to unilaterally amend binding employment contracts appears questionable. This follows first and foremost from the simple fact that these are “guidelines” and – thus – by definition not binding rules and regulations. The Sole Arbitrator is also aware, however, that the Circular letter 1714 (which refers to the FIFA COVID-19 Guidelines) states that the “*attached document represents the outcome of various discussions (...)was approved by the Bureau on 6 April 2020 and **enters into force immediately***”. The Sole Arbitrator also notes that page 2 of the FIFA COVID-19 Guidelines states that the FIFA “*recognized that the disruption to football caused by COVID-19 was a case of force majeure*”. However, such recognition in itself cannot alter the general legal regime, more particularly the principle of *pacta sunt servanda*. Furthermore, the Sole Arbitrator is of the view that FIFA has watered down its initial position. It can be clearly inferred from the COVID FAQs that the scope of application of the above Guidelines is not (or no longer) designed to interfere with or amend the contents of binding contracts. The COVID-FAQs explicitly state as follows:

*“The Bureau did not determine that the COVID-19 outbreak was a force majeure situation in any specific country or territory, or that any specific employment or transfer agreement was impacted by the concept of force majeure.*

*For clarity: clubs or employees cannot rely on the Bureau decision to assert a force majeure situation (or its equivalent).*

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

82. Thus, it follows from the above that whether or not a party is entitled – based on the COVID-19 pandemic – to unilaterally change the contents of a binding contract is a matter “*of law and fact, which must be addressed on a case-by-case basis vis-à-vis the relevant laws that are applicable to any specific employment or transfer agreement*”. The Sole Arbitrator finds that the FIFA Guidelines are clear to the extent that the COVID pandemic does not trigger an event of force majeure and

that the FIFA Guidelines do not determine that COVID-19 was a force majeure situation in any specific country exempting a club from paying players pursuant to a specific employment agreement.

83. Thus, as the sole arbitrator in CAS 2021/A/7799 (para. 104) has put it:

*“This approach was also confirmed in the case CAS 2020/A/7603, to which this Sole Arbitrator fully adheres, where that Sole Arbitrator considered that based on the FIFA COVID-19 Football Regulatory Issues ‘the Appellant cannot rely on the FIFA Bureau decision to assert a force majeure defence’”.*

84. In the absence of any specific provisions in the FIFA rules and regulations (allowing the Appellant to unilaterally reduce the monthly salaries), the Sole Arbitrator, consequently, must turn to the provisions of Swiss law.

## **2. Force Majeure**

### *a) The Concept of Force Majeure*

85. In its (oral and written) submissions, the Appellant – *inter alia* – referred to the concept of *force majeure* as a basis to reduce or withhold the monthly salaries.

86. The legal concept of *force majeure* is widely and internationally accepted and, in particular, is valid and applicable under Swiss law, which is the applicable law to the present dispute. Under Swiss law, there is no statutory definition of *force majeure*. However and according to the Swiss Federal Tribunal (“SFT”), there is *force majeure* in the presence of an unforeseeable and extraordinary event that occurs with irresistible force (WERRO F., in Commentaire Romand 2nd ed., Art. 41 CO no 46 and references).

87. The concept of force majeure is also known in CAS jurisprudence. In CAS 2015/A/3909 the panel held that “*force majeure takes place in the presence of extraordinary and unforeseeable events that occur beyond the sphere of activity of the person concerned and that impose themselves on him/her in an irresistible manner*”. According to other Panels, “*force majeure implies an objective (rather than a personal) impediment, beyond the control of the “obliged party”, that is unforeseeable, that cannot be resisted and that renders the performance of the obligation impossible*” (CAS 2018/A/5537; CAS 2017/A/5496; CAS 2013/A/3471; CAS 2006/A/1110; CAS 2002/A/388).

88. In CAS 2010/A/2144, the panel stated that “*force majeure is an event which leads to the non performance of a part of a contract due to causes which are outside the control of the parties and which could not be avoided by exercise of due care. The unforeseen event must also have been unavoidable in the sense that the party seeking to be excused from performing could not have prevented it. (...) Moreover, force majeure is not intended to excuse any possible negligence or lack of diligence from a party, and is not applicable in cases where a party does not take reasonable steps or specific precautions to prevent or limit the effects of the external interference*”.

89. It follows from all of the above that “[t]he conditions for the occurrence of force majeure are to be narrowly interpreted, since force majeure introduces an exception to the binding force of an obligation” (CAS 2018/A/5537; CAS 2015/A/3909; CAS 2006/A/1110).

b) *The Consequences of Force Majeure*

90. According to Swiss law the legal consequences of non-performance of a contract depend on whether the impossibility to discharge the obligation because of *force majeure* is temporary or permanent and whether one of the contractual parties is at fault.

- Should the impossibility be of a permanent nature, Article 119 CO applies. The provision reads as follows:

<sup>1</sup> *An obligation is deemed extinguished where its performance is made impossible by circumstances not attributable to the obligor.*

<sup>2</sup> *In a bilateral contract, the obligor thus released is liable for the consideration already received pursuant to the provisions on unjust enrichment and loses his counter-claim to the extent it has not yet been satisfied.*

<sup>3</sup> *This does not apply to cases in which, by law or contractual agreement, the risk passes to the obligee prior to performance”.*

- Should the impossibility to fulfil the obligations be only temporary, Articles 107 to 109 CO apply. According to these provisions, the counterparty can, at its discretion, a) set an appropriate time limit for subsequent performance or ask the court to set such time limit (Article 107 CO), b) under certain circumstances, insist on performance without delay (Article 108 CO), c) waive performance and claim damages (Article 107(2) CO) or d) terminate the agreement and demand the return of any performance already made. In addition, it may claim damages for the lapse of the contract, unless the debtor can prove that he was not at fault (Article 109 CO). In accordance with Article 97 CO, the debtor’s fault is presumed. Pursuant to Article 99(1&2) CO, the debtor is generally liable for any fault attributable to him. The scope of such liability is determined by the particular nature of the transaction and in particular is judged more leniently where the obligor does not stand to gain from the transaction.

c) *The Burden of Proof and the Standard of Proof*

91. With respect to the burden of proof (that is governed by the law applicable to the merits), Article 8 CC states that “[u]nless the law provides otherwise, the burden of proving the existence of an alleged fact shall rest on the person who derives rights from that fact”. Also, CAS panels adhere to the principle according to which “... any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue. In other words, the party which asserts facts to support its rights has the burden of establishing them. The Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one. Hence, if a party wishes to establish some facts and persuade the deciding body, it must actively substantiate its allegations with convincing evidence” (CAS 2014/A/3546, no. 7.3 and references).

92. The standard of proof describes the degree to which a judge / arbitral tribunal needs to be persuaded in order to accept or not to accept an alleged fact. The question of the standard of proof is a procedural question governed in an international arbitration by Article 182 of the Swiss Private International Law Act. Absent any provision agreed upon by the Parties, the Sole Arbitrator is inspired by Swiss law when determining the applicable standard of proof. According thereto absolute certainty is not required. Instead, it suffices if the judge / arbitral tribunal has no serious doubt about the existence of the alleged facts or if any remaining doubt appears to be tenuous (SFT 130 III 321, consid. 3.3).

d) *The Application of the Above Principles to the Case at hand*

93. The Appellant's submission is unsubstantiated. The Appellant does not state whether it was under some permanent or temporary impossibility to perform under the contract. Furthermore, no evidence was submitted to what extent the COVID-19 pandemic actually affected the Club financially. In a parallel proceeding involving the club the sole arbitrator stated as follows (CAS 2021/A/7799, para. 102):

*"In the present case, the Appellant exclusively provides the Turkish Football Federation's Recommendations on the Contracts, a document, which is not applicable before CAS and contains only general assessment as well as the extract of a website of the Turkish government listing the indicative exchange rates on 23 March 2020. Such general documents do however not provide any concrete elements on the Club's financial situation between February and May 2020. In view of the above, the Sole Arbitrator finds that the Appellant did not submit any evidence that the financial effect of COVID-19 pandemic on the EURO/TL Exchange rate and the temporary suspension of sports activities caused serious financial difficulties to the Club, and, furthermore, the Appellant did not prove that there has been a 30% decrease in seasonal revenues which consequently affected its possibility to make the contractually provided payments".*

94. The situation is very similar in the case at hand. There is simply no evidence on file to substantiate the issue of *force majeure*. The Appellant failed to meet the applicable burden of proof. Furthermore, it appears rather questionable whether the COVID-19 pandemic was even causal for the financial difficulties of the Appellant, since the latter was in default with its payment obligations under the Employment Contract already prior to the outbreak of the COVID-19 pandemic.

95. With the above, the Sole Arbitrator does not wish to minimize the economic impact of the COVID-19 pandemic. The latter has led to major upheavals in organized sport, plunged many clubs and sports organisations into economic crisis or let them to the economic abyss. But it is simply not enough to invoke a pandemic in general to suspend one's contractual obligations. Rather, the debtor must substantiate and, if necessary, also prove to the required standard of proof that it was temporarily or permanently impossible to personally meet its obligations because of the pandemic. The debtor can easily provide such evidence by submitting a liquidity plan showing the payment flows over the relevant periods of time. None of this was submitted. To conclude, therefore, the Sole Arbitrator finds that the Appellant has failed to

show that the COVID-19 pandemic constituted a *force majeure* event preventing it from performing its obligations under the Employment Contract.

### 3. ***Other arguments advanced by the Appellant***

96. The Appellant in its submissions and at the hearing requested that the Sole Arbitrator take into account that it “*does not have a history of non-payment*” vis-à-vis its creditors. The Sole Arbitrator is unsure what legal conclusion follows from the above. In any event, the Sole Arbitrator notes that the Appellant does not bring any evidence of such statement which legal relevancy is in any event doubtful. there are – to his knowledge – at least 4 recent DRC decisions dealing with the Appellant’s failure to meet its payment obligations (REF 20-01468; REF 20-01039; REF 20-01128/ifa; REF 20-01551).

#### **B. What are the Consequences of the above?**

97. It is undisputed that the Appellant was in default of payment in the amount of EUR [...] on 20 July 2020, when counsel of the Respondent sent a formal notice to the Appellant. The notice reads as follows:

*“Either way, your club and A. have agreed on a total of wages of e [...] net for the 2019-2020 football season. Yet your club has made three installments (EUR [...] in January, EUR [...] on April 30<sup>th</sup>, EUR [...] on June 25<sup>th</sup>) for a total amount of EUR [...].*

***In these circumstances, I formally request you to comply with the terms of A.’s employment contract and to pay the amount of EUR [...] within fifteen (15) days after the delivery of the present notice”.***

98. Furthermore, on 30 June 2020, a further monthly instalment in the amount of EUR 71,250 fell due. Following the above discussion, the Appellant was not entitled to withhold any of the above amounts. Consequently, the Appellant breached its payment obligation under the Employment Contract and the Respondent was entitled to unilaterally terminate the Employment Contract with just cause based in Article 14bis (1) RSTP. The latter provision reads as follows:

*“In the case of a club unlawfully failing to pay a player at least two monthly salaries on their due dates, the player will be deemed to have a just cause to terminate his contract, provided that he has put the debtor club in default in writing and has granted a deadline of at least 15 days for the debtor club to fully comply with its financial obligation(s). Alternative provisions in contracts existing at the time of this provision coming into force may be considered”.*

99. In light of the breach of contract committed by the Appellant, the Respondent is not only entitled to outstanding remuneration, but also to damages according to Article 17(1) RSTP. The provision provides as follows:

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

100. The FIFA DRC calculated the damage to be in the amount of EUR [...]. The Appellant has not challenged the methodology of the calculation performed by FIFA. The Sole Arbitrator sees no reason to depart from the established jurisprudence according to which the damage is to be calculated – absent any liquidated damage clause in the contract – taking into account the remuneration due to the Player in accordance with the Employment Contract as well as the time remaining on the same contract, along with the professional situation of the Player after the early termination occurred.
101. The Appellant submits that it was not able *“to check the new contract of the player [with Kansas City Sport Club]”* and that the *“FIFA DRC did not discuss and evaluate the reality and genuineness of financial terms of the players new agreement with US club ...”*. The Sole Arbitrator notes that the Respondent submitted his new contract with Sporting KC together with his Answer and that the Appellant did not make any comment further to the production of this contract at the hearing and that the Appellant has not challenged the facts related to the new employment contract of the Player. Thus, the Sole Arbitrator finds that all submissions related to question whether and to what extent the new employment contract is compatible with the Player’s obligation to mitigate his damage are wholly unsubstantiated and must be dismissed.

### **C. Conclusion**

102. The Respondent was entitled to terminate the Employment Contract with just cause according to Article 14bis RSTP. Consequently, the Player is entitled to the outstanding remunerations under the Employment Contract and to damages according to Article 17(1) RSTP. Furthermore, the Sole Arbitrator confirms the calculation of the amounts due made in the Appealed Decision, which was not challenged by the Appellant. It follows from the above that the Appeal filed by the Club against the Appealed Decision must be dismissed in its entirety.

## ON THESE GROUNDS

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

1. The appeal filed on 31 August 2021 by Yeni Malatyaspor FK against the decision rendered on 18 June 2021 by the FIFA Dispute Resolution Chamber is dismissed.
2. (...).
3. (...).
4. All other and further motions or prayers for relief are dismissed.