TAS / CAS
TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

CAS 2021/A/7638 Associação Social E Esportiva SADA v. Robertlandy Simon Aties & A.S. Volley Lube S.r.l

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition

President: Mr André Brantjes, Attorney-at-Law in Amsterdam, the Netherlands

Artbitrators: Mr Jordi López Batet, Attorney-at-law in Barcelona, Spain

Prof Luigi Fumagalli, Professor and Attorney-at-law in Milan, Italy

in the arbitration between

Associação Social E Esportiva SADA, Belo Horizonte, Brazil

Represented by Mr Luiz Fernando Ribeiro and Mr Gustavo Nogueira Mendes, Attorneys-at-law, Mattos De Paiva, Nogueira & Ribeiro Advogados, Nova Lima, Brazil

- Appellant -

and

Mr Robertlandy Simon Aties, Italy

Represented by Mr Achille Reali, Attorney-at-law, Studio Legale Di Gregorio-Reali-Puoti, Rome, Italy

- First Respondent -

and

A.S. Volley Lube S.r.l, Italy

Mr Giovanni Fontana, Attorney-at-law, Studio Legale Fontana, Sezze, Italy

- Second Respondent -

* * * * * * *

I. THE PARTIES

1. Associação Social E Esportiva SADA ("SADA" or the "Appellant") is a professional volleyball club with its registered office in Belo Horizonte, Brazil. SADA is affiliated to the Confederação Brasileira de Voleibol (the Brazilian Volleyball Confederation – the "CBV"), which in turn is affiliated to the Fédération Internationale de Volleyball (the "FIVB").

2. Mr Robertlandy Simon Aties (the "Player" or the "First Respondent") is a professional volleyball player from Cuba.

3. A.S. Volley Lube S.r.l ("Lube" or the "Second Respondent") is a professional volleyball club with its registered office in Civitanova Marche, Italy. Lube is affiliated to the Federazione Italiana Pallavolo (the Italian Volleyball Federation – "FIPAV"), which in turn is affiliated to the FIVB.

4. The Player and Lube are hereinafter jointly referred to as the "Respondents", and together with SADA as the "Parties".

II. FACTUAL BACKGROUND

5. Below is a summary of the main relevant facts, as established on the basis of the Parties' written and oral submissions, as well as the evidence examined in the course of the present appeal arbitration proceedings and at the hearing. This background serves the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion.

6. The present appeal arbitration proceeding concerns an appeal filed by SADA against a decision issued by the FIVB Tribunal of 20 December 2020 (the "Appealed Decision") in an employment-related dispute, by means of which it was held that SADA had to pay outstanding salary payments to the Player in an amount of BRL 2,492,416.42.

A. Background Facts

7. On 15 August 2015, SADA and the Player entered into a "*Formalization of Agreement*" (the "Agreement") for the seasons 2016/2017, 2017/2018 and 2018/2019.

8. Article 2 of the Agreement provides as follows:

> *"The club will pay the Player the amount of BRL 1,600,000.00 (one million and six hundred thousand Reals) net (Free of Taxes) per season. The amount of each season (BRL 1,600,000.00) shall be paid in 12 months, with 50% of the amount in Brazilian territory and the other 50% in a natural persons bank account abroad, to be indicated by the Player."*

9. Article 3 of the Agreement states:

> *"The club shall pay to the agents REGOR MOLINA REYES and GERALDO MACIEL NETO the amount of BRL 120,000 (One Hundred and Twenty Thousand Reals) net for each season."*

10. Article 6 of the Agreement states:

> *"The club shall pay the expenses of a car during the contractual period, except fuel."*

11. Article 9 of the Agreement states:

> *"The sporting bonuses will be that standard of team, to be discussed later."*

12. On 20 June 2016, an employment agreement ("the Employment Agreement") was registered with the Brazilian authorities for the Player for the term of 20 June 2016 until 19 June 2018. The First Respondent received monthly payments of BRL 5,000 gross and, until June 2018, a total amount of BRL 104,139.58.

13. In June 2016, SADA provided the Player with a car, a Fiat Punto.

14. Between July 2016 and August 2018, the Player received 8 separate cash payments in various currencies for a total amount of BRL 603,144.

15. In August 2016, SADA provided a Range Rover, which was used by the Player.

16. On 7 April 2017, the Brazilian company *Brazul Transporte de Veiculos* ("Brazul") paid an amount of USD 200,000 (equal to BRL 635,400) to the company *Simon Business Inc*, Coral Gables, in Florida, USA.

17. On 1 August 2017, the legal entity *S13 Serviços Esportivos LTDA-ME* ("S 13") and SADA entered into another agreement entitled "*Particular instrument of assignment for the use of name, appearance, image and voice of professional volleyball player*" (the "IR Agreement"). As per the IR Agreement, S 13 was entitled to use the image rights of the Player. In accordance with Article 4 of the IR Agreement, for the use of these image rights, S 13 was entitled to BRL 786,330 for the season 2017/2018 to be paid in 11 monthly instalments starting 15 September 2017. For the season 2018/2019, S 13 was entitled to BRL 853,644 to be paid in 12 monthly instalments.

18. SADA paid a total amount of BRL 88,000 as bonuses to the Player.

19. SADA made four payments for an agent commission fee to Mr Geraldo Maciel Neto, a players' agent, for a total amount of BRL 267,857.14.

20. Between 29 May 2018 and 1 June 2018, the Player exchanged WhatsApp messages with Mr Pereira, the Manager of SADA, indicating, *inter alia*, that he wanted to leave SADA.

21. On 26 June 2018, SADA served a notice to the Player and Lube, informing them that the Player was still engaged for one more season with SADA and asking them to, *inter alia*, cease further transfer negotiations.

22. On 3 July 2018, in response to the 26 June 2016 notice, Lube informed SADA that it would act according to the applicable regulations in case of any interest in the Player.

23. On 7 July 2018, Mr Stefano Bartocci, a players' agent, informed SADA that the Player would not return to resume training as he feared the consequences of non-payment of taxes by SADA.

Additionally, he stated that the Agreement was *"already terminated"* and that if SADA wanted the Player to play, it should pay him BRL 3,140,000.00 and prove tax payments.

24. On 12 July 2018, SADA served another notice to the Player, regarding his absence since 4 July 2018, and reminded him that he was still engaged for another season.

25. On 14 July 2018, the Player's counsel, Mr Reali, referred to the email of 7 July 2018 and requested SADA to pay all outstanding amounts and provide evidence for the payment of taxes within 3 days, in the absence of which the Agreement "*will be immediately resolved*".

26. On 16 July 2018, SADA replied that without a power of attorney, all communication allegedly sent on behalf of the Player could not have any legal effect.

27. On 18 July 2018, the Player's counsel provided a power of attorney to SADA.

28. Also on 18 July 2018, SADA contested that there were any outstanding salary payments and disputed the existence of legal grounds for a premature termination.

29. On 20 July 2018, the Player's counsel informed SADA that the Agreement was terminated, indicating, *inter alia*, as follows:

> *"First of all, I reiterate in all its contents the Stefano Bartocci's e-mail dated 7 July 2018 and in particular that, contrary to what you affirmed,* [SADA] *did not pay to* [the Player] *the sum of* [BRL] *3.140.000,00.*
>
> *In fact, until now* [SADA] *has never given proof of payments to* [the Player], *as established in the* [Agreement], *and for this reason* [SADA] *is clearly defaulting towards the player.*
>
> *Furthermore, in article 2 of the* [Agreement] *it is clearly established that the amount paid to* [the Player] *is net of taxes* […].
>
> *In your letter, however, it is stated that the taxes had to be paid by the player and in this way it is indirectly admitted that the taxes have not been paid by* [SADA], *as established in the* [Agreement]. *All of this causes the risk for the player to be penalized for tax evasion in Brazil without being responsible for it.*
>
> *In addition to this, we know that* [SADA] *would have registered a "Contrato de Trabalho" to the Brazilian competent authority with a much lower fee in a possible violation of Brazilian law.*
>
> *For all the aforementioned reasons, the* [Agreement] *is terminated due to serious contractual breaches of* [SADA] *and for the repeated missed responses to our previous e-mails.* […]*"*

30. On 5 August 2018, the Player and Lube entered into a contract for the seasons 2018/2019 and 2019/2020, starting 18 July 2018 and expiring 30 June 2020.

B. First Instance Proceedings before the FIVB Tribunal

31. On 1 August 2018, SADA filed a claim with the FIVB, naming the Player and Lube as respondents.

32. On 21 August 2018, the Player filed an Answer and a counterclaim.

33. On 22 August 2018, Lube filed an Answer and a counterclaim.

34. On 11 September 2018, SADA filed its comments to both counterclaims.

35. On 2 October 2018, the Player and Lube filed their final comments.

36. On 3 December 2018, the Parties were informed that the dispute had been referred to the FIVB Tribunal pursuant to Article 18 of the FIVB Sports Regulations and that the dispute would be heard by a panel of arbitrators.

37. On 11 March 2019, the FIVB Tribunal informed the Parties that the case would be decided *ex aequo et bono* pursuant to Article 20.9 of the FIVB Sports Regulations.

38. On 31 October 2019, the Parties filed their last submissions.

39. On 18 December 2020 the FIVB Tribunal issued the Appealed Decision, with the following operative part:

> *"1. Associação Social e Esportiva SADA shall pay to Mr Robertlandy Simon Aties the amount of BRL 2,492,416.42 net (free of taxes).*
>
> *2. Each party must bear its own legal fees and other expenses, including the handling fees paid.*
>
> *3. All other requests for relief are dismissed."*

40. The FIVB Tribunal's (relevant) findings in the Appealed Decision can be summarized as follows:

- The FIVB Tribunal concluded that the Player failed to comply with the Agreement because he did not return to Brazil for the pre-season training and prematurely terminated the Agreement without adequately warning SADA.

- The FIVB Tribunal concluded therefore that SADA was entitled to compensation in the amount of BRL 1,600,000 according to Article 12 of the Agreement.

- As for the counterclaim filed by the Player, the FIVB Tribunal found that the payments by SADA regarding the premium car, the image rights, the consultancy services, and the bonuses and commission fees were all not part of the financial compensation of BRL 1,600,000 as described in Article 2 of the Agreement.

- The only payment by SADA which was confirmed by the Player was an amount of BRL 707,583,58 (a cash payment of BRL 603,144 and a payment of BRL 104,439.58 under the Employment Agreement).

- The FIVB Tribunal confirmed that SADA therefore failed to pay the full salary over the seasons 2016/2017 and 2017/2018.
- As the amount of BRL 707,583,58 was already paid by SADA, the FIVB Tribunal ordered SADA to pay (on balance) the remaining salary of BRL 2,492,416.42.
- The FIVB Tribunal found that SADA breached Article 2 of the Agreement because it decided not to pay the Article 2 compensation of BRL 1,600,000 in full.
- The FIVB Tribunal found the amount of BRL 1,600,000 for compensation under Article 12 of the Agreement was not disproportionate and decided the Player is entitled to this amount.
- As the Player had to pay the same amount to SADA, the FIVB Tribunal decided that the amounts of BRL 1,600,000 could be offset against each other.
- The FIVB Tribunal dismissed SADA's claim against Lube because there was no adequate evidence on file that Lube induced the Player the breach the Agreement as the Player already decided to leave SADA before Lube came into the picture.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

41. On 8 January 2021, SADA lodged an appeal against the Appealed Decision with the Court of Arbitration for Sport ("CAS"), naming the Player, Lube and the FIVB as respondents. In accordance with Articles R47 *et seq.* of the Code of Sports-related Arbitration (edition 2021 – the "CAS Code"), the arbitration was assigned to the Appeals Arbitration Division. In the Statement of Appeal, SADA nominated as arbitrator Mr Jordi López Batet, Attorney-at-law in Barcelona, Spain.

42. On 22 January 2021, the Player and Lube jointly nominated as arbitrator Prof Luigi Fumagalli, Professor and Attorney-at-law in Milan, Italy.

43. On 27 January 2021, the FIVB informed the CAS Court Office that it did not object to the nomination of Prof. Fumagalli as arbitrator.

44. On 28 January 2021, following the agreement of the Parties and the FIVB, the CAS Court Office informed the Parties and the FIVB that the dispute would be referred to CAS mediation and suspended the arbitration proceeding until further notice.

45. On 27 May 2021, the CAS Court Office informed the Parties that the suspension of the arbitration proceeding was lifted, because the mediation had been unsuccessful.

46. On 28 May 2021, the Parties were provided by a disclosure made by Mr López further to Article R33 of the CAS Code, which none of the Parties subsequently challenged further to Article R34 of the CAS Code.

47. On 1 June 2021, the FIVB requested the CAS Court Office to be excluded as a respondent as it considered that it could not be considered as a party to the dispute.

48. On 4 June 2021, SADA informed the CAS Court Office it had no objection to the exclusion of the FIVB from the proceedings and agreed to withdraw its claim against the FIVB if the FIVB would accept, acknowledge and commit to enforce any eventual CAS award.

49. On 9 June 2021, the FIVB informed the CAS Court Office that Article 21 of the FIVB Sports Regulations, which allows the FIVB to impose sanctions for non-compliance with a CAS award, applies even after the exclusion of the FIVB as a respondent.

50. On 10 June 2021, SADA confirmed to definitely withdraw the appeal with respect to the FIVB.

51. On 15 June 2021, following several extensions granted by the CAS Court Office further to Article R32 of the CAS Code, SADA filed its Appeal Brief in accordance with Article R51 of the CAS Code.

52. On 6 July 2021, the Player filed his Answer further to Article R55 of the CAS Code, *inter alia*, requesting that the witnesses called to be heard by SADA be excluded.

53. On 8 July 2021, Lube filed its Answer further to Article R55 of the CAS Code, in which it maintained, *inter alia*, that the appeal was inadmissible, because: (i) the appeal was notified to an address that no longer belonged to Lube; and (ii) SADA had not timely paid the CAS Court Office fee of CHF 1,000 in accordance with Article R64 of the CAS Code. Lube also requested that the witnesses called to be heard by SADA and documents that had not been presented in the proceedings before the FIVB Tribunal be excluded.

54. On 22 July 2021, further to Article R55 of the CAS Code, SADA filed its reply on Lube's objection to the admissibility of the appeal.

55. On 26 July 2021, pursuant to Article R54 of the CAS Code, and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to decide the present matter was constituted as follows:

President:	Mr André Brantjes, Attorney-at-Law in Amsterdam, the Netherlands;
Arbitrators:	Mr Jordi Lopez Batet, Attorney-at-Law in Barcelona, Spain;
	Prof Luigi Fumagalli, Professor and Attorney-at-Law in Milan, Italy.

56. On 29 July 2021, following an inquiry from the CAS Court Office in this respect, SADA indicated its preference for a hearing to be held.

57. On 30 July 2021, following an inquiry from the CAS Court Office in this respect, the Respondents indicated that the Panel could issue an award solely based on the written submissions.

58. On 2 August 2021, the CAS Court Office informed the Parties that the Panel had decided to hold a hearing by video-conference, further to Articles R44.2 and R57 of the CAS Code.

59. On 26 August 2021, the CAS Court Office, on behalf on the Panel, invited SADA to comment on the Respondents' objection to apply Swiss law on a subsidiary or complementary base.

60. On 2 September 2021, SADA informed the CAS Court Office that it considered that Swiss law had to be applied to assess whether Lube is liable jointly with the Player and referred to Article 43 of the Swiss Code of Obligations (the "SCO") in this respect.

61. On 9 September 2021, SADA indicated that it wanted to hear the four witnesses mentioned in the Appel Brief.

62. On 15 September 2021, Lube reiterated its objection against hearing the witnesses called by SADA.

63. On 22 September 2021, after having consulted the Parties, the CAS Court Office informed the Parties that the hearing would be held on 22 November 2021 by video-conference and that the Panel had decided to allow the witnesses called by SADA to testify, without prejudice to any evaluation as to the relevance and reliability of the witnesses' respective testimony.

64. On 29 October 2021, the CAS Court Office, on behalf of the Panel, circulated a draft tentative hearing schedule to the Parties suggesting, *inter alia*, to have post hearing briefs *in lieu* of closing statements.

65. On 29 October 2021 and 5 November 2021, respectively, Lube, SADA and the Player commented on the draft tentative hearing schedule and accepted to have post hearing briefs *in lieu* of closing statements.

66. On 8 November 2021, the Parties each returned duly signed copies of the Order of Procedure provided to them by the CAS Court Office.

67. On 10 November 2021, the CAS Court Office, on behalf of the Panel, circulated a final tentative hearing schedule and informed the Parties that they were allowed to file post hearing briefs *in lieu* of closing statements.

68. On 22 November 2021, a hearing was held by video-conference further to Articles R44.2 and R47 of the CAS Code. In addition to the Panel and Ms Kendra Magraw, CAS Counsel, the following persons attended the hearing:

For SADA:

1) Mr Gustavo Nogueira Mendes, Counsel;
2) Mr Luiz Fernando Ribeiro, Counsel;
3) Mr Flavio Pereira, SADA's Sports Director;
4) Mr Geraldo Maciel Neto, Witness;
5) Mr Gregor Reyes Molina, Witness;
6) Mr Filipe Ferraz, Witness;
7) Mr Vinicius Mafra, Interpreter.

For the Player:

1) Mr Robertlandy Simon Aties, the Player;
2) Mr Achile Reali, Counsel;
3) Mr Stefano Bartocci, Interpreter;
4) Mr Simone Ceccariglia, Interpreter.

For Lube:

1) Mr Giovanni Fontana, Counsel;
2) Ms Claudia Machetti, Interpreter.

69. The Panel heard evidence from the following persons in order of appearance:

1) Mr Geraldo Maciel Neto, players' agent, witness called by SADA. Mr Neto gave testimony about the background of the negotiations between the Parties. He stated he was involved in the negotiations between the Player and SADA resulting in the Agreement. He stated the Player requested and agreed that the first payments provided in the Agreement would be done through his company as "image rights" and that these amounts were fully transferred to the Player, afterwards. He asserted having negotiated other players' deals with SADA and never had a single complaint of default against the club. SADA always fulfilled all financial obligations.

2) Mr Gregor Reyes Molina, players' agent, witness called by SADA. Mr Molina stated he played against Mr Simon when he was a volleyball player and he used to have a good relation with the Player. Mr Molina stated he was responsible for presenting SADA's proposal to the Player and was closely involved in the negotiations. He disputed SADA's default of payment. He stated it was an excuse in order to terminate the Agreement. He also stated that the Player was fully aware of the terms of the deal and that he never challenged the performance by SADA.

3) Mr Filipe Ferraz, former player and teammate of the Player with SADA, witness called by SADA. Mr Ferraz confirmed that he played alongside Mr Simon at SADA in the Brazilian volleyball seasons 2016/2017 and 2017/2018 and, at that time, he was the captain of the team. As the captain, Mr Ferraz stated he was in charge of the dialogue and interconnection between players and the board of the club. He also stated that during the period the Player was playing at SADA, the Player never complained about any default of payment.

70. All witnesses were instructed by the President of the Panel to tell the truth, subject to the sanctions of perjury under Swiss law. The Parties and the members of the Panel had full opportunity to examine and cross-examine the witnesses and expert witnesses in accordance with the hearing schedule.

71. The Parties were afforded full opportunity to present their cases, submit their arguments and answer the questions posed by the members of the Panel.

72. The hearing was then closed without closing arguments being held. The Panel reserved its decision for this reasoned Award, once it had received and considered the post hearings briefs. Upon closing the hearing, the Parties expressly stated that they had no objections in relation to their respective rights to be heard and that they had been treated equally in these arbitration proceedings.

73. On 21 December 2021, SADA filed its post hearing brief.

74. On 28 January and 7 February 2022 respectively, the Player and Lube filed their post hearing briefs. The Player provided additional evidence with his post hearing brief.

75. On 18 February 2022, upon being invited by the CAS Court Office to express their views, SADA objected to the new evidence presented with the Player's post hearing brief, whereas Lube did not object.

76. On 28 February 2022, the Player reiterated his request to admit the evidence presented with his post hearing brief, invoking alleged exceptional circumstances.

77. On 3 March 2022, the CAS Court Office informed the Parties that the Panel would decide upon this issue in the Award.

78. The Panel confirms that it carefully heard and took into account in its decision all of the submissions, evidence, and arguments presented by the Parties, and all of the witness testimony, even if they have not been specifically summarised or referred to in the present award.

IV. SUBMISSIONS OF THE PARTIES AND REQUESTS FOR RELIEF

A. The Appellant's Submissions on the Merits

79. SADA's submissions, in essence, can be summarised as follows:

- Within the performance of the Agreement, SADA and the Player have rearranged the payment method and agreed to split it in different kinds as image rights, base salary and cash payments, among others, all under the umbrella and in connection with the Agreement.

- During the first two seasons, the Player never made any contractual complaint to SADA. Just after the second season along his vacation and interseason, he changed his attitude completely and started to confront SADA's directors. He started sending text and WhatsApp messages to Mr Flavio Pereira, the general Director of SADA, in which he demanded his release. The Player also stated that he would do whatever it takes to leave SADA.

- SADA decided to comply with the Agreement and maintain the Player for another year because he was very important for the team.

- Due to rumours that the Player was entering into an agreement with Lube, SADA served a notice by email to both of them, indicating that the Player was engaged for one more season and asked to cease the transfer negotiations. The FIVB was copied into this email.

- On 12 July 2018, SADA served another notice to the Player, acknowledging his absence since 4 July 2018 and reminding him that he was still engaged for another season.

- On 18 July 2018, SADA challenged the allegation of the existence of outstanding payments, which was described to be a clear strategy with the purpose of fabricating a "*bow-egged"* theory to terminate the Agreement.

- Originally, the payment of each season would be made in 12 months, 50% in Brazilian territory and 50% in a natural person's bank account abroad. During the performance

of the Agreement, SADA and the Player mutually agreed to adjust the payment method, which was split into base salary, cash payments, image rights, payments to Simon Business Inc. in the USA, a premium car, bonuses and commissions.

- SADA has fulfilled all its obligations and respected the payment method that was mutually agreed. It was the Player who decided to leave SADA notwithstanding having one more year of contract left.

- The Appealed Decision shows that the Player breached the Agreement due to his refusal to return to Brazil and the premature termination without proper notice.

- The notices sent on behalf of the Player were sent without proper power of attorney, which prevented SADA to open discussions about contractual matters.

- The Player breached the Agreement by entering into a new agreement with Lube exactly on the same day when he submitted the power of attorney to SADA.

- When the notice was served to SADA stating that the Agreement was terminated, the Player was already engaged with Lube, which triggered the penalty clause in Article 12 of the Agreement.

- SADA proved that it has fulfilled all its financial obligations which can be detailed as follows:

    a. Base salary – SADA has paid in total BRL 104,439.58 as base salary. This was confirmed by the Player and the FIVB Tribunal in the Appealed Decision.

    b. Cash payments – SADA paid BRL 603,144 in cash. This was confirmed by the Player and the FIVB Tribunal.

    c. Image rights – As the Player was not an owner of a company in Brazil and while it was being constituted, part of the image rights payments were made through a company of his Agent. In total, an amount of BRL 352,452.50 was paid for these image rights through this Agent. Additionally, an amount of BRL 786,330.05 was paid to the Player's company S 13 for these image rights as from October 2017.

    d. Payment abroad – In accordance with Article 2 of the Agreement, part of the financial compensation had to be paid abroad. SADA used one of its entities, i.e. Brazul, to perform a payment of USD 200,000 net. Based on the exchange rate of 17 April 2017, the equivalent is BRL 635,400.

    e. Premium car – In accordance with Article 6 of the Agreement, SADA provided the Player with a Fiat Punto. However, in August 2016 the Player decided to buy a Range Rover and asked SADA to assist him. SADA paid in total BRL 422,449.36 for this car. As the current value of this car is BRL 322,400, this has to be set off against the compensation fee.

f. Bonuses – SADA made 7 bonus payments of BRL 88,000 in total. The Player has not proven that these payments were not part of the financial compensation under the Agreement.

g. Commissions – Further to Article 3 of the Agreement, SADA made 4 commission fee payments of BRL 267,857.14 in total. If the Panel decides that the agent commissions are not to be taken into account, the amount overpaid of BRL 27,857.14 should be considered as part of the financial compensation.

- SADA has fully proven that Lube acted negligently by entering into an agreement with the Player when he was still engaged with SADA. This caused damages not only in terms of the penalty clause, but also from a sporting perspective. Lube shall be held jointly or severally liable with the Player to pay the amount of BRL 1,600,000 to SADA.

80. On this basis, SADA submitted the following prayers for relief:

"a. To accept and uphold the present Appeal;

b. The decision rendered by the FIVB Tribunal on 18 December 2020, on the case Nr. CF 139/2018 shall be set aside;

c. The First Respondent shall pay to the Appellant the amount of BRL 1.600.000,00 provided in Clause 12 of the Agreement plus 5% interest since 18 July 2018;

d. Additionally, the Second Respondent 2 shall be jointly and severally (or subsidiarily) liable to pay to the Appellant the amount of BRL 1.600.000,00 plus 5% interest rate since 18 July 2018 upon application of art. 41 in combination with art. 50 of SCO

At any rate, the Appellant also requests the following:

a. The Respondents shall pay all arbitration costs and reimburse the Appellant the CAS court office fee of CHF1,000 and the advance of costs paid to the CAS;

b. The Respondents shall pay contribution towards the legal fees incurred by the Appellant in an amount to be duly established at discretion of the Panel."

B. The First Respondent's Submissions on the Merits

81. The First Respondents submissions, in essence, can be summarised as follows:

- At the end of the second season, the Player had only received BRL 102,144.00 instead of BRL 3,200,000.00 as established in Article 2 of the Agreement.

- Until now it is still uncertain whether (and which) taxes have been paid by SADA with respect to payments due to the Player.

- The Player verbally asked SADA to pay the balance of the Agreement and to show evidence of tax payments, but he did not receive anything.

- The WhatsApp messages between 29 May 2018 and 1 June 2018 submitted by SADA are *"an exhibit created unilaterally by the Appellant, of which there is no full technical and documentary guarantee"*. The Player's phrases are also *"reported partially and out of context"*.

- The reasons for the Player to leave SADA are mentioned in an interview of 4 July 2018 by the reporter Mr Bruno Voloch: *"There are many things involved. I have already decided to return to Italy from 2019 but also there were problems with my contract. The birth of my daughter and the beginning of a new cycle in Cruzeiro with a launch of many players have a large weight.* […] *I loved SADA Cruzeiro, I gave everything to this shirt and expected much more understanding, but they only sent threats. They know that my intention is not to return and also know the contractual problems.* […]*"*

- On 7 July 2018, Mr Bartocci sent a notice of termination to SADA on behalf of the Player in which he requested evidence of payment of taxes and payment of the balance of the Agreement.

- The notice of SADA of 12 July 2018 was evidently devoid of effect, because the presentation of the team was not fixed previously, SADA has not sent a summons first for his presentation and SADA has not paid for the flight tickets of the Player confirming the summons for the start of the pre-season.

- On 14 July 2018, the Player's lawyer sent an email in which he repeated the termination because SADA had not paid the salary in full and giving SADA three additional days to pay all outstanding payments and show evidence of tax payment. He indicated that the Agreement otherwise would have been terminated immediately.

- Only after this deadline of three days, the *"player's agent"* requested Lube to start their agreement reached for the season 2019/2020 already as from the season 2018/2019.

- On 18 July 2018, Lube made the official presentation of the Player for the season 2018/2019.

- FIPAV registered the Player until 23 December 2018.

- On 20 July 2018, the Player's lawyer sent an email attaching a power of attorney which gave legal effect to the email sent earlier.

- SADA deliberately put the Player at risk with the Brazilian Tax Authority. Instead SADA only registered a "work contract" which showed only a monthly salary of BRL 5,000.00 with the purpose of paying less taxes.

- The Player disputes that he and SADA had agreed to split the payment of his salary in different parts. The payments had to be made to the Player and not to other persons or companies.

- These payments are not part of the Financial Compensation for the following reasons:

  a. Base salary – While SADA should have registered the Agreement, SADA only registered a work contract for BRL 5,000.00 each month with the purpose of paying less taxes. Payment of BRL 104,439.58 is acknowledged.

  b. The cash payments – These payments totalling BRL 603,144 are acknowledged and were part of the Agreement.

  c. Image Rights – These payments were made on the basis of the IR Agreement by means of which *Serviços Esportivos Ltda.* transferred the Player's image rights to SADA for BRL 786,330.00 for the season 2017/2018 and for BRL 853,644.00 for the season 2018/2019. This IR Agreement and the Agreement are totally different. Moreover, these payments were not made to the Player but initially to *Maciel Molina Assessoria Esportiva LTDA* ("MMAE"), a company of two players' agents, Mr Regor Molina Reyes and Mr Geraldo Maciel Neto, and eleven payments were made to S 13, a company of the Player based in Brazil.

  d. Payments to *Simon Business Inc* – These payments were made by Brazul to a bank account of a company, which is in conflict with Article 2 of the Agreement, as it requires payments to be made to a natural person. The payments were made for the purpose of *"Sport Consultancy"* which has nothing to do with the Agreement.

  e. Premium car – The Range Rover was part of the Article 6 of the Agreement and was never registered in the Player's name. The car was never his property.

  f. Bonuses – The bonuses paid are all extra from the Agreement, as established in Article 9 of the Agreement. They were all cash payments related to results achieved in different tournaments. They were not part of the financial compensation set forth in the Agreement.

  g. Commissions – These payments refer to the commissions of the agents regulated in Article 3 of the Agreement, not to the compensation for the Player set forth in Article 2 of the Agreement.

- The total amount that remains unpaid by SADA is BRL 2,492,416.42. The Player had the right to terminate.

- There was tax evasion on the part of SADA. The Player needed to find another club to avoid legal consequences.

- The Player is entitled to BRL 1,600,000.00 in accordance with Article 12 of the Agreement.

82. On this basis, the Player submitted the following prayers for relief:

"a) To reject the present appeal;

b) To confirm FIVB Tribunal's decision n.2018-06 of the case n. CF 139/2018, dated 18 December 2020.

Moreover, the First Respondent asks a counterclaim because the termination of the contract was for exclusive liability of the Club, which breached the contract and respectfully requests the following Relief:

c) The Appellant shall pay to the First Respondent the amount of BRL 1.600.000,00 provided in Article 12 of the Contract plus 5% interest since 18 July 2018.

At any rate, the First Respondent also requests the following:

d) Accordingly to R57 of the CAS Code, the exclusion of the Appellant's witnesses for this appeal.

e) The Appellant shall pay contribution towards the legal fees incurred by the First Respondent in an amount to be duly established at discretion of the Panel."

C. The Second Respondent's Submissions on the Merits

83. Lube's submissions, in essence, can be summarised as follows:

- The Player wanted to leave SADA because he was not paid, and, above all, because he was not shown the taxes paid by SADA to the Brazilian tax authorities.
- The contractual problems with SADA were addressed in an interview of 4 July 2018 and an email of the Player's agent of 7 July 2018.
- Between the interview and the signing of the contract with Lube, almost a month passed without SADA providing any proof of tax payment or payment of the amounts due.
- Lube never took any action to take the Player away from SADA. No evidence was produced.
- The transfer was legitimate and in accordance with international standards and was never challenged by SADA.
- No evidence was brought by SADA and it never explained why it should receive BRL 1,600,000.00 from Lube.
- SADA cannot claim damages for improper behaviour, as it has behaved wrongly itself.

84. On this basis, Lube submitted the following prayers for relief:

"a) The rejection of Sada's appeal

b) The condemnation of Sada to pay the costs of the proceedings, both first (file named "electronic invoice") and second instance, in favour of Lube, with reserve the right to produce the invoice of this level of judgement after its payment."

V. JURISDICTION OF CAS

85. 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.*
>
> *An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned."*

86. Article 20.12 of the FIVB Regulations provides as follows:

> *"Decisions of the FIVB Tribunal can only be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland and any such appeal must be lodged with CAS within twenty-one days from the receipt of the decision. The CAS shall decide the appeal ex aequo et bono and in accordance with the Code of Sports-related Arbitration, in particular the Special Provisions Applicable to the Appeal Arbitration Procedure."*

87. The jurisdiction of CAS is not contested by the Respondents and is explicitly confirmed by the signature of the Order of Procedure.

88. Based on the provisions set out above, the Panel finds that CAS has jurisdiction to adjudicate and decide on the present dispute.

VI. ADMISSIBILITY OF THE APPEAL

89. Article R49 of the CAS Code determines the following:

> *"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against."*

90. Article 20.12 of the FIVB Regulations provides as follows:

> *"Decisions of the FIVB Tribunal can only be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland and any such appeal must be lodged with CAS within twenty-one days from the receipt of the decision. The CAS shall decide the appeal ex aequo et bono and in accordance with the Code of Sports-related Arbitration, in particular the Special Provisions Applicable to the Appeal Arbitration Procedure."*

91. The admissibility of the appeal is contested by Lube, and not by the Player. Lube invokes three grounds in this respect: i) that SADA allegedly mentioned an incorrect address of Lube in the Statement of Appeal; ii) that the appeal only reached Lube after 21 days from the date the

Appealed Decision was issued; and iii) that SADA has not paid the CAS Court Office fee of CHF 1,000 timely in accordance with Article R64 of the CAS Code.

92. With respect to Lube's arguments, SADA submits: i) that it used the correspondence address indicated on Lube's official website; ii) that it filed its appeal on 8 January 2021, which is within the deadline of 21 days following notification of the Appealed Decision; and iii) that it paid the CAS Court Office fee timely, as confirmed by the letter of the CAS Court Office dated 12 January 2021.

93. The Panel notes that it is the responsibility of an appellant to provide the CAS Court Office with the correct correspondence details of the respondents, but even if the address of Lube mentioned in the Statement of Appeal was incorrect, the Panel does not consider this to be a flaw that is not curable. In any event, Lube did not demonstrate to have suffered any prejudice from SADA's alleged failure to indicate the correct contact details of Lube in its Statement of Appeal. The Panel therefore does not consider it necessary to examine whether the address details of Lube set forth in the Statement of Appeal were in fact incorrect, and/or whether such alleged mistake was caused by incorrect address details being mentioned on Lube's official email address.

94. The failure to comply with the 21-day deadline to appeal would trigger the inadmissibility of the appeal. The Panel, however, finds that this is not the case, as the Statement of Appeal was filed with the CAS Court Office on 8 January 2021. Since the Appealed Decision was notified to the Parties on 18 December 2020, the 21-day deadline to appeal expired on 8 January 2021.

95. Article 21.12 of the FIVB Regulations provides that *"any such appeal must be lodged with CAS"* (emphasis added), and does not indicate that the respondent(s) have to be notified within the same time limit. The Panel therefore does not consider the notification of the respondents within the 21-day deadline to appeal to be a prerequisite for the admissibility of the appeal. Accordingly, SADA's appeal was filed timely.

96. As to the alleged untimely payment of the CAS Court Office fee, the Panel notes that SADA provided evidence of a payment notification demonstrating a payment of CHF 1,000 to CAS on 6 January 2021, i.e. within the 21-day deadline to appeal, which payment was confirmed to have been received by the CAS Court Office by letter dated 12 January 2021.

97. It follows from the above that Lube's objections to the admissibility of the appeal are to be dismissed and that SADA's appeal is admissible.

VII. APPLICABLE LAW

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

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

99. Article 20.12 of the FIVB Regulations provides as follows:

> *"Decisions of the FIVB Tribunal can only be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland and any such appeal must be lodged with CAS within twenty-one days from the receipt of the decision. The CAS shall decide the appeal ex aequo et bono and in accordance with the Code of Sports-related Arbitration, in particular the Special Provisions Applicable to the Appeal Arbitration Procedure."*

100. In its Appeal Brief, SADA submits that the application of *ex aequo et bono* principles does not exclude the possibility to apply Swiss law on a subsidiary basis, since this is a dispute of an international dimension and because the FIVB has its registered seat in Switzerland.

101. Both Respondents objected to the application of Swiss law on a subsidiary basis and maintained that the case should be decided purely *ex aequo et bono*.

102. In the first instance proceedings before the FIVB Tribunal, SADA argued that due to the absence of a choice of law by the Parties, Swiss law should be applied, but the FIVB Tribunal decided the case *ex aequo et bono*.

103. In the Appealed Decision, the FIVB Tribunal made reference to Article 20.9 of the FIVB Regulations, which states:

> *"Unless otherwise agreed by the parties, the Tribunal shall apply general considerations of justice and fairness without reference to any particular national of international law (ex aequo et bono)."*

104. The Panel notes that in Article 20.12, the FIVB Regulations provide that a CAS panel dealing with an appeal against a decision rendered by the FIVB Tribunal shall decide *ex aequo et bono*.

105. While Article 20.12 of the FIVB Regulations does not refer to the possibility of applying any domestic law, Article 20.9 of the FIVB Regulations allows the parties to a dispute to deviate from the default application of *ex aequo et bono* principles.

106. The reference in Article 20.12 to the *"Code of Sports-related Arbitration, in particular the Special Provisions Applicable to the Appeal Arbitration Procedure"*, regards only the procedural rules, not the rules of law governing the substantive aspects of an appeal.

107. Given that the Parties have not agreed to deviate from the default application of the principle of *ex aequo et bono*, the Panel finds that Article 20.12 of the FIVB Regulations is clear in stating that the appeal is to be decided *ex aequo et bono.*

108. The Panel is aware that mandatory law could lead to a need to (partially) apply another legal framework. For this reason, at the start of the hearing, the Panel informed the Parties that, on a preliminary basis, it was of the view that it should resolve the dispute *ex aequo et bono*, but asked SADA to indicate in its further statements during the hearing whether there were any specific mandatory Swiss law rules for each topic that could lead to a different view on the applicable law.

109. The Panel finds that SADA was not convincing in its statements as to why Swiss law should be applied, neither on a primary nor on a subsidiary basis. SADA did not invoke any mandatory rules of Swiss law or public policy principles that would require the Panel to apply any legal framework besides *ex aequo et bono* principles.

110. Moreover, the Panel finds that it is not logical for a dispute to be decided *ex aequo et bono* in the first instance, while an appeal procedure would have to be based on other law. This would make the legal framework to be applied in the first instance and the one to be applied on appeal entirely different, which could make a two-tiered court structure at least dysfunctional. Such system would in advance already undermine the relevance of the decision rendered in first instance.

111. Hence, the Panel concludes that it can decide the merits of the present dispute *ex aequo et bono*.

112. As to the concept of deciding *ex aequo et bono*, the Panel draws inspiration from an arbitral award issued by the Basketball Arbitral Tribunal (the "BAT", or rather "FAT" at the relevant point in time) on 16 August 2007 (ref. 0001/07 FAT), which sets out an exhaustive analysis of this concept, to which the Panel subscribes itself:

> *"6.1.1 The statutory concept of ex aequo et bono arbitration*
>
> *Unlike an amiable compositeur under French law, an arbitrator deciding en équité according to Article 187(2) PIL will not begin with an analysis of the applicable law and of the contract to possibly moderate their effects if they are too rigorous. He/she will rather ignore the law and focus exclusively on the specific circumstances of the case at hand. The concept of équité (or ex aequo et bono) used in Article 187(2) PILA originates from Article 31(3) of the Concordat intercantonal sur l'arbitrage 11 (Concordat), 12 under which Swiss courts have held that arbitration en équité is fundamentally different from arbitration en droit:*
>
> *'When deciding ex aequo et bono, the arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules.'*
>
> *In substance, it is generally considered that the arbitrator deciding ex aequo et bono receives 'a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case'.*
>
> [...]
>
> *6.1.2 The limits of the arbitrator's mandate to decide ex aequo et bono*
>
> *It is generally acknowledged that the arbitrator deciding ex aequo et bono is not required to apply mandatory provisions of the law that would otherwise be applicable to the dispute. Under the PIL, the only limit to the arbitrator's freedom in deciding a dispute ex aequo et bono is international public policy.*

> *When the parties authorize the arbitrator to decide ex aequo et bono, the arbitrator is required to decide ex aequo et bono. That said, this duty does not prevent the arbitrator from referring to the solution which arises from the application of the law before reaching a decision ex aequo et bono, in particular to "guide or reinforce" his/her own understanding of fairness." (FAT 0001/07, paras. 6.1.1 and 6.1.2, with further references to jurisprudence and legal doctrine)."*

VIII. PRELIMINARY ISSUES

113. Before addressing the substance of the present proceedings, the Panel considers it incumbent to set forth the scope and nature of the present appeal arbitration proceeding.

114. The first sentence of Article R57 of the CAS Code provides as follows:

> *"The Panel has full power to review the facts and the law."*

115. It is consistent CAS jurisprudence that pursuant to such *de novo* review principle, the Panel is not limited to assessing the correctness of the Appealed Decision, but may make its own findings, potentially based on new arguments and new evidence that was not available in the proceedings leading up to the Appealed Decision.

116. The scope of the Panel's review is, however, limited to the *quaestio litis* decided in the Appealed Decision on the one hand, and the prayers for relief of the Appellant before CAS on the other hand.

117. In the matter at hand, considering that only SADA challenged the Appealed Decision and because the Appealed Decision ordered SADA to pay an amount of BRL 2,492,416.42 net to the Player, the Panel is barred from awarding a higher amount to the Player.

118. If the Player considered that he was entitled to an amount higher than the amount awarded in the Appealed Decision, he should have filed his own independent appeal against the Appealed Decision, and he cannot do so by means of a counterclaim in his Answer after the 21-day deadline to appeal passed. Indeed, it is no longer possible to file counterclaims in CAS appeals proceedings, but rather only in ordinary proceedings.

119. The Panel feels comforted by CAS jurisprudence in this respect, for instance:

> *"The Panel concludes that the FIFA DRC should have ordered the Appellant to pay a total of EUR 1,391,000 net to the Respondent, which sum should have comprised EUR 91,000 for the month of May 2011 and EUR 1,300,000 for the full second season from 1 August 2011 until 31 May 2012, i.e. to include both the Provider contract amount of EUR 390,000 and ten monthly payments of EUR 91,000.*
> *However, in line with CAS jurisprudence (see e.g. case CAS 2013/A/3432 at para. 59) the competence of this Court extends only so far as the scope of the Appellant's pleas. The Appellant appealed against the decision of the FIFA DRC to award the Player EUR 91,000 for outstanding remuneration, and EUR 670,000 in respect of compensation for breach of contract. Whilst the Respondent did, in his answer to the Appeal, request that the Court make a ruling de novo that the Appellant pay to*

> *him the sum of EUR 1,391,000, that request must be deemed as a counterclaim and accordingly must be found to be inadmissible in light of the amendment to article R55 in the 2010 edition of the CAS Code, and the jurisprudence cited above."* (CAS 2013/A/3436, paras. 133-134)

120. The consequence of this for the matter at hand is two-fold: i) insofar as the Player requests to be awarded a sum higher than the sum awarded to him by the Appealed Decision, this amounts to an inadmissible counterclaim; and ii) within the matter properly submitted before this Panel, the Parties are in principle entitled to rely on evidence that had not been presented in the first instance proceedings to further substantiate their case.

121. Against this background, the Panel finds the Player's request for relief c) (*"The Appellant shall pay to the First Respondent the amount of BRL 1.600.000,00 provided in Article 12 of the Contract plus 5% interest since 18 July 2018"*) amounts to an inadmissible counterclaim, as it demands an amount in addition to the amount awarded to him in the Appealed Decision.

122. Furthermore, insofar the Respondents object to the admissibility of hearing evidence from witnesses called by SADA, the Panel finds that the Respondents' objection must be dismissed, because SADA is free to further substantiate its case. This may potentially be different if SADA would suddenly have relied on a line of reasoning entirely different from its position in the proceedings leading to the Appealed Decision, or if it had withheld relevant evidence in the first instance proceedings in bad faith, but the Panel finds that this has not been established.

123. Insofar as the Respondents maintain that the witness evidence provided by SADA must be declared inadmissible because the witnesses called are not impartial, the Panel finds that also this argument is to be dismissed, because the witness can potentially testify on relevant aspects of the case: an evaluation concerning the reliability of the witness indeed does not concern the admissibility of his/her testimony.

124. Consequently, the Panel finds that the Player's request for relief c) is an inadmissible counterclaim and that SADA is entitled to call witnesses to testify on the relevant aspects of the dispute. The admissibility of the witness evidence is however without prejudice as to the credibility and reliability of the testimonies, which remains the Panel's prerogative to assess.

125. As for the new evidence submitted by the First Respondent in its post hearing brief, the Panel finds the following. The first sentence of Article R56 of the CAS Code provides as follows:

> *"Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument, to produce new exhibits, or to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer."*

126. The First Respondent argued that he needed to submit new evidence to "*prove the unreliability of the witnesses*" and to respond to the statement of Mr Molina during the hearing that he did not receive any complaints made by the Player about the outstanding debt. As this discussion was already addressed in the Appeal Brief, the First Respondent could and should have used his Answer to submit this evidence. The First Respondent therefore has not convinced the Panel there were exceptional circumstances for him to submit new evidence after his Answer. The new evidence submitted by the First Respondent in his post hearing brief is thus inadmissible.

IX. MERITS

A. The Main Issues

127. It is not in dispute between the Parties that the Player terminated the Agreement on 20 July 2018.

128. Since it was the Player who terminated the Agreement, the Panel finds that it is primarily the Player's burden to establish that he had good reason to do so. Whether the Player had good reason or not to terminate the Agreement prematurely is relevant for the question whether any of the Parties needs to pay compensation for breach of contract on the basis of Article 12 of the Agreement.

129. Article 12 of the Agreement provides as follows:

> *"*[…] *This agreement creates a compromise between the parties (Athlete and Club), having the offended party the right to request compensation in the amount of BRL 1,600,000 (Hum* [sic] *Million and Six Hundred Thousand Reais), in case of failure to comply with the agreement due to the exclusive fault of the other party."*

130. The Panel finds that based on Article 12 of the Agreement, if the Player had good cause to terminate the Agreement, SADA would in principle have to pay compensation for breach of contract to the Player, whereas if the Player did not have just cause, the Player would in principle have to pay compensation to SADA.

131. In light of the Parties' submissions, the main issues to be resolved by the Panel are the following:

1. Did the Player have just cause to terminate the Agreement?
2. What are the consequences thereof?

1. Did the Player have good cause to terminate the Agreement?

132. In his termination letter dated 20 July 2018, the Player maintains that he had good cause to terminate the Agreement prematurely, because SADA had failed to fully pay the remuneration owed to him in accordance with the terms of the Agreement. The Player further indicated that he suspected that SADA had failed to pay taxes on the remuneration owed to him, also because SADA refused to provide him with evidence that it had paid the relevant taxes, and that the Player therefore feared repercussions from the Brazilian tax authorities.

133. It is not disputed that the Player was entitled to a total sum of BRL 3,200,000 net over the 2016/2017 and 2017/2018 seasons, based on Article 2 of the Agreement:

> *"The club will pay the Player the amount of BRL 1,600,000.00 (one million and six hundred thousand Reals) net (Free of Taxes) per season. The amount of each season (BRL 1,600,000.00) shall be paid in 12 months, with 50% of the amount in Brazilian territory and the other 50% in a natural persons bank account abroad, to be indicated by the Player."*

134. Whereas SADA maintains that the Player has received all remuneration due to him and that it had actually overpaid the Player, the Player maintains that SADA had only paid him a total amount of BRL 707,583.58, i.e. allegedly BRL 2,492,416.42 short of what he was owed.

135. In the Appealed Decision, the FIVB Tribunal upheld the Player's claim in this respect, and awarded him outstanding salary in the amount of BRL 2,492,416.42.

136. Since the Player established that he was entitled to a salary of BRL 3,200,000 over the 2016/2017 and 2017/2018 seasons, the burden of proof shifts to SADA to establish that it has indeed paid this amount to the Player.

137. SADA maintains that the Player's salary was paid in full by different means: i.e. i) base salary; ii) cash payments; iii) image rights; iv) payments to *Simon Business Inc.*; v) a premium car; vi) bonuses; and vii) commission.

138. The Panel will assess the evidence and arguments provided by the Parties in respect of each of these seven points one by one below, before coming to an overall conclusion as to the total amount owed to the Player on the date of termination of the Agreement, and thus whether the Player terminated the Agreement with just cause on the basis of outstanding salary payments.

i) Base salary

139. SADA maintains and the Player does not dispute that the Player was paid a total net amount of BRL 104,439.58 as base salary.

ii) Cash payments

140. SADA maintains and the Player does not dispute that the Player was paid a total net amount of BRL 603,144 as cash payments.

iii) Image rights

141. SADA maintains that it had agreed with the Player that part of the payments provided for in the Agreement would be made as compensation for using his image rights, which is disputed by the Player, who maintains that the payments made with respect to image rights was not comprised in the remuneration set forth in the Agreement, but that such payment obligation was in fact autonomous from the Agreement.

142. It is not in dispute between the Parties that the Player, through his company S 13, received a total amount of BRL 786,330.05 from SADA based on the IR Agreement. A further amount of BRL 352,452.50 was paid by SADA to MMAE, allegedly also based on the IR Agreement. The payment references refer to the IR Agreement.

143. The Panel observes that the amount of BRL 1,138,782.55 is an important amount, as it comprises approximately one third (1/3) of the value of the Agreement.

144. As set forth *supra*, Article 2 of the Agreement provides as follows:

> *"The club will pay the Player the amount of BRL 1,600,000.00 (one million and six hundred thousand Reals) net (Free of Taxes) per season. The amount of each season (BRL 1,600,000.00) shall be paid in 12 months, with 50% of the amount in Brazilian*

> *territory and the other 50% in a natural persons bank account abroad, to be indicated by the Player."*

145. The Agreement does not make any reference to the Player's image rights. Accordingly, the Panel finds that in principle it cannot be inferred from the Agreement that the Player allowed SADA to exploit his image rights.

146. Since the IR Agreement does not make any reference to the Agreement, the Panel finds that it is to be presumed that a separate autonomous payment obligation was created in addition to the payment obligation that had been created two years before with the conclusion of the Agreement. As also maintained by the FIVB Tribunal in the Appealed Decision, *"Both contracts have a different purpose, and the* [IR Agreement] *does not even mention the* [Agreement]*"*.

147. The Panel also considers the reasoning of the FIVB Tribunal in the Appealed Decision convincing insofar as it distinguishes the situation in the matter at hand from the situation in other decisions of the FIVB Tribunal, particularly also because SADA did not directly dispute or discredit the reasoning in the Appealed Decision in this respect:

> *"The FIVB Tribunal Panel is well aware of jurisprudence of the FIVB Tribunal in which image right payments were considered as part of the structure of a total compensation package (e.g., FIVB Tribunal 2015-07 and FIVB Tribunal 2016-07). However, the FIVB Tribunal Panel finds the present case to be different. In FIVB Tribunal 2015-07, the underlying employment contract contained references to an "image rights contract" in addition to a "sport contract" (see para 7 et seq. of FIVB Tribunal 2015-07: 'All payments in sport contract will be done by Player named bank account. For all payments in image rights [sic] contract part will be discussed the banking situation.') and the respective Single Judge of the FIVB Tribunal was provided with evidence for prior communication between the parties explicitly referring to image rights payments as part of the player's total compensation (see, in particular, para 13 of FIVB Tribunal 2015-07). In the present case, there is no such reference. In FIVB Tribunal 2016-07, it was undisputed by the parties (at least in the appeal phase) that image rights payments were part of the salary. In the present case, this issue is disputed and lacks sufficient evidence. Therefore, the FIVB Tribunal Panel finds that neither potential payments of BRL 352,452.50 net from SADA to MMAE nor potential payments of BRL 786,330.05 net to the Company S13 could be taken into account for the present dispute, and, thus, no respective deduction (BRL 1,138,782.55 net in total) from the Player's compensation shall be made."* (Appealed Decision, para. 156)

148. Furthermore, the Panel notes that the IR Agreement was concluded in August 2017, which is two full years after the conclusion of the Agreement and one full year after the Player was employed by SADA. The Panel considers this timing very odd and therefore unlikely that the payment obligations under the IR Agreement were supposed to incapsulated in the amounts payable under the Agreement, especially in the absence of any reference to the Agreement in the IR Agreement.

149. The Panel finds that the witness evidence of Mr Ferraz is of limited relevance, as he was not involved in the salary negotiations with the Player and thus was not able to give any evidence

on the intention behind the Agreement, or on whether or not SADA and the Player discussed and/or agreed to change the payment elements. He merely stated the Player appeared to be satisfied during the course of the Agreement and that it is common practice in Brazil that players receive remuneration for allowing clubs to use their image rights.

150. The witness evidence of Mr Reyes Molina and Mr Maciel Neto was very unspecific. In particular, their statements lacked detailed information as to how and when SADA and the Player would have discussed the alleged change to the payment obligations of SADA as set forth in the Agreement, which diminishes the overall value of their testimonies. Although both witnesses were presented as players' agents by SADA in its Appeal Brief, it is not clear to the Panel in which capacity they were involved exactly, i.e. whether they were engaged by the Player or by SADA. No engagement or commission letters were submitted by SADA, nor any correspondence between them and the Player.

151. In his written statement of 10 September 2018, Mr Neto indicated that he just acted as one of the intermediaries involved in the negotiations between the Player and SADA.

152. The Panel finds that it is not established that either of the witnesses acted on behalf of the Player.

153. The Panel finds that the evidence of Mr Reyes Molina and Mr Maciel Neto, insofar as they maintain that the Player agreed that part of the remuneration set forth under the Agreement would be transferred to him under the IR Agreement through the company of Mr Reyes Molina and Mr Maciel Neto, i.e. MMAE, does not outweigh the documentary evidence on file. In this respect, the Panel considers it important that neither SADA, nor Mr Reyes Molina and Mr Maciel Neto, provided any evidence of payments being made by MMAE to the Player.

154. The Panel does not exclude the possibility that the Player may indeed have received the remuneration due to him under the Agreement through the IR Agreement, also because it is strange that the Player has not provided any documentary evidence of having protested against SADA's failure to pay him the remuneration due, but the Panel finds that SADA failed to prove that it paid the Player what was due to him under Article 2 of the Agreement. If SADA's allegations were true, one would expect this to be contemplated for in some level of detail in the IR Agreement with the explicit consent of the Player. In the absence thereof, the Panel holds that, based on the terms of the Agreement and the IR Agreement, there is no link between the two, as a consequence of which the remuneration to be received by the Player under both agreements is complimentary.

155. Consequently, the Panel finds that amounts received by the Player under the IR Agreement are not to be taken into account as compensation due to the Player under the Agreement.

iv) Payments to *Simon Business Inc.*

156. SADA maintains that the Player had indicated that he wanted the amounts under the Agreement that were to be paid abroad to be transferred to his company *Simon Business Inc.*, based in Coral Gables, Florida, United States of America. SADA further indicates that it transferred the relevant sums (i.e. USD 200,000 equivalent to BRL 635,400) through its related company, Brazul. SADA argues that there is plenty of evidence proving that the Player received such amounts as part of the financial compensation under the Agreement, such as the invoice signed by the Player. The Player also failed to prove why he would have received such amount from Brazul.

157. The Player does not deny that such payments were made, but he maintains that while Article 2 of the Agreement indicates that the payments abroad are to be made *"in a bank account of a natural person indicated by the Player"*, the payments were not made to a natural person and that SADA failed to establish any link between SADA and Brazul. The payments were made for *"Sport Consultancy"*, which has nothing to do with the Agreement.

158. The Panel finds that SADA failed to establish that these payments were made on the basis of the Agreement. Even if SADA and Brazul may belong to the same group of companies as established in SADA's website www.gruposada.com.br - see footnotes 4 and 5 of the Appeal Brief and the statement of Mr Milton De Oliveira e Souza, Adminstrator of Brazul - this does not convincingly explain in the Panel's view why Brazul would pay the Player a sum of USD 200,000 without being contractually required to do so. Furthermore, the reference to *"Sport Consultancy"* in the invoice does not appear to have any link with the Agreement.

159. The Panel acknowledges that it is a weak point in the Player's case that he did not establish why the relevant sum of USD 200,000 was paid to his company, but the Panel considers this to be insufficient to determine that the relevant amount was paid on the basis of the Agreement.

160. Again, if this had been the arrangement between SADA and the Player, SADA should have contemplated for this in written form or provided other reliable and convincing evidence supporting such purported agreement.

v) Premium car

161. SADA maintains that, upon the Player's arrival, it provided him with a Fiat Punto for his personal use in accordance with the Agreement. Because the Player asked for help from SADA, it ordered and paid for a Range Rover, including insurance for a total amount of BRL 422,449.36, with a current value of BRL 322,400, which SADA considers as compensation based on the Agreement.

162. The Player maintains that the Range Rover was provided to him by SADA in accordance with Article 6 of the Agreement and that the Fiat Punto had only temporarily been provided to him until he received the Range Rover. The Player left the Range Rover with SADA when he registered with Lube. The Player submits that the value of the Range Rover cannot be considered as compensation under the Agreement.

163. The Panel finds that SADA provided insufficient evidence of its allegation that it purchased the Range Rover on behalf of the Player and that the value thereof would be set off against his remuneration under the Agreement. The evidence on file does not establish that the car is registered on the Player's name, but it rather suggests that the car is owned by SADA. In any event, should SADA have operated in the way it alleges to have operated, it would be expected to properly document this, in particular with respect to the Player's consent to set off the relevant amounts against his remuneration under the Agreement. However, SADA did not do so.

164. The expenses related to the Range Rover are covered by Article 6 of the Agreement and can thereof not be set off against the remuneration due to the Player on the basis of Article 2 of the Agreement.

165. Consequently, the Panel finds that the value of the Range Rover is not to be taken into account as compensation due to the Player under the Agreement.

vi) Bonuses

166. SADA maintains that it paid bonuses to the Player for a total amount of BRL 88,000.

167. The Player maintains that the bonuses were paid to him in accordance with Article 9 of the Agreement and therefore did not fall under the remuneration set forth in Article 2 of the Agreement.

168. The Panel finds that the language of Articles 2 and 9 of the Agreement is clear. Whereas Article 2 sets forth a fixed remuneration regardless of the Player's individual or the team's performance, the bonus payments addressed in Article 9 are variable and depend on the Player's individual and/or the team's performance.

169. If the variable compensation were comprised under the Player's fixed remuneration, this would beat the purpose of bonuses, as it would not incentivise the Player to perform well.

170. Furthermore, Article 9 of the Agreement indicates that the bonuses were *"to be discussed later"*, which confirms that they were not comprised under the fixed compensation set forth in Article 2.

171. Consequently, the Panel finds that the bonus payments are not to be taken into account as compensation due to the Player under the Agreement.

vii) Commission

172. SADA maintains that it paid commission to the Player's agents, Mr Reyes Molina and Mr Maciel Neto, through their company MMAE, in a total amount of BRL 267,857.14 in accordance with Article 3 of the Agreement.

173. The Player maintains that the payments made to Mr Reyes Molina and Mr Maciel Neto are indeed made on the basis of Article 3 of the Agreement, but that it is obvious that these payments cannot be counted as payments in accordance with Article 2 of the Agreement.

174. The Panel finds that the Agreement clearly delineates payments to be made to the Player and payments to be made to Mr Reyes Molina and Mr Maciel Neto. Should it have been the intention of SADA and the Player that SADA would pay the commission to the Agents on behalf of the Player and that such payment would be set off against his remuneration on the basis of Article 2 of the Agreement, this should have been clearly addressed in the Agreement, which it is not. The Panel finds that it is not even clear on whose behalf Mr Reyes Molina and Mr Maciel Neto acted in the negotiations between SADA and the Player.

175. The Panel finds that SADA was responsible to pay the commission to Mr Reyes Molina and Mr Maciel Neto in accordance with Article 3 of the Agreement and that such payment cannot be set off against any payment obligations of SADA towards the Player on the basis of Article 2 of the Agreement.

176. Furthermore, as to the commission of BRL 27,857.14 allegedly overpaid by SADA, the Panel finds that, even if such amount was indeed overpaid, this cannot be set off against SADA's overdue payables towards the Player, as the Player never received the amount of BRL 27,857.14.

viii) Conclusion

177. In light of the above, the Panel finds that only the following two payments are to be considered as being paid to the Player under Article 2 of the Agreement:

- Base salary in the amount of BRL 104,439.58;
- Cash payments in the amount of BRL 603,144;

178. Consequently, the Panel confirms the conclusions reached by the FIVB Tribunal in the Appealed Decision in this respect. Since the total amount paid under Article 2 of the Agreement amounts to BRL 707,583, this leaves a balance of BRL 2,492,416.42.

179. The Panel finds that because SADA had an outstanding balance of BRL 2,492,416.42 towards the Player on the date of termination on a total due amount of BRL 3,200,000, which is a very significant portion, the Player had good cause to terminate the Agreement.

180. The Panel also notes that there is no provision under the relevant FIVB regulations or in the Agreement required the Player to grant a certain period of time for SADA to remedy its default before he was able to terminate the Agreement. Therefore, the Player (who did in fact alert SADA that it was in default) was able to terminate the Agreement with just cause for overdue salary payments on the date that he did.

2. What are the consequences thereof?

181. Based on the above conclusion, SADA is required to pay to the Player outstanding salary in a total amount of BRL 2,492,416.42.

182. As to SADA's claim for compensation for breach of contract by the Player, Article 12 of the Agreement provides as follows:

> *"*[…] *This agreement creates a compromise between the parties (Athlete and Club), having the offended party the right to request compensation in the amount of BRL 1,600,000 (Hum* [sic] *Million and Six Hundred Thousand Reais), in case of failure to comply with the agreement due to the* ***exclusive fault of the other party****."* (emphasis added by the Panel)

183. Before making its own assessment, the Panel considers it relevant to set forth the FIVB Tribunal's findings in the Appealed Decision with respect to compensation for breach of contract.

184. On the one hand, the FIVB Tribunal concluded as follows:

> *"Consequently, the FIVB Tribunal Panel concludes that the Player failed to comply with the* [Agreement] *because he did not return to Brazil for the pre-season training*

> *and prematurely terminated the* [Agreement] *without adequately warning SADA. The failure to comply with the* [Agreement] *was due to his exclusive fault, as it was the Player's decision not to return and not to give proper notice."* (Appealed Decision, para. 127)
>
> *"The FIVB Tribunal Panel finds that SADA is entitled to compensation in the amount of BRL 1,600,000.00 according to Clause 12 of the* [Agreement]*."* (Appealed Decision, para. 131)

185. However, on the other hand, the FIVB Tribunal concluded as follows:

> *"The FIVB Tribunal Panel has already concluded that SADA breached Clause 2 of the* [Agreement]. *The FIVB Tribunal Panel also considers that the breach is due to SADA's exclusive fault because it was the one that decided not to pay the Financial Compensation in full. Again, the FIVB Tribunal Panel has discussed whether it is bound to award the full amount of BRL 1,600,000.00 or entitled under ex aequo et bono to determine a lower amount. For the reasons explained above with regard to SADA's claim for compensation to be paid by the Player, the FIVB Tribunal Panel holds that the amount of BRL 1,600,000.00 is not disproportionate and will, therefore, stick to the wording of the* [Agreement] *for determination of the amount to be awarded in case of a breach of the* [Agreement].
>
> *Therefore, the Player is entitled to the amount of BRL 1,600,000.00 for compensation under Clause 12 of the* [Agreement]*."* (Appealed Decision, paras. 181-182)

186. To reconcile these two conclusions, the FIVB Tribunal came to the following decision:

> *"As the Player must pay the same amount to SADA, the amounts are set-off against each other with the consequence that no payment for compensation in the amount of BRL 1,600,000.00 has to be made by SADA nor by the Player."* (Appealed Decision, para. 183)

187. As addressed *supra*, the Panel is barred from addressing the question of whether the Player is entitled to compensation for breach of contract from SADA. The Panel is only competent to rule on the question of whether SADA is entitled to compensation for breach of contract from the Player.

188. In this respect, it must be borne in mind that the FIVB Tribunal upheld the claims for compensation from both sides, but set off the obligations to pay compensation against one another with the net result that no compensation was to be paid at all.

189. Facing such situation, and in order to potentially award compensation for breach of contract to SADA, the Panel would be required to rule: i) that SADA is indeed entitled to compensation in an amount of BRL 1,600,000; and ii) that the Player is not entitled to compensation. If one of these two elements is missing, SADA is not entitled to compensation.

190. Against the background of the conclusion set out above that outstanding payments in an amount of BRL 2,492,416.42 were due to the Player at the time of termination, the Panel finds that

SADA is not entitled to compensation for breach of contract by the Player. Accordingly, the first prerequisite to potentially award compensation for breach of contract to SADA is missing.

191. On the basis of Article 12 of the Agreement, regardless of whether or not the Player had served a proper default notice to SADA prior to terminating the Agreement or whether he should have reported to SADA for the pre-season, the application of Article 12 of the Agreement does not necessarily require the Panel to award compensation for breach of contract to SADA, because the Panel finds that the early termination was in any event not the Player's exclusive fault. Indeed, SADA was at significant fault because it failed to pay the Player a large part of the remuneration owed to him under the Agreement.

192. Whether the respective entitlements to compensation are set off against one another, or whether no compensation is to be awarded due to contributory negligence of both sides, the net result would be the same: no compensation for breach of contract is payable.

193. Consequently, the Panel finds that, on an *ex aequo et bono* basis, it is just and fair that no compensation is to be paid by the Player to SADA.

194. As a corollary, the Panel finds that the issue of whether or not Lube should be held jointly and severally liable with the Player to pay compensation to SADA is moot.

B. Conclusion

195. Based on the foregoing, the Panel finds that:

i) The Player had good cause to terminate the Agreement.
ii) SADA is required to pay outstanding salary in a total amount of BRL 2,492,416.42 to the Player.
iii) SADA is not entitled to receive compensation for breach of contract from the Player and/or from Lube.
iv) All other and further motions or prayers for relief are dismissed.

196. Consequently, SADA's appeal is dismissed and the Appealed Decision is confirmed in full.

X. COSTS

(…).

* * * * *

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed on 8 January 2021 by Associação Social E Esportiva SADA against Robertlandy Simon Aties and A.S. Volley Lube S.r.l. with respect to the decision issued on 18 December 2020 by the FIVB Tribunal is rejected.

2. The decision issued on 18 December 2020 by the FIVB Tribunal is confirmed.

3. (…).

4. (…).

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

Seat of arbitration: Lausanne, Switzerland
Date: 16 January 2023

THE COURT OF ARBITRATION FOR SPORT

André Brantjes
President of the Panel

Jordi López Batet
Arbitrator

Luigi Fumagalli
Arbitrator