CAS 2021/A/8070 Gabriel Girotto Franco v. Al Hilal S.FC

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Mr Rui Botica Santos, Attorney-at-Law, Lisbon, Portugal

in the arbitration between

Gabriel Girotto Franco, Brazil

Represented by Mr Breno Costa Ramos Tannuri, Attorney-at-Law at Tannuri Ribeiro Advogados Law Firm, São Paulo, Brazil

Appellant

and

Al Hilal Saudi Football Club, Kingdom of Saudi Arabia

Represented by Messrs Marcos Motta and Stefano Malvestio, Attorneys-at-Law at Bichara e Motta Advogados, Rio de Janeiro, Brazil

Respondent

I. PARTIES

1. Gabriel Girotto Franco (the "Appellant" or the "Player") is a Brazilian professional football player, born on 10 July 1992 in Brazil, currently playing for the Sport Clube Internacional, Brazil.

2. Al Hilal Saudi Football Club ("Al Hilal", the "Club" or the "Respondent") is a professional football club incorporated and registered in accordance with the laws of the Kingdom of Saudi Arabia ("KSA"), with its registered head office in Riyadh, KSA, affiliated to the Saudi Arabian Football Federation (the "SAFF"), which is a member association of the Fédération Internationale de Football Association ("FIFA"). FIFA is the international governing body of football and exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials, and players belonging to its affiliates. FIFA is an association under Articles 60 et seq. of the Swiss Civil Code with headquarters in Zurich, Switzerland.

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

II. INTRODUCTION

4. The Appellant is challenging the decision rendered by the FIFA Dispute Resolution Chamber (the "FIFA DRC") passed on 6 May 2021 (case ref. 20-00786), which grounds were communicated to the Parties on 1 June 2021 (the "FIFA Decision" or the "Appealed Decision"), in accordance with Article R55 of the Code of Sports-related Arbitration (the "CAS Code").

5. The dispute between the Parties concerns the legal consequences in result of their contacts and negotiations to conclude an employment relation, i.e. whether the employment proposal/offer sent by the Club to the Player is to be considered a valid and biding contract on them, as well as the alleged Player's response and actions were sufficient to trigger the consequences of (i) an employment relationship between the Parties or (ii) the right to be compensated for the breach of the rules of good faith and for the expectations generated during the negotiations ("*culpa in contrahendo*").

III. FACTUAL BACKGROUND

6. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions. Additional facts and allegations 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, it refers in this award (the "Award") only to the submissions and evidence it considers necessary to explain its reasoning.

(A) The Club's expression of interest in signing the Player and the mandate granted to the Club's intermediary

7. On 25 August 2019, the intermediary Mr El Yaagoubi Mohammed (the "Club's Intermediary") directly contacted the Player's intermediary Mr Guilherme Miranda (the "Player's Intermediary", the Parties' intermediaries are collectively referred to as the "Intermediaries") with the aim to submit an offer to contract the Player (the "Employment Proposal" or the "Offer"). The Player was employed by the Sport Club Corinthians Paulista ("Corinthians") since 13 January 2017.

8. The Club's Intermediary informed the Player's Intermediary that it had addressed a formal offer to the Colombian football professional Gustavo Cuellar (the "Player Cuellar"), but he did not accept the offer and for this reason the Club decided to open negotiations to hire the Player.

9. The Club's Intermediary was authorized to negotiate – on Club's behalf – the "*possible transfer agreement of the (...)* [P]*layer (...)*" with Corinthians (the "Mandate").

10. The Mandate, *inter alia*, established the following: "*this mandate is only limited to negotiate on behalf of Al Hilal SFC with (...) Corinthians (...). Any and all documentations and/or agreements without the signature of Al Hilal SFC shall be deemed as invalid and null. This exclusive mandate to the Intermediary is valid until 30 August 2019*".

(B) <u>The signature of the Transfer Agreement between Al Hilal and Corinthians</u>

11. On 28 August 2019, upon several discussions and negotiations, the Club and Corinthians entered into a transfer agreement by means of which the Player should be transferred to Al Hilal (the "Transfer Agreement"). The Player has not signed the Transfer Agreement (at least on this date) and, if it was signed, such fact was never properly communicated to the Club. The agreed transfer fee was USD $5.500.000.

12. The Transfer Agreement was subject to the execution of the "*relevant employment contract to be executed between* [Al Hilal] *and the* [P]*layer*" (Article 9 of the Transfer Agreement).

13. With relevance to the present appeal, we also highlight the content of Article 12.3 of the Transfer Agreement: "*notwithstanding anything to the contrary, the Parties hereby expressly and irrevocably agree that nothing herein shall oblige* [Al Hilal] *to enter into an employment contract with the* [P]*layer and in the event that* [Al Hilal], *for any reason, does not enter into an employment contract with the* [P]*layer, this agreement shall become null and void."*

(C) <u>The negotiations between the Intermediaries with the aim to transfer the Player to the Club</u>

14. On 28 August 2019, after several discussions between Intermediaries, the Player received from Al Hilal the "Employment Proposal", containing the main terms and conditions of their eventual employment relationship (seasons 2019-21). On this same date, the Intermediaries exchanged some WhatsApp messages regarding the duration of the proposed Offer. The Employment Proposal was signed by the Club's CEO.

15. In accordance with the Employment Proposal "[Al Hilal is] *looking forward (…)* [the Player's response] *to this letter by no later than 29 August 2019 at 22:00 (KSA hrs). Should we not receive any response (sic), this letter shall be deemed as terminated*". The Employment Proposal specified that it was a "*non-binding offer*" which should be considered as a letter that "*is not intended to be legally binding and Al Hillal* (…) *may withdraw from negotiations at any time without liability and without prior written notice".*

16. On 29 August 2019, the Intermediaries exchanged via WhatsApp the following messages:

- at 1:17 AM Brazilian Time ("BRT time"), the Player's Intermediary wrote to the Club's Intermediary, *in verbis*: *"2 years ok for Gabriel. I manage that".*

- at 5:38 PM BRT time the Club's Intermediary sent the Player the air tickets to travel São Paulo to Riyadh with a stopover in Dubai. The plane tickets were for the Player and the Player's Intermediary to fly on 29 August 2019 at 21:40 BRT time and arrive in Dubai on 30 August 2019 at 22:55 United Arab Emirates time ("UAE time").

- at 7:16 PM BRT time, the Club's Intermediary asked the Player's Intermediary if everything was okay with the flight and the latter replied only "yes". Subsequently, the Club's Intermediary wrote "*let me know when about to leave*".

17. On 29 August 2019, the Player played an official match for Corinthians in Rio de Janeiro, Brazil, valid for the 2019 CONMEBOL Sudamerica, against Fluminense FC. The Player did not take the flight to Riyadh to meet Al Hilal and, after the match with Fluminense FC, gave the following interview:

"Good night. We came to know at the end of the night that there would be an inquire, an interest from Al Hilal, but I was focused on the match. Now that the match is over, I am happy about the qualification, I don´t know to say what is right and what is wrong. I will meet with my agents and with Corinthians in order to know the decision taken. But irrespective of anything, I am happy for the match and the qualification. When I will know 100% what will happen, I will speak. Corinthians is my home. I am happy. (…) what's really missing is signing. Everything happened very fast today. Because I was concentrated, focused on the match, I could not stop to think about it. Now the adrenaline will low down, I will meet with my agents, Corinthians and family in order to take a decision. In a few hours or at least in one day, the windows will close, it will be defined".

(D) <u>The Cub's lack of interest in signing the Player</u>

18. On 30 August 2019, the Club officially announced that had concluded an employment contract with the Player Cuellar.

19. On 31 August 2019, the Player sent a formal notice to Al Hilal, in which stated that the Parties had signed an employment contract and requested Al Hilal to confirm within the following 24 hours if "*the Club has decided to beach the Employment Contract*".

20. On 7 September 2019, the Player played an official match for Corinthians in the staring eleven.

21. On 9 September 2019, Al Hilal replied to the Player's notice refusing the existence of any employment relationship and highlighted the clear terms of the non-binding letter of intention of 28 August 2019 – the Employment Proposal.

22. On 6 January 2020, the Player and Corinthians amended the terms and conditions of the Corinthians' Employment Contract. In essence, the amendment extended the employment relation until 31 December 2022, as well as it established that the latter became entitled to receive monthly salaries amounting to BRL 500,000 and Corinthians has acquired 100% of the Player's image rights for the amount of BRL 2,000,000.

(E) The Player's claim before the FIFA

23. On 27 May 2020, the Player filed before FIFA a claim against the Club under Article 17 of the Regulations on the Transfer of Players (the "FIFA RSTP" or the "RSTP"), requesting the following:

a. To order Al Hilal to pay him USD 1,957,866.04 as compensation for breach of contract, plus 5% interest *p.a* as from 2 September 2019 until the date of effective payment;

b. To impose a transfer ban on Al Hilal for two entire and consecutive registration periods;

Alternatively,

c. To confirm that by breaching the Employment Proposal, Al Hilal violated the principle of *culpa in contrahendo* and as such, shall pay a compensation to the Player amounting USD 1,957,866.04, plus default interest at the rate of 5% *p.a* as from 2 September 2019 until the effective date of payment.

24. The Club was invited to reply to the Player's claim and in its replied / counterclaim requested the following:

a. To dismiss the Player's claim for lack of jurisdiction because is not an employment-related matter;

Alternatively, in the event that FIFA determines that it has jurisdiction

b. To dismiss the Player's claim in the merits and to admit the counterclaim to decide that the Player breached the employment contract with Al Hilal and that the Player should pay a compensation of USD 10,500,000 and SAR 75,809, plus 5% interest p.a. on all the due amounts as from the due dates and util the effective payment;

c. To impose sporting sanctions on the Player, restricting him from playing official matches for at least four months; and

d. To order the Player to pay Al Hilal EUR 50,000 as legal expenses and costs, as well as to deem the Player liable for any procedural costs.

25. On 6 May 2021, the FIFA DRC passed the Appealed Decision. The operative part of the Appeal Decision states the following:

"(...)

1. The claim of the [Player] (…) *is admissible.*

2. The claim of *the* [Player] (…) is rejected.

3. The counter-claim of the [Club] *is rejected.*

(...)"

26. On 1 June 2021, the grounds of the Appealed Decision were communicated to the Appellant.

27. In summary, the FIFA DRC concluded and rejected both the Player's claim and the Club's counterclaim. The main grounds of the Appealed Decision are the following:

"(...) the [P]*layer did not meet his burden of proof in order to demonstrate that he dully accepted Al Hilal's offer."*

"(...) in accordance with the documentation brought forward by the [P]*arties (..)",* the Employment Proposal was delivered by the Club's Intermediary to the Player's Intermediary via WhatsApp, but the copy of this documents signed by the Player was never delivered to Al Hilal, nor to the Club's Intermediary.

"(...) In view of the above, the [FIFA DRC] *highlighted that the* [P]*layer's consent was only limited to a WhatsApp message sent by* [the Player's Intermediary to the Club's Intermediary] *after the formal expiry of the deadline settled by the* [C]*lub (i.e. in the early morning of 29 August 2019, at 1:17 AM, Brazilian time)."*

"(...) Consequently, (...) the [P]*layer did not provide any evidence that confirms that he formally answered the* [E]*mployment* [P]*roposal within the deadline."*

"(...) the consent provided via WhatsApp by a third person other than the player himself – and also to a third person to Al Hilal (...) shall not be deemed as a valid manner to accept an employment proposal and, hence, to trigger the consequences of a labour

relationship. (…) the message in question was dubious and unclear, and does not clearly state an acceptance on the player's part".

"(…) the issuance of the plane tickets by Al Hilal to the [P]*layer cannot supplement the fact that the* [P]*layer did not validly accept the employment proposal under the perspective of the long-standing jurisprudence of* [the FIFA DRC]".

"(…) the signature of the transfer agreement by the clubs do not impact the conclusion above since the transfer agreement expressly set forth that the "execution" of "an employment agreement" between Al Hilal and the [P]*layer should be considered as a condition precedent to the enforcement of the contract."*

"(…) Al Hilal engaged the services of a different player and expressed to the player that it was no longer interested in his services as no confirmation had been received from him. Therefore, (…) no compensation (…)" should be awarded to the Parties.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

28. On 23 June 2021, in accordance with Article R47 of the CAS Code, the Appellant filed its statement of appeal (the "Statement of Appeal") with the Court of Arbitration for Sport ("CAS") challenging the Appealed Decision and requested the matter to be decided by a Sole Arbitrator.

29. On 27 July 2021, in accordance with Article R51 of the CAS Code and within the previously extended relevant time-limit, the Appellant filed his Appeal Brief.

30. On 17 August 2021, the Parties informed the CAS Court Office of their agreement to jointly nominate Mr Rui Botica Santos, Attorney-at-Law, Lisbon, Portugal, as Sole Arbitrator and, in consequence, suggested his appointment by the CAS Appeals Arbitration Division.

31. On 18 August 2021, the CAS Court Office informed the Parties that pursuant to Article R54 of the CAS Code, and on behalf of the Deputy President of the CAS Appeals Arbitration Division, it was confirmed the joint appointment by the Parties of Mr Rui Botica Santos as Sole Arbitrator.

32. On 26 October 2021, the Respondent filed its Answer, pursuant to Article R55 of the CAS Code. The Appellant initially objected to the admissibility of the Answer, however, during a case management conference promoted by the Sole Arbitrator and which was held on 11 November 2021, ultimately withdrew his challenge and accepted its inclusion in the file.

33. On 2 September 2022, the CAS Court Office issued the Order of Procedure, which was duly signed by the Parties.

34. On 9 November 2022, a hearing was held in Rio de Janeiro, Brazil, as per the Parties' agreement after extended discussions commenced in November 2021. The following persons attended the hearing, in addition to the Sole Arbitrator and Mr Giovanni Maria Fares (remotely):

1. For the Appellant

In person

- Mr Gabriel Girotto Franco – the Appellant
- Mr Breno Costa Ramos Tannuri – Counsel
- Mr André Oliveira de Meira Ribeiro – Counsel
- Mr Somaiah Mandepansa Jaya – Consul
- Ms Gwenn Le Garrec – Counsel

By videoconference

- Mr Carlos Gilberto Nascimento Silva – Witness
- Mr Guilherme Miranda – Witness
- Mr Mohamed Chrif Zorai – Interpreter

2. For the Respondent

- Mr Stefano Malvestio – Counsel
- Mr Gustavo Awad – Counsel
- Ms Ariadna Mendoza – Intern
- Ms Georgia Wray – Intern
- Mr Rahul Raj – Intern

By videoconference

- Mr Sami Alaskari – Representative of the Respondent
- Mr El Yaagoubu Mohammed – Witness
- Mr Turki Khalid Almesned – Witness

3. As observer:

- Ms Fernanda Szyszka – lawyer at the BMA Law Firm /host of the venue for the hearing (invited by the Sole Arbitrator)

35. As a preliminary remark, the Parties were requested to confirm not having any objection to the appointment of the Sole Arbitrator, and they so confirmed.

36. The Parties were given the opportunity to present their case and make their submissions and arguments. After the Parties' closing submissions, the hearing was closed, and the Sole Arbitrator reserved its decision to this Award.

37. Before the hearing concluded, the Parties expressly stated that they had no objection to the way that these proceedings have been conducted and that the equal treatment of the Parties and their right to be heard had been respected.

V. THE PARTIES' SUBMISSIONS

38. The following summary of the Parties' positions is illustrative and does not necessarily comprise each contention put forward by the Parties. The Sole Arbitrator, however, has carefully considered all the submissions made by the Parties, even if no explicit reference is made in what immediately follows:

(A) The Appellant's submissions

39. The Appellant prayed the below reliefs in its Appeal Brief:

"(...)

FISRT – To uphold the present appeal;

SECOND – To order the Club to pay to the Player USD 1,957,866.04 due as compensation for the breach of the [Employment] Contract, plus default interest at the rate of 5% per annum as from 2 September 2019 until the effective date of payment; or

Alternatively and only, if the above is rejected:

THIRD – To order the Club t pay to the Player USD 1,249,999 due as compensation for the breach of the [Employment] Contract, plus default interest at the date of 5% per annum as from 2 September 2019 until the effective date of payment;

FOURTH – To order the Club to pay all arbitration costs and be ordered to reimburse the Player the minimum CAS court office fee of CHF 1,000 and any other advance of costs paid to the CAS; AND

FIFTH – To order the Club to pay the Player a contribution towards the legal and other costs incurred and regarding the ongoing proceedings in the amount of CHF 20,000."

40. The Appellant advanced the following grounds in support of its appeal:

(A.1) The Offer contained all *essentialia negotii*

41. In accordance with the long-standing understanding of the *lex sportiva*, a document that contains (i) date; (ii) the name of the parties; (iii) the term; (iv) the remuneration; and (v) the signature of the parties is considered to include all *essentialia negotii* and is therefore a valid and binding agreement.

42. It is undisputed that the Offer is dated "28/08/2019" and was sent to the Player on the same day. It is also undisputed that the Offer contains the identification of the Parties ("*Player and the Club*"), the object of the contract ("*employment*"), its term ("*2 seasons*"), the remuneration of the Player and the starting of the employment relationship ("*… to be commenced as of the date of signature*"). All elements of the "*essentialia negotii*" were met. It is also important to highlight that the Offer also guarantee certain additional perks and benefits that the Player was entitled to receive: (i) transportation; (ii) accommodation; and (iii) medical insurance.

43. FIFA DRC righty concluded that the Offer contained the *essentialia negotii*, which is crucial for a contract (and/or a pre-contract) to be valid and binding. This is also supported by Article 2.1 of the Swiss Code of Obligations (the "SCO"): "[w]*here the parties have agreed on all the essential terms, it is presumed that the contract will be binding notwithstanding and reservation or secondary terms."*

(A.2) <u>The Player's acceptance of the Offer</u>

44. In case a football club presents a player with an offer, which contains the essential elements of a football player's contract, and this offer is subsequently accepted by the player, it is presumed that this offer becomes a valid and binding employment contract.

45. The Player expressly and/or implicit accepted the Offer and such acceptance was communicated to the Club's Intermediary. As per Article 1 of the SCO the conclusion of a contract requires a mutual expression of intend by the parties and the expression of intent may be express or implicit. Moreover, Article 10.1 and 2 of the SCO establishes that: "[a] *contract concluded in the parties' absent takes effect from the time acceptance is sent"* and "[w]*here express acceptance is not required, the contract takes effect from the time the offer is received."*

46. The Club's Intermediary – based on the Mandate – was the only person exclusively entitled to represent the Club during any negotiations related to the deal and such powers were valid until 30 August 2019. Article 32.1 of the SCO provides that: "[t]*he rights and obligations arising from a contract made by an agent in the name of another person accrue to the person represented, and not to the agent."*

47. As very well stressed by FIFA DRC, the Player's Intermediary communication to the Club's Intermediary about the acceptance and agreement of the Player – in relation to the Offer – was sent at 1:17 AM BRT time on 29 August 2019. Hence, approximately 15

hours before (and not "after" as mistakenly affirmed by the Appealed Decision) the time limit determined by the Club.

48. It is undisputed that the time zone difference between Brazil and the KSA during the time of the year is 6 hours meaning that the time in KSA is 6 hours ahead of Brazil. As such, the referenced time limit was going to expire at 4 PM BRT on 29 August 2019.

49. The conclusion that the Player failed to comply with the time limit imposed by the Club must be set aside in full.

50. The FIFA RSTP does not provide any eventual provisions established by Swiss Law which prohibited a contract offered by an employer to be accepted by an employee through a messaging application for instance WhatsApp. Swiss law grants the parties the liberty to conclude a contract within a very informal and practical manner if necessary.

51. It is undisputed that the Players' Agent only forwarded the WhatsApp message with an "ok" to the Offer, after having discussed its terms and conditions with the Player and having obtained the Player's agreement to it. This conversation between the Player's Intermediary and the Player was necessary because the Player had first to agree to reduce the term of the employment relationship from 3 to 2 seasons. Only after, the Player's Intermediary was in position to send the WhatsApp message with the "ok" regarding the Offer. This "ok" WhatsApp message – the communication of the acceptance of the Offer – provided legal effects and any eventual attempt to ignore or minimize it is legally groundless – Article 32 of the SCO.

52. The Player's Intermediary did not sign the Offer on behalf of the Player but simply communicated that the latter had agreed with its terms and conditions as such fulfilled with the time limit set out by the Club to receive a positive or negative answer regarding its contents. The Club's behavior confirmed this understanding because a few hours later the Club forwarded the Player the plane tickets to travel to KSA. The issue of the tickets is clear evidence that the Club knew and received the acceptance from the Player regarding the Offer and that the Club's Intermediary had the powers to represent the Club towards Corinthians and the Player.

53. The FIFA DRC's finding that the Player's message was dubious and unclear is wrong.

54. The Parties have chosen an extremely informal means of communication (WhatsApp) that is simple and direct. It is in this context that the messages have to be understood. By the exchange of messages, it is clearly understood that the only open negotiation point was the term of the contract (two or three seasons). Once the two seasons are clarified and accepted, this acceptance must be understood as the acceptance of the Offer. This is also the reason why the Club forwarded the plane tickets to the Player. The Player and the player's Intermediary were not going to travel to KSA if they were not accepted the Offer.

55. Another argument used by the FIFA DRC to reject the Player's claim was that *"...a copy of the said document signed by the Player was never delivered to Al Hilal (nor to Mr. Mohammedi)".*

56. The FIFA DRC wrongly understood that the Offer had to be signed by the Player was a mandatory procedure to consider valid the existence of an employment relationship. However, this understanding has no support in the FIFA RSTP, as this regulation does not provide any clarification regarding the matter. Under Swiss law the validity of a contract is not subject to the compliance with any particular form unless a particular form is prescribed by law. Moreover, the Offer does not require that the Player had to forward a signed copy of the document. The Club only wanted a simple response nothing else, without any formality whatsoever. The Offer refers to the receipt of "any respond", which clearly provides broad meaning to what is was effectively looking from the Player. The response "ok" was good enough to revert the Offer into a valid and binding agreement.

57. As per CAS 2007/A/1213; 2013/A/3133 and CAS 2013/A/3054:

"In determining the intent of the parties, or the intent which a reasonable person would have had in the same circumstances, it is necessary to look to the words used or conduct engaged by the parties. However, the investigation is not to be limited to those words or the conduct even if they appeal to give a clear answer to the question. In order to go beyond the apparent meaning of the words or the conduct of the parties, due consideration is to be given to all relevant circumstances of the case. This includes the negotiations, any subsequent conduct of the parties and usages."

(A.3) <u>The Club's contractual breach</u>

58. The contractual parties must respect the principle of *pacta sunt servanda* and, whenever there is a unilateral termination of a contract without valid reason for just cause, the party in breach will have to pay a compensation and may be subjected to sporting sanctions. This understanding is not only supported by the principle of respect of contracts but also on other fundamental principles such as good-faith, party autonomy, freedom of contract, prohibition of abuse of right, etc.

59. Any eventual presumption that the Club had the unilateral right to cancel (or disregard) the terms and conditions of the Offer at any time must be considered invalid. It is undisputed the Offer's clause mentioned in para. 15 above. Only the Club had the right to cancel the Offer at any time. These types of clauses are contrary to the general principles of contractual stability as well as labor law as it gives to the Club undue control over the Player without granting the same right to the Player. These types of clauses are also contrary to the fundamental principles of law and FIFA RSTP. Article 335a no. 1 of the SCO provides that: "[n]*otice periods must be the same for both parties; where an*

agreement provides for different notice periods, the longer period is applicable to both parties".

60. The Club did not have the alleged right to cancel the Offer after the Player had provided his acceptance to its terms and conditions to the Offer. After this moment was no pending negotiations anymore.

61. Moreover, and as per Article 3.1 of the SCO "[a] *person who offers to enter into a contract with another person and sets a time limit for acceptance is bound by his offer until the time limit expires".*

62. Therefore, the Club breached the employment relationship with just cause and for this reason must compensate the Player under Article 17 para. 1 and 2 of the FIFA RSTP.

63. FIFA DRC ignored several pieces of evidence, disregarded fundamental principles of Swiss law, the various rules, regulations and guidelines established by FIFA and for this reason the Player should be compensated for the breach of his employment agreement with the Club.

(A.4.) <u>As to the so-called *"culpa in contrahendo" (in subsidiary analysis)*</u>

64. FIFA RSTP does not provide any definition or proper clarification regarding pre-contracts. This lacuna shall be filled by Swiss law – Article 22 of the SCO establishes:

"*1. Parties may reach a binding agreement to enter into a contract at a later date.*

2. Where in the interests of the parties the law makes the validity of a contract conditional on observance of a particular form, the same applies to the agreement to conclude a contract."

65. According to general principles of law – SFT 113 II 31 p. 35; SFT 118 II 32 p. 33 a preliminary contract is a contract that obligates the contracting parties to conclude another contract under the law of obligations, which is then called the main contract (CAS 2016/A/4489). Under this context, it is important to stress that letters of intent are often considered as pre-contracts, as the parties agree on some important elements in view of the negotiation of the final contract and may provide for sanctions to be imposed in case of violation of specific commitments.

66. From the moment when the parties enter into contract negotiations, they are in special legal relationship with each other. That pre-contractual relationship involves certain reciprocal obligations, in particular, the parties must negotiate in a serious manner and accordance with their actual intentions. A party that terminates contractual negotiations in violation of these principles may become liable to the other party based on the *culpa in contrahendo* doctrine.

67. Under Swiss law, *culpa in contrahendo* means the negligent/intentional breach of pre-contractual duties. A finding of culpa *in contrahendo* requires the existence of contractual negotiation, trust that merited protection, a breach of a duty, harm, a casual connection, and fault. The breach of a duty in particular derives from the principle of good faith which includes the duty to negotiate seriously and in a fair manner. The parties must negotiate in good faith and should not abandon the negotiations without compelling reason for doing so.

68. The Offer contained an indication that it was non-binding but also makes the indication that such condition remained valid but only during the period of negotiations between the Parties. CAS needs to take into consideration that the Player accepted the Offer within the required deadline.

69. The validity of the employment relationship cannot be subject to a successful medical examination (Article 18. 4 FIFA RSTP).

70. Only when the Player and the Player's Intermediary arrived in Dubai, this latter received a call from the Club's Intermediary informing that the Club had signed Player Cuellar since the latter had changed his mind after the failure of the negotiations with Bologna FC 1909.

71. The decision to breach the employment relationship few hours before the Player had travelled in a 15-hour flight from Rio de Janeiro to Dubai and few hours before landing Riyadh is a typical case of *culpa in contrahendo*.

(A.5.) <u>As to the legal consequences</u>

72. The breach of a contract shall be compensated and calculated under Article 17.1 FIFA RSTP. This provision sets the principles and method of calculation of the compensation (positive interest doctrine). The primary role is the parties' autonomy ("… *unless otherwise provided for in the contract."*). In the case at hand there is no indication of compensation is case of breach.

73. The other criteria set out in the same relevant provision that provides guidelines to be applied with the purpose to fix a just and fair compensation is "*the specific circumstances of the case into consideration"*. Within this context, it is applicable the *"… so-called "positive interest" (or "expectation interest") i.e. it will aim at determining an amount which shall basically put the injury party in the position that the same party would have had if the contract was performed properly, without such contractual violation to occur*". (CAS 2006/A/106).

74. The Player's loss of earnings and loss of gains result from the breach of the contract by the Club. The Player's remuneration during the relevant period should also be considered

as mitigation factor. This should be the criteria to be followed to determine the compensation due for the Club's breach.

75. Considering the Player's remuneration set out in the Offer, minus the remuneration received from Corinthians during equivalent period, the compensation amount should be USD 1,957,866.04. The calculation is as follows:

a. As per the Offer, the Club undertook to pay the Player the total remuneration of USD 2,500,000 net per season, which represents the monthly salary of USD 208,333 (USD 2,500,000: 12 months) as from September 2019.

b. In turn, the Player received from Corinthians the gross monthly salary of BRL 280,000 (clause 10 of the Corinthians Contract). This contract was amended on 6 January 2020 and it was extended until 31 December 2022. The Player's increased monthly gross salary to BRL 500,000 and the additional remuneration received from the Corinthians for his image rights – in the total amount of BRL 2,000,000 – must also be considered.

c. In line with the above, the following amounts should be deducted:
   (i) BRL 1,400,000.00 (BRL 280,000 x 5 months) related to the gross salaries from August 2019 to December 2019;
   (ii) BRL 9,500,000 (BRL 500,000 x 18 months) related to the gross salaries from January 2020 to July 2021;
   (iii) BRL 1,333,333,32 (two installments of BRL 666.666,66) related to the player's image rights.
   (iv) Total: BRL 12,233,333.30.

d. Considering the exchange rate established by the Brazilian Central Bank on 2 January 2020 (a more favorable exchange rate to the Club), the Player received during the term of his employment relation with Corinthians the amount of BRL 12,233,333.30, equivalent to USD 3,042,133.96.

e. So, the Player had a loss of USD 1,957,866.04 (USD 5,000,000 – USD 3,042,133.96).

76. In relation to the compensation for breach of a pre-contract (subsidiary request), the amount should be USD 1,249,999.00 correspondent to 6 gross monthly salaries (USD 5,000,000.00: 24 months = USD 208,333. X 6). In the Appellant's opinion the compensation shall be never lower than USD 1,249,999.00.

(A.6) Payment of Default Interest

77. The compensation shall be subjected to legal interest due for late payment of 5% - Article 104.1 of the SCO. According to Swiss jurisprudence and doctrine, in case of a claim for compensation for a premature, unjustified termination of an employment agreement, interest shall start to accrue immediately, i.e. as per the date of the termination of the agreement.

78. On 31 August 2019, the Player sent to the Club a notification with the purpose to remind the latter about the existence of the employment relationship – Article 102.1 of the SCO – and granted the Club a deadline of 24 hours to reply. The calculation of the 5% interest *p.a* shall start from 2 September 2019 until the effective date of payment.

(B) The Respondent's submissions

79. The Respondent filed its Answer to the Appeal Brief and made the following prayers for relief:

a) "Dismiss all the allegations put forward by Mr. Gabriel Girotto Franco;
b) Dismiss the present appeal and confirm the decision rendered by the FIFA Dispute Resolution Chamber on 6 May 2021 in totum;
c) Order Mr. Gabriel Girotto Franco to bear any and all CAS administrative and procedural costs, which have already been incurred or may eventually be incurred in connection with this arbitration; and
d) Grant Al Hilla SFC a contribution towards its legal fees and other expenses incurred in connection with the proceedings, pursuant to Article R64.5 of the CAS Code, in an amount to be fixed by this honourable Court at its discretion but in no event lower than CHF15,000 (fiteen thousand Swiss Francs)."

80. The Respondent advanced the following grounds in support of its position:

(B.1) The Respondent is in line with the main grounds of the Appeal Decision

81. The dispute between the Parties is related to an offer of employment, which was expressly stated to be non-bidding.

82. The Respondent fully agrees with the FIFA Decision rejecting the claim on the grounds that "*the* [P]*layer did not meet his burden of proof in order to demonstrate that he dully accepted Al Hilal's offer*". Moreover, *"as a consequence, the Chamber decided that by not manifesting his acceptance as established under the employment offer, the player withdrew his will in rendering services to Al Hilal, hence triggering the termination of the offer"*.

83. The Player is not presenting any new evidence which could materially challenge any fact or considerations established in the FIFA Decision.

84. The Respondent does not deny that the message sent at 1:17 AM BRT time on 29 August 2019 was before the expiry of the Offer but denies the Player's consequences in relation to this fact. This observation is irrelevant and must be considered moot, since the Player failed to comply with the time limit imposed by Al Hilal.

85. As highlighted in the FIFA Decision *"the message* [from the Player] *was dubious and unclear, and does not clearly state an acceptance on the* [P]*layer's part".*

86. The consent provided via WhatsApp by a third person other than the Player himself – and also to a third person to Al Hilal – shall not be deemed as a valid manner to accept an employment proposal and, hence, to trigger the consequences of a labor relationship.

(B.2) <u>The main facts show that there was no acceptance of the Offer by the Player</u>

87. Al Hilal was looking for a central defensive midfield and identified two profiles who may fit the position. The options were the Player (who was playing for Corinthians) and the Player Cuellar (who was playing for Clube de Regatas do Flamengo).

88. The Mandate was expressly "*(…) limited to negotiate on behalf of Al Hilal SFC with Sport Club Corinthians Paulista"* and related to *"the possible transfer agreement"*. The Mandate did not authorize the Club's Intermediary to negotiate with the Player and/or the terms of any employment contract.

89. The Mandate was also clear stating that "[a]*ny and all documentation and/or agreements without the signature of Al Hilal SFC shall be deemed as invalid and null*" and that "[n]*otwithstanding anything to the contrary, this letter is not intended to be legally binding, and we may withdraw from negotiations at any time without liability and without prior written notice."*

90. The Mandate only entitled the Club's Intermediary to engage in discussion with Corinthians in relation the possible transfer of the Player. It is a fact that the Transfer Agreement was signed, but its validity was *"subject to the relevant employment contract to be executed between Al Hilal (…) and the Player".*

91. The Club's offer sent on 28 August 2019 was a "*non-binding offer*" of "*employment proposal*" that contained the main terms of a possible employment relationship. In this "non-binding offer" was mentioned that the Club was "looking forward" for the Player to respond by no later than 29 August 2019 at 22:00 (KSA hrs) and that *"Should we not receive any respond, this letter shall be deemed as terminated".*

92. No response from the Player was received within the granted deadline.

93. Al Hilal sent to the Player a flight ticket for him to fly to Riyadh, via Dubai on 29 August 2019 at 21:40 (BRT time) and arriving in Dubai on 30 August 2019 at 22:55.

94. On 29 August 2019, Al Hilal received the Transfer Agreement signed by Corinthians, but without the Player's signature.

95. On 29 August 20219 (by 22:00 KSA time), Al Hilal received no answer from the Player.

96. On 30 August 2019, the Player played an official match for Corinthians, gave the interview described in para. 17 above and missed the flight booked by the Club.

97. On 30 August 2019 at 20:25, Al Hilal officially announced having signed the Player Cuellar and thus closed its transfer deals for the 2019 summer transfer window.

98. The summer registration period in Saudi Arabia was closing on 31 August 2019.

(B.3) <u>No valid and binding Employment Agreement between the Parties</u>

99. The Player has never accepted the Offer. The Player has neither provided any handwritten signed version nor send any WhatsApp message accepting the (non-binding) Offer. The handwritten signed version of the (non-binding) Offer filed before the FIFA DRC was done in bad faith. It seems that the Appellant no longer relies in this argument.

100. An employment agreement is only valid with the signature of both parties (FIFA Circular 1171 of 24 November 2008). The FIFA and CAS jurisprudence establish that the *essentialia negotii* for an employment contact or precontract to be valid and binding must have: (i) the name of the parties; (ii) the subject matter of the contract; (iii) the duration of the relationship (iv) the Player's remuneration; and (v) the signature of both parties (CAS 2015/A/3953 & 3954, preamble para. 1; CAS 2017/A/5164, preamble, para. 4 and CAS 2018/A/5628, para. 81). This understanding is also supported by the scholar Frans de Weber (DE WEGER, Fras, The Jurisprudence if the FIFA Dispute Resolution Chamber, ASSER International Sports Law Series. 2nd Edition, page 146).

101. The WhatsApp message from the Player's Intermediary – in reply to the message "2 years ok for Gabriel" cannot be considered as an acceptance of the Offer, since it is a response to the duration of the contract.

102. The Offer is defined as a "non-binding offer" and no acceptance has been sent by the Player within the required deadline. Moreover, the Offer is called "Employment

Proposal" and not "Employment Contract". Article 7 para. 1 of the SCO admits non-binding offer: "[a]*n offeror is not bound by his offer if he has made express declaration to that effect or such a reservation arises from the circumstances or from the particular nature of the transaction."*

103. Furthermore, the Offer was addressed to the Player and the response (which is not considered as an acceptance) was sent by the Player's Intermediary.

104. The Player failed to communicate his alleged acceptance to the Offer (non-binding) within the granted deadline, but he also played an official match for his club Corinthians. The Player's interview after this match is also evidence that he never considered himself as part of the Al Hilal football family.

(B.4) <u>The Club's Intermediary had no authority to bind the Club</u>

105. The Mandate did not grant the Club's Intermediary with powers to negotiate with the Player and/or the terms of any employment contract (Cfr. para. 10). The Mandate simply entitled the Club's Intermediary to engage in discussions with Corinthians (only) in relation the possible transfer agreement without any powers to represent or bind the Club. This is the reason why all letters exchanged between the Club, the Player and Corinthians were signed by the Club's representative and not by the Club's Intermediary. This was also the findings of FIFA DRC.

(B.5) <u>The Player did not terminate his employment agreement with Corinthians</u>

106. The Player did not terminate his employment relationship with Corinthians and in January 2019 it was extended the contractual relationship for 2 years. The renewal of the Player's employment contract with Corinthians involved a significant revision of his remuneration conditions.

(B.6.) <u>Subsidiarily – Al Hilal and not the Player has a claim for *culpa in contrahendo*</u>

107. The Club has all times acted in good faith, transparently and expeditiously.

108. The Club has made no representations so as to cause the Appellant to inadvertently terminate his employment contract with Corinthians. In fact, the Player remained employed with Corinthians.

109. The Club's decision not to hire the Player was nothing more than the exercise of its freedom (not) to contract.

110. The following facts are relevant to support this understanding: (i) the Player failed to send his acceptance within the granted time-limit; (ii) the Player failed to embark using

the flight tickets provided by the Club; (iii) the Player played an official match for Corinthians in the night when he was supposed to travel to Dubai/Saudi Arabia; and (iv) the Player gave an interview stating that Corinthians was his "home".

(B.7.) <u>Subsidiarily – The compensation requested by the Appellant is baseless</u>

111. The Player's claim of compensation (USD 1,957,866.04) shall be rejected as groundless.

112. As per Article 44.1 SCO, CAS should reject the claim or, alternatively, reduce it at least by 80%.

113. The co-responsibility of the Player in the events leading up to alleged breach of contract is manifestly higher than that of the injured party in CAS 2014/A/3647-3648 and CAS 2014/A/3735.

114. The same considerations above shall also lead to the rejection of the Appellant's claim for compensation (USD 1,249,999.00) based on the principle of *culpa in contrahendo*.

115. The Player wrongly invokes the application of the principle of the positive interests for the assessment of the compensation eventually due, but only the negative damage can be compensated in the event of liability arising out of *culpa in contrahendo*. This is confirmed by the jurisprudence of the Swiss Federal Tribunal ("SFT"): *"In the event of liability arising from culpa in contrahendo, the negative interest shall be compensated. The aggrieved party is entitled to compensation for the damage which he has suffered as a result of the trust placed in the conclusion of a contract by the other party."* This means that the creditor is to be placed in the same financial position it would be if it had never negotiated the contract. This includes only losses suffered and costs incurred by the creditor as a result of the negotiations of the envisaged contract.

116. The Player never terminated his contract with Corinthians and continued playing and training for this club. Moreover, the Player renewed his employment contract with Corinthians on 6 January 2020 and his remuneration was increased. Therefore, the Player suffered no losses.

117. *Ad argumentandum*, and in the unlikely event that CAS considers that any compensation for *culpa in contrahendo* is due, the amount sought by the Appellant (*i.e* the residual value of his potential contract with Al Hilal) is excessive/disproportionate and must be mitigated by the salaries paid by his subsequent clubs (Cfr CAS 2016/A74489, para. 109, 111 and 112 and CAS 2014/A/3573).

118. In conclusion, any potential compensation to the Player based on the Club's *culpa in contrahendo* shall be reduced on the following grounds; (i) Al Hilal has always acted in

good faith on the conviction that the Offer was non-binding and could not constitute a valid employment contract; (ii) when the alleged employment pre-contract was alleged breached, the Parties were still negotiating crucial terms of the employment agreement; (iii) the Player was not a free agent, but had a valid contract with Corinthians – the Player was not unemployed one single day; (iv) the Player continued his carrier with Corinthians; and (v) the execution of the employment relationship with Al Hilal never took place and the Player has never played for it.

VI. JURISDICTION OF THE CAS

119. 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."

120. The jurisdiction of CAS is based on Articles 56 para 1 and 57 para. 1 of the FIFA Statutes and Article 24 para. 2 of the RSTP.

121. The CAS jurisdiction is not disputed by the Parties, and it was further confirmed by the Order of Procedure duly signed by the Parties.

122. It follows that the CAS has jurisdiction to hear this dispute.

VII. ADMISSIBILITY

123. Article R49 of the 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 of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late."

124. Article 58 of the FIFA Statutes read 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."

125. The Panel notes that the admissibility of the Appeal is not contested by the Respondent. The grounds of the Appealed Decision passed on 6 May 2021 were notified to the Appellant on 1 June 2021 and the Statement of Appeal was filed on 22 June 2021, *i.e.* within the 21-day deadline fixed under Article 58 of the FIFA Statutes.

126. It follows that the Appeal is admissible.

VIII. APPLICABLE LAW

127. Pursuant to Article R58 of the CAS Code, in an appeal arbitration procedure before the CAS:

"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."

128. In addition, Article 57.2 of the FIFA Statutes (2019 edition) stipulates the following:

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

129. Furthermore, Article 25 para. 6 of the RSTP provides as follows:

"The relevant FIFA decision-making body shall, when making its decision, apply these regulations (...)"

130. The Sole Arbitrator is satisfied that the various regulations of FIFA constitute the applicable law to the matter in dispute – namely, if applicable, the FIFA RSTP – and that, subsidiarily, Swiss law shall be applied should the need arise to fill a possible gap or *lacuna* in the various regulations of FIFA. Since the Appellant's claim before FIFA was initiated on 27 May 2020, the March 2020 edition of the RSTP is applicable.

IX. MERITS

(A) What is this case about?

131. Prior to assessing the legal issues at stake, the Sole Arbitrator deems it useful to clarify the scope of the Appeal – what is this case about?

132. The present case, as framed by the Appellant, concerns a claim for compensation by breach of contract and, subsidiarily, a claim for compensation as per the doctrine of *culpa in contrahendo*. The principal claim is based on the fact that the Club disrupted the negotiations with the Player and that there was, at that stage, a valid employment agreement between the Parties. As such, the Appellant feels he is entitled to a compensation as per Article 17 of the RSTP. The subsidiary request is based on an alleged violation of pre-contractual duties by the Club, making it liable as per the doctrine of *culpa in contrahendo*.

133. Considering the above, the sole arbitrator is satisfied that the issues for determination consist of the following:

(i) Was there a valid employment agreement between the Player and the Club?
(ii) If the Sole Arbitrator determines that the Parties have not concluded an employment contract, is there a case of liability as per the doctrine of *culpa in contrahendo*?

134. The Panel will address the above issues below, starting by pointing out the applicable rules of burden of proof.

(B) The burden of proof

135. Before entering in the analysis of the merits, the Sole Arbitrator notes that the burden of proof lies, in accordance with Article 12.3 of the FIFA Rules Governing the Procedures of the Player's Status Committee and the Dispute Resolution Chamber (Edition January 2021) and in accordance with Article 8 of the Swiss Civil Code (the "SCC"), with the Appellant, which is the party deriving a right from the alleged employment agreement.

136. It is also important to establish the applicable standard of proof, as applicable per longstanding jurisprudence of the CAS (see, *ex plurimis*, RIGOZZI and QUINN, "*Evidentiary Issues Before the CAS*" in International Sports Law and Jurisprudence of the CAS, Bern 2014, p. 24-25).

137. In the present case, the Sole Arbitrator sees no reason to impose a higher standard of proof than comfortable satisfaction (see CAS 2020/A/7503, para. 95; CAS 2018/A/6075, para. 46), seeing as the case at hand concerns essentially matters of contractual nature.

138. The "comfortable satisfaction" standard of proof may be defined "(…) *as being greater than a mere balance of probability but less than proof beyond a reasonable doubt (CAS 2014/A/3625, with further reference to CAS 2009/A/1920, CAS 2013/A/3258, CAS 2010/A/2267, CAS 2010/A/2172). In particular, CAS jurisprudence clearly established that to reach this comfortable satisfaction, the Panel should have in mind "the seriousness of the allegation which is made" (CAS 2014/A/3625, with further reference to CAS 2005/A/908, CAS 2009/A/1902)"* (CAS 2016/A/4558, para. 70)

139. In light of the above, the Sole Arbitrator concludes that the burden of proving that there was in fact a valid and binding employment agreement, as well as a breach of such contract, lies with the Appellant, which should be able to prove its allegations to the "comfortable satisfaction" of the Sole Arbitrator. The same applies in relation to the subsidiary claim, i.e on the alleged violation of pre-contractual duties by the Club, making it liable as per the doctrine of *culpa in contrahendo*.

(C) The merits of the dispute

(C.1) Did the Player and the Club conclude an employment agreement?

140. In order to determine whether there is a valid employment contract between the Parties, the Sole Arbitrator must consider the following issues: (i) the presence in the Offer of the *essentialia negotii* elements of an employment contract, (ii) whether there was a valid acceptance of the Offer by the Player and (iii) whether it was a binding Offer.

(i) As to the essentialia negotii elements

141. The Sole Arbitrator will start by considering whether the Offer contains all the *essentialia negotii* elements of an employment contract according to FIFA regulations, the applicable law and CAS case law.

142. The Offer, duly signed by the Club´s CEO, contained the following elements:

- It is in writing: i.e. it was sent, as an attachment, via WhatsApp;
- It is a proposal: it contains an offer of employment (an intention to negotiate), although it is entitled a "*non-binding offer*";
- It is dated: 28 August 2019;
- It identifies the Parties: i.e. the "sender" "Al Hilal SFC" and the "addressee" "Mr Gabriel Girotto Franco Professional Football Player";
- It states the contractual term: 2 seasons (2020-21 and 2021-22);
- It states the commencement date of the employment relationship: *"... to be commenced as of the date of signature*".

- It states the location of the employment: *"Riyadh, Kingdom of Saudi Arabia, which is the hometown of Al Hilal SFC*."; and
- It states the remuneration: USD 2,500,000 per season, plus transportation, accommodation, and medical insurance.

143. While there is no specific provision in the regulations regarding the minimum requirements for the existence of a valid employment contract, apart from the requirement of written form in Article 2.2 of the FIFA RSTP, there is substantial CAS case law regarding this issue. The following is a citation from one of the many decisions concerning this issue, in the extensive CAS case law, i.e. case CAS 2015/A/3953 & 3954, para. 44:

"Considering the document in question, the Panel considers that it includes: i) a date, ii) the name of the parties, iii) the duration of the contract, iv) the amount of remuneration, and v) the signature of the parties. According to CAS jurisprudence, such text includes all essentialia negotii and is therefore considered a valid and binding agreement (amongst others, CAS 2013/A/221)."

144. Considering the above, the Sole Arbitrator is sufficiently satisfied that the Offer contained all the main *essentialia negotii* elements, from the substantive point of view, to trigger the existence of an employment relationship between the Parties.

(ii) Did the Player accept the Offer?

145. The answer to this question requires the analysis of two other issues. (i) was the Player's response to the Offer given within the required timeframe? and, (ii) can the content of the Player's response be considered a valid acceptance of the Offer.

146. The Offer was sent to the Player's Intermediary on 28 August 2019, and expressly stated that the Player should give an answer *"by no later than 29 August 2019 at 22:00 (KSA hrs)."* Considering that the time zone difference between Brazil and KSA is 6 hours, the time limit in the Offer ended on 29 August 2019 at 4PM (BRT time).

147. On 29 August 2019 at 1:17AM (BRT time) the Player's Intermediary sent the Club's Intermediary a WhatsApp message with the following content: *"two years ok for Gabriel"*.

148. The Sole Arbitrator acknowledges that the said message was sent within the timeframe stipulated in the Offer, however, the Parties differ regarding the content and relevance of the said "message". The Player claims that it was a valid acceptance of the Offer; and the Club claims that the said "message" is merely an acceptance of the proposed term of the employment relationship (i.e. a reduction of the term from 3 seasons to 2 seasons).

149. Article 1 of the SCO provides that "[t]*he conclusion of a contract requires a mutual expression of intent by the parties"* and that the expression of intent *"(…) may be express or implied."*.

150. In line with the decision of the FIFA DRC in the decision now under appeal, the Sole Arbitrator considers the message *"two years ok for Gabriel"* to be related to the term of the contract. In reaching this conclusion, the Sole Arbitrator resorts to Swiss law, according to which contractually significant statements are to be interpreted and given effect in the manner in which their recipient was and ought to have understood them in good faith (so called *Vertrauensprinzip*: in this respect see *ex plurimis* Decision of the Swiss Federal Tribunal 143 III 157). The Sole Arbitrator therefore considers that the wording of the message could not, in good faith, be understood in a different way as referring to the duration of the contract, and not to the contract as a whole.

151. The conclusion of the Sole Arbitrator is also reinforced by the circumstances surrounding the "message", i.e., (i) the Player's interview (see para. 17); (ii) the Player's subsequent actions, namely regarding his travel to Dubai; and (iii) the non-termination of the Player's employment contract with Corinthians.

152. The Sole Arbitrator considers that the following statements made during the Player's interview are relevant: "*I will meet with my agents, Corinthians and family in order to take a decision. In a few hours or at least in one day, the windows will close, it will be defined"*. At no point in the interview was the Player clear that he had accepted the proposal to go and play for Al Hilal. Quite the opposite. In the interview the Player was very cautious in the way he approached the subject.

153. An equally non-committal position was also assumed by the Player when he accepted and managed his trip to Dubai. The Sole Arbitrator finds that the Player did not make use of the air tickets provided by the Club and did nor ask the Club to alter the itinerary to a flight with a more convenient schedule and connections, as could be expected. On the contrary, the Player and his Intermediary ended up traveling with tickets paid for by the latter, as was confirmed by the Player's Intermediary at the hearing. This attitude, combined with the other circumstances already analysed, reveals that the Player did not want to demonstrate a definitive commitment.

154. Moreover, it is also noted that the Player did not terminate his employment contract with Corinthians, or initiate formal negotiations to do so, or, as least, the Player has not proved that he did so.

155. The Sole Arbitrator does not question the evident interest of the Player in concluding the negotiations, but it seems clear that the negotiations were not yet concluded.

156. Another issue that could be discussed, for more academic purposes, is whether the signing of the Offer by the Player was a required condition. The Sole Arbitrator has in

mind the provisions of Article 2.2 of the FIFA RSTP and FIFA Circular 1171 dated 24 November 2008, which reads as follows: "(…) [t]*he contract must be in writing, duly signed by both parties with the necessary legal binding power of signature. It also includes indications with regard to place and date of when the contract was duly signed. In the case of a minor the parent/guardian must also sign the contract."*

157. It has been proved, by both the evidence adduced and the examination of the witnesses El Yaagoubu Mohammed and Turki Khalid Almesned, that no signed version of the Offer was ever sent to the Club by the Player. Contrary to the arguments presented before the FIFA DRC, the Player no longer relies on the allegation that he sent a signed version of the Offer to the Club.

158. In light of the above, the Sole Arbitrator considers that there was neither an express nor an implied acceptance of the Offer.

(iii) As to the binding nature of the Offer

159. The Offer is expressly stated to be non-binding "[n]*otwithstanding anything to the contrary, this letter is not intended to be legally binding, and we may withdraw from negotiations at any time without liability and without prior written notice."*.

160. Swiss law permits the making of non-binding offers. Article 7.1 of the SCO states that: "[a]*n offeror is not bound by his offer if he has made express declaration to that effect, or such a reservation arises from the circumstances or from the particular nature of the transaction."* Furthermore, Article 2.1 of the SCO clearly states: "[w]*here the parties have agreed on all the essential terms, it is presumed that the contract will be binding notwithstanding any reservation on secondary terms*."

161. The argument of the Player that "non-binding offers" are abusive does not apply to the pre-contractual stage. We know from experience that it is common for players and clubs to negotiate with more than one party at the same time. The transfer window is short and very competitive. As part of the exercise of their autonomous will, both players and clubs understandably always try to maximize and exploit their best opportunities. In this context, it is usual and understandable that the parties keep their options open, i.e. their freedom to contract or not to contract, until the most advantageous moment. This makes sense as long as negotiations are conducted with the clear awareness that they are only conclusive once the final contract has been signed. If this was not the case, there would be a clear and unacceptable limitation of the parties' freedom to negotiate.

162. Even if there was some doubt regarding the issues considered above, the Sole Arbitrator also stresses the fact that the Parties were aware that the conclusion of the negotiations was, in practice, dependent on the medical examination of the Player. The medical examinations were scheduled to take place in Dubai on 30 August 2019. As confirmed by the witnesses, Guilherme Miranda and El Yaagoubu Mohammed, the medical

examination was the main reason why the Player had to make a stopover in Dubai. We know that the validity of an employment contract cannot be subject to a satisfactory medical examination. However, we also know, from practical experience of the hiring players, that the negotiations only conclude with the completion of medical examinations that confirm the satisfactory physical condition of the player.

163. In light of the above, the Sole Arbitrator concludes that the Offer was clearly and expressly non-binding in nature. Regardless of the non-binding nature of the Offer, the Sole Arbitrator further determines, as explained above, that there was no valid formal acceptance of the Offer. It follows therefore that there is no valid employment contract between the Parties.

164. A final consideration is necessary regarding the Player's claim that the Offer can be considered to be a pre-contract, and that, according to the Player, it therefore has the same effects as a valid employment contract. The Sole Arbitrator stresses in this regard what he has already stated above, i.e. that regardless of the nature of the Offer, it was clearly non-binding. The classification of the Offer as a pre-contact is irrelevant.

(C.2) Is there a case of liability as per the doctrine of *culpa in contrahendo*?

165. The Player believes that the negotiations gave rise to *reliance* that an employment contract would be concluded and signed, and that said *reliance* merits protection. The Player was surprisingly informed of the termination of negotiations and of the Club's loss of interest in signing him, when he arrived in Dubai and, when he was, furthermore, surprisingly informed that the Club had decided to sign the Player Cuellar. As such, the Player feels that the Club violated the pre-contractual duties imposed by the principle of good faith when it called off the negotiations at their final stage.

166. The Club contested the above allegations and states, amongst other arguments, that it was always clear to both Parties that the Offer was non-binding and that the Club could withdraw from negotiations at any time.

167. The Sole Arbitrator will address the issue below.

168. The concept of ***culpa in contrahendo*** under which the Player submitted his alterative claim is embodied in the pre-contractual duties imposed by Article 2 para. 1 of the SCC, which reads as follows:

"Every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations."

169. Regarding the *culpa in contrahendo* concept, the Sole Arbitrator also notes the position adopted by CAS in case CAS 2016/A/4489 (para 6. of the preamble):

"Under Swiss Law culpa in contrahendo means the negligent/intentional breach of pre-contractual duties. A finding of culpa in contrahendo requires the existence of contractual negotiations, trust that merited protection, a breach of a duty, harm, a causal connection, and fault. The breach of a duty in particular derives from the principle of good faith. At the contractual negotiation stage it includes – regardless of whether a contract is concluded later on – certain duties of care, considerateness, good faith, and of providing information, including the duty to negotiate seriously and in a fair manner."

170. In essence, the duties that derive from the principle of good faith aim to avoid the formation of intent or reliance based on incorrect or incomplete information, the intentional or negligent frustration of reliance, by either party, and, conduct of any party that can cause damage to a counterparty. *Contrario sensu*, the purpose of these duties is to ensure that the parties act in good faith, always provide truthful and complete information whenever it is asked for, and, refrain from acting so as to cause damage to the other party.

171. It is therefore necessary to determine whether the Club violated any of its pre-contractual duties when it unexpectedly terminated the negotiations, and if the Player had developed a believe in, or reliance on, the completion of the employment contract that merits protection.

172. The negotiations between the Parties commenced on 25 August 2019 with the message sent by the Club's Intermediary to the Player's Intermediary via WhatsApp (see para. 7 above). In this message, the Club's Intermediary was very open in stating that the Club's interest in the Player had arisen because its negotiations with the Player Cuellar had failed.

173. The negotiations started with the assistance of the Parties' Intermediaries and on 28 August 2019 the Club's Intermediary sent the Offer (non-binding offer). The Player's Intermediary must have been aware that the entire negotiations were being conducted on the assumption that the Club had the right to terminate negotiations at any time and that the Offer submitted was non-binding. The Player and the Player's Intermediary were aware of this negotiating condition and never called it into question.

174. On 29 August, after the player travelled to Dubai, he received an unexpected phone call informing him that the negotiations were terminated because the Club had managed to sign Gustavo Cuellar.

175. The Club claims that the negotiations were terminated because (i) the Club's Intermediary had no power to bind the Club; (ii) the Player played for Corinthians in a football match on 29 August 2019 therefore risking injury; (iii) the Player did not use the plane tickets bought by the Club to travel to Dubai; and (iv) the Player did not arrive in Dubai on time to perform the necessary medical examinations.

176. The Sole Arbitrator understands that the Player's expectations that he would be signed by the Club were frustrated and notes the less than positive nature and timing of the communication of the Club's decision to end the negotiations.

177. The Sole Arbitrator is also not convinced by the arguments presented by the Club and fails to understand their relevance in terms of the abrupt termination of negotiations.

178. As far as the Player's participation in a football match is concerned, it is relevant that the Player was still legally bound by his employment contract with Corinthians. Furthermore, the participation of the Player in the match on 29 August 2019 was never discussed by the Parties. Moreover, the match was very important as it was a quarter-finals match in the "Copa Sudamericana". The risk of the Player being injured was understandable, but he was not in fact injured and played well in the match, which had a positive effect on the Player's image.

179. The fact that the Player did not use the tickets provided by the Club in order to travel to Dubai is also irrelevant, because the Player arrived in Dubai on 30 August 2019 at about 05:10am (UAE Time) instead of arriving in Dubai on 29 August 2019 at 10.55pm (UAE Time). The small time difference between the actual and original times of the Player's arrival in Dubai (i.e. he arrived 6 hours and 5 minutes later than he would have arrived on the flight booked by the Club) cannot be an acceptable reason for loss of interest in the Player, particularly as both flights arrived in Dubai at night.

180. The difference between the flight arrival times is irrelevant in terms of the conduct of the medical examinations, which were schedule to take place on 30 August 2019. According to the witness El Yaagoubu Mohammed, the Club had booked facilities at the clinic for the medical exams for the entire day. The Sole Arbitrator therefore considers that the change of the flight and the resulting change of arrival times is immaterial.

181. In the Sole Arbitrator's opinion, the manner in which the Club terminated the negotiations was not in line with good practices, particularly as the Player had agreed to travel to Dubai for the medical examinations requested by the Club. The Club should, considering the advanced stage of the negotiations and the specific circumstances of the case, have received the Player in Dubai and have explained the situation to him. The Club should have behaved with greater transparency and have explained to the Player that it had (expectedly or unexpectedly) found a more satisfactory solution, and had therefore decided to terminate the negotiations.

182. The Sole Arbitrator notes regarding the violation of pre-contractual duties, that, in this case, the negotiations were called off by the Club, which did so at an unexpected time (i.e. immediately upon the Player's arrival in Dubai) and in an unexpected way (by a

mere telephone call, as the Sole Arbitrator confirmed from the evidence of the witnesses Guilherme Miranda and El Yaagoubu Mohammed).

183. There is no doubt that the negotiations were terminated at the instance of the Club, in a surprising and improper manner, i.e. by a mere telephone call, which, in the opinion of the Sole Arbitrator, is, to some extent, a failure to comply with the ethical standards required in negotiations.

184. Regardless of the non-binding nature of the Offer, the Parties' conduct shows that the negotiations were well underway, and that agreement had been reached regarding the main terms of the employment contract. This was demonstrated by the Club when it sent the air tickets to the Player and scheduled the medical examinations in Dubai; and, by the Player when he travelled to Dubai and arrived in time for the medical examinations on 30 August 2019, regardless of the travel vicissitudes noted.

185. Nevertheless, the Sole Arbitrator notes that, notwithstanding the improper way in which the Club terminated the negotiations, the situation is not such as to give rise to pre-contractual liability. Moreover, even if this case did involve precontractual liability, the liability in question would be limited to the reimbursement of expenses incurred in relation to the negotiations, because the Club always stressed the non-binding nature of both the Offer, and the ongoing negotiations.

186. Considering the above, the Sole Arbitrator considers that the Club (and the Player) were entitled to terminate the negotiations at any time.

187. Although the Player had expectations of being hired, it is nevertheless clear that he did not accept the entire Offer unconditionally. The Sole Arbitrator notes that (i) the Player did not terminate his contract with Corinthians; (ii) did not stop playing matches for Corinthians, e.g. the match on August 29, 2019; (iii) gave an interview in which he was not conclusive about his future; (iv) avoided using the tickets sent by the Club on his trip to Dubai, to ensure that he had a broad autonomy regarding the decision to sign with the Club.

188. The Players comments in the said interview are particularly noteworthy:

"*What's really missing is signing. Everything happened very fast today. Because I was concentrated, focused on the match, I could not stop to think about it. Now the adrenaline will low down, I will meet with my agents, Corinthians and family in order to take a decision. In a few hours or at least in one day, the windows will close, it will be defined".* (***Emphasis added by the Sole Arbitrator***)

189. Despite the statement of the witness Carlos Gilberto Nascimento Silva that the Player said goodbye to his teammates after the football match on 29 August 2019, the post-

match interview transcribed above appears to contradict the witness' evidence, and does not reflect a fully formed intention, or reliance.

190. While the Sole Arbitrator recognises that the Club did not behave correctly when it terminated the negotiations, it is also true that the Player's expectations could not have amounted to the absolute belief that he would be signed. The Player's belief in (or reliance on) the making of the employment contract does not merit protection, as it was always limited by the non-binding nature of the Offer, as the Player's actions show. Had this not been the case, the Player would not have left for Dubai without first ending his contractual relationship with the Corinthians and would have done everything possible to request the issue of new tickets or requested an immediate refund of the tickets the Player's Intermediary had paid for.

191. In any case, and even if the Player was entitled to compensation for the abrupt and surprising manner in which the Club ended the negotiations, this would only result in the payment of direct damages, as if there had been no negotiations, as established by the decision of the Swiss Supreme Federal Court ("SFT") ATF 105 II 75, consid. 3:

"Bei Haftung aus culpa in contrahendo ist das negative Interesse zu ersetzen. Der Geschädigte hat Anspruch auf Ersatz des Schadens, der ihm aus dem von der Gegenpartei erweckten Vertrauen auf das Zustandekommen eines Vertrages erwachsen ist (...) Entgegen der Auffassung der Klägerin geht es daher nicht an, die schuldige Partei so zu behandeln, wie wenn ein Vertrag mit ihr abgeschlossen worden wäre, sie also zum Ersatz des positiven Vertragsinteresses zu verpflichten."

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"In the case of liability from culpa in contrahendo, the negative interest is to be compensated. The injured party is entitled to compensation for the damage that he has suffered as a result of the trust placed in the conclusion of a contract by the other party (...) Contrary to the plaintiff's view, it is therefore not a question of treating the party at fault as if a contract had been concluded with it, i.e. of obliging it to compensate for the positive interest in the contract."

192. According to the case law of the SFT and CAS, in cases of *culpa in contrahendo* only the negative interest, i.e. the losses sustained and costs incurred, deserve protection. Therefore, the Player would only be entitled to be compensated for the damage caused by the Club to him. Damages are therefore limited to quantifiable losses as if there had been no negotiations (e.g. costs incurred such as travelling expenses, legal fees, etc.). The concept of "*negative interest*" does not include loss of profits (as claimed by the Player), i.e. the amounts that the Player would have earned if the negotiations had been successfully concluded.

193. Moreover, the Sole Arbitrator notes that the Player did not submit any expenses that could be considered in this regard. In fact, it was clarified by the Player's Intermediary, at the hearing, that the travel costs to Dubai were borne by him.

194. The Sole Arbitrator concludes, in the light of all of the above, that the prerequisites of liability based on *culpa in contrahendo* are not met in this case and that no compensation is therefore owed by the Club to the Player on that basis.

X. COSTS

(…).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr Gabriel Girotto Franco on 23 June 2021 against the decision issued by the FIFA Dispute Resolution Chamber Judge passed on 6 May 2021 is dismissed.

2. The decision of the FIFA Dispute Resolution Chamber Judge passed on 6 May 2021 is confirmed in full.

3. (…).

4. (…).

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

Seat of arbitration: Lausanne, Switzerland

Date: 28 March 2023

THE COURT OF ARBITRATION FOR SPORT

Rui Botica Santos
Sole Arbitrator