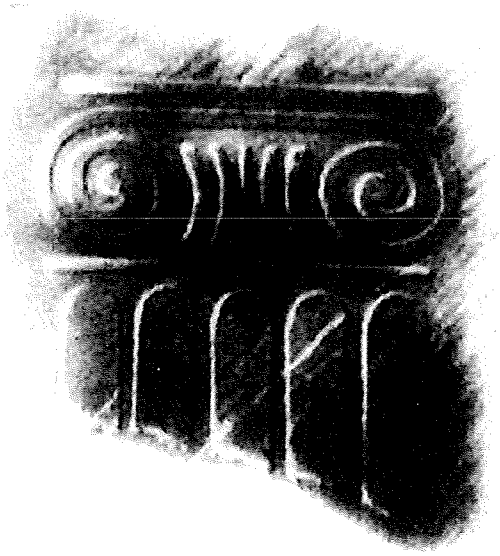
TAS / CAS

Tribunal Arbitral du Sport
Court of Arbitration for Sport
Tribunal Arbitral del Deporte



ARBITRAL AWARD

Besiktas Futbol Yatirimlari Sanayi Ve Ticaret A.S., Istanbul, Turkey

v.

1/ Fédération Internationale de Football Association (FIFA), Zurich, Switzerland

&

2/ Victor Ruiz Torre, Spain

CAS 2020/A/7455 - **Lausanne, April 2022**

CAS 2020/A/7455 Besiktas Futbol Yatirimlari Sanayi Ve Ticaret A.S. v. FIFA & Victor Ruiz Torre

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition

President: Mr Lars Hilliger, Attorney-at-Law, Copenhagen, Denmark
Arbitrators: Mr Nicolas Cottier, Attorney-at-Law, Saint-Prex, Switzerland
Mr Jan Räker, Attorney-at-Law, Stuttgart, Germany

in the arbitration between

Besiktas Futbol Yatirimlari Sanayi Ve Ticaret A.S., Istanbul, Turkey
Represented by Messrs Sébastien Besson and Antonio Rigozzi, Attorneys-at-Law, Lévy Kaufmann-Kohler, Geneva, Switzerland

Appellant

and

1/ Fédération Internationale de Football Association (FIFA), Zurich, Switzerland.
Represented by Ms Marta Ruiz-Ayucar, Litigation Department, FIFA, Zurich, Switzerland

First Respondent

2/ Victor Ruiz Torre, Spain
Represented by Mr Oriol Castañer and Ms Teodora Taneva, Attorneys-at-Law, Barcelona, Spain

Second Respondent

I. INTRODUCTION

1. This appeal is brought by Besiktas A.S. ("Besiktas", the "Club" or the "Appellant") against the letter issued by the Dispute Resolution Chamber (the "FIFA DRC") of the Fédération Internationale de Football Association ("FIFA" or the "First Respondent") on 1 October 2020 (the "Appealed Letter") regarding a contractual dispute between Besiktas and Mr Victor Ruiz Torre (the "Player" or the "Second Respondent").

II. PARTIES

2. Besiktas is a professional football club based in Istanbul, Turkey. Besiktas is affiliated with the Turkish Football Federation (the "TFF"), which in turn is affiliated with FIFA.

3. FIFA is an association under Swiss law and has its registered office in Zurich, Switzerland. FIFA is the world governing body of international football. It exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials and football players worldwide.

4. The Player is a professional football player of Spanish nationality. The Player is currently registered with the Spanish football club Real Betis Balompié S.A.D. ("Real Betis").

5. FIFA and the Player are hereinafter collectively referred to as the "Respondents" and together with Besiktas as the "Parties", where applicable.

III. FACTUAL BACKGROUND

A. *Background facts*

6. Below is a summary of the main relevant facts as established on the basis of the Parties' written submissions and the evidence examined in the course of these proceedings. Additional facts and allegations found in the Parties' submissions may be set out, where relevant, in connection with the further legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, the award only refers to the submissions and evidence it considers necessary to explain its reasoning.

7. On 7 August 2019, the Player and Besiktas entered into an employment agreement (the "Employment Agreement") valid until 31 May 2021.

8. On 25 June 2020, due to an alleged breach of its obligation to pay his remuneration, the Player put the Club in default.

B. *Proceedings before the FIFA Dispute Resolution Chamber*

9. On 22 July 2020, the Player lodged a claim against Besiktas in front of FIFA, asking:

> *"a) To accept the claim against BESIKTAS FUTBOL YATIRIMLARI. SAN. TIC. A.S.;*
> *b) Hold the Club liable for breaching both Art. 14bis and Art. 17 paragraph 1 of the RSTP in light of its unjustified breach of the employment contract, at the same time, to order the Claimant to pay the amount of* ***Three million nine hundred eight nine thousand Euros net (EUR 3.989.000)*** *as follows:*
>
> - *Outstanding remuneration for the monthly salary of March, April and May 2020 in amount of* ***EUR 498.000*** *net;*
> - *Remaining contractual period amounting to* ***EUR 3.500.000 net.***
>
> *a)* [sic] *Order the payment of legal interest at a rate of five (5) per cent (%) p.a. to the values due by the Club to the Player, starting to count on the date when the each of them became due until effective payment;*
> *a)* [sic] *Impose sporting sanctions on the Club, vanning it from registering any new player, either nationally or internationally, for two registration periods under article 17, paragraph 4 of the FIFA RSTP;*
> *b)* [sic] *Order that the Club bear all administrative and procedural costs eventually incurred by the Player."*

10. By letter of 28 July 2020 (the "Opening Letter"), the FIFA Player Status Department (the "FIFA PSD") informed the Club of the claim lodged by the Player with the FIFA DRC and initiated the proceedings under Ref. No. 20-01044, inviting the Club to present its position on the claim on or before 17 August 2020 via email.

11. The Opening Letter further stated, *inter alia*, as follows:

> "*In this context, we specifically refer you to art. 9 par. 3 second sentence of the Procedural Rules, in accordance with which, if no statement or reply is received before the time limit expires, a decision shall be taken upon the basis of the documents already on file, and to the third sentence of the aforementioned provision, which stipulates that submissions received outside the time limit shall not be taken into account.*
>
> *We would like to inform all the parties involved that the present matter is scheduled to be submitted to the Dispute Resolution Chamber, if need be, in the week of 3 October 2020. Please be informed that any changes affecting the date of this meeting will be communicated accordingly.*"

12. The Opening Letter was sent to info@bjk.com.tr, demet.gurbak@bjk.com.tr and basak.pekin@bjk.com.tr, which addresses were all to be found in FIFA's Transfer

Matching System (the "FIFA TMS"). It is undisputed between the Parties that the FIFA TMS also contained the email addresses of the Club's TMS Managers, i.e. the Club's (then) football director, Mr Ali Naibi (ali.naibi@bjk.com.tr), and the reporting manager, Ms Nazife Çakir (nazife.cakir@bjk.com.tr).

13. By letter of 29 September 2020, the FIFA PSD made reference to the Opening Letter and informed the Club and the Player that no correspondence had been received from Besiktas, that the investigation phase was now closed and that no further submissions would be admitted to the file. Moreover, it was stated, *inter alia*, that *"[...] in line with our aforementioned correspondence as well as art. 9 par. 3 of the said Procedural Rules, we wish to inform you that we will proceed to submit this matter to the Dispute Resolution Chamber for consideration and a formal decision upon the basis of the documents already on file. [...]"*

14. On 30 September 2020, Besiktas replied to the FIFA PSD, stating, *inter alia*, as follows:

"[...] *Your correspondence dated 29 September 2020 was a complete surprise for [Besiktas] since the club did not receive any e-mail and/or any communication from FIFA on 28 July 2020 or afterwards regarding the above-referenced dispute and did not receive or were not made aware of any claim lodged by Player Victor Ruiz Torre before the FIFA Dispute Resolution Chamber ("DRC").*

[Besiktas] has conducted an internal search within its e-mail servers and did not locate your referred communication dated 28 July 2020 in the above-reference d dispute and the only communication [Besiktas] received so far is your communication dated 29 September 2020.

Notwithstanding the fact that [Besiktas] did not receive your communication and the claim dated 28 July 2020 and not meaning as an acceptance that [Besiktas]was made aware of the claim of Player Victor Ruiz Torre, we also would like to point out that the recipients of your communication dated 29 September 2020 (assuming that they were also appointed as recipients in your referred communication dated 28 July 2020) do not reflect the full list of recipients which are declared by the Respondent in the FIFA TMS.

In detail, [Besiktas'] football director Ali Naibi (ali.naibi@bjk.com.tr), assistant football director Mr. Can Kaymakoglu (can.kaymakoglu@bjk.com.tr) and reporting manager Ms. Nazife Qakir (nazife.cakir@bik.com.tr) are the TMS managers and main contact points declared by [Besiktas] in the FIFA TMS. However, it is understood through your communication dated 29 September 2020 that none of these main contacts were included in your communication.

Therefore, for any future correspondence due to Besiktas Futbol regarding legal matters, we respectfully request you to send such communication to [Besiktas'] football director Ali Naibi (ali.naibi@bjk.com,tr), assistant football director Mr. Can Kaymakoglu (can.kavmakoglu@bik.com.tr) and reporting manager Ms. Nazife Cakir (nazife.cakir(@bik.com.tr).

Notwithstanding the above, we wish to inform you that the undersigned will be representing [Besiktas] in the above captioned matter. A copy of the Power of Attorney is enclosed. We kindly request the future communication in the referred case to be sent to the email address: koravakalp@akalpSunna.com.

Due to the fact that your referred correspondence dated 28 July 2020 had never been received by [Besiktas] and the fact that not all contacts of [Besiktas] (and most importantly main contacts listed in TMS) were not included in your communication, the Respondent was never made aware of the claim lodged by Player Victor Ruiz Torre and logically, could not provide its answers and counter claims against the claim.

Consequently, we respectfully request FIFA;

- *To provide us with your referred communication dated 28 July 2020 and the claim of Player Victor RuizTorre in the above-captioned matter.*
- *To restore the deadline of [Besiktas]to provide its answers and counter-claim to the claim of Player Victor Ruiz Torre. [...].*"

15. On 1 October 2020, FIFA PSD issued a letter (the "Appealed Letter") on behalf of the FIFA DRC informing Besiktas that it was not in a position to restore the deadline for Besiktas to provide its answer and counterclaim to the claim of the Player.

16. In the Appealed Letter, FIFA determined, *inter alia,* the following:

"[W]*e kindly refer* [Besiktas] *to art. 9bis(3) of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (hereinafter: the "Procedural Rules"), according to which "Communications from FIFA shall be sent to the parties in the proceedings by using the email address provided by the parties or as provided in* [FIFA TMS]. *The email address provided in TMS by associations is considered a valid and binding means of communication".*

Equally, we also refer [Besiktas] *to the last sentence of the aforementioned rule, pursuant to which "The parties and associations must ensure that their contract details (e.g. address, telephone number and email address) are valid and kept up to date at all times".*

Bearing in mind the foregoing, we note that our letter of 28 July 2020 was sent and delivered to the e-mail addresses of Besiktas indicated in FIFA TMS, namely info@bjk.com.tr and Demet.gurbak@bjk.com.tr, and therefore is a valid and binding mean of communication (cf. art. 9bis par. 3 of the Procedural Rules).

Consequently, we regret to inform you that we are not in a position to grant the request made on your correspondence dated 30 September 2020., i.e. to restore the deadline of [Besiktas] *to provide its answer and counter-claim to the claim of* [the Player].

Lastly, [Besiktas] *will find enclosed, for information purposes only, a copy of the entire documentation on file. In this regard, we kindly remind Besiktas Futbol of the contents of art. 9 par. 3 of the Procedural Rules, in accordance with which submissions received outside the time limit shall not be taken into account. Equally, we kindly refer to ar. 9 par. 4 of the Procedural Rules, in accordance with which the parties shall not be authorised to supplement or amend their requests or their arguments, to produce new exhibits or to specify further evidence on which they intend to rely after notification of the closure of the investigation. [...]*"

17. On 4 October 2020, Besiktas filed a claim against the Player and his new club, the Spanish professional football club Real Betis ("Real Betis"), with FIFA regarding the Player's alleged breach of contract and the request for compensation pursuant to Article 17 of the FIFA Regulations on the Status and Transfer of Players (the "FIFA RSTP").

18. On 7 October 2020, the FIFA PSD, on behalf of the FIFA DRC, informed Besiktas that its claim could not be taken into account as it was a "counterclaim" in the proceedings under Ref. No. 20-01044 initiated by the Player and that the investigation phase of the said proceedings was closed.

19. By letter of 12 October 2020, Besiktas objected to the content of the letter of 7 October 2020 and stated that its claim filed on 4 October 2020 was not to be considered as a counterclaim made in the context of the original claim of the Player and, by extension, requested the FIFA PSD "*to proceed with registering the claim of [Besiktas] dated 4 October against [the Player] and [Real Betis] under a new registration number.*"

20. On 13 October 2020, and with reference to the proceedings under Ref. No. 20-01044, the FIFA PSD informed the Club and the Player, *inter alia*, that "*we kindly inform you the parties, that it will be up to the Dispute Resolution Chamber to decide whether Besiktas Futbol's correspondence can be taken into account in the present matter.*"

21. On 22 October 2020, and after Besiktas had filed its Statement of Appeal against the Appealed Letter with the Court of Arbitration for Sport (the "CAS"), the FIFA DRC rendered the operative part of its decision (the "DRC Decision") in the proceedings under Ref. No. 20-01044. The operative part did not contain any reference to or ruling on Besiktas' request for a restoration of its deadline to file its position or Besiktas' filing of a claim on 4 October 2021.

22. On 4 December 2020, the FIFA DRC notified the grounds of the DRC Decision in the proceedings under Ref. No. 20-01044 to the Parties. The grounds stated, *inter alia*, as follows:

"*(39) Notwithstanding the above, the Chamber was observant of the fact that the Respondent, after having been granted a deadline until 17 August 2020 to file his position, and after the FIFA Administration closed the investigation phase of the matter on 29 September 2020:*
a. On 30 September 2020, submitted a request that a new deadline was set for it to file its position; and

b. On 4 October 2020, filed a parallel claim against the player and Betis pertaining to the same matter as the one at hand, i.e. the termination of the contract by the player.

(40) Bearing in mind the foregoing, the DRC deemed it necessary to assess the admissibility of the correspondences filed by the Respondent both on 30 September 2020 and on 4 October 2020.

(41) By doing so, the DRC confirmed that the correspondence sent by the FIFA Administration on 28 July 2020 was sent to the email addresses indicated by the Respondent in the Transfer Matching System (TMS). Additionally, it recalled the contents of art. 9bis par. 3 of the Procedural Rules, according to which "Communications from FIFA shall be sent to the parties in the proceedings by using the email address provided by the parties or as provided in the Transfer Matching System (TMS; cf. art 4 par. 1 of Annexe 3 and art. 5 par. 2 of Annexe 3 of the Regulations on the Status and Transfer of Players)". The email address provided in TMS by associations and clubs is considered a valid and binding means of communication.

(42) Moreover, the DRC referred to the last sentence of the cited article and confirmed that it is a duty of the Respondent to "ensure that their contact details (e.g. address, telephone number and email address) are valid and kept up to date at all times".

(43) Consequently, the DRC firmly established that the Respondent had been properly summoned to the proceeding at hand for the letter dated 28 July 2020 was sent by FIFA was addressed to a valid and binding means of communication, i.e. the email addresses indicated by the Respondent itself on TMS.

(44) In continuation, the Chamber noted that it stood undisputed that the Respondent had not sent any submissions to FIFA by 17 August 2020.

(45) Accordingly, the DRC found that the FIFA Administration acted correctly on the basis of art. 9 par. 3 and 4 of the Procedural Rules by closing the investigation phase of the matter on 29 September 2020 and subsequently not granting the Respondent a new deadline on 1 October 2020. The DRC arrived at such decision considering that the Respondent had failed either to adequately request a deadline extension in accordance with article 16 par. 1 of the Procedural Rules or to timely file its position. The Chamber highlighted that the Respondent filed its letters (i.e. dated 30 September 2020 and 4 October 2020) after the closure of the investigation, that is, at a moment in time where the parties were no longer authorised to supplement or amend their requests or their arguments, to produce new exhibits or to specify further evidence on which they intended to rely, pursuant to the unequivocal contents of both art. 9 par. 4 of the Procedural Rules and FIFA's letter dated 29 September 2020.

(46) In continuation, the Chamber noted that the parallel claim filed by the Respondent against the Claimant and Betis on 4 October 2020 is nothing more than a counterclaim, which should have been filed within the same time limit applicable to the reply in line with art. 9 par. 3 of the Procedural Rules.

(47) As such, the members of the Chamber concluded that the Respondent's parallel claim is to be considered an attempt to circumvent the Procedural Rules, and since it was not timely filed, it cannot be taken into account.

(48) Although confident of the foregoing line of reasoning, the Chamber emphasized, for the sake of completeness, the contents of FIFA Circular no. 1694 dated 30 October 2019, which introduced the wording currently found in articles 9 and 9bis of the Procedural Rules, and which reads inter alia, as follows:

Simplifying proceedings: (. . .)
2. (.. .) ***If party would like to lodge counterclaim, it should do so jointly with its position to the claim*** *and submit all necessary documents.*
The contact details of parties contained in the Transfer Matching System (TMS) are binding for procedures managed by the Players' Status Department. In other words, they will be taken as default information. Therefore, it is important to ensure that the contact details of clubs and associations are up to date at all times in TMS." (emphasis added by the DRC)

(49) The Chamber furthermore referred to the jurisprudence of the Dispute Resolution Chamber, such as the decision passed on 8 May 2020 pertaining the player Hassamo, as well the jurisprudence of the CAS, in particular cases CAS 2019/A/6144 Anthony Modestev. Tiajin Tianhai FC and CAS 2019/A/6145 Tiajin Tianhai FC v. Anthony Modeste, 1. FC Köln & FIFA, and firmly confirmed its position.

(50) On account of the foregoing, the DRC concluded that the correspondence of the Respondent dated 4 October 2020 was filed late and thus is inadmissible."

23. On 23 December 2020, Besiktas lodged a second appeal with the CAS against FIFA, the Player and Real Betis with respect to the DRC Decision. This appeal was registered under reference CAS 2020/A/7610.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

24. On 19 October 2020, Besiktas filed a Statement of Appeal against the Appealed Letter with the CAS. Besiktas requested that the appeal be decided by a panel comprised of three arbitrators and nominated Mr Nicolas Cottier as arbitrator. Together with its Statement of Appeal, Besiktas filed an application to stay the execution of the Appealed Letter.

25. By letters of 21 October 2021, both Respondents objected to the Appellant's request to stay the execution, and later on the same date, the Deputy President of the Appeals Arbitration Division rendered her Order dismissing the Club's Request for a Stay of the Decision under appeal. In short, the Deputy President of the Appeals Arbitration Division held that, given the *de novo* aspect of CAS procedures, Besiktas would not suffer any irreparable harm if the request was not granted.

26. On 22 October 2020, the CAS Court Office received the original version of the Statement of Appeal filed by Besiktas.

27. On 29 October 2020, the CAS Court Office received a letter from Besiktas, in which it informed the CAS that FIFA had rendered a decision on the merits of the FIFA proceedings between Besiktas and the Player, that it intended to appeal this decision, and that it sought consolidation of the two proceedings in front of the CAS in accordance with Article R52 of the CAS Code. Furthermore, it requested the present proceedings to be stayed until the CAS had decided on the request for consolidation and requested that the time limit to file its Appeal Brief be suspended.

28. On the same day, the CAS Court Office invited the Respondents to file their comments on Besiktas' request to stay not later than 3 November 2020 and informed the Parties that Besiktas' time limit to file its Appeal Brief was suspended until further notice from the CAS Court Office.

29. On 16 November 2020, the CAS Court Office informed the Parties that Besiktas' request to stay was rejected and that Besiktas' time limit to file its Appeal Brief had been extended by ten days.

30. On 24 November 2020, the CAS Court Office confirmed to the Parties that, pursuant to a letter from Besiktas of the same day in which it informed the CAS that the Respondents did not object to the time limit being set at 30 November 2020, Besiktas' time limit to file its Appeal Brief would expire on 30 November 2020.

31. On 26 November 2020, the Respondents informed the CAS Court Office that they jointly nominated Mr Jan Räker as arbitrator.

32. On 30 November 2020, after a granted extension, Besiktas filed its Appeal Brief pursuant to Article R51 of the CAS Code.

33. By letter of 2 February 2021, FIFA requested for a bifurcation of the proceedings in order for the Panel first to issue a preliminary decision on the jurisdiction of the CAS and/or the admissibility of the appeal.

34. On 3 February 2021, the Player also requested a bifurcation of the proceedings in order for the Panel first to issue a preliminary decision on the jurisdiction of the CAS and/or the admissibility of the appeal.

35. Still on 3 February 2021, the CAS Court Office informed the Parties that pursuant to Article R54 of the CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the Arbitral Tribunal appointed to hear the appeal was constituted as follows:

President: Mr Frans de Weger, Attorney-at-Law, Haarlem, the Netherlands

Arbitrators: Mr Nicolas Cottier, Attorney-at-Law, Saint-Prex, Switzerland
Mr Jan Räker, Attorney-at-Law, Stuttgart, Germany.

36. On 22 February 2021, the CAS Court Office noted that the Parties had reached an agreement to bifurcate this matter into (i) a jurisdiction/admissibility phase and (ii) a merits phase.

37. On 25 February 2021, the Panel confirmed the Parties' agreement to bifurcate these proceedings into (i) a jurisdiction/admissibility phase and (ii) a merits phase.

38. On 23 March 2021, the Respondents filed their submissions with respect to the bifurcated issues, and on 6 April 2021, Besiktas filed its submissions on the same issues.

39. On 15 April 2021, the CAS Court Office notified the Parties that the Panel had concluded that the CAS has jurisdiction, that the appeal filed by Besiktas against the Appealed Letter is admissible, that the grounds of such a decision would be given with the final arbitral award and that the Respondents should file their answers with respect to the merits of the appeal.

40. On 17 and 20 May 2021, respectively, FIFA and the Player filed their Answers with respect to the merits of the appeal.

41. On 25 and 27 May 2021, FIFA and the Player, respectively, informed the CAS that they considered that a hearing was not necessary in this matter.

42. On 1 June 2021, Besiktas informed the CAS that it agreed not to hold a hearing in this matter, provided that it was granted the right to address in writing a limited number of new factual and legal elements.

43. On 4 June 2021, the CAS informed the Parties that the Panel had decided to render an award without holding a hearing and to grant the Parties a final round of written submissions instead. In this regard, the Parties were instructed not to reiterate what has already been said in their previous submissions and informed the Parties that new evidence would not be admitted to the file.

44. On 14 June 2021, the Appellant submitted its Reply.

45. On 25 June 2021, the Respondents submitted their Rejoinders.

46. By letter of 14 September 2021, the Parties were informed that Mr Frans de Weger had recently been appointed as new Chairman of the FIFA Dispute Resolution Chamber and was to start his new functions as of 1 October 2021.

47. On 21 September 2021, Besiktas informed the CAS Court Office that, based on the new circumstances, it had no choice but to request that Mr Frans de Weger withdraw from the

post of President of the Panel, following which request Mr Frans de Weger decided to step down.

48. By letter of 4 November 2021 from the CAS Court Office, the Parties were informed that Mr Lars Hilliger had been appointed as new President of the Panel.

V. SUBMISSIONS OF THE PARTIES ON THE BIFURCATED ISSUES

49. The following summary of the Parties' positions on the bifurcated issues is illustrative only and does not necessarily comprise each and every contention put forward by the Parties. The Panel, however, has carefully considered all the submissions on the bifurcated issues made by the Parties, even if no explicit reference is made in what immediately follows.

50. Given that the Respondents raise a jurisdiction/admissibility objection, the positions of the Respondents with respect to the bifurcated issues are set out first, before summarising Besiktas' position.

a. FIFA's position on the bifurcated issues

51. FIFA's submissions on the bifurcated issues, in essence, may be summarised as follows:

- FIFA contends that CAS lacks jurisdiction to handle the appeal lodged by Besiktas as it is not directed against an autonomous and appealable decision.

- FIFA respectfully requests the Panel to "*confirm its lack of jurisdiction to entertain this appeal and/or declare the inadmissibility of the appeal by virtue of the so-called "Kompetenz-Kompetenz" principle*" and refers to CAS 2017/A/5187.

- With regard to the difference between jurisdiction and admissibility, FIFA holds that "[r]*egardless of whether the Panel shall consider that this objection relates to the jurisdiction of CAS and/or to the admissibility of the appeal, the material outcome of the proceedings is the same (i.e. the substance of the appeal cannot be entertained.*" and adds that difference between jurisdiction and admissibility appears relevant only to the extent to which the Swiss Federal Tribunal (the "SFT") may review the issue.

- The Panel must address any jurisdictional/admissibility issue by considering Article R47 of the CAS Code and Article 58. (1) of the FIFA Statutes. In accordance with these provisions, the CAS has the power to adjudicate appeals against a sports organisation provided notably that an actual decision has been issued, that it is final and that it is challenged in a timely manner. The issue in the bifurcated proceedings is whether rejecting a request to restore an elapsed

deadline is a final decision within the meaning of Article 58 (1) of the FIFA Statutes.

- The Appealed Letter is merely a procedural decision that did not put an end to the proceedings and is therefore not appealable to CAS individually.

- FIFA's primary line of argumentation is that the present arbitral proceedings have lost their object as the i) FIFA DRC ruled on the request for restoration of Besiktas' deadline to file its position on the Player's claim in the DRC Decision and ii) Besiktas has already appealed against the DRC Decision in the proceedings CAS 2020/A/7610. In this regard, FIFA refers to CAS 2015/A/4266 and CAS 2017/A/5339.

- Subsidiarily, FIFA contends that CAS lacks jurisdiction to handle the appeal as it is not directed against an autonomous and appealable decision.

- Under Article 149 of the Swiss Civil Procedural Code (the "CPC") and the jurisprudence of the SFT, partial awards contain a final decision on one or more issues in dispute, whereas interlocutory awards decide one or more preliminary issues. While partial awards may be appealed immediately as final awards, interlocutory awards may be appealed only because of the irregular composition or the arbitral tribunal or lack of jurisdiction of the arbitral tribunal.

- The decision to reject the restoration of a time limit is, at most, an interlocutory decision, which cannot be subject to an individualised appeal before the CAS.

- Alternatively, the appeal is considered to be inadmissible as it has been lodged against a preliminary decision which does not put an end to the proceedings pending before the FIFA DRC.

- Besiktas' interpretation of Article R57 of the CAS Code is wrong as legal scholars have argued that the discretion to exclude evidence should be used with restraint. This is also confirmed by CAS jurisprudence, as in CAS 2016/A/4704, *inter alia*, it was stated that "[the] *full review by the CAS should only be limited in exceptional circumstances of abusive or inappropriate conduct by the parties submitting new evidence*".

52. Based on the aforementioned, FIFA submits the following prayers for relief:

"*Based on the foregoing, FIFA respectfully request CAS to issue an award:*

(a) *Declaring the present appeal inadmissible;*

(b) *Alternatively, declaring the lack of jurisdiction of CAS in the present case;*

(c) *In any event, ordering* [Besiktas] *to bear the full costs of these arbitration proceedings; and*

(d) *Ordering* [Besiktas] *to make a contribution to FIFA's legal costs."*

b. The Player's position on the bifurcated issues

53. The Player's submissions on the bifurcated issues, in essence, may be summarised as follows:

- The Appealed Letter cannot be regarded as a final decision in the context of Article 58 (1) of the FIFA Statutes as it was purely informative of the rules a party should comply with. It does not contain any type of ruling which aims to affect the legal situation of the Appellant and therefore does not fall within what constitutes a "decision" under CAS jurisprudence. In this regard, the Player refers to CAS 2005/A/899.

- The requirements set out in Article R47 were not fulfilled either as it is undisputed that Besiktas failed to exhaust the internal legal remedies available to it prior to the appeal. As can be observed from CAS 2019/A/6677 and CAS 2019/A/6298, CAS should follow the SFT approach that only decisions terminating the proceedings are appealable.

- The Player also underlines that Besiktas has also appealed against the DRC decision of 22 October 2020 to the CAS in the proceedings 2020/A/7610. In that case, the CAS will have jurisdiction to review the fact and the law and enter into the substance of the case. Given the *de novo* basis of proceedings before the CAS, a panel's scope is fundamentally unrestricted, and procedural flaws in a first instance decision can be cured by a CAS proceeding. In this regard, the Player refers to CAS 2015/A/4153, CAS 2016/A/4387 and CAS 2008/A/1700 & 1710.

- In light of the above, the appeal of Besiktas is premature as Besiktas will still have the possibility to appeal against the decision of the FIFA proceedings under Ref. No. 20-01044. With respect to Besiktas' request to send the matter back to FIFA, it is the Player's belief that this request would only delay the appeal proceedings 2020/A/7610. As such, the Player considers that the present appeal is a dilatory tactic by Besiktas in order to postpone the appeal proceedings 2020/A/7610 and consequently also its financial obligations.

54. On this basis, the Player submits the following prayers for relief:

"For all of the reasons outlined above, [the Player] *respectfully requests the CAS Panel to issue a Preliminary Award on Jurisdiction and/or Admissibility of the present appeal ruling that:*

(i) CAS does not have jurisdiction to hear this case;

And/or

(ii) The appeal filed on 19 October 2020 by [Besiktas] *against FIFA's letter of 1 October is inadmissible;*

(iii) The costs of the arbitration shall be borne in full by [Besiktas];

(iv) [Besiktas] *shall bear* [the Player]*'s legal fees incurred in connection with these proceedings."*

c. Besiktas' position on the bifurcated issues

55. Besiktas's submissions on the bifurcated issues, in essence, may be summarised as follows:

- Besiktas firstly notes that FIFA argues that procedural deficiencies may be repaired before the CAS. While it is true that procedural deficiencies may be repaired in the proceedings CAS 2020/A/7610, FIFA neglects to acknowledge that Besiktas also had the right to be heard by the FIFA DRC, and Article R57 (3) of the CAS Code contains potential limitations on a party's right to be heard.

- Besiktas notes that FIFA's second and main argument is that the Appealed Letter is not a final decision. To support this position, FIFA argues that the Appealed Letter i) is a mere 'informative letter"; ii) "lost any appearance of *animus decidendi*; iii) is not a *"final or partial decision that can be appealed autonomously"*; and iv) did not put an end to the proceedings.

- CAS jurisprudence determines that the Appealed Letter is clearly a decision. In this regard, Besiktas refers to CAS 2017/A/5058 and CAS 2018/A/5746.

- With regard to the argument that the Appealed letter lost any appearance of *animus decidendi* as Besiktas was informed that its request would be decided upon by the FIFA DRC, this is to be deemed nonsensical as i) Besiktas' request to restore its deadline was obviously aimed at being granted a new deadline to file its position; and ii) the operative part of

the decision did not make any ruling on Besiktas' request to restore the deadline.

- With regard to the argument that the Appealed Letter is not a "*final or partial decision that can be appealed autonomously*" under Swiss Law, Besiktas holds that there is no basis for such an analogy.

- In response to FIFA and the Player's submissions that Article R57 (3) of the CAS Code should be implemented with restraint, Besiktas underlines that FIFA can give no guarantee that none of the Parties will seek to argue otherwise in the CAS 2020/A/7610 proceedings.

56. On this basis, Besiktas submits the following prayers for relief:

> "*In view of all of the above, the Appellant respectfully requests that the CAS Panel issues a preliminary award:*
>
> *(i) Holding that it has jurisdiction to hear the present appeal;*
>
> *(ii) Holding that the present appeal is admissible;*
>
> *(iii) Rejecting FIFA and Mr. Victor Ruiz Torre's requests for relief with respect to jurisdiction and admissibility, as contained in their respective Positions filed on 23 March and any prior submissions; and*
>
> *(iv) Ordering that FIFA and/or Victor Ruiz Torre will bear all arbitration costs incurred with the present phase of these proceedings and cover all legal expenses of Besiktas Futbol Yatirimlari Sanayi Ve Ticaret A.S. related to the present phase of these proceedings.*"

VI. JURISDICTION AND ADMISSIBILITY

57. The present arbitration is governed by chapter 12 of the Swiss Private International Law Act ("PILA"), which provides in Article 186 (1) that the Panel is entitled to rule on its jurisdiction ("Kompetenz-Kompetenz").

58. Article R47 of the CAS Code reads as follows:

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

59. Article 58 (1) of the FIFA Statutes (2020 edition) reads:

> "*Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question.*"

60. The Panel duly notes that the Respondents dispute the jurisdiction of the CAS and the admissibility of the appeal in this case. In particular, the Respondents argue that there is no jurisdiction and/or the appeal is inadmissible because (i) the Appealed Letter is not a "final decision" within the meaning of Article 58 (1) of the FIFA Statutes; (ii) the Appealed Letter does not fall within what constitutes a "decision" within the meaning of Article R47 of the CAS Code under CAS jurisprudence; (iii) the present arbitral proceedings have lost their object as the FIFA DRC ruled on the request for restoration of Besiktas' deadline to file its position on the Player's claim in the DRC Decision and Besiktas has already appealed the DRC Decision in the proceedings CAS 2020/A/7610; and (iv) Besiktas failed to exhaust the internal legal remedies available to it prior to the appeal.

61. The Panel is aware that there is some debate as to whether the above-mentioned arguments relate to jurisdiction or admissibility (Rigozzi/Hasler in Arroyo (Ed.), Arbitration in Switzerland, Art. R47 CAS Code, marg. No. 37; See also Mavromati/Reeb, The Code of the CAS, R47, marg. no. 12 and 32; see, *inter alia*, CAS 2019/A/6253 and CAS 2007/A/1251, CAS 2017/A/5058). In this regard, the Panel notes that the Player did not specify whether his arguments relate to the admissibility or jurisdiction of the appeal, whereas FIFA even explicitly states that since the material outcome of the proceedings is the same, the difference between jurisdiction and admissibility appears relevant only to the extent to which the SFT may review the issue, whereas it is not of relevance to which of the two their arguments relate.

62. In this case, the Panel finds that it remains dispensable to deal with the question whether the individual objections raised by the Respondents are related to jurisdiction or admissibility as the Panel will eventually conclude that the CAS has jurisdiction to decide on the present dispute and that the present appeal is admissible.

63. In this context, the Panel wishes to underline that, while there is debate, as set out above, as to whether the above-mentioned arguments are questions of jurisdiction or a question of admissibility, the previous CAS jurisprudence contains a clear framework to decide if a communication is an appealable decision before the CAS. This is also confirmed by both the Respondents and the Appellant referring to the well-established CAS jurisprudence on this topic.

64. In line with previous CAS cases, the Panel therefore decided to discuss the jurisdiction and admissibility of this appeal jointly, and in the light of the well-established CAS framework (see, *inter alia*, CAS 2018/A/5746 and CAS 2015/A/4213).

65. While the Panel is mindful of Article 149 of the CPC and the jurisprudence of the SFT as submitted by FIFA, which suggest that the SFT is reluctant to assume that a refusal of a restitution is open for appeal (see SFT 4A_137/2013), the Panel chose to follow the framework that derives from the established CAS jurisprudence. Particularly because i) by applying the framework provided by the CAS, the Panel can take into account the peculiarities of the procedure before the CAS such as Article 57 (3) of the CAS Code; and because ii) Article 1 of the Swiss Civil Code ("SCC") provides that customary law as well as the established doctrine and case law must be followed. Therefore, in view of the uniform application of the law and to reach the fairest decision, the Panel feels comforted to apply and refer to established CAS jurisprudence.

66. Given the above arguments, in order to determine whether the CAS has jurisdiction and whether the appeal is admissible, the Panel first has to define the object of the appeal. The Panel must then decide whether the appeal was filed against a decision within the meaning of Article R47 (1) of the CAS Code and Article 58 (1) of the FIFA Statutes, *i.e.* a final decision passed by FIFA against which the internal legal remedies have been exhausted. Finally, the Panel must analyse whether the time limit to appeal to the CAS as provided for in Article R49 and the other formal requirements of Article R48 of the CAS Code were respected.

a. Object of the Appeal

67. With regard to the object of the Appeal, FIFA argues that the present arbitral proceedings have lost their object as i) the FIFA DRC ruled on the request for restoration of Besiktas' deadline to file its position on the Player's claim in the DRC Decision and ii) Besiktas has already appealed against the DRC Decision in the proceedings CAS 2020/A/7610. The Player also underlines that Besiktas has appealed against the DRC Decision. The Respondents furthermore argue that the Panel's scope in proceedings CAS 2020/A/7610 is unrestricted, and procedural flaws in a first instance decision can be cured by a CAS proceeding. The Respondents lastly argue that as Article R57 (3) of the CAS Code is to be interpreted in the sense that the full review by the CAS should only be limited in exceptional circumstances of abusive or inappropriate conduct by the parties submitting new evidence, this article does not restrict the Panel's scope in an unjustified way.

68. On the other hand, while Besiktas is aware of FIFA and the Player's submissions that Article R57 (3) of the CAS Code should be implemented with restraint, it underlines that FIFA can give no guarantee that none of the Parties will seek to argue otherwise in the CAS 2020/A/7610 proceedings. Besiktas finds that Article R57 (3) of the CAS Code contains a potential limitation on Besiktas' right to be heard. Furthermore, with regard to the argument that the FIFA DRC ruled on the request for restoration in the DRC Decision, Besiktas finds that this is not the case, as the operative part of the DRC Decision did not make any ruling on Besiktas' request to restore the deadline.

69. Against the above background, the Panel acknowledges that there is a theoretical possibility that the CAS Panel in the parallel case CAS 2020/A/7610 follows a strict interpretation of Article R57 (3) of the CAS Code as no evidence was submitted by the

Appellant in the first instance proceedings. The Panel therefore agrees with Besiktas that it cannot be guaranteed under all circumstances that Besiktas will be allowed to present its case before the CAS at this stage.

70. Furthermore, while it has already been established that this case does not lack an "object" based on Article 57 (3) of the CAS Code, if FIFA is of the opinion that the DRC Decision contained the "decision" with regard to the request of Besiktas for restoration, it would have made sense, according to the Panel, to make a ruling in this regard in the operative part of the DRC Decision, which the FIFA DRC failed to do.

71. Based on the foregoing, the Panel finds that Besiktas' appeal against the Appealed Letter does not lack an object.

b. Is the Appealed Letter a decision?

72. The Panel must then decide whether the appeal was filed against a decision within the meaning of Article R47 (1) of the CAS Code and Article 58 (1) of the FIFA Statutes, *i.e.* a final decision passed by FIFA against which the internal legal remedies have been exhausted.

73. The Panel endorses the definition of "decision" and the characteristic features of a "decision" identified in the CAS jurisprudence set out below:

- "[t]*he form of the communication has no relevance to determine whether there exists a decision or not. In particular, the fact that the communication is made in the form of a letter does not rule out the possibility that it constitutes a decision subject to appeal"* (CAS 2008/A/1633 para. 31; CAS 2007/A/1251 para. 30; CAS 2005/A/899 para. 63; CAS 2004/A/748 para. 90).

- "*In principle, for a communication to be a decision, this communication must contain a ruling, whereby the body issuing the decision intends to affect the legal situation of the addressee of the decision or other parties*" (CAS 2008/A/1633 para. 31; CAS 2007/A/1251 para. 30; CAS 2005/A/899 para. 61; CAS 2004/A/748 para. 89).

- "*A decision is thus a unilateral act, sent to one or more determined recipients and is intended to produce legal effects*" (CAS 2008/A/1633 para. 31; CAS 2004/A/748 para. 89; CAS 2004/A/659 para. 36).

- "[a]*n appealable decision of a sport association or federation "is normally a communication of the association directed to a party and based on an 'animus decidendi', i.e. an intention of a body of the association to decide on a matter (...). A simple information, which does not contain any 'ruling', cannot be considered a decision*". (CAS 2008/A/1633 para. 32; BERNASCONI M., "When is a 'decision' an appealable decision?" in: RIGOZZI/BERNASCONI (eds), The Proceedings before the CAS, Bern 2007, p. 273)" (CAS 2015/A/4266, para. 51 of the abstract published on the CAS website).

74. The Panel finds that the Appealed Letter meets the criteria established in CAS case law as i) its form being a letter has no relevance; ii) the Appealed Letter affects the legal situation of Besiktas as it was denied the possibility to express its view in the FIFA proceedings and

might (theoretically) be denied to do so before the CAS based on Article R57 (3) of the CAS Code as set out above; iii) the Appealed Letter contained a unilateral decision by FIFA not to restore Besiktas' time limit; and iv) the Appealed Letter was passed by a FIFA body and contains a ruling.

75. Therefore, the Panel agrees with Besiktas that the Appealed Letter constitutes a decision.

c. Have the internal remedies been exhausted?

76. With regard to the exhaustion of internal remedies, while FIFA has not raised any objections, the Players states that Besiktas has failed to exhaust the internal legal remedies available to it prior to the appeal as the Appealed Letter merely constitutes an interlocutory decision.

77. In this context, the Panel concurs with Besiktas that the FIFA rules do not provide for any further recourse against decisions made by the FIFA DRC. The Panel rules that no internal legal remedy against the Appealed Letter within the meaning of Article R47 of the CAS Code and Article 58 of the FIFA Statutes was available to Besiktas.

d. Time limit and other formal requirements

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

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

79. The Panel notes that pursuant to Article 58 (1) of the FIFA Statutes, the time limit for filing an appeal is 21 days of receipt of the Appealed Letter.

80. The Panel observes that the Appealed Letter was notified to the Club and the Player on 1 October 2020. In accordance with Articles R47 and R48 of the CAS Code, Besiktas filed its Statement of Appeal on 19 October 2020, which is within the 21-day deadline.

81. Therefore, the appeal was timely filed.

82. Based on the foregoing, the Panel find that the CAS has jurisdiction to decide on the present dispute and that the appeal is admissible.

VII. SUBMISSIONS ON THE MERITS

a. Besiktas' position

83. Besiktas's submissions, in essence, may be summarised as follows:

- The relevant FIFA regulations are the Procedural Rules and, in particular, Article 9bis. As follows from Article 9bis (3), FIFA has put in place a system where (contrary to practice in many dispute resolution bodies and proceedings, including the CAS) the first communication notifying a party of the commencement of proceedings is not sent by courier or registered mail. FIFA's use of email correspondence in its internal proceedings, as well as the Procedural Rules, is intended to promote the fast and efficient resolution of disputes. However, this risky system of communication should not come at the expense of a party's right to be heard.

- The Procedural Rules do not provide for any "official" email address, and FIFA cannot rely on a single alleged "official" email address.

- The proper interpretation of Article 9bis (3) of the Procedural Rules should be that FIFA is required to send its correspondence to "*one specific email address or all of the relevant addresses in TMS*". FIFA itself has taken the latter approach on numerous occasions.

- Furthermore, it follows from Article 5 (8) of the Procedural Rules that "*subject to any provisions to the contrary, all parties in the proceedings shall be granted the right to be heard, the right to present evidence, the right for evidence leading to a decision to be inspected, the right to access files and the right to a motivated decision*".

- As FIFA did not send its Opening Letter to the full list of recipients declared by the Club in the TMS, thus not to Mr Naibi or Ms Cakir, Besiktas' FIFA TMS managers, Besiktas was unaware that the proceedings had commenced until its receipt of the Appealed Letter. Numerous emails from FIFA were previously forwarded also to Mr Naibi and/or Ms Cakir.

- Besiktas never acted in bad faith and was never aware of the proceedings until its receipt of the Appealed Letter.

- The COVID-19 pandemic put considerable strain on Besiktas' operations, and the Club's office and infrastructure had not been fully operational, which is why the Club had justified reason to request the restoration of the time limit to submit its position and evidence in the FIFA proceeding once it was informed about the proceedings.

- FIFA's refusal to restore Besiktas' deadline constitutes a clear infringement of the prohibition of excessive formalism, which is prohibited under Article 29(1) of the Swiss Federal Constitution (the "SFC").

- The prohibition of excessive formalism derives from the prohibition of abuse of rights and pertains to Swiss public policy. In essence, one acts with excessive formalism when the strict application of procedural rule is not justified by any interest worthy of protection, becomes an end in itself or inadmissibility impedes access to the courts. FIFA has failed to identify any interest worthy of protection which would justify refusing Besiktas' request.

- Furthermore, under Swiss law the regulations and decisions of associations must respect the personality rights of individuals or entities.

- As the request for restoration, on the one hand, had limited impact and would not have delayed the proceedings in an unreasonable way and, on the other hand, the decision preventing Besiktas from presenting its case to FIFA has dramatic consequences, the interests of FIFA do not prevail over the interests of Besiktas in this case. In this regard, Besiktas refers to CAS 2011/A/2426 and Article 28(2) of the SFC.

- Under Swiss law, the principle of default as expressed in Article 9bis (3) of the Procedural Rules is not absolute. Before proceeding by default, the tribunal must ensure that the defaulting party is given an adequate opportunity to present its case.

- Article 16 of the Procedural Rules governs time limits, without addressing when and how a time limit can be restored. As the possibility of restoring a time limit is a fundamental requirement to ensure access to justice, this must be considered a *lacuna*.

- Article 148 of the CPC and Article 50 (1) of the Swiss Federal Tribunal Act govern the restoration of time limits under Swiss law. These articles require that i) the request for restoration of a deadline is submitted without delay; and that ii) the party prevented from acting cannot be deemed at fault or responsible for the default or is only responsible to a minor extent.

- As Besiktas requested the restoration immediately after it became aware of the proceedings, and as the COVID-19 pandemic had a significant impact on the operations of all organisations, both requirements have been met in this case.

- As Article R57 (3) of the CAS Code gives a panel the discretion to exclude evidence presented if it was available to them before the challenged decision was rendered, there is a risk that Besiktas will not be able to present its case during an appeal before the CAS, and, thus, loses its right to be heard in relation to the Player's claim.

- In any case, the Panel should declare the decision in the Appealed Letter to be unlawful.

84. On this basis, Besiktas, in its Appeal Brief, submits the following prayers for relief:

"In view of all of the above, the Appellant respectfully requests that the CAS issues an arbitral award:

(i) upholding the present Appeal;

(ii) setting aside the Decision under Appeal;

(iii) reopening the FIFA Ref. Nr. 20-01044 proceedings initiated by Victor Ruiz Torre, declaring that the decision on the merits in those proceedings is null and void (alternatively produces no legal effects), and restoring the time limit for Besiktas Futbol Yatirimlari Sanayi Ve Ticaret A.S. to file its answer in those proceedings.

(iv) alternatively to (iii), ordering FIFA to reopen the FIFA Ref. Nr. 20-01044 proceedings initiated by Victor Ruiz Torre, to declare that the decision on the merits in those proceedings is null and void (alternatively produces no legal effects), and to restore the time limit for Besiktas Futbol Yatirimlari Sanayi Ve Ticaret A.S. to file its answer in those proceedings.

(v) alternatively, taking any other appropriate measures to cure the present situation and avoid that the refusal of the restoration of the deadline definitively prevents Besiktas Futbol Yatirimlari Sanayi Ve Ticaret A.S. from presenting its arguments and claims in its dispute against Victor Ruiz Torre, including by declaring that the Decision under Appeal was unlawful.

(vi) ordering that FIFA and/or Victor Ruiz Torre will bear all arbitration costs incurred with the present proceedings and cover all legal expenses of Besiktas Futbol Yatirimlari Sanayi Ve Ticaret A.S. related to the present proceedings."

b. FIFA's position

85. FIFA's submissions, in essence, may be summarised as follows:

- Besiktas' principal argument that its "right to be heard" was violated before the FIFA DRC stands against the wording of the relevant provisions of the RSTP and FIFA Procedural Rules concerning communications with the parties.

- As set out in Article 9bis (3) Procedural Rules, FIFA TMS is a valid and binding means of communication, which is not disputed by the Club, and a preliminary obligation rests on the parties and national associations to ensure that their contact details inserted in FIFA TMS are kept up to date.

- The regulatory framework for the use of TMS in relation to the transfer of professional players is to be found in Annexe 3 of the FIFA RSTP.

- Under no circumstances it is provided in the FIFA Regulations that the communications from FIFA must be sent to all FIFA TMS users and/or managers or to all email addresses included in the TMS.

- Furthermore, it must be stressed that the Player's claim is a contractual dispute addressed to the Club, and not a TMS-related issue.

- FIFA sent the Opening Letter to info@bjk.com.tr, demet.gurbak@bjk.com.tr and basak.pekin@bjk.com.tr. As these are the email addresses inserted by Besiktas in FIFA TMS, and more specifically for info@bjk.com.tr, which was inserted by the Club under the section of general contract information, these addressed are deemed to be valid for the purposes of notifications to the Club and must produce legal effects.

- As FIFA received a delivery receipt of the Opening Letter, FIFA discharged the burden of proof to establish that the Opening Letter was delivered to Besiktas, and it has to be concluded that the Opening Letter was delivered and therefore received by all addressees.

- The conclusion that Besiktas must be deemed to have received the Opening Letter given its delivery is in accordance with the theory of "sphere of control" in Swiss Law and CAS jurisprudence. Following this theory, once a message leaves the sender's sphere of control, it enters the recipient's sphere of control and every error which might occur as from that point is the latter's responsibility. In this context, FIFA refers to CAS 2016/A/4817.

- The fact that Besiktas received the Opening Letter is also supported by the fact that Besiktas informed the TFF on 7 September 2020 that is was involved in a legal dispute with the Player.

- Moreover, Besiktas failed to provide any counter-evidence in order to demonstrate that it never received the email on its server.

- With regard to Besiktas' argument that COVID-19 prevented it from receiving the Opening Letter, FIFA holds that this is not a valid means of justification. In particular, FIFA finds it striking to note that Besiktas was able to receive and file answers to other claims during the same period, and finds that anyone with a mobile phone and an internet connection can receive and send emails. In this regard, FIFA also refers to CAS 2020/A/7186.

- As FIFA continuously acted in accordance with the relevant provisions of the RSTP and FIFA Procedural Rules, Besiktas' principal argument that its "right to be heard" by the FIFA DRC was violated has to be rejected. Besiktas itself waived its right to present its arguments based on an inexistent failure to deliver the Player's claim. Furthermore, if the Panel were to decide that any procedural violations had occurred, FIFA recalls that CAS proceedings have a healing effect on any procedural irregularities and this same Panel would be in a position to consider Besiktas' answer to the Player's claim in the proceedings CAS 2020/A/7610.

- Lastly, FIFA argues that its refusal to restore Besiktas' time limit is not unlawful under Swiss law as i) it was foreseen in the aforementioned FIFA regulations; ii) FIFA did not apply excessive formalism; and iii) the Appealed Letter does not infringe Besiktas' personality rights.

86. Based on the aforementioned, FIFA, in its Answer, submits the following prayers for relief:

"*Based on the foregoing, FIFA respectfully request CAS to issue an award:*

(a) Rejecting the reliefs sought by [Besiktas] *and confirming the Appealed Letter;*

(b) In any event, ordering [Besiktas] *to bear the full costs of these arbitration proceedings; and*

(c) Ordering [Besiktas] *to make a contribution to FIFA's legal costs.*"

c. the Player's position

87. The Player's submissions, in essence, may be summarised as follows:

- According to Besiktas' unsubstantiated allegations, Besiktas was unaware of the Appealed Letter due to the COVID-19 outbreak as its employees were working from home and as FIFA did not notify the letter to all addresses provided by it in FIFA TMS.

- Article 9bis (3) of the Procedural Rules clearly states that it is the parties' obligation to ensure that their contact details in TMS are valid and the wording of this provision does not specify that communications have to be sent to each and every recipient.

- Besiktas has been receiving correspondence from FIFA sent to the email addresses info@bjk.com.tr, demet.gurbak@bjk.com.tr and basak.pekin@bjk.com.tr. For instance, the three recipients correctly received a correspondence of 9 July 2020, which was just before the Opening Letter of 28 July 2020.

- Besiktas lacks due diligence in the prudent receipt of its communications. This, *inter alia,* is shown by the fact that Besiktas, in another CAS case against it, only responded four months after the Request for Arbitration by the intermediary.

- Besiktas carries the burden of proof to show that it has never received the Opening Letter. In this regard, Besiktas has not submitted any evidence to prove that it never received the Opening Letter. In this regard, the Player, *inter alia,* refers to CAS 2003/A/506, CAS 2016/A/4580 and CAS 2011/A/2681.

- Besiktas's actions violate the principle of "*venire contra factum proprium*", which provides that where the conduct of one party has induced legitimate expectations in another party, the first party is estopped from changing its course of action to the detriment of the second party. As Besiktas recognised on 7 September 2020 that there is a legal dispute between the Parties, denying to have received the Opening Letter is a violation of the principle of "*venire contra factum proprium*". In this regard, the Player refers to CAS 2008/A/1699.

- In contrast to Besiktas, FIFA did deliver proof to show that the Opening Letter had been received by submitting the Microsoft Outlook delivery receipts with information that the Opening Letter was correctly delivered. Reinforcing this, according to the theory of "*sphere of control*" once a message leaves the sender's sphere of control, any error which might occur is the recipient's responsibility. In this regard, the Player refers to CAS 2016/A/4317 and CAS 2016/A/4651.

- As follows from CAS 2020/A/7356, if a party empowers several representatives to receive communications on its behalf, communications can be sent to either of the representatives and be considered properly notified.

- Besiktas's claim of 4 October 2020 was righteously qualified as a counterclaim by FIFA and therefore not admissible under Article 9 (3) of the Procedural Rules.

- As Article 9 (3) of the Procedural Rules explicitly and clearly states that if no statement or reply is received before the deadline, a decision must be made upon the basis of the documents already on file, applying this provision is not an excess of formalism. In this regard, the Player refers to CAS 2008/A/1621 and CAS 2014/A/3482.

- As the CAS has the discretion to examine the facts and the law and may heal any procedural flaws under Article R57 of the CAS Code, the CAS Panel in the proceedings CAS 2020/A/7610 will have an unlimited scope of review. In this regard, the Player, *inter alia,* refers to CAS 2015/A/ 4153. Therefore, sending the matter back to FIFA would only delay the appeal proceedings CAS 2020/A/7610, in which the Panel can cure any alleged procedural violations and Besiktas will be provided with the possibility to present its position.

- While Article R57 (3) of the CAS Code gives a panel the discretion to exclude new evidence, this is only possible in case of exceptional circumstances of abusive or inappropriate conduct by the parties submitting new evidence.

88. On this basis, the Player in his Answer submits the following prayers for relief:

> "*For all of the reasons outlined above,* [the Player] *respectfully requests the CAS Panel to issue an Award of the present appeal ruling that:*
>
> *(i) The appeal filed by* [Besiktas] *on 19 October 2020 against the letter issued on 1 October by the FIFA Administration of FIFA is dismissed;*
>
> *(ii) The costs of the arbitration shall be borne in full by* [Besiktas];
>
> *(iii)* [Besiktas] *shall bear* [the Player]*'s legal fees incurred in connection with these proceedings.*"

VIII. APPLICABLE LAW

89. Article R58 of the CAS Code provides more specifically 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 the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."

90. Article 57 (2) of the FIFA Statutes reads as follows:

"*The arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the dispute has the closest connection.*"

91. In its Appeal Brief, Besiktas submits that the case is primarily governed by the FIFA Regulations and, subsidiarily, Swiss law applies pursuant to Article 57 (2) of the FIFA Statutes and the jurisprudence of the CAS.

92. In their submissions, the Player and FIFA acknowledged that the case must be governed primarily by the RSTP and additionally by Swiss law and the CAS jurisprudence.

93. In light of the above, the Panel is satisfied that the FIFA Regulations are applicable, with Swiss law applying to fill in any gaps or *lacuna* within those regulations.

IX. MERITS

94. Initially, the Panel notes that the factual circumstances of this case are in essence undisputed by the Parties, including the content of the Opening Letter from FIFA regarding the claim lodged by the Player.

95. It is further undisputed that the Opening letter was sent by email to info@bjk.com.tr, demet.gurbak@bjk.com.tr and basak.pekin@bjk.com.tr, which addresses were all to be found in the FIFA TMS with regard to Besiktas.

96. Furthermore, it is undisputed between the Parties that the FIFA TMS also contained the email addresses of the Club's TMS Managers, i.e. the Club's (then) football director, Mr Ali Naibi (ali.naibi@bjk.com.tr), and the reporting manager, Ms Nazife Çakir (nazife.cakir@bjk.com.tr).

97. By letter of 29 September 2020, and with reference to the undisputed fact that no correspondence had been received from Besiktas, the FIFA PSD informed the Club and the Player that the investigation phase was now closed and that no further submissions would be admitted to the file.

98. Finally, on 1 October 2020, the FIFA PSD issued the Appealed Letter on behalf of the FIFA DRC, informing Besiktas that it was not in a position to restore the deadline for the Club to provide its answer and counterclaim to the claim of the Player.

99. In this regard, the Panel initially notes that regardless of the subsequent claim filed by Besiktas against the Player and his new club, and the subsequent correspondence between Besiktas and FIFA with regard to such "claim/counterclaim", the only decision under appeal in these proceedings is the Appealed Letter, which contains the decision not to restore the deadline for Besiktas to provide its answer and counterclaim to the claim of the Player.

100. As such, the Panel in these proceedings can only deal with this one issue.

101. Article 9 of the Procedural Rules states, *inter alia*, as follows:

"***9. Petitions and statements***

1. Petitions shall be submitted in one of the four official FIFA languages via the means of communication as established in these rules (d. art. 9bis). They shall contain the following particulars:
a) the name, address and e-mail address of the parties;
b) the name, address and e-mail address of any legal representatives, if applicable, and the power of attorney;
c) the motion or claim;
d) a representation of the case, the grounds for the motion or claim and details of the evidence;
e) documents of relevance to the dispute, such as contracts and previous correspondence with respect to the case in the original language and, if applicable, translated into one of the official FIFA languages (evidence);
f) the name, address and e-mail address of other natural and legal persons involved in the case concerned (evidence)
g) the amount in dispute, insofar as it is a financial dispute (except in claims related to the solidarity mechanism);
h) proof of payment of the relevant advance of costs for any proceedings before the Players' Status Committee or the single judge (cf. art. 17);
i) the date and a valid signature.

[...]

3. Once the petition is complete, it shall be sent to the opposing party or the person affected by the petition with a time limit for a statement or reply. If no statement or reply is received before the time limit expires, a decision shall be taken upon the basis of the documents already on file. Submissions received outside the time limit shall not be taken into account. The parties shall present all the facts and legal arguments together with all the evidence upon which they intend to rely/ in the original language, and, if applicable/ translated into one of the official FIFA languages. In case the opposing party wishes to lodge a counter-claim, it shall submit within the same time limit applicable to the reply its petition containing all the elements described in paragraph 1 above. There will only be a second exchange of correspondence in exceptional cases.

4. The parties shall not be authorised to supplement or amend their requests or their arguments, to produce new exhibits or to specify further evidence on which they intend to rely, after notification of the closure of the investigation.

[...]"

Moreover, Article 9bis of the Procedural Rules has the following wording:

"***9bis Communication with parties***

1. As a general principle, all communication with the parties in the proceedings shall be conducted by email. Electronic notification by email is considered a valid means of communication and will be deemed sufficient to establish time limits and their observance. Alternatively, submissions may also be transmitted by regular mail or courier. By contrast, submissions transmitted by fax shall have no legal effect.

2. Submissions transmitted by e-mail shall be addressed to psdfifa@fifa.org. Only communications submitted as PDF files containing the date and a valid and binding signature shall have legal effect.

3. Communications from FIFA shall be sent to the parties in the proceedings by using the email address provided by the parties or as provided in the Transfer Matching System (TMS; d. art. 4 par. 1 of Annexe 3 and art. 5 par. 2 of Annexe 3 of the Regulations on the Status and Transfer of Players). The email address provided in TMS by associations and clubs is considered a valid and binding means of communication. The parties and associations must ensure that their contact details (e.g. address, telephone number and email address) are valid and kept up to date at all times.

4. Parties are obliged to comply with the instructions provided in the communications sent by FIFA to the email address provided by the parties or as provided in TMS."

102. As set out in FIFA Circular no. 1603 of 24 November 2017, the system of communication with parties to disputes covered by these rules via email was developed in order to facilitate and expedite such proceedings before the relevant decision-making bodies of FIFA.

103. Although the legality of this system is not under dispute, the Club submits, *inter alia*, that this alleged "*risky*" system should not come at the expense of a party's right to be heard, with which the Panel fully agrees.

104. However, and as explained below, Besiktas' right to be heard was not violated in this situation.

105. The Panel first of all notes that pursuant to Article 9 (3) of the Procedural Rules, the relevant decision-making body of FIFA is entitled to issue a decision in a dispute as the present one and based on the documents already on file "[i]*f no statement or reply is received before the time limit expires*".

106. The application of this rule is subject to, *inter alia*, the party in question having duly received the needed information about the initiated proceedings, including information about the deadline to comply with.

107. Besiktas submits that it was never duly informed about the opening of the proceedings against it until its receipt of the Appealed Letter and, consequently, never acted in bad faith or without due diligence.

108. Based on the facts of the case and the Parties' submissions, the Panel finds that it is up to FIFA to discharge the burden of proof to establish that Besiktas was in fact duly informed about the opening of the proceedings against the Club.

109. In doing so, the Panel adheres to the principle of *actori incumbit probatio*, which has consistently been observed in CAS jurisprudence and according to which "*in CAS arbitration, any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue. In other words, the party which asserts facts to support its rights has the burden of establishing them (..) The Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one. Hence, if a party wishes to establish some fact and persuade the deciding body, it must actively substantiate its allegations with convincing evidence*" (e.g. CAS 2003/A/506, para. 54; CAS 2009/A/1810&1811, para. 46 and CAS 2009/A/1975, para. 71ff).

110. However, the Panel finds that FIFA has adequately discharged the burden of proof to establish that the Opening Letter was duly notified to the Club.

111. The Panel first of all notes that FIFA submitted proof of delivery of the Opening letter on 28 July 2020 to the following email addresses of the Club, which were all to be found in the TMS: info@bjk.com.tr, demet.gurbak@bjk.com.tr and basak.pekin@bjk.com.tr.

112. In this regard, the Panel agrees with the principles set out by the Sole Arbitrator in CAS 2020/A/7356 that in order for the Opening Letter to be notified to an addressee, the letter "*must enter into the recipient's sphere of control*" and "[*i]f a company or association grants authority to serve as a point of contact to several representatives, communications can be sent to either of the representatives*".

113. Based on the above-mentioned proof of delivery of the Opening Letter to the addresses which were indisputably to be found in the TMS as valid contacts for the Club, the Panel is satisfied that the Opening Letter was in fact duly notified to the Club even if, as submitted by the Club, it was not opened by anybody until the

receipt of the Appealed Letter. This is in line with CAS jurisprudence (e.g. CAS 2016/A/4817, para. 89).

114. It follows directly from Article 9bis (3) of the Procedural Rules that "*The parties and associations must ensure that their contact details (e.g. address, telephone number and email address) are valid and kept up to date at all times*", and the Panel therefore finds that FIFA was entitled to rely on the contact information inserted by the Club in the TMS, even under the very special circumstances of a pandemic.

115. The Panel furthermore finds that the fact that the Opening Letter was not sent to the Club's (then) TMS managers, (then) football director, Mr Ali Naibi (ali.naibi@bjk.com.tr), and the reporting manager, Ms Nazife Çakir (nazife.cakir@bjk.com.tr), does not imply that the said letter was not duly notified to the Club, in which regard the Panel, *inter alia*, notes that the Opening Letter is not a letter containing TMS issues.

116. With the Opening Letter duly notified to Besiktas, and thus producing legal effects on the Club, the Panel finds that the Club was duly and correctly summoned by FIFA to answer to the claim within the granted time limit and was granted sufficient time to submit its answer.

117. With no response from the Club within the granted time limit, the Panel finds that FIFA was indeed entitled to close the investigation phase and proceed to rule on the basis of the file as provided for in Article 9 (3) of the Procedural Rules.

118. As such, and in line with CAS 2018/A/5597, the Panel does not find that Besiktas was deprived of its right to be heard when FIFA in the Appealed Letter informed the Club that its request to have the deadline restored was not granted. As a matter of fact, the Club's right to the heard had already sufficiently been respected by the Opening Letter.

119. Moreover, not granting the Club a restored deadline to file its answer is neither unlawful, nor does it violate the principle of equal treatment, and FIFA did not apply excessive formalism when deciding not to do so.

120. First of all, it is crucial that FIFA treats all parties subject to FIFA proceedings in the same way, and it is the parties' duty of diligence to respect the deadline set by the regulations of FIFA, which serves the interests of legal certainty and security.

121. As such, the Panel agrees with FIFA that the Procedural Rules cannot be bent in favour of the needs of one party as confirmed in, *inter alia*, CAS 2019/A/6463.

122. Moreover, the Panel agrees that the provision of Article 9 (3) of the Procedural Rules is clear and leaves no room for interpretation. It also sets out clearly the consequences for not complying with the given deadlines, which is why the

decision to reject the Club's belated request for restoration of the deadline cannot be considered as an excessive formalism on the part of FIFA.

123. Finally, the Panel finds that the personality rights of the Club were not violated in this situation.

124. Based on the foregoing, and after having taken into due consideration the relevant circumstances of the case, the evidence produced and the written arguments submitted, the Panel concludes that the Appealed Letter was issued with sufficient legal basis and that it did not violate any rights of the Club, on which grounds the appeal must be dismissed.

X. COSTS

125. Article R64.4 of the CAS Code provides as follows:

> "*At the end of the proceedings, the CAS Court Office shall determine the final amount of the cost of arbitration, which shall include the CAS Court Office fee, the administrative costs of the CAS calculated in accordance with the CAS scale, the costs and fees of the arbitrators, the fees of the ad hoc clerk, if any, calculated in accordance with the CAS fee scale, a contribution towards the expenses of the CAS, and the costs of witnesses, experts and interpreters. The final account of the arbitration costs may either be included in the award or communicated separately to the parties. The advance of costs already paid by the parties are not reimbursed by the CAS with the exception of the portion which exceeds the total amount of the arbitration costs.*"

126. Article R64.5 of the CAS Code provides as follows:

> "*In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such a contribution, the Panel shall take into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.*"

127. Having taken into account the outcome of the present proceedings, in particular the fact that the appeal is admissible but has been dismissed, the Panel finds that the costs of the arbitration, to be determined and served to the Parties by the CAS Court Office, must be borne entirely by the Appellant.

128. Furthermore, as a general rule, the award must grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings. Considering that the Appellant prevailed on the issues of the jurisdiction of the CAS and

admissibility of the appeal, but that the Respondents prevailed on the merits of the case, the Panel rules that the Appellant must pay a contribution towards the Second Respondent's legal fees in the amount of CHF 5,000 (five thousand Swiss francs), while FIFA – as it was not represented by external counsel – must bear its own legal fees and expenses.

*****

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Besiktas Futbol Yatirimlari Sanayi Ve Ticaret A.S. on 19 October 2020 against the letter of 1 October 2020 from the FIFA Players' Status Department on behalf of the FIFA Dispute Resolution Chamber is dismissed.

2. The costs of the arbitration, to be determined and served to the Parties by the CAS Court Office, shall be borne entirely by Besiktas Futbol Yatirimlari Sanayi Ve Ticaret A.S.

3. Besiktas Futbol Yatirimlari Sanayi Ve Ticaret A.S. is ordered to pay the amount of CHF 5,000 (five thousand Swiss francs) to Mr Victor Ruiz Torre as a contribution towards his legal fees and expenses incurred in connection with these arbitration proceedings.

4. The Fédération Internationale de Football Association shall bear its own legal fees and expenses incurred in connection with these arbitration proceedings.

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

Seat of Arbitration: Lausanne, Switzerland
Date: 12 April 2022

THE COURT OF ARBITRATION FOR SPORT

Lars Hilliger
President of the Panel

Nicolas Cottier
Arbitrator

Jan Räker
Arbitrator