

Decision of the Dispute Resolution Chamber

passed on 5 April 2024

regarding an employment-related dispute concerning
the player Hildeberto José Morgado Pereira

BY:

Frans DE WEGER (The Netherlands), Chairperson
Dana MOHAMED AL-NOAIMI (Qatar), member
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CLAIMANT:

Hildeberto José Morgado Pereira, Portugal

RESPONDENT:

Henan Football Club, China PR

I. Facts of the case

1. On 8 June 2023, the club issued an intention letter for a contract, indicating the following:
"An employment contract for a term starting from 1 July 2023 until 31 December 2023. In the event that your played more than 50% of time playable, the term shall be automatically extended for another year (i.e. expiration date shall be 31 December 2024);
(...)
This letter is only a letter of intention and shall not have any legal and binding effect between the parties until the signature of a binding employment contract with the Club."
2. On 1 July 2023, the player and HENAN FOOTBALL CLUB concluded an employment contract.
3. As to the period of validity, the contract stipulated the following:
"This Contract shall enter into force upon on 1 July 2023 and shall continue until 31 December 2023, unless otherwise automictically extended according to Article 11 hereunder."
4. According to art. 2 of the contract, the player was entitled to EUR 51,666 before taxes (EUR 33,333 net) from July 2023 until December 2023.
5. Art 11 of the contract stipulated the following:
"ARTICLE 11: Automatic Extension Clause
1. The term of the Contract established in Article 1 shall be automatically extended for one (1) extra year, (i.e. the extended expiration date shall be December 31 2024) upon the notice sent by Party A within 5 working days after the final official game of season 2023 to Party B's email address set out in the first page hereof, in the event that Party B participated no lower than 50% of Party A's remaining matches in season 2023 CSL (i.e. counting since 1 July 2023, "Appearance Rate"). The amount of salary for the extended term of this Contract shall be EUR 670,000 (in words: six hundred and seventy thousand Euros) before taxes in mainland China, which amounts to EUR 400,000 (in words: four hundred thousand Euros) after taxes in mainland China. The amount of salary and bonuses for the extended term of this Contract shall be subject to Article 3.1 to Article 3.9 hereof. Additional remuneration (if any) during the extended term shall be agreed by Parties in writing."
6. On 10 November 2023, the club participated in the last match of the season.
7. On 31 December 2023, the club sent a letter to the player indicating that the contract will expire on 31 December 2023.
8. On 1 January 2024, the player sent a letter to the club, indicating that he was "perplexed" and argued that the conditions of the extension clause were met.
9. According to the information contained in TMS, the player concluded a contract with the Brazilian club, Portimonense SAD, valid as from 5 January 2024 until 30 June 2025.
10. Accordingly, the player was entitled to the following:
 - EUR 7,000 for the season 2023/2024 (6 instalments, for a total amount of EUR 42,000)
 - EUR 14,000 per month for the season 2024/2025 (12 instalments, for the total amount of EUR 140,000).[for the year 2024, the player would earn 42,000 + 14,000*6 = EUR 126,000]

II. Proceedings before FIFA

11. On 15 January 2024, the player lodged a claim before the FIFA Football Tribunal for breach of contract and requested the payment of EUR 670,000 as compensation and corresponding to the residual value of the contract.
12. The player requested the payment of the procedural costs and fees.
13. The player considered that the contract included an automatic extension clause and argued that the condition for the extension was solely based on the player's sporting performance.
14. The Claimant argued that, throughout the 2023 season, he fulfilled the condition of playing more than 50% of the remaining games, which triggers the automatic extension of the contract (evidence on file).
15. The Claimant stated that the club verbally confirmed the extension and that the head coach acknowledged that the player would be included for the 2024 season (note: WhatsApp conversation on file).
16. In its reply, the Respondent rejected the claim of the player and denied that the contract was extended.
17. The Respondent considered that the contract expired.
18. According to the Respondent, FIFA DRC and CAS decisions have stated that clauses that allow one party to unilaterally extend a contract are potestative and thus invalid.
19. The Respondent underlined that it did not send a notice expressing its intent to extend the contract within the specified timeframe, and the Player did not raise any objection to this.
20. The club argued that the player's interpretation of the term "automatic" is too broad and misleading.
21. In his replica, the Claimant insisted in its initial views.
22. The Claimant argued that the Respondent club unilaterally terminated the Claimant player's employment contract without just cause, violating FIFA regulations and the principles of good faith and *pacta sunt servanda*.
23. The player argued that the employment contract contained an impermissible unilateral option clause in favor of the club, which should be declared null and void.
24. The player considered that the club had discretionary power to extend or not extend the contract, and the player was at the mercy of the club's decision.

25. The player argued that the FIFA Dispute Resolution Chamber has previously ruled that clauses that leave a player at the mercy of a club cannot be upheld.
26. The player highlighted that the club failed to communicate the renewal of the contract within the agreed timeframe and instead notified the player on 31 December 2023, that the contract would not be renewed.
27. In its duplica, the Respondent insisted in its previous arguments.
28. The Respondent underlined that the contract clearly states that the term of the contract is from 1 July 2023 to 31 December 2023, and can only be extended according to Article 11 of the contract.
29. The Respondent considered that the Claimant has failed to provide any evidence of another agreement or means of extending the term beyond 31 December 2023.
30. The club considered that the contract clearly states that it was signed voluntarily and on an equal basis.
31. The Respondent considered that the Claimant's contention that the contract would be automatically renewed based on their sporting performance is not supported by any evidence.
32. The club underlined that it is not obligated to send a non-renewal notification if the contract is not to be renewed.

III. Considerations of the Dispute Resolution Chamber

a. Competence and applicable legal framework

33. First of all, the Dispute Resolution Chamber (hereinafter also referred to as *Chamber* or *DRC*) analysed whether it was competent to deal with the case at hand. In this respect, it took note that the present matter was presented to FIFA on 15 January 2024 and submitted for decision on 4 April 2024. Taking into account the wording of art. 34 of the May 2023 edition of the Procedural Rules Governing the Football Tribunal (hereinafter: *the Procedural Rules*), the aforementioned edition of the Procedural Rules is applicable to the matter at hand.
34. Subsequently, the members of the Chamber referred to art. 2 par. 1 of the Procedural Rules and observed that in accordance with art. 23 par. 1 in combination with art. 22 lit. b) of the Regulations on the Status and Transfer of Players (May 2023 edition), the Dispute Resolution Chamber is competent to deal with the matter at stake, which concerns an employment-related dispute with an international dimension between a Brazilian player and a Chinese club.
35. Subsequently, the Chamber analysed which regulations should be applicable as to the substance of the matter. In this respect, it confirmed that, in accordance with art. 26 par. 1 and 2 of the Regulations on the Status and Transfer of Players (May 2023 edition), and considering that the present claim was lodged on 15 January 2024, the May 2023 edition of said regulations (hereinafter: *the Regulations*) is applicable to the matter at hand as to the substance.

b. Burden of proof

36. The Chamber recalled the basic principle of burden of proof, as stipulated in art. 13 par. 5 of the Procedural Rules, according to which a party claiming a right on the basis of an alleged fact shall carry the respective burden of proof. Likewise, the Chamber stressed the wording of art. 13 par. 4 of the Procedural Rules, pursuant to which it may consider evidence not filed by the parties, including without limitation the evidence generated by or within the Transfer Matching System (TMS).

c. Merits of the dispute

37. Its competence and the applicable regulations having been established, the Chamber entered into the merits of the dispute. In this respect, the Chamber started by acknowledging all the above-mentioned facts as well as the arguments and the

documentation on file. However, the Chamber emphasised that in the following considerations it will refer only to the facts, arguments and documentary evidence, which it considered pertinent for the assessment of the matter at hand.

i. Main legal discussion and considerations

38. The foregoing having been established, the Chamber moved to the substance of the matter.
39. In this context, the Chamber acknowledged that the present case concerns an extension clause within a contract originally valid until 31 December 2023.
40. In particular, the Chamber noted that Clause 11 of the contract implied the automatic extension for another year if the player fulfils the condition of participating in more than 50% of the remaining games by the end of the 2023 season.
41. The Chamber observed that there is a dispute regarding the interpretation of this clause, as the club unilaterally added a requirement for the club to send a notification to the player for the extension to take effect. The Chamber also noted that the player argued that this notification requirement was not negotiated or accepted and should not be considered a substantial condition for the contract extension. The player argued that he fulfilled the participation requirements of the clause, which is undisputed by the club.
42. Furthermore, the Chamber noted that the player argued that the intention letter issued by the club before the contract should be used as an indicator, but said intention letter clearly stipulated that it is only an intention letter to be superseded by the contract. As a result, the Chamber understood that it cannot be relied upon.
43. Given the above, the Chamber underlined exact language of Article 11 of the contract shall be relied upon. This clause stipulated that *"The term of the Contract established in Article 1 shall be automatically extended for one (1) extra year, (i.e. the extended expiration date shall be December 31 2024) upon the notice sent by Party A within 5 working days after the final official game of season 2023 to Party B's email address set out in the first page hereof, in the event that Party B participated no lower than 50% of Party A's remaining matches in season 2023 CSL"*.
44. The foregoing been said, the Chamber examined whether said extension clause and, in general, clause 11 of the contract, is of a potestative nature.
45. The Chamber observed that, according to CAS (CAS 2013/A/3375) *"unilateral options to extend contracts of employment in favour of football clubs are not per se invalid and incompatible with the FIFA Regulations on the Status and Transfer of Players (RSTP) and the principle of global labour law"*, but it is also acknowledged that *"unilateral options are problematic since they limit the freedom of the party that cannot make use of the option in an excessive manner (...) The jurisprudence does not absolutely preclude the valid operation of*

such a clause; each specific clause and the circumstances of its purported exercise must be examined on a case by case basis."

46. In general, as per CAS jurisprudence (CAS 2020/A/7145), several elements can be taken into account in order to determine the validity of a unilateral extension option. These are: i) the potential maximum duration of the labour relationship should not be excessive; ii) the option should be exercised within an acceptable deadline before the expiry of the current contract; iii) the salary reward deriving from the option right should be defined in the original contract; iv) one party should not be at the mercy of the other party with regard to the contents of the employment contract; v) the option should be clearly established and emphasized in the original contract so that the player is conscious of it at the moment of signing the contract; vi) the extension period should be proportional to the main contract; and vii) it would be advisable to limit the number of extension options to one sole extension.
47. Thus, the Chamber considered that the foregoing can be compared to the clause at stake.
- i) **Potential Maximum Duration:** The extension clause specifies that the contract can be extended for an additional year if certain conditions are met.
 - ii) **Exercise Deadline:** The clause mandates that the club must provide notice within five working days after the final official game of the season for the extension to take effect.
 - iii) **Defined Salary Reward:** The extension clause clearly stipulates the salary for the extended term of the contract.
 - iv) **Mutual Agreement and Club's Discretionary Power:** The clause requires both parties to fulfil specific conditions for the extension to occur. However, in the view of the Chamber, the club's discretion in deciding whether to extend the contract based on the player's participation could arguably give it undue leverage over the player.
 - v) **Clear Establishment in Contract:** The extension clause is clearly featured in the contract and outlines the conditions under which the contract may be extended.
 - vi) **Disproportionate Extension Period:** The extension period, which is an additional year, corresponds to twice the duration of the main contract term, which is initially set for six months. This is, in the view of the Chamber, clearly disproportional.
48. Overall, while the extension clause meets some of the requirements outlined in the CAS jurisprudence, the Chamber considered that there are some significant objections to be made regarding the balance of power as well as in relation to certain of its elements that showcase a certain disproportionality.
49. In this respect, the Chamber underlined that the club had the discretion to decide whether to align with the player's participation or not.
50. Therefore, in the opinion of the Chamber, the club's discretionary capacities in relation to this clause can only be considered as excessive. The Chamber concurred with the player's argument, according to which said clause unduly limited his freedom and unfairly favoured

the club.

51. In light of the potestative nature of the clause, the Chamber considered that the player could have expected in good faith that the contract would have been automatically extended. As a result, and given the club's refusal to honour the contractual terms as per the extension clause, the Chamber understood that the club committed a breach of contract without just cause and the player is entitled to compensation.

ii. Consequences

52. Having stated the above, the members of the Chamber turned their attention to the question of the consequences of such unjustified breach of contract committed by the Respondent.
53. Having stated the above, the Chamber turned to the calculation of the amount of compensation payable to the player by the club in the case at stake. In doing so, the Chamber firstly recapitulated that, in accordance with art. 17 par. 1 of the Regulations, the amount of compensation shall be calculated, in particular and unless otherwise provided for in the contract at the basis of the dispute, with due consideration for the law of the country concerned, the specificity of sport and further objective criteria, including in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, and depending on whether the contractual breach falls within the protected period.
54. In application of the relevant provision, the Chamber held that it first of all had to clarify as to whether the pertinent employment contract contained a provision by means of which the parties had beforehand agreed upon an amount of compensation payable by the contractual parties in the event of breach of contract. In this regard, the Chamber established that no such compensation clause was included in the employment contract at the basis of the matter at stake.
55. As a consequence, the members of the Chamber determined that the amount of compensation payable by the club to the player had to be assessed in application of the other parameters set out in art. 17 par. 1 of the Regulations. The Chamber recalled that said provision provides for a non-exhaustive enumeration of criteria to be taken into consideration when calculating the amount of compensation payable.
56. Bearing in mind the foregoing as well as the claim of the player, the Chamber proceeded with the calculation of the monies payable to the player under the terms of the contract from the date of its unilateral termination until its end date. In particular, the Chamber noted that the contract value for the season 2024 would be EUR 670,000. Consequently, the Chamber concluded that the amount of EUR 670,000 serves as the basis for the determination of the amount of compensation for breach of contract.

57. In continuation, the Chamber verified as to whether the player had signed an employment contract with another club during the relevant period of time, by means of which he would have been enabled to reduce his loss of income. According to the constant practice of the DRC as well as art. 17 par. 1 lit. ii) of the Regulations, such remuneration under a new employment contract shall be taken into account in the calculation of the amount of compensation for breach of contract in connection with the player's general obligation to mitigate his damages.
58. Indeed, the player found employment with Portimonense SAD. In accordance with the pertinent employment contract, the player was entitled to the following:
- EUR 7,000 for the season 2023/2024 (6 instalments, for a total amount of EUR 42,000)
 - EUR 14,000 per month for the season 2024/2025 (12 instalments, for the total amount of EUR 140,000).
59. Thus, the Chamber understood that, for the year 2024, the player would earn $42,000 + 14,000 \times 6 = \text{EUR } 126,000$.
60. Therefore, the Chamber concluded that the player mitigated his damages in the total amount of EUR 126,000.
61. Consequently, on account of all of the above-mentioned considerations and the specificities of the case at hand, the Chamber decided that the club must pay the amount of EUR 544,000 to the player (i.e. EUR 670,000 minus EUR 126,000), which was to be considered a reasonable and justified amount of compensation for breach of contract in the present matter.
62. Lastly, taking into consideration the player's request as well as the constant practice of the Chamber in this regard, the latter decided to award the player interest on said compensation at the rate of 5% p.a. as of the date of termination until the date of effective payment.

iii. Compliance with monetary decisions

63. Finally, taking into account the applicable Regulations, the Chamber referred to art. 24 par. 1 and 2 of the Regulations, which stipulate that, with its decision, the pertinent FIFA deciding body shall also rule on the consequences deriving from the failure of the concerned party to pay the relevant amounts of outstanding remuneration and/or compensation in due time.
64. In this regard, the DRC highlighted that, against clubs, the consequence of the failure to pay the relevant amounts in due time shall consist of a ban from registering any new players, either nationally or internationally, up until the due amounts are paid. The overall

maximum duration of the registration ban shall be of up to three entire and consecutive registration periods.

65. Therefore, bearing in mind the above, the DRC decided that the Respondent must pay the full amount due (including all applicable interest) to the Claimant within 45 days of notification of the decision, failing which, at the request of the Claimant, a ban from registering any new players, either nationally or internationally, for the maximum duration of three entire and consecutive registration periods shall become immediately effective on the Respondent in accordance with art. 24 par. 2, 4, and 7 of the Regulations.
66. The Respondent shall make full payment (including all applicable interest) to the bank account provided by the Claimant in the Bank Account Registration Form, which is attached to the present decision.
67. The DRC recalled that the above-mentioned ban will be lifted immediately and prior to its complete serving upon payment of the due amounts, in accordance with art. 24 par. 8 of the Regulations.

d. Costs

68. The Chamber referred to art. 25 par. 1 of the Procedural Rules, according to which *"Procedures are free of charge where at least one of the parties is a player, coach, football agent, or match agent"*. Accordingly, the Chamber decided that no procedural costs were to be imposed on the parties.
69. Likewise, and for the sake of completeness, the Chamber recalled the contents of art. 25 par. 8 of the Procedural Rules, and decided that no procedural compensation shall be awarded in these proceedings.
70. Lastly, the DRC concluded its deliberations by rejecting any other requests for relief made by any of the parties.

IV. Decision of the Dispute Resolution Chamber

1. The claim of the Claimant, Hildeberto José Morgado Pereira, is partially accepted.
2. The Respondent, Henan Football Club, must pay to the Claimant the following:

- EUR 544,000 as compensation for breach of contract without just cause
3. Any further claims of the Claimant are rejected.
4. Full payment (including all applicable interest) shall be made to the bank account indicated in the **enclosed** Bank Account Registration Form.
5. Pursuant to art. 24 of the Regulations on the Status and Transfer of Players, if full payment (including all applicable interest) is not made **within 45 days** of notification of this decision, the following **consequences** shall apply:
 1. The Respondent shall be banned from registering any new players, either nationally or internationally, up until the due amount is paid. The maximum duration of the ban shall be of up to three entire and consecutive registration periods.
 2. The present matter shall be submitted, upon request, to the FIFA Disciplinary Committee in the event that full payment (including all applicable interest) is still not made by the end of the three entire and consecutive registration periods.
6. The consequences **shall only be enforced at the request of the Claimant** in accordance with art. 24 par. 7 and 8 and art. 25 of the Regulations on the Status and Transfer of Players.
7. This decision is rendered without costs.

For the Football Tribunal:



Emilio García Silvero

Chief Legal & Compliance Officer

NOTE RELATED TO THE APPEAL PROCEDURE:

According to article 57 par. 1 of the FIFA Statutes, this decision may be appealed against before the Court of Arbitration for Sport (CAS) within 21 days of receipt of the notification of this decision.

NOTE RELATED TO THE PUBLICATION:

FIFA may publish this decision. For reasons of confidentiality, FIFA may decide, at the request of a party within five days of the notification of the motivated decision, to publish an anonymised or a redacted version (cf. article 17 of the Procedural Rules Governing the Football Tribunal).

CONTACT INFORMATION

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