

Decision of the Players' Status Chamber

passed on 12 October 2021

regarding a dispute concerning the transfer of the player **Fabio Roberto Gomes Netto**

BY:

Loïs Alves (France)

CLAIMANT:

Oeste Futebol Clube, Brazil

Represented by Bichara e Motta Advogados

RESPONDENT:

Albirex Niigata, Japan

Represented by Breno Costa Ramos Tannuri

I. Facts of the case

1. On 26 December 2019, the Brazilian club, Oeste Futebol Clube (hereinafter: *the Claimant*), and the Japanese club Albirex Niigata (hereinafter: *the Respondent*) concluded a loan agreement (hereinafter: *"the agreement"*), for the temporary transfer of the player, Fabio Roberto Gomes Netto (hereinafter: *the player*) from the Claimant to the Respondent, which agreement was valid from 1 February 2020 until 31 December 2021.
2. Pursuant to clause 3 of the agreement, the Respondent agreed to pay to the Claimant a transfer fee of USD 1,000,000 in two instalments, as follows:
 - USD 500,000 within 10 (ten) days from signature of the agreement; and
 - USD 500,000 by no later than 1 February 2021.
3. Clause 3.4 of the agreement stipulated the following:

"In the event Albirex [Respondent] fails to make the payments in the due date herein agreed, a fine of 10% (ten per cent), plus interest on the full amount outstanding at the rate of 12% (twelve percent) per year shall be applied from the due date until the date of payment. Partial payments are applied first against interest accrued to the date of payment and any balance against the amount outstanding."
4. Additionally, clause 4.1 of the agreement, indicated the following:

"During the term of this Agreement, the ALBIREX [Respondent] shall be responsible to pay in full the wages, bonuses and/or any other remuneration agreed in accordance of ALBIREX PLAYER Contract (hereinafter: the "Salary")."
5. Furthermore, clause 5.2 of the agreement established the following:

"Neither ALBIREX nor the PLAYER may terminate this Agreement or the ALBIREX-PLAYER Contract without formal and express consent of OESTE, except if otherwise set forth in this Agreement."
6. Moreover, clause 5.5 of the agreement established the following:

"The Party that breaches an terms of this Agreement shall compensate the innocent party for any resulting loss or damage."
7. By correspondence dated 8 March 2021, the Claimant put the Respondent in default of payment of the amount of USD 500,000 relating to the second instalment of the transfer fee granting a deadline of 10 (ten) days in order to remedy the default, however to no avail.

II. Proceedings before FIFA

8. On 1 April 2021, the Claimant filed the claim at hand before FIFA. A brief summary of the position of the parties is detailed in continuation.

a. Position of the Claimant

9. According to the Claimant, it received a notification on 21 October 2020 from the Respondent, in which the Respondent expressed its intention to terminate the agreement with the Claimant in light of the drunk-driving incident of the player.
10. On 25 October 2020, the Claimant replied to the notification of the Respondent highlighting the provisions of clauses 5.2 and 5.5 of the agreement, and in addition informing the Respondent that it did not agree with the termination of both the employment contract and the transfer agreement.
11. On 27 October 2020, the Claimant sent an email to the Respondent, enquiring as to whether the Respondent will proceed with the termination of the agreements.
12. The Claimant indicated that the Respondent failed to respond and accordingly, *"the Employment Contract between Oeste FC and the Player was reactivated. Consequently, Oeste FC's obligation to pay remuneration to the Player resumed as well."*
13. Moreover, on 6 January 2021, the Claimant sent a further correspondence to the Respondent *"to provide its position regarding its contractual obligations within 10 (ten) days"*.
14. The requests for relief of the Claimant, were the following:
- a) consider the Respondent as guilty for failing to comply with its obligations as established in the agreement and in breach of article 12bis of the Regulations;
 - b) order the Respondent to pay to the Claimant the amount of USD 550,000 in connection with the second instalment and the applicable fine stipulated in clause 3 of the agreement;
 - c) order that an interest rate of 12% *p.a.* shall apply over the above-mentioned amount, as from the due date until the date of effective payment;
 - d) order the Respondent to pay to the Claimant the amount of BRL 107,419.35 as further damages caused by Albirex for the early termination of the agreement; and
 - e) order the Respondent to bear all administrative and procedural costs related to this procedure.

b. Position of the Respondent

15. In its reply to the claim, the Respondent confirmed that on 10 January 2020, it concluded an employment contract with the player, for the same term as the agreement, i.e. 1 February 2020 until 31 December 2021.
16. The Respondent further highlighted that, *"it is important to stress that during the negotiations regarding the contents of the Employment Contract, the Parties agreed to establish very clear reasons (or just causes) that would eventually grant Albirex the right to terminate said labour relationship with the Player unilaterally."* In particular, the Respondent deemed it relevant to refer to art. 8 of the employment contract, which allows the Respondent to unilaterally terminate the employment contract if the player was driving under the influence of alcohol.
17. According to the Respondent, on 17 September 2020, the player violated the laws of Japan, *"namely the Article 65 of the Road Traffic Act (Prohibition against Driving Under the Influence of Alcohol and Related Conduct) by being drunk while driving in the city of Niigata"*.
18. On this account and based on a report which was provided by the police department of Niigata, an internal investigation was conducted by the Respondent according to which it was concluded on 21 October 2020, that the player had driven under the influence of alcohol. As a result, the Respondent stipulated that it *"had no other option but to rely on the contents of the Employment Contract and terminate it unilaterally and with just cause."*
19. Accordingly, the Respondent sent a termination letter to the player and a notice to the Claimant *"with the purpose to communicate to the latter about the decision to terminate the Loan Agreement due to the breach of a mandatory obligation set out in the Employment Contract by the Player"*.
20. Moreover, the player left Japan and returned to Brazil and the Claimant decided to re-activate their employment contract with the player.
21. According to the Respondent, the Claimant on 15 January 2021, entered into a loan agreement for the player with the Major League Soccer (hereinafter referred to as "MLS"), for the player to provide services to New York Red Bull until 30 June 2021. In this context, the Respondent stipulated the following:
 - *"MLS undertook to pay to Oeste a fixed (loan) fee of USD 200,000 (two hundred thousand dollars). In addition, MLS also agreed to pay to Oeste an extra amount, if – on 30 June 2021 – the loan of the Player was extended until 1 January 2022."*
 - *Pursuant to the MLS Loan Agreement, Oeste would be also entitled to receive few bonuses depending on the performance of the Player during the period under contract,*

as well as the achievements of the New York Red Bull during the championships and cups eventually disputed.

- *Oeste also granted an option to MLS to transfer the Player on permanent basis, evidently conditioned upon the payment of a new transfer compensation. In this case, MLS undertook to pay to Oeste an amount of USD 1,500,000”.*
22. Additionally, the Respondent indicated that clause 5.2 of the agreement, violated art. 18bis of the RSTP, it shall be deemed as null and void, as from the provisions of the clause it is clear that *“Oeste has the ability influence and influences the independence of Albirex in the Employment Contract and Policies. Obviously, Oeste is not a party to such Employment Contract and should have any influence over employment matter where they are not party to.”*
23. The requests for relief of the Respondent, were that the FIFA PSC:
- a) *“reject the Statement of Claim in its entirety; and*
 - b) *order the Claimant to bear all administrative and procedural fees.”*

Alternatively,

- c) *To order the Respondent to pay to the Claimant, USD 20,000 due as the loan fee set out in the agreement; and*
- d) *order the Claimant to bear all FIFA PSC administrative and procedural fees.*

Alternatively,

- e) *order the Respondent to pay to the Claimant, USD 260,000 due as the loan fee set out in the agreement; and*
- f) *order the Claimant to bear all FIFA PSC administrative and procedural fees.”*

c. Loan agreement between the Claimant and New York Red Bulls (MLS)

24. According to the information available on TMS, on 15 January 2021, the Claimant concluded a subsequent loan agreement, for the temporary transfer of the player, to the New York Red Bulls, valid from 1 January 2021 until 30 June 2021 for a loan fee of USD 200,000, payable on or before 28 February 2021, subject to the deduction of solidarity and training compensation.
25. On 25 May 2021, the option was exercised to extend the aforesaid loan agreement in accordance with clause 3 of the said loan agreement to 31 December 2021 for a further loan fee of USD 200,000 payable on or before 15 September 2021, subject to the deduction of solidarity and training compensation.

III. Considerations of the Players' Status Chamber

a. Competence and applicable legal framework

26. First of all, the Single Judge of the Players' Status Chamber (hereinafter also referred to as *Single Judge*) analysed whether he was competent to deal with the case at hand. In this respect, he took note that the present matter was presented to FIFA on 1 April 2021 and submitted for decision on 12 October 2021. Taking into account the wording of art. 34 of the October 2021 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.
27. Subsequently, the Single Judge referred to art. 2 par. 1 of the Procedural Rules and observed that in accordance with art. 23 par. 2 in combination with art. 22 lit. c) of the Regulations on the Status and Transfer of Players (August 2021 edition), the Single Judge is in principle competent to deal with disputes between clubs belonging to different associations.
28. Subsequently, the Single Judge analysed which regulations should be applicable as to the substance of the matter. In this respect, he confirmed that, in accordance with art. 26 par. 1 and 2 of the Regulations on the Status and Transfer of Player (August 2021 edition) and considering that the present claim was lodged on 1 April 2021, the February 2021 edition of said regulations (hereinafter: *the Regulations*) is applicable to the matter at hand as to the substance.

b. Burden of proof

29. The Single Judge 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 Single Judge stressed the wording of art. 13 par. 4 of the Procedural Rules, pursuant to which he 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

30. His competence and the applicable regulations having been established, the Single Judge entered into the merits of the dispute. In this respect, the Single Judge started by acknowledging all the above-mentioned facts as well as the arguments and the documentation on file. However, the Single Judge emphasised that in the following considerations, he will refer only to the facts, arguments and documentary evidence, which he considered pertinent for the assessment of the matter at hand.

i. Main legal discussion and considerations

31. The foregoing having been established, the Single Judge moved to the substance of the matter and acknowledged all the above-mentioned facts as well as the arguments and the documentation on file.
32. In this context, the Single Judge acknowledged that the Claimant and the Respondent signed a loan agreement regarding the temporary transfer of the player from the Claimant to the Respondent against a transfer compensation fee of USD 1,000,000.
33. The Single Judge noted that the Respondent argued that it terminated the loan agreement on the basis of the early termination of the employment contract between the player and the Respondent on the basis that the player violated the laws of Japan by driving under the influence of alcohol and that it had the contractual right to exercise such unilateral termination in accordance with the employment contract concluded between the player and the Respondent.
34. In this context the Single Judge pointed out that a loan agreement and an employment contract are two independent contracts which do not have the same object. In this respect, the Single Judge stated, on the one hand, a loan agreement is usually concluded between two clubs and generally pertains mainly to the financial and administrative aspects of the temporary transfer of a player and that an employment contract, on the other hand, is usually concluded between a club and a player and generally provides for the employment-related obligations of each party.
35. The Single Judge noted that it is uncontested that the loan agreement was prematurely terminated, and that the player was re-registered with the Claimant during November 2020 and that following this, the Claimant was loaned to the Major League Soccer (MLS) club, New York Red Bulls, as from 1 January 2021 until 30 June 2021. It is also uncontested that, the loan of the player was extended with the MLS until 31 December 2021.
36. The Single Judge acknowledged that for the duration of the loan agreement, the Respondent was responsible to pay the salary and other agreed remuneration to the player and that the Claimant argued that upon the player's return until his loan transfer to New York Red Bulls, the Claimant paid the salaries of the player.
37. The Single Judge concluded that the Claimant only received the first instalment of the loan fee in the total amount of USD 500,000, however as detailed in clause 3 of the agreement, the Respondent was obliged to pay to the Claimant the total of USD 1,000,000.
38. On account of the aforementioned consideration, the Single judge established that the Respondent failed to remit to the Claimant the loan fee in the amount of USD 500,000, which fell due on 1 February 2021.

39. As a result of the foregoing, the Single Judge concluded that the Respondent had to fulfil the contractually agreed financial obligations as per the loan agreement, which it failed to do.

ii. Consequences

40. Having stated the above, the Single Judge turned his attention to the question of the consequences of such unjustified breach of contract committed by the Respondent and decided, that the Respondent must fulfil its obligations in accordance with the general legal principle of "*pacta sunt servanda*".

41. The Single Judge decided that as per the loan agreement the amount of USD 500,000 is in principle due to the Claimant.

42. In continuation, the Single Judge remarked that the Claimant had signed a subsequent loan agreement as well as an extension for the temporary transfer of the player to the New York Red Bulls for the period 1 January – 31 December 2021. As the player continued to render his services to the Claimant as from 1 November 2020, the non-amortized loan fee for the period between 1 November 2020 and 31 December 2022 amounts to USD 521,739 (USD 1,000,000 / 23 x 12). In the overlapping period until 31 December 2022, the Claimant received a total amount of USD 380,000 from the New York Red Bulls.

43. Consequently, on account of all of the above-mentioned considerations and the specificities of the case at hand, the Single Judge decided that the Respondent must pay the amount of USD 141,739 to the Claimant.

44. Taking into consideration the Claimant's request, the Single Judge decided to award interest on said amount at the rate of 12% *p.a.* as of from 2 February 2021 until the date of effective payment.

45. The Single Judge referred to the fine of 10% in respect of payment failures, agreed to in clause 3.4 of the loan agreement and deemed said penalty is not to be considered disproportionate and/or excessive, therefore the Single Judge decided that the Respondent should pay to the Claimant the fine of USD 14,174, i.e. 10% of the outstanding amount of USD 141,739.

46. In continuation, the Single Judge deemed that for the timeframe between the end of the loan with the Respondent and the transfer of the player to the New York Red Bulls, the Claimant had to pay the November and December 2020 salaries of the player. Consequently, the Single Judge decided that the Respondent is liable to pay to the Claimant the amount of BRL 15,000 as further damages.

47. As regards to the administrative and procedural cost, the Single Judge referred to art. 25 par. 8 of the Procedural Rules as well as to its long-standing and well-established jurisprudence, in accordance with which no procedural compensation shall be awarded in

proceedings in front of the Players' Status Chamber. Consequently, the Single Judge decided to reject the Claimant's request relating to administrative and procedural cost.

iii. Compliance with monetary decisions

48. Finally, taking into account the applicable Regulations, the Single Judge referred to art. 24bis par. 1 and 2 of the Regulations, which stipulate that, with his 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.
49. In this regard, the Single Judge 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.
50. Therefore, bearing in mind the above, the Single Judge 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. 24bis par. 2, 4, and 7 of the Regulations.
51. 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.
52. The Single Judge 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. 24bis par. 8 of the Regulations.

d. Costs

53. In continuation, the Single Judge referred to art. 25 par. 2 of the Regulations in combination with art. 18 par. 1 of the Procedural Rules, according to which in the proceedings before the Players' Status Chamber and the Single Judge costs in the maximum amount of USD 25,000 are levied. The costs are to be borne in consideration of the parties' degree of success in the proceedings and are normally to be paid by the unsuccessful party.
54. In this regard, the Single Judge indicated that the claim of the Claimant is partially accepted.
55. Consequently, the Single Judge concluded that the final cost in the proceedings in the amount of CHF 25,000 have to be paid by the parties to FIFA as follows:

- (a) an amount of USD 5,000 to be paid by the Claimant. In view of the fact that the Claimant has already paid advance of costs in the amount of CHF 5,000, no further procedural costs shall be charged; and
- (b) an amount of USD 20,000 are to be paid by the Respondent

IV. Decision of the Players' Status Chamber

1. The claim of the Claimant, Oeste Futebol Clube, is partially accepted.
2. The Respondent, Albirex Niigata, has to pay to the Claimant, the following amounts:
 - (a) USD 141,739 as outstanding amount plus 12% interest *p.a.* as from 2 February 2021 until the date of effective payment;
 - (b) USD 14,174 as penalty; and
 - (c) BRL 15,000 as further damages.
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. 24bis 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 the ban shall be of 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. 24bis par. 7 and 8 and art. 24ter of the Regulations on the Status and Transfer of Players.
7. The final costs of the proceedings in the amount of USD 25,000 are to be paid by the parties to FIFA as follows: (cf. note relating to the payment of the procedural costs below)
 - (a) an amount of USD 5,000 by the Claimant. In view of the fact that the Claimant has already paid advance of costs in the amount of CHF 5,000, no further procedural costs shall be charged.; and
 - (b) an amount of USD 20,000 by the Respondent

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).

CONTACT INFORMATION

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