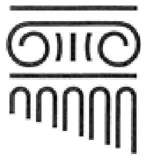

TAS / CAS
TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

CAS 2022/A/9047 Korona S.A. v. Iván Márquez Álvarez & FIFA

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Mr Edward Canty, Solicitor, Manchester, United Kingdom

in the arbitration between

Korona S.A., Poland

Represented by Mr Artur Meissner, Attorney-at-Law, Poznań, Poland

- Appellant -

and

Iván Márquez Álvarez, Spain

Represented by Mr Pierluigi Tiberi and Mr Jesús Otaolaurruchi Caro, Attorneys-at-Law, Madrid, Spain

- First Respondent -

and

Fédération Internationale de Football Association, Switzerland

Represented by Mr Miguel Liétard, Director of Litigation, Zurich, Switzerland

- Second Respondent -

I. PARTIES

1. Korona S.A. (the "Appellant" or "the Club") is a football club with its registered office in Kielce, Poland. The Club is registered with the Polish Football Association (the "PZPN"), which in turn is affiliated with the Fédération Internationale de Football Association and is currently participating in the Ekstraklasa, the first division in the Polish football league system.

2. Iván Márquez Álvarez (the "First Respondent" or "the Player") is a is a player of Spanish nationality, now playing for the Dutch football club NEC Nijmegen.

3. Fédération Internationale de Football Association (the "Second Respondent" or "FIFA") is an association under Swiss law (Articles 60 et seq. of the Swiss Civil Code (the "SCC")) 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.

II. FACTUAL BACKGROUND

4. 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 the present appeals arbitration proceedings.[1] This background is made for the sole purpose of providing a synopsis of the matter in dispute. Additional facts and allegations found in the Parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal analysis that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, this Award refers only to the submissions and evidence considered necessary to explain its reasoning.

A. Background Facts

5. On 16 August 2018, the Club and the Player signed an employment contract valid as from 16 August 2018 until 30 June 2020 (the "Playing Contract") in which it was agreed, *inter alia*, as follows:

"*c) pay the Player:*

- *in the period from the date of* ***16 August 2018*** *till the day of* ***30 June 2019:***
- ***basic remuneration*** *in the total amount of* ***101 600,00 Euro gross (one hundred one thousand six hundred Euro gross)****, payable in 11 monthly installments: first in amount of* ***5 600,00 Euro gross (five thousand six hundred Euro gross) and 10 monthly installments of 9 600,00 Euro gross (nine thousand six hundred Euro gross)*** *each, payable until the 15th day of each month for the previous month,*

[1] Several of the documents submitted by the Parties and referred to in this Award contain various misspellings: for the sake of efficiency and to facilitate the reading of this Award, not all of the misspellings have been identified with a [sic] or otherwise.

- ***bonus** for each point scored by the first team of the Club, in the first 30 league queues of the Ekstraklasa league championship of season 2018/2019 in the amount of:*
- ***400,00 Euro gross (four hundred Euro gross) – if the Player starts the match in the basic eleven,***
- ***200,00 Euro gross (two hundred Euro gross) – if the Player enters to the game during the match,***
- ***100,00 Euro gross (one hundred Euro gross) – if the Player will be in the match, but will not enter to the game.***

- *if the Player will play in 15 matches of the Ekstraklasa in season 2018/2019 in the first team of the Club (1 match is minimum 60 minutes) then he will receive an additional fee of **7 700,00 Euro gross (seven thousand seven hundred Euro gross)***

- *in the period from the date of **01 July 2019** till the day of **30 June 2020:***
- ***basic remuneration***
- ***in the total amount of 111 480,00 Euro gross (one hundred eleven thousand four hundred eighty Euro gross), payable in 12 equal monthly installments of 9 290,00 Euro gross (nine thousand two hundred ninety Euro gross)**, until the 15th day of each month for the previous month – if the Player will play less than 20 matches of the Ekstraklasa in season 2018/2019 in the first team of the Club (1 match is minimum 60 minutes)*
- ***in the total amount of 126 000,00 Euro gross (one hundred twenty six thousand Euro gross), payable in 12 equal monthly installments of 10 500,00 Euro gross (ten thousand five hundred Euro gross)**, until the 15th day of each month for the previous month – if the Player will play in minimum 20 matches of the Ekstraklasa in season 2018/2019 in the first team of the Club (1 match is minimum 60 minutes)*

- ***bonus** for each point scored by the first team of the Club, in the first 30 league queues of the Ekstraklasa league championship of season 2019/2020 in the amount of:*
- ***400,00 Euro gross (four hundred Euro gross) – if the Player starts the match in the basic eleven,***
- ***200,00 Euro gross (two hundred Euro gross) – if the Player enters to the game during the match,***
- ***100,00 Euro gross (one hundred Euro gross) – if the Player will be in the match, but will not enter to the game.***

- *if the Player will play in 15 matches of the Ekstraklasa in season 2019/2020 in the first team of the Club (1 match is minimum 60 minutes) then he will receive an additional fee of **7 700,00 Euro gross (seven thousand seven hundred Euro gross)***

[…]

6.2 All dispute matters concerning the validity, existence or termination of this Contract are settled by the proper PZPN and FIFA authorities acting in accordance with separate

regulations. Property disputes resulting from this Contract are submitted to the competence of the Football Arbitration Court acting at PZPN or the competent authority of FIFA." (emphasis in original)

6. On 5 March 2020, the Player asked for permission to travel to Spain to accompany his wife in order that she may receive medical treatment for a serious condition and the Club agreed to this and agreed that he could therefore miss the final match of the season on 9 March 2020.

7. On 13 March 2020, the Polish government announced the closure of the Polish borders to counteract the threat of the Covid-19 pandemic; foreign citizens were allowed to enter Poland if they had a work permit, but all international passenger air and rail travel was suspended.

8. Also on 13 March 2020, the Ekstraklasa announced the suspension of the league match schedule until at least the end of the month, with a decision to be taken as to when the resumption would take place.

9. On 14 March 2020, the Spanish government announced similar travel restrictions, preventing foreign travel.

10. On 20 March 2020, the Ekstraklasa announced that the postponement of the league match schedule would be extended to 8 May 2020.

11. On 23 March 2020, the Club wrote to the Player, *inter alia*, as follows:

"*Due to the potential resumption of games of the Polish first division soccer league (PKO Ekstraklasa) planned on 8 May 2020, the Management Board of Korona S.A. requests you to return to Kielce at the latest by 31.03.2020, so that after your mandatory quarantine at home, resulting from the epidemiologic situation, you could participate in training of the 1st team that might start on 13.04.2020.*"

12. On 24 March 2020, the Player's agent, Dimitar Atanasov, wrote to the Club on the Player's behalf, *inter alia*, as follows:

"*Ivan cannot return 31.03 first because there is no flight between Poland and Spain /all is closed/ and second if he back in Kielce must stay 14 days under quarantine, instead staying with his family supporting his wife in her fight. At the moment in Spain 40 000 people are with Covid 19 and already 4600 died!!! Please lets be reasonable and lets follow the situation every day and create some emergency plan, because also i don't think that Ekstraklasa will start again 01.05. For sure will be later. Same will be with all championships in Europe, even UEFA are thinking to prolong the period of ending the championships 30.06. They already canceled dates for Champions league final /30.06/ and Europa league final in Gdansk /27.06./*

Everyday is different so my suggestion is to ***stay in touch and speak every day****, Ivan is in Spain, staying at home, supporting his wife, training at home, looking after his baby. if there are some changes and this decease stop we can talk and make immediately plan*

to return in Poland and start trainings with the team. For now Ivan stays in Spain and follow the news. He ***CANNOT*** *fly no where. All is closed!!!! It is extremely hard situation for all but lets be reasonable and not make hasty decisions. Ivan is top professional and last 2 years gave a lot to the club. Now is time to support each other in this difficult moment. We are open for every day communication- you know my number, also Ivan's, so we can talk anytime. We know also that Korona has financial problems, and we support the Club in this tuff moment, nobody expected this.*"

13. On 28 March 2020, the Club wrote to the Player to propose a reduction in his salary due to the Covid-19 pandemic, *inter alia*, as follows:

"*1) The monthly remuneration arising from the contract of* ***16.08.2019*** *point 2.1. c indent second, in the amount of* ***10 500,00 EURO gross*** *is reduced to the amount of* ***5 250,00 EURO gross*** *for the period from 14 March 2020 to the end of the 2019/2020 season or until 30 June 2020, whichever occurs later.*

Notwithstanding the foregoing, in the event of the first match of the first senior team of Korona S.A. being played after the date of this statement, as part of competitions held by the Ekstraklasa S.A. with the participation of the public, based on the decision to organize a mass event – the date of this match is the end date of the period of reduction of remuneration referred to above."

14. On 2 April, the Club's Vice President, Marek Paprocki, wrote to the Player enclosing the abovementioned document dated 28 March 2020 and a document setting out the proposed amendment to the Playing Contract dated 31 March 2020, *inter alia*, as follows:

"*The Board of Korona S.A. sends the attached statement regarding your professional football player contract*

in connection with extraordinary circumstances caused by the SARS-CoV-2 virus epidemic, which prevents both parties from performing the contract.

We also send an amendment to your contract, which introduces changes resulting from the above-mentioned statement,

with a request to sign it and send the scan back by email (or send it to the Club in paper form)."

15. On 6 April 2020, the Club's First Team Manager, Lukasz Tomczyk, exchanged messages with the Player to encourage him to return to the Club.

16. On 8 April 2020, the Player wrote to the Club, *inter alia*, as follows:

"*korona kielce club: I do not accept it for these reasons: I have given everything in this club, you know the situation of my family and the reasons why I played with my sick wife which no player does, and I also have to come to Spain with your permission to take care of her and even more. with The virus is a person at risk, as you will understand in my situation. I need all the money to pay for his treatment, so I cannot accept it. I hope*

this great club and its fans understand me greetings ivan marquez"

17. On 10 April 2020, the Club wrote to the Player to unilaterally terminate the Playing Contract, *inter alia*, as follows:

"*Due to:*

*1/ the conclusion on **16.08.2018** the contract with **Ivan Marquez***

2/ the extraordinary circumstances related to the SARS - CoV-2 virus epidemic, which prevent both Parties to the contract from performing it, the circumstances provided for in art. 492 and 357 of the Civil Code.

*Declares to Mr. **Ivan Marquez** that:*

*As of 31 March 2020, Korona S.A. withdraws from the contract-agreement of **16.08.2018** due to the lack of possibility of providing mutual benefits, for which neither party is liable as they are caused by force majeure.*"

18. On 29 April 2020, the Player sent a default letter to the Club, *inter alia*, as follows:

"*On March 28, 2020, the Club sent an e-mail to the Player in order to communicate him that was going to reduce in fifty percent (50%) his wage for the period from 14th March, 2020 to the end of the 2019/2020 season or unil 30th June, 2020, whichever occurs later, as a result of SARS-CoV-2 health crisis.*

On April 10, 2020, to the surprise of the Player, the Club sent another e-mail communicating him that his employment contract was unilaterally terminated. As the Club said, "due to the lack of possibility of provinding mutual beneficts, for which neither party is liable as they are caused by force majeure".

Although it is true that the current situation of football competitions has been affected by the health crisis caused by the SARS-CoV-2. Nevertheless, the Club can not be excused itself in this circumstances to unilaterally terminate the employment contract of the Player. Therefore, the Club has unilaterally terminated the employment contract without just cause.

[…]

At the present date, the Club has already paid seventy three thousand five hundred Euros gross (73.500,00 € gross). In other words, the Club has paid the basic remuneration corresponding to the months of July, August, September, October, November and December 2019; and January 2020.

The Club has unilaterally terminated the employment contract of the Player without just cause and, therefore, must pay the rest of all amounts corresponding to the 2019/2020 season:

• Basic remuneration: fifty two thousand five hundred Euros gross (52.500,00 € gross).
• Bonus for each point scored: nine hundred Euros gross (900,00 € gross)
• Appareance Bonus: seven thousand seven hundred Euros gross (7.700,00 € gross)

In the light of the foregoing, we hereby formally request the Club, in the next ten (10) days from receipt of the present communication, to proceed with the payment of ***SIXTY ONE THOUSAND ONE HUNDRED EUROS (61.100,00 €) GROSS.***

To end, independently of the present request, we declare that our client reserves any and all of its legal rights arising from the present claim. Should the Club not carry out the aforesaid payment within the time limit granted, the Player will have no other alternative but to commence legal actions against the Club before the FIFA competent legal bodies." (emphasis in original)

19. On 10 May 2020, having received no response, the Player sent a further default letter to the Club (received on 12 May) in very similar terms, *inter alia*, as follows:

"*Once again, we hereby write you on behalf of our client, the professional football player Iván Márquez Álvarez (hereinafter, the "Player") regarding* ***the Contract Agreement subscribed between the Player and Korona Spólka Akcyjna (hereinafter, the "Club") on August 16th, 2018 (hereinafter, the "Agreement")****.*

[…]

On April 29, 2020, we sent an e-mail with evidence of receipt in order to request to the Club the due amount regarding the Agreement, but we haven't received any reply.

To end, independently of the present request, we declare that our client reserves any and all of its legal rights arising from the present claim. Should the Club not carry out the aforesaid payment within the time limit granted, the Player will have no other alternative but to commence legal actions against the Club before the FIFA competent legal bodies." (emphasis in original)

20. On 15 May 2020, the Club wrote to the Player, *inter alia*, as follows:

"*Ivan has always been appreciated as a professional footballer. We even agreed to his absence in the last match played against ŁKS Łódź, which was very important to us in the context of the struggle to stay in the league.*

However, we understand that Ivan's personal problems are the most important in this situation and we wish him that his wife's health problems end happily.

After the announcement of the state of epidemic threat by the Polish government on 14 March 2020 Ekstraklasa games were suspended. On 23 March 2020, the Club was informed by Ekstraklasa S.A. about the resumption of Ekstraklasa games scheduled for 8 May 2020.

Accordingly, Ivan Marquez was summoned by the Management Board of Korona S.A. by letter of 23 March 2020 to return to the club.

After returning, he was to undergo a two-week quarantine and start training. Because Ivan did not return to the club, which we understand due to the epidemic prevailing in Spain and Poland, the Management Board of Korona SA, in order to maintain the continuity of Ivan's contract, sent a proposal to reduce his contract by 50% on 28 March 2020. Ivan Marquez informed Korona S.A. that he does not agree to the proposed reduction of the contract.

As a consequence, the Management Board of Korona S.A., having no other option, submitted to Ivan on 10 April 2020 a statement of withdrawal from the contract, because the services to which the Player was obliged by the contract cannot be provided.

It is incomprehensible to us to state in your letter that the withdrawal from the contract was made to a Player without just cause.

Incomprehensible to the Management Board of Korona S.A. there is also a demand to pay the Player all contractual obligations due until the end of the season, in the event of the Player's absence from the Club for two and a half months and no declared return to the club.

We understand the difficult situation of Ivan and his family, we are worried with him about the health of his wife and we wish Ivan that everything would end happily, but in this situation we could not make any other decision than withdrawing from the Player's contract."

21. On 21 May 2020, the Player sent a further default letter to the Club, *inter alia*, as follows:

"*As the Club said by email on 15th May 2020, Player's wife has serious health problems.* […] *Notwithstanding the health difficulties of his wife, the Player was only absent in the last match played against LKS Lódz and the Club was agreed with that. The Player has always been fully committed to the Club.*

On March, the Player traveled to Spain […]. *On 14th March 2020, Spanish Government decreed Alarm State due to the COVID 19 pandemic, and as a result, borders were closed and all flights were banned, therefore, the Player was not allowed to leave Spain.*

On 23rd March 2020, in the midst of health crisis, the Player was summoned by the Management Board of Korona S.A. by letter to return to the Club.

On 24th March 2020, Dimitar Atanasov who is the Player's intermediary in Poland emailed to the Club in order to explain the current situation. As the Club acknowledged in the email of 15th May 2020, the COVID 19 pandemic prevailing in Spain and Poland (and in the rest of the world) and thus the Player was not allowed to go back to Poland.

On 28th March 2020, the Club sent an e-mail to the Player in order to communicate him that was going to reduce in fifty percent (50%) his wage for the period from 14th March

2020 to the end of the 2019/2020 season or until 30th June, 2020, whichever occurs later, as a result of SARS-CoV-2 health crisis. On April 6th, the team captain on behalf of the entire team notified to the Club that the Club had to pay the wages due and then the entire team would negotiate the reduction in the wages.

On April 10th 2020, to the surprise of the Player, the Club sent another e-mail communicating him that his employment contract was unilaterally terminated. As the Club said, "due to the lack of possibility of providing mutual benefits, for which neither party is liable as they are caused by force majeure".

Furthermore, it is important to emphasize that the training (individual training) started on May 4th May 2020.

Although it is true that the current situation of football competitions has been affected by the health crisis caused by the COVID 19. Nevertheless, the Club cannot be excused itself in these circumstances to unilaterally terminate the employment contract of the Player.

Furthermore, the Club cannot be excused itself in the fact that the Player did not accept the reduction in his salary proposed by the Club to unilaterally terminate the employment contract of the Player. The Player was entitled not to accept the reduction in his salary; besides, he was just informing the Club to pay the due wages before starting any negotiation.

It seems that the Club has unilaterally terminated the employment contract of the Player in order to save money. Therefore, the Club has unilaterally terminated the employment contract without just cause.

[…]

In the light of the foregoing, we hereby formally request the Club, in the next ten (10) days from receipt of the present communication, to proceed with the payment of ***SIXTY-ONE THOUSAND ONE HUNDRED EUROS (61.100,00 €) GROSS.***

To end, independently of the present request, we declare that our client reserves any and all of its legal rights arising from the present claim. Should the Club not carry out the aforesaid payment within the time limit granted, the Player will have no other alternative but to commence legal actions against the Club before the FIFA competent legal bodies." (emphasis in original)

22. On 3 June 2020, the Club wrote to the Player, *inter alia*, as follows:

"*Once again, we explain that our decision to withdraw from the contract with Ivan Marquez was justified, because the Player was absent from the club from the beginning of March 2020 and has not made any declaration when he can return to Kielce.*

The discussion of reducing the Player's salary by 50% did not matter for our decision. Many other players also did not agree to a reduction of their salary and the Club did not apply any sanctions.

The salary reduction was only a suggestion from the Club and Ivan Marquez was treated like any other player of our Club.

The remuneration due to Ivan by 31 March 2020 will be paid on the dates when we will pay remuneration to other players.

On 22 May 2020, Ivan Marquez received remuneration for February 2020.

On what basis is the Club supposed to pay to the player who does not provide the club any servics and has not returned to the club despite being called back?

We believe that further correspondence will not contribute anything."

23. After having sent his third letter of default on 21 May 2020, the Club then paid to the Player the outstanding salaries, for the months of February and March 2020, up to the date of termination of the Playing Contract.

24. On 1 August 2020, the Player signed an employment contract with another Polish club, MKS Cracovia SSA, valid as from 1 August 2020 until 30 June 2022.

25. On 8 August 2020, the Club signed a dismissal notice to allow the Player to sign for another club in which it confirmed that the "*player's professional soccer contract concluded with our Club was terminated on 31 March 2020*".

26. On 7 March 2022, the Player sent a further default letter to the Club, *inter alia*, as follows:

"*After almost two years, which have been very hard due to the illness of the Player's wife, we are contacting the Club for the fourth time to ask you for the payment of the due amount.*

[…]

At the present date, the Club has already paid ninety four thousand five hundred Euros gross (94.500,00 € gross). In other words, the Club has paid the basic remuneration corresponding to the months of July, August, September, October, November and December 2019; and January, February and March 2020.

The Club has unilaterally terminated the employment contract of the Player without just cause and, therefore, must pay the rest of all amounts corresponding to the 2019/2020 season:

> *• <u>Basic remuneration:</u> thirty one thousand five hundred Euros gross (31.500,00 € gross).*
>
> *• <u>Bonus for each point scored:</u> nine hundred Euros gross (900,00 € gross)*
>
> *• <u>Appareance Bonus:</u> seven thousand seven hundred Euros gross (7.700,00 € gross)*

In the light of the foregoing, we hereby formally request the Club, in the next ten (10) days from receipt of the present communication, to proceed with the payment of ***FORTY THOUSAND ONE HUNDRED EUROS (40.100,00 €) GROSS.***

To end, independently of the present request, we declare that our client reserves any and all of its legal rights arising from the present claim. Should the Club not carry out the aforesaid payment within the time limit granted, the Player will have no other alternative but to commence legal actions against the Club before the FIFA competent legal bodies." (emphasis in original)

27. On 17 March 2022, the Club wrote to the Player, *inter alia*, as follows:

"*Korona S.A. maintains its current position on the matter, expressed, inter alia, in the letter of 15 May 2020 and considers the claims presented by Mr. Ivan Marquez Alvarez to be unfounded and lacking any legal basis.*

We understand your client's position and family situation at the time. The Club had this in mind at every stage of the case, but the contract binding the parties was terminated in the manner prescribed by law. There are no grounds to claim that the contract was unilaterally terminated without just cause.

The contract of August 16, 2018 was terminated due to the impossibility of mutual benefits, for which neither party is responsible, as they are caused by force majeure.

It should be noted that Article 27 of the RSTP states that cases of force majeure shall be decided by the FIFA Council, whose decisions are final. The COVID-19 situation is, per se, a case of force majeure for FIFA and football (COVID-19 Guidelines issued by FIFA).

According to the COVID-19 Guidelines issued by FIFA, it must be emphasized that the Club send on March 28, 2020 a proposal to Mr Ivan Marquez Alvarez to reduce his contract by 50%, to which the Player did not agree. As a consequence of the fact that Mr Ivan Marquez Alvarez did not intend to return to the Club and did not agree to reduce his contract, the Management Board of Korona S.A., having no other option, submitted on 10 April 2020 a statement of withdrawal from the contract.

Korona S.A. therefore does not see any grounds for payment of the amounts indicated in your letter."

B. Proceedings before the FIFA Dispute Resolution Chamber

28. On 29 March 2022, following the above, the Player lodged a claim against the Club before the FIFA Dispute Resolution Chamber (the "FIFA DRC") arguing that the Club had terminated the Playing Contract without just cause. The Player requested that the Club be ordered to pay to the Player compensation in the amount of EUR 40,100 corresponding to three monthly salaries of EUR 10,500 each, or the residual value of the Playing Contract, as well as bonuses due under the Playing Contract in the amounts of EUR 900 and EUR 7,700 plus 5% interest per annum from 10 April 2020 until the

date of effective payment. The Player also requested that the Club be sanctioned in accordance with Article 17 paragraph 4 of the Regulations on the Status and Transfer of Players (the "FIFA RSTP").

29. The Club disputed the Player's claim stating that the FIFA DRC was not competent to hear the dispute at hand because clause 6.2 of the Playing Contract explicitly stated that disputes shall be decided by the proper PZPN authority, in particular, the Football Arbitration Court which satisfies the requirements set out in FIFA Circular No. 1010. Furthermore, the Playing Contract was terminated with just cause due to a force majeure event, being the Covid-19 pandemic and the resulting financial difficulty for the Club, and in addition, the Player breached the Playing Contract by refusing to return to Poland as instructed by the Club.

30. On 9 June 2022, the FIFA DRC rendered its decision (the "FIFA DRC Decision" or the "Appealed Decision"), with the following conclusion and operative part:

"*39. The Chamber, after analysing the wording of the jurisdiction clause, concluded that such clause did not clearly and exclusively establish the competence of the Football Arbitration Court acting at PZPN, in accordance with art. 22 par. 1 lit. b) of the aforementioned Regulations.*

40. As a consequence, the Chamber was of the opinion that the first pre-requisite for establishing the competence of an NDRC was not met, and therefore, without the need to enter the analysis of any further requirement, it established that the Respondent's objection to the competence of FIFA to deal with the present matter has to be rejected and that the Dispute Resolution Chamber is competent, on the basis of art. 22 par. 1 lit. b) of the Regulations, to consider the present matter as to the substance.

[…]

48. Following these general observations, the Chamber noted that, in the case at stake, the Respondent proposed a unilateral variation to the Contract, which the Claimant rejected, prior to the termination. The Chamber considered that this alone was sufficient in establishing that the Respondent had terminated the Contract without just cause, in line with the explicit wording of FAQ no. 16, as well as pages 6 and 7 of the FIFA COVID-19 guidelines.

49. Notwithstanding the above, the Chamber went on to analyse the allegation of the Respondent – disputed by the Claimant – that the temporary absence of the latter as from 9 March 2022 until the date of termination, without authorisation after the announcement that league matches would be resumed by the Polish Professional Football League, consisted of a breach of contract on his part.

50. In view of the foregoing, the Chamber referred to art. 13 par. 5 of the Procedural Rules (October 2021 edition), according to which a party that asserts a fact has the burden of proving it, and went on to analyse the arguments provided by the parties in support of their allegations. In this respect, the Chamber noted that

the Respondent summoned the Claimant to return from Spain to Poland, following the announcement by the Polish Professional Football League that games shall resume on 8 May 2020, at a time when there were travel restrictions in place in Spain. Notwithstanding the above, the Chamber also noted that the Claimant, despite stating that he needed to tend to a difficult family issue, never explicitly refused to return to the Respondent after the restrictions in Spain would lift; on the contrary, the Claimant explicitly communicated, via his agent on 24 March 2020, that he intended to return to Poland after the restrictions in Spain, preventing him from leaving, would be lifted.

51. In this scenario, the Chamber recalled its long-standing jurisprudence, according to which only a breach or misconduct which is of a certain severity justifies the termination of a contract without prior warning. In other words, only when there are objective criteria which do not reasonably permit to expect the continuation of the employment relationship between the parties, a contract may be terminated prematurely. Hence, if there are more lenient measures which can be taken in order for an employer to assure the employee's fulfilment of his contractual duties, such measures must be taken before terminating an employment contract. A premature termination of an employment contract can only be an ultima ratio.

52. With the above in mind and after having carefully analysed the parties' submissions, the Chamber concluded that the absence under the circumstances of the present case, namely travel restrictions mandated by national law, preventing the Claimant from returning when summoned, cannot be deemed as a substantial breach of an employment contract, capable of triggering the consequences of an unlawful termination. The Chamber also underlined that, contrary to the Respondent's argumentation, the Claimant did submit enough evidence to demonstrate that the Respondent was fully aware of his difficulties to return to the Respondent, namely the aforementioned communication made through his agent on 24 March 2020, in which he informed the Respondent of the fact that no outgoing flights from Spain were available due to the COVID-19 travel restrictions mandated by the Spanish government.

ii. Consequences

53. 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.

54. The Chamber observed that the Claimant had no outstanding amounts due to him under the Contract at the time of termination. In this respect, it took note in particular of the fact that both parties agreed that the Respondent, after being put in default for a third time on 21 May 2020, paid the outstanding salaries to the Claimant which corresponded to the months of February 2020 and March 2020.

[…]

58. *Bearing in mind the foregoing as well as the claim of the Claimant, the Chamber proceeded with the calculation of the monies payable to the Claimant under the terms of the Contract from the date of its unilateral termination until its end date. Consequently, the Chamber concluded that the amount of EUR 40,100 (i.e. i.e. 3 times EUR 10,500, plus EUR 900, plus EUR 7,700 or the residual value of the Contract) serves as the basis for the determination of the amount of compensation for breach of contract.*

59. *In continuation, the Chamber verified as to whether the Claimant had signed an employment contract with another Respondent 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 Claimant's general obligation to mitigate his damages.*

60. *Indeed, the Claimant found employment with MKS Cracovia SSA. However, in this respect, the Chamber deemed it important to point out that the New Contract signed by the Claimant had a contractual start date that was after the Contract with the Respondent would have naturally expired.*

61. *Consequently, the Chamber referred to art. 17 par. 1 lit. ii) of the Regulations, according to which, in case there is no new contract to be taken into account, as a general rule, the compensation shall be equal to the residual value of the Contract that was prematurely terminated.*

62. *In this respect, the Chamber decided to award the Claimant compensation for breach of contract in the amount of EUR 40,100, as the residual value of the Contract and the contractual bonus payments due to the Claimant, the fulfilment of the necessary conditions of which were substantiated by the Claimant in his request.*

63. *Lastly, taking into consideration the Claimant's request as well as the constant practice of the Chamber in this regard, the latter decided to award the Claimant interest on said compensation at the rate of 5% p.a. as of the date of claim, 29 March 2022 until the date of effective payment.*

[…]

IV. Decision of the Single Judge of the Players Status Chamber

1. *The claim of the Claimant, Iván Márquez Álvarez, is partially accepted.*

2. *The Respondent, Korona Kielce, has to pay to the Claimant the following amount:*

- EUR 40,100 as compensation for breach of contract without just cause, plus 5% interest p.a. as from 29 March 2022 until the date of effective payment.

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 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 article 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.*" (emphasis in original)

31. On 28 June 2020, the grounds of the Appealed Decision were notified to the Parties.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

32. On 18 July 2022, the Appellant lodged an appeal with the Court of Arbitration for Sport (the "CAS") against the Appealed Decision, pursuant to Article R48 of the CAS Code of Sports-related Arbitration (edition 2021) (the "CAS Code") and requested that the case be submitted to a sole arbitrator.

33. On 22 July 2022, the CAS Court Office provided a copy of the Statement of Appeal to the Respondents.

34. On the same day, the Second Respondent confirmed its agreement to the case being submitted to a sole arbitrator.

35. On 27 July 2022, the First Respondent confirmed his agreement to the case being submitted to a sole arbitrator.

36. On 28 July 2022 the Appellant filed its Appeal Brief pursuant to Article R51 of the CAS Code, a copy of which was circulated to the Respondents on 2 August 2022.

37. On 4 August 2022, the CAS Court Office confirmed that, in accordance with the Second Respondent's request of 3 August 2022, the deadline for it to file its Answer was set aside and would be fixed after the Appellant had paid its share of the advance of costs.

38. On 19 August 2022, the CAS Court Office confirmed that, in accordance with the First Respondent's request of 18 August 2022, the deadline for it to file his Answer was set aside and would be fixed after the Appellant had paid its share of the advance of costs.

39. On 9 September 2022, the CAS Court Office confirmed that the Appellant had paid the advance of costs and therefore fixed the deadline for the Respondents to file their Answers. Furthermore, in accordance with Article R54 of the CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to this case was constituted as follows:

    Sole Arbitrator: Mr Edward Canty, Solicitor in Manchester, United Kingdom

40. On 25 October 2022, the Second Respondent, after having been granted an extension further to Article R32 of the CAS Code, filed its Answer pursuant to Article R55 of the CAS Code.

41. On 31 October 2022, the First Respondent, after having been granted an extension further to Article R32 of the CAS Code, filed his Answer pursuant to Article R55 of the CAS Code.

42. On 1 November 2022, the CAS Court Office circulated copies of the Respondents' Answers and invited the Parties to indicate their preference for a hearing to be held or for the matter to be determined based on the written submissions filed.

43. On the same day, the Second Respondent indicated that it did not wish to have a hearing and was content to have the case determined on the basis of the written submissions.

44. On 3 November 2022, the CAS Court Office wrote to the Parties to request the First Respondent to provide copies of two exhibits which he had referenced in his Answer but had omitted to include.

45. On 7 November 2022, the First Respondent provided copies of the requested exhibits and also indicated that he did not wish to have a hearing and was content to have the case determined on the basis of the written submissions.

46. On 8 November 2022, the Appellant indicated it did not wish to have a hearing and was content to have the case determined on the basis of the written submissions.

47. On 11 November 2022, the CAS Court Office wrote to the Parties to confirm the Sole Arbitrator's decision that it was not necessary to hold a hearing and the case would be determined based on the Parties' written submissions.

48. On 16 November 2022, 23 November 2022 and 15 November 2022 respectively, the Appellant, the First Respondent and the Second Respondent returned duly signed copies of the Order of Procedure to the CAS Court Office.

IV. SUBMISSIONS OF THE PARTIES

49. The following summaries of the submissions of the Parties is illustrative only and does not necessarily comprise every contention put forward by the Parties. The Sole Arbitrator has, however, carefully considered all the submissions and evidence filed by the Parties with the CAS, even if there is no specific reference to those submission or evidence in the following summaries.

A. The Appellant

50. The Appellant's submissions, in essence, may be summarized as follows:

- The FIFA DRC did not have jurisdiction to determine the underlying dispute which instead should have been referred to PZPN Football Court of Arbitration. Article 22(b) of the FIFA RSTP provides that FIFA is competent to hear "*employment-related disputes between a club and a player of an international dimension*" however the parties may explicitly elect for disputes to be decided by an independent arbitration tribunal established at national level, providing it is referred to in the contract and the "*independent national arbitration tribunal must guarantee fair proceedings and respect the principle of equal representation of players and clubs*".

- Paragraph 6.2 of the Playing Contract stated that "*All dispute matters concerning the validity, existence or termination of this Contract are settled by the proper PZPN and FIFA authorities acting in accordance with separate regulations. Property disputes resulting from this Contract are submitted to the competence of the Football Arbitration Court acting at PZPN or the competent authority of FIFA*." Further, the Playing Contract is subject to Polish law and the parties agree to abide by the regulations of the PZPN. The PZPN Football Court of Arbitration complies with the requirements of independence, equal representation and fair proceedings and therefore it had jurisdiction to hear the underlying dispute rather than the FIFA DRC.

- Article 19 of the PZPN Statutes sets an obligation to comply with the regulations of FIFA, UEFA and the PZPN, with paragraph 1(7) obliging the Club to "*formulate in their statutes or agreements related to playing football a clause stipulating that all domestic disputes concerning material and/or non-material rights which could be the subject of settlement, including those related to contractual stability and club licences, shall be brought to the independent and impartial Football Court of Arbitration of PZPN*".

- Therefore, the Club was under an obligation to comply with the PZPN Statutes and therefore was obliged to ensure that a dispute it may have with a player was referred to the PZPN Football Court of Arbitration and not to the FIFA DRC.

- Turning to the composition, it is clear that the PZPN Football Court of Arbitration satisfied the requirements of Article 22(b) of the FIFA Statutes, as demonstrated by Article 11, paragraph 2 of the PZPN Statutes which confirmed that "*The Management Board of PZPN appoints and dismisses the Chairman, Vice-Chairman and Secretary of the Football Court of Arbitration at the request of the President of PZPN. The Management Board appoints the remaining 2 members of the Presidium of the Court, and subsequently 27 arbitrators proposed, respectively, by the league club community (9 arbitrators), league player community (9 arbitrators) and the Chair of the Court (9 arbitrators).*" This demonstrates that most of the arbitrators (20) are ones proposed by neutral and independent communities.

- Furthermore, Article 22 of the Regulations of the PZPN Football Court of Arbitration sets out the procedure for selecting arbitrators, which allows for each party to select an arbitrator, and Articles 25-31 provide for the possibility to remove an arbitrator if there are doubts as to impartiality and independence. Therefore, this demonstrates that the PZPN Football Court of Arbitration meets the criteria set out in FIFA Circular No. 1010.

- Indeed, Article 37 requires that proceedings are conducted "*in a way that ensures equal treatment of parties and the right of each party to be heard and present their respective statements and evidence to support them.*"

- Therefore, the PZPN Football Court of Arbitration satisfies the requirements of Article 22(b) of the FIFA RSTP and the FIFA Circular No. 1010, and the requirements of the PZPN Statutes require a dispute such as the underlying dispute between the Club and the Player to be referred to PZPN Football Court of Arbitration and not to the FIFA DRC.

- Turning to the substantive merits, the Club maintains that there was no bad faith on its part at any stage and that it had the right to terminate the Playing Contract in the circumstances.

- The Club were always sympathetic to the Player's personal situation and allowed him to travel to Spain, when necessary, even though the Playing Contract placed obligations on him to be available to train.

- When the Covid-19 pandemic started, the Polish borders were not completely closed because an exception was made for people employed in Poland as they were still allowed to return to Poland. The situation was constantly changing and on 20 March 2020, the Ekstraklasa announced that matches would resume on 8 May 2020. Therefore, the Club sent a request to the Player on 23 March 2020 to return to the Club on 31 March 2020 to allow him to undergo a 14-day quarantine before returning to training for the first match on 8 May 2020. Unfortunately, the Player refused to return and also refused to help with the problems by reducing his salary.

- FIFA released its publication, Covid-19 Football Regulatory Issues, on 7 April 2020 and it encouraged clubs and players to work together to reach collective agreement if leagues are suspended with unilateral decisions to vary agreements only recognised

if in accordance with national law or covered by a collective agreement. If this is not the case then the unilateral decision to vary terms will be considered by the FIFA DRC or the FIFA Players' Status Chamber and must be made in good faith, reasonable and proportionate. It referred to five specific consideration which would be taken into account to determine the reasonableness of such a decision:

"*a) whether the club had attempted to reach a mutual agreement with its employee(s);*

b) the economic situation of the club;

c) the proportionality of any contract amendment;

d) the net income of the employee after contract amendment;

e) whether the decision applied to the entire squad or only specific employees."

- Taking each of these elements in turn, the Club did attempt to reach agreement with its players, with 14 deciding to lower their salaries, 7 deciding not to cooperate and it was only the Player who did not engage in any compromise discussions. Therefore, the Club not only attempted to reach agreement but was successful with many of the players.

- In terms of the economic situation of the Club, this was very difficult and its audited financial statements for the period 1 July 2019 to 30 June 2020 showed a "*net loss of PLN 4,677,086.98*" which meant the Club's financial situation was at risk and unfortunately it then suffered relegation from the Ekstraklasa to the 1st League.

- With regard to the proportionality of the proposed contract amendment, unfortunately the Club's attempts to find a proportionate and adequate solution were not met with any goodwill from the Player. He refused to negotiate and also refused to return to the Club despite the Polish borders remaining open to those who worked in Poland. This showed his attitude towards his obligations and his refusal to return was due to personal reasons.

- The net income of the Player would have been a fixed remuneration of 50% of the Playing Contract value, which he would have the right to receive despite not providing any services to the Club.

- Finally, as referenced above, the proposal to change salaries applied to all players of the Club.

- The Club also notes that at the time of these discussions and the termination of the Playing Contract, the FIFA Covid-19 Football Regulatory Issues document had not yet been published or any other binding guidance which the Club could rely on. The Club was left to interpret the provisions of the Playing Contract, Polish law as well as the extraordinary situation Covid-19 presented. Therefore, in accordance with Polish law, in the absence of the possibility of mutual performance due to force majeure, the Club had no option but to terminate the Playing Contract.

- The principle of *pacta sunt servanda* is demonstrated by Article 13 of the FIFA RSTP whereby a playing contract can only be terminated upon expiry of the term or by mutual agreement. However, an exception to this principle is where "*unexpected and severe circumstances distorting the balance of the contract may affect the validity of the contract, interpretation of the contract and the enforceability of the contract.*"

- Force majeure is one such circumstance which is applicable to the Playing Contract following the outbreak of Covid-19 and is defined as an event which is external in nature, impossible (or almost impossible) to predict and the consequences of which cannot be prevented.

- Given that the contractual obligation is of a reciprocal nature, the lack of performance by one party (the Player not providing his services due to restrictions imposed by the pandemic) entails such consequence that such party cannot expect to receive the reciprocal benefit from the other party, proportionally to his lack of performance.

- There is no statutory definition of force majeure in Swiss law but Articles 107 – 109 of the Swiss Code of Obligations (the "SCO") are relevant which establish that "*in cases where a party is in default, the other party may set an appropriate time limit for the performance to be fulfilled. If there is no performance by the defaulting party during this time period, the other party may withdraw from the contract.*"

- The FIFA Covid-19 Football Regulatory Issues document confirmed that "*the disruption to football caused by COVID-19 was a case of force majeure. Article 27 of the RSTP states that cases of force majeure shall be decided by the FIFA Council, whose decisions are final. The COVID-19 situation is, per se, a case of force majeure for FIFA and football.*"

- Despite this, FIFA indicated in its Answer that the effect of Covid-19 and whether it was a force majeure event must be considered on a case-by-case basis taking into account all of the circumstances.

- Given this, the consequences of the Player's failure to provide services to the Club must include termination or withdrawal from the Playing Contract. The Club did not terminate the Playing Contract due to the Player's fault, but instead due to circumstances which neither party was responsible for.

- In the alternative, the termination of the Playing Contract was with just cause, in accordance with Article 14 of the FIFA RSTP, because there was no other option than to terminate given the extraordinary circumstances. The lengthy absence of the Player does constitute just cause for the Club to terminate the Playing Contract, provided it was without authorization; the Club had requested his return and, with the Polish borders open, he had no justification for not returning (having only cited his family circumstances as the reason preventing his return as opposed to any other technical reason).

- With regard to the compensation awarded in the Appealed Decision of EUR 40,100, this is not correct because the Player is not entitled to the remuneration for the months

of April, May and June 2020 because the Playing Contract was correctly terminated. Furthermore, he is not entitled to the bonuses of EUR 900 and EUR 7,700 because these should only be awarded if the Player was still participating in the competition, which he was not.

51. Accordingly, the Appellant submitted the following requests for relief:

"*1. To set aside the before-mentioned Decision of FIFA DRC in its entirety.*

2. To confirm that the FIFA DRC did not have jurisdiction to adjudicate the claim filed by the Player (Respondent 1).

3. To rule that the termination of the contract between the Appellant and the Respondent 1 was of just cause.

4. To find that the Appellant is not obliged to pay Mr Iván Márquez Álvarez (Respondent 1) an amount said in the Decision.

5. To rule that the Respondents shall bear all the costs before FIFA and the CAS as well as the fees of the Appellant's counsel in the CAS procedure at amount at least of 5.000 CHF.

6. The Appellant requests that this case may be submitted to a Sole Arbitrator."

B. The First Respondent

52. The First Respondent's submissions, in essence, may be summarized as follows:

- The Club has mischaracterised the position regarding the ability of the Player to travel at the time it requested his return (on 23 March 2020); as confirmed by evidence supplied by the Club itself, whilst foreign citizens working in Poland could return, all international passenger air and rail connections were suspended so there was no way the Player could actually travel back to Poland from Spain.

- Furthermore, despite the Club requesting his return at this time and then terminating the Playing Contract on 10 April 2020, the Club did not resume playing matches in the Ekstraklasa until 31 May 2020.

- The Appealed Decision is correct in determining that the FIFA DRC had jurisdiction to hear the underlying dispute because of the international dimension of the dispute and the express reference in clause 6.2 of the Playing Contract regarding the jurisdiction of the "*competent authority at FIFA*". There is no clear, explicit and exclusive reference in the Playing Contract to the choice of law that applied and therefore, in light of clause 6.2 which provides for FIFA jurisdiction, Article R58 of the CAS Code and Article 57(2) of the FIFA Statutes, the FIFA Regulations should be applied and, subsidiarily, Swiss law. The fact that the Appellant has appealed against a decision of the FIFA DRC is a tacit and indirect choice of law, as Swiss law is the law of the country where FIFA is domiciled.

- The Player always intended to fulfil his obligations with the Club however the Club proposed a unilateral variation of the Playing Contract, which is not the same as setting an appropriate time-limit for the performance to be fulfilled, and when the Player rejected the first proposal, the Club immediately and unilaterally terminated the Playing Contract. Given this step is an *ultima ratio* measure, in support of the principle of contractual stability the Club should first have put in place a series of measures, such as the threat of a penalty and then a fine. As to *force majeure,* according to the FIFA Covid-19 Football Regulatory Issues publication, its existence shall be established on a case by case basis and it must therefore be established by the party invoking it. Accordingly, the principle of *pacta sunt servanda* and contractual stability must be applied to this case.

- Under Swiss law, employment contracts which are of unlimited duration can be terminated upon an agreed notice period, fixed term contracts terminate at the end of the term, and both may be terminated at any time if there is good cause (Article 337 of the SCO). According to CAS jurisprudence, the concept of just cause, as per Article 14 of the FIFA RSTP, is similar to the concept of just cause under Swiss law and therefore follows the case law of the Swiss Federal Tribunal; it must only be used for material breaches and should be applied restrictively.

- The CAS jurisprudence shows that this should be the absolute last resort where it could not be expected that one of the parties could be reasonably expected to continue to be bound by the contractual relationship. Therefore, it is clear that the actions of the Club fell short of this and therefore the immediate termination was not justified.

- In accordance with Article 17 of the FIFA RSTP, given there was no compensation clause in the Playing Contract, the residual value serves as the basis for the determination of the amount of compensation for breach of contract; this was EUR 40,100 based on EUR 31,500 for three months' salary plus EUR 900 and EUR 7,700 for unpaid bonuses.

- There is no mitigation to be applied because the Player only signed for his new club, MKS Cracovia SSA, after the expiry date of the Playing Contract.

- Therefore, due to the unjustified termination of the Playing Contract, the Club must pay EUR 40,100 as compensation for breach of contract without just cause plus interest at the rate of 5% per annum from the day after termination, 10 April 2020, until the date of payment.

- The Club should also have sporting sanctions imposed on it for breach of contract in the protected period and therefore the transfer ban imposed on the Club in the Appealed Decision should be confirmed.

- In conclusion, the appeal should be dismissed, and the Appealed Decision should be upheld.

53. Accordingly, the First Respondent submitted the following requests for relief:

"*On the basis of the foregoing,* ***the Appellant*** **[sic]** ***hereby respectfully requests the COURT OF ARBITRATION FOR SPORT – APPEALS ARBITRATION DIVISION to deem this ANSWER TO THE APPEAL BRIEF filed on behalf of IVÁN MÁRQUEZ ÁLVAREZ admissible and well-founded*** *together with the copies thereof and documents enclosed thereto, and following the appropriate procedures, to rule in due course as follows:*

1. To reject the reliefs sought by KORONA KIELCE S.A. in its Appeal Brief;

2. To confirm the Appealed Decision in its entirety.

3. To condemn the CLUB:

3.1 To bear all the arbitration and administrative costs pertaining to these appeal proceedings before the CAS; *and*

3.2 To pay IVÁN MÁRQUEZ ÁLVAREZ a significant contribution towards its legal fees and other expenses incurred in connection with these proceedings in an amount to be determined at the discretion of the Panel in accordance with Article R65(3) of the CAS Code" (emphasis in original)

C. The Second Respondent

54. The Second Respondent's submissions, in essence, may be summarized as follows:

- In accordance with Article 22(b) *juncto* Article 24(1) of the FIFA RSTP, supported by CAS jurisprudence, as a general rule, the FIFA DRC is competent to deal with employment-related disputes between a club and a player of an international dimension. The Appellant accepts that this dispute has an international dimension as it is between a Polish club and a Spanish player.

- Therefore, FIFA's jurisdiction is automatically established unless the alternative competence of an independent national arbitration tribunal, guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs, is explicitly selected as being the dispute resolution chamber in the employment contract.

- If there is a dispute between the parties as to the competence of FIFA as a deciding body, the FIFA DRC would first examine if there was a clear, specific and exclusive clause and, secondly, if the relevant national decision-making body is an independent national arbitration tribunal, guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs. Therefore, the FIFA DRC may accept competence based on two separate grounds, either if the parties desire to deviate from FIFA's default competence is not clearly established or, even if it is, the national arbitration tribunal does not comply with the relevant requirements. The burden of proof falls on the party contesting the FIFA DRC's competence, in this

case the Appellant, to establish that the national arbitration tribunal satisfied the necessary requirements.

- FIFA Circular 1010 and the FIFA National Dispute Resolution Chamber (the "NDRC") Standard Regulations (the "FIFA NDRC Standard Regulations"), which came into force on 1 January 2008, provided guidance to national associations to establish a national arbitration tribunal, as a reflection of the FIFA DRC, which respected the following criteria:

  - Principle of parity when constituting the arbitral tribunal;
  - Right to an independent and impartial tribunal;
  - Principle of a fair hearing;
  - Right to contentious proceedings;
  - Principle of equal treatment.

- Firstly, however, clause 6.2 of the Playing Contract is non-exclusive referring as it does to all disputes being settled by "*the proper PZPN and FIFA authorities*" and property disputes being submitted to the "*Football Arbitration Court acting at PZPN or the competent authority of FIFA*". Therefore, there is no exclusive competence of the PZPN Football Arbitration Court nor any exclusion of the FIFA DRC's competence.

- The competence of both arbitral bodies can co-exist without having to exclude the other. There is no hierarchical preference as the use of "*and*" and "*or*" clearly shows that both are competent to hear such disputes. As an aside, the reference to property disputes is not relevant as it falls outside the scope of this dispute which concerns the termination of the Playing Contract. CAS jurisprudence supports the conclusion that both arbitral tribunals can co-exist without the competence of one excluding the competence of the other.

- As an aside, clause 6.2 of the Playing Contract is pathological because it does not contain the *essentialia negotii* of a valid arbitration clause. The two requirements to ensure an arbitration clause is not pathological or deficient are that it must (a) define a specific legal relationship and (b) unequivocally mention a specific body competent to entertain claims arising out of the relationship.

- Given that it simply refers to "*the proper PZPN* […] *authorities*" without detailing the specific competent body means the parties failed to precisely indicate the body they wished to refer disputes to, as well as failing to set out the dispute resolution method. Therefore, the arbitration clause is pathological because the reference is not clear, it is not specific and does not appear to be exclusive in view of the plurality of options (including the FIFA arbitral bodies). Given the pathological clause, it cannot overrule the default competence of the FIFA DRC when it comes to employment-related disputes of an international nature.

- The Appellant's arguments that the PZPN Statutes support the FIFA DRC lacking competence is fundamentally flawed. Article 55 of the PZPN Statutes states that "*PZPN has jurisdiction over internal domestic disputes, i.e. disputes between parties affiliated to PZPN, including foreign players and coaches providing their footballing services in Poland, unless the jurisdiction of FIFA and CAS bodies has been expressly specified upon signing the contract with these persons*." This actually confirms FIFA's competence; it sets out that the PZPN has jurisdiction for domestic disputes and also has jurisdiction over international disputes if FIFA's jurisdiction was not expressly specified however in this case, FIFA's jurisdiction was expressly specified in the Playing Contract, as set out above.

- In the alternative, the Second Respondent claimed that the PZPN dispute resolution system did not comply with the minimum requirements established by Article 22(b) of the FIFA RSTP, FIFA Circular 1010 and the principles contained in the FIFA NDRC Standard Regulations. It noted, in accordance with Article 8 of the Swiss Civil Code, that the Appellant bears the burden to prove that the PZPN dispute resolution system complies with the minimum requirements, guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs.

- The Appellant has failed to discharge this burden. It appears that the PZPN Football Court of Arbitration does not comply with the minimum standards required. For instance, the Management Board of the PZPN is fully responsible for the appointment and dismissal of the 32 arbitrators elected. There is no clear definition as to what the "*league player community*" and "*Chair of the Court*" are. It appears that the election of the Chairman is not made by consensus, and it could not be excluded that the Management Board of the PZPN has decisive influence over the list of arbitrators. The Chairman and a Deputy Chairman (as well as other arbitrators) are not chosen by consensus by the player and club representatives but are appointed by the Management Board of the PZPN. The Appellant has failed to put forward any supporting evidence to demonstrate that the Chairman and Vice-Chairman are proposed and nominated from a list of individuals selected by consensus by the Players and Clubs, respectively.

- Article 3(1) of the FIFA NDRC Standard Regulations requires that the player representatives are proposed by the national player association, if there is one in existence, which there is in Poland. There is no evidence that the Polski Zwiazek Pilkarzy (the "PZP") has any involvement in this process and whether the reference to the "*league player community*" means the PZP or not.

- For all of these reasons, it is clear that the Appellant has failed to prove that the PZPN Football Court of Arbitration complies with minimum requirements established by Article 22(b) of the FIFA RSTP, FIFA Circular 1010 and the principles contained in the FIFA NDRC Standard Regulations.

- Once the FIFA DRC's competence is confirmed, the dispute ceases to have a 'vertical' component and becomes strictly 'horizontal' in nature because nothing is sought against the Second Respondent with respect to the contractual dispute

between the Appellant and the First Respondent and the Second Respondent is not personally obliged by the disputed right.

- Therefore, the Second Respondent does not have standing to be sued in relation to the contractual relationship and so once the jurisdiction of the FIFA DRC has been addressed and confirmed, it is unnecessary for the Second Respondent to comment on a dispute which exclusively concerns the other parties to this arbitration, save to say that it refers to the FIFA DRC's findings which it feels is a sound and well-grounded decision.

55. Accordingly, the Second Respondent submitted the following requests for relief:

"*Based on the foregoing, FIFA respectfully requests CAS to:*

(a) Reject the Appellant's appeal in its entirety;

(b) Confirm the Appealed Decision and, in particular, that the FIFA DRC was competent to deal with the dispute between the Appellant and the Player;

(c) Order the Appellant to bear all costs incurred with the present procedure; and

(d) Order the Appellant to make a contribution to FIFA's legal costs." (emphasis in original)

V. JURISDICTION

56. The jurisdiction of CAS, which is not disputed, derives from Article R47 of the CAS Code which states "[a]*n appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body*".

57. Article 57(1) of the FIFA Statutes (2021 edition) then provides that "[a]*ppeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS […]".*

58. The Parties do not dispute the jurisdiction of the CAS and further confirmed it by signing the Order of Procedure.

59. It follows that the CAS has jurisdiction to decide on the present dispute.

VI. ADMISSIBILITY

60. 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."

61. According to Article 57(1) of the FIFA Statutes (2021 edition), appeals *"shall be lodged with CAS within 21 days of receipt of the decision in question"*.

62. The appeal was filed within the deadline of 21 days set by Article 57(1) of the FIFA Statutes (2021 edition). The appeal complied with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fee.

63. It follows that the appeal is admissible.

VII. APPLICABLE LAW

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

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

65. Article 56(2) of the FIFA Statutes (2021 edition) stipulates the following:

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

66. In accordance with the long-standing CAS jurisprudence in relation to appeals against the decisions of FIFA arbitral bodies, by accepting the jurisdiction of CAS as established in the FIFA Statutes, then in line with the abovementioned extracts from the CAS Code and the FIFA Statutes, CAS panels decide the dispute based on the rules and regulations of FIFA and with Swiss law applied on a subsidiary basis if necessary. Therefore, by appealing to the CAS, in reliance on the FIFA Statutes, the Parties have accepted the application of the CAS Code and the FIFA regulations.

67. The Appellant suggests that Polish law should be applied based on clause 6.1 of the Playing Contract which sets out that "*All changes and completions to this Agreement require a written form, otherwise it will be deemed invalid. To all matters not settled in this Contract – Agreement, appropriate provisions of the Polish law shall respectively apply especially appropriate regulations of PZPN*."

68. However, the Sole Arbitrator is not persuaded by the Appellant's argument. The Playing Contract also explicitly references the jurisdiction of the FIFA arbitral bodies and the

applicability of the FIFA regulations, specifically clause 6.2 of the Playing Contract which states as follows, "*All dispute matters concerning the validity, existence or termination of this Contract are settled by the proper PZPN and FIFA authorities acting in accordance with separate regulations.*".

69. It follows, therefore, that since the issue at hand is one of "*termination of this Contract*" and has been determined at first instance by the FIFA DRC, then the relevant FIFA regulations apply.

70. It is indeed widely recognised in cases of an appeal against a decision issued by a FIFA judicial body that there is a tacit and indirect choice of law pursuant to Article 56(2) of the FIFA Statutes (2021 edition) which confirms that "*CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law.*" (see MAVROMATI/REEB, *The Code of the Court of Arbitration for Sport – Commentary, Cases and Materials,* 2015, p. 544, para. 99; see also RIGOZZI/HASLER, in ARROYO M. (ed.), Arbitration in Switzerland, The Practitioner's Guide, Art. R58 CAS Code, N10 and HAAS U., *Applicable law in football-related disputes - The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law* -, CAS Bulletin 2015-2, p. 13).

71. With respect to the law chosen by the Parties in their agreement, if any, it is only relevant with respect to issues which are not addressed in the FIFA regulations and for which FIFA has not set any uniform standards of the industry. (see HAAS U., *Applicable law in football-related disputes – The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law* -, CAS Bulletin 2015-2, p. 15). *In casu*, the dispute relates to the termination of an employment agreement, a corner stone of the principle of contractual stability, which is extensively addressed by the FIFA regulations.

72. Accordingly, the Sole Arbitrator is satisfied that primarily the various regulations of FIFA are applicable to the substance of the case, and additionally Swiss law, should the need arise to fill a possible gap in the various regulations of FIFA.

VIII. MERITS

73. The main issues to be determined are:

    (i) What is the burden of proof and the standard of proof applicable to the present matter?

    (ii) Did the FIFA DRC have jurisdiction to consider the underlying dispute?

    (iii) Was the Appellant entitled to terminate the Playing Contract?

    (iv) What are the consequences that follow from the termination of the Playing Contract?

A. What is the burden of proof and standard of proof applicable to the present matter?

74. Before assessing the main issues of the present dispute, the Sole Arbitrator deems it necessary to first establish the burden of proof and the standard of proof applicable to the present matter.

75. The concept of burden of proof has been considered in many CAS decisions and is well established CAS jurisprudence. It was set out in CAS 2007/A/1380 as follows:

"*According to the general rules and principles of law, facts pleaded have to be proved by those who plead them, i.e., the proof of facts, which prevent the exercise, or extinguish, the right invoked, must be proved by those against whom the right in question is invoked. This means, in practice, that when a party invokes a specific right it is required to prove such facts as normally comprise the right invoked, while the other party is required to prove such facts as exclude, or prevent, the efficacy of the facts proved, upon which the right in question is based. This principle is also stated in the Swiss Civil Code. In accordance with Article 8 of the Swiss Civil Code "Unless the law provides otherwise, each party shall prove the facts upon which it relies to claim its right" (free translation from the French original version – "Chaque partie doit, si la loi ne prescrit le contraire, prouver les faits qu'elle allègue pour en déduire son droit"). It is well established CAS jurisprudence that any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. must give evidence of the facts on which its claim has been based. The two requisites included in the concept of "burden of proof" are (i) the "burden of persuasion" and (ii) the "burden of production of the proof". In order to fulfil its burden of proof, a party must, therefore, provide the Panel with all relevant evidence that it holds, and, with reference thereto, convince the Panel that the facts it pleads are true, accurate and produce the consequence envisaged by the party. Only when these requirements are complied with has the party fulfilled its burden and has the burden of proof been transferred to the other party*" (see also CAS 2005/A/968 and CAS 2004/A/730).

76. This concept was further explained in CAS 2011/A/2384 & 2386 as follows:

"*Under Swiss law, the 'burden of proof' is regulated by Art. 8 of the Swiss Civil Code (the "CC"), which, by stipulating which party carries such burden, determines the consequences of the lack of evidence, i.e., the consequences of a relevant fact remaining unproven ... Indeed, Art. 8 CC stipulates that, unless the law provides otherwise, each party must prove the facts upon which it is relying to invoke a right, thereby implying that the case must be decided against the party that fails to adduce such evidence. Furthermore, the burden of proof not only allocates the risk among the parties of a given fact not being ascertained but also allocates the duty to submit the relevant facts before the court/tribunal. It is the obligation of the party that bears the burden of proof in relation to certain facts to also submit them to the court/tribunal*".

77. In CAS 2003/A/506, it was held:

"[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 (see also article 8 of the Swiss Civil Code, ATF 123 III 60, ATF 130 III 417). The Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one. Hence, if a party wishes to establish some facts and persuade the deciding body, it must actively substantiate its allegations with convincing evidence*."

78. This position is further supported by the provisions of Article 13 para. 5 of the FIFA Procedural Rules Governing the Football Tribunal (2021 edition) which is referenced in the Appealed Decision and states:

"*A party that asserts a fact has the burden of proving it*."

79. It follows therefore that each Party must fulfil its burden of proof to the required standard by providing and referring to evidence to convince the Sole Arbitrator that the facts it pleads are established.

80. The assessment of the standard of proof in CAS jurisprudence can differ depending on the specific circumstances of the case, in particular whether relating to disciplinary issues or contractual matters. Given the case in hand relates to the latter, then the Sole Arbitrator is content to adopt the approach and reasoning in CAS 2021/A/8277 which states as follows:

"*The standard of proof describes the degree to which a judge / arbitral tribunal needs to be persuaded in order to accept or not to accept an alleged fact. The question of the standard of proof is a procedural question governed in an international arbitration by Article 182 of the Swiss Private International Law Act. Absent any provision agreed upon by the Parties, the Sole Arbitrator is inspired by Swiss law when determining the applicable standard of proof. According thereto absolute certainty is not required. Instead, it suffices if the judge / arbitral tribunal has no serious doubt about the existence of the alleged facts or if any remaining doubt appears to be tenuous (SFT 130 III 321, consid. 3.3).*"

81. Finally, in accordance with Article R57 of the CAS Code, "[t]*he Panel has full power to review the facts and the law*", which means that the CAS appellate arbitration procedure provides for a de novo review of the merits of the case. Accordingly, as is well-established in CAS jurisprudence, a panel is not limited to deciding if the appealed decision is correct or not but rather its function is to make an independent determination as to the merits.

B. Did the FIFA DRC have jurisdiction to consider the underlying dispute?

82. Firstly, by way of reminder, clause 6.2 of the Playing Contract (the "Jurisdiction Clause") sets out the following:

"*All dispute matters concerning the validity, existence or termination of this Contract*

are settled by the proper PZPN and FIFA authorities acting in accordance with separate regulations. Property disputes resulting from this Contract are submitted to the competence of the Football Arbitration Court acting at PZPN or the competent authority of FIFA."

83. The position of the Parties is clear in respect of the interpretation of the Jurisdiction Clause. The Appellant maintains that the FIFA DRC was not competent to hear the dispute because the contracting parties elected to refer it to the PZPN Football Court of Arbitration, which itself satisfies the requirements stipulated by FIFA of independence, equal representation and fair proceedings. In contrast, the First and Second Respondents both maintain that the wording of the Jurisdiction Clause is clear and unambiguous; there was no agreement that such a dispute would be referred to the PZPN Football Court of Arbitration because the Jurisdiction Clause actually provided for disputes to be referred to either the PZPN arbitral bodies or the FIFA arbitral bodies, with no order of preference indicated. Furthermore, the PZPN Football Court of Arbitration did not satisfy the requirements stipulated by FIFA for a national arbitration tribunal.

84. By way of reminder, Article 8 of the Swiss Civil Code states that a party has the burden of proving the facts underlying its claim(s) as follows:

"*Unless the law provides otherwise, the burden of proving the existence of an alleged fact shall rest on the person who derives rights from that fact.*"

85. Turning to the various arguments put forward by the Appellant, the Sole Arbitrator has carefully considered the same, as well as the arguments put forward by the First and Second Respondents.

86. Article 14 of the FIFA Statutes (2021 edition) determines that all member associations have to "*to comply fully with the Statutes, regulations, directives and decisions of FIFA bodies at any time as well as the decisions of the Court of Arbitration for Sport (CAS) passed on appeal on the basis of art. 56 par. 1 of the FIFA Statutes*".

87. The FIFA DRC, as a rule, is competent to deal with an employment-related dispute with an international dimension, as set out in Article 22 (b) of the FIFA RSTP (supported by Article 24 (1)):

"*FIFA is competent to hear:*

[…]

(b) employment-related disputes between a club and a player of an international dimension; the aforementioned parties may, however, explicitly opt in writing for such disputes to be decided by an independent arbitration tribunal that has been established at national level within the framework of the association and/or a collective bargaining agreement. Any such arbitration clause must be included either directly in the contract or in a collective bargaining agreement applicable on the parties. The independent national arbitration tribunal must guarantee fair proceedings and respect the principle of equal representation of players and

clubs".

88. FIFA issued its Circular No. 1010, dated 20 December 2005, which set out the minimum procedural standard for an independent and duly constituted arbitration tribunal which comprised the following conditions and principles:

"***Principle of parity when constituting the arbitration tribunal***

The parties must have equal influence over the appointment of arbitrators. This means for example that every party shall have the right to appoint an arbitrator and the two appointed arbitrators appoint the chairman of the arbitration tribunal. The parties concerned may also agree to appoint jointly one single arbitrator. Where arbitrators are to be selected from a predetermined list, every interest group that is represented must be able to exercise equal influence over the compilation of the arbitrator list.

Right to an independent and impartial tribunal

To observe this right, arbitrators (or the arbitration tribunal) must be rejected if there is any legitimate doubt about their independence. The option to reject an arbitrator also requires that the ensuing rejection and replacement procedure be regulated by agreement, rules of arbitration or state rules of procedure.

Principle of a fair hearing

Each party must be granted the right to speak on all facts essential to the ruling, represent its legal points of view, file relevant motions to take evidence and participate in the proceedings. Every party has the right to be represented by a lawyer or other expert.

Right to contentious proceedings

Each party must be entitled to examine and comment on the allegations filed by the other party and attempt to rebut and disprove them with its own allegations and evidence.

Principle of equal treatment

The arbitration tribunal must ensure that the parties are treated equally. Equal treatment requires that identical issues are always dealt with in the same way vis-à-vis the parties." (emphasis in original)

89. FIFA issued its Circular No. 119, dated 28 December 2007, which implemented the FIFA NDRC Standard Regulations which served as a guide for member associations to establish a national dispute resolution body in line with the principles of the FIFA DRC.

90. Article 3 of the FIFA NDRC Standard Regulations provides as follows:

"*1. The NDRC shall be composed of the following members, who shall serve a four-year renewable mandate:*

a) a chairman and a deputy chairman chosen by consensus by the player and club representatives from a list of at least five persons drawn up by the association's executive committee;

b) between three and ten player representatives who are elected or appointed either on the proposal of the players' associations affiliated to FIFPro, or, where no such associations exist, on the basis of a selection process agreed by FIFA and FIFPro;

c) between three and ten club representatives who are elected or appointed on the proposal of the clubs or leagues.

2. The chairman and deputy chairman of the NDRC shall be qualified lawyers.

3. The NDRC may not have more than one member from the same club.

4. The NDRC shall sit with a minimum of three members, including the chairman or the deputy chairman. In all cases the panel shall be composed of an equal number of club and player representatives."

91. The Sole Arbitrator has considered the facts in this case and is satisfied that the dispute between the Appellant and the First Respondent is of an international dimension, as being between a club domiciled in Poland and a player domiciled in Spain. It is noted that none of the Parties seek to argue that the dispute is not of an international dimension.

92. The burden of proof falls on the party making the assertion, in this case, upon the Appellant, to demonstrate firstly that the Jurisdiction Clause sets out an express agreement of the contracting parties in favour of the PZPN Football Court of Arbitration, and providing it can prove this, secondly that the national dispute resolution body referred to by the Appellant, the PZPN Football Court of Arbitration, satisfies the necessary requirements for it to displace the presumption that the FIFA DRC has jurisdiction to determine a dispute between a player and a club with an international dimension.

93. Upon review of the Playing Contract, and in particular the Jurisdiction Clause, the Sole Arbitrator notes that in relation to both categories of disputes, firstly all disputes relating to "*the validity, existence or termination of this Contract are settled by the proper PZPN* ***and*** *FIFA authorities*" (emphasis added) and secondly, all property disputes should be submitted to "*the Football Arbitration Court acting at PZPN* ***or*** *the competent authority of FIFA*" (emphasis added).

94. The Sole Arbitrator notes that the underlying dispute relates to the "*termination of this Contract*" and therefore is covered by the first element of the Jurisdiction Clause, which therefore means it should be settled by the "*proper PZPN* ***and*** *FIFA authorities*" (emphasis added). On a plain reading of this, it is clear that the contracting parties had actually agreed that **both** the relevant PZPN and FIFA arbitral bodies were competent to hear a dispute relating to the termination of the Playing Contract. There was no

suggestion that one body had precedence over the other, at least as far as the Playing Contract dictated, and therefore it could be considered that the contracting parties were free to choose the forum.

95. In actual fact, the Sole Arbitrator considers that the FIFA arbitral bodies are competent to hear disputes with an international dimension as a default position and an express agreement of the contracting parties that FIFA should not have competence and the national dispute resolution body should be competent instead is the exception to that default position (CAS 2015/A/4333). Therefore, the fact that the Jurisdiction Clause seeks to make both bodies competent is not sufficient to displace the default position. Indeed, this conclusion is supported by CAS jurisprudence whereby if a jurisdiction clause in favour of a national dispute resolution body is not exclusive, and particularly where there is mention of FIFA, then FIFA remains competent to hear such a dispute, as follows:

"*Upon review of article 17 of the Employment Contract, the Panel is of the opinion that this clause does not explicitly and in a clear way make reference to one specific deciding body, but to several courts and arbitration bodies, including the FIFA DRC and CAS. The Panel, therefore, adopts the view of the FIFA DRC and deems that article 17 of the Employment Contract cannot be considered as an exclusive arbitration clause in favour of the CFA national deciding body, as asserted by the Appellant*." (CAS 2014/A/3579)

96. Furthermore, there is no suggestion that there is "*a collective bargaining agreement applicable on the parties*" which includes such an arbitration clause in favour of the PZPN Football Court of Arbitration and certainly the Appellant has failed to evidence the same.

97. As an aside, the Sole Arbitrator also agrees with the argument put forward by the Second Respondent that the Jurisdiction Clause was pathological in nature because it did not satisfy the two requirements to be a valid arbitration clause; whilst it may have defined a specific legal relationship, in the Sole Arbitrator's view, it failed to unequivocally reference a specific body which was competent to hear a dispute. In this regard, the Sole Arbitrator finds that the reference to "*proper PZPN* […] *authorities*" was not specific enough to satisfy this requirement.

98. Finally, the Sole Arbitrator notes that the Appellant has submitted excerpts from the PZPN Statutes and in particular, it has included the following reference to Article 50, paragraph 8:

"*Contracts concluded between a club and a player in the professional football sector shall include the following clause: "Any property or non property disputes arising in relation to the creation, existence, validity, performance and termination of contracts (including professional football contracts) between clubs and players bound by PZPN regulations, including those concerning contractual stability, shall be submitted by the parties to the adjudication of the PZPN Football Court of Arbitration*."

99. The Sole Arbitrator notes that the Appellant elected not to use the suggested jurisdiction clause in the Playing Contract, which specifically references the PZPN Football Court

of Arbitration and does not include any reference to FIFA's competence, in contrast to the Jurisdiction Clause.

100. Furthermore, Article 55 paragraph 2 of the PZPN Statutes sets out the following:

"*PZPN has jurisdiction over internal domestic disputes, i.e. disputes between parties affiliated to PZPN, including foreign players and coaches providing their footballing services in Poland, unless the jurisdiction of FIFA and CAS bodies has been expressly specified upon signing the contract with these persons. FIFA has jurisdiction over international disputes, i.e. disputes between clubs which belong to different football associations and/or national federations that do not belong to the judicial authorities of PZPN*."

101. Again, it is noted that the contracting parties elected to specifically include "*the jurisdiction of FIFA*" in the Jurisdiction Clause.

102. Taking all of the above into account, it follows that the Sole Arbitrator finds that the FIFA DRC was competent to hear the underlying dispute.

103. Whilst it is technically a moot point in light of the finding above, given the Parties have also addressed whether the PZPN Football Court of Arbitration satisfies the requirements set out by FIFA in Article 22 (b) of the FIFA RSTP, FIFA Circular 1010 and the FIFA NDRC Standard Regulations, for the sake of completeness, the Sole Arbitrator is content to comment in brief terms.

104. The Club has adduced the Regulations of the PZPN Football Court of Arbitration in support of its contention that it satisfies the requirements set out.

105. In particular, the Sole Arbitrator notes that Article 11 sets out the organisation of the PZPN Football Court of Arbitration as follows:

"*1. The Football Court of Arbitration shall be composed of 32 arbitrators appointed and dismissed by the Management Board of PZPN.*

2. The Management Board of PZPN appoints and dismisses the Chairman, Vice-Chairman and Secretary of the Football Court of Arbitration at the request of the President of PZPN. The Management Board appoints the remaining 2 members of the Presidium of the Court, and subsequently 27 arbitrators proposed, respectively, by the league club community (9 arbitrators), league player community (9 arbitrators) and the Chair of the Court (9 arbitrators)."

106. The Sole Arbitrator notes that the Management Board of PZPN is responsible for the appointment of all members of the PZPN Football Court of Arbitration and therefore finds that this fails to satisfy the minimum requirements of independence.

107. Furthermore, the FIFA NDRC Standard Regulations states that the player representatives are appointed or elected following a proposal put forward by a national player association affiliated to FIFPro (if one is set up in that country) and given the existence of the Polish Player Association (the PZP) there is no evidence that it played

any role in this process, with the reference to "*league player community*" demonstrating a clear lack of clarity.

108. Therefore, on the evidence supplied by the Appellant, it is not possible to verify whether or not the PZPN Football Court of Arbitration satisfies the requirements set out in FIFA Circular No. 1010 relating to parity in the constitution of the arbitral panel whereby every interest group has equal input in the list of arbitrators or the requirements set out in the FIFA NDRC Standard Regulations that the members of a NDRC must comprise representatives elected or appointed by the players' representative body and by the clubs and leagues.

109. The Club has failed to provide evidence to prove that these mandatory requirements are met by the PZPN Football Court of Arbitration to allow it to have jurisdiction in this case (notwithstanding the primary finding that the Jurisdiction Clause confirmed the competence of the FIFA DRC). Having established this, the Sole Arbitrator therefore determined that the FIFA DRC was indeed competent to adjudicate and issue a decision on the proceedings.

C. Was the Appellant entitled to terminate the Playing Contract?

110. Whilst both the Appellant and First Respondent are in agreement that the First Respondent was temporarily impeded from carrying out his obligations under the Playing Contract, they disagreed about the consequences.

111. On the one hand, the Appellant maintained that such impediment justified the termination of the Playing Contract, both under Polish law, by reference to Articles 107 to 109 of the SCO and to the FIFA publication, COVID-19 Football Regulatory Issues of 7 April 2020 (the "FIFA Covid-19 Guidelines"), or in the alternative, under Article 14 of the FIFA RSTP.

112. In contrast, the First Respondent alleged that such termination of the Playing Contract was made without just cause and that Article 17 of the FIFA RSTP should apply.

113. In support of their respective positions, the Appellant and the First Respondent made reference to various regulatory and statutory provisions, which are set out below for ease of reference.

(a) Relevant provisions and provisions referred to by the Appellant, the First Respondent and the Appealed Decision.

a. <u>The FIFA Regulations</u>

114. The most relevant provisions of the FIFA RSTP sets out as follows:

"***13 Respect of contract***

A contract between a professional and a club may only be terminated upon expiry of the term of the contract or by mutual agreement.

14 Terminating a contract with just cause

1. A contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause.

2. Any abusive conduct of a party aiming at forcing the counterparty to terminate or change the terms of the contract shall entitle the counterparty (a player or a club) to terminate the contract with just cause."

[…]

"***17 Consequences of terminating a contract without just cause***

The following provisions apply if a contract is terminated without just cause:

1. In all cases, the party in breach shall pay compensation. Subject to the provisions of article 20 and Annexe 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, 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, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period.

Bearing in mind the aforementioned principles, compensation due to a player shall be calculated as follows:

i. in case the player did not sign any new contract following the termination of his previous contract, as a general rule, the compensation shall be equal to the residual value of the contract that was prematurely terminated;

ii. in case the player signed a new contract by the time of the decision, the value of the new contract for the period corresponding to the time remaining on the prematurely terminated contract shall be deducted from the residual value of the contract that was terminated early (the "Mitigated Compensation"). Furthermore, and subject to the early termination of the contract being due to overdue payables, in addition to the Mitigated Compensation, the player shall be entitled to an amount corresponding to three monthly salaries (the "Additional Compensation"). In case of egregious circumstances, the Additional Compensation may be increased up to a maximum of six monthly salaries. The overall compensation may never exceed the rest value of the prematurely terminated contract.
iii. Collective bargaining agreements validly negotiated by employers' and employees' representatives at domestic level in accordance with national law may deviate from the principles stipulated in the points i. and ii. above. The terms of such an agreement shall prevail".

[…]

115. Article 27 of the FIFA RSTP sets out as follows:

"***27 Matters not provided for***

Any matters not provided for in these regulations and cases of force majeure shall be decided by the FIFA Council whose decisions are final".

116. FIFA Circular 1714 was issued on 7 April 2020 and set out, inter alia, as follows:

"*The Bureau recognised that the disruption to football caused by COVID-19 was a case of force majeure.*

Article 27 of the RSTP states that cases of force majeure shall be decided by the FIFA Council, whose decisions are final. The COVID-19 situation is, per se, a case of force majeure for FIFA and football.

[…]

(iii) Where:

a. Clubs and employees cannot reach an agreement, and

b. national law does not address the situation or collective agreements with a players' union are not an option or not applicable,

Unilateral decisions to vary terms and conditions of contracts will only be recognised by FIFA's Dispute Resolution Chamber (DRC) or Players' Status Committee (PSC) where they were made in good faith, are reasonable and proportionate.

When assessing whether a decision is reasonable, the DRC or the PSC may consider, without limitation:

a. whether the club had attempted to reach a mutual agreement with its employee(s);

b. the economic situation of the club;

c. the proportionality of any contract amendment;

d. the net income of the employee after contract amendment;

e. whether the decision applied to the entire squad or only specific employees.

(iv) Alternatively, all agreements between clubs and employees should be "suspended" during any suspension of competitions (i.e. suspension of football activities), provided proper insurance coverage is maintained, and adequate alternative income support arrangements can be found for employees during the period in question".

117. The FIFA publication, Covid-19 Football Regulatory Issues – Frequently Asked Questions (FAQs), dated 11 June 2020 (the "FIFA Covid-19 FAQs"), sets out the following:

"***(1) Did the Bureau of the FIFA Council declare a "force majeure" situation in any territory? Can this declaration be relied upon by MAs, clubs, or employees?***

Article 27 of the RSTP allows the FIFA Council to decide "…matters not provided for and in cases of force majeure". In this context, on 6 April 2020, the Bureau made several decisions regarding regulatory and legal issues as a result of COVID-19. In order to temporarily amend the RSTP, the Bureau relied upon article 27 as its source of power, determining that the COVID-19 outbreak was a matter not provided for and a force majeure situation for FIFA and football generally. The Bureau did not determine that the COVID-19 outbreak was a force majeure situation in any specific country or territory, or that any specific employment or transfer agreement was impacted by the concept of force majeure. For clarity: clubs or employees cannot rely on the Bureau decision to assert a force majeure situation (or its equivalent). Whether or not a force majeure situation (or its equivalent) exists in the country or territory of an MA is a matter of law and fact, which must be addressed on a case-by-case basis vis-à-vis the relevant laws that are applicable to any specific employment or transfer agreement.

[…]

(16) The FIFA guiding principles in this section only refer to unilateral variations to existing employment agreements. Do they also apply to unilateral terminations of existing employment agreements?

No, the RSTP shall apply in the assessment of disputes that arise before the FIFA judicial bodies concerning unilateral terminations.

If a unilateral termination has occurred following a unilateral variation made as a result of COVID-19 (e.g. a club unilaterally reduces the employee's salary and the employee terminates the agreement), the FIFA judicial bodies will:

(i) examine the validity of the unilateral variation vis-à-vis the relevant FIFA guiding principles; and

(ii) after determining whether the unilateral variation was valid or invalid, assess the unilateral termination vis-à-vis the RSTP".

b. The SCO

118. Article 107 of the SCO sets out as follows:

"*1 Where the obligor under a bilateral contract is in default, the obligee is entitled to set an appropriate time limit for subsequent performance or to ask the court to set such time limit.*

2 If performance has not been rendered by the end of that time limit, the obligee may compel performance in addition to suing for damages in connection with the delay or, provided he makes an immediate declaration to this effect, he may instead forego subsequent performance and either claim damages for non-performance or withdraw from the contract altogether".

119. Article 108 of the SCO sets out as follows:

"*No time limit need be set:*

1. where it is evident from the conduct of the obligor that a time limit would serve no purpose;

2. where performance has become pointless to the obligee as a result of the obligor's default;

3. where the contract makes it clear that the parties intended that performance take place at or before a precise point in time".

120. Article 109 of the SCO sets out as follows:

"*1 An obligee withdrawing from a contract may refuse the promised consideration and demand the return of any performance already made.*

2 In addition he may claim damages for the lapse of the contract, unless the obligor can prove that he was not at fault".

121. Article 119 of the SCO sets out as follows:

"*1 An obligation is deemed extinguished where its performance is made impossible by circumstances not attributable to the obligor.*

2 In a bilateral contract, the obligor thus released is liable for the consideration already received pursuant to the provisions on unjust enrichment and loses his counter-claim to the extent it has not yet been satisfied.

3 This does not apply to cases in which, by law or contractual agreement, the risk passes to the obligee prior to performance".

122. Article 334 of the SCO sets out as follows:

"*1 A fixed-term employment relationship ends without notice.*

2 A fixed-term employment relationship tacitly extended beyond the agreed duration is deemed to be an open-ended employment relationship.

3 After ten years, any employment relationship contracted for a longer duration may be terminated by either party by giving six months' notice expiring at the end of a month".

123. Article 337 of the SCO sets out as follows:

"*1 Both employer and employee may terminate the employment relationship with immediate effect at any time for good cause; the party doing so must give his reasons in writing at the other party's request.*

2 In particular, good cause is any circumstance which renders the continuation of the employment relationship in good faith unconscionable for the party giving notice.

3 The court determines at its discretion whether there is good cause, However, under no circumstances may the court hold that good cause is constituted by an employee being prevented from working through no fault of his own".

124. Article 337c of the SCO sets out as follows:

"*1 Where the employer dismisses the employee with immediate effect without good cause, the employee is entitled to damages in the amount he would have earned had the employment relationship ended after the required notice period or on expiry of its agreed duration.*

2 Such damages are reduced by any amounts that the employee saved as a result of the termination of the employment relationship or that he earned by performing other work or would have earned had he not intentionally foregone such work.

3 The court may order the employer to pay the employee an amount of compensation determined at the court's discretion taking due account of all circumstances; however, compensation may not exceed the equivalent of six months' salary for the employee".

(b) Was the Appellant entitled to terminate the Playing Contract under Polish law, under the general provisions of the SCO or the FIFA COVID-19 Guidelines of 7 April 2020?

125. *Force majeure* is considered to be a situation or event, beyond the control of the parties, which prevents them from fulfilling their contractual obligations and for which the parties should not carry any liability.

126. In the present case, the Appellant alleges that *force majeure* justified the termination of the Playing Contract and relies on Polish law, on Articles 107 ff SCO as well as on the FIFA COVID-19 Guidelines issued by FIFA on 7 April 2020.

a. <u>Polish law</u>

127. The Sole Arbitrator notes that the Appellant did not make reference to, nor adduce in evidence, any Polish law provision to support its allegation that it would be entitled to terminate the Playing Contract in such circumstances under Polish law, which is in any event not applicable.

128. Indeed, for the reasons set out above at paragraphs 64-72, primarily the various regulations of FIFA are applicable to the substance of the case, and additionally Swiss

law, should the need arise to fill a possible gap in the various regulations of FIFA.

b. General provisions of the SCO

129. As a preliminary point, the Playing Contract contains no reference to force majeure or its application generally.

130. There is no definition of *force majeure* in the FIFA regulations (as confirmed by Article 27 of the FIFA RSTP) and therefore it is necessary to turn to Swiss law which does address the concept of force majeure.

131. The Sole Arbitrator notes that, in terms of Swiss law, there is a distinction between whether the impediment to carry out the obligation is temporary (Article 97, 107-109 of the SCO) or permanent (Article 119 of the SCO) and whether one of the parties is at fault. In terms of the former, it is noted that the Appellant, without seeking to invoke Article 119 of the SCO, alleged that a *force majeure* event justified its termination of the Playing Contract. In terms of the latter, the Appellant explicitly confirms that it does not consider that the termination of the Playing Contract due to the force majeure event was due to any fault on the part of the First Respondent. It is fair to say the situation created by the Covid-19 pandemic was temporary as opposed to permanent and therefore it is Articles 97, 107-109 of the SCO which are relevant.

132. It was clear, even at the time, and confirmed by the fact that the Ekstrklasa resumed on 31 May 2020, that there was always an intention for the league to resume as soon as possible once governmental restrictions relating to the Covid-19 pandemic were lifted, and therefore the suspension of the league matches did not mean there was a definite impossibility for the resumption, but rather a temporary measure analogous to a "suspension". Therefore, Article 119 of the SCO is not applicable as it requires a definite impossibility. It follows that the temporary suspension of the Ekstraklasa is not a *force majeure* situation.

133. The Appellant, thus correctly, does not seek to invoke Article 119 of the SCO, and instead maintained that it was entitled to terminate the Playing Contract in accordance with Articles 107-109 of the SCO.

134. The Sole Arbitrator however notes that these provisions are not applicable.

135. Indeed, under Swiss law, the immediate termination of an employment contract is covered in Article 337 of the SCO, the special provisions dedicated to the termination of an employment contract, which implement Articles 107-109 of the SCO in labour law and therefore prevail on Article 107-109 of the SCO (cf. ATF 4C. 348/2000, consid. 1b in fine). Additionally, the termination of an employment agreement is in any event addressed by the FIFA RSTP, which is primarily applicable.

c. FIFA Circular 1714 - COVID-19 Football Regulatory Issues of 7 April 2020

136. The Appellant also seeks to defend its position by relying, in very general terms, on the FIFA Bureau's initial recognition that COVID-19 was a case of *force majeure* and by

suggesting that the steps it attempted to make in unilaterally reducing the First Respondent's salary were justified based on the five considerations set out in FIFA Circular 1714.

137. However, the Sole Arbitrator notes that this is a moot point because the Appellant did not ultimately impose a unilateral variation of the Playing Contract, instead opting to unilaterally terminate it. Therefore, the steps it took should not be considered in light of FIFA Circular 1714 because this was limited to "[u]*nilateral decisions to vary terms and conditions of contracts*" not unilateral terminations of contracts, which is what the Appellant chose to do immediately upon receipt of the First Respondent's refusal to reduce his salary.

138. Accordingly, and as confirmed by FAQ 16 of the FIFA publication, Covid-19 FAQs (dated 11 June 2020), "*the RSTP shall apply in the assessment of disputes that arise before the FIFA judicial bodies concerning unilateral terminations*." Therefore, unlike a situation where a unilateral variation of an employment contract is then followed by a unilateral termination (in which case, the FIFA Guidelines principles will assess the former and then the FIFA RSTP assess the latter), because the case in hand is simply about a unilateral termination of the Playing Contract, the Sole Arbitrator determines that it is the FIFA RSTP which must be applied when considering the justification for such action.

139. The Appellant claims that it had to make its own assessment as to the appropriate action to take, when deciding to terminate the Playing Contract on 10 April 2020, because the aforementioned FIFA publication, Covid-19 FAQs (dated 11 June 2020) had not been published at that stage. However, as noted above, it is the FIFA RSTP which are applied in terms of assessing the justification for terminating a playing contract (as well as the relevant jurisprudence) and these were, of course, available to the Appellant at the time.

(c) Did the Appellant have just cause to unilaterally terminate the Playing Contract?

140. By way of introduction, the Sole Arbitrator notes that Article 14 of the FIFA RSTP sets out that a "*contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause.*"

141. In terms of the Appellant's decision to unilaterally terminate the Playing Contract, it is firstly necessary to consider the chronology in brief terms, in order to provide some background to then consider whether this termination was with or without just cause:

a. On 14 March 2020, the Spanish government announced Covid-related travel restrictions which prevented the First Respondent from leaving the country;

b. On 20 March 2020, the Ekstraklasa announced an intention to resume matches on 8 May 2020;

c. On 23 March 2020, the Appellant requested the First Respondent to return to

Poland on 31 March 2020;

d. On 24 March 2020, the First Respondent advised the Appellant that he was unable to return to Poland given the travel restrictions in Spain, but he would return as soon as he was allowed by the authorities;

e. On 28 March 2020, the Appellant proposed that it would unilaterally reduce his salary by 50% until the end of the contractual term;

f. On 8 April 2020, the First Respondent rejected the proposal to reduce his salary by 50%; and

g. On 10 April 2020, the Appellant unilaterally terminated the Playing Contract on the basis that there was a "*lack of possibility of providing mutual benefits, for which neither party is liable as they are caused by force majeure.*"

142. The Sole Arbitrator notes that the Appellant did not enter into any further negotiations with the First Respondent having had the proposal to unilaterally reduce the salary by 50% rejected. Furthermore, it was clear that the First Respondent was prevented from leaving Spain due to Covid-related travel restrictions and therefore there was no practical way in which he could abide by the Appellant's direction to return. Despite the Appellant's suggestion that it was possible for non-Polish nationals to return if they were working in Poland, notwithstanding the Polish borders having been closed at this time, it neglects to mention that this did not extend to travel via international plane or trains, which remained suspended to non-Polish nationals. Therefore, this added a further reason why the First Respondent was prevented from returning to Poland at this time. Furthermore, the Sole Arbitrator notes that the First Respondent confirmed that there were also severe restrictions imposed in Spain at the time, which included a suspension of international travel. As an aside, the Sole Arbitrator notes that the Appellant did not actually recommence matches in the Ekstraklasa until 31 May 2020.

143. When considering whether the termination of the Playing Contract was made with or without just cause, as the First Respondent points out, such action should only be taken as the last resort and, in the case at hand, there remained other options open to the Appellant; it could have proposed an alternative adjustment to the Playing Contract which may have been mutually acceptable. Indeed, the Appellant could have decided to take disciplinary action against the First Respondent for failure to return to Poland when instructed, which if justified, would potentially allow it to issue fines to the First Respondent for non-compliance.

144. In contrast, the Appellant argued that the First Respondent's absence without authorisation, after he failed to return when requested to do so by 31 March 2020 was a breach of the Playing Contract which provided just cause for the Appellant to terminate the Playing Contract.

145. The FIFA RSTP do not explicitly define what constitutes "just cause" and, in line with CAS jurisprudence, it is necessary to look to Swiss law and the way in which the jurisprudence has interpreted it to answer this question.

146. The concept of "just cause" was considered in CAS 2006/A/1062, noting "[t]*he FIFA Regulations do not define when there is such "just cause". One must therefore fall back on Swiss law. Pursuant to this, an employment contract which has been concluded for a fixed term can only be terminated prior to expiry of the term of the contract if there is 'good cause' (see also ATF 110 I 167). In this regard Art. 337(2) of the Code of Obligations ("CO") states – in loose translation: "Particularly any circumstance, the presence of which means that the party terminated cannot in good faith be expected to continue the employment relationship, is deemed to be good cause". The courts have consistently held that a grave breach of duty by the employee is good cause (ATF 121 III 467; ATF 117 II 72)*".

147. Furthermore, in CAS 2006/A/1180, it was held that "[a]*ccording to Swiss case law, whether there is "good cause" for termination of a contract depends on the overall circumstances of the case (...). Particular importance is thereby attached to the nature of the breach of obligation. The Swiss Federal Supreme Court has ruled that the existence of a valid reason has to be admitted when the essential conditions, whether of an objective or personal nature, under which the contract was concluded are no longer present (...). In other words, it may be deemed to be a case for applying the clausula rebus sic stantibus. According to Swiss law, only a breach which is of a certain severity justifies termination of a contract without prior warning (...). In principle, the breach is considered to be of a certain severity when there are objective criteria which do not reasonably permit an expectation that the employment relationship between the parties be continued, such as a serious breach of confidence (...). Pursuant to the established case law of the Swiss Federal Supreme Court, early termination for valid reasons must, however, be restrictively admitted.*"

148. The concept of just cause is also explored in CAS 2014/A/3706 in which it was held that:

"*80. According to Swiss case law, whether there is "good cause" for termination of a contract depends on the overall circumstances of the case (ATF 108 II 444, 446; ATF February 2 nd , 2001). Particular importance is thereby attached to the nature of the breach of obligation.*

81. Always according to Swiss law, only a breach which is of a certain severity justifies termination of a contract without prior warning (ATF 127 III 153; ATF 121 III 467; ATF 117 II 560; ATF 116 II 145 and ATF 108 II 444, 446). In principle, the breach is considered to be of a certain severity when there are objective criteria which do not reasonably permit an expectation that the employment relationship between the Parties be continued, such as a serious breach of confidence (CAS 2006/A/1180; ATF February 2nd, 2001, 4C.240/2000 no. 3 b aa; ATF 5 May 2003, 4C.67/2003 no. 2; WYLER R., op. cit., p. 364 and TERCIER P., Les contrats spéciaux, Zurich et al. 2003, no. 3402, p. 496).

82. Should the breach be of a minor severity, Swiss jurisprudence is of the opinion that it can still lead to an immediate termination but only if it was repeated despite a prior warning (ATF 130 III 213 v. 3.1 p. 221).

83. Nonetheless, the severity of the breach cannot lead by itself to a termination for just cause. What is decisive is that the facts adduced in support of the immediate termination have resulted in the loss of trust which is the basis of the employment contract (ATF 130 III 213 c. 3.1 p. 221; 127 III 1534 c. 1c p. 157 s)."

149. It is therefore well-established CAS jurisprudence that the termination of a playing contract must be for a sufficiently serious breach to justify termination with "just cause".

150. The Sole Arbitrator further notes here that Swiss law specifically addresses the case of a prevention from working under Article 337, paragraph 3, of the SCO which sets out as follows:

"*The court determines at its discretion whether there is good cause, However, under no circumstances may the court hold that good cause is constituted by an employee being prevented from working through no fault of his own*."

151. Even in connection with events relating to the Covid-19 pandemic, pursuant to Article 337, paragraph 3, of the SCO, a court may "*not recognize the employee's inability to perform work through no fault of his own as an important reason for termination without notice*" (see Kurt Pärli / Jonas Eggmann, Corona und die Arbeitswelt - Bestandsaufnahme und Würdigung der aktuellen Rechtslage, in Jusletter, 8 February 2021, free translation). Accordingly, the Appellant's argument relating to the First Respondent's lack of performance of his contractual obligations (not providing his services due to the imposed restrictions relating to the Covid-19 pandemic), could in any event not justify the termination of the Playing Contract.

152. The jurisprudence of both the FIFA DRC and the CAS is further clear that termination of a contract must be a last resort and warnings should normally follow in the first instance for misbehaviour. This is confirmed in CAS 2011/A/2567 as it states, "*the club will only have just cause to terminate the employment contract if it had previously warned the player of his unacceptable conduct or attitude*" (see also CAS 2007/A/1233 & 1234 and CAS 2004/A/587).

153. CAS 2011/A/2567 goes on to explain that "[i]*n accordance with the extensive case law regarding such matters, the seriousness and frequency of the facts, the circumstances under which they occurred and the parties' attitude with regard thereto, before, during and after they occur, is decisive in terms of the evaluation of the extent of the employee's fault and whether the facts amount per se to grounds for the termination of the employment relationship. (…) As per art. 337.3 of the Swiss Code of Obligations (…) and art. 14.2 of the FIFA Commentary, the deciding authority has the discretion to assess the facts and determine whether there was just cause for terminating the contract, on the merits of each particular case*."

154. It is clear therefore that the jurisprudence of CAS, in accordance with Swiss law, shows that a breach must be deemed of sufficient severity to justify a termination without warning, a situation whereby a party could no longer reasonably be expected to continue the contractual relationship. It should be a last resort and normally it is expected that warnings would be issued before a unilateral termination for just cause.

155. In the case at hand, the Appellant has not provided any evidence of any warnings having been issued to the First Respondent before the unilateral termination of the Playing Contract.

156. By way of reminder, on 23 March 2020, the Appellant requested the First Respondent to return to Poland, which he was unable to do, as confirmed by his agent in writing on 24 March 2020, due to the travel restrictions imposed by the Spanish government due to the Covid-19 pandemic, *inter alia*, as follows:

"*Especially in Spain where Government and official authorities forbid people to go outside, there are no flights or any transport.* […] *Ivan cannot return 31.03 first because there is no flight between Poland and Spain /all is closed/* […] *For now Ivan stays in Spain and follow the news. He* ***CANNOT*** *fly no where. All is closed!!!!*" (emphasis in original)

157. In addition, based on the evidence adduced by the Appellant itself regarding the situation in Poland at the time, namely the Polish government's announcement dated 13 March 2020, which stated inter alia as follows:

"*From Sunday, March 15, we are closing the borders of our country to foreigners.* […] *We suspend international passenger air and rail connections, but cargo transport works.* […]

Charter planes with Poles will be admitted to the country. Citizens will also be able to return to Poland by road transport, i.e. cars, buses and coaches. However, all international passenger air and rail connections will be suspended.

The temporary ban on entering Poland applied to foreigners. However, some of them will still be able to come to our country. Among them are:

[…]

- *persons with the right of permanent or temporary residence in the territory of the Republic of Poland or a work permit.*"

158. The Sole Arbitrator notes that whilst the First Respondent would presumably satisfy the final caveat to the ban on foreign citizens entering Poland at this time, due to his employment with the Appellant and temporary residence, it is clear that he was prevented from leaving Spain due to the travel restrictions imposed by the Spanish government as well as the restrictions imposed by the Polish government on international passenger flights entering Poland.

159. Therefore, the Sole Arbitrator is satisfied that the First Respondent's absence at this time was not a just cause for the unilateral termination of the Playing Contract by the Appellant. In fact, the Appellant had given him authorisation to travel to Spain at this time, and it is clear that it was almost impossible for him to return at the time the request was made. It is potentially possible he could return by road, with international air and rail travel suspended, although it is not clear if it was possible to cross borders at all at

this time. In any event, the First Respondent gave an assurance that he would return to Poland as soon as he was practically able to do so. Accordingly, the travel restrictions imposed by both countries actually provided him with a justification for his absence and his assurances to return were evidence of his good faith towards both the Appellant and his contractual obligations.

160. The Sole Arbitrator further notes that when the Appellant requested the First Respondent to perform his contractual obligations while it was almost impossible for him to do so, the Appellant itself had not complied with its contractual obligations, since the First Respondent had several overdue salaries.

161. Taking all of the above into account, the Sole Arbitrator is satisfied that the Appellant had no just cause to terminate the Playing Contract.

162. It follows, therefore, that the Appellant has failed to prove that it had grounds, either based on force majeure or just cause, to justify the termination of the Playing Contract, which was thus terminated without just cause by the Appellant.

D. What are the consequences that follow from the termination of the Playing Contract?

163. Having established that the Appellant's termination of the Playing Contract on 10 April 2020 was without just cause, the Sole Arbitrator needs to determine the consequences that follow.

164. As a starting point, the Sole Arbitrator holds that, in accordance with the well-established jurisprudence of both the FIFA DRC and the CAS, and the principle of *pacta sunt servanda*, the Appellant is liable to fulfil its contractual obligations to the First Respondent under the Playing Contract, meaning that the contractual entitlements not paid up to the date of termination are payable in full.

165. In this regard, the Sole Arbitrator notes that, after the First Respondent sent his third letter of default on 21 May 2020, the Appellant then paid to the First Respondent the outstanding salaries, for the months of February and March 2020, up to the date of termination of the Playing Contract.

166. Turning to any other liability of the Appellant, it is relevant to note that the FIFA RSTP firstly apply to the case at hand, with Swiss law being applied if required to complete any gap or to provide any interpretation of the FIFA RSTP.

167. It follows therefore that Article 17 of the FIFA RSTP is relevant in setting out, as it does, the principle that if a contract is terminated without just cause, the party in breach pays compensation to the other party. It goes on to set out certain matters which should be taken into account, where relevant, in determining the appropriate levels of compensation, which includes the remuneration and other benefits due to a player under the breached contract and also any benefits due to a player under any new contract should be taken into account in mitigation, providing it covered the same period as the period remaining on the existing contract, up to a maximum of five years.

168. Accordingly, the Sole Arbitrator also finds that, given that the Appellant is liable for the early termination of the Playing Contract, the First Respondent is entitled to receive an amount in compensation for the breach of contract from the Appellant.

169. Therefore, the Appellant is also liable to pay compensation to the First Respondent calculated as the residual value of the Playing Contract at the point of termination. This is confirmed in CAS 2015/A/4206 & 4209 which states, *"consistent with the well-established CAS jurisprudence, the injured party is entitled to a whole repatriation of the damages suffered according to the provisions of articles 337 b) and 337 c) of the SCO, pursuant to the principle of the "positive interest", under which compensation for breach must be aimed at reinstating the injured party to the position it would have been in, had the contract been fulfilled to its end (CAS 2012/A/2698; CAS 2008/A/1447; CAS 205[sic]/A/801; CAS 2006/A/1602)."*

170. The Sole Arbitrator notes that the residual value of the Playing Contract, as the Appealed Decision determined, was the amount of EUR 40,100, made up of the monthly salaries of EUR 10,500 for April, May and June 2020 and the contractual bonus payments of EUR 900 and EUR 7,700.

171. The Appellant disputes the bonuses were payable because "*the above bonuses should be awarded in the event that the player is still participating in the competition*". However, the Appealed Decision confirms that the "*contractual bonus payments due to the* [First Respondent]*, the fulfilment of the necessary conditions of which were substantiated by the* [First Respondent] *in his request.*"

172. The Sole Arbitrator also notes that in his first letter of default, dated 29 April 2020, that the First Respondent requests payment of amounts outstanding including the following:

"*<u>Bonus for each point scored:</u> nine hundred Euros gross (900,00 € gross)*

<u>Appareance Bonus:</u> seven thousand seven hundred Euros gross (7.700,00 € gross)" (emphasis in original)

173. Therefore, this is clear evidence to support the First Respondent's contention that these bonuses had already fallen due for payment, as opposed to, for instance, future bonuses based on the team performance after the termination of the Playing Contract.

174. Accordingly, in accordance with Article 8 of the Swiss Civil Code the Appellant bears the burden of proving that the bonuses had not already fallen due for payment by the termination date of 10 April 2020, and the Sole Arbitrator notes that it has failed to offer any evidence to support that the bonuses had not already been achieved by that date.

175. Finally, and for completeness, the Sole Arbitrator notes that the First Respondent signed a new employment contract with the Polish club MKS Cracovia SSA on 1 August 2020, for a period from 1 August 2020 to 30 June 2022. Given that the Playing Contract was due to expire on 30 June 2020, there is no mitigation to apply because the new employment contract did not commence until after that date.

176. Therefore, the Sole Arbitrator finds that the Appellant has to pay to the First Respondent the residual value of the Playing Contract, as at the date of termination, by way of compensation to the First Respondent, which is calculated to be EUR 40,100.

177. In accordance with Article 104 of the SCO, the Appellant has to pay interest at the rate of 5% per annum on the amount due which, in accordance with the First Respondent's request for the Appealed Decision to be confirmed, is calculated from the date of the claim before the FIFA DRC, 29 March 2022, until the date of effective payment.

E. Conclusion

178. Based on the above, and having taken into account all the arguments put forward and the evidence supplied, the Sole Arbitrator finds that:

(a) the Appellant unilaterally breached the Playing Contract without just cause;

(b) the Appellant has to pay to the First Respondent the sum of EUR 40,100 plus interest at the rate of 5% from 29 March 2022 to the date of effective payment; and

(c) the Appellant´s appeal against the Appealed Decision is dismissed.

179. Accordingly, the Appellant's appeal against the Appealed Decision is dismissed and the Appealed Decision is confirmed.

IX. COSTS

180. Pursuant to Article R64.4 of the CAS Code, which is applicable to this proceeding:

"*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."

181. In addition, 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 and without any specific request from the parties, 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 contribution, the Panel shall take into account the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties."

182. Following the outcome of these proceedings, the Sole Arbitrator finds that, in accordance with Article R64.4 of the CAS Code, the arbitration costs of these proceedings, in an amount to be subsequently notified to the Parties by the CAS Court Office, shall be borne by the Appellant.

183. For the reasons above, the Sole Arbitrator is also of the view that, pursuant to Article R64.5 of the CAS Code, the Appellant shall pay CHF 6,000 (six thousand Swiss francs) to the First Respondent as a contribution towards the legal costs and other expenses incurred in relation to these proceedings.

184. Finally, the Sole Arbitrator determines that the Second Respondent is not entitled to a contribution to its legal fees and expenses based on the standing practice of the CAS not to grant an international federation a contribution to its legal costs when it is not represented by external counsel. Therefore, the Appellant and the Second Respondent shall bear their own legal fees and other expenses incurred in relation to these proceedings.

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ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 18 July 2022 by Korona S.A. against the decision issued on 9 June 2022 by the FIFA Dispute Resolution Chamber is dismissed.

2. The decision issued on 9 June 2022 by the FIFA Dispute Resolution Chamber is confirmed.

3. The costs of the arbitration, to be determined and served to the Parties by the CAS Court Office, shall be borne by Korona S.A.

4. Korona S.A. shall pay to Iván Márquez Álvarez CHF 6,000 (six thousand Swiss francs) as a contribution towards the legal fees and expenses incurred in connection with these arbitration proceedings.

5. Korona S.A. and Fédération Internationale de Football Association shall bear their own legal fees and other expenses incurred in connection with these arbitration proceedings.

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

Seat of arbitration: Lausanne, Switzerland
Date: 18 July 2023

THE COURT OF ARBITRATION FOR SPORT

Edward Canty
Sole Arbitrator