CAS 2022/A/8890 Samsunspor Futbol Kulübü A. Ş. v. Alen Melunović

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Mr Wouter Lambrecht, Attorney-at-Law, Barcelona, Spain

in the arbitration between

Samsunspor Futbol Kulübü A. Ş, Samsun, Turkey

Represented by Mr Georgi Gradev and Mr Ersin Hamarat, Attorneys-at-law, SILA International Lawyers, Sofia, Bulgaria

- Appellant -

and

Alen Melunović, Serbia

Represented by Mr Mustafa Melih Kuyucu, Attorney-at-law, Kanar Kuyucu Koç Law Firm, Istanbul, Turkey

- Respondent -

* * * * *

I. PARTIES

1. Samsunspor Futbol Kulübü A. Ş (the "Appellant", "Samsunspor" or "the Club") is a professional football club with registered offices in Samsun, Turkey. Samsunspor is registered with the Turkish Football Federation ("TFF") which in turn is affiliated to the *Fédération Internationale de Football Association* ("FIFA"). During the sporting season 2022-23, Samsunspor participated in the TFF 1st League corresponding to the second division of Turkish association football.

2. Alen Melunović ("the Respondent" or "the Player") is a professional football player of Serbian nationality. He is a former player of Samsunspor. During the sporting season 2022-23, he rendered his services for Iraklis FC which participated in the Greek Super League 2 corresponding to the second division of Greek association football.

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

II. FACTUAL BACKGROUND

4. Below is a summary of the main relevant facts, established based on the written submissions of the Parties, and the evidence examined during the proceedings, including at the hearing. The background information is given for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion.

A. Background Facts

5. On 10 August 2021, the Club and the Player concluded an employment contract valid from the date of signature until 31 May 2022 ("the Employment Contract") or until any later date on which the Club had an official match during the 2021/2022 football season.

6. In the Employment Contract, the Parties *inter alia* agreed on an automatic extension option ("the Automatic Extension Option") which reads as follows:

> *"**ARTICLE 4 – TERM OF THE CONTRACT***
>
> *(…)*
>
> *b) In addition, the Parties have agreed and accept that the terms of this Contract may be automatically extended for 1 (one) more football season of 2022/2023 with the conditions specified herein ("**Extension**")*
>
> *In case the following conditions are met together, the term of this Contract shall be automatically extended for one more football season of 202212023:*
>
> - *the Player plays in the first 11 (eleven) in 25 (twenty-five) or more official matches that the Club plays in 2021/2022 TFF 1st League **and***

- *the total number of the goals scored and the assists made by the Player reaches 15 (fifteen) or above in the official matches that the Club plays in 2021/2022 TFF 1st League*

In case the term of this Contract is extended for 2022/2023 football season, the same provisions stated in this Contract and the financial conditions stated in Article 6 paragraph B of this Contract shall apply and this Contract shall expire on 31.05.2023.

(…)"

7. The other relevant clauses in the Employment Contract read as follows:

"***ARTICLE 6 – OBLIGATIONS OF THE CLUB***

A) For 2021/2022 Football Season

1. Sign-On Fee: *The Club shall pay the Player in total of 62.500- € (-sixtytwothousandfivehundred-Euro) as sign-on fee at the latest one week (7 days) after the signature date of this Contract.*

2. Salary: *The Club shall pay to the Player in total of 212.500- € (-twohundredtwelvethousandfivehundred-Euro) as salary on or before the following dates in ten (10) instalments:*

17.08.2021	*20.000- EUR*	*Monthly salary*
15.09.2021	*20.000- EUR*	*Monthly salary*
15.10.2021	*20.000- EUR*	*Monthly salary*
16.11.2021	*20.000- EUR*	*Monthly salary*
15.12.2021	*20.000- EUR*	*Monthly salary*
18.01.2022	*32.500- EUR*	*Monthly salary*
15.02.2022	*20.000- EUR*	*Monthly salary*
15.03.2022	*20.000- EUR*	*Monthly salary*
15.04.2022	*20.000- EUR*	*Monthly salary*
17.05.2022	*20.000- EUR*	*Monthly salary*
TOTAL	***212.500- EUR***	

3) Bonuses: *In addition to the remunerations above, the Club shall pay the below-mentioned bonuses to the Player with the conditions set hereunder:*

i. *In case the Player enters the field in the first 11 (eleven) in 25 (twentyfive) or more official matches that the Club plays in the TFF 1st League in 2021/2022 season, the Club shall pay a bonus of 10.000-€ (-tenthousand-Euro) to the Player. This bonus shall be paid to the Player within 30 (thirty) days after the 2021/2022 season ends.*

ii. *In case the total number of the goals scored and the assists made by the Player reaches 20 (twenty) or above in the official matches that the Club plays in TFF 1st League in 2021/2022 season, the Club shall pay a bonus of 10.000-€ (-tenthousand-Euros) to the Player. This bonus shall be paid to the Player within 30 (thirty) days after the 2021/2022 season ends.*

iii. *In case the Club is promoted to the TFF Super League at the end of 2021/2022 season, the Club shall pay a bonus of 30.000-€ (-thirtythousand- Euro) to the Player. This bonus shall be paid to the Player within 30 (thirty) days after the condition for the bonus is met and the bonus is earned by the Player.*

The above-mentioned bonuses which are decided to be paid to the Player by the Club, are bonuses of objectives and are paid conditionally by assuming that the Player shall contribute in achievement of Club's objective and he will remain with the Club until the end of the relevant football season. If the objective is not achieved, the bonus payment shall not be made. In case the objective is achieved however the Player has not continued his sportive activities within the Club for any reason (included but not limited to cases where this Contract is terminated or the Player is temporarily or permanently transferred to a third Club, etc. and not limited to these) during the whole relevant season, the bonus payment shall not be made as well.

4) Other Benefits: *The Club shall pay a monthly allowance of 1.000-€ (-onethousand-Euro) to the Player starting from August to May in 2021/2022 football season for the Player's accommodation and transportation (car).*

(...)

B.2.) If the Club plays in the TFF 1st League in the 2022/2023 football season, the Club will only pay the amounts specified in this article of B.2. to the Plaver. (In this case, the amounts mentioned in the article B.1 above shall not be paid to the Player.)

1) Salary: *The Club shall pay to the Player in total of 275.000- € (-twohundredtseventyfivethousand-Euro) as salary on or before the following dates in ten (10) instalments:*

16.08.2022	*35.000- EUR*	*Monthly salary*
15.09.2022	*22.500- EUR*	*Monthly salary*
18.10.2022	*22.500- EUR*	*Monthly salary*
15.11.2022	*22.500- EUR*	*Monthly salary*
15.12.2022	*22.500- EUR*	*Monthly salary*
17.01.2023	*35.000- EUR*	*Monthly salary*
15.02.2023	*22.500- EUR*	*Monthly salary*
15.03.2023	*22.500- EUR*	*Monthly salary*
18.04.2023	*22.500- EUR*	*Montly salary*
16.05.2023	*22.500- EUR*	*Monthly salary*

TOTAL	***275.000- EUR***	

2) Bonuses: *In addition to the remunerations above, the Club shall pay the below- mentioned bonuses to the Player with the conditions set hereunder:*

i. *In case the Player enters the field in the first 11 (eleven) in 25 (twentyfive) or more official matches that the Club plays in the TFF 1st League in 2022/2023 season, the Club shall pay a bonus of 10.000-€ (-tenthousand- Euro) to the Player. This bonus shall be paid to the Player within 30 (thirty) days after the 2022/2023 season ends.*

ii. *In case the total number of the goals scored and the assists made by the Player reaches 20 (twenty) or above in the official matches that the Club plays in TFF 1st League in 2022/2023 season, the Club shall pay a bonus of 10.000-€ (-tenthousand- Euros) to the Player. This bonus shall be paid to the Player within 30 (thirty) days after the 2022/2023 season ends.*

iii. *In case the Club is promoted to the TFF Super League at the end of 2022/2023 season, the Club shall pay a bonus of 30.000-€ (-thirtythousand- Euro) to the Player. This bonus shall be paid to the Player within 30 (thirty) days after the condition for the bonus is met and the bonus is earned by the Player.*

The above-mentioned bonuses which are decided to be paid to the Player by the Club, are bonuses of objectives and are paid conditionally by assuming that the Player shall contribute in achievement of Club's objective and he will remain with the Club until the end of the relevant football season. If the objective is not achieved, the bonus payment shall not be made. In case the objective is achieved however the Player has not continued his sportive activities within the Club for any reason (included but not limited to cases where this Contract is terminated or the Player is temporarily or permanently transferred to a third Club, etc. and not limited to these) during the whole relevant season, the bonus payment shall not be made as well.

3) Other Benefits: *The Club shall pay a monthly allowance of 1.000-€ (-onethousand-Euro) to the Player starting from August to May in 2022/2023 football season for the Player's accommodation and transportation (car).*

(…)

ARTICLE 10 – MISCELLANEOUS

a) *Any dispute arising from or related to the present Contract may be referred to the FIFA Dispute Resolution Chamber as the first instance body. The language of the procedure before FIFA shall be English. The Court of Arbitration for Sport (CAS) in Lausanne will act as the appeals body. The language of the arbitration will be*

English. The applicable law shall be those applicable FIFA Regulations, and Swiss law."

8. Shortly after having signed with the Club, the Player suffered an injury rendering him unfit to play.

9. On 11 September 2021 and following several weeks of physiotherapy sessions which did not improve the Player's condition and with the Club's doctors not being able to correctly diagnose the injury, the Player went to Switzerland for medical examinations.

10. Upon his return to Turkey, rather than undergoing an operation as was recommended by the medical expert in Switzerland, the Player, on 20 September 2021 was treated at the Samsun University Hospital where he got some injections. He remained unfit to play and according to the Player he allegedly asked for suitable conditions for an operation, but the Club rejected the same as they wanted to terminate the Employment Contract.

11. On 15November 2021, the Club's President requested the Player to terminate the Employment Contract but the Player refused to do so and indicated that such matter should be discussed with his agent.

12. On 21 November 2021, the President of the Club sent a message to the Player asking the phone number of the agent but no call or meeting between them took place.

13. On 22 November 2021, the Player received a letter from the Club dated 18 November 2021, by means of which the Club informed him that "*it had been detected that you left Samsun and went to Switzerland on 11 September 2021 and got health service and returned the Club on 16 September 2021, without obtaining any official and prior written permission of the Club.*" such in violation of article 5 g) of the Employment Contract. The letter continued to state that the Player had failed to share any record regarding the medical examination, had failed to inform the Club regarding his health condition, had been absent from training, all of which constituted *"serious irregularities with regard to your contract*". The Player was given 48 hours to provide his explanations.

14. On the same day, the Player provided his answer to the Club fully challenging the allegations of the Club. He submitted that the Club fully supported his trip to Switzerland as they could not "*diagnose and fix the problem*" and he referred *inter alia* to WhatsApp conversations with club officials regarding his trip to Switzerland and the results of the medical examinations conducted there. In his answer, the Player also referred to the approach of the President (cfr. para. 11), requested to be provided with suitable conditions for an operation. In the same letter, the Player also put the Club on notice pursuant to articles 12bis and 14bis of the FIFA Regulations on the Status and Transfer of Players ("FIFA RSTP") and requested to be paid 3 months of salary and 3 months of accommodation and transportation fees.

15. The Club did not react to the answers provided by the Player nor did it challenge the content of said letter.

16. On 30 November 2021, the Club agreed for the Player to undergo the surgery with a doctor of his choice at the hospital of his choice, namely a private hospital in Istanbul, but the Club made the Player sign a document pursuant to which the Player accepted that he would carry all the costs of the surgery and the responsibility for the risks involved.

17. On 1 December 2020, the Player underwent a lumbar discectomy /spine surgery at the private hospital due to an intervertebral disc disorder with radiculopathy. The different medical reports issued by the doctor of the Player stated the following for what concerned the rehabilitation process of the Player:

"*it was decided to rest the patient from 01.12.2021 until 20.12.2021. it is appropriate to come for control on 21.12.2021*.

"Our patient can attend sports and fitness centers from 21.12.2021 until 17.01.2022".

18. On 6 December 2021 and considering the default notice sent by the Player regarding the outstanding amounts (cfr. para 14), the Parties signed a settlement ("the Settlement") agreeing on a payment plan for the Club to pay the Player the outstanding amount of EUR 63,000.

19. On 15 December 2021, the Club failed to pay the December salary in the amount of EUR 20,000.

20. On 31 December 2021, the Club made the payments pursuant to the Settlement.

21. On 13 January 2022, the Club signed a new foreign striker, allegedly exceeding the quota of foreign players that could be registered with the Turkish 1st League.

22. On an unknown date in January, the Club allegedly orally informed the Player that he would never return to the team.

23. On 18 January 2022, the Club failed to pay the January salary in the amount of EUR 32,500.

24. On 20 January 2022, the Player sent a default notice to the Club requesting to be paid his December 2021 and his January 2022 salary instalments as well as two months of transportation and accommodation fees. The default notice was sent pursuant to article 12bis and 14bis of the FIFA RSTP and contained the warning that in case the Club failed to pay the outstanding amount within 15 days, the Player would terminate the contract with just cause.

25. Still on the same day, the Club sent a notice to the Player via public notary informing him that he was excluded from the squad "*indefinitely upon the necessity*" and this until 13 February 2022.

26. On 22 January 2022, the Player sent a new notice to club indicating that the individual training sessions organised for him were being held under unacceptable conditions whilst during his individual training sessions, supporters of the Club entered the pitch where he was training and "*physically interfered him*". In this letter, the Player again put the Club on notice regarding its outstanding payments and this pursuant to article 12bis and 14bis of the FIFA RSTP.

27. On 24 January 2022, the Club replied to the Player's last notice contesting the latter's allegations, indicating *inter alia* that proper conditions for training were being provided and that it did not control nor was responsible for its fans.

28. On the same day, the Club sent another letter to the Player indicating that he had committed various breaches of contract, those breaches allegedly being that (i) the Club had not received any satisfactory answers from the Player regarding its letter dated 18 October 2021 (cfr. para 13), (ii) that "*recently it had been discovered that after the surgery operated in December 2021 and the medical report provided for you, you have failed to take care of your health*" and that you are "*not following the training program the club is suggesting*" and (iii) "*that it has been noted that you carried your mobile phone on you during training and unlawfully recorded people who are watching the training*. The Player was provided 48 hours to share his comments with the Club.

29. On 26 January 2022, the Player replied to the Club. In his letter, he completely dismissed the Club's allegations, pointed out several inconsistencies between the different letters of the Club and its apparent bad faith and *inter alia* requested to be reinstated at or to participate in group trainings all whilst putting the club on notice that its behaviour and lack of payment could lead to a unilateral termination with just cause.

30. On 27 January 2022, the Club imposed two fines on the Player for a total of EUR 54,999.60, for alleged violations by the Player of the ethical rules, fines which were increased with 100% to EUR 109,999.20 as the Player provided "*a weak defence*".

31. On 28 January 2022, the Player contested the fines imposed on him indicating that they were unreasonable, unfair, unacceptable and unlawful. The letter continued to state that the Club's behaviour was abusive and was to be seen in light of the Club's desire to the terminate the contract with the Player.

32. Still on the same day, the Club terminated the Employment Contract invoking that the trust between the parties had been irrevocably damaged as a result of the Player's behaviour and misconduct.

33. On 11 February 2022, the Player signed a new contract with the Serbian club FK Napredak valid from said date until 31 May 2022 and pursuant to which he was entitled to receive a total amount of EUR 5,464.28.

34. On 22 August 2022, the Player signed a new contract with Iraklis FC valid from said date until 30 June 2023. Pursuant to this contract, the Player was entitled to a monthly salary of EUR 740.5.

B. Proceedings before the FIFA Dispute Resolution Chamber ("FIFA DRC")

35. On 3 March 2022, the Player filed a claim against the Club with the FIFA DRC requesting *inter alia* to be awarded outstanding remuneration and compensation for the Club's breach of contract without just cause. More specifically, the Player requested to be awarded the residual value of the Employment including the optional year as per the Automatic Extension Option, i.e. the season 2022-23.

36. The Club, in its reply dated 3 April 2022, contested the claim of the Player. The Club indicated that it had just cause when terminating the Employment Contract due to several breaches committed by the Player and that there were no outstanding payments keeping in with the fines that were validly imposed on the Player. The Club, in subsidiary order, also indicated that the Player's request to be awarded the residual value for the season 2022-23 was groundless, as it was not guaranteed that he would meet the conditions for the Employment Contract to be extended.

37. On 21 April 2022, the FIFA DRC rendered a decision (the "Appealed Decision"), notified to the Parties on 24 April 2022, with the operative part reading as follows:

> ***1. The claim of the Claimant, Alen Melunovic, is partially accepted.***
>
> ***2. The Respondent, Samsunspor, has to pay to the Claimant, the following amount(s):***
>
> - ***EUR 54,500 as outstanding remuneration, plus 5% interest p.a. as from 3 March 2022 until the date of effective payment;***
> - ***EUR 349,600 as compensation for breach of contract without just cause plus 5% interest p.a. as from 3 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 of the ban shall be of up to three entire and consecutive registration periods.

2. The present matter shall be submitted, upon request, to the FIFA Disciplinary Committee in the event that full payment (including all applicable interest) is still not made by the end of the three entire and consecutive registration periods.

6. The consequences shall only be enforced at the request of the Claimant in accordance with art. 24 par. 7 and 8 and art. 25 of the Regulations on the Status and Transfer of Players.

7. This decision is rendered without costs.

38. On 5 May 2022, the grounds of the Appealed Decision were communicated to the Parties, determining, *inter alia*, as follows:

- *37. […]the Chamber moved to the substance of the matter, and took note of the fact that the parties strongly dispute whether the player had acted in line with the instructions regarding medical treatment the club had given him and whether this alleged non-compliance with the medical instructions and his alleged illegally leaving of the city of Samsun and the country of Turkey, for which he was later fined with an amount of EUR 109,999.20, had given the club a just cause to terminate the contract with the player on 28 January 2022.*

- *42. Moreover, 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.*

- *43. Having established the foregoing, the Chamber went on to analyse the documentation provided by the parties in support of their allegations. In this respect, the Chamber noted that the player had provided some messages he exchanged via WhatsApp with alleged officials of the club. After having analysed the content of said messages, the Chamber concluded that the content of said messages is not entirely clear in the sense that no explicit permission is given to the player by the alleged employee of the club to travel abroad and/or to Switzerland in the period between 11 until 16 September 2022, however that the content of said messages, which was rather general, was also not contested by the club. What is more, according to the members of the Chamber, it could be*

noted from these messages that the club did not indicate to have any problems at all with the player travelling abroad for a medical opinion.

- *45. Additionally, the members of the Chamber noted that – after the player travelled to Switzerland in September 2021 – it took the more than two months, i.e. until on 18 November 2021, to bring up the issue of player's alleged unauthorized absence, and subsequently requested the player to provide an explanation. What is more, the Chamber noted that after the player provided such explanation, the club no longer requested information from the player on his absence and focused on agreeing on a payment plan for the outstanding amount of EUR 63,000.*

- *46. Furthermore, the Chamber wished to point out that from the information on file, it turns out that in January 2022, the club allegedly excluded the player from its first team, a circumstance which is not denied by the club, and, after the player put the club in default for several other outstanding amounts, brought up again the discussion about the player's alleged absence in September 2021. The club, consequently, asked the player again to provide a new clarification as to his absence, which lead – after the player provided a renewed explanation – to the imposture of a fine of EUR 54,999.60 for violations of ethical rules and for his alleged non-approved health constitute, and a consequent increasing of said fine with 100% to EUR 109,999.20, as the player provided "a weak defence".*

- *47. After having evaluated the above circumstances, the members of the Chamber turned to the club's allegation that on 27 January 2022, it had validly imposed a fines of EUR 109,999.20 on the player, for his alleged absence of 5 days in the period between 11 and 16 September 2022.*

- *48. In this context, the Chamber observed in relation to the fines imposed on the player by the club the following circumstances: a) the fine was based on a (contested) absence without authorization from the club's offices, b) the player was asked to present his position to the intention to imposture of the fines, however it appears that nor the player, nor FIFA in the current proceeding, was provided a copy of the Club's Internal Disciplinary Regulations, c) after the player presented his position, the fine was allegedly doubled of the "weak defence" of the player, and d) the total amount of the fines imposed on the player by the club represents almost 35% of the player's yearly salary.*

- *49. After having analysed the above circumstances, the members of the Chamber were of the unanimous opinion a fine corresponding to almost 35% of the player's yearly salary for a(contested) absence of a few days without authorization from the club, is clearly excessive and disproportionate.*

- *52. With the above in mind and after having carefully analysed the parties' submissions, the Chamber concluded that a short absence of 5 days under the circumstances of the present case, namely an unclear situation whether the player was allowed to travel to Switzerland for medical examination, cannot be deemed as a substantial breach of an employment contract, capable of triggering the consequences of an unlawful termination. Said circumstance, in combination with the consequent disciplinary proceedings and the imposture of an excessive and disproportionate fines by the club followed by the termination the contract one day later, made the members of the Chamber come to the conclusion that the club had no justified reasons to terminate the contract with the player.*

- *55. The Chamber observed that the outstanding remuneration at the time of termination, coupled with the specific requests for relief of the player, are equivalent to 2 salaries (one of EUR 20,000 and the one of EUR 32,500), as well as accommodation and transportation allowance in the amount of EUR 2,000 under the contract, amounting to a total amount of EUR 54,500.*

- *61. Bearing in mind the foregoing as well as the claim of the player, the Chamber proceeded with the calculation of the monies payable to the player under the terms of the contract from the date of its unilateral termination until its end date. In this respect, the members of the Chamber reiterated that it deemed that the effective end date of the contract is the end of the season 2022/2023, as the extension clause, which left the extension of the contract essentially completely at the discretion of the club, as it could decide on whether or not the player would be fielded, cannot be upheld against the player. Consequently, the Chamber concluded that the amount of EUR 355,000 (i.e. the amount of EUR 80,000 for the remainder of the season 2021/2022 and the amount of EUR 275,000 for the 2022/2023 season) serves as the basis for the determination of the amount of compensation for breach of contract.*

- *62. In continuation, the Chamber verified as to whether the player had signed an employment contract with another club during the relevant period of time, by means of which he would have been enabled to reduce his loss of income. According to the constant practice of the DRC as well as art. 17 par. 1 lit. ii) of the Regulations, such remuneration under a new employment contract shall be taken into account in the calculation of the amount of compensation for breach of contract in connection with the player's general obligation to mitigate his damages.*

- *63. Indeed, the player found employment with the Serbian club FK Napredak. In accordance with the pertinent employment contract, the player was entitled to a total amount of EUR 5,464 in the period between*

11 February and 31 May 2022. Therefore, the Chamber concluded that the player mitigated his damages in the total amount of EUR 5,400.

- *64. Subsequently, the Chamber referred to art. 17 par. 1 lit. ii) of the Regulations, according to which a player is entitled to an amount corresponding to three monthly salaries as additional compensation should the termination of the employment contract at stake be due to overdue payables. In the case at hand, the Chamber however noted that the contract was terminated by the club, and therefore, the termination was not based on overdue payables, and therefore decided to not award any additional compensation to the player.*

- *65. Consequently, on account of all of the above-mentioned considerations and the specificities of the case at hand, the Chamber decided that the club must pay the amount of EUR 349,600 to the player (i.e. EUR 355,000 minus EUR 5,400), which was to be considered a reasonable and justified amount of compensation for breach of contract in the present matter*.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT ("CAS")

39. On 20 May 2022, the Club filed a Statement of Appeal with the Court of Arbitration for Sport ("CAS") against the Appealed Decision in accordance with Articles R47 and R48 of the 2021 edition of the CAS Code of Sports-related Arbitration (the "CAS Code"). In its Statement of Appeal, the Club named the Player as the sole respondent and requested, *inter alia*, that the proceedings be submitted to a sole arbitrator pursuant to Article R50.1 of the CAS Code.

40. On 23 May 2023, the CAS Court Office notified the Statement of Appeal to the Player *inter alia* requesting the Player to provide his input on several procedural matters, including the possibility to submit the dispute to a sole arbitrator.

41. On the same day, the CAS Court Office also notified the Statement of Appeal to FIFA and invited FIFA *inter alia* to indicate whether it intended to participate as a party in the present proceedings pursuant to Article R41.1 of the CAS Code.

42. On 24 May 2022, FIFA informed the CAS Court Office that it renounced to its right to request its possible intervention in the present arbitration proceedings pursuant to articles R52.2 and R41.3 of the CAS Code.

43. On 25 May 2022, the Player provided his input on the different procedural requests made by the CAS Court Office and requested that the case be submitted to a panel of three arbitrators.

44. On 26 May 2022, and following a request thereto by the CAS Court Office, the Player indicated that due to economic problems he would not be able to pay his share of the advance of costs.

45. On 30 May 2022, the Appellant filed its Appeal Brief and this in accordance with Article R51 of the CAS Code.

46. On 31 May 2022, the CAS Court Office, pursuant to Article R55 of the CAS Code, invited the Player to submit his Answer within twenty days upon receipt of the letter by courier letter whilst complying with Article R31 para. 3 of the CAS Code.

47. On 2 June 2022, the Player, pursuant to Article R55 *iuncto* Article R64.2 of the CAS Code, requested that the time-limit to file his Answer be set after the Club had paid its share of the advance of costs.

48. On 3 June 2022, the CAS Court Office informed the Player that the time-limit to file his Answer was set aside as per its request.

49. On 28 June 2022, new legal representatives acting on behalf of the Club made themselves known to the CAS.

50. On 1 July 2022, the CAS Court Office confirmed receipt of payment of the advance of costs by the Club and invited the Player, pursuant to Article R55 of the CAS Code to submit his Answer within twenty days upon receipt of the letter by courier, whilst complying with Article R31 of the CAS Code.

51. In the same letter, the CAS Court Office informed the Parties that pursuant to Article R54 of the CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the arbitral tribunal appointed to hear the appeal was constituted as follows:

Sole Arbitrator: Mr Wouter Lambrecht, Attorney-at-Law, Barcelona, Spain

52. On 21 July 2022, the Player filed its Answer in accordance with Articles R31 and R55 of the CAS Code.

53. On 26 July 2022 and following an inquiry from the CAS Court Office in this respect, the Club indicated that it wanted to celebrate a hearing whilst the Player indicated that he would prefer for the Sole Arbitrator to issue an award based on the Parties' written submissions.

54. On 17 August 2022, the CAS Court Office, informed the Parties that pursuant to Article R57.2 of the CAS Code, the Sole Arbitrator had decided to hold a hearing.

55. On 24 August 2022 and following several exchanges with the Parties regarding their availabilities, the CAS Court Office informed the Parties that the hearing was scheduled for 14 September 2022 via video-conference. In the same letter, the Parties were requested to inform the CAS Court Office of the names of all the people who would attend the hearing.

56. On the same day, Mr Georgi Gradev and Mr Ersin Hamarat made themselves known to the CAS as the new legal representatives of the Club.

57. On 29 August 2022 and following several exchanges with the new legal representative of the Club, the CAS Court Office confirmed that the date of the hearing via videoconference remained as previously scheduled.

58. On the same day, the Club filed a letter raising several procedural issues. Namely, the Club, pursuant to Article R56 of the CAS Code requested the Sole Arbitrator to (i) summon the Player to participate in the hearing and allow time to examine him and to (ii) order the Player to provide evidence of his efforts to find a new club as of June 2022 onwards and share any employment contract signed from said date onwards. The Club also asked permission to submit CAS case law on which it intended to rely at the hearing and disputed the admissibility of Player's requests for relief nº4 to nº10 as these allegedly represented a counterclaim. Finally, the Club indicated that it wished to withdraw requests for relief nº4,5,7 and 9 as contained in its Appeal Brief and the Club proposed to settle the dispute against the payment of EUR 100,000, an offer which was valid until 14 September 2022.

59. On 5 September 2022, the Player informed the CAS Court Office that in light of Article R56 of the CAS Code, it objected to the Club's request to supplement and amend its requests for relief and/or its arguments. In the same letter, the Player indicated that he did not accept the settlement proposal of the Appellant.

60. On 8 September 2022, the CAS Court Office, on behalf of the Sole Arbitrator, informed the Parties, *inter alia* as follows:

"1. Appellant's request of production of documents

The Respondent is invited to produce the new employment contract with Iraklis FC and any annexe thereto on or before 12 September 2022.

The Appellant's request that the Respondent be ordered to provide evidence of his efforts to find a new club constitutes a new request that should and could easily have been made in its Appeal Brief – for which it shall be refused as per Article R56 of the CAS Code. Furthermore, the Appellant's request is moot given that the Player found new employment and is ordered to share a copy of the new employment contract and any annexe thereto.

2. Appellant's request to summon and question the Player at the hearing

On behalf of the Sole Arbitrator, the Appellant's request is rejected in application of Article R56 of the CAS Code as it should and easily could have been included in the Appeal Brief.

3. Production of case-law

The Appellant is hereby allowed to produce the case-law which is linked to the legal argumentation set out in its Appeal Brief as they do not constitute new evidence as per article R56 of the CAS Code. Such case law should be produced on or before 12 September 2022.

4. Withdrawal of requests for relief by Appellant & objections to certain requests for relief made by Respondent

In light of the opposition of the Respondent, both issues shall be addressed at the hearing.

5. Legal arguments

The Parties are hereby reminded that in spite of the principle of jura novit curia, new legal arguments developed at the hearing which could obviously have been made at a previous stage will not be accepted such in accordance with the principle that all parties shall act in procedural good faith."

61. On 10 September 2022, the Club sent a new letter to the CAS Court Office *inter alia* submitting the jurisprudence it wished to rely on (CAS 2012/A/2874) and explaining why it wished to withdraw certain of its requests for relief contained in its Appeal Brief. Namely, the Club indicated that:

- *Appellant hereby accepts that it unilaterally terminated the litigious contract without just cause on January 28, 2022;*
- *Appellant hereby accepts that the monetary fine of EUR 109,099 is invalid and unenforceable and thus, cannot be offset against the amounts due to the Respondent;*
- *Appellant hereby accepts that it owes the Respondent EUR 54,500 as outstanding remuneration, plus 5% interest p.a. as of March 3, 2022, until the date of effective payment;*
- *Appellant hereby accepts that the Respondent is, in principle, entitled to compensation for breach of contract based on art. 17.1 RSTP but not in the amount adjudicated by FIFA, which should be reduced significantly.*

62. On 12 September 2022, the Player submitted a copy of his contract with Iraklis FC and filed several new FIFA decisions on which he intended to rely. In his letter, the Player also confirmed that in light of the comments of the Club in its latest correspondence, its witness Mr Bratislav Ristic would not attend the hearing.

63. On respectively 13 and 14 September 2022, the Player and the Club returned a signed copy of the Order of Procedure ("OoP").

64. On 14 September 2022, a hearing was held via videoconference. The Sole Arbitrator was assisted by Ms Sophie Roud, Counsel to the CAS. The following persons attended the hearing for the Parties:

For Samsunspor	Mr Georgi Gradev, legal counsel

Mr Ersin Hamarat, legal counsel

For Alen Melunović: Mr Mustufa Kuyucu, legal counsel

Ms Ayse Erayan, legal counsel

Mr Alen Melunović, party

65. At the opening of the hearing, the Parties confirmed that they had no objections to the constitution of the Panel and recognised that conducting the hearing via videoconference was an acceptable means of communication.

66. Consequently, the Parties, in light of Club's admissions that (i) it terminated the Employment Contract without just cause, (ii) that that the imposed fine was invalid and that (iii) it had overdue payables towards the Player, agreed to change their requests for relief and this pursuant to Article R56 of the CAS Code (*infra* para. 74 and 77).

67. The Parties then went on to make submissions in support of their respective case and had the opportunity to examine and cross-examine Mr Alen Melunović. The examination of Mr Melunović was limited to his contract with Iraklis FC and his earnings.

68. At the end of the hearing, the Parties indicated that no additional evidentiary measures were considered necessary and expressly stated that their right to be heard and to be treated equally in the proceedings had been fully respected.

69. On the same day, and as follow-up to hearing, the CAS Court Office, on behalf of the Sole Arbitrator, requested the Parties to inform it on or before 26 September 2022 whether they had reached a settlement agreement.

70. On 18 September 2022, the Club informed the CAS Court Office that the Parties had not reached a settlement and requested that the operative part of the award be notified in advance so to avoid unnecessary interests on the amounts to be awarded by the Sole Arbitrator .

71. On 21 September 2022, the CAS Court Office, on behalf of the Sole Arbitrator, invited the Player to confirm that no settlement had been reached and informed the Club that the award would be issued in due course and that meanwhile nothing prevented it from paying the due outstanding salaries as recognized by the Club at the hearing.

72. On 22 September 2022, the Player confirmed that the Parties had not reached a settlement.

IV. SUBMISSIONS OF THE PARTIES

73. The following section summarises the Parties' main arguments in support of their respective requests for relief with respect to the merits of the case. The Sole Arbitrator confirms that, in reaching his decision, he carefully took into account all of the

submissions and evidence presented by the Parties, even if they have not been specifically summarised or referred to in the present arbitral award. More precisely, only those arguments which in his view are relevant to decide the issue under appeal have been summarised and this keeping in mind that the scope of the present procedures was significantly narrowed prior to and at the hearing in that the Club recognized that it had terminated the Employment Contract without just cause, that the fine imposed on the Player was invalid and that it had outstanding salaries towards the player.

A. The Appellant

74. At the outset of the hearing, the Club, pursuant to Article R56 and with the approval of the Player, amended the request for relief contained in its Appeal Brief, its amended request for relief being the following:

*"**1- withdrawn***

2- *to grant a permanent relief reversing the appealed decision and reverse the decision of FIFA Dispute Resolution Chamber (FPSD-5337)*

3- withdrawn

4- withdrawn

5- withdrawn

6- partially withdrawn now reading: *Mitigate the compensation claim and dismiss the additional compensation*

7- withdrawn

8- *Dismiss the Claimant's request of 2022/23 football season salaries.*

9- withdrawn

10- partially withdrawn now reading: *To reduce the compensation for breach of contract to an amount which will be deemed proportionate*

11- *To establish that the costs of the present arbitration procedure shall be borne by the Respondent,*

12- *To condemn the Respondent to pay the Appellant the legal fees and other expenses in connection with the present proceedings.*

75. The Club's submissions in support of its amended requests for relief may, in essence, be summarised as follows:

- **Regarding the optional season 2022-23**

- After having narrowed the scope of this Appeal, this case now purely concerns an issue of quantum.

- The quantum is to be calculated in accordance with the principle of positive interest and the Sole Arbitrator needs to establish what would have happened if the Employment Contract had not been terminated by the Club.

- The Employment Contract was due to expire in May 2022 but clause 4.4. of the Employment Contract contains an automatic extension option for the sporting season 2022-23 provided the Player played more than 25 games and scored 15 goals or more for the Club during the sporting season 2021-22.

- Respondent states that the Automatic Extension Option concerns a potestative clause, but such reference is too generic. In fact, potestative clauses and conditions are those of which the realisation depends purely on the will of one of the contracting parties.

- The Automatic Extension Option is not a pure potestative clause but merely a simple potestative clause as the fulfilment of one of the conditions depended on the Player. In application of CAS 2012/A/2874, the Automatic Extension Option involved in any case a personal performance of the Player and as such, it must be considered a clear and undisputed condition and therefore a valid clause.

- Moreover, even if fielding the Player depended exclusively on the discretion of the Club, still the Player would not have been able to participate in the required number of matches as mentioned in the automatic extension option. The Player was injured almost immediately upon his arrival and once he would become fit again to train, as of 17 January 2022, only 18 games were left to be played.

- As such, even if the Employment Contract would not have been terminated, the conditions for the automatic extension option would never have been fulfilled and even if the automatic extension option would be considered invalid, invalid does not mean that it must then be applied in favour of the Player.

- The Club did not prevent in bad faith prevent the automatic option clause from being triggered.

- **Regarding the damages due as per Article 17 of the FIFA RSTP**

  - The Player, for the reasons set out above, is not entitled to the residual value for the season 2022-23.

- The correct residual value to be taken into account is the value of remaining months for the season 2021-22 following the termination of the Employment Contract, namely EUR 80,000. From this amount, the salary the Player earned in Serbia must be deducted, namely EUR 5,400. The correct residual value therefore amounts to EUR 74,600.

- In subsidiary order, in case the Sole Arbitrator were to consider that the Employment Contract was extended for the season 2022-23, no compensation should be awarded as the Player acted in bad faith as he did not disclose the annexe to his contract with Iraklis FC and therefore did not disclose his true earnings with Iraklis FC.

- It is impossible to believe that a Player, earning what he earned at the Club (EUR 20,000), would agree to sign a contract earning the bare minimum salary of EUR 740.5 per month. The Player, in bad faith, tries to avoid the application of the mitigation principles and this must be taken into account by the Sole Arbitrator who shall draw the corresponding inferences therefrom in line with the IBA Guidelines on the taking of evidence in international arbitration.

B. The Respondent

76. In light of the Club's admissions and the Club's amended requests for relief, the Player, at the outset of the hearing and pursuant to Article R56 of the CAS Code, also amended, with the approval of the Club, the requests for relief contained in his Answer..

77. The Player's amended request for relief are as follows:

*"**1.** **Withdrawn,***

2. *To confirm the decision of the Dispute Resolution Chamber (FPSD-5337),*

3. *To reject the appeal of Club Samsunspor Futbol Kulübü A.S.,*

4. ***Withdrawn,***

5. ***Withdrawn,***

6. ***Withdrawn*** *(N.B. In any case inadmissible as it concerned a counter-claim),*

7. ***Withdrawn,***

8. *To confirm the Respondent's request of 2022/2023 football season salaries as compensation,*

9. ***Withdrawn,***

10. *To reject the request to reduce the compensation for breach of contract to an amount which will be deemed appropriate,*

11. *To establish that the costs of the present arbitration procedure shall be borne by the Appellant,*

12. *To condemn the Appellant to pay the Respondent the legal fees and other expenses in connection with the present proceedings.*

78. The Player's submissions in support of his amended requests for relief may, in essence, be summarised as follows:

- **Regarding the optional season 2022-23**
  - The extension option contained in the Employment Contract is a purely potestative clause and depended exclusively on the will and discretion of the Club. The Club is the one which decides whether or not to field a player, and since the Club controlled the fielding of the Player, one cannot take into account the required number of goals since if the Player is not fielded, he cannot score.
  - As correctly held by FIFA, the extension was left essentially completely at the discretion of the Club and can therefore not be upheld against the Player.
  - Such approach is confirmed in numerous other decisions of the FIFA DRC, namely in the following decision:
    - FIFA DRC decision dd. 10 December 2020 between the player Lluis Sastre Reus and AEK Lacarna FC.
    - FIFA DRC decision dd. 10 February 2020, between the player Alaaeldin Nasr Elmaghraby and the Club Trust and Care Sports Club.
- **Regarding the damages due as per Article 17 of the FIFA RSTP**
  - The Appealed Decision should be confirmed in that the Player is in principle entitled to damages corresponding to the full residual value of contract composed of both the remainder of the 2021-22 sporting season and the value of the optional year, as the option, which depended purely on the Club, cannot be upheld against the Player.
  - The Player submitted a copy of the contracts he signed with third clubs since he left Samsunspor and has made such disclosure in full transparency. These values can be deducted from the damages payable by the Club.

- The Player firmly rejects any allegations regarding his alleged bad faith in not disclosing his "true" salary with Iraklis FC. The Player submitted the actual and true values he received from Iraklis FC and did not sign any annexe or side agreement.

- He joined said club for a low salary as he did not receive any other offers and hoped by joining Iraklis FC, he would be able to proof himself so to secure a higher salary the year after. Albeit this is a low salary, previously he played in China and Turkey where he earned sufficient money so to be able to make this move and continue his career.

V. JURISDICTION

79. The jurisdiction of CAS in this present procedure derives from Article 47. 1 of the CAS Code and Article 57(1) of the FIFA Statutes (May 2021 edition).

26. Article R47 para. 1 of the CAS Code provides as follows:

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

80. Article 57(1) of the FIFA Statutes determines 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 within 21 days of receipt of the decision in question*".

81. The jurisdiction of CAS has not been contested by the Parties and is further confirmed by the Order of Procedure signed by both Parties.

82. Therefore, CAS has jurisdiction to adjudicate and decide the present dispute whilst according to Article R57 para. 1 of the CAS Code, the Sole Arbitrator has full power to review the facts and the law and can decide the case *de novo*.

VI. ADMISSIBILITY

83. Article R49 of the Code provides as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or 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."

84. The grounds of the Appealed Decision were communicated to the Parties on 5 May 2022. The Appellant filed its Statement of Appeal with the CAS on 20 May 2022, *i.e.* within the time limit of 21 days set forth by Article 57(1) FIFA Statutes. Besides, the appeal complied with all other requirements contained in Article R48 of the CAS Code, including the payment of the CAS Court Office fee.

85. Hence, the appeal is admissible, which in any case was not challenged by the Player.

VII. APPLICABLE LAW

86. Article R58 of the CAS Code provides as follows:

"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."

87. Article 56(2) of the FIFA Statutes provides as follows in relation to CAS procedures:

"*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.*"

88. Article 10 a) of the Employment Contract provides as follows:

"[…] *the applicable law shall be those applicable by FIFA Regulations, and Swiss law.*"

89. In accordance with article 10 a). of the Employment Contract, Article R58 of the CAS Code and Article 56(2) of the FIFA Statutes, the regulations of FIFA are primarily applicable with Swiss law subsidiarily applicable should there be a need to interpret the FIFA Regulations and/or should there be a need to fill a possible gap in the various rules of FIFA.

VIII. MERITS

90. Since the Club recognised that (i) it had terminated the Employment Contract without just cause, (ii) that the fine imposed by the Club on the Player was invalid and (iii) that it owed outstanding salaries to the Player, the open issues to be decided upon by the Sole Arbitrator in these proceedings have been narrowed down significantly compared to the requests for relief contained in the Appeal Brief of the Club..

91. In fact, in order to adjudicate the case under review, only the following main question need to be addressed:

A. Is the automatic extension option for the season 2022-23 contained in the Employment Contract valid or invalid?

And depending on the answer to the above question:

B. What are the damages payable by the Club for its breach of contract?

A. Is the automatic extension option for the season 2022-23 contained in the Employment Contract valid or invalid?

92. In answering this question, the Sole Arbitrator deems it relevant to first recall the wording of the option clause contained in article 4 b) the Employment Contract which reads as follows:

*"In addition, the Parties have agreed and accept that the terms of this Contract may be automatically extended for 1 (one) more football season of 2022/2023 with the conditions specified herein ("**Extension**")*

In case the following conditions are met together, the term of this Contract shall be automatically extended for one more football season of 202212023:

- *the Player plays in the first 11 (eleven) in 25 (twenty-five) or more official matches that the Club plays in 2021/2022 TFF 1st League **and***

- *the total number of the goals scored and the assists made by the Player reaches 15 (fifteen) or above in the official matches that the Club plays in 2021/2022 TFF 1st League*"

93. A plain reading of this clause clearly demonstrates that it does not concern a unilateral option clause granting one of the Parties from the outset, the possibility to extend, at its entire discretion, the duration of their employment relationship.

94. Rather the option clause contained in the Employment Contract is made subject to two cumulative conditions, which if met, trigger the automatic extension of the Parties' employment relationship. Accordingly, the clause does not grant a unilateral right to either party which as per CAS 2010/O/2132 means that "*it cannot be understand that the clause was drafted in the interest or detriment of one of the parties only, but in the interest or detriment of the two of them*".

95. This observation and qualification is important since once we distinguish the clause in the Employment Contract from a unilateral (option) clause, it means that this clause, unlike unilateral (option) clauses to extend or terminate a contractual relationship, should not, in the opinion of this Sole Arbitrator, be analysed from the perspective of a clause that could excessively curtail the freedom of the Player or which would could constitute an excessive commitment by the Player, the latter being legal principles which the CAS has relied upon in its well-established jurisprudence regarding unilateral (option) clauses (CAS 2021/A/7145 with further references to inter alia CAS 2013/A/3260, CAS 2013/A/3375 & 3376, CAS 2014/A/3852).

96. Keeping in mind the initial observations above, the Sole Arbitrator shall now continue to analyse the validity of the automatic extension option contained in the Employment Contract.

97. In doing so, he observes that the FIFA Regulations on the Status and Transfer of Players remain silent for what concerns (unilateral) options clauses in general and automatic extension options more specifically.

98. As such, the Sole Arbitrator, as per Article R58 of the CAS Code and the choice of law clause contained in the Employment Contract, needs to refer to Swiss law and more precisely to article 151 *et seq.* of the Swiss Code of Obligations ("SCO") which read as follows:

*"**Art. 151***

[1] A contract is conditional if its binding nature is made dependent on the occurrence of an event that is not certain to happen.

[2] The contract takes effect as soon as this condition precedent occurs, unless the parties clearly intended otherwise.

Art. 152

[1] Until such time as the condition precedent occurs, the conditional obligor must refrain from any act which might prevent the due performance of his obligation.

[2] A conditional obligee whose rights are jeopardised is entitled to apply for the same protective measures as if his claim were unconditional.

[3] On fulfilment of the condition precedent, dispositions made before it occurred are void to the extent that they impair the effect of the condition precedent.

Art. 156

A condition is deemed fulfilled where one of the parties has prevented its fulfilment by acting in bad faith."

99. In light of said legal framework, the Respondent submits that the two conditions precedent contained in the Automatic Extension Option are purely potestative conditions. It was the Club who could decide to field the Player at its entire discretion and keeping in mind this discretion it could also directly control whether or not the Player would have the opportunity to score the required goals. Hence, the optional year depended entirely on the will of the Club and since potestative conditions are invalid, the clause cannot be interpreted against the interest of the Player and the condition should therefore be considered met. According to the Player, the Appealed Decision rightly held that:

"*In this respect, the members of the Chamber reiterated that it deemed that the effective end date of the contract is the end of the season 2022/2023, as the extension clause, which left the extension of the contract essentially completely at the discretion*

of the club, as it could decide on whether or not the player would be fielded, cannot be upheld against the player."

100. The Club from its side argues that the Automatic Extension Option is not a purely potestative clause but rather a simple potestative clause as it also requires a personal performance of the Player, namely, to score 15 or more goals. As such, the Automatic Extension Option contains valid conditions and must be upheld. Anyhow, even if invalid, it is unclear how the clause could then work in favour of the Player, in that the optional year would be granted.

101. Considering the submissions of the Parties and the legal framework set by the SCO, the Sole Arbitrator observes that the Parties have a different opinion on the qualification of the Automatic Extension Option and the conditions precedent contained therein, namely whether they constitute purely potestative clause conditions or simple potestative conditions, which depending on either qualification would, allegedly, make the Automatic Extension Option invalid.

102. As a first remark, the Sole Arbitrator observes that once the Parties have agreed on the Automatic Extension Option, the Parties are bound by the clause and a "*rapport de droit"* exists, the effects of which are suspended.

103. Now, for what concerns the distinction between purely potestative and simple potestative clauses, the following should be considered (*Commentaire Romand 2e edition, article 155, page 1135 et seq.*,Thévenoz Werro):

"*en suivant les auteurs français, on peut opérer une distinction entre la condition purement potestative et la condition potestative limitée (ou simplement potestative). Cette distinction a aussi été reprise par les auteurs allemands. Dans la* ***condition purement potestative*** *[…], la volanté d'une partie peut s'exercer de manière arbitraire (« si velim », « si je veux », sans qu'une indication de motifs soit requise et sans qu'il y ait un élément d'objectivation ; tel est le cas si un contrat de vente ou un contrat d'entreprise est soumis à l'achat préalable d'immeuble par un tiers. Au contraire,* ***dans la condition potestative limitée*** *[…] la volanté de la partie doit s'exercer à certaines conditions ou en fonction de certains critères prédéfinis. Toutefois, même dans cette hypothèse, le poids de l'engagement assumé par la partie dont dépend l'avènement de la condition est variable. En effet, la condition potestative limitée restreint la liberté d'une partie de faire ou non un acte, sans toutefois la supprimer complètement. Des lors, si les effets de la condition potestative sont principalement dans l'intérêt de l'autre partie, le Tribunal fédéral interprète restrictivement la limitation à la liberté imposée par la condition suspensive*.

Contrairement à certains ordres juridiques qui considèrent que l'obligation contractée sous une condition purement potestative est nulle, le droit suisse admet sa validité et prévoit expressément des hypothèses de conditions purement potestative . »

[…]

Il faut toutefois apporter une précision sur les effets de la condition purement potestative :

- *Dans un contrat unilatéral, cette condition supprime tout caractère immédiatement juridiquement contraignant à l'engagement lorsque l'avènement de la condition dépend du débiteur (je te donne 100 si je veux bien). Une promesse de donner soumise à une condition purement potestative du promettant n'a dès lors pas de portée juridique, puisqu'il n'y a pas de volonté immédiate d'être lié.*

- *Dans un contrat bilatéral, le contrat soumis à cette condition est valablement conclu, alors que l'autre peut s'en libérer unilatéralement (droit formateur résolutoire) si elle le souhaite (condition résolutoire) ou au contraire décider d'être liée (condition suspensive)*

104. Translated as

"Following the French authors, a distinction can be made between the purely potestative condition and the limited (or merely potestative) condition. This distinction has also been taken up by German authors. In ***the purely potestative condition*** *[...], a party's will may be exercised arbitrarily ('si velim', 'if I want'), without any indication of reasons being required and without any element of objectification; this is the case if a contract of sale or a contract of enterprise is subject to the prior purchase of real estate by a third party. On the contrary, in* ***the simple potestative condition*** *[...] the party's will must be exercised under certain conditions or according to certain predefined criteria. However, even in this case, the weight of the commitment assumed by the party on whom the development of the condition depends on, varies. Indeed, the limited potestative condition restricts the freedom of a party to do or not to do an act but does not completely eliminate it. Therefore, if the effects of the potestative condition are mainly in the interest of the other party, the Federal Supreme Court interprets the limitation of freedom imposed by the suspensive condition restrictively.*

Unlike some legal systems which consider that an obligation entered into under a purely potestative condition is null and void, Swiss law admits its validity and expressly provides for hypotheses of purely potestative conditions

[...]

However, it is necessary to clarify the effects of a purely potestative condition:

- *In a unilateral contract, this condition removes any immediate legal binding character of the commitment when the occurrence of the condition depends on the debtor (I will give you 100 if I will). A promise to give subject to a purely potestative condition on the part of the promisor therefore has no legal effect, since there is no immediate willingness to be bound.*

- *In a bilateral contract, the contract subject to this condition is validly concluded, whereas the other party may unilaterally release itself from it (resolutory right) if it so wishes (resolutory condition) or on the contrary decide to be bound (suspensive condition).*

105. Whilst :

« Il faut rappeler que si les parties ont convenu d'une condition potestative limitée, la partie dont dépend l'accomplissement de la condition n'a en principe pas une liberté entière de refuser cet accomplissement et de se dégager de ses obligations contractuelles (du moins lorsque l'acte a une valeur juridique). Elle doit, au contraire, agir de manière loyale et conforme aux règles de la bonne foi, en cas de violation de ces exigences, la condition est censée accomplie selon CO 156. Le degré de liberté subsistant pour la partie concernée et les devoirs que lui imposent les règles de la bonne foi sont déterminés dans chaque cas d'espèce en tenant compte de l'ensemble des circonstances et, en particulier, de l'objet et du but du contrat, interprétés selon le principe de la confiance. »

106. Translated as :

« *It should be remembered that if the parties have agreed on a limited potestative condition, the party on whose fulfilment the condition depends, does not in principle have complete freedom to refuse its fulfilment and withdraw from its contractual obligations (at least where the act has legal value). On the contrary, it must act fairly and in good faith, and in case of violation of these requirements, the condition is deemed fulfilled according to CO 156. The degree of freedom available to the party concerned and the duties imposed on him by the rules of good faith are determined in each individual case taking into account all the circumstances and, in particular, the object and purpose of the contract, interpreted according to the principle of trust.*"

107. Keeping the above in mind, the Sole Arbitrator considers that the Automatic Extension Option most definitely does not contain a purely potestative condition whilst it is even questionable whether it contains a limited potestative condition, the qualification of which, still in line with the above, does not affect the validity of the Automatic Extension Option.

108. In fact, the Sole Arbitrator considers that the Automatic Extension Option, which is made subject to two conditions, does not, unlike unilateral extension options, depend on the (exclusive) will of the Club or in other words because the Club does or does not want to extend the contract. Rather, it is made conditional upon two conditions, which the Club does not (entirely) control nor influence.

109. For what concerns the required number of matches, the Sole Arbitrator does not share the opinion of the Player, and as consequence the conclusion of the Appealed Decision, that the realisation of such a fact depends exclusively on the Club. First, such assertation, equates the head coach of the Club with the Club itself, which, in the opinion of this Sole Arbitrator, is a too simplistic point of view. It omits to take

into account that the Head-coach, in most if not all cases, is not a legal representative of the Club, such as a CEO, President or any of its organs, works independently with full managerial control and responsibilities regarding the players selected for games, the fielding of the same and the match strategy or game-plan, and this (in almost all cases) without interferences from the Club's management and the Club's legal representatives. Secondly, such assertation omits to take into account that players which are injured, recovering from injury, physically (*ut infra*), mentally or otherwise unavailable to play, cannot be selected for games. Hence, the Sole Arbitrator does not consider that the condition requiring a certain number of matches to be played, depends (exclusively) on the will of the Club and this conclusion is even demonstrated by the fact specifics in the case at hand. Namely, it is not disputed between the Parties that, in August 2022, the Player, shortly after his arrival at the Club, got injured and could only return to training as of the 17th of January 2022. As of that date, less than 25 games remained to be played and hence, even if the Player would have been completely match-fit as of his return on the 17th of January 2022, which would be highly unlikely, he would never have been able to play the sufficient number of games for the condition to be met, even if he would have been fielded in all of them.

110. For what concerns the required number of goals, whereas it is true that the Player can only score goals if he is fielded, which, as set out above does not entirely depend on the Club, still such condition then requires an individual performance of the Player. Hence, also this condition cannot be considered to depend exclusively on the will of the Club.

111. As such, the Automatic Extension Option is a valid clause and this irrespective of whether the conditions contained therein are to be qualified as purely or simple potestative clauses. In fact, based on the above-mentioned, the Sole Arbitrator is of the opinion that the conditions contained in the Automatic Extension Option neither qualify as purely or simple potestative clauses and considers that they qualify either as mixed conditions, being dependent on both of the Parties or that they qualify as pure suspensive conditions of which the legal consequences are made dependent on an uncertain event in the future. In any case, the relative lack of importance as to whether the conditions contained in the Automatic Option Clause are purely or simple potestative clause or even mixed for that matter, is further confirmed by the fact that the CAS jurisprudence has recognized that also unilateral extension options, which are in fact purely potestative must, under certain circumstances, be considered valid (CAS 2021/A/7145).

112. In light of the above conclusion, the correct question that needs to to be addressed *in casu* is not whether the fulfilment of the conditions depended entirely on the will of the Club, which in turn would, as the Appealed Decision concluded, albeit incorrectly, affect the validity of said clause in that it could not be interpreted against the interest of the Player, rather, the question to be posed is whether the Club, in bad faith, prevented the condition precedents as contained in the Automatic Extension Option from being fulfilled, irrespective of how these conditions are/were to be qualified, implying that those conditions, pursuant to article 152 SCO *iuncto* article 156 of the SCO, should be deemed fulfilled.

113. Pursuant to article 8 of the Swiss Civil Code, the burden of proof to establish the bad faith of one of the contractual parties as well as the causal link between said bad faith and the condition not being met, lies with the party against whose interest said conduct took place, i.e. the Player. (SFT 4A_293/2007, c. 7.1).

114. The bad faith behaviour would need to be analysed based on the fact specifics of the case, the nature of the condition, the object and the intention of the contract.

115. *In casu* the Player, neither at FIFA level nor during the CAS proceedings made any (meaningful) allegations or submissions regarding the bad faith of the Club in preventing the conditions precedent contained in the Employment Contract from being fulfilled nor did he make any allegations regarding the causal link between the bad faith of the Club and the conditions precedent not being fulfilled.

116. In fact, whilst the Club indicated that the triggering of the Automatic Option Clause was not prevented in bad faith by the Club, the Player limited himself to referring to the reasoning contained in the Appealed Decision, i.e. that the Automatic Extension Option depended purely on the will of the Club and that as it constituted a purely potestative clause, it could not be upheld against the interest of the Player.

117. Lacking any (meaningful) submission in this respect, the Sole Arbitrator can only conclude that the Player failed to meet his burden of proof and failed to demonstrate the bad faith behaviour of the Club in preventing the Automatic Extension Option from being triggered.

118. Additionally, whereas the Sole Arbitrator understands that in certain situations, the termination of the contract without just cause could and should be considered sufficient to conclude that a club, in bad faith prevented an automatic extension option from being triggered, *in casu*, even if such argument would have been made and would have been withheld by the Sole Arbitrator, still he would need to look at the causal link between the bad faith and the unfulfillment of the conditions precedent. In doing so, he would need to consider that at that moment in time when the Employment Contract was terminated, and as argued by the Club, only 18 games remained to be played by the Club in the TFF 1st league. Hence the Player, having not played any official games with the Club in the TFF 1st League prior to the termination, would never have been able to reach the required number of appearances for the Automatic Extension Option to be met, namely appearing in the starting 11 in 25 games in the TFF 1st League, the latter being one of the two cumulative conditions precedent that was to be met for the Automatic Extension Option to be triggered. Hence, even if there would have been bad faith on behalf of the Club, there would have been no causal link between said bad faith of the Club and the conditions not having been met.

119. The above is important keeping in mind that:

"*La partie qui a empêché la condition de se réaliser peut ainsi toujours apporter la preuve que la condition ne se serait de toute manière pas accomplie* (SFT 4C.281/2005, c.3.5.2.).

Translated as

«The party which prevented the condition from happening can always submit the proof that the condition would in any case not have been fulfilled."

Commentaire Romand 2ieme édition, article 156, N22, p. 1143 et seq. Thévenoz Werro

120. In light of all the above, the Sole Arbitrator, also keeping in mind the principle of *pacta-sunt servanda* considers that the Automatic Extension Clause, including its conditions precedent, was by all means a valid clause binding on the Parties whilst the conditions contained therein cannot be deemed to have been fulfilled as per article 156 of the SCO.

B. What are the damages payable by the Club for its breach of contract?

121. In light of the above, the Sole Arbitrator holds that the Player is not entitled to receive the residual value corresponding to the optional sporting year 2022-2023 and that his entitlement to damages must, *in casu* and lacking an appeal from the Player against the Appealed Decision, be limited to the residual value of the Employment Contract for the sporting year 2021-22 i.e. the amount of EUR 80,000; minus what he earned with the Serbian club FK Napredak, i.e. EUR 5,400 during the same period. As a consequence, the compensation for breach of contract without just cause due by the Appellant shall be fixed at EUR 74,600, plus 5% interest p.a. as from 3 March 2022 until the date of effective payment.

122. The Sole Arbitrator is comforted in reaching this decision when looking at CAS 2016/A/4664 which concerned a case in which both FIFA and the CAS panel dealing with the appeal did not grant damages for breach of contract for an optional year that was subject to a player being fielded in "*twenty five percent of the total matches with the first team […] during the seasons 2010/2011 and 2011/2012.*".

123. In said case, FIFA and CAS held as follows:

"*39. The Appealed Decision was based on the following grounds:*

[…]

d) The Player was to be compensated in accordance with Article 17.1 of the FIFA RSTP, […]. The monies due for the 2012/2013 season would not be considered given that the extension of the Employment Contract was subjected to certain terms and conditions. […]

[…]

140. Although the Employment Contract was valid for five seasons, the 5th season was subject to the Player meeting certain conditions, which in fact were not met. It is therefore accepted that the Employment Contract could have expired at the end of the 4th season, i.e. the 2011/2012 season."

C. Conclusion

124. In light of the above findings, it follows that the Appeal, as per its amended requests for relief, shall be upheld and the Appealed Decision shall be partially set aside for what concerns the quantum of damages payable for the breach of contract by the club.

IX. COSTS

(…).

* * * * * * * * *

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 30 May 2022 by Samsunspor Futbol Kulübü against the decision passed on 21 April 2022 by the FIFA Dispute Resolution Chamber is upheld.

2. The decision issued on 7 December 2021 by the Players' Status Chamber of the *Fédération Internationale de Football Association* is partially set aside in that its point 2 shall now read as follows:

   "*2. The Respondent, Samsunspor, has to pay to the Claimant, the following amount:*

   - *EUR 54,500 as outstanding remuneration, plus 5% interest p.a. as from 3 March 2022 until the date of effective payment;*

   - *EUR 74,600 as compensation for breach of contract without just cause, plus 5% interest p.a. as from 3 March 2022 until the date of effective payment;*"

3. (…).

4. (…).

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

Seat of arbitration: Lausanne, Switzerland
Date: 30 October 2023

THE COURT OF ARBITRATION FOR SPORT

Wouter Lambrecht
Sole Arbitrator