CAS 2023/A/9949 Marcos Raphael Alvarez Giraldez v. MKS Cracovia S.S.A. & FIFA

ARBITRAL AWARD

delivered by

COURT OF ARBITRATION FOR SPORT

seating in the following composition:

Sole Arbitrator: Mr. Sofoklis P. Pilavios, Attorney-at-law, Athens, Greece

in the arbitration between

Marcos Raphael Alvarez Giraldez, Germany

Represented by Mr. Mateusz Stankiewicz, Attorney-at-law, Kancelaria Radcy Prawnego Mateusz Stankiewicz, Krakow, Poland

Appellant

and

MKS Cracovia S.S.A., Poland

Represented by Mr. Wiktor Zień, Attorney-at-law, Kancelaria Radcy Prawnego Wiktor Zień, Warsaw, Poland

First Respondent

&

Fédération International de Football Association, Zurich, Switzerland

Represented by Mr. Miguel Liétard Fernández-Palacios, FIFA Director of Litigation and Ms. Cristina Pérez González, Senior Legal Counsel

Second Respondent

I. PARTIES

1. Mr. Marcos Raphael Alvarez Giraldez (the "Player" or the "Appellant") is a professional football player of German nationality.

2. MKS Cracovia S.S.A. (the "Club" or the "First Respondent") is a professional football club with its registered office in Krakow, Poland. It is affiliated with the Polish Football Association (the "PZPN") which in turn, is affiliated with the "*Fédération Internationale de Football Association* ("FIFA" or the "Second Respondent").

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

4. The Player, the Club and FIFA shall be collectively referred to as the "Parties". Likewise, the First and the Second Respondent shall be collectively referred to as the "Respondents".

II. FACTUAL BACKGROUND

5. Below is a summary of the main relevant facts, as established on the basis of the written and oral submissions of the Parties and the evidence examined in the course of the proceedings. Additional facts may be set out, where relevant, in connection with the legal discussion 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

6. On 4 January 2020, the Player and the concluded an employment agreement valid as of 1 July 2020 until 30 June 2023 (the "Employment Agreement"). It remains uncontested between the Parties that, whereas §12(2) of the Employment Agreement provides that "[t]*he Parties hereby agree that the* [Employment Agreement] *not constitute* (sic) *between the Parties a contract of employment and the provisions of Polish Labour Code shall not be applicable*", the Employment Agreement governs, in essence, the employment relationship between the Club and the Player and it was drafted as such in order to abide by the particularities found in the legal system of Polish professional football.

7. The Employment Agreement provides, *inter alia*, as follows:

"*§5*

REMUNERATION

1. On the basis of this Agreement, the [Player] *shall receive the individual base remuneration as follows:*

- *in the period from July 1st 2020 until June 30th, 2021 (i.e. within Tournament season 2020/2021) the Service Provider shall receive the individual base remuneration in the total amount of 266.700,00 (say: two hundred sixty six thousand seven hundred) EUR + VAT tax payable in monthly instalments in the amount of 22.225,00 (say: twenty two thousand two hundred twenty five) EUR + VAT tax, for each month during which this Agreement stays in force.*

- *in the period from July l 2021 until June 30, 2022 (i.e. within Tournament season 2021/2022) the Service Provider shall receive the individual base remuneration in the total amount of 266.700,00 (say: two hundred sixty six thousand seven hundred) EUR + VAT tax payable in monthly instalment<; in the amount of 22.225,00 (say: twenty two thousand two hundred twenty five) EUR + VAT tax, for each month during which this Agreement stays in force subject to the provisions of §5.2*

- *in the period from July 1, 2022 until June 30th, 2023 (i.e. within Tournament season 2022/2023) the Service Provider shall receive the individual base remuneration in the total amount of 266.700,00 (say: two hundred sixty six thousand seven hundred EUR+ VAT tax payable in monthly instalments in the amount of 22.225,00 (say: twenty two thousand two hundred twenty five) EUR + VAT tax, for each month during which this Agreement stays in force subject to the provisions of §5.3".*

[..]

"*§10*

FINAL PROVISIONS

[...]

7. This Agreement and all matters arising from this Agreement shall be governed by Polish law and the relevant regulations of the [PZPN] *and FIFA.*

8. Any disputes arising out of the Agreement shall be finally settled by the Polish Football Association Dispute Resolution Chamber (Izba ds.Rozwiqzywania Spor6w Sportowych PZPN) or Football Arbitration Court of Polish Football Association (Pilkarski Sqd Polubowny PZPN [the "PSP PZPN"]*) relevant to the competence of this authorities".*

8. On 15 March 2022, the Player sent a default notice to the Club with, *inter alia*, the following content (the "Default Notice"):

[...]

"*Until today [March 15, 2022] I have not received any salary from you for January 2022 in the amount of PLN 131 862.35 PLN (according to invoice No. FA /1/2022) as well as I did not receive salary for the month of February 2022 in the amount of PLN 134,491.12 (according to invoice no. FA /2/2022).*

I indicate that, pursuant to the provisions of Resolution Ill / 54 of March 27, 2015 of the Management Board of the Polish Football Association on the Minimum Requirements for standard contracts of players from the professional football sector [the "Resolution"], *in the event that the Club is late with the payment of the due remuneration for at least two months, I am entitled to unilateral termination of the contract due to the Club's fault after the Club has been called for payment and an additional 14-day deadline for payment has been set under the pain of termination of the contract. This time limit is not an extension, and is set solely for procedural reasons*".

9. While contesting having received the Default Notice, on the same day the Club paid the Player the amount of PLN 10,000 (ten thousand Polish zloty).

10. On 30 March 2022, the Player sent a termination notice to the Club which provides as follows (the "Termination Notice"):

"*I, the undersigned Marcos Raphael Alvarez Giraldez, conducting business activity under the name Marcos Alvarez Sport (30-698 Lusina, Osiedle Dębowe 21), acting on my own behalf, due to the ineffective expiration of the deadline set in my summons dated March 15, 2022, delivered to the Club on March 15, 2022 concerning the demand for payment of outstanding contractual remuneration for a period of two months, i.e. for the months of January and February 2022 under the contract of cooperation in the professional performance of sports services for the sports club dated January 04, 2020 in the total amount of PLN 266,353.47, out of which you have paid only the amount of PLN 10,000 on the specified date, after delivery of a call for payment, I declare that in view of the Club's delay in payment of the remuneration due to me under article 8 paragraph 3 item a of* [the Resolution], *I hereby unilaterally terminate the Contract between me and your Club, dated January 04, 2020, with all the consequences arising from the contents of the above-mentioned Resolution*".

11. On 31 March 2022, the Club replied to the Termination Notice and highlighted, *inter alia*, the following:

"[W]*e would like to inform you that* ***your letter and statement regarding unilateral termination of the Contract are completely ineffective*** *and due to this fact it will not result in termination of the Contract. We also inform you that MKS Cracovia SSA will take all*

necessary steps provided for in applicable Polish Football Association rules and regulations to obtain a confirmation of the ineffectiveness of your statement by the [PSP PZPN].

Regarding the ineffectiveness of your statement it must be pointed out that, contrary to your statement, MKS Cracovia SSA has not received from you any call or summon to pay the outstanding amounts within an additional deadline provided also that failure to pay the arrears in full will result in the possibility of exercise by you the right to unilaterally terminate the Contract due to the Club's fault. We want to stress that abovementioned summon is a necessary prerequisite for exercising the right to unilateral termination of the Contract under [the Resolution].

Moreover, it should be emphasized that the Club has never had a full two-month arrears towards you. Thus the condition regarding existence of such full two-month arrears provided for in a Resolution does not exist and due to this fact you were not allowed to exercise the right of unilateral termination of the Contract.

All of the above-mentioned circumstances clearly determine and confirm the ineffectiveness of your statement. Therefore you are obliged to continue a properly performance of the contractual obligations to the full extent, including participation in trainings". (emphasis in original)

12. On 1 April 2022, the Club paid the Player the amount of PLN 252,894.97 (two hundred fifty two thousand eight hundred and ninety four Polish zloty and ninety seven grosz).

13. It remains undisputed between the Parties that despite having received the above-mentioned amounts, the Player did not return to the activities of the Club.

14. On 11 April 2022, the Club sent another notice to the Player thereby inquiring the reasons for his "*unjustified absence in* (sic) *training*" as of 31 March 2022 and henceforth. By means of said notice, the Club further informed the Player that, on 5 April 2022, it filed a claim against him before the PSP PZPN and sought to declare the Termination Notice "*ineffective*" pursuant to the applicable regulation of the PZPN (the "PSP PZPN Claim").

15. On the same date, the PSP PZPN invited the Player to submit his position on the PSP PZPN Claim and nominate an arbitrator of his choice for the purposes of said proceedings.

16. On 19 April 2022, the Player filed his reply to the PSP PZPN Claim. In summary, the Player maintained that due to the failure of the Club to timely repay the salaries in arrears within the deadline set by means of the Default Notice, he was entitled to terminate the Employment Agreement with just cause in accordance with Article 8 par.3 of the Resolution. However, by means of this submission the Player did not contest the jurisdiction of the PSP PZPN over the case at hand and submitted, *inter alia*, the following requests for relief:

"*1.* [Dismiss] *the foregoing lawsuit in its entirety and* [recognize] *the effectiveness of the* [Termination Notice] *to terminate the* [Employment Agreement] *due to the fault of the Club.*

2. [Order] *the* [Club] *to pay the* [Player] *the costs of the trial, including the costs of legal representation according to the law.*

[...]

4. I agree to hold the hearing in the present case via videoconference.

5. I request the admission of evidence from: [..]"

17. On the same date, the Player submitted an additional "*request for injunctive relief*" before the PSP PZPN. By virtue of this submission, the Player in essence requested to be released from his obligation to participate in the activities of the Club until the proceedings before the PSP PZPN would have been finally resolved.

18. On 25 August 2022, the new attorney of the Player sent another default notice to the Club, granting the latter a 10-day deadline to pay the Player the amount of EUR 410,051.25 as compensation for breach of the Employment Agreement. In this correspondence, the Player highlighted, *inter alia*, that the PSP PZPN "*does not meet the requirements of FIFA independent tribunal* (sic) *under article 22 sec. 1 let. B) FIFA RSTP and does not thus have jurisdiction in the present case* [...]".

19. On 30 August 2022, the Club replied to the Player's latest default notice and stated, *inter alia*, that "[t]*he Player has never questioned the* [jurisdiction clause of the Employment Agreement] *and exclusive jurisdiction of the PSP PZPN. It must also be emphasized that all statements of the Player clearly based on the provisions of the Resolution, not FIFA RSTP* [...]. *The confirmation of the above is the fact that the Player has already enter* (sic), *on the merits, into the dispute concerning ineffectiveness of his statement regarding termination of the* [Employment Agreement] *before PSP PZPN and the case is pending*".

B. Proceedings before the FIFA Dispute Resolution Chamber

20. On 20 September 2022, the Player lodged a claim before the Dispute Resolution Chamber of the FIFA Football Tribunal (the "FIFA DRC") against the Club and requested the payment of EUR 410,051.25 (four hundred ten thousand and fifty one euro and twenty five cents) plus interest at a rate of 5% *p.a.* as compensation against the premature termination of the Employment Agreement with just cause. In this respect, the Player asserted, *inter alia*, that following the appointment of a new attorney, he was informed that the PSP PZPN does not constitute an "*independent arbitration tribunal that has been established at national level within the framework of the association and/or a collective bargaining agreement*" under the auspices of Article 22(1)(b) of the FIFA Regulations on the Status and Transfer of Players (the "FIFA RSTP").

21. On 27 October 2022, the Player submitted an unsolicited correspondence informing the FIFA DRC that, with regard to the PSP PZPN Claim, the PSP PZPN had held a hearing on 25 October 2022. In said correspondence, the Player also included a letter dated 24 October 2022 and addressed towards the PSP PZPN whereby the Player attested, *inter alia*, that "*I have dismissed my attorney in the present case, I am also amending the position that was presented, so that I question the jurisdiction of the* [PSP PZPN] *and I will not recognize nor take part in any more steps in this* (sic) *proceedings. It is the first moment I can do so as I thought that FIFA proceedings ended the current proceedings before PZPN and I was also misadvised by the lawyer in the proceedings before PZPN*".

22. On 4 November 2022 and upon being invited to provide its position in this respect, the Club submitted its reply to the claim of the Player. Primarily, the Club contested the jurisdiction of the FIFA DRC to adjudicate the pertinent case given that "*the proceeding related to the subject matter of this dispute is already conducted before PSP PZPN (in particular as the first instance of such proceeding before PSP PZPN is in its final stage) and the Player initially accepted the jurisdiction of PSP PZPN (both explicitly and implicitly), replied to the claim of the Respondent and presented his position on the merits/substance of the dispute without contesting PSP PZPN's jurisdiction. In fact, the FIFA DRC is obliged to render the Claim inadmissible in such case in line with FIFA Regulations (including the Official Commentary on the RSTP), consistent jurisprudence of FIFA Football Tribunal, Court of Arbitration for Sport in Lausanne ("CAS") and Swiss Federal Tribunal (the "SFT") as well as Article 186 para. 2 of the Swiss Private International Law Act (the "PILA")*". On a subsidiary basis, the Club filed a counterclaim against the Player, thereby requesting the payment of EUR 1,500,000.00 (one million five hundred thousand euro) as compensation for the unilateral termination of the Employment Agreement without just cause.

23. On 24 November 2022, the Player provided his comments on the Club's counterclaim and subsequently, the Club and the Player were informed by the FIFA DRC that the submission-phase of the pertinent case was closed.

24. On 13 March 2023 and upon being invited to provide their comments in this regard, the Club and the Player informed the FIFA DRC about the outcome of the PSP PZPN Claim. On the one hand, the Player asserted that, despite not having been informed about the issuance of any final decision on behalf of the PSP PZPN, the proceedings before the latter pertained to a different subject matter compared to the proceedings before FIFA and therefore, they should be disregarded by the FIFA DRC. In the view of the Player, the fact that Articles 8.8 and 8.9 of the Resolution establish an additional deadline within which a party in an employment agreement may seek to annul its unilateral termination from the other party clearly violates the principles established by virtue of Articles 1(3)(c) and 17 FIFA RSTP. On the other hand, the Club maintained that on 25 October 2022 the PSP PZPN upheld the PSP PZPN Claim and held that the Employment Agreement was "*not effectively terminated by the Player pursuant to the* [Termination Notice]" (the "PSP PZPN Award"). Further, the Club submitted

an official notice on behalf of the PZPN whereby it was attested the PZPN Award had become final and binding as of 30 January 2023.

25. On 20 April 2023, a decision was issued by the FIFA DRC on the matter at hand with, *inter alia*, the following operative part (the "Appealed Decision"):

"*1. The Football Tribunal does not have jurisdiction to hear the claim of the* [Player];

2. The Football Tribunal does not have jurisdiction to hear the counterclaim of the [Club]. [...]"

26. On 7 June 2023, the grounds of the Appealed Decision were communicated to the Parties. The legal reasoning adopted by the FIFA DRC determines, *inter alia,* the following:

"*30. First of all, the* [FIFA DRC] *analysed whether it was competent to deal with the case at hand. [...]*

31. Subsequently, the members of the [FIFA DRC] *referred to art. 2 par. 1 of the Procedural Rules and observed that in accordance with art. 23 par. 1 in combination with art. 22 lit. b) of the* [FIFA RSTP], *the* [FIFA DRC] *is competent to deal with the matter at stake, which concerns an employment-related dispute with an international dimension between a player from Germany and a club from Poland.*

32. However, the [FIFA DRC] *acknowledged that the club, firstly, contested the competence of FIFA's deciding bodies based on article 12 par.8 of the contract, which mentions that "any disputes arising out of the Agreement shall be finally settled by the Polish Football Association Dispute Resolution Chamber (Izba ds.Rozwiqzywania Spor6w Sportowych PZPN) or* [the PSP PZPN] *relevant to the competence of this authorities."*

33. Secondly, the [FIFA DRC] *observed that the club indicated that a claim with the same object has already been lodged at the Polski Związek Piłki Nożnej (hereinafter: Polish NDRC) prior to the lodgement of the claim at FIFA.*

34. The [FIFA DRC] *noted that in this regard the player replied to the claim of the club and presented his position at the Polish NDRC, without contesting the jurisdiction of the said body.*

35. In this context, the [FIFA DRC] *referred to the active participation of the player to the said proceedings i.e., filing a response to the claim and the submission of request for injunctive relief, both dated 19 April 2022.*

36. In continuation, the [FIFA DRC] *duly observed that on 24 October 2022, a day before the hearing of the case at the Polish NDRC, the* [Player] *informed the body that it objects to its jurisdiction, moreover, he failed to attend the hearing.*

37. *Subsequently, the* [FIFA DRC] *noted that on 25 October 2022, the Polish NDRC, continued with the scheduled hearing attended by the* [Club] *in the absence of the player, and that the said body reached the following decision which ruling of the hearing was confirmed on 30 January 2023:*

    "1. determine that the [Termination Notice] *of* [the Player] *submitted to* [the Club] *in Krakow on 30 March 2022 to terminate the* [Employment Agreement] *is ineffective,*

    2. award from the [Player] *in favour of the* [Club] *the amount of PLN 1,000 as reimbursement of legal representation costs."*

38. *In this regard the* [FIFA DRC] *recalled that in general if no objection is raised before the Polish NDRC, the Football Tribunal cannot hear the claim.*

39. *Bearing in mind the foregoing, the* [FIFA DRC] *turned its attention to occurrence of events prior to the lodgement of the claim at FIFA and in doing so it considered the following; (i) the* [Club] *lodged a claim against the* [Player] *at the Polish NDRC requesting a declaration that the termination of his contract be ineffective; (ii) on 19 April 2022, the* [Player] *submitted his reply to the said claim arguing that the termination of the contract was valid and at the same time requesting injunctive relief from the said body; (iii) on 24 October 2022, the* [Player] *objects to competence of the Polish NDRC; (iv) on 25 October 2022 a decision with the ruling confirmed on 30 January 2023 was issued by the Polish NDRC in terms of which the body upheld the claim of* [the] *club.*

40. *Having established that a claim had indeed been lodged at the Polish NDRC, prior to the one at FIFA and following the above events, the Chamber considered that the player's objection to the Polish NDRC only occurred months after the lodgement of the initial claim and that he clearly failed to at first object to the jurisdiction of the Polish NDRC, moreover he was fully aware of the proceedings being conducted before the said body, actively participating thereto, which rendered a final decision on 30 January 2023.*

41. *The* [FIFA DRC] *indicated that FIFA is not in a position to deal with the substance of a case in the event that another deciding body has already dealt with the same matter by passing a final and binding decision on it.*

42. *Taking the above into account, the* [FIFA DRC] *pointed out that the abovementioned considerations suffice to determine that the Football Tribunal does not have jurisdiction to decide over the present matter, which include both the claim of the player and the counterclaim of the club*".

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

27. On 27 June 2023 the Appellant filed a Statement of Appeal with CAS against the Appealed Decision in accordance with Articles R47 and R48 of the CAS Code of Sports-related Arbitration (the "CAS Code"). By means of its Statement of Appeal, the Appellant requested that the present matter be submitted to a Sole Arbitrator and for a 10-day extension of the deadline to file his Appeal Brief.

28. On 17 July 2023, the Appellant submitted his Appeal Brief, in accordance with Article R51 of the CAS Code.

29. On 4 September 2023, the CAS Court Office initiated the present arbitration procedure and *inter alia* invited the Respondents to submit their respective Answers within twenty (20) days upon receipt of the pertinent correspondence and to state their preference on the present matter being referred to a Sole Arbitrator.

30. On 5 September 2022, FIFA consented to the submission of the matter at hand to a Sole Arbitrator and requested that the time limit to file its Answer be fixed upon the payment by the Appellant of his share of the advance of costs. Said request was granted.

31. On 8 September 2023, the First Respondent expressed its preference for the present matter to be submitted to a three-member Panel.

32. On 12 September 2023 and upon being invited to provide its view in this regard, the Club stated that it did not intent to pay its share of the advance of costs and requested that the time limit to file its Answer be fixed upon the payment by the Appellant of his share of the advance of costs. Said request was granted.

33. On 7 November 2023, the CAS Court Office acknowledged receipt of payment of the advance of costs and, pursuant to Article R55 of the CAS Code, invited the Respondents to file their respective Answers within 20 days upon receipt of said letter.

34. On 4 and 7 December 2023 respectively and following a 10-day extension of the pertinent deadline, FIFA and the Club submitted their Answers pursuant to Article R55 of the CAS Code.

35. Also on 7 December 2023, the CAS Court Office informed the Parties that, pursuant to Article R54 of the CAS Code, the Deputy President of the CAS Appeals Arbitration Division had decided that the arbitral tribunal appointed to decide on the matter at hand was constituted as follows:

    - Sole Arbitrator: Mr. Sofoklis P. Pilavios, Attorney-At-Law, Athens, Greece

36. On 11 and 12 December 2023 respectively and upon being invited to provide their comments in this regard, the Respondents expressed their preference for an Award to be rendered in the present arbitral proceedings solely on the basis of the Parties' written submissions.

37. On 13 December 2023, the Appellant stated his preference for a remote hearing to be held via video-conference.

38. On 14 December 2023, the CAS Court Office informed the Parties that, after having considered the respective positions of the Parties in this respect, the Sole Arbitrator had decided to grant the Parties a second round of submissions and render an Award based solely on their submissions, pursuant to Article R57(2) of the CAS Code.

39. On 4 January 2024 and after having been granted a 10-day extension of the pertinent deadline, the Appellant filed his Reply.

40. On 24 January 2024 and after having been granted a 10-day extension of the pertinent deadline, the Respondents filed their respective Rejoinders.

41. On 14 February 2024, the CAS Court Office invited the Parties to return a signed copy of the Order of Procedure.

42. On 15 February 2024, the First Respondent filed a duly signed Order of Procedure.

43. On 19 February 2023, the Appellant and the Second Respondent filed their duly signed Orders of Procedure.

44. The Sole Arbitrator confirms that he carefully heard and took into account in his decision all of the submissions, evidence, and arguments presented by the Parties, even if they have not been specifically summarised or referred to in the present arbitral award.

IV. PARTIES' SUBMISSIONS AND PRAYERS FOR RELIEF

A. Marcos Raphael Alvarez Giraldez

45. The submissions of the Appellant may be summarized as follows:

- The FIFA DRC erred in concluding that the subject matter of the pertinent case had already been dealt by the PSP PZPN in the context of the PSP PZPN Claim and thus, that it lacked jurisdiction over the claim of the Player. Indeed, from a Swiss law perspective, the *res judicata* effect presupposes identity of claims and identity of parties. Whereas the PSP PZPN Claim pertained to the effectivity of the Termination Notice, the subject matter of the Player's claim before the FIFA DRC was "*to award compensation for termination of the* [Employment Agreement] *with just cause*".

- The Appellant never actively participated in the proceedings before the PSP PZPN and withdrew all his statements before the hearing. As a result, the Player never received a copy of the PSP PZPN Award which was notified to him by FIFA.

- The pertinent provisions of the PZPN which establish that the unilateral termination of an employment agreement with just cause is effective once having been ratified by the PSP PZPN clearly violate the principles established by means of Article 1(3)(c) of the FIFA RSTP, according to which an employment agreement may be terminated by either party without any consequences where there is just cause.

- The Appellant was misadvised by his previous attorney and was not aware of the fact that the PSP PZPN does not meet the minimum requirements set in FIFA Circular 1010 and therefore, it does not constitute an independent arbitration tribunal in light of Article 22(1)(b) FIFA RSTP. Once the Player received the above information by his new lawyer, he withdrew all his substantive submissions before the PSP PZPN and objected to its jurisdiction to adjudicate the pertinent case. According to the legal principles established in civil litigation "*the result of withdrawal of the petition in civil litigation is that such petition does not have any effect for the proceedings as it was never lodged*".

- The fact that, by virtue of the Default Notice and the Termination Notice, the Player referred to the regulations of the PZPN does not entail the acceptance of the jurisdiction of the deciding bodies of the PZPN over his dispute against the Club. What is more, the PSP PZPN Claim was lodged by the Club and not by the Player who did not initiate nor have any control over said proceedings.

- Even if the Player had objected to the jurisdiction of the PSP PZPN, said objection would not have altered the outcome of the proceedings before the PSP PZPN, given that the Employment Agreement explicitly confers to the deciding bodies of the PZPN the authority to decide on any dispute that may arise out of the abovementioned employment contract.

46. On this basis, the Appellant submits the following prayers for relief:

"*1)* [Accept] *the Appeal lodged by the Appellant.*

2) [Set aside] *the* [Appealed Decision] *in its entirety.*

3) [Award] *the costs of the proceedings including the legal costs (attorney fee) from the Respondent to the benefit of the Appellant.*

4) [Appoint] *a Sole Arbitrator.*

5) Grant legal aid by the FLAF – Football Legal Aid Fund on the grounds of the application sent separately to CAS via electronic mail".

B. MKS Cracovia S.S.A.

47. The submissions of the First Respondent may be summarised as follows:

- According to the well-established jurisprudence of CAS the requests for relief submitted by the Appellant in the course of arbitral proceedings should "*be worded in a way that the appellate authority may, where appropriate, incorporate them to the operative part of its own decision without modification*". However, the prayers for relief submitted by the Appellant in the course of the present proceedings are rather obscure in the wording which in turn, renders their rebuttal impossible for the Respondents. Additionally, the scope of the present proceedings, as defined by the prayers of relief submitted by the Appellant, is limited to the issue of the admissibility of the Player's claim before the FIFA DRC and therefore, the arbitral tribunal is prevented from examining the substance of the matter at hand.

- Turning to the merits of the present case, it is uncontested that the Player and the Club chose to insert a jurisdiction clause in favour of the PSP PZPN in the Employment Agreement and agreed to apply the regulations of the PZPN and Polish law over the pertinent contractual relationship. Their agreement was further corroborated by the subsequent actions of the Player who explicitly referred to the Resolution as a legal basis to unilaterally terminate the Employment Agreement and adhered to the formalities provided therein.

- Despite not having received a copy of the Default Notice, once the Club received the Termination Notice, it proceeded immediately to repay the Player's outstanding salaries and apologize for the delay. According to the applicable regulations of the PZPN, the Club was therefore entitled to lodge a request with the PSP PZPN in order to render the Termination Notice ineffective.

- Following the filing of the PSP PZPN Claim, the Player was invited by the PSP PSZPN to submit his arguments in this respect. It should be noted that, by means of his initial submissions, the Player addressed the substance of the pertinent case and requested the dismissal of the PSP PZPN Claim. As a matter of fact, the Player not only failed to contest the jurisdiction of the PSP PZPN at this stage of the proceedings but he even filed a request for interim relief which would allow him to abstain from the sporting and other activities of the Club until the PSP PZPN Claim would be finally resolved.

- Almost six months after the submission of his arguments in regard with PSP PZPN Claim, the Player sent another notice to the Club thereby demanding the payment of EUR 410,051.25 as compensation for the unilateral termination of the Employment Agreement with just cause. By means of said correspondence, the Player stated for the first time that the regulations of the PZPN were contrary to the regulations of FIFA and that the unilateral termination of the Employment Agreement was based on Article 14*bis* FIFA RSTP. In turn, the Player proceeded with withdrawing any statements previously

made before the PSP PZPN and stated that the latter does not have jurisdiction to decide on the dispute between the Club and the Player due to the fact that, allegedly, said deciding body does not comply with the minimum standards of FIFA Circular 1010.

- According to the consistent jurisprudence of the FIFA DRC and CAS, a party that has failed to contest the competence of a national deciding body, either by filing a claim with it, or by filing a response to the substance of a claim pending before it without contesting its competence, will not be allowed to subsequently claim that said deciding body does not meet the minimum standards of FIFA Circular 1010. This view is further confirmed by the Swiss Federal Tribunal (the "SFT") in light of article 186 par.2 of the Swiss Private International Law Act (the "PILA").

- For one to ascertain whether two proceedings pertain to the same subject matter and consequently, whether the principle of *res judicata* prevents the tribunal from entertaining a case that has already been decided, the so-called "triple identity test" must be applied. According to said test, there is *res judicata* where: i) there is an identity of claims from a substantive point of view, ii) the same parties were involved in both proceedings and iii) both claims are based on the same factual background. In the present case, it is evident that the Player's claim before the FIFA DRC pertained to the same subject matter as the PSP PZPN Claim while at the same time, both claims were based on the same factual circumstances and involved the same parties.

48. On this basis, the First Respondent submits the following prayers for relief:

"*1. That the Appeal is rejected in totum;*

2. That the Appealed Decision is confirmed in totum;

3. That, on the basis of the principle of ne ultra petita, the Sole Arbitrator will not consider:

(i) the question of the potential lack of jurisdiction of the FIFA DRC due to a clear, valid and exclusive choice of forum clause agreed by the [Club and the Player] *and/or*

(ii) the question of the premature termination of [the Employment Agreement]*; and/or*

(iii) the question of the consequences of the premature termination of [the Employment Agreement]*; on a de novo basis, pursuant to Article 57 of the CAS Code;*

4. That res judicata is declared on the dispute between the [Club and the Player]*, preventing the Appellant to take any further proceedings in the matter before FIFA's jurisdiction bodies and/or the CAS;*

On a subsidiary basis:

1. *in the event the Sole Arbitrator shall decide that the* [Appealed Decision] *should be changed in any way, the Sole Arbitrator is requested to return the vase to the FIFA DRC;*

In any event:

1. *That the Appellant is ordered to bear the costs of arbitration;*

2. *That the Appellant is ordered to pay a contribution towards the Respondent's legal fees and other expenses in the present arbitration, in an amount deemed proportionate by the Sole Arbitrator*".

C. FIFA

49. The submissions of the Second Respondent may be summarised as follows:

- Regardless of whether the PSP PZPN meets the minimum standards set in FIFA Circular 1010 in order to be considered an acceptable alternative to the resolution of employment-related disputes between clubs and players, the fact that the Player addressed the merits of the PSP PZPN Claim without questioning the competence of the PSP PZPN in this regard is perceived as a tacit acceptance of its jurisdiction by the Player. Therefore, FIFA is prevented from entertaining any arguments brought forward by the Player in regard with the constitution of the PSP PZPN or the compatibility of the regulations of the PZPN with the regulations of FIFA.

- The Player attempts to portray that the subject matter of his claim before the FIFA DRC is materially different from the subject matter of the PSP PZPN Claim. Nevertheless, it is evident that, before the FIFA DRC could award any amount to the Player as compensation for breach of contract with just cause, it was priorly obliged to assess the validity of the Termination Notice, a matter that had already been adjudicated by means of the PZPN Award.

- The procedural behaviour of the Appellant constitutes an evident attempt of "*forum shopping*": once the Appellant changed his counsel, he was advised that it would be more favorable for him to submit his case before the competent deciding bodies of FIFA, rather than those of the PZPN. As a result, the Appellant decided to withdraw his statements made in the context of the PSP PZPN Claim and challenge the competence of the PSP PZPN to decide on his dispute against the Club.

- The Appellant's argument that he had not received a copy of the PSP PZPN Award is "*suspicious (if not opportunistic)*", especially considering that he had received all the previous communications of the PSP PZPN addressed to him. Further, the Appellant was aware that the hearing of the PSP PZPN Claim was scheduled on 25 October 2023. Therefore, the Appellant should have adopted a proactive stance towards said matter and he should have attempted to discover whether the PSP PZPN had received his letter dated 24 October 2023 and subsequently, to monitor the outcome of the pertinent proceedings.

- Even if the Player had indeed been "*misadvised*" by his previous legal counsel, this does not justify the unexpected alteration in his course of action. In fact, the procedural stance of the Player that preceded the change of his counsel created the legitimate expectation that he had accepted the jurisdiction of the PSP PZPN. Therefore, the Appellant was estopped from subsequently questioning the competence of the PSP PZPN.

- The argument of the Appellant that, by withdrawing his substantive arguments before the PSP PZPN, said brief is as if it was never submitted, is simply an erroneous line of reasoning. Besides the fact that the Appellant has failed to discharge his burden to prove that the pertinent correspondence was actually sent acknowledged and taken into consideration by the PSP PZPN, there is no evidence in the case file indicating that under the Polish law, all the effects of the proceedings before the PSP PZPN disappeared as if the PSP PZPN Claim was "*never lodged*".

50. On this basis, the Second Respondent submits the following prayers for relief:

a) reject the requests for relief sought by the Appellant and dismiss the appeal in full;

b) confirm the Appealed Decision;

c) order the Appellant to bear the full costs of these arbitration proceedings;

V. JURISDICTION

51. Article R47 of the CAS Code provides the following:

"*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*".

52. The Sole Arbitrator notes that whereas the Appellant did not present any arguments in this regard, the Respondents state that the jurisdiction of CAS to decide on the present matter derives from Article 57(1) of the FIFA Statutes (ed. May 2022) which 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 within 21 days of receipt of the decision in question*".

53. The jurisdiction of CAS is further confirmed by the Parties by means of their signature on the Order of Procedure.

54. In view of the above, the Sole Arbitrator finds that CAS has jurisdiction to decide on the present dispute. Nevertheless, it is clarified that the issue of whether FIFA was competent

ab initio to decide on the claim of the Player against the Club constitutes a different matter which will be addressed in detail below.

VI. ADMISSIBILITY

55. The Sole Arbitrator notes that the present Appeal was filed within the deadline of 21 days set by Article 57(1) FIFA Statutes. Further, the present Appeal complied with all other requirements set in Article R48 of the CAS Code, including the payment of the CAS Court Office fee.

56. It follows that the Appeal is admissible.

VII. APPLICABLE LAW

57. 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.*"

58. Pursuant to Article 56(2), of the FIFA Statutes, "[t]*he 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*".

59. The Sole Arbitrator notes that whereas the Appellant and the Second Respondent agree on the primary application of the various regulations of FIFA and, subsidiarily, of Swiss law on the present matter, the First Respondent submits that the case at hand should be decided on the basis of the PZPN regulations and Polish law. In this regard, the Sole Arbitrator recalls that section 12(7) of the Employment Agreement provides that "*this Agreement shall be governed by Polish law and the relevant regulations of the* [PZPN] *and FIFA*" a choice of law that is not to be airily disregarded. Because of the potential conflict, the question arises as to how one delineates the scope of application of each body of law on a given case. The pertinent question has been thoroughly dealt by Prof. Dr. Ulrich Haas in his article "*Applicable law in football-related disputes*" published in the CAS Bulletin 2015/2 (pag.7 *et seq.*). The author explains (*idem*, page 15), that "*FIFA lays down the standard for a particular sports industry in its rules and regulations*[...] [c]*onsequently the purpose of the reference to Swiss law in Art. [57] (2) of the FIFA Statutes is to ensure the uniform interpretation of the standards of the industry*". Then he deals with the relations between the CAS Code, the FIFA Statutes, and the agreement of the parties on the application of a specific national law, and concludes the following (*ibid* pag.17):

"*(2) In CAS proceedings the parties have invariably made a choice of law, since the agreement on the CAS as the court of arbitration always also entails an implicit (and indirect) agreement in relation to the provision of Art. R58 of the CAS Code.*

(3) This implicit agreement on Art. R58 of the CAS Code takes precedence over any explicit choice of law by the parties (for example in the contract), since the purpose of Art. R58 of the CAS Code is to restrict the autonomy of the parties. This Article provides for a mandatory hierarchy of the applicable legal framework, which the parties cannot change. Consequently the parties are entitled to freedom of choice of law solely within the limits set by Art. R58 of the CAS Code, with the result that they can only determine the subsidiarily applicable law. In contrast, under Art. R58 of the CAS Code the "applicable regulations" always primarily apply, regardless of the will of the parties.

(4) If for their part the "applicable regulations" contain a reference to a national law (see for example Art. [57(2)] *of the FIFA Statutes), then the scope of application of the national law thus invoked must be delineated from the law chosen by the parties. Swiss law as invoked in Art.* [57(2)] *of the FIFA Statutes does not prevail over the choice of law made by the parties. Rather, this gives rise to a co-existence of the "applicable regulations", Swiss law and the law chosen by the parties.*

(5) The application of Swiss law is confined to ensuring uniform application of the FIFA regulations. Art. [57(2)] *merely clarifies that the FIFA regulations are based on a normative preconception, which is borrowed from Swiss law. Therefore if questions of interpretation arise over the application of the FIFA regulations recourse must consequently be made to Swiss law in this regard.*

(6) Accordingly any other issues (regarding interpretation and application) that are not addressed in the FIFA regulations, i.e. for which FIFA has not set any uniform standards of the industry, are subject to the law that has been chosen by the parties".

60. These conclusions are fully endorsed by the Sole Arbitrator. If to summarize them, one can say that in the course of appellate arbitration proceedings before CAS against a final decision passed by the adjudicatory bodies of FIFA, the FIFA Regulations – in the sense of the entire statutory regime of FIFA – apply primarily and recourse must be made to Swiss law only when questions on their interpretation arise. Accordingly, the law chosen by the parties applies to all the matters that are not addressed by the FIFA Regulations and therefore, do not require a globally uniform application because "*they are not part of the standards of the industry set by FIFA*".

61. In view of the abovementioned remarks, the Sole Arbitrator accepts that the parties to the Employment Agreement have chosen the Polish law to govern any disputes arising out of its execution. This view is further corroborated by Article 19(1) of the PILA, providing that "*If, pursuant to Swiss legal concepts, the legitimate and manifestly preponderant interests of a party so require, a mandatory provision of a law other than that designated*

by this Code may be taken into account if the circumstances of the case are closely connected with that law".

62. Consequently, the Sole Arbitrator concludes that the FIFA Regulations apply primarily on the matter at hand, while Swiss law shall apply only if questions of interpretation arise over the application of the FIFA regulations. In turn, the law of Poland shall govern all legal issues that are not specifically addressed by the FIFA Regulations.

VIII. SCOPE OF REVIEW

63. Before addressing the substance of the case at stake, the Sole Arbitrator notes that the First Respondent argues that "*the requests for relief submitted by the Appellant in the Statement of Appeal and in the Appeal Brief (i.e., the request for annulment of the Appealed Decision due to "no breach of the res judicata principle) are not sufficiently specified, making it impossible for the Respondent to assess whether a subsidiary requests* (sic) *regarding: (i) the potential issues of the jurisdiction of the FIFA DRC due to a clear, valid and exclusive choice of forum clause agreed by the Parties and more importantly (ii) merits of the case at hand (i.e., the issue of the premature termination of the* [Employment Agreement]*) are implicit by the Appellant*". Differently put, the First Respondent claims that due to the vaguely articulated prayers for relief submitted by the Appellant, the scope of review in the present appellatory proceedings is limited only to the issue of the admissibility of the Player's claim before the FIFA DRC in light of the binding effect of the PSP PZPN Award.

64. In this respect, the Sole Arbitrator recalls that the prayers for relief submitted by the Appellant that pertain to the merits of the present case provide as follows:

"*1)* [Accept] *the Appeal lodged by the Appellant.*

2) [Set aside] *the* [Appealed Decision] *in its entirety*".

65. As a general rule, the Sole Arbitrator notes that, without prejudice to Article R57 of the CAS Code, which confers to CAS panels the power to review the facts and the law of the case *de novo*, the Sole Arbitrator is nonetheless bound to the limits of the parties' motions since the arbitral nature of the proceedings in CAS obliges the Sole Arbitrator to decide all the claims submitted by the parties and, at the same time, prevents the Sole Arbitrator from granting more than the parties are seeking, according to the principle of *ne ultra petita* (cf. CAS 2019/A/6578 par.169). Further, the Sole Arbitrator is mindful of the CAS jurisprudence brought forward by the First Respondent according to which "*requests for relief must be specified with enough precision in order for the Respondent(s) to be in a position to all parts of the claim. They must be worded in a way that the appellate authority may, where appropriate, incorporate them to the operative part of its own decision without modification* (cf. CAS 2020/A/6950 par.171 with further references).

66. Despite the fact that the prayers for relief submitted by the Appellant could indeed have been more detailed, the Sole Arbitrator does not concur with the argumentation brought forward by the First Respondent in this respect. In the view of the Sole Arbitrator, the material scope of any dispute is primarily defined during the first-instance proceedings, according to the arguments and requests for relief submitted by the claimant. Following the issuance of the appealed decision, a party may choose to appeal against the entire decision in question or certain parts of it. In the subsequent appellate proceedings before CAS and depending on the extent the first instance decision is contested, the arbitral tribunal enjoys the discretion to either "*issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance*" (Article R57 of the CAS Code), provided that the pertinent appeal will be upheld. Simply put, if only certain parts of the appealed decision are questioned, the arbitral tribunal cannot exceed its mandate and review also the parts of said decision that are not contested. Similarly, if the appellant requests the entire decision in question to be set aside, the tribunal is bound to decide *de novo* on every aspect of the pertinent dispute. Therefore, it is of paramount importance for the appellant in every appellate proceedings to articulate its prayers for relief in such manner that will undoubtedly define the extent of the scope of review.

67. In the present matter, the Player submitted a claim against the Club before the FIFA DRC requesting the payment of a certain amount as compensation for breach of contract with just cause. Due to the fact that the FIFA DRC concluded that it had no jurisdiction to decide over the pertinent matter, the Player filed an appeal against the Appealed Decision, thereby requesting its annulment on the grounds that the FIFA DRC had erred in deciding that the *res judicata* effect prevented it from entertaining the claim of the Player. Therefore, in case the Sole Arbitrator finds that the pertinent argument presented by the Appellant is valid and decides to uphold the present Appeal and consequently, to set aside the Appealed Decision on its entirety (given that the FIFA DRC did not address the merits of the pertinent dispute), he is vested with the power to either issue a new decision on the merits of the present matter – within the limits that were determined before the previous instance – or refer the case back to the FIFA DRC. At the same time, the Appellant must discharge the burden of proving his substantive arguments, including any arguments regarding the competence of the FIFA DRC on the present dispute despite the explicit jurisdiction clause inserted in the Employment Agreement, or the validity of the unilateral termination of the Employment Agreement. Nevertheless, this is a totally different issue which is preceded by the review of the grounds of the Appeal.

68. This view is further corroborated by the Swiss doctrine and caselaw, according to which a judicial body may be authorized to adjudicate also on "implicit requests", i.e. on requests other than that expressly submitted which may be considered as virtually "contained" or "included" in the latter or implicitly formulated: "*Dans certains cas, la loi ou la jurisprudence autorisent le juge à statuer sur la base de conclusions implicites, pour autant que les faits qui les justifient aient été allégués et les moyens de preuve offerts régulièrement et en temps utile (cf. infra N 1316 ss). Ces conclusions sont implicites en ce sens que, sans être formellement exprimées, elles sont virtuellement contenues dans celles qui le sont et*

peuvent en être tirées par déduction" (HOHL F., Procédure civile, Tome I, Introduction et théorie générale, 2e éd., Berne 2016, para. 1200).

69. The above extract can be freely translated into English as follows: "*In certain cases, a statute or case-law authorises a court to decide on the basis of implicit prayers of relief, provided that the facts justifying them have been alleged and the evidence offered regularly and on time (cf. infra N 1316 et seq.). Such prayers of relief are implicit in the sense that, without being formally expressed, they are virtually contained in those that are stated and can be drawn from them by deduction*".

70. Indeed, the Sole Arbitrator believes that unspoken requests may be considered "virtually contained" in other requests which were expressly formulated, only provided that they are connected with each other by the same grounds, namely, by the same reasons in fact and in law (so that the main legal issue to be resolved by the adjudicator is the same). Otherwise, the principle of *ne ultra petita* would be circumvented. In the case at stake, the Appellant requests the annulment of the Appealed Decision in its entirety, given that no further specification is included in his submissions and that by means of the Appealed Decision, the FIFA DRC addressed only the issue of its jurisdiction on the pertinent matter. Naturally, said request entails also the implicit request that a new decision will be issued on the merits of the dispute or alternatively, that the case will be referred back to the FIFA DRC.

71. In view of the above, the Sole Arbitrator finds that the scope of review in the present appellatory proceedings is not limited by the requests for relief submitted by the Appellant and that, following the assessment on the issue of the jurisdiction of the FIFA DRC on the Player's claim, the Sole Arbitrator is mandated to examine *de novo* every aspect of the present matter.

IX. MERITS

72. The main issues to be resolved by the Sole Arbitrator are:

    A. Had the Player, either tacitly or explicitly accepted the jurisdiction of the PSP PZPN on the PSP PZPN Claim?

    B. Which are the consequences thereof?

73. The Sole Arbitrator will address these issues in turn.

A. Had the Player, either tacitly or explicitly, accepted the jurisdiction of the PSP PZPN on the PSP PZPN Claim?

74. The Sole Arbitrator notes that one of the main areas of contention between the Parties, in the context of the matter at hand, pertains to the jurisdiction of the PSP PZPN to decide on the dispute that arose from the unilateral termination of the Employment Agreement. On the one

hand the Player claims that he was misadvised by his previous legal counsel in addressing the substance of the PSP PZPN Claim, given that the PSP PZPN does not meet the minimum requirements set in FIFA Circular 1010 for the establishment of independent arbitration tribunals operating at a national level. Prior to the hearing of the PSP PZPN Claim, the Player withdrew all his statements made before the PSP PZPN and contested its competence to decide on the pertinent dispute which in turn, according to the Player, rendered every submission made before the PSP PZNP of no legal effect whatsoever. On the other hand, the Respondents argue that, by submitting his position on the merits of the PSP PZPN Claim, the Appellant tacitly accepted the jurisdiction of the PSP PZPN to decide on the pertinent dispute between the Player and the Club and therefore, he was prevented from submitting said dispute before any other deciding body, including the FIFA DRC.

75. As an initial remark the Sole Arbitrator notes that, pursuant to Articles 22(1)(b) and 23(1) of the FIFA RSTP (ed. October 2022), the FIFA DRC is, in principle, competent to decide on any employment-related dispute of an international dimension between a football club and a player. Nevertheless, the contracting parties may "*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* [...]". In light of the clear wording of the abovementioned provision and the long-standing jurisprudence of CAS, the Sole Arbitrator finds that tribunals established at national level have jurisdiction to settle employment-related disputes of an international dimension between clubs and players only if the following requirements are met: (i) there is an independent arbitral tribunal established at the national level; (ii) the jurisdiction of this independent arbitral tribunal derives from a clear reference in the employment contract; and (iii) this independent arbitral tribunal guarantees fair proceedings and respects the principle of equal representation of players and clubs. Pursuant to the FIFA Circular 1010, the terms "*independent*" and "*duly constituted*" require that an arbitral tribunal meets the minimum procedural standards which comprise the principle of parity in the constitution of said tribunal, the right to an independent and impartial tribunal, the principle of a fair hearing, the right to contentious proceedings and the principle of equal treatment.

76. Against that background however, the Sole Arbitrator recalls that pursuant to Article 186(2) of the PILA, any objection to the jurisdiction of the arbitral tribunal must be raised prior to any defence on the merits. According to the pertinent jurisprudence of the SFT: "*Anyone who enters into an arbitration procedure without reservation as to the merits of the case recognizes, by this conclusive act, the competence of the arbitral tribunal and consequently loses definitively the right to invoke the lack of competence of the said tribunal*" (SFT 120 II 155). The legal principles established by means of the above jurisprudence are also depicted in the intentions of the draftsman of Article 22 FIFA RSTP i.e., FIFA. Particularly, for one to ascertain the intentions of FIFA in adopting a certain provision of the FIFA RSTP, the Sole Arbitrator finds that it is hard to imagine a document that could more accurately serve

this purpose than the FIFA Commentary on the Regulations for the Status and Transfer of Players (the "FIFA Commentary"). The Sole Arbitrator acknowledges that the FIFA Commentary, albeit not binding, can provide useful guidance for the interpretation of the FIFA RSTP and shall be seen "*as an interpretative approach, which is likely to give a certain degree of certainty among sports professionals*" (cf. CAS 2012/A/2698 par. 111, CAS 2007/A/1369 par. 56). In this regard, the Sole Arbitrator observes that the FIFA Commentary appears to be rather conclusive in determining that "*if both parties recognise the jurisdiction of the national body by failing to contest it, FIFA will recognise any decision passed by the national body, even if that body does not comply with the procedural standards. In other words, a party that has recognised (or failed to contest) a national body's competence to hear a specific case – either by lodging its claim with the national body or merely by submitting a response to the substance of the claim without contesting the national body's jurisdiction – will not be allowed to claim that the national body concerned does not meet the minimum standards provided for by article 22 paragraph 1 (b) (and FIFA Circular no. 1010), or to ask the DRC to reconsider the case on that basis* [...] *The final considerations concern the practice known as "forum shopping" – a party taking the same matter to multiple fora in the hope of obtaining the result that suits its purposes. The relevant jurisprudence650 is designed to prevent such behaviour, which is viewed as illegitimate. A party should not be able to game the system by having multiple fora hear the same argument in the hope one of them will hand down the judgment it wants. For example, a party should not be allowed to ask a national body to confirm that a contract has been breached without just cause, and then, having obtained a favourable decision at national level, ask the DRC to set the compensation payable in the case. The principle that a party that has chosen to have a case heard under one competent jurisdiction cannot then have recourse to another (known colloquially as "forum shopping") is consistently applied*".

77. In the matter at hand, the Sole Arbitrator observes that, following the submission of the PSP PZPN Claim and upon being invited by the PSP PZPN to present his arguments in this respect, the Player actively participated in the pertinent proceedings by submitting his statement of defence and by requesting the dismissal of the PSP PZPN Claim on its merits. It remains uncontested between the Parties that, at that stage of the proceedings, the Player failed to contest the jurisdiction of the PSP PZPN to settle the employment-related dispute that arose from the unilateral termination of the Employment Agreement. By demonstrating such procedural stance, the Sole Arbitrator finds that the Appellant tacitly accepted the jurisdiction of the PSP PZPN to adjudicate on the PSP PZPN Claim and therefore, he was prevented, in light of the above considerations, from contesting the competence of the PSP PZPN at a later stage of the proceedings. Taking the above into consideration, the fact that the Appellant did not subsequently participate in the hearing of the PSP PZPN Claim is of little to no importance for the purposes of determining whether he accepted the competence of the PSP PZPN on said claim: The unequivocal wording of Article 186(2) PILA provides that any plea of lack of jurisdiction shall be raised prior to any defence on the merits of the dispute, regardless of whether such defence on the merits is made by virtue of written submissions or during an oral hearing. In view thereof, the Sole Arbitrator does not concur with the argumentation brought forward by the Appellant according to which his absence

from the hearing of the PSP PZPN Claim is equated with him not having participated in at pertinent proceedings at all. For the sake of completeness, the Sole Arbitrator highlights that the assessment of the above argument submitted by the Appellant may have led to a different conclusion had the Appellant effectively demonstrated that, under the applicable procedural rules of the PZPN or the Polish law, the plea of lack of jurisdiction of the seized tribunal could have been submitted following any defence of the merits of the pertinent dispute and in any case, prior to its hearing. Nonetheless, the Player failed to discharge the burden of proving such argument (Article 8 of the Swiss Civil Code) and therefore, the Sole Arbitrator feels comfortable to rely on the pertinent provision of PILA in this regard.

78. Finally, the Sole Arbitrator notes that the Appellant argues that, on 24 October 2022, he withdrew the statement of defence submitted before the PSP PZPN on 19 April 2022. According to the Player, said procedural action results in said statement to "*not have any effect for the proceedings as it was never lodged*" without submitting any evidence in support of his argument. Nevertheless, the Sole Arbitrator reiterates that this is a procedural issue that should be assessed according to the applicable procedural rules i.e., the procedural rules of the PSP PZPN or the pertinent provisions of the Polish Civil Procedure Code. In any case, the Sole Arbitrator notes that the Player failed to submit concrete evidence whereby it could be adequately proven that his letter dated 24 October 2022 was indeed sent to, and in turn, receive by, the PSP PZPN.

79. It follows that the Player tacitly accepted the competence of the PSP PZPN to decide on the PSP PZPN Claim.

B. Which are the consequences thereof?

80. Having established the above, the Sole Arbitrator will proceed his analysis by reviewing whether the Player's tacit acceptance of the competence of the PSP PZPN and the subsequent issuance of the PSP PZPN Award prevented the FIFA DRC from entertaining the claim submitted by the Player against the Club on its merits. In this regard, the Sole Arbitrator notes that the Appellant claims, *inter alia*, that the nature of his claim before the FIFA DRC is of purely pecuniary nature and therefore, materially different from the subject matter of the PSP PZPN Claim which pertained exclusively to the validity of the Termination Notice. On the contrary, the Respondents argue that, from a substantive point of view, the subject matter of the pertinent claims is identical and therefore, the FIFA DRC is not competent to decide on the Player's claim due to the *res judicata* effect of the PSP PZPN Award.

81. As a general rule, the Sole Arbitrator recalls that pursuant to the jurisprudence of the SFT, the arbitral tribunal violates the procedural public policy if it disregards the *res judicata* effect of a previous decision. *Res judicata* applies both domestically and internationally and applies in particular to the relationship between an arbitral tribunal sitting in Switzerland and a foreign court or arbitral tribunal (ATF 140 III 278 consid 3.1, p. 279; ATF 127 III 279 consid 2). The question of *res judicata* is, in principle, a procedural question which is governed by the *lex fori* i.e., Swiss law under which, in order to determine whether there is *res judicata*

one must apply the so-called "triple identity test". In line with the long-standing of CAS and the SFT, there is *res judicata* when the claim in dispute has already been the subject of an enforceable judgement and the claims in question: i) pertain to the same subject matter, ii) involve the same parties and iii) are premised on the same factual background. The identity must be understood from a substantive and not grammatical point of view, so that a new claim, no matter how it is formulated, will have the same object as the claim already adjudicated (ATF 140 III 278 at 3.3; ATF 139 III 126 at 3.2.3).

82. In some circumstances (depending on the legal effects at stake arising out of the *res judicata*), the existence of a previous decision or judgment will entail the lack of jurisdiction of a subsequent arbitral tribunal. As remarked by the Panel in *CAS 2018/A/5888*, the SFT has held that: "[q]*uant à l'autorité de chose jugée, ce principe interdit au juge de connaître d'une cause qui a déjà été définitivement tranchée; ce mécanisme exclut définitivement la compétence du second juge*" (ATF 127 III 279), which can be freely translated to English as follows: "*With regard to the res judicata authority, this legal principle prevents the judge from entertaining a case that has been already and definitively decided; this mechanism excludes the competence of the second judge*". Indeed, under Swiss law, *res judicata* is part of the procedural public policy, and it applies both domestically and internationally (SFT 4A_633/2014). This aspect of the *res judicata* principle constitutes, as confirmed by the constant CAS case law (CAS 2013/A/3256 and CAS 2018/A/5800), the so-called "*Sperrwirkung*" (prohibition to deal with the matter – *ne bis in idem*), the consequence of which is that if a matter (with *res iudicata*) is brought again before the adjudicatory authority, the latter is not even allowed to look at it, but must dismiss the matter (insofar) as inadmissible. The second aspect of that principle being the so-called "*Bindungswirkung*" (binding effect of the decision), according to which the judge in a second procedure is bound to the outcome of the matter decided in *res judicata*.

83. In the case at hand, it remains undisputed that the PSP PZPN Claim and the claim of the Player against the Club which was submitted before the FIFA DRC involve the same parties and pertain to the same set of facts i.e., the events that transpired in the employment relationship between the Player and the Club as of the conclusion of the Employment Agreement until its unilateral termination. However, as indicated above, there is a contention between the Parties regarding the material scope of the claims in question: Whereas the Respondents maintain that said claims are identical from a substantive point of view, the Appellant asserts that his claim before the DRC, being of a pecuniary nature, is materially different from the PSP PZPN Claim which concerns exclusively the validity and the legal effects of the Termination Notice.

84. After having examined the pertinent claims, the Sole Arbitrator does not agree with the view of the Appellant in this respect. It is recalled that the "*identity of claims*" criterion shall be assessed from a substantive and not a grammatical point in view. In reality, both claims pertain to the examination of the circumstances that led to the unilateral termination of the Employment Agreement and the consequences thereof. The fact that the Club sought to declare the Termination Agreement "*ineffective*" whereas the Appellant seeks to be awarded

compensation for the termination of the Employment Agreement with just cause is only natural in view of the conflicting interests of the parties. In the view of the Sole Arbitrator, the PSP PZPN Claim and the claim of the Player before the DRC are, in essence, the "two sides of the same coin" and any differences that may be detected between them in terms of their material scope are attributed exclusively to the opposite interests of the implicated parties. Besides, in light of the FIFA applicable regulations, any determination on behalf of the FIFA DRC regarding the entitlement of the Player to receive compensation by the Club due to the premature termination of the Employment Agreement would presuppose the assessment of the validity of said termination. Accordingly, even if one were to assume that indeed that claims in question were actually not identical, the FIFA DRC would be bound by the assessment made by virtue of PSP PZPN Award, at least with regard to the effects of the premature termination of the Employment Agreement, and it would have been obliged to dismiss the claim of the Player.

85. Against that background, the Sole Arbitrator remarks that he is mindful of the ample CAS and SFT jurisprudence according to which decisions issued by the deciding bodies of a sports association are not vested with the *res judicata* effect which, under Swiss law, is reserved only for the decisions rendered by state courts and true arbitral tribunals. Further, pursuant to Article 196 of the PILA, the recognition and enforcement of foreign arbitral awards in Switzerland is governed by the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards and not the FIFA RSTP as incorrectly assumed by the Appellant. In view of the foregoing, the Sole Arbitrator highlights that the Player did not claim, let alone prove, that the PSP PZPN is not a "true" arbitral award or that it cannot be recognized and enforced within the Swiss legal system pursuant to the aforementioned international convention.

86. Consequently, the Sole Arbitrator concludes that the FIFA DRC was indeed prevented by the *res judicata* effect of the PSP PZPN Award from entertaining the merits of the Player's claim against the Club.

X. CONCLUSIONS

87. Based on the foregoing, the Sole Arbitrator finds that:

- The Player tacitly accepted the jurisdiction of the PSP PZPN to adjudicate the PSP PZPN Claim.
- The FIFA DRC was bound by the res judicata effect of the PSP PZPN Award and therefore, could not entertain the claim of the Player against the Club.

88. It follows that the appeal is dismissed, as are all other motions and requests for relief.

XI. COSTS

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

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

90. Article R64.5 of the CAS Code provides the following:

> *"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."*

91. Having taken into account the outcome of the arbitration, in particular that the Appellant's appeal was dismissed, the Sole Arbitrator considers it reasonable and fair that the costs of the arbitration, in an amount that will be determined and notified to the parties by the CAS Court Office, shall be borne by the Appellant.

92. Furthermore, pursuant to Article R64.5 CAS Code and in consideration of the complexity and outcome of the proceedings as well as the conduct and the financial resources of the parties, the Sole Arbitrator rules that the Appellant shall bear his own costs and pay a contribution towards the First Respondent's legal fees and other expenses incurred in connection with these arbitration proceedings in the amount of CHF 3'000. FIFA being not

represented by outside counsel, it shall bear its own costs and expenses, in line with CAS jurisprudence.

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ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 27 June 2023 by Mr. Marcos Raphael Alvarez Giraldez against the decision issued on 20 April 2023 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* Football Tribunal is dismissed.

2. The decision issued on 20 April 2023 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* Football Tribunal is confirmed.

3. The costs of the arbitration, to be determined and served to the parties by the CAS Court Office, shall be entirely borne by Mr. Marcos Raphael Alvarez Giraldez.

4. Mr. Marcos Raphael Alvarez Giraldez shall bear its own costs and is ordered to pay the amount of CHF 3'000 (three thousand Swiss Francs) to MKS Cracovia S.S.A. as a contribution towards its legal fees and other expenses incurred in connection with these arbitration proceedings.

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

Seat of arbitration: Lausanne, Switzerland

Date: 6 May 2024

Sofoklis Pilavios
Sole Arbitrator