Arbitration CAS 2022/A/8882 Clube Desportivo Nacional v. Fédération Internationale de Football Association (FIFA), Vincent Thill & FC Vorskla Poltava, award of 28 November 2023

Panel: Mr Patrick Stewart (United Kingdom), President; Mr Daniel Cravo Souza (Brazil); Mr João Nogueira da Rocha (Portugal)

Football
Termination of contract without just cause
Standard of proof
Withholding of consent
Serious breach

1. **Each party must fulfil its burden of proof to the required standard by providing and referring to evidence to convince a panel that the facts it pleads are established. Regarding the question of standard of proof, neither the Swiss Private International Law Act (PILA) nor the CAS Code prescribe a standard applicable to CAS proceedings. Where no applicable standard of proof is specified in the applicable regulations, the panel has the discretion to determine the appropriate standard although it should at least consider consistent CAS jurisprudence in similar fields when exercising this discretion. When considering cases involving the FIFA Regulations on the Status and Transfer of Players (RSTP), CAS panels have generally applied the "comfortable satisfaction" standard.**

2. **A party's silence may amount to an unreasonable withholding of consent, contrary to Article 2(a) of the Swiss Civil Code which requires a party to act in good faith when exercising a right.**

3. **As per the FIFA Commentary on the RSTP, *"[o]nly a sufficiently serious breach of contractual obligations by one party to the contract qualifies as just cause for the other party to terminate the contract".***

I. PARTIES

1. Clube Desportivo Nacional (the "Appellant" or "Nacional") is a professional football club based in Portugal and is a member of the Federação Portuguesa de Futebol, which in turn is affiliated to FIFA.

2. The Fédération Internationale de Football Association (the "First Respondent" or "FIFA") is an association incorporated under Swiss law with its registered office in Zurich, Switzerland. FIFA is the governing body for international football. It exercises regulatory, supervisory and disciplinary functions over continental confederations, national associations, clubs, officials and players worldwide.

3. Vincent Thill (the "Second Respondent" or the "Player") is a professional football player from Luxembourg.

4. FC Vorskla Poltava (the "Third Respondent" or "Vorskla") is a professional football club based in Ukraine and is a member of the Ukrainian Association of Football, which in turn is affiliated to FIFA

5. Collectively, Nacional, FIFA, the Player and Vorskla will be referred to as the "Parties".

II. FACTUAL BACKGROUND

A. Background Facts

6. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations found in the Parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel 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.

7. Nacional and the Player entered into an employment contract dated 1 September 2020 (the "Employment Contract") pursuant to which:

   a) Nacional agreed to pay the Player: (i) a signing-on fee of EUR 20,000; (ii) a net monthly housing allowance of EUR 500; (iii) four round-trip airline tickets between Paris and Funchal, per season, for the Player and his family; (iv) a net salary of EUR 120,000 for season 2020/2021, EUR 130,000 for season 2021/2022, EUR 140,000 for season 2022/2023 and EUR 150,000 for season 2023/2024); and

   b) The Player confirmed as follows: *"The Player hereby declares that he is fully informed about [Nacional's] Internal Regulations […] and in that sense being forbidden of any activity that is in violation of those regulations, under penalty of the provided sanctions"*.

   c) It was confirmed that Nacional did not pay a transfer fee for the Player.

8. The internal regulations referred to in the Employment Contract (the "Internal Regulations") included, inter alia, the following provisions:

a) Article 1(2) which states as follows:

"All players who officially represent CLUBE DESPORTIVO NACIONAL, Futebol SAD in any of its teams, are linked to the National (sic)*, in accordance with the contracts or sporting commitments they signed and in absolute agreement with what is prescribed by the regulation of relations between Club and football players".*

b) Article 2(1) which states as follows:

"The Professional Football team is under the supervision of the Board of Directors of CLUBE DESPORTIVO NACIONAL, Futebol SAD, which is responsible for exercising disciplinary powers".

c) Article 3(1)(c) and (h) which state that Nacional Players shall appear *"punctually to all training sessions, treatments, games, internships, meetings and initiatives to be summoned"* [and] *"at the clinical services whenever they are or believe they are sick, not undergoing consultations or treatments of any kind, either inside or outside the National's premises, without the consent and authorization of the clinical department, except in cases of force majeure".*

d) Article 3(3) which states as follows:

"Failure to comply with any obligations expressed above will be punished in accordance with the penalties provided for in this regulation and as per the attached table".

e) Articles 3A(1) and (2) which state as follows:

"The following facts constitute just cause for the employer to terminate the contract, pursuant to paragraph 2 of the previous base (sic)*, among others:*

1. Unlawful disobedience to the orders of the employer or its representatives;

2. The repeated failure to comply with the rules of conduct specific to the activity and those necessary for the discipline of work".

f) Articles 7(3) and (4) which state as follows:

"(3) Violation without justification or non-compliance with this regulation may imply the application, within the limits established by law and in accordance with the regulations issued in the Collective Agreement entered into between the Professional Football Players Union and the Portuguese Professional Football League, of the following sanctions:

(a) Warning; (b) Written Reprimand; (c) Pecuniary fine; (d) Suspension with loss of pay; (e) Termination of the contract;

(4) Without detriment to its application to other cases and other penalties, the pecuniary fines are fixed

for the following specific situations:

[…] (d) Abandonment, unjustified absence or with justification not accepted, to training or treatment – 250.00".

9. Nacional and Mr. Meissa N'Diaye entered into an intermediary contract dated 1 September 2020, pursuant to which Nacional agreed to pay the intermediary EUR 50,000 in consideration for scouting services with respect to the Player.

10. During football season 2020/21, the Player made 19 appearances for Nacional. However, Nacional were relegated from the top Portuguese division at the end of the season.

11. The Player recalled that he started experiencing pain in his pubic bone on 30 January 2021 whilst playing a match for Nacional. The clinical record form prepared by Nacional's medical team on 5 May 2021 (the "Nacional Clinical Record") stated that the Player initially reported that he was experiencing hip pain on 3 March 2021 and that he had been doing so since 26 February 2021.

12. On 3 March 2021, the Player recalled that Nacional conducted an ultrasound on his injury but that the results were inconclusive. The Nacional Clinical Record does not refer to this.

13. On 15 March 2021, Nacional arranged an MRI scan for the Player. According to the Nacional Clinical Record this showed *"absolutely nothing"*. However, the Player's recollection was that the MRI showed him to be at risk of *osteitis pubis*, although it was considered he could still play football.

14. On 27 March 2021 and 30 March 2021, the Player participated in two matches for the Luxembourg national team. Whilst with the national team, he discussed the pain in his pubic bone with the medical staff of the Luxembourg national team and, in particular, Dr. Lara Heinz.

15. On 14 April 2021, Dr. Heinz, contacted Nacional's doctor, Dr. Rui Almeida, to advise that the Player was still experiencing pain while playing despite treatment provided by both Nacional and the Luxembourg national team. She advised that: (i) the Luxembourg national team had arranged a further MRI at a private hospital in Madeira (where Nacional is based) with a view to identifying the cause of the problem; and (ii) she would share the results with Nacional. In his reply to Dr. Heinz's e-mail, Dr. Almeida welcomed the exchange of information.

16. On 15 April 2021, the further MRI was carried out. The Nacional Clinical Record made the following comments about that MRI:

"After studying the MRI, [the Luxembourg national team] *contacted the* [Nacional] *Medical Department (27/04/2021) in order to suggest the immediate stop* (sic) *of training for the athlete, as well as the trip (sic) to Luxembourg for rehabilitation. The images of this MRI clearly show hypersignal in the pubic area, bilaterally".*

17. According to the Nacional Clinical Record, Nacional undertook a further MRI on 29 April 2021 *"in order to verify the progression/regression of the process, as well as establish (sic) objectives and the intervention plan"*. The Nacional Clinical Record made the following comments following that MRI:

"The images of this last MRI show maintained inflammatory process, with little positive evolution. Furthermore, on MRI, all structures surrounding the pubic symphysis are without signal alteration, thus, it can be concluded that there is a chronic process of pubalgia installed.

Plan: muscular reinforcement of the structure surrounding the pubis symphysis, as well as the stabilzers of the trunk.

Objectives: Recover the athlete by 05/19/2021".

18. Following this further MRI, the Player stopped playing and training and he missed Nacional's final five matches of the season which were played between 1 May 2021 and 19 May 2021.

19. On 20 May 2021, Nacional received a transfer offer for the Player from Vorskla for EUR 100,000. Nacional did not accept the offer.

20. The Player was also called up by the Luxembourg national team for fixtures taking place between 2 and 6 June 2021 but the player was unable to participate in them due to injury.

21. According to a media report of 28 May 2021, Vorskla and the Player were in negotiations for the Player to join Vorskla.

22. On 9 June 2021, Nacional received an increased offer from Vorskla for EUR 120,000 and also an offer from another Ukrainian club, FC Kolos, for a one season loan with an option to buy for EUR 100,000. Nacional did not accept either offer,

23. On 16 June 2021, the Player received a WhatsApp from Mr. Saturnino Sousa, the individual in charge of administration at Nacional, instructing that he report back to Nacional on 27 June 2021. The Player confirmed the arrangement and asked for his return flight to depart from Luxembourg airport. He also advised that he was under the medical care of the Luxembourg national team and asked to finish his treatment in Luxembourg. Mr. Sousa confirmed that he would ask Nacional's medical department.

24. On 18 June 2021, Mr Sousa informed the Player via WhatsApp that it would not be possible for him to stay in Luxembourg as Nacional's medical department wished to assess him. When the Player stated that the medical treatment was better in Luxembourg, Mr. Sousa replied as follows:

"You are a Nacional player. And the medical department of the club takes the medical decisions. And because of that you must be here on the 28th. Tonight I'm sending you the plane ticket".

25. The Player then replied as follows:

"So I won't be ready to play again for a long time if I do the treatments with you. But it's as you wish. It's you who decides".

26. On 21 June 2021, Mr. Sousa sent the Player details of the flight booking which Nacional had made for the Player to travel from Luxembourg to Madeira on 27 June 2021 so that the Player would be with Nacional for the start of its pre-season programme.

27. On 22 June 2021, the Player underwent an x-ray arranged by Dr. Heinz.

28. On 23 June 2021, the Player underwent an MRI arranged by Dr. Heinz.

29. On 25 June 2021, the Player underwent an echography (ultrasound) arranged by Dr. Heinz.

30. On 26 June 2021, Dr. Heinz emailed Dr. Almeida to advise that: (i) the Player was undergoing constant physiotherapy and rehabilitation treatment which had decreased the Player's pain but that he was still experiencing pain when running at a normal pace; (ii) they had conducted tests on the Player including an x-ray, MRI and ultrasound; (iii) the results (which Dr. Heinz provided to Dr. Almeida) showed persistent inflammation; and (iv) she had arranged for the Player to meet a German pubalgia specialist on Friday 2 July 2021. She sent a similar message to Mr. Sousa on the same day, but without the attachments.

31. Dr. Almeida did not respond to Dr. Heinz's e-mail of 26 June 2021, or any subsequent e-mail from Dr. Heinz. At the hearing both Mr. Sousa and Dr. Almeida explained that, by this point, Nacional had decided to communicate with the Player only. They considered side-channel communications between Dr. Almeida and Dr. Heinz to be unhelpful as Dr. Heinz was not mandated to speak on behalf of the Player.

32. On 26 June 2021, Mr. Sousa sent Dr. Heinz's e-mail to the Player to query what it was. The Player replied that it was from the doctor of the Luxembourg national team. Mr. Sousa responded as follows:

    "Your contract is with Nacional and not with the Luxembourg federation. Therefore, it's Nacional who decides what to do in medical terms. You have been informed of the return date. You have the plane ticket. If you don't turn up, on the day determined by the club, we will open disciplinary proceedings".

33. On 27 June 2021, the Player failed to take the flight from Luxembourg to Madeira which had been arranged for him by Nacional.

34. On 28 June 2021, the Player sent Mr. Sousa a WhatsApp containing an image of a document entitled *"certificat medical d'incapacité de travail"* (i.e. a medical certificate of incapacity to work) for the period from 25 June 2021 to 4 July 2021. This resulted in the following exchange of WhatsApp messages between the Player and Mr. Sousa:

    Mr. Sousa: *"This document prevents you from training. [It] does not prevent you from turning up on the date that we told you to. If you don't come you will suffer the consequences".*

Player: *"My health remains what is most important…I am doing everything I can to return to the field as soon as possible, that is why I remain here to make use of the best possible treatment…I will see a specialist in Germany on Friday…as I still cannot run without pain....it's also in the club's interests"*.

35. On 2 July 2021, Mr Sousa instructed the Player to return to Nacional by 5 July 2021 with full medical documentation. The Player replied that he would not be there as he intended to undergo an operation for a 2cm tear in his adductor. Mr. Sousa requested that the Player send all relevant medical examination reports for evaluation by Nacional's doctor.

36. On 3 July 2021:

    a) Mr. Sousa advised the Player that Nacional's doctor did not consent to the operation as he had not received the medical examination reports. Mr. Sousa instructed the Player to return to the club by 5 July 2021. Mr. Sousa also asked the Player why he had not returned a call from the coach; and

    b) Dr. Heinz e-mailed Dr. Almeida to explain that: (i) the Player had been examined by Dr. Sascha Hopp, a *"specialist in pubalgia and athletes injuries of the pubis"* based in Kaiserslautern (Germany); (ii) this had confirmed a rupture of the *"aponeurosis from the rectus abdominis and the adductor on the right side. The rupture is about 2cm large"*; (iii) the rupture is not healing by itself and will reoccur if the Player starts playing football again; (iv) Dr. Hopp recommended operating as soon as possible, as the healing time is six weeks and then a further 10 to 12 weeks is required for the Player to return to sport; and (v) the operation is scheduled for 13 July 2021. Dr. Heinz confirmed that she would provide Dr. Almeida with Dr. Hopp's written report as soon as she received it.

37. On 4 July 2021, Mr. Sousa advised the Player that Nacional had still not received medical examination reports (i.e. Dr Hopp's report) and that he was expected to return the following day. The Player advised that Dr. Heinz had e-mailed Dr. Almeida and he forwarded that e-mail to Mr. Sousa. Mr. Sousa noted that Dr. Heinz's message did not attach the medical examination reports and reiterated that Nacional would not provide its permission for the operation without these.

38. On the evening of 5 July 2021, Dr. Heinz emailed Dr Hopp's report (of the same date) to Dr. Almeida. At the hearing, Mr. Sousa confirmed that he received the report from Dr. Almeida but, as it was in German and from a doctor who was unknown to the club, he felt unable to rely on it.

39. On 12 July 2021, Nacional e-mailed a letter to the Player advising him that disciplinary proceedings had been opened against him that could lead to a sanction being imposed upon him for *"repeated and unjustified absences from training"* (the "First Notification"). The potential sanction referred to in the First Notification was a fine of EUR 1,250, as per Article 7(4) of the Internal Regulations, *"for five straight unjustified absences"*. The First Notification explained that Dr. João Marques would be "the Instructor" for the proceedings but did not otherwise explain what the proceedings would entail or whether the Player would be entitled to make representations.

40. On 13 July 2021, the Player underwent the surgery recommended by Dr. Hopp.

41. On 15 July 2021, the Player's lawyer (Mr. Novazio) requested a copy of the Internal Regulations which Mr. Sousa duly provided on the same day.

42. On 19 July 2021, Nacional e-mailed a letter to the Player advising him that disciplinary proceedings had been opened against him that could lead to a sanction being imposed upon him for *"repeated absences from training"* from 12 July 2021 to 19 July 2021 (the "Second Notification"). The potential sanction referred to in the Second Notification was a fine of EUR 1,500, as per Article 7(4) of the Internal Regulations, *"for five straight unjustified absences"*. Again, the notification explained that Dr. João Marques would be "the Instructor" for the proceedings but did not otherwise explain what the proceedings would entail or whether the Player would be entitled to make representations.

43. On 25 July 2021, Dr. Heinz e-mailed Dr. Almeida a post-operative letter from Dr. Hopp along with a treatment plan for the Player which had been prepared by Dr. Hopp's clinic.

44. On 27 July 2021, Nacional e-mailed a letter to the Player advising him that disciplinary proceedings had been opened against him that could lead to a sanction being imposed upon him for *"repeated and unjustified absences from training"* from 20 July 2021 to 27 July 2021 (the "Third Notification"). The potential sanction referred to in the Third Notification was a five day suspension from work with the associated loss of salary, as per Article 7(4) of the Internal Regulations, for *"seven straight unjustified absences"*. Again, the notification explained that Dr. João Marques would be "the Instructor" for the proceedings but did not otherwise explain what the proceedings would entail or whether the Player would be entitled to make representations.

45. On 4 August 2021, Nacional e-mailed the following to the Player:

    a) A letter dated 3 August 2021 regarding the First Notification which confirmed that, following the Player's lack of response, a fine of EUR 1,250 would be imposed (the "First Decision").

    b) A letter dated 3 August 2021 regarding the Second Notification which confirmed that, following the Player's lack of response, a fine of EUR 1,500 would be imposed (the "Second Decision").

    c) A letter opening a disciplinary process against the Player for *"repeated and unjustified absences from training"* for more than one month (the "Fourth Notification"), carrying a potential sanction of *"the unilateral termination of the employment contract, with just cause"*. The Fourth Notification further advised the Player that *"You are legally awarded 10 days to respond to the allegations made against you"*.

    d) A "Note of Fault in Disciplinary Proceedings" relating to the Fourth Notification which highlighted the following alleged misdemeanors of the Player: (i) the Player's failure to be

at the club for the start of pre-season training on 5 July; (ii) the Player's repeated, unjustified absences which resulted in him missing pre-season training, four pre-season friendly matches and one competitive match; (iii) the Player's failure to respond to the disciplinary proceedings instigated by Nacional; (iv) the Player's continued absence from training and the club's training facilities; and (v) the Player undergoing unauthorised medical treatment.

46. On 7 August 2021, Nacional e-mailed a letter to the Player with reference to the Third Notification which confirmed, following the Player's lack of response, the Player was suspended from work for five days with associated loss of pay (the "Third Decision").

47. On 14 August 2021, the Player responded to the Fourth Notification as follows:

"I have received all your communications regarding the disciplinary proceedings that you introduced against me.

With the present letter I criticize all your letters.

In the last letter, dated August 3, 2021 and notified on August 4, 2021, you assigned me a specific term of 10 days to send an answer and therefore I respond with this e-mail.

In your letter you have proposed the termination of the employment contract based on 'the repeated and unjustified absences from training'.

The proposed sanction is completely groundless because you were constantly informed by the doctor of the federation and by my Agent about my physical situation and you have been also duly updated about the necessity and the result of the surgery which I incurred.

Hereby I expressly contest your proposed sanction".

48. On 20 August 2021, Nacional informed the Player that, following the Fourth Notification, it was terminating the Employment Contract with just cause (the "Termination Decision").

49. On 31 August 2021, the Player entered into a contract of employment with Vorskla (the "Vorskla Employment Contract") with: (i) a duration from 31 August 2021 to 30 June 2024' (ii) monthly salary of EUR 1,245; and (iii) a release clause of EUR 1,500,000.

50. On 21 Match 2022, the Player was transferred on a temporary basis to Orebro in Sweden.

B. Proceedings before the FIFA Dispute Resolution Chamber

51. On 10 December 2021, Nacional filed a claim against the Player with the FIFA Dispute Resolution Chamber (the "FIFA DRC") with the following requests for relief:

"EUR 1,000,000 as compensation for breach of contract, plus 5% interest p.a. as from the contractual breach;

CHF 3,000 as legal costs".

52. The Player counter-claimed that Nacional had terminated the Employment Contract without just cause and made the following requests for relief:

"EUR 377,670 as compensation for breach of contract by the club, consisting of the residual value of the contract in the amount of EUR 420,000, minus the amount of EUR 42,330 as the value of his new contract with the Ukrainian club Poltava.

To impose sporting sanctions on the club".

53. On 7 April 2022, the FIFA DRC issued the following decision (the "Appealed Decision"):

"1. The claim of the Claimant / Counter-Respondent, CD Nacional, is rejected.

2. The counterclaim of the Respondent / Counter-Claimant, Vincent Thill, is accepted.

3. The Claimant / Counter-Respondent has to pay to the Respondent / Counter Claimant, the following amount:

- *EUR 377,670 as compensation for breach of contract without just cause, plus 5% interest p.a. as from 10 December 2021 until the date of effective payment.*

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 Claimant / Counter-Respondent shall be banned from registering any new players, either nationally or internationally, up until the due amount is paid. The maximum duration the ban shall be of three entire and consecutive registration periods.

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

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

54. On 19 April 2022, the grounds of the Appealed Decision were communicated to the Parties.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

55. On 10 May 2022, pursuant to Articles R47 and R48 of the Code of Sports-related Arbitration (2021 edition) (the "Code"), the Appellant filed a Statement of Appeal at the Court of Arbitration for Sport (the "CAS") in which it challenged the Appealed Decision and nominated Mr. Daniel Cravo Souza as an arbitrator.

56. On 18 May 2022, the CAS Court Office acknowledged receipt of the Statement of Appeal invited the First Respondent, the Second Respondent and the Third Respondent (the "Respondents") to nominate an arbitrator.

57. On 29 May 2022, the Player advised that, in agreement with FIFA, he would like to nominate Mr. João Nogueira da Rocha as an arbitrator. FIFA confirmed this on 2 June 2022.

58. The Third Respondent did not express its position on the appointment of an Arbitrator by the Respondents. Indeed, the Third Respondent, despite having been duly notified with all correspondence of the CAS Court Office, did not participate in the CAS proceedings at all.

59. On 10 June 2022, the Appellant, within the time limit previously extended, files its Appeal Brief.

60. On 13 June 2022, the CAS Court Office confirmed receipt of the Appeal Brief and advised the Respondents that they had 20 days within which submit their Answers.

61. On 3 August 2022, FIFA, within the time limit previously extended, submitted its Answer.

62. On 29 August 2022, the Player, within the time limit previously extended, submitted his Answer.

63. On 30 August 2022, the CAS Court Office advised that the Panel for the case was constituted as follows:

President: Mr. Patrick Stewart, Solicitor in Manchester, United Kingdom

Arbitrators: Mr. Daniel Cravo Souza, Attorney-at-Law, Porto Alegre, Brazil

Mr. João Nogueira da Rocha, Attorney-at-Law, Lisbon, Portugal

64. On 14 September 2022, the CAS Court Office informed the Parties that the Panel had decided to hold a hearing and, on 23 September 2022, the date of the hearing was confirmed to the Parties as 8 December 2022.

65. On 1 November 2022, FIFA signed the Order of Procedure provided by the CAS Court Office.

66. On 2 November 2022, Nacional signed the Order of Procedure provided by the CAS Court Office.

67. On 9 November 2022, the Player signed the Order of Procedure provided by the CAS Court Office.

68. On 8 December 2022, a hearing was held at the CAS Court Office in Lausanne, Switzerland. In addition to the Panel and Mr. Giovanni Maria Fares, Counsel to the CAS, the following persons attended the hearing:

For FIFA:

- Mr. Saverio Paolo Spera - Counsel
- Ms. Cristina Pérez González - Counsel

For Nacional:

- Mr. David Casserly - Counsel
- Mr. Adam Taylor – Counsel
- Mr. Saturnino Sousa (Administrator, Nacional) – Witness, appearing by video-conference
- Dr. Rui Almeida (medical doctor, Nacional) – Witness, appearing by video-conference
- Mr. Joao Marques (lawyer, Nacional) – Witness, appearing by video-conference
- Mr. Rui Alves (President, Nacional) – Witness, appearing by video-conference
- Mr. Raffaele Poli (Expert Witness of CIES Football Observatory) – Witness, appearing by video-conference

For the Player:

- Mr. Nilo Effori - Counsel
- Mr. Cristiano Novazio - Counsel
- Ms. Maxime van den Dijssel – Counsel

69. Vorskla, despite having been duly summoned to appear, did not attend the hearing.

70. At the opening of the hearing, the Parties confirmed that they had no objections to the constitution of the Arbitral Tribunal nor to the procedure adopted by the Panel so far. The Parties were given full opportunity to submit their arguments in opening and closing statements and to answer the questions posed by the Panel.

71. Before the hearing was concluded, the Parties confirmed that their right to be heard had been duly respected.

IV. SUBMISSIONS OF THE PARTIES

72. The following summary of the Parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the Parties. The Panel, however, has

carefully considered all the submissions made by the Parties, even if no explicit reference is made in this Section IV of the award.

A. Submissions of the Appellant

73. The Appellant made the following requests for relief:

"Clube Desportivo Nacional respectfully requests the CAS Appeals Arbitration Division to rule as follows:

1. The Appeal of Clube Desportivo Nacional is admissible.

2. The decision of the FIFA Dispute Resolution Chamber, dated 7 April 2022 (Ref. FPSD- 4528) and regarding an employment-related dispute concerning the player Vincent Thill, is set aside.

3. Mr Vincent Thill was in breach of his contractual obligations pursuant to the contract of employment entered into between himself and Clube Desportivo Nacional.

4. Clube Desportivo Nacional had just cause in terminating the contract of employment entered into between itself and Mr Vincent Thill.

5. Mr Vincent Thill and FC Vorskla Poltava are ordered, jointly and severally, to pay the sum of EUR 1,000,000 to Clube Desportivo Nacional, in compensation and/or damages for the breach of the employment contract committed by Mr Vincent Thill.

6. Mr Vincent Thill and FC Vorskla Poltava are ordered, jointly and severally, to pay interest to Clube Desportivo Nacional on the sum set out in sub-paragraph 129(5) directly above, at a rate of 5% per annum and for a period commencing from 28 June 2021.

7. Mr Vincent Thill is subject to a sporting sanction of a four or six-month restriction on playing in official matches.

8. The Respondents are ordered, jointly and severally, to pay the arbitration costs of these proceedings.

9. The Respondents are ordered, jointly and severally, to pay to Clube Desportivo Nacional a significant contribution to its legal and other costs".

74. In support of its claim, Nacional submitted, *inter alia*, as follows:

a) Nacional was entitled to terminate the Employment Contract with just cause pursuant to Article 14 of the FIFA RSTP.

b) Pursuant to Article 17 of the FIFA RSTP, Nacional is entitled to compensation of EUR 1,000,000 for Player's breach of the Employment Contract.

c) Vorskla and the Player are jointly and severally liable for any compensation awarded to Nacional.

d) The Player should also be subject to sporting sanctions.

e) In the alternative, if it is found that Nacional terminated the Employment Contract without just cause, the level of compensation awarded to the Player in the Appealed Decision should be reduced.

75. Each of the above will now be summarised in more detail.

a. Nacional was entitled to terminate the Employment Contract pursuant to Article 14

76. Article 14 of the FIFA RSTP states as follows:

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

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

77. The FIFA Commentary provides, inter alia, as follows with respect to Article 14:

"[…] for a party to have a just cause to terminate the contract, the other party must have ignored or failed to comply with its own contractual obligations. […] Under normal circumstances, and at the request of the party that ended the contractual relationship with just cause, the counterparty will be required to pay compensation and may also be subject to sporting sanctions. In other words, if one party creates or provides a valid reason for the other party to terminate the contractual relationship early by committing a serious breach of contractual obligations, this will be regarded as equivalent to that party having itself terminated the contract without just cause.

[…]

When required to assess whether a valid reason existed for a unilateral contract termination, the following principles should be applied, while considering the specific circumstances of each individual matter:

- Only a sufficiently serious breach of contractual obligations by one party to the contract qualifies as just cause for the other party to terminate the contract.

- In principle, the breach is considered sufficiently serious when there are objective circumstances that would render it unreasonable to expect the employment relationship between the parties to continue, such as a serious breach of trust.

- The termination of a contract should always be an action of last resort (an 'ultima ratio' action).

[…]

A player's conduct can also qualify as abusive within the meaning article 14 paragraph 2. One potential example might occur if a player wishes to leave their club prematurely to join a new club, but their current club refuses to release them. To force the club to agree to the transfer, the player might start refusing to train or to participate in matches, coming up with various excuses for their behaviour. Under such circumstances the club might have just cause to terminate the contract; after all, the player would appear to be in breach of their main contractual obligations.

[…]

The early and unilateral termination of a contract by the club as a disciplinary sanction on the player is not generally considered as just cause per se. Such cases must be treated with caution. It should always be borne in mind that terminating a contract should always be a last resort (ultima ratio action). Consequently, the less stringent sanctions available to the club, such as warnings, proportionate fines, temporary suspensions, temporary demotion to the reserves (etc), should be exhausted before this step is considered".

[…]

A club considering the option of terminating a contract with a player because they have left the club without authorisation, or because they have not returned after authorised leave, should also respect the ultima ratio principle; less stringent disciplinary measures should be considered and applied first. In addition, before terminating a contract in these circumstances, the club must request the player to return to the club and set a reasonable deadline by which they must do so".

78. Nacional cited, *inter alia*, the following case law to demonstrate that the current case satisfies the requirements established in CAS jurisprudence for a club to terminate an employment contract with just cause:

a) CAS 2016/A/4408 in which the panel held, *inter alia*, as follows:

"There is an unjustified non-appearance at or leaving of the working place when the employee is absent for a certain amount of time and the employer can reasonably assume that it is not in the employee's intention to return and that his decision is final. This is particularly true if the employee is summoned to return to work or to justify his non-appearance (for instance by means of a medical certificate) and does not comply or is unable to provide a just cause […]".

b) CAS 2013/A/3407 (which was referred to by the Panel in CAS 2016/A/4408).

c) The FIFA DRC decision of 11 April 2019 (no. 04190658-E) in which it was decided that a club had just cause to terminate where a player was absent for 20 days and where three warnings were sent to him, the last of which threatened termination of the employment contract.

d) CAS 2015/A/4327, in which a club was found to have terminated without just cause, in circumstances where a player was absent for medical treatment, but later returned to the club and took part in training. Nacional submitted that there are material distinctions between CAS 2015/A/4327 and the current case which serve to indicate that Nacional

terminated the Employment Contract with just cause. For example, in CAS 2015/A/4327: (i) The player was willing to be treated by his club's medical staff.; (ii) When the player left the country of his club without its consent, the player was owed two months' salary; (iii) The player had a legitimate expectation that he could undergo injury rehabilitation abroad as, after an initial request by the club for the player to return, the club did not repeat its request in any subsequent communications; (iv) The club did not pursue disciplinary proceedings against the player or otherwise warn him that it was considering terminating the employment contract for breach; and (v) after recovering from his injury, the player retuned to the club and trained for a month before the employment contract was terminated.

79. In summary, Nacional made the following arguments:

"The termination came as a last resort, after the Player decided to be absent without leave from the club, took his medical treatment entirely into his own hands, and missed the start of the 2021/2022 season, without giving any indication as to when he would return. Nacional had no first-hand understanding of what state he was in or how his recovery was progressing.

The Player took these steps despite a lack of authorisation from the club for any treatment and his own prior acceptance (both in WhatsApp messages and by contractually accepting the application of the Internal Regulations) that it was Nacional who would make decisions regarding consent for medical treatment and that he must accept such decisions. He did so despite multiple warnings giving him the chance to return, both informally (but powerfully) via WhatsApp and formally via the four stages of disciplinary proceedings. He then chose not to engage with those proceedings, save for at the last minute and in the most superficial way. Nacional was in the meantime receiving contract offers from other clubs.

The mutual relationship of trust and confidence was thereby shattered".

80. Nacional also made, *inter alia*, the following further submissions as to why it was justified in terminating the Employment Contract with just cause:

a) Nacional was willing to liaise with Dr. Heinz on the Player's treatment while the Player was present at the club, but the situation changed when he ignored Nacional's instructions to return. The Player's claim that he would receive better medical treatment in Luxembourg was not justified. Although Dr. Heinz was updating Dr. Almeida on the Player's treatment, this did not justify the Player's failure to return.

b) Dr. Hopp's report of 5 July 2021 which recommended surgery did not justify the Player proceeding without Nacional's consent. The report was in German (without a translation) and lacked sufficient detail for Nacional to make an informed decision. By failing to return to Nacional, the club's medical team was unable to assess the Player's medical requirements. Typically when surgery is being contemplated, all parties would collaborate to agree appropriate next steps.

c) Nacional's coach attempted to contact the Player in July, but the Player ignored him. Indeed, between 13 July 2021 and the date on which termination proceedings commenced, the Player ceased communications with Nacional.

d) By opening disciplinary proceedings, Nacional put the Player on notice as to the escalating seriousness of his absence and gave him an opportunity to engage formally with Nacional. His failure to engage with the proceedings implied acceptance of the allegations and associated sanctions. Even when the Player did respond to the final notification, his reply was brief and derisory and gave Nacional no choice but to terminate the Employment Contract.

e) Nacional rejected criticism from the Player as to its disciplinary process. In any event, even if the process had been conducted differently, there is no evidence to suggest that this would have resulted in the Player returning to Nacional. Given that Nacional started receiving offers for the Player shortly after the club was relegated, Nacional was justified in believing that the Player had "checked out".

81. Nacional submitted that the FIFA DRC's decision that Nacional terminated the Employment Contract was based on flawed logic and a misunderstanding of the underlying facts. For example:

a) The FIFA DRC was wrong to consider that Nacional's failure to respond to Dr. Heinz's e-mails constituted a tacit confirmation that the Player did not require to return to the club immediately. Nacional consistently communicated directly to the Player that he had to return immediately.

b) The FIFA DRC was wrong to place an emphasis on the following: *"that throughout the entire disciplinary proceedings in July and August 2021, only in the letter dated 3 August 2021, the club brought up for the first time in a constructive way that it does not agree with the player undergoing medical treatment"*. Mr. Sousa consistently emphasised the club's requirement that the Player return to be assessed by its medical team. Furthermore, the commencement of disciplinary proceedings for unjustified absence was also a clear indication of Nacional's position.

c) The FIFA DRC was wrong to find as follows: *"apart from the letter dated 3 August 2021, the player was never requested to present his official position as to the proposed sanctions"* and that *"the disciplinary proceedings that were initiated by the club, did not appear to have followed a due process, as the player was not properly requested to provide his position to the proposed sanctions"*. Nacional argued that each of the four disciplinary processes *"announced the opening of a disciplinary process, proposed a sanction, referred to the regulations, and after a considerable period of time imposed a sanction. Furthermore, each of the first three letters imposing a sanction also specified that no response had been received from the Player. It was clear from the very nature of the process and the wording of the decision letters (especially when repeated) that the Player was free to engage and to provide any response"*.

d) The FIFA DRC was wrong to find as follows: *"Another point that the members of the Chamber deemed vital to point out that is that the club failed to submit a copy of its internal disciplinary regulations"*. The Internal Regulations were supplied to the Player's lawyer.

e) The FIFA DRC was wrong to find as follows: *"the club should have acted in a more diligent way and trying to communicate on the medical issues of the player with the medical staff of the national team of Luxemburg, rather than starting several disciplinary proceedings against the player and eventually terminating the contract on 20 August 2021"*. The Player and Nacional were parties to the Employment Contract and, accordingly, Nacional communicated directly with the Player. It has no relationship with, or obligation towards, the Luxembourg national team.

f) The FIFA DRC was wrong to hold as follows: *"the alleged breach of the contract by the player could not legitimately be considered as being severe enough to justify the termination of the contract, and that there would have been more lenient measures to be taken"*. Nacional is unclear as to what those more lenient measures would have been, given the Player's continued absence and lack of engagement after three rounds of sanctions on an escalating scale.

b. Nacional is entitled to compensation pursuant to Article 17

82. Article 17 of the FIFA RSTP provides as follows:

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

1. In all cases, the party in breach shall pay compensation. […] unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period. Bearing in mind the aforementioned principles, compensation due to a player shall be calculated as follows:

[…]

ii. in case the player signed a new contract by the time of the decision, the value of the new contract for the period corresponding to the time remaining on the prematurely terminated contract shall be deducted from the residual value of the contract that was terminated early (the 'Mitigated Compensation') […]

[…]

2. Entitlement to compensation cannot be assigned to a third party. If a professional is required to pay compensation, the professional and his new club shall be jointly and severally liable for its payment. The amount may be stipulated in the contract or agreed between the parties.

3. In addition to the obligation to pay compensation, sporting sanctions shall also be imposed on any player found to be in breach of contract during the protected period. This sanction shall be a four-month restriction on playing in official matches […]".

83. Nacional cited, *inter alia*, the following case law by way of context for its compensation claim:

a) CAS 2008/A/1519 & 1520 – According to the FIFA Commentary, this CAS award *"marks the beginning of a reasonably consistent trend in CAS jurisprudence"*. In CAS 2008/A/1519 & 1520, the panel referred to the following principles which may be considered when deciding on the level of compensation:

   i. "Positive interest" is the overriding principle. That is where the wronged party is placed in the same position financially as it would have been had there been no contract breach.

   ii. The remuneration payable to the player under the breached contract and any new contract may be relevant in determining the market value of a player's services.

   iii. A penalty clause may be relevant for determining compensation if it is a realistic indicator of value, rather than a deterrent against third parties wishing to acquire the player's services.

   iv. The amount that the former club could have received as a transfer fee is a relevant factor if there is sufficient nexus between the contractual breach and the club's lost opportunity to generate a profit.

   v. Other additional fees and expenses relating to the player may also be taken into account including, for example, agent fees to acquire the player's services.

   vi. The specificity of sport may justify other factors being taken into account (e.g. the timing and the context of the contract termination).

b) CAS 2009/A/1880 & 1881 - The panel for these consolidated procedures upheld the positive interest principle by treating a transfer fee as a relevant factor.

c) TAS 2009/A/1960 & 1961 – The panel for these consolidated procedures quantified compensation based on the player's transfer value.

d) CAS 2017/A/4935 – The panel noted that lost transfer fees may be considered when determining compensation if there is a *"logical nexus"*.

84. Nacional made, *inter alia*, the following submissions in support of its compensation claim of EUR 1,000,000:

a) To be put back to the position it would have been in had the Player not breached the Employment Contract, Nacional should be compensated for the loss of opportunity to receive a transfer fee. Had the Player properly communicated his transfer request, Nacional would have been able to generate a market for the Player and secure a competitive transfer fee.

b) The Player's transfer value is evidenced by the following: (i) the website www.transfermarkt.com which valued the Player at EUR at 1,500,00 in May 2021; (ii) the penalty clause of EUR 1,500,000 in the Vorskla Employment Contract (which, given the www.transfermarkt.com valuation is a realistic valuation as opposed to a deterrent); and (iii) expert evidence from Mr. Raffaele Poli of the CIES Football Observatory ("CIES") which has developed a model with an accuracy rating of 80% (i.e. there is never more than a 20% difference between the actual transfer fee for a player and the estimated transfer fee generated by the model). Using the model, CIES estimated the Player's transfer value as at the 2021 Summer transfer window to be EUR 1,430,000.

85. If the loss of transfer fee is not considered the appropriate method for calculating the level of compensation, then (in the alternative) Nacional submitted that it should be based on the residual value of the Employment Contract (i.e. EUR 520,620). The value of the Vorskla Contract (EUR 14,940 *per annum*) cannot be considered a realistic market value.

86. Nacional further submitted that, in any event, the following further amounts are also relevant for deciding the level of compensation due (whether to further justify its EUR 1,000,000 claim or to increase the value of its claim using the alternative calculation method):

a) The fee of EUR 50,000 paid by Nacional to Sport Cover for scouting services related to the signing of the Player.

b) A sporting indemnity which acknowledges the sporting impact caused by the Player's refusal to return to Nacional, including his absence from important matches at the start of season 2021/22. Using CAS 2008/A/1519 & 1520 as a benchmark, Nacional argued that the indemnity should be an amount equal to at least one year of the Player's salary with Nacional (i.e. EUR 150,000).

c. Vorskla and the Player are jointly and severally liable

87. Nacional noted that, pursuant to Article 17(2) of the FIFA RSTP, the Player and Vorskla are jointly and severally liable to pay any compensation awarded.

d. Sporting sanctions should be applied

88. Nacional submitted that, in addition to paying compensation, the Player should also be subject to sporting sanctions pursuant to Art. 17(3) of the FIFA RSTP as the Player breached the Employment Contract during its protected period (i.e. the first two or three seasons of a contract depending on the age of the player).

89. Nacional acknowledged that, as stated by the panel in CAS 2014/A/3754, the imposition of sporting sanctions is not mandatory (despite the wording of Article 17(3)) but compelling arguments are necessary to deviate from this position. Furthermore, the FIFA Commentary provides as follows:

"Despite the wording of the Regulations, the DRC's consistent jurisprudence suggests it has a certain margin of discretion in this regard. It interprets the Regulations as granting it the power to impose sporting sanctions, rather than placing it under an obligation to do so […] CAS has repeatedly and consistently confirmed this approach".

90. At the hearing, Nacional rebutted arguments in the Respondents' Answers that it lacks the necessary legal standing to request the imposition of sporting sanctions because it has no legitimate interest to protect. Nacional argued that sporting sanctions deter other players from breaching their contracts with Nacional.

e. In the alternative, the compensation payable by Nacional should be reduced

91. In the alternative, if the Panel decides that Nacional terminated the Employment Contract without just cause, Nacional submitted that the level of compensation awarded by the FIFA DRC is too high as it does not take into account the Player's contributory actions. In support of this, Nacional cited both Article 44 of the Swiss Code of Obligations and also TAS 2015/A/3955 & 3956.

92. In TAS 2015/A/3955 & 3956, the panel for these consolidated procedures: (i) found that, although the player was overly hasty in unilaterally terminating his employment contact with the employer-club, it was established that the employer-club did not wish to retain the player; and (ii) accordingly, reduced the compensation payable by the player to the club pursuant to Article 17 of the FIFA RSTP to reflect the "innocent" party's fault.

93. Nacional submitted that, given the extent of the Player's wrongdoing, compensation should be reduced to zero or, alternatively, by at least 50%.

f. Witness evidence

94. At the hearing, Nacional called several witnesses to give evidence.

95. Mr. Saturnino Sousa (Administrator, Nacional) provided, *inter alia*, the following witness evidence:

a) In response to the Player's claim that he was not provided with the Internal Regulations, Mr. Sousa stated that the Internal Regulations are: (i) issued in both English and Portuguese and included in a welcome pack which Nacional provides to each new player as a matter of course; and (ii) signed on behalf of Nacional to identify them as an official document of Nacional, but that Nacional does not require players to counter-sign them.

b) Nacional insisted on the Player returning to the club prior to undergoing surgery as: (i) Nacional's insurance policy does not cover medical treatment which has not been approved by the insurance provider; and (ii) Nacional has previously suffered a negative experience with a Brazilian player who received medical treatment without the involvement of its medical team.

c) At the end of season 2020/21, an agent claiming to act for the Player (Mr. Nouma) contacted Mr. Sousa to express the Player's unhappiness and desire to leave the club.

d) When asked why Nacional did not respond to Dr. Heinz's e-mails of 3 July 2021 and 5 July 2021 to object to the proposed surgery, Mr. Sousa advised that this was a matter for the medics (i.e. Dr. Heinz and Dr. Almeida) but that, in any event, it was already clear that: (i) the Player was contractually obliged to obtain Nacional's approval for any medical treatment; and (ii) Nacional had not given that approval.

96. Dr. Rui Almeida (medical doctor, Nacional) provided, *inter alia*, the following witness evidence:

a) When Nacional conducted an MRI scan on the Player on 15 March 2021, it focussed on the Player's hip area as that was where he was feeling pain. Unsurprisingly, the MRI did not identify any issue given that it subsequently transpired that the pain was caused by an injury to the pubic bone. This was confirmed by further MRI scans arranged by the Luxembourg national team on 15 April 2021 and by Nacional on 29 April 2021.

b) Nacional has experience of treating this type of injury and he would generally try to avoid surgery. An alternative to surgery is for the injury to be managed while the athlete continues to play. Dr. Almeida was unable to say whether surgery was the correct course of action for the Player but he felt that Nacional's treatment plan was working.

c) The e-mail from Dr. Heinz of 3 July 2021, which provided feedback from the Player's consultation with Dr. Hopp, introduced a new factor – i.e. a rupture of the aponeurosis which would not heal without surgical intervention.

d) Dr. Almeida stopped communicating with Dr. Heinz at the end of season 2020/21 after being instructed to do so by *"club administration"* due to contract issues between Nacional and the Player. He could not recall whether he conveyed the information in Dr. Heinz's e-mails to club administration, but believes it likely that he did so.

97. Mr. Rui Alves (President, Nacional) provided, *inter alia*, the following witness evidence:

a) The Player's first season at Nacional was viewed as a season in which to acclimatise and he was expected to become an important member of the team in season 2021/22.

b) After Nacional's relegation from the top league was confirmed, the Player's agent (Mr. Nouma) started agitating for Nacional to transfer the Player's registration. Mr. Alvez advised that Nacional would do so for a €1,000,000 fee.

c) Mr. Alvez had been at Nacional for 28 years and this is the first occasion on which the club has terminated an employment contract for a player's breach.

98. Mr. Joao Marques (lawyer, Nacional) provided, *inter alia*, the following witness evidence:

a) Mr. Marques is the "instructor" responsible for administering disciplinary proceedings against employees. Although he is employed by Nacional, he seeks to do so independently from the club. His role is to make a recommendation to Nacional, but it is the club which exercises the disciplinary power.

b) Typically, an employee will respond to a disciplinary notification. However, the Player did not do so until the Fourth Notification. For the First Notification, Second Notification and Third Notification, Mr. Marques made his decision based on Nacional's version of events as the Player did not provide a response. He did not interrogate Nacional's version of events.

c) Although only the Fourth Notification contained a deadline by which to respond, Mr. Marques explained that it is well known that Portuguese law gives employees 10 days within which to respond to a disciplinary notification.

d) Mr. Marques was unaware of Dr. Heinz's letter of 3 July 2021 in which surgery was recommended. When asked why he did not refer to the Player's injury until the Fourth Notification, Mr. Marques advised that he included the information provided to him by Nacional.

B. Submissions of the First Respondent

99. FIFA made the following requests for relief:

"FIFA respectfully requests CAS to:

a. Reject the Appellant's appeal in its entirety;

b. Confirm the decision rendered by the DRC on 7 April 2022;

c. Order the Appellant to bear the full costs of these arbitration proceedings; and

d. Order the Appellant to make a contribution to FIFA's legal costs".

100. FIFA submitted, inter alia, as follows:

"[…] insofar as FIFA is concerned, it should be noted that (i) the case mainly relates to a horizontal dispute between the Appellant and the Player and Poltava and (ii) only one of the Appellant's requests for relief can concern FIFA (the Appellant's request for the imposition of sporting sanctions against the Player). Therefore, there is nothing substantial sought by the Appellant against FIFA, which therefore does not have standing with respect to the contractual (i.e., horizontal) dispute between Nacional, the Player and Poltava.

[…] in accordance with what has been consistently decided by various CAS Panels, the Appellant has no standing to request the imposition of sporting sanctions against the Player. Such request shall therefore be dismissed".

101. FIFA made, *inter alia*, the following arguments in support of its position:

a) According to jurisprudence of the CAS and the Swiss Federal Tribunal (the "SFT"), a party only has standing to appeal a matter if: (i) the party has a legitimate and direct interest in the decision being appealed; and (ii) the interest is present at the time the appeal is filed and the decision is rendered.

b) Regarding Nacional's position, several CAS panels have determined that a club or a player does not have any legitimate interest in requesting the imposition of sporting sanctions on the party which has breached the contract. See: (i) CAS 2014/A/3707; (ii) CAS 2018/A/6044; (iii) CAS 2019/A/6533; (iv) CAS 2019/A/6539; and (v) CAS 2020/A/7054. As demonstrated by CAS 2016/A/4718, the FIFA RSTP gives FIFA's judicial bodies the exclusive prerogative to impose sporting sanctions, meaning that third parties have no legally protected interest to have sporting sanctions imposed by FIFA.

c) In the consolidated procedures CAS 2019/A/6533 and CAS 2019/A/6539, the sole arbitrator concluded that *"the Player does not have standing to request that sporting sanctions be imposed upon the Club. In this regard, it is solely within FIFA's prerogative, so the Sole Arbitrator finds, also from the perspective that sports governing bodies shall be given a certain reasonable degree of deference, in order to determine if and what sanctions are warranted in a concrete case upon a party* […] *the Sole Arbitrator does not see, does not want to leave unmentioned, what there is to gain for the Player if sporting sanctions would be applied on the Club"*.

d) In CAS 2018/A/6002, the panel confirmed that third parties do not have a legitimate interest to request the imposition of sporting sanctions.

C. Submissions of the Second Respondent

102. The Second Respondent made the following requests for relief:

"The Respondent Respectfully requests CAS to make the following orders:

a. To confirm the Challenged Decision.

b. To declare that the Appellant terminated the Employment Contract without just cause.

c. To order the Appellant to pay the Respondent compensation in the amount of EUR 377,670 as compensation for breach of contract.

d. Subsidiarily, if the above is rejected, declare the following:

i. Declare that no compensation is due to the Appellant

ii. Declare that Vincent Thill is not subject to any sporting sanctions.

e. Subsidiarily, if the above is rejected, declare the following

i. Declare the Appellant's claim for EUR 1,000,000 in compensation is disproportionate and not applicable.

ii. Declare that Vincent Thill is not subject to any sporting sanctions.

f. Order the Appellant to bear the entire costs of these arbitration proceedings.

g. Order the Appellant to bear the entire costs of the Respondent's legal costs and expenses incurred with the present arbitration proceedings".

103. The Player's submissions addressed, *inter alia*, the following:

a) The principles of contractual stability and termination without just cause.

b) Nacional's lack of entitlement to terminate the Employment Contract for unjustified absence on the part of the Player.

c) The invalidity of the disciplinary proceedings which resulted in the Employment Contract being terminated.

d) The Player's duty to mitigate his losses.

e) In the alternative (if Nacional is found to have terminated the Employment Contract with just cause), the groundless nature of Nacional's compensation request.

104. Each of the above is summarised in more detail.

a. The principles of contractual stability and termination without just cause

105. The Player noted that, pursuant to Articles 13 and 14 of the FIFA RSTP, there must be a valid reason for a club or player to terminate an employment contract. The Player also referred to Article 337 of the Swiss Code of Obligations which provides as follows:

"both employer and employee may terminate the employment relationship with immediate effect at any time for good cause, the party doing such must give his reasons in writing at the other party's request. In particular, good cause is any circumstance which renders the continuation of the employment relationship in good faith unconscionable for the party giving notice".

106. The Player noted that the SFT has interpreted Article 337 very narrowly when considering just cause, finding that *"the event that leads to the immediate termination must so significantly shatter the trust between the parties that a reasonable person could not be expected to continue to work with the other party who is responsible for the just cause"*. See ATF 130 III 28; ART 116 II 145; ATF 116 II 142.

107. The Player submitted that jurisprudence relating to the FIFA RSTP and corresponding Swiss Law *"unequivocally establishes that premature termination of an employment relationship is only justified under extremely limited, ultima ratio, circumstances. Accordingly, any premature termination requires an extensive examination of the underlying factual and legal circumstances"*.

b. Nacional's lack of entitlement to terminate for unjustified absence

108. The Player submitted that, according to Swiss law and the FIFA Commentary, unjustified absence is only a ground for just cause termination in limited circumstances. The Player referenced, *inter alia*, the following:

a) SFT case ATF 121 V 277, in which the tribunal commented that *"If the employee fails to attend work for a relatively short period of time, he cannot be dismissed without failure to attend work on time before a prior warning or a further episode"*.

b) The FIFA Commentary which: (i) emphasises the importance of a club respecting the *ultima ratio* principle when contemplating termination of an employment on grounds of a player being absent without authority; and (ii) comments that a player's absence *"is unjustified when its extended duration gives the club reasonable grounds to assume that the player made a final decision not to return to the club. This conclusion may be drawn, in particular, if the club has prompted the player to resume their duties or to justify their absence (for example, by providing a medical certificate) and the player either ignored the club's instruction or fails to provide a convincing and valid explanation for their absence"*.

109. The Player argued that Nacional had misinterpreted the law and mischaracterised the facts of the case to justify its actions and referenced, *inter alia*, the following examples:

a) Nacional cited CAS 2016/A/4408 in which the sole arbitrator decided that a club terminated an employment contract with just cause after the player failed to return to the club. However, the facts of that case are very different to the current proceedings in that the player was absent for several months without contacting the club. In the current proceedings, the Player was absent from Nacional for just over one month and was in communication with Nacional throughout.

b) Nacional also cited FIFA DRC decision (no. 04190658) in which a just cause termination was found following a 20-day absence of the player. However, the decision states that the predominant reason for its decision was the player's failure to file a response before the FIFA DRC, which meant he relinquished his right to a defence and accepted the club's allegations.

c) Nacional also cited CAS 2015/A/4327, in which a club was found to have terminated <u>without</u> just cause in circumstances where a player was absent for medical treatment but later returned to the club and took part in training. Nacional submitted that the distinctions between CAS 2015/A/4327 and the current case serve to indicate that Nacional terminated the Employment Contract <u>with</u> just cause. One such distinguishing

factor which Nacional referenced was the Player's failure to return to Nacional following his operation. However, this was primarily due to Nacional terminating the Employment Contract while he was still recuperating. The following comments of the panel are also noted:

"If a player has followed all the medical instructions of the club, but after a few months still has not resolved his physical problems in spite of the treatment followed on the club's indication, it is lawful for him to seek an alternative and independent medical opinion in order to guarantee his fundamental right to health […] *If a player cannot provide his club with his working capacity due to illness or injury this does not constitute a breach of contract or a just cause for early termination".*

d) The Player submitted that CAS 2015/A/4327 actually has a similar fact-pattern to this case and that the Panel should therefore follow the panel in CAS 2015/A/4327 (which decided that the club terminated the employment contract without just cause).

e) Nacional stated that *"termination came as a last resort after the Player decided to be absent without leave from the club, took his medical treatment entirely into his own hands and missed the start of the 2021/2022 season, without giving any indication when he would return. Nacional had no first hand-understanding of what state he was in or how he was recovery was progressing".* In fact: (i) Nacional was involved in treating his injury from 3 March 2021 and Dr. Heinz and Dr. Almeida collaborated on the Player's treatment; (ii) in June 2021, Dr. Almeida stopped responding to Dr. Heinz's communications and Mr. Sousa insisted on conducting direct communications with the Player, even though neither are medically qualified; and (iii) Nacional refused to engage with the Player, Dr. Heinz or Dr. Hopp after surgery was scheduled.

f) Nacional argued that the disciplinary proceedings opened against the Player were evidence of it not consenting to the operation. However, it was only the Fourth Notification which referred to unauthorised medical treatment.

110. The Player further submitted as follows:

"In absence of a formal rejection and in view of the consistent communication from both the Player and the Luxembourg national team's medical staff – it must be concluded, in line with the principle of nemo potest venire contra factum proprium, that [Nacional] created a legitimate expectation to the [Player] that led him to believe that [Nacional] had tacitly authorized him to receive medical treatment. [Nacional] is therefore bound by its own acts and by its own failure to formally assess and object to the Player receiving medical treatment from a medical team which it had been in communication with since April 2021. [Nacional] cannot now pretend that its disciplinary proceedings (which fail to mention medical treatments) or its Whatsapp messages which promised evaluation of the Player's medical documentation amount to a formal objection to him receiving medical treatment. [Nacional] has been in a position to amicably communicate with the Player and the Luxembourg's medical staff since April 2021 but rather than doing so, it opted to terminate the Player's contract. This emphatically cannot be considered an ultima ratio scenario that merits a just cause termination […] [Nacional] could have easily avoided this dispute by simply engaging with the doctor of the Federation or by providing a concrete medical assessment from its own medical staff. However, rather than showing any interest in the Player's health they opted to remain completely silent […]".

111. The Player submitted that the FIFA DRC was correct to conclude in the Appealed Decision that the alleged breach of contract by the Player was not sufficiently material to justify termination and that more lenient measures could have been taken.

c. The invalidity of the disciplinary proceedings

112. The Player submitted that the disciplinary proceedings which ultimately resulted in the Employment Contract being terminated were fundamentally flawed. The Player's arguments in this regard included, *inter alia*, the following:

a) The disciplinary proceedings were based on the Internal Regulations which the Player did not receive or sign. Indeed the Player's lawyer required to request a copy of the Internal Regulations when Nacional commenced disciplinary proceedings.

b) The Internal Regulations do not: (i) describe any procedural steps to be followed by Nacional; or (ii) provide a right for the Player to respond or defend himself. Further, the first three disciplinary notifications did not invite a response from the Player or provide a timeframe within which the process would unfold.

c) While the Fourth Notification (which started the process leading to the Player's dismissal) provided a timeframe for the Player to respond to the allegations, the disciplinary procedure was not explained to the Player, leaving him unclear on how his response would be taken into account or whether he had a right to be heard.

d) Nacional did not explain to the Player what procedure was followed by it to reach the First Decision, Second Decision, Third Decision or Termination Decision.

d. The Player's duty to mitigate

113. The Player submitted that, by joining Vorskla, he was fulfilling an implied obligation to mitigate his losses following Nacional's breach of contract. He rebutted Nacional's argument that the offers it received from Vorskla and another club were evidence of the Player having "checked-out" from the club. He has no control over the actions of third party clubs and there is no evidence of any connection between those offers and his absence on medical grounds.

e. In the alternative, the groundless nature of Nacional's compensation request

114. The Player made, *inter alia*, the following submissions with respect to the "transfer value" approach adopted by Nacional:

a) Nacional has misinterpreted the positive interest principle established in CAS 2008/A/1519 & 1520. While the loss of a transfer fee is a category of loss which has been accepted in CAS jurisprudence, the circumstances in which this is justified are limited to

cases where there is a clear logical nexus between the unjustified termination and the lost opportunity to realise that specific profit (see CAS 2008/A/1519 & 1520).

b) In this case there is concrete evidence of the player's market value in the form of the transfer offers from two Ukrainian clubs. However, Nacional has instead chosen to rely on the market value as listed on www.transfermarkt.com, the reliability of which was queried by the panel in CAS 2018/A/5608. Indeed, when the Player moved from FC Metz to Nacional, he did so on a free transfer despite having nine months remaining on his contract, yet www.transfermarkt.com valued the Player at EUR 1,620,000.

115. The Player made, *inter alia*, the following submissions with respect to the "residual contract value" approach:

a) Although this is the most common method of assessing compensation levels, the level of compensation should be reduced to reflect Nacional's conduct.

b) Nacional significantly contributed to the premature termination of the Employment Contract by being deliberately uncooperative with the Player, failing to communicate sufficiently with the Player about his medical condition and ceasing communications with Dr. Heinz. If Nacional had communicated openly with the Player and Dr. Heinz then a mutually agreeable solution could have been found.

c) Accordingly, the Player should not be required to pay any compensation or, in the alternative, the level of compensation should be materially below that claimed by Nacional.

116. With respect to Nacional's claim to be compensated for agent's fees of EUR 50,000, the Player submitted that: (i) Nacional had not submitted any evidence showing that these fees were actually incurred; and (ii) if the fees are considered to be recoverable, then the amount awarded should be reduced by 25% to recognise that they amortise over the four-year term of the Employment Contract.

117. With respect to Nacional's request for EUR 150,000 by way of a sporting indemnity, the Player noted that he was injured for the duration of his absence and would have been unable to contribute to Nacional's performance in the matches taking place at the start of season 2021/22.

118. The Player made, *inter alia*, the following submissions with respect to Nacional's request for the application of sporting sanctions:

a) The discretionary nature of sporting sanctions is consistently confirmed by both CAS jurisprudence and by the FIFA Commentary.

b) Sporting sanctions are only imposed upon players in extremely limited circumstances. Indeed as noted by the FIFA Commentary, to date there has only been one instance in which a sporting sanction was upheld against a Player.

119. The Player made, *inter alia*, the following submissions against Nacional's alternative argument that the level of compensation awarded to the Player in the Appealed Decision should be reduced:

a) Nacional's unjust termination of the Employment Contract was primarily attributable to its own conduct.

b) The following aggravating circumstances should be taken into account: (i) the unjust premature termination took place in the protected period' (ii) Nacional failed to communicate with the Player at key stages; (iii) Nacional did not provide the Player with a concrete medical evaluation when the Player requested additional medical treatment; and (iv) Nacional did not formally object to the Player receiving additional medical treatment.

c) Throughout the entire process, the Player and Dr. Heinz remained in contact with Nacional and provided it with medical reports to aid Nacional's treatment of the Player. Despite the Player's good faith efforts, Nacional was uncooperative.

V. JURISDICTION

120. Article R47 of the Code provides as follows:

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

121. Article 57 (1) of the FIFA Statues (May 2021 Edition) provides as follows:

"Appeals 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".

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

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

VI. ADMISSIBILITY

124. 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. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after considering any submission made by the other parties".

125. Article 57 (1) of the FIFA Statues requires appeals to be lodged within 21 days of receipt of the decision in question.

126. Article 15(5) of the FIFA Procedural Rules Governing the Football Tribunal (edition October 2021) provides as follows:

"Where no procedural costs are ordered, a party has ten calendar days from notification of the operative part of the decision to request the grounds of the decision. Failure to comply with the time limit shall result in the decision becoming final and binding and the party will be deemed to have waived its right to file an appeal. The time limit to lodge an appeal begins upon notification of the grounds of the decision".

127. The FIFA DRC rendered the Appealed Decision on 7 April 2022 and notified its grounds to the parties on 19 April 2022. The last day of the 21 day period by which the Appellant was required to have filed the Statement of Appeal was therefore 10 May 2022. The Appellant submitted its appeal on 10 May 2022 and it was therefore submitted in a timely manner.

128. Accordingly, the Appellant's appeal to CAS is admissible.

VII. APPLICABLE LAW

129. Article R58 of the 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".

130. FIFA is the body which issued the Appealed Decision and it is domiciled in Switzerland. Furthermore Article 56(2) of the FIFA Statutes (May 2021 Edition) provides as follows:

"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".

131. Accordingly, the Panel is satisfied that the various regulations of FIFA (and specifically the FIFA RSTP) shall apply and that Swiss law shall apply additionally to fill in any gaps or lacuna when appropriate.

VIII. MERITS

132. According to Article R57.1 of the Code, the Panel has *"full power to review the facts and the law"*. As repeatedly stated in the CAS jurisprudence (e.g. CAS 2007/A/1394), by reference to this provision the CAS appeals arbitration procedure entails a *de novo* review of the merits of the case, and is not confined merely to deciding whether the ruling appealed was correct or not. Accordingly, it is the function of the Panel to make an independent determination as to merits.

133. In light of the facts and the circumstances of the case, as well as considering the Appellant's contentions in support of its claims, the Panel considers that the main issues to be resolved are the following:

a) What is the applicable burden and standard of proof?

b) Did Nacional terminate the Employment Contract with or without just cause? In making this determination, the Panel requires to consider the following issues:

i. Do the Internal Regulations form part of the Employment Contract?

ii. By proceeding with the operation, did the Player commit a breach of contract?

iii. By failing to return to Nacional for pre-season, did the Player commit a breach of contract?

iv. If the Player committed a breach of contract, was that breach sufficiently serious to qualify as just cause for Nacional to terminate the Employment Contract?

v. Was termination of the Employment Contract the *ultima ratio*?

c) What is the correct level of compensation to be awarded to the wronged party?

d) Should sporting sanctions apply?

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

134. The FIFA Procedural Rules governing the Football Tribunal govern the organisation of the following chambers: (i) the FIFA DRC; (ii) the FIFA PSC; and (iii) the FIFA Agents' Chamber. Article 13(5) of those rules (both the May 2021 Edition and June 2022 edition) state as follows:

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

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

"According to the general rules and principles of law, facts pleaded have to be proved by those who plead them, i.e., the proof of facts, which prevent the exercise, or extinguish, the right invoked, must be proved by those against

whom the right in question is invoked. This means, in practice, that when a party invokes a specific right it is required to prove such facts as normally comprise the right invoked, while the other party is required to prove such facts as exclude, or prevent, the efficacy of the facts proved, upon which the right in question is based. […] It is well established CAS jurisprudence that any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. must give evidence of the facts on which its claim has been based. […] The two requisites included in the concept of 'burden of proof' are (i) the 'burden of persuasion' and (ii) the 'burden of production of the proof'. In order to fulfil the burden of proof, the Club must, therefore, provide the Panel with all relevant evidence that it holds, and, with reference thereto, convince the Panel that the facts it pleads are true, accurate and produce the consequence envisaged by the Club. Only when these requirements are complied with has the party fulfilled its burden and has the burden of proof been transferred to the other party" (see also CAS 2005/A/968 and CAS 2004/A/730).

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

"[In] CAS arbitration, any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue… Hence, if a party wishes to establish some facts and persuade the deciding body, it must actively substantiate its allegations with convincing evidence".

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

138. As to the question of what the standard of proof is, the Panel makes the following observations:

a) Neither the Swiss Private International Law Act nor the Code prescribe a "standard of proof" applicable to CAS proceedings.

b) According to legal authorities, the parties to CAS arbitration proceedings are entitled to enter into a separate agreement on the evidential procedures to be followed, provided that these do not depart from mandatory procedural requirements of the Code. See the chapter entitled "Evidentiary Issues Before CAS" by RIGOZZI/QUINN which is contained in "International Sports Law and Jurisprudence of the CAS - 4th Conference CAS & SAV/FSA Lausanne 2012, Editions Weblaw 2014" edited by BERNASCONI M. ("Rigozzi/Quinn"). In this case, the Parties have not agreed, or otherwise expressed a view as to, the standard of proof to be applied.

c) Consistent CAS jurisprudence has upheld the right of a sports-governing body to set its own standard of proof (see, for example, CAS 2011/A/2426 and CAS 2011/A/2625). The regulations applicable to this case (i.e. the FIFA RSTP) are silent on this.

d) Where no applicable standard of proof is specified in the applicable regulations, CAS jurisprudence confirms that the Panel has the discretion to determine the appropriate standard although, as indicated in CAS 2010/A/2172, the Panel should at least consider consistent CAS jurisprudence in similar fields when exercising this discretion. The Panel notes that previous CAS panels have generally applied the "comfortable satisfaction" standard when considering cases involving the FIFA RSTP. See, for example, CAS

2012/A/2908, CAS 2019/A/6187 and CAS 2020/A/7605. As explained by the panel in CAS 2011/A/2426, that standard is considered to be *"higher than the civil standard of 'balance of probability' but lower than the criminal standard of 'proof beyond a reasonable doubt'"*.

e) The following FIFA regulations adopt the standard of comfortable satisfaction: (i) Article 35 of the FIFA Disciplinary Code (for the standard of proof to be applied in FIFA disciplinary proceedings); (ii) Article 48 of the FIFA Code of Ethics (for the standard of proof to be applied by FIFA's Ethics Committee); and (iii) Article 68(1) of the FIFA Anti-Doping Regulations (for the standard of proof to establish an anti-doping rule violation).

139. In light of the above observations, the Panel considers it most appropriate to apply the standard of "comfortable satisfaction".

B. Do the Internal Regulations form part of the Employment Contract?

140. Firstly, it is important to establish the terms which apply to the employment relationship between Nacional and the Player and, specifically, whether the Internal Regulations apply. In this regard, the Panel makes the following observations:

a) By signing the Employment Contract, the Player: (i) declared that he was fully informed of the Internal Regulations; and (ii) acknowledged that he was prohibited from committing any act in violation of the Internal Regulations. See paragraph 7.b) of this Award.

b) Notwithstanding this, the Player claimed that he had not received the Internal Regulations. However, when giving evidence, Mr. Sousa explained to the Panel the process which Nacional follows to ensure that every player receives a copy of the Internal Regulations. See paragraph 95.a) of this Award. The Panel found Mr. Sousa to be a reliable and credible witness and sees no reason to doubt his evidence.

c) In light of the contractual declaration and Mr. Sousa's evidence, the Panel is satisfied that the Player was provided with the Internal Regulations and that, accordingly, they applied to the employment relationship.

141. Article 3(1) of the Internal Regulations contains the following obligations of relevance to this case:

a) Article 3(1)(c) obliges the Player to *"[a]ppear punctually to all training sessions, treatments, games, internships, meetings and initiatives to be summoned"*.

b) Article 3(1)(h) obliges the Player to *"[a]ppear at the clinical services whenever they are or believe they are sick, not undergoing consultations or treatments of any kind, either inside or outside the National's premises, without the consent and authorization of the clinical department, except in cases of force majeure"*.

142. The Player was, *prima facie*, in breach of both Articles 3(1)(c) and 3(1)(h) by: (i) failing to return to Nacional for its pre-season programme in accordance with the club's instructions; and (ii) proceeding with surgery without National's explicit consent. However, before making a definitive finding, it is necessary for the Panel to consider the particular circumstances surrounding each alleged breach.

C. By proceeding with the operation, did the Player commit a breach of contract?

143. It is evident that the precise nature of the Player's injury was challenging to diagnose. Indeed, it took the combined efforts of medics from both Nacional and the Luxembourg national team, as well as three MRI scans (on 15 March 2021, 15 April 2021 and 29 April 2021), to diagnose that the injury was in the Player's pubic area.

144. It was the second MRI scan, arranged by the Luxembourg national team, which initially diagnosed the nature of the injury and this was confirmed by the third MRI scan, arranged by Nacional. Between the first and third scans, the Player continued to play and train. According to the Nacional Clinical Record, it was the medics from the Luxembourg national team who recommended that the Player stop training immediately in order to rehabilitate. Nacional followed this advice and the Player did not train or play for the remainder of season 2020/21.

145. Based on his evidence (including at the hearing), the Panel considers Dr. Almeida to be a conscientious, diligent and experienced medical professional. However, the Player has a long-standing relationship with Dr. Heinz and her colleagues at the Luxembourg national team, so it is natural that the Player should trust them highly. When the second MRI scan (i.e. the scan arranged by Dr. Heinz) resulted in a successful diagnosis, it is understandable if the Player wished Dr. Heinz to remain involved with the management of his injury.

146. Following the diagnosis, the majority of the Panel considers that the Player and Dr. Heinz were both transparent in terms of sharing information with Nacional and respectful of Nacional's status as the Player's employer. This was exemplified by Dr. Heinz pro-actively sharing information with Dr. Almeida, including on 14 April 2021, 27 April 2021, 26 June 2021, 3 July 2021, 5 July 2021 and 25 July 2021. Dr. Almeida and Dr. Heinz appeared to be collaborating effectively in managing the Player's injury, until June 2021.

147. From June 2021, Nacional decided that all communications regarding the Player should be conducted between Mr. Sousa and the Player directly. Accordingly, Dr. Almeida ceased responding to e-mails from Dr. Heinz. It was clear from the witness evidence of Mr. Sousa and Mr. Alves that Nacional were genuinely concerned that the Player did not wish to honour the Employment Contract after the club's relegation. It was therefore understandable for Nacional to put in place a strict communications protocol with respect to the Player. However, it was unfortunate that Nacional did not make this protocol sufficiently clear to the Player or Dr. Heinz. In the view of the majority of the Panel, from the Player's perspective, it may have appeared that Nacional was simply being obstructive and uncooperative, particularly in the period from 2 July 2021 to the date of the operation. Specifically:

a) On 2 July 2021, Mr. Sousa required the Player to provide all medical examination reports so that Nacional's medical team could evaluate the proposed operation.

b) On 3 July 2021, Dr. Heinz sent an e-mail to Dr. Almeida which summarised the Player's consultation with Dr. Hopp, during which he recommended that the Player undergo surgery. Dr. Heinz also promised to share the written consultation report once received from Dr. Hopp.

c) On 4 July 2021, Mr. Sousa advised the Player that Nacional was still awaiting the medical examination reports. The Player appeared to assume that Dr. Heinz's e-mail of 3 July 2021 would have been sufficient for this purpose. However, Mr. Sousa advised that Nacional required Dr. Hopp's report.

d) On the evening of 5 July 2021, Dr. Heinz emailed Dr Hopp's report of the same date to Dr. Almeida. At the hearing, Mr. Sousa confirmed that he received the report from Dr. Almeida but, as it was in German and from a doctor who was unknown to the club, he was not comfortable relying on it. Mr. Sousa did not share his concerns with either the Player or Dr. Heinz.

e) As at 5 July 2021, Nacional was either: (i) sufficiently informed to provide or withhold its consent for the operation; or (ii) still in need of further information in order to reach a decision. Either way, the majority of the Panel considers that the ball was clearly in Nacional's court to communicate its position to the Player or Dr. Heinz. However, Nacional simply went silent.

148. Article 3(1)(h) of the Internal Regulations does not prescribe a form which Nacional's consent must take (e.g. for it to be express and/or in writing) or preclude implied consent.

149. In the circumstances of this case, the majority of the Panel considers that it was reasonable for the Player to interpret Nacional's silence as implied consent for the operation to proceed on 13 July 2021. Prior to 5 July 2021, Mr. Sousa had been in regular contact with the Player (including on 2, 3 and 4 July 2021) to stipulate and reiterate what the club required by way of information in order to consent to the operation. After providing Nacional with Dr. Hopp's report of 5 July 2021, Mr. Sousa's requests for information then stopped. The majority of the Panel considers it reasonable for the Player to have assumed that this was because Nacional now had sufficient information to be persuaded as to the necessity of the operation. If Nacional continued to have concerns, then it should have communicated these without delay.

150. Even if it could be argued that Article 3(1)(h) of the Internal Regulations required the Player to obtain Nacional's express consent for the operation, the majority of the Panel considers that Nacional's silence amounted to an unreasonable withholding of consent, contrary to Article 2(a) of the Swiss Civil Code which requires a party to act in good faith when exercising a right (in the case of Nacional, a right of approval). As stated by the Panel in CAS 2015/A/4327, a player's health is a *"fundamental right"*. Dr. Hopp's recommendation was to operate as soon as possible, given: (i) the likelihood of the injury re-occurring if the Player played football; and (ii)

the recovery time. Accordingly, the only option reasonably available to the Player in response to Nacional's conduct, was to proceed with the operation.

151. Nacional did communicate with the Player on 12 July 2021 (i.e. the day before the operation). However, this took the form of the First Notification for disciplinary purposes and it made no reference to the Player's injury situation or the impending operation. Accordingly, the majority of the Panel considers that: (i) the First Notification did not constitute a withholding of consent with respect to the operation; and (ii) even if it had constituted a withholding of consent to the operation, Nacional failed to act in good faith as it delayed communication of its position until the eve of the operation and went against the clear recommendation of Dr. Hopp without providing any reasons for its position.

152. In light of the above, the majority of the Panel does not consider that the Player breached the Employment Contract or the Internal Regulations by proceeding with the operation.

D. By failing to return to Nacional for pre-season, did the Player commit a breach of contract?

153. In considering this issue, the majority of the Panel considers it appropriate to divide the Player's absence into two separate periods as follows:

a) The period from 28 June 2021 (i.e. the original date on which the Player was instructed to return to Nacional for its pre-season programme) to 12 July 2021 (i.e. the day prior to the operation) (the "Pre-Operation Absence").

b) The period from 13 July 2021 (i.e. the original date on which the Player was instructed to return to Nacional for its pre-season programme) to 20 August 2021 (i.e. the date that Nacional terminated the Employment Contract) (the "Post-Operation Absence").

154. As the majority of the Panel does not consider that the operation itself constituted a breach of contract, it follows that the Player was entitled to a reasonable period of absence in order to recover from the operation. In the e-mail from Dr. Heinz to Dr. Almeida of 3 July 2021, Dr. Heinz advised that *"the healing time is six weeks and then a further 10 to 12 weeks is required for the Player to return to sport"*. In Dr. Hopp's post-treatment plan (which Dr. Heinz e-mailed to Dr. Almeida on 25 July 2021), Dr. Hopp set a 12-week rehabilitation programme, with two further consultations after six and 12 weeks to assess his recovery. Accordingly, the majority of the Panel does not consider that the Post-Operation Absence constituted a breach of contract.

155. However, the Panel considers that the Pre-Operation Absence requires to be considered differently. Nacional's instructions to the Player to return for pre-season were clear and consistent. Only on the scheduled date of return (i.e. 28 June 2021) did the Player provide Nacional with a medical certificate which declared him unfit to work. However, as Mr. Sousa pointed-out to the Player, his condition did not prevent him from travelling. Indeed, the Player subsequently travelled from Luxembourg to Germany for his consultation with Dr. Hopp.

156. The Player attempted to justify his absence by stating that he would receive better medical treatment if he remained in Luxembourg and that this would be for the mutual benefit of both the Player and Nacional. While the Player had a high degree of trust in Dr. Heinz and her colleagues at the Luxembourg national team, this did not justify his refusal to return to Nacional, particularly given that Dr. Almeida had previously demonstrated a willingness to work collaboratively with Dr. Heinz in the best interests of the Player.

157. Given the above, the Panel considers that the Pre-Operation Absence constituted a breach of contract.

E. Was the Player's breach sufficiently serious to qualify as just cause for Nacional to terminate the Employment Contract?

158. As per the FIFA Commentary *"[o]nly a sufficiently serious breach of contractual obligations by one party to the contract qualifies as just cause for the other party to terminate the contract"*.

159. Nacional has already conducted two disciplinary proceedings which address the Player's Pre-Operation Absence. The First Decision addressed the Player's absence up to and including 11 July 2021, while the Second Decision addressed the Player's absence on 12 July 2021. The outcome of those proceedings was fines of EUR 1,250 and EUR 1,500 respectively.

160. In the view of the Panel, it is therefore evident that Nacional did not consider the Pre-Operation Absence to constitute a breach sufficiently serious to entitle it to terminate the Employment Contract for just cause.

161. Nacional terminated the Employment Contract approximately five weeks after the operation, on 20 August 2021. As already explained, this date fell during a period in which the majority of the Panel considers that the Player was entitled to be absent for post-operation recovery purposes. As such, the majority of the Panel considers Nacional terminated the Employment Contract without just cause.

F. Was termination of the Employment Contract the *ultima ratio*?

162. In light of the above findings, it is not necessary for the Panel to consider this issue.

G. What is the correct level of compensation to be awarded to the wronged party?

163. The Panel notes the submissions made by Nacional in the alternative. See paragraphs 91 to 93 of this Award. Essentially, Nacional argues that the level of compensation awarded to the Player in the Appealed Decision should be reduced to reflect the Player's contributory actions.

164. Nacional formed concerns regarding the Player's desire to remain with Nacional after the club's relegation based on several factors, including the following:

a) An agent purporting to act on behalf of the Player made representations to Mr. Alves pressing for the Player's transfer.

b) Nacional received what it considered to be a very low offer from Vorskla at a time when there were media reports of the Player being in discussions with that same club.

165. However, the Player's injury was clearly genuine, as was the recommendation from a medical expert that the Player undergo surgery with an associated recovery time of 12 weeks. Furthermore, Nacional did not submit any evidence which comfortably satisfied the majority of the Panel that the Player was intent on not returning to Nacional when he was fit to do so. As Nacional terminated the Employment Contract while the Player was still recovering from the operation, Nacional's suspicions were not put to the test. Accordingly, the majority of the Panel considers that: (i) Nacional terminated the Employment Contract based on unproven suspicions; and (ii) as such, this case is not analogous to TAS 2015/A/3955 & 3956 which was cited by Nacional as a relevant precedent. In that case, the panel considered that, while the player had been hasty in terminating the employment contract unilaterally, it was established that the employer-club did not wish to retain him.

166. As already decided by the Panel, the Player's Pre-Operation Absence constituted a breach of contract. This resulted in Nacional imposing fines of EUR 1,250 and 1,500. Given that Nacional has already imposed a sanction for the Player's unauthorised absence, the majority of the Panel does not consider it appropriate for further consequences to be applied.

167. Accordingly, the majority of the Panel sees no grounds to amend the level of compensation awarded in the Appealed Decision.

H. Should sporting sanctions be applied?

168. In light of the above findings, it is not necessary for the Panel to consider this issue.

I. Conclusions

169. In summary, the majority of the Panel finds as follows:

a) Nacional terminated the Employment Contract without just cause.

b) Accordingly, the Player was entitled to compensation for Nacional's breach of contract.

c) There is no basis for amending the level of compensation awarded to the Player in the Appealed Decision

d) The Appealed Decision is upheld in full and Nacional's appeal is rejected.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Clube Desportivo Nacional against the decision issued on 7 April 2022 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association is rejected.

2. The decision issued on 7 April 2022 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association is confirmed.

3. (…).

4. (…).

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